Foreign Affairs Crises and the Constitution’s Case or Controversy Limitation: Notes from the Founding Era

by William R. Casto*

In theory the federal courts might play a significant role in formulating foreign policy and in resolving disputes related to foreign policy, but from the earliest days of the Republic, they seldom have. Instead federal judges have always played a comparatively minor role in the arena of foreign policy. This essay examines two high-profile foreign policy cases that the Federal District Court in Philadelphia adjudicated some two hundred years ago. The resolution of these two cases teaches enduring lessons about the federal courts’ structural ability to render timely and useful legal advice related to controversial foreign affairs issues.

Today the federal judiciary’s relatively modest role respecting foreign affairs stems in large part from a panoply of principles and prudential considerations that hinder the courts’ ability to address issues of law related to foreign policy. Most of these limitations are corollaries to the fundamental constitutional rule that the judicial power of the United States extends only to judicial cases and controversies.1 Thus the courts may not render advisory opinions,2 a plaintiff must have standing,3 and a case must be ripe4 but must not be moot.5 These corollaries are not limited to disputes

*Allison Professor of Law, Texas Tech University. This article will form part of my forthcoming book Foreign Affairs and the Constitution in the Age of Fighting Sail. The American Philosophical Society provided a grant for research in Great Britain. An early version of this article was presented at a Faculty Colloquium of the University of Tennessee-Knoxville College of Law, and I thank the faculty for their helpful comments. I also thank Bryan Camp and Ingrid Wirth for their helpful comments on preliminary drafts of this article.

1. U.S. Const., Art. III §§1 & 2. There are a number of excellent texts that address issues of justiciability in the federal courts. To avoid unnecessarily prolix citations, the present essay relies primarily upon Erwin Chemerinsky, Federal Jurisdiction (4th ed. 2003) [hereinafter cited Chemerinsky’s Federal Jurisdiction].


3. See Chemerinsky’s Federal Jurisdiction §2.3. For example in Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1979), the court dismissed a law professor’s challenge to the constitutionality of the Vietnam War for lack of standing.


5. See Chemerinsky’s Federal Jurisdiction §2.5.
implicating foreign policy issues but are often raised in that context.\textsuperscript{6}

In addition a bundle of considerations loosely labeled the political question doctrine frequently influences the courts to subordinate their lawmaking authority to the political branches.\textsuperscript{7} In a leading case, the Supreme Court explained, “Not only does resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislative; but many such questions uniquely demand single-voiced statements of the Government’s views.”\textsuperscript{8} Finally the lower federal courts in the District of Columbia have relied upon their equitable or remedial discretion to deny remedies to members of Congress in foreign affairs and other cases.\textsuperscript{9}

In 1793, the United States confronted its first foreign affairs crisis under the Constitution, and the federal courts—like they frequently do today—generally refused to address the merits of particular plaintiffs’ foreign-policy-related claims.\textsuperscript{10} Capable lawyers of the Founding Era had a nascent vision of today’s political question doctrine,\textsuperscript{11} but instead the courts relied upon an unwritten limitation to their subject matter jurisdiction that the passage of time has rendered quite irrelevant.\textsuperscript{12} Nevertheless

\textsuperscript{6} For the operation of these corollaries in foreign affairs cases, see Harold Hong Ju Koh, The National Security Constitution, ch. 6 (1990); Michael Glennon, Constitutional Diplomacy, ch. 8 (1990).

\textsuperscript{7} See Chemerinsky’s Federal Jurisdiction §2.6. See also Koh, The National Security Constitution, ch. 6 and Glennon’s Constitutional Diplomacy, ch. 8.


Such decisions are wholly confined by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power nor subject to judicial intrusion or inquiry.


\textsuperscript{10} See notes 84-95, infra, and accompanying text.

\textsuperscript{11} When the British Minister petitioned the Executive Branch for restitution of prizes taken by theCitoyen Genet andSans Culottes (see notes 45-49, infra, and accompanying text), Alexander Hamilton urged President Washington to comply. Alexander Hamilton to George Washington (May 15, 1793), 14 Hamilton Papers 451. In the course of a lengthy analysis, he argued that the matter should not be submitted to the courts:

Because it is believed, [the courts] are not competent to the decision. The whole is an affair between the Governments of the parties concerned—to be settled by reasons of state, not rules of law.

Id. at 459. See also Alexander Hamilton, Pacificus No. 1 (June 29, 1793), 15 Hamilton Papers 33, 39. Judges Peters and Bee in Philadelphia and Charleston agreed. See notes 86-88, infra, and accompanying text.

\textsuperscript{12} See notes 85-89, infra, and accompanying text.
the judge in the leading case bolstered his decision with a readily recognizable political question analysis.13

Notwithstanding the early use of political question analysis, the 1793 litigation’s primary enduring value is to illustrate structural limitations inherent in the Constitution’s case or controversy requirement. These structural limitations operate as a general inhibition to the courts’ ability to provide clear and timely advice in all cases, but the problem is especially significant in the context of rapidly developing events like foreign affairs crises. This is not to say that the federal courts never provide clear and timely advice in cases affecting foreign policy. They obviously do on occasion.14 The case or controversy requirement impedes rather than bars courts from reaching foreign policy issues, and courts are therefore an unreliable source of advice. These problems usually are analyzed in terms of corollaries to the fundamental requirement of a case or controversy,15 but the very nature of the judicial process is at least as serious an impediment to the courts’ ability to render useful advice. This structural problem is not simply a function of the orderly and usually ponderous pace of the judicial process. Instead the deficiency lies in a divergence between the general interests of the government and nation at large and the specific interests represented in actual cases and controversies. The experience of the federal courts in 1793 epitomizes the divergence of general and specific interests and teaches lessons that are as pertinent today as they were some two hundred years ago. The lessons from 1793 are particularly compelling because the Federalist judges wanted to support the President’s policies.

II. THE NEUTRALITY CRISIS OF 1793

In the Neutrality Crisis of 1793,16 the United States tried to steer a course of neutrality between warring European superpowers. When the year began, France was already at war with Austria and Prussia. Then in January the revolutionary French government beheaded Louis XVI and declared war on Great Britain a few weeks later. Virtually all Americans

13. See notes 86-88, infra, and accompanying text.
14. See, e.g., The Steel Seizure Case, 343 U.S. 579 (1952), in which the Supreme Court ruled on President Truman’s nationalization of the steel industry two months after the case was filed in the district court. The Steel Seizure Case also is a good modern example of the problem of ambiguity. See note 183, infra. Although the rationale for the Court’s decision was hopelessly jumbled, the Court provided the clearest possible advice that the President’s action was unlawful.
15. See notes 1-6, supra, and accompanying text.
wished to remain neutral in this essentially European conflict, but neutrality could be shaped to favor one side or the other. To paraphrase George Orwell, all belligerents are equal in a neutral nation’s eyes, but some may be more equal than others. Should the United States adopt a policy of strict neutrality that would, in effect, tilt American policy toward Great Britain, or should the nation pursue a loose policy favoring France? The answer to this question was complicated by the existence of treaties between the United States and France that gave the French special rights in the event of war.17 As President George Washington and his cabinet attempted to fashion a workable neutrality policy, they were confronted by a welter of legal issues involving the law of nations, treaties of the United States, and United States domestic law.18 Many of these issues wound up in federal court, but the judiciary proved to be remarkably unhelpful in resolving them.

The appropriate contours of American neutrality regarding the European war quickly became a matter of grave practical importance to the Washington Administration. Troubles began almost as soon as a powerful cruiser of the French Navy brought a new ambassador19 to the United States from France. In April 1793, Ambassador Edmond Genet disembarked from the frigate L’Embuscade in Charleston, South Carolina, and the frigate left the port about a week later to prey on British shipping along the Eastern Seaboard. Although L’Embuscade had a successful career as a commerce

17. In 1778 the United States and France entered into two treaties to formalize France’s support of the United States’ rebellion against Great Britain. Treaty of Amity and Commerce (1778), 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3 (H. Miller ed. 1931); Treaty of Alliance (1778), id. 35. Article 17 of the Treaty of Amity and Commerce authorized the French to bring prizes taken from France’s enemies into American ports and forbade the United States to “make examination concerning the Lawfulness of such prizes.” As a matter of interpretation, the United States took the position that Article 17 applied only to captures on the high seas and not to captures in American waters and in violation of United States sovereignty. Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), 26 JEFFERSON PAPERS 697, 702-04.

Article 22 of the Treaty of Amity and Commerce was particularly problematic. It provided that privateers of nations in enmity with France could not be fitted out in American ports. The French took the position that this article, by negative inference, gave France a right to fit out privateers in American ports, but the Washington Administration concluded that Article 22 did not carry this negative implication. See HYNEMAN, THE FIRST AMERICAN NEUTRALITY 74-82.

18. See generally HYNEMAN, THE FIRST AMERICAN NEUTRALITY; THOMAS, AMERICAN NEUTRALITY IN 1793.

19. Actually France’s new representative was a minister rather than an ambassador. In the late eighteenth century, European nations and the United States recognized four types of embassies. First in rank was an ambassador who was the personal representative of his king, then came ministers plenipotentiary and envoys, ministers resident, and finally, chargés d’affaires. See 1 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES §88 (F. Wharton ed. 1886). With the decline of the power of kings and the rise of democratic forms of government, the differences between an ambassador who has the ear of the king and a minister who is merely the representative of the state is no longer significant. See DIGEST OF INTERNATIONAL LAW 394-95 (G. Hackworth ed., 1942). In this article the words ambassador and minister will be used interchangeably.
raider,20 she was only a single ship and could not be everywhere at once. To augment *L’Embuscade*’s maritime depredations, the French commissioned many corsairs or privateers to attack British shipping.21

**A. Privateering**22

The practice of privateering has long since lapsed into desuetude,23 but in the late eighteenth century, it was a common method of waging maritime war. A major objective of war at sea has always been the capture, destruction, or disruption of the enemy’s commercial shipping, and maritime nations used a system of prize money to encourage attacks on enemy commerce. Captured ships, which were called prizes, would be sold, and a substantial portion of the proceeds would be distributed to the capturing crew. In addition to encouraging and rewarding the crews of regular navy ships with prize money, governments also opened the prize system to private commerce raiders who operated for profit. These private commerce raiders were called privateers in English-speaking countries and corsairs in France.

The practice of privateering required adventurers to refit small, fast merchant vessels at their own expense. The owner of a privateer also would have to hire a large complement of sailors. The crew of a two-masted schooner operating in a commercial mode would seldom exceed six men, but the same ship converted to a privateer usually would carry a crew of 40 or 50 men.24 These extra hands made the schooner easier to sail and were especially useful when attacking another ship. In addition after capturing an enemy ship, members of the privateer’s crew would have to be transferred to the captured ship to serve as a prize crew. The leader of the prize crew was the prize master and was responsible for sailing the captured ship into a port where it could be sold. A privateer’s oversized crew made it possible to despatch a number of prizes into port without seriously affecting the privateer’s ability to continue cruising.

The practice of privateering enabled countries to maintain relatively small navies during peacetime, but with the onset of war, a host of commerce raiders could be created with the stroke of a pen. In exchange for a privateering commission, merchant adventurers would assume the capital

---

20. See William Casto, “We are armed for the defense of the rights of Man”: The French Revolution Comes to America, 61 AM. NEPTUNE 263 (2003).
costs of obtaining and refitting a suitable vessel and the expenses of crewing and operating the vessel. These costs and expenses were not defrayed from the national treasury. Instead privateers had to recoup their investments from the sale of prizes taken from the enemy. There were three prerequisites to a successful privateering campaign: adventurers had to refit suitable merchant vessels for war and significantly augment their crews, and the government had to provide an effective system of prize courts. The importance of the first two requirements are virtually self-evident, but the vital need for prize courts is not as obvious to twenty-first century minds.

Without easy access to prize courts, privateering was not commercially profitable. The problem was that privateers looked much like pirates except that privateers carried a sheet of paper from a belligerent nation authorizing their depredations. Few people would purchase a prize, especially the ship itself, on the bare assurance from a privateer that the capture was lawful. To solve this and other problems, the North Atlantic nations created prize courts that would adjudicate the lawfulness of captures. The prize would then be sold pursuant to a judicial order of condemnation. Britain’s leading Admiralty judge of the era explained that the mere taking by a captor is not enough to give the captor lawful title. It is not “thought fit, in civilized society, that property of this sort should be converted without the sentence of a competent Court.” They would then sell pursuant to a judicial order of condemnation. Britain’s leading Admiralty judge of the era explained that the mere taking by a captor is not enough to give the captor lawful title. It is not “thought fit, in civilized society, that property of this sort should be converted without the sentence of a competent Court.” In addition to facilitating sales, prize courts also served an important regulatory function. The simple fact was that privateers were not entirely trustworthy. They were “activated by a spirit of lucre, which not only incites to plunder the base and lawless freebooter, but tarnishes even heroism, by seducing into unjustifiable actions the bravest men.”

The basic question in prize courts was prize or no prize. If a privateer were “seduced into unjustifiable action” and a capture was unlawful, the court would rule no prize, and the privateer would lose the capture. For example, privateers were not allowed to make a capture within the territorial waters of a neutral country. If a privateer snapped up a rich

26. Id. A contemporary American observer agreed that the sale of a prize vessel without a decree of condemnation was difficult because “those who purchase the vessels, will not easily take them without a previous condemnation.” In contrast consumer goods were different, and the “sale as far as it reflects the cargoes, will be attended with no difficulty.” Augusta Chronicle, Nov. 9, 1793.
27. See CASTO’S SUPREME COURT at 41.
29. See CHARLES THOMAS, AMERICAN NEUTRALITY IN 1793, ch. 3 (1931).
prize in neutral waters, a prize court with jurisdiction presumably would refuse to condemn to prize.

The requirement of a judicial condemnation presented problems for the French corsairs operating off the American coast. Traditionally a prize was sailed to the nearest port controlled by the capturing vessel’s country and condemned in that port. Therefore tradition would have dispatched French prizes across the Atlantic or to a French port in the Caribbean. Along the way, however, there was a good chance that the prize would be retaken by the British. After all, Britain was the world’s predominant naval power and usually maintained effective control of the Caribbean and the North Atlantic sea lanes. Even if the prize made it to a distant French port, the condemnation, sale, and proceeds of the sale would be far away and beyond the immediate control of the captor.

Everyone understood the importance of an effective prize court. During the Revolutionary War, James Wilson and a group of Philadelphia merchants petitioned for the creation of effective American prize courts because, “In the privateering trade in particular, the very life of which consists in the adventurers receiving the rewards of their success and bravery as soon as the cruise is over, the least delay is uncommonly destructive.”30 Rather than suffer uncommonly destructive delay or subject prizes to the vicissitudes of a long voyage and possible recapture, the French came up with a quick and dirty solution. Each major port in the United States had a French consul, and these consuls established prize courts that issued judgments of condemnation.

B. The Neutrality Proclamation

From the outset of the Neutrality Crisis, President Washington wished to steer the nation on a course of neutrality that would keep America out of the European war. As soon as he learned of the outbreak of war, the President wrote Secretary of State Thomas Jefferson and Secretary of Treasury Alexander Hamilton that he wished “to main a strict neutrality”31 toward the belligerent powers. Washington was particularly concerned by news “that many vessels in different ports of the Union are designated for Privateers & are preparing accordingly.”32 Although Hamilton and Jefferson engaged in serious political infighting throughout the Crisis, they agreed that the nation should remain neutral. They also agreed on the broad propositions that French corsairs could not be completely33 fitted out in

33. In his private papers, Jefferson noted that the Cabinet unanimously agreed that French corsairs could not be completely fitted out in American ports, but that Jefferson believed that the French were “free to use their own means, i.e., to mount their guns &c [but that
American ports, should not be crewed by American citizens, and that the French Consular Courts were contrary to American sovereignty.

The government’s initial response to the Crisis was to issue a proclamation of neutrality under the President’s name. Washington assured the country and the world that the United States would “with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers.” He went on to note that American citizens were subject to punishment for “committing, aiding, or abetting hostilities against any of the said powers,” and he warned that this conduct would result in criminal prosecution.

C. The *Citoyen Genet* and the *William*

Before the Neutrality Proclamation was published, the French had already set in train a course of events that would threaten U.S. neutrality. As soon as Edmond Genet set foot in Charleston, word swept through the port that privateer commissions were available for those who wished to pillage British commerce for profit. The new French minister quickly commissioned Peter Johannene, who was French, and he assumed command of a small schooner of the type frequently used as pilot vessels along the coast. Her deck was quickly reinforced and reconfigured to mount between four and six light guns, and she sallied forth on April 18 in search of British ships. The schooner, which was renamed *Citoyen Genet*, was an ideal privateer for American waters. A British captain who was in Charleston described her as a “small fast sailing Schooner” with a crew of 40 to 50. A few days later a second corsair, the *Sans Culottes*, departed Charleston.

As the *Citoyen Genet* and the *Sans Culottes* sailed north, they captured at least twelve vessels and sent them into American ports. The British Consul in Norfolk, Virginia, soon reported that “British trade is

---

35. Id.
37. John Ewing to James空白 (April 20, 1793), PRO:FO 5/3 Domestic Letters; George Miller to Lord Grenville (May 6, 1793), PRO:FO 5/2, Consular Correspondence. In this essay the citation PRO:FO refers to Foreign Office records in Great Britain’s Public Records Office outside London. For a description of the complex process of refitting a merchant schooner to sail as a privateer, see Depositions of Warren Nicoll, Benjamin Baker, John McClarity, Benjamin King, and Michael Ballard (Sept. 15 & Oct. 21, 1793), in THE COUNTER CASE OF GREAT BRITAIN BEFORE THE TRIBUNAL OF ARBITRATION, CONVENCED AT GENEVA at 550-52 (1872).
much annoy’d here by Small Privateers.”40 The most significant prize proved to be a British ship, the William, which was 42 days out of Bremen and bound for Maryland.41 On May 3 she was approaching the Capes under a fair wind when her crew spotted the Citoyen Genet sailing out from the Capes. The William did not alter course because she thought the approaching schooner was a revenue cutter. At about this time the wind abated, and the Citoyen Genet put out sweeps and bore down on the William. The prospect of a rich prize lent enthusiasm to the corsairs as they bent to their oars. Perhaps the William’s officers became uneasy, but they were momentarily reassured when they saw that the “revenue cutter” was flying “American Colours.” As the corsair drew near she ran up her “French Colours,” fired a gun, and hailed the William. In a shouted conversation between the two vessels, the French verified that the William was British, and then took her as a prize. Captain Johannene immediately dispatched his capture into Philadelphia under a prize crew commanded by an American, Gideon Henfield, who was assisted by another American, John Singleterry.

The William was a moderately valuable prize. The ship together with her equipment were appraised at $3200.42 Her cargo was “Eighty Nine pieces of Osnaburg & Ticklinburg,” which were huge bolts of coarse linen and were valued at $1460.43 The French Consul quickly ruled that she was a lawful prize and issued an order of condemnation so that she could be sold.44

The arrival of the William with her American prizemaster caused quite a stir in the capital. She was taken on May 3 and just five days later the British Minister, George Hammond, filed two formal protests with Secretary of State Jefferson. He noted that the Citoyen Genet has “been fitted out from” Charleston and that her crew “are for the most part citizens of the United States.”45 Hammond condemned these practices as “breaches of neutrality . . . and direct contraventions of the [President’s neutrality] proclamation.”46 He urged the government to take action “for repressing

40. John Hamilton to Lord Grenville (May 1793), PRO:FO 5/2, Consular Correspondence.
41. My account of the taking of the William is drawn from the statements of her Master and her Mate. Affidavit of James Legget (June 7, 1793), Findlay v. The William, case file (D.Pa. 1793), National Archives Regional Archive, Philadelphia, PA; Affidavit of John Whiteside (June 7, 1793), Findlay v. The William, case files (D.Pa. 1793), National Archives Regional Archive, Philadelphia, PA.
42. Appraisal (June 11, 1793), Findlay v. The William, case files (D.Pa. 1793), National Archives Regional Archive, Philadelphia, PA.
43. Id. See Oxford English Dictionary, Osnaburg and Ticklinburgh.
44. See Phineas Bond to Lord Grenville (June 8, 1793), PRO:FO 5/2, Consular Correspondence.
45. Memorial from George Hammond (May 8, 1793), 2 Jefferson Papers, 686, 687. In the same Memorial, Hammond made the same objections to Sans Culottes, the second Charleston corsair.
46. Id.
such practices in future” and to restore any prizes taken by the *Citoyen Genet*.\(^{47}\) In the second protest, Hammond condemned the French Consular Courts as “not warranted by the usage of nations or . . . existing treaties.”\(^{48}\) Needless to say the French hotly contested Hammond’s claims.\(^{49}\)

Philadelphians assumed that the legal issues raised by the William’s capture would be resolved through litigation in the federal courts. Less than two weeks after her capture, Edmond Livingston wrote his brother, “Two very important questions have arisen in Philadelphia—one on the prosecution of sailors on board the privateers and the other on the libeling of prizes.”\(^{50}\) He continued, “These have become much the subject of conversation and occasion much degree of warmth.”\(^{51}\)

Secretaries Hamilton and Jefferson agreed that the legality of the William’s capture should be considered by the judiciary, and Jefferson encouraged the British minister to have a suit for the ship’s restitution filed in the local federal district court.\(^{52}\) As for Gideon Henfield and John Singleterry, the cabinet unanimously believed that it was the government’s “duty to have prosecutions instituted against them, that the laws might pronounce on their case.”\(^{53}\) Therefore the government decided to prosecute the two men as a test case “to try the question and to satisfy the complaint of the British Min.”\(^{54}\) On May 15, Jefferson instructed William Rawle, the United States Attorney for Pennsylvania, to apprehend and prosecute Henfield and Singleterry,\(^{55}\) and Rawle saw to it that the two

\(^{47}\) Id.

\(^{48}\) Memorial from George Hammond, with Jefferson’s Notes (May 8, 1793), 25 JEFFERSON PAPERS, 685, 685-86.

\(^{49}\) See CHARLES HYNEMAN, THE FIRST AMERICAN NEUTRALITY 118-21 (1939).

\(^{50}\) Edmond Livingston to Robert Livingston (May 15, 1793), Robert Livingston Papers, New York Historical Society, New York, N.Y. With reference to Article 17 of the Treaty of Amity and Commerce, see supra note 17, he also noted the possible relevance of “the provision of Treaty that the legality of the prizes shall not be questioned in our Courts.” Id.

\(^{51}\) Id.

\(^{52}\) Thomas Jefferson to George Hammond (June 5, 1793), 26 JEFFERSON PAPERS 198; Alexander Hamilton to Rufus King (June 15, 1793), 14 HAMILTON PAPERS 547-48, Hamilton’s belief was based upon advice from William Rawle and William Lewis, who served as the owners’ counsel in the suit for restitution. Id.

\(^{53}\) Notes on Neutrality Questions (July 13, 1793), 26 JEFFERSON PAPERS at 498.

\(^{54}\) Id. at 499. Jefferson assured the British Minister that “no measures would be spared to bring [Henfield and others] to Justice.” Thomas Jefferson to George Hammond (June 5, 1793), 26 JEFFERSON PAPERS 197, 198. The British Minister had received informal assurances to this effect a few weeks earlier. See George Hammond to Lord Grenville (May 17, 1793), PRO:FO 5/1.

\(^{55}\) Thomas Jefferson to William Rawle (May 15, 1793), 26 JEFFERSON PAPERS 40-41. In the 1790s the Secretary of State and not the Attorney General was charged with supervising the U.S. Attorneys. JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 545 & 632-33 (1970). On May 12, Attorney General Edmund Randolph sent Rawle a copy of the Neutrality Proclamation and told Rawle that the “President . . . is sincere & unequivocal in his profession [and] desires that you will be extremely watchful over those infractions of neutrality which are punishable under our laws; and that you will prosecute them without distinction of persons.” Edmund Randolph to William Rawle (May 12, 1793), William Rawle Papers, Historical Society of Pennsylvania.
men were arraigned before a local magistrate and confined in the county jail. A special federal grand jury indicted them on July 27.

D. Findlay v. The William

While the preliminary criminal proceedings against Henfield were moving forward, the British owners filed suit in the federal district court to obtain restitution of the William and her cargo. In addition the British Minister petitioned President Washington to return the ship and cargo by executive decree. The Cabinet decided to delay consideration of the Minister’s petition pending the outcome of litigation. Because the suit was a libel in Admiralty, the case proceeded apace. Admiralty courts did

56. See William Rawle to Hilary Baker (May 17, 1793), Henfield’s Case, at 51 n*; Memorial from Edmond Charles Genet (May 27, 1793), 26 Jefferson Papers 130-31. The next day Rawle wrote Chief Justice Jay requesting a special circuit court in Philadelphia that would try Henfield and Singletery. 2 DHSC 394 n. 2.

57. See Carlisle Gazette, June 5, 1793; Augusta Chronicle, June 29, 1793.


59. 9 F. Cas. 57 (D. Pa. 1793) (No. 4790). The pleadings are reprinted in [Philadelphia] Federal Gazette, June 24, 1793. For a rich and extensive account of the oral argument, see [Philadelphia] General Advertiser, June 19, 21, & 24. Judge Peters’ original, handwritten opinion is in Findlay v. The William case file (D. Pa. 1793), National Archives Regional Archive, Philadelphia, PA. The opinion in Federal Cases, which is taken from 1 Pet. Adm. 12 (Peters’ report of his admiralty decisions), is virtually the same as the original opinion. Aside from minor grammatical changes, the only differences are the bracketed insert on 9 F. Cas. 57 identifying the owners as British subjects, the bare citations of Vattel and Lee on 9 F. Cas. 59, the bare citation of the volume and page numbers for Palachie’s Case on 9 F. Cas. 60, and the bare citations of Lee and Grotius on 9 F. Cas. 60. The extensive footnote on 9 F. Cas. 60-61 is in the original opinion. As is obvious the two footnotes at 9 F. Cas. 61-62 and the “NOTE” at the end of the case are later additions.

60. Findlay v. The William, 9 F. Cas. 57 (D. Pa. 1793) (No. 4790). The suits were filed by the owners’ agent at the request of the British Ambassador. George Hammond to Lord Grenville (June 10, 1793), PRO: FO 5/1.

61. The Minister initially sought executive restitution on the basis that the Citoyen Genet had been legally fitted out and crewed, Memorial from George Hammond (May 8, 1793), 25 Jefferson Papers 686-87, but this petition was denied. Thomas Jefferson to George Hammond (June 5, 1793), 26 Jefferson Papers 197-98. In the meantime the Minister successfully obtained executive restitution of a prize taken by the Frigate L’Embuscade in American waters. After the Attorney General concluded that the United States had sovereignty over all of Delaware Bay and that the ship Grange was taken within the Bay, the government asked that the Grange be restored to her British owners and the French complied. See Charles Hyneman, The First American Neutrality 99-100 (1934). Encouraged by this success, he subsequently sought restitution of the William on the basis that she too was taken in American waters. George Hammond to Thomas Jefferson (June 5, 1793), 26 Jefferson Papers 199-201. Memorial from George Hammond (June 21, 1793), 26 Jefferson Papers 335.

not use juries and had a tradition of providing speedy justice. District Judge Richard Peters was one of the nation’s ablest Admiralty judges, and he promptly scheduled the case for oral argument on June 14.

The suit in Admiralty provided a vehicle for obtaining a timely ruling from the federal courts on some of the legal issues bedeviling the Washington Administration. Everyone agreed that the taking of a prize in United States territorial waters was an unlawful violation of American sovereignty, but there was disagreement as to how far American sovereignty extended out to sea. Hamilton believed that the Federal “Courts had best settle” this specific issue. Similarly the outfitting of French corsairs in American ports was arguably unlawful and therefore could be viewed as tainting the legality of the corsairs’ captures. Finally a suit for restitution inevitably would require the federal court to assess the legality of a French Consular Court’s prior condemnation. A federal court sitting in Admiralty could resolve these legal issues and order restitution of prizes illegally taken.

Although cases like the William could have provided valuable assist-

63. For example in a seaman’s claim for unpaid wages, which was the most common type of private admiralty litigation, the tradition was that the claim would be decided by an admiralty court “between tide and tide, so as to enable them to go to sea again immediately.” A. Browne, A COMPENDIUS VIEW OF THE CIVIL LAW AND THE LAW OF THE ADMIRALTY 85 (2d ed. 1802). This tradition must have stemmed at least in part from the fact that libels in admiralty were commenced by attaching the ship, which in effect placed the ship in demurrage and prevented it from serving its commercial purpose.


65. An alleged capture within American territorial waters was the principal basis of the British owners’ claim in Findlay v. The William, 9 Fed. Cas. 57 (D. Pa. 1793) (No. 4790), and in many other cases. Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); The Catherine, DECREE ON THE ADMIRALTY SIDE OF THE DISTRICT COURT OF NEW YORK (Evans no. 26, 915; 1794) (D.Y. 1794) Castello v. Bouteille 5 F. Cas. 278 (D.S.C. 2504). Eventually the outer limits of sovereignty for this purpose was set at three miles out to sea, and the William was determined to have been taken beyond this limit. See supra note 91.

66. Alexander Hamilton to Rufus King (June 15, 1793), 14 HAMILTON PAPERS 547, 548.

67. This issue was raised in Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); Castello v. Bouteille, 5 F. Cas. 278 (D.S.C. 1794) (No. 2504). See also British Consul v. Schooner Nancy, 4 F. Cas. 171 (D.S.C. 1795) (No. 1898); Williamson v. Brig Betsy, 30 F. Cas. 7 (D.S.C. 1795) (No. 17,750).

68. Because the William had been formally condemned by the French Consular Court in Philadelphia (see Phineas Bond to Lord Grenville (June 8, 1793), PRO:FO 5/2, Consular Correspondence), the ship could not be restored without considering the validity of the French judgment. During the Revolutionary War, the Federal Court of Appeals under the Articles of Confederation held that after a prize is erroneously condemned “all further questions and examinations are precluded . . . and . . . the party injured must apply for redress to that nation, whose courts have committed the error or inequity.” Miller v. Miller 2 U.S. (2 Dall.) 1, 5 (Fed. Ct. App. 1781). See also Rose v. Himley, 8 U.S. (4 Cranch.) 241 (1808); 5 Op. Att’y Gen. 689 (1799). When the Supreme Court finally held that the federal courts were authorized to return unlawful captures to their proper owners, the Court, on its own motion, ruled that the French Consular Courts were unlawful. Glass v. The Betsy, 3 U.S. (3 Dall.) 6 (1794). The Court’s ruling on this point provided a basis for denying Consular condemnations’ preclusive effect.
tance to the Washington Administration in divining the applicable principles of law pertinent to neutrality, their potential was never reached. In response to the claimants' suit for restitution, the captors insisted that the federal court lacked subject matter jurisdiction to review the legality of the William's capture. They pointed to a settled principle of Admiralty law that in prize cases no court other than a court of the captor's country had jurisdiction to determine the validity of a capture.69 In a case involving a French prize, neither a British court nor a neutral United States court was competent to determine this fundamental question of prize or no prize.

Oral argument on the challenge to subject matter jurisdiction commenced on the Friday morning of June 14. The interested parties had joined issue on the contention that the court lacked subject matter jurisdiction, and the captors' lead attorney Peter Stephen du Ponceau spent most of the morning presenting the argument against jurisdiction.70 Du Ponceau was a polymath who among other things was one of the nation's most capable and highly regarded international lawyers.71 He had originally come to America during the Revolutionary War as an aide to Baron von Steuben. With the "slightest imaginable accent [which] revealed his French origin,"72 du Ponceau argued:

That prizes should be tried in the court of the country to whom the captor belongs; that a neutral power has no right to enquire into the validity of prizes brought into their ports, and expressly so by treaty, as it relates to France and the United States; and that questions in which the sovereignty of States is involved can only be settled by negotiation [between the interested governments].73

Du Ponceau based his argument upon settled prize law, and he supported it with extensive citation to pertinent authority and precedent. He closed with a policy argument "on the importance of keeping clear of the disturbances which agitate Europe."74 Then du Ponceau's co-counsel, Jonathan Dickson Sergeant added "some authorities omitted by his colleague."75 Like du Ponceau, Sergeant was a highly regarded attorney.76 At that point Judge Peters adjourned for lunch. In the afternoon the British owners' counsel began their argument. They were also distinguished members of the bar. First up was William Rawle,77 who was the United States Attorney for Pennsylvania. Although he was also the lead prosecutor in

69. Captor's Plea, Federal Gazette, June 24, 1793. See also General Advertiser, June 19 & 21, 1793 (argument of Captor's counsel).
70. General Advertiser, June 19, 1793 (argument of counsel).
71. See Peter Stephen du Ponceau, 5 DICTIONARY OF AMERICAN BIOGRAPHY 525-26 (A. Johnson & D. Malone eds. 1930).
73. Id. The treaty to which du Ponceau referred was Article 17 of the Treaty of Amity and Commerce. See supra note 17.
74. General Advertiser, June 19, 1793 (argument of counsel).
75. Id.
76. See Jonathan Dickson Sergeant, 16 DICTIONARY OF AMERICAN BIOGRAPHY 589-90.
77. See William Rawle, 15 DICTIONARY OF AMERICAN BIOGRAPHY 400.01.
Henfield’s Case, he appeared in the William in his private capacity. He agreed with the general proposition that the courts of a neutral power lacked subject matter jurisdiction over the fundamental question of prize or no prize but argued for an exception for captures made in violation of the neutral power’s sovereignty. Finally after a long day, Judge Peters adjourned court for the evening.

The next morning, which was on a Saturday, Jared Ingersol presented additional arguments for the captors. When Ingersol started edging into the merits with an argument “that a 24 pounder [cannon] will not throw a ball to the distance of quite 3 miles,” Judge Peters broke in and reminded counsel that “the point, before the court [was] whether if the capture was made on neutral territory, then can the court take cognizance.” And so the argument continued until the noon adjournment. When everyone returned after lunch, William Lewis, who had preceded Judge Peters as the United States District Judge for Pennsylvania, concluded the British owners’ case. His argument, which lasted into the evening, was based entirely upon policy and extrapolation from precedent and authority not directly on point. Like his co-counsel, he urged that in cases where a capture violated a neutral country’s sovereignty, an exception should be created to the general rule against jurisdiction. At one point he conceded “that no instance can be produced of a similar case being brought in a [neutral country’s] court of admiralty.” Finally after two solid days of detailed argument by the best lawyers in Philadelphia, Judge Peters took the case under advisement.

Judge Peters devoted great care and attention to the issue, and about a week later, he announced his decision in a lengthy opinion. His basic approach was to follow precedent. Peters was perhaps the nation’s most capable admiralty judge, and he reached his decision with the assistance of two days of extended argument by some of the nation’s most capable lawyers. He concluded that the owners’ arguments for subject matter jurisdiction were without precedent and contrary to the settled rule that “affairs of prizes are only cognizable in the courts of the power making

78. [Philadelphia] General Advertiser, June 19, 1793 (argument of counsel). The British Ambassador wrote the Foreign Office that he did not “entertain any very sanguine expectations: that the federal courts would recognize a general jurisdiction to review captures. George Hammond to Lord Grenville (June 10, 1793), PRO:FO 5/1. Nevertheless, he hoped that the court would recognize an exception for prizes “captured within the jurisdiction of the United States.” Id.

79. See Jared Ingersoll, 9 D ICTIONARY OF AMERICAN BIOGRAPHY 468-69.

80. [Philadelphia] General Advertiser, June 21, 1793 (emphasis original). Ingersol immediately went back on script: “The question, Mr. Ingersol said, is a question of prize and no prize.” Id.


83. Id. He ingeniously argued “that this only showed, that the privateer had gone further than any one before her.” Id.

84. Findlay v. The William, 9 F. Cas. 57 (D.Pa. 1793).
point. He understood that a capture in American waters implicated the nation’s sovereignty interests, and both sides had addressed this point at great length. The captors’ attorneys insisted that the nation’s sovereignty interests had to be vindicated through diplomacy, and the British owners’ attorneys responded that litigation provided a more just and effective mode of vindication. Insofar as the case involved the United States’ interest as a sovereign, Judge Peters concluded, “this is a matter, not of judicial, but political arrangement.” As a trial judge, he felt that he could not ignore the settled precedent. At the conclusion of his opinion, however, he strongly hinted that the Supreme Court might be willing to ignore the precedent. “There is an appeal,” noted Judge Peters, “from any determination I may give, to a superior tribunal.”

Notwithstanding Judge Peters’ broad hint that the owners should appeal his decision, the case never reached the Supreme Court. The owners elected not to appeal. Instead they decided to petition the Executive Branch for a remedy, and their petition was finally denied a year later.

85. 9 F. Cas. at 61. A subsequent critic claimed that Judge Peters’ “judgment, however well founded it may be in the opinion of some, is nevertheless generally exploded by most of the lawyers of eminence.” [Philadelphia] Federal Gazette (Aug. 24, 1793). The “lawyers of eminence” probably were William Lewis, Jared Ingersoll, and William Rawle. See notes 77-83, supra, and accompanying text. The fact remains that no one has ever adduced any precedent to support subject matter jurisdiction over the suit for restitution.
86. See 9 F. Cas. at 58. For more detailed accounts, see [Philadelphia] General Advertisers June 19 & 21, 1793 (arguments of du Ponceau, Ingersol, & Sergeant). Du Ponceau pointed out that diplomatic negotiations had recently led to the return of the Grange, which was taken in Delaware Bay. Id. June 24, 1793. See CHARLES HYNEMAN, THE FIRST AMERICAN NEUTRALITY 99-100 (1934). Sergeant explained that “the executive . . . having the public force at their command they can make those neutral rights more respected.” Id.
87. See 9 F. Cas. at 58-59. For more detailed accounts, see [Philadelphia] General Advertiser, June 19 & 24 (arguments of Rawle and Lewis). Rawle argued that a “judicial decision is more conformable to justice [because] the executive is often guided by motives of policy.” Id. June 19, 1793. Lewis pointed out that unlike "an absolute monarch . . . our executive has no strong arm to enforce obedience to its decisions." Id. June 24, 1793.
88. 9 F. Cas. at 59. He recognized that the President did not have all the powers of an absolute monarch but decided that if this was a serious enough problem “our legislature can vest the executive in future with similar powers.” Id.
Similarly in another suit for restitution, Judge Bee in South Carolina refused to consider the fact that a French corsair had been unlawfully fitted out in an American port: “The court cannot notice this. The constitution has wisely separated the judicial and executive departments, and we must not infringe the barriers. . . . [C]omplaint must be made to the executive, who will proceed by negotiation to obtain the due redress.” Castello v. Bouteille, F. Cas. 278, 279 (D.S.C. 1794) (No. 2504).
89. 9 F. Cas. at 59. Charles Hyneman believed that “Judge Peters regarded the captures as illegal.” Hyneman at 89. There is, however, no evidence to support Hyneman’s claim, and in fact the capture was subsequently determined to be lawful. See infra note 91 and accompanying text.
90. Memorial from George Hammond (June 21, 1793), 26 JEFFERSON PAPERS 335.
91. Edmund Randolph to George Hammond (June 19, 1793), COUNTER CASE at 582-83. Captures like the William forced the United States to determine the extent of which its sovereignty extended out to sea, which eventually was set at “three geographical miles from the sea shores.” Thomas Jefferson to Certain Foreign Ministers in the United States (Nov. 8,
Soon after Judge Peters’ decision, a second case for restitution of an allegedly unlawful prize was filed in his court, and the cabinet expected that he would “very shortly reconsider” his decision in *Findlay*. But in *Moxon v. The Fanny*, Judge Peters cleaved to his original analysis. Within half a year, at least four other district judges followed Peters’ lead. One of the losing owners in these other cases was “unwilling to appeal if Govt will afford any Extrajudicial [Executive] Relief.” Judge Lowell in Massachusetts was the only lower federal judge who was willing to carve out a narrow exception to the general rule against jurisdiction. Following an idea initially advanced by the Executive Branch, he held that the courts had jurisdiction in the case of prizes and cargoes belonging to American citizens and other neutrals.

The question of the federal courts’ jurisdiction to review the validity of captures was not finally resolved until February of the next year when a case finally reached the Supreme Court. In *Glass v. The Betsy*, the Court announced without explanation that it was “decidedly of opinion” that the federal district courts have jurisdiction to examine the legality of a capture and order restitution in an appropriate case. The Justices did not deliver opinions in support of their decision probably because they knew

1793), 27 *JEFFERSON PAPERS* 328-30; Act of June 5, 1794, 1 Stat. 384. See Hyman at 101-07; Phillip Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 3-7 & 49-54 (1927). Shortly after the *William* was captured, the British Ambassador told the Foreign Office that she “was taken at the distance of four miles and a half of the Capes of Chesapeake.” George Hammond to Lord Grenville (June 10, 1793), PRO:FO 5/1.


93. 17 F. Cas. 942 (D. Pa. 1793) (No. 9895). In this second case, the owners ingeniously pleaded the Congress’s Alien Tort Claims Act, Judiciary Act of 1789, ch. 20 §9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350), discussed in Casto, The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467 (1986). The argument evidently was that even if the law of nations precluded subject matter jurisdiction, the Alien Tort Claims Act overturned the law of nations. Judge Peters rejected this argument on the ground that the owners’ suit was not a tort action. 17 F. Cas. at 947-48. After losing in court, the owners petitioned for an executive remedy, and their petition was denied about four months later on the ground that the *Fanny* was not in fact taken in United States waters. Thomas Jefferson to Certain Foreign Ministers in the United States (Nov. 8, 1793), 27 *JEFFERSON PAPERS* 328-30.


96. Folger v. Lecuyer, Boston Centinel, Jan. 4, 1794 (D. Mass. 1793). For the Executive Branch, see Henry Knox to Governor Lee of Virginia (Aug. 21, 1793), 6 *CALENDAR OF VIRGINIA STATE PAPERS* 491 (S. McRae ed. 1886).

97. 3 U.S. (3 Dall.) 6 (1794). For the details of this litigation see, 6 DHSC at 296-355.

98. 3 U.S. (3 Dall.) at 16.
that admiralty precedents and authorities were so decidedly to the contrary. The Court’s opinion was too late to assist the Washington Administration in dealing with the Neutrality Crisis of the prior year. By the time that the Court decided Glass, the country was involved in a new crisis that threatened war with Great Britain.

E. Henfield’s Case

While Judge Peters was crafting his opinions in Findlay and Moxon, the criminal case against the William’s prize crew moved forward. Henfield was on board the Citoyen Genet when he was arrested, and he was quickly arraigned before Hilary Baker, a local alderman with judicial powers. In his defense he initially explained to Alderman Baker that he had been a sailor without a ship in Charleston and was looking for a ride north to Philadelphia. Because he could not afford to pay his passage, he struck a bargain with Captain Johannene. He agreed to sail with the Citoyen Genet, and the captain agreed to make him prize master of the

99. See CASTO’S SUPREME COURT at 85-86.
100. The new crisis was sparked by an apparent British attack on American maritime commerce. In Europe the British facilitated depredations by the Barbary Pirates, and in the Caribbean British privateers directly attacked United States ships. At the same time British agents fomented Indian attacks on the northwest frontier. See ALBERT BOWMAN, THE STRUGGLE FOR NEUTRALITY, ch. VI (1974); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM, ch. IX (1993).
101. The best report of Henfield’s Case is FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 49 (1849). The report in Federal Cases is a republication of Wharton’s report. See 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No.6360). All citations to Henfield’s Case in this article are to Wharton’s report. Wharton’s account of the preliminary hearings, trial, and Justice Wilson’s charge to the jury are drawn virtually verbatim from a lengthy article in Dunlap’s American Daily Advertiser, Aug. 8, 1793. The author of the Dunlap’s article was “a gentlemen of the bar, who attended the Court”. See Carlisle Gazette, Aug. 21, 1793.

102. Edmond Charles Genet to Thomas Jefferson (June 1, 1793), 26 JEFFERSON PAPERS 159, Henfield’s Case at 89 n.* (English translation).
103. Memorial from Edmond Charles Genet (May 27, 1793), 26 JEFFERSON PAPERS 130. Baker, whose given name was Hilarius, was born in Hesse-Darmstadt, and three years after the Henfield case, he became mayor of Philadelphia. 2 COLONIAL FAMILIES OF PHILADELPHIA 1658-59 (J. Jordan ed. 1911). Lewis Deblois, Esq. John Morgan, and James Bassett may also have appeared at the arraignment as witnesses. These three men and Baker apparently appeared as witnesses before the grand jury. Henfield’s Case, at 77 (grand jury). Deblois had information about the case, assisted the United States Attorney Rawle in prearrainment investigations, and testified against Henfield at the arraignment. Thomas Jefferson to William Rawle (May 15, 1793), 26 JEFFERSON PAPERS 40-41; William Rawle to Hilary Baker (May 17, 1793), Henfield’s Case, at 51 n.* James Basset may have been the master of the brigantine, Active, which was another one of the Citoyen Genet’s prizes. See COUNTERCASE at 610. At the subsequent trial, the witnesses for the prosecution were “Jonas Simmons, John Morgan, Hilary Baker Esq. [and] Lewis Deblois.” CIRCUIT COURT MINUTES at 29.
first capture sent into an American port.\textsuperscript{104} During the initial arraignment, Henfield “protested himself an American, that as such he would die, and therefore could not be supposed likely to intend anything to her prejudice.”\textsuperscript{105} Moreover he joined the corsair without knowledge of the Neutrality Proclamation, which was issued three days after the \textit{Citoyen Genet} departed Charleston.\textsuperscript{106} He earnestly “declared if he had known it to be contrary to the President’s proclamation, or even the wishes of the President, for whom he had the greatest respect, he could not have entered on board.”\textsuperscript{107}

A month later at a second preliminary hearing, Henfield told a different story. The French Ambassador had retained counsel for him, and now Henfield insisted that he had become a French citizen and “meant to move his family within their [i.e., French] dominions.”\textsuperscript{108} If so, Henfield’s service on the \textit{Citoyen Genet} could not be a violation of American neutrality. There could be nothing wrong with a French citizen fighting for his own country.

\textit{Henfield’s Case} was a high profile, politically controversial prosecution. When the French Ambassador learned of Henfield’s arrest, he immediately dashed off a firm protest to Thomas Jefferson. With angry irony he protested that the alleged crime “—the crime which my mind cannot conceive, and which my pen almost refuses to state—is the serving of France, and defending with her children the common glorious cause of liberty.”\textsuperscript{109} He then stated two technical legal defenses. First the Ambassador protested that he was “ignorant of any positive law [by which he meant an act of Congress] which deprives Americans of this privilege” of helping France.\textsuperscript{110} Second, he protested that Henfield had become a French citizen before joining the \textit{Citoyen Genet} and therefore had “the right of French citizens” to defend France.\textsuperscript{111} In a letter carefully vetted by Alexander Hamilton and Attorney General Randolph, Jefferson replied that the matter was now with the judiciary “over whose proceedings the Executive has no control.”\textsuperscript{112}

The defenses that Genet raised on behalf of Henfield were not

\textsuperscript{104} Henfield’s Case, at 77-78 (taken from the [Philadelphia] American Daily Advertiser, Aug. 8, 1793).
\textsuperscript{105} Id. at 78. Accord, Argument of William Rawle, id. at 81.
\textsuperscript{106} The Proclamation was issued on April 22 and the \textit{Citoyen Genet} sailed on April 19. Neutrality Proclamation (April 22, 1793), 11 Stat. 753 (App. 1859); John Ewing to James Blank (April 20, 1793), PRO:FO 5/3, Domestic Letters.
\textsuperscript{107} Henfield’s Case, at 78.
\textsuperscript{108} Id.
\textsuperscript{109} Edmond Genet to Thomas Jefferson (June 1, 1793), 26 JEFFERSON PAPERS 159, Henfield’s Case, at 89 n* (English translation).
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Thomas Jefferson to Edmond Genet (June 1, 1793), 26 JEFFERSON PAPERS 160. Although Jefferson’s reply is dated June 1, it actually was written at a later date after being edited and approved by the cabinet. Id. at 160-61 (editorial note).
frivolous. In fact there was no act of Congress making his conduct a crime or forbidding American citizens from violating American neutrality. The cabinet referred the matter to Attorney General Randolph who quickly came up with a common law solution to the problem. Randolph believed that Henfield had violated treaties that established a condition of peace between the United States and some of the powers at war with France.113 Although the treaties made no reference to criminal prosecutions, there was a well-established common law doctrine that the law of nations was incorporated into the common law and that violations of the law of nations were common law misdemeanors.114 Randolph concluded that Henfield “is indictable at the common Law; because his conduct comes within the description of disturbing the Peace of the United States.”115 Jefferson assured James Monroe that Randolph’s opinion “coincided with all our private opinions, and the lawyers of this state, New York and Maryland who were applied to, were unanimously of the same opinion.”116 He noted, however, that U.S. Attorney Rawle, “supposes the law more doubtful. New Acts therefore of the same kind are left unprosecuted till the question is determined by the proper court.”117

In addition to the matter of common law prosecutions, there was some doubt whether the law of nations had been violated. Today American citizens’ participation in fitting out French commerce raiders and crewing them may seem obvious neutrality violations, but in 1793 the

114. See CASTO’S SUPREME COURT at 130-41.
117. Id. Monroe had also express doubts on this point. James Monroe to Thomas Jefferson (June 27, 1793), 26 JEFFERSON PAPERS 381, 382.
issue was not so clear cut. In the late eighteenth century, the rights and duties under international law of a neutral country had yet to be clearly established. For example, “[t]he direct supply of troops and of actual or potential warships by neutral powers to belligerent States was in frequent use in the 16th-18th centuries.”  

The policies that the United States crafted in response to the 1793 crisis eventually played a significant role in the development of the international law of neutrality. But “not all of [the American policies] reflected mandatory rules of international law in force at that time.”

When a special circuit court was convened in July to consider the government’s test case, Justice Wilson, the senior circuit judge was well aware of the legal issues that would be raised in the case, but his charge was somewhat vague on the applicable legal rules. In ten pages replete with numerous references to obscure and well-known lawyers and philosophers from Plato to Blackstone, Wilson extolled the common law that Americans had inherited from their Saxon forefathers. In particular Wilson explained that the common law included the law of nations and that by the law of nations, countries not at war were required not to harm each other. If the United States did not take steps to punish citizens like Henfield who attacked Great Britain, the nation would be in violation of the law of nations. The United States would become responsible for injuries caused by citizens like Henfield, which could lead “to Reprisals certainly: And if so; probably to War.” Wilson concluded with a lengthy explanation that under the Constitution only the Congress—and certainly not private citizens like Henfield—had authority to declare war.

Judge Wilson’s solemn predictions of dire consequences flowing from Americans joining the French cause struck many Philadelphians as unrealistic. At the outset of the Neutrality Crisis, a pro-French American writing under the pen name “Americanus” pointed out that individuals commonly served in the armed forces of other countries. More significantly Americanus insisted, “I am free to enter into any service, or


119. See VERZIJL at 51-58.

120. Id. at 52. “Some of [the American policies] indeed only proclaimed a policy that the United States intended to adopt freely as a neutral Power.” Id.

121. James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (June 22, 1793), 2 DHSC 414.

122. Id. at 491-20. Wilson included a detailed refutation of the claim that the Treaty of Amity and Commerce, see note 17, supra, gave France a right to fit out corsairs in American ports. Id. at 420-21.

123. Id. at 421 (citations omitted; emphasis original).

become a citizen in any nation who will receive me.”

Wilson’s charge was more an extended political essay than a careful analysis of the applicable rules of criminal law. In the late eighteenth century, American judges and especially United States Supreme Court justices routinely used grand jury charges as a vehicle for addressing important national political issues. A modern student of the Founding Era has dubbed the early justices Republican Schoolmasters, and Wilson’s charge epitomizes this description.

The grand jury returned a long, prolix, and virtually unreadable indictment that was drafted by Rawle. As befitted a political prosecution, the Attorney General and Secretary Hamilton assisted in drawing up this masterpiece of legal jargon. To this day capable lawyers find the indictment puzzling and daunting.

Trial commenced on Friday, July 26, and Henfield pleaded “non cul[pabilis],” but Singleterry “being called came not.” The two men were out on bail, and at the last moment, Singleterry fled the jurisdiction. The trial then proceeded against Henfield as the sole defendant.

The judges were Wilson and Iredell of the Supreme Court and Peters, the local federal district judge. The opposing counsel from Findlay v. The William were again present. Du Ponceau, Ingersoll, and Sergeant represented Henfield, and Rawle represented the United States with the assistance of Attorney General Randolph. William Lewis was not a prosecutor and did not appear as counsel for the government. Nevertheless, he and Alexander Hamilton took an active role in assisting the prosecution.

---

126. See **CASTO’S SUPREME COURT** at 126-29.
129. Edmund Randolph, Draft Indictment, Henfield’s Case, at 77 n* (with emendations by Alexander Hamilton). See also Alexander Hamilton to William Lewis (July 1793), 15 **HAMILTON PAPERS** 156 (discussing whether Henfield was indicted for violating the common law or violating the law of nations).
130. See *e.g.*, **JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES ANTECEDENTS AND BEGINNINGS TO 1801**, at 625-27 (1971). See also editorial note, 26 **JEFFERSON PAPERS** at 131.
132. Carlisle Gazette, Aug. 21, 1793. Just the day before the trial, Singleterry’s attorney was in court seeking a copy of the indictment “to the End that he may prepare for his Defense.” **CIRCUIT COURT MINUTES**, at 25. The persons who posted bond for Singleterry also fled the jurisdiction. The following Monday the Court ordered the recognizances of Singleterry and his “Bail to wit Louis Croussillat and Peter Barriere . . . forfeited.” *Id.* at 32.
133. In 1793 the circuit court, which was the primary federal trial court, was staffed by the local federal district judge and two Supreme Court Justices riding circuit. See **CASTO’S SUPREME COURT** at 45.
134. Henfield’s Case, at 78.
135. See Alexander Hamilton to William Lewis (July 1793), 15 **HAMILTON PAPERS** 156. See also Henfield’s Case, at 77 n* (noting Randolph’s and apparently Hamilton’s
The facts of the case were fairly straightforward and uncomplicated. 136 Henfield's service with the French and the taking of the William were not in dispute. With the exception of the question whether Henfield had actually intended to become a French citizen, all the issues in the case were legal rather than factual. The principal witnesses for the prosecution were Jonas Simmons, John Morgan, Lewis Deblois, and Hilary Baker, who presided at Henfield's arraignment. 137 There is no indication that the defense called any witnesses. On Saturday the attorneys made their closing arguments, the judge charged the jury, and the jurors commenced their deliberations.

Some two hundred years later, the closing attorneys' arguments to the jury are puzzling and seem irrelevant. Both the prosecutor and the defense attorneys devoted most of their arguments to conflicting views of the applicable legal principles. 138 Today these legal arguments would be reserved for the judge's ears, but this approach made sense in the late eighteenth century. At that time the jury in a criminal case had final authority to determine both the facts and the law. Judge Wilson explained to the petit jurors in his charge that "the jury, in a general verdict, must decide both law and fact." 139 Although the judge charged the jury on the law, his charge was advisory. The jury had no obligation to follow the judge's charge if they believed that the judge was in error. But the jury did not have an unfettered discretion to make law. As Judge Wilson explained, they were not authorized "to decide it as they pleased; they were as much bound to decide by law as the judges: the responsibility was equal upon both." 140

Judge Wilson's idea that the jurors "were as much bound to decide by law as the judges: the responsibility was equal upon both" rings strange to modern ears, but his charge was not for modern ears. The

---

137. Circuit Court Minutes at 29.
138. See Henfield's Case, at 78-83.
139. Id. at 87. Less than a year later, Chief Justice Jay gave essentially the same charge in an unrelated civil action. The trial was in the Supreme Court pursuant to the Court's original jurisdiction over cases involving a state. Chief Justice Jay explained, "on questions of fact, it is the province of the Jury, on questions of law, it is the province of the Court, to decide . . . . But . . . you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." Georgia v. Brailsford, Charge to the Petit Jury (U.S. 1799), 6 DHSC 171, 173. He concluded, "Juries are the best judges of facts; it is, on the other hand, presumable, that the Courts are best judges of law. But still both objects are lawfully, within your power of decision." Id. For able discussions of the early Federal judges' understanding that juries had final authority to determine the law, see John Gordan, Juries as Judges of the Law: The American Experience, 108 L.Q. Rev. 272 (1992). Daniel Blinka, "This Germ of Rottedness": Federal Trials in the New Republic 1789-1807, 36 Creighton L. Rev. 135 (2003). See also William Nelson, Americanization of the Common Law 28-29 & 165-66 (1975) (discussing the parallel practice in Massachusetts).
140. Henfield's Case, at 87-88.
predominant eighteenth-century understanding of the judicial process denied that judges had any lawmaking authority whatsoever.141 Judges merely applied preexisting legal rules to the cases that came before their courts. In the case of positive laws like statutes and treaties, the rules came from legislatures and treaty makers. In the case of unwritten laws like the common law or the law of nations, virtually all eighteenth-century attorneys believed that the applicable rules existed in nature. Under this natural law vision, judges did not make laws. Instead the judges used their experience and intellect to find the applicable rules that existed in nature. Therefore in searching for the pertinent legal principles, the judges and the jurors performed parallel and comparable functions. The “responsibility was equal upon both” to discover the applicable, preexisting law.

Under this natural-law understanding of the legal process, the purpose of a judge’s charge to a jury was to give the untutored jurors the benefit of the judge’s experience and wisdom. Therefore Judge Wilson addressed the pertinent legal issues. He emphatically rejected the argument that Henfield should be acquitted because there was no act of Congress making his conduct a crime. He explained that it “is the joint and unanimous opinion of the Court” that Henfield’s conduct was “an offense against this country, and punishable by its laws.” He specifically explained that this was “not an ex post facto law.” Henfield’s conduct was in violation of the law of nations and treaties of the United States, which predated the Neutrality Crisis.

In respect of the expatriation defense that Henfield had changed his citizenship, Judge Wilson narrowed his analysis to the specific facts of the case. He agreed that “Emigration [i.e. change of citizenship] is, undoubtedly one of the natural rights of man.” But he insisted that something other than conduct inconsistent with citizenship was necessary to accomplish a change of citizenship. Otherwise he noted, there could seldom be a prosecution for treason: “Nothing is more inconsistent with the duty of a citizen than treason; but it is because he still continues a citizen that he is liable to punishment.” A few weeks later, Thomas Jefferson elaborated upon this idea, noting that American “citizens are certainly free to divest themselves of that character, by emigration, and other acts manifesting their intention.”142 There must, however, be some evidence to support an intent to change citizenship and “the laws do not admit that the bare Commission of a crime amounts of itself to a divestment of the character of citizen.”143

Finally the jury began their deliberations at nine o’clock Saturday evening and after two and a half hours, reported that they were unable to agree. The judges asked them to try again and adjourned court at midnight while the jury continued deliberating.144 Sometime early Sunday morning,

143. Id. at 701.
144. Circuit Court Minutes, at 31.
the jurors reached a tentative agreement and gave a privy verdict\textsuperscript{145} to Judge Wilson who had remained while his fellow judges went to bed. When court was reconvened on Monday, one of the jurors expressed some doubts about the privy verdict, which made the vote 11-1 for acquittal.\textsuperscript{146} Apparently many of the jurors were persuaded by the change of citizenship defense, but the lone dissenter was not. He stated that “he was induced to agree to the [privy] verdict which acquitted Henfield because he heard threats made out of doors against any one who should be against the acquittal.”\textsuperscript{147} All three judges separately gave their opinions on the applicable law “particularly as to the change of political relation in the defendant.”\textsuperscript{148} The jury then returned to their deliberations, and as an inducement the judges decided that no food would be made available to the jurors. The “constable [was] to supply them with water merely.”\textsuperscript{149}

Late in the afternoon, the jurors finally reached an agreement for acquittal and presented a written verdict that apparently provided the reasons for their decision. But the judges refused to accept the verdict because it was “neither general nor special.”\textsuperscript{150} In other words it was neither a simple recitation of guilty or not guilty nor a bare determination of specific facts. And so the jurors returned to their water, and finally at seven o’clock Monday evening, they returned a general verdict of “Not Guilty.”\textsuperscript{151}

Although Henfield quickly faded from history, he experienced a brief period of national acclaim. Most of the nation exulted in Henfield’s acquittal. Many years later Chief Justice Marshall reminisced “the verdict in favor of Henfield was celebrated with extravagant marks of joy and exultation.”\textsuperscript{152} In Boston the toast of the day was, “The virtuous and Independent jury of Pennsylvania, who acquitted Henfield.”\textsuperscript{153} In Philadelphia a scurrilous cartoon was distributed, which celebrated the acquittal as a symbolic execution by guillotine of President Washington and Judge Wilson.\textsuperscript{154} In

\textsuperscript{145} Henfield’s Case, at 88. A privy verdict was unofficial and had no validity until affirmed by a public verdict in court. \textit{Henry Campbell Black, Black’s Law Dictionary} 1080 (5th ed. 1979).


\textsuperscript{147} [Philadelphia] General Advertiser (July 30, 1793).

\textsuperscript{148} Henfield’s Case, at 88. One of the jurors who voted for acquittal noted Henfield’s “having been some time absent from home, previous to his entering on board the privateer.” \textit{Id}.

\textsuperscript{149} [Philadelphia] Federal Gazette, July 29, 1793.

\textsuperscript{150} Henfield’s Case, at 88.

\textsuperscript{151} \textit{Id}.

\textsuperscript{152} \textit{John Marshall, Life of Washington} 274 (1807), quoted in Henfield’s Case at 89 n*.


\textsuperscript{154} British Consul in Norfolk, Virginia, reported

The President and Judge Wilson I am informed have been grossly insulted in a caricature which has lately appeared in Philadelphia, they are represented as having just suffered from the Stroke of the Guillotine under which they are placed. Mr. Hammond His Majesty’s Minister, the Dutch Consul, and Mr. Hamilton the American Secy are exhibited as chief Mourners. Underneath is an inscription purporting that the above Gentlemen died of Grief on hearing that an American Citizen who was tried for Serving on Board one of the Privateers fitted out under French Colours had been acquitted.
addition to celebrating the acquittal, supporters of France vigorously attacked the judges’ analyses of the applicable law. In a criticism resonating with natural-law philosophy, a writer in Philadelphia “lament[ed] that any occasion should arise for introducing motives of policy, to influence the decisions of our courts of justice.”

In addition the argument was made that:

By this verdict, which according to the charge of the court, indicates a decision on the law as well as the facts, it is now established that a citizen of the United States may by law enter on board a French Privateer and it is presumable that no other prosecution for this same cause can be sustained.

“Archy Simple” in South Carolina presented a more narrowly focused legal analysis. He elaborately argued that the verdict supported Americans’ rights to expatriate themselves and become French citizens.

In anticipation of this kind of talk, Attorney General Randolph placed an anonymous note in the Federal Gazette emphatically stating that “the court, with whom the law rests, most explicitly and unanimously declared that [Henfield’s] conduct is in violation of our treaty with his Britannic majesty . . . and . . . is criminal.” He explained that the acquittal “was owing to some deficiency in point of fact, or some equitable circumstances.” Randolph later told President Washington that “the leading man among” the jury told Randolph that Henfield’s “declaration that he would never have enlisted, had he known it to be against General Washington’s opinion, was the reason of my voting for his acquittal.”

John Hamilton to Lord Grenville (Aug. 9, 1793) PRO:FO 5/2, consular correspondence. Apparently no copy of the cartoon has survived. When Henry Knox brought up the cartoon in a cabinet meeting the President threw a gigantic temper tantrum. Notes of Cabinet Meeting (Aug. 2, 1793), 26 JEFFERSON PAPERS 602.


158. [Philadelphia] Federal Gazette, July 30, 1793, discussed in 26 JEFFERSON PAPERS 653-54. A few weeks later another writer in the same newspaper rejected the use of the Henfield verdict as legal precedent:

[The Henfield] verdict has been as universally reprobated throughout the continent as it was unwarrantable if the fact was proved—but admitting it to be right are we to collect the law of the land from the verdict of a jury?


160. Edmond Randolph to George Washington (Aug. 21, 1793), quoted in 26 JEFFERSON PAPERS at 713 n. See also Thomas Jefferson, Notes on Neutrality Question (July 13, 1793) (“it was thought [Henfield] might have offended unwittingly”), JEFFERSON PAPERS 498, 499; Thomas Jefferson to James Monroe (July 14, 1793), id. at 502.
Alexander Hamilton also believed that the acquittal could not be fairly read as a refutation of the judges’ charges on the applicable legal principles. He wrote, “The Jury was universally believed in this city to have been selected for the purpose of acquittal; so as to take off much the force of example.” Therefore, the verdict could “afford no evidence that other juries would pursue the same course.”

About two weeks after the acquittal, Jefferson followed Attorney General Randolph’s analysis and stated in official correspondence that the jury acquitted Henfield because he “was ignorant of the unlawfulness of his undertaking; that in the moment he was apprised of it, he shewed real contrition.” In addition Jefferson believed that the verdict was influenced by Henfield’s “meritorious services during the late war [for independence].” No other surviving records from the time of the trial even hint at these “meritorious services,” but Jefferson’s letter indicates that the jury knew about them.

Henfield was an experienced captain and not a simple impecunious seaman seeking a ride home. He was from Salem, Massachusetts, which during the Revolutionary War was a major privateering port. In early April of 1793, a respected Boston merchant had warned Alexander Hamilton that “some of our old adventurers in privateering who are again reduced will require a tight Rein to prevent them” from attacking British commerce. During the Revolution, Henfield was the “very successful” commander of the privateer Centipede, which was almost identical in size, armament, and crew to the Citoyen Genet. He commanded several other privateers during the war, but in January 1781 he was captured and was confined in Old Mill prison in England. John Singleterry, Henfield’s co-defendant who jumped bail, was one of Henfield’s fellow prisoners at Old Mill. After the

161. Alexander Hamilton to George Washington (Aug. 5, 1793), 15 HAMILTON PAPERS 194. The British Minister, who was in Hamilton’s confidence, reported that the acquittal was obtained “through the means of a packed jury.” George Hammond to Lord Grenville, (Aug. 10, 1793), Library of Congress.

162. Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), 26 JEFFERSON PAPERS 697, 702.

163. Id.

164. See Elias Hasket Derby, in 2 FREEMAN HUNT, LIVES OF AMERICAN MERCHANTS 17, 33-53 (1858).


166. JAMES DUNCAN PHILLIPS, SALEM IN THE EIGHTEENTH CENTURY 418 (1937). For a detailed and dramatic eyewitness account of Henfield’s daring attack upon a British port in Canada in 1778, see BENJAMIN SMITH, SKETCH OF THE LIFE OF BENJAMIN SMITH (1820), reprinted in 12 PROC. & COLL. WYOMING HIST. & GEN. SOC. 123, 137-38 (1912).


169. Id. at 173.
acquittal the French made Henfield captain of the sloop Spry, which they were fitting out as a corsair.170 Little is known of his subsequent career except that he was captured by a British cruiser and died about seven years later in his home town of Salem.171

The Henfield acquittal effectively ended common law prosecutions against American citizens who violated American neutrality. A few months after the acquittal a federal jury in Georgia acquitted one Joseph Rivers in a case virtually identical to Henfield.172 The acquittal was “contrary to the opinion of the judges,”173 and Rivers publicly boasted that the Georgia jurors, like those in “Philadelphia, [had] established the rights of man, by a judicial and well reasoned verdict.”174 A planned prosecution in North Carolina against Gideon Olmstead, another famous “adventurer in privateering” from the American Revolution, was subsequently dropped without even seeking an indictment.175

III. CONCLUDING THOUGHTS

The federal courts’ shortcomings during the Neutrality Crisis stemmed from a structural problem inherent in the Constitution and that structural problem remains today. The Constitution limits the federal courts’ judicial power to “Cases [and] Controversies,” and the Founders understood the federal judicial power to be limited to “Cases of Judiciary nature.”176 To be sure the Founders probably had a broad and even nebulous concept of cases—a concept that embraced grand jury charges intended primarily for public political purposes rather than simply to instruct the jury.177 Moreover the early judges frequently rendered advisory opinions in situations that clearly did not involve a case of a judiciary nature.178 The

170. 1 PENNSYLVANIA ARCHIVES (9th ser.) 634 & 648 (G. MacKinney ed. 1931). The Spry was a prize of the Sans Culottes and was purchased by the French for conversion to a privateer. COUNTERCASE at 611; Pennsylvania Journal, May 22, 1793.

171. Henfield’s Case at 89 n.; Salem Gazette, March 18, 1800. The French first attempted to refit the Spry in Philadelphia, but the governor called out the militia and stopped her conversion. See 1 PENNSYLVANIA ARCHIVES (9th Ser.) 634-35, 639, & 648 (G. MacKenney ed. (1931). She subsequently sailed for French Guadaloupe to be fitted out there. COUNTERCASE at 611. The British probably captured her on the way. Francis Wharton simply reports that Henfield “sallied forth in a new excursion, which resulted in his capture by a British cruiser.” Henfield’s Case at 89 n.*.


175. See WILLIAM CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (publication forthcoming); LOUIS MIDDLEBROOKS, CAPTAIN GIDEON OLMSTEAD (1933).


177. See CASTO’S SUPREME COURT at 126-29

178. See id. at 71-72, 74-75, 97-98, & 178-79. See also STEWART JAY, MOST HUMBLE SERVANTS (1997).
passage of two hundred years, however, has clarified the outer limits of the Case or Controversy limitation.

Today’s understanding of the Case or Controversy requirement confines the judicial power of the United States to the resolution of actual disputes between specific parties. There must be an adversarial relationship between the parties, and the plaintiff must seek a remedy for an actual harm that has not become moot. Moreover the specific judicial relief being sought must remedy in part the harm that the plaintiff suffered.

Findlay v. The William and Henfield’s Case epitomize modern litigation involving a proper case or controversy. Both cases involved an actual underlying dispute to which the parties sought a judicial resolution in the form of a traditional judicial remedy, and the parties were represented by counsel who vigorously and capably explored the pertinent issues. Nevertheless, from the government’s and the nation’s point of view, the judgments in Findlay and Henfield were disastrously ambiguous.

Findlay was decided at the height of the Neutrality Crisis, and the government would dearly have loved advice from the courts on such legal issues as the extent to which United States sovereignty extended out to sea, the legality of fitting out French corsairs in American ports, and the legality of the French Consular Courts. The government had no desire to act unlawfully, and a formal judgment on these issues from the courts would have provided valuable guidance in charting a course of lawful conduct. Even in respect of issues that the cabinet viewed as clearly settled, a judgment would have been useful in responding to the conflicting protests of the French and British ambassadors. A judgment also would have assisted the Washington Administration in the court of public opinion. Most Americans firmly supported the cause of revolutionary France. In this heated political crisis, a judgment from the courts would have provided valuable political support to the government and valuable legal advice to the nation at large. With these considerations in mind, the government through Secretary Jefferson actually encouraged the filing of suits like Findlay.

Instead of rendering valuable legal advice, Judge Peters punted. He dismissed the case for lack of subject matter jurisdiction. Only a court of the capturing nation was empowered to decide the fundamental question of prize or no prize, and the precedents for this proposition were too well settled to ignore. Judge Peters clearly wanted to assist the government and strongly hinted that the claimants should appeal his decision, but the claimants decided not to appeal. Instead they sought an executive remedy. Although the Supreme Court eventually rejected the settled precedent that Judge Peters felt compelled to follow, the Court’s decision did not come until the next year in another case. By that time the nation was in the throes of a different crisis.

Findlay neatly illustrates a structural problem that inhibits, which is not to say prohibits, the Judicial Branch from playing a timely advisory role in resolving foreign affairs crises. Almost by definition foreign affairs

179. See generally Chemerinsky’s Federal Jurisdiction, Ch. 2.
crises have broad, national implications, but the federal courts’ power to speak to the relevant legal issues is hostage to the comparatively narrow interests of the litigants. The Constitution limits the judicial power of the United States to the adjudication of cases or controversies involving actual disputes between specific parties. The case or controversy limitation therefore entrusts litigation to the particular interests of specific parties who may be relatively uninterested in more general issues. As a result specific judicial cases may be resolved without regard to pertinent overarching legal issues of nationwide concern.

For example Findlay was fundamentally about who was lawfully entitled to the William. The captors had her and the claimants wanted her back. On the merits the fundamental issue of lawful possession turned upon the important national issues of territorality and fitting out corsairs and also implicated the consular courts’ legitimacy. The captors would have been pleased with favorable rulings on these important issues, but what they really wanted was to retain possession of the William. Because they already had an order of condemnation from the French Consular Court, their attorneys correctly perceived that a preliminary challenge to the federal courts’ subject matter jurisdiction would best serve their clients’ immediate interests. The captors probably would have preferred a favorable ruling on the more important issues, but in litigation a procedural dismissal of the plaintiffs case almost always counts as a win for the defendant. Judge Peters’ decision left the status quo in place, and under the status quo, the French had the William. Even if the captors had had an inkling that Judge Peters would rule in their favor on the important issues, their narrow interest in being able to keep and sell the William virtually dictated that they challenge the court’s subject matter jurisdiction.80

The claimants in Findlay were like the captors. For both sides the major issues of territorality, fitting out privateers, and consular courts were secondary. The claimants—like the captors—wanted the William. Judge Peters practically begged the claimants to appeal his decision, but they were more interested in regaining their property than in having a court decide general legal propositions like the territorial limits of the United States. They made an economical calculation that they were more likely to get their property back through diplomatic channels than through litigation. Therefore they opted not to appeal. They might have simultaneously pursued remedies from both the Executive and Judicial Branches, but perhaps they feared that the President would have stayed his decision pending the outcome of a judicial appeal.181

180. There is a rule that federal judges must raise issues of subject matter jurisdiction on their own motion—that parties may not waive subject matter jurisdiction. See Charles Wright, The Law of Federal Courts 27-31 (5th ed. 1994). This cherished bit of federal courts arcana, however, is one of the mysteries of Article III jurisprudence under the Constitution. In contrast the jurisdictional limitation of prize or no prize came from customary Admiralty law and therefore may have been waivable.

181. In another case the cabinet delayed executive consideration of a capture pending the outcome of litigation. See note 92, supra, and accompanying text.
Some additional structural problems inherent in the case or controversy limitation are illustrated in Henfield. Unlike Findlay the government’s interests in Henfield were not hostage to the narrow interests of all the various parties. The government was the plaintiff in Henfield, and its interests were directly represented by the United States Attorney and the Attorney General. Henfield was indicted specifically to create a test case on the lawfulness of American citizens joining the crews of French corsairs to fight against the British. The case was carefully structured to present this precise issue to the court, but again the case or controversy limitation prevented a clear judicial resolution of the question.

Cases or controversies always arise in the context of sui generis facts. Frequently the specific facts of a case are insignificant, but sometimes unique facts become crucial to the ultimate outcome of litigation. Henfield is a good example of a case that may have turned upon sui generis facts. The government sought to establish a number of legal propositions of general application throughout the nation. In particular the prosecution argued that Americans who joined a French corsair’s crew acted unlawfully and that notwithstanding the absence of an applicable criminal statute, their unlawful conduct was subject to criminal penalties. In addition the government firmly contested Henfield’s expatriation defense. Each of these three propositions of law was crucial to the effective implementation of the President’s Neutrality Proclamation. But Henfield had another defense. He, in fact, had no knowledge of the Neutrality Proclamation when he sailed on the Citoyen Genet. Once the Neutrality Proclamation became common knowledge, which happened almost immediately, this particular fact pattern could not be repeated.

Henfield was a specific case—a prosecution of a specific individual. Although the government sought to use the prosecution as a test case to establish general principles of law, the court had to focus on the far more narrow issue of whether the specific defendant’s actual conduct warranted his conviction. The “leading man among” the jurors—presumably the foreman—told Attorney General Randolph that he voted for an acquittal specifically because Henfield had no knowledge of the President’s Proclamation. If this narrow and not-to-be-repeated circumstance was the basis of the court’s judgement, Henfield was a nondecision respecting the important legal issues of nationwide significance.

Henfield also illustrates another problem with the case or controversy limitation. Although judges make legal pronouncements and create legal precedents, these functions are secondary to the court’s primary responsibility in rendering a judgment. The court is immediately concerned with who wins or loses a case. At the conclusion of litigation, a judgment is entered, and the case is resolved. Sometimes the reasons for the court’s judgment will be unclear, but ambiguity or lack of clarity in

---

182. For example assuming all other facts remained constant, it would not have mattered if the Citoyen Genet had fitted out in Savannah, Georgia, and Henfield had joined her crew there rather than in Charleston.
the ratio decidendi usually does not diminish the value of the judgment to the specific parties before the court.

In Henfield the court entered a judgment of acquittal, but to this day no one knows the basis of the court’s decision. Therefore attempts to explain the court’s judgment as premised on one legal principle or another are misguided. 183 The judges charged the jury that Americans serving on French corsairs were violating the law, that their service was subject to criminal sanction notwithstanding the absence of an applicable act of Congress, and that the defense of expatriation was unavailable. If the jury based their acquittal upon Henfield’s ignorance of the Neutrality Proclamation, the verdict does not conflict with the judges’ clear and unambiguous charges. 184 But “Archy Simple” in South Carolina believed that the Henfield judgment supported the expatriation defense, and the court’s decision to recharge the jury on expatriation lends credence to Archy’s belief. Others read the judgment as a general refutation of the government’s case and of the judge’s charges. The upshot was that the government’s carefully planned test case produced disastrously ambiguous guidance on legal issues crucial to the preservation of American neutrality.

The structural problems that mired the federal courts in 1793 still exist. Certainly the problem of the disparity between the narrow interest of the parties in litigation and the broader interests of the nation persists. For example current efforts to defend against terrorism originating abroad have raised important legal questions, and the prosecution of John Walker Lindh seemed to provide the judiciary with an opportunity to answer some of these questions. 185 But like in Findlay, a funny thing happened on the way to the Supreme Court. Lindh and the government agreed upon a plea bargain. 186 Both parties had narrow interests that trumped the national interest in determining the constitutional rights of Americans captured overseas during the course of antiterrorist military operations. Lindh obtained a possibly lighter sentence, and the government avoided the possibility of an embarrassing not-guilty verdict on some or all of the counts in the indictment. 187

The problem of ambiguity that bedeviled attempts to understand the judgment in Henfield’s Case also persists. Of course ambiguity pervades any project to frame rules for regulating human conduct. The fundamental


184. Similarly the verdict can be explained on other comparatively narrow grounds not in conflict with the judges’ charges. See notes 145 & 159, supra, and accompanying text.


187. See id.
problem lies in the simple linguistic fact that a word and certainly a sentence may have multiple meanings. This fundamental ambiguity may become pertinent in any analysis of the relationship between general rules and specific conduct. An attorney advising a client, a judge deciding a case, and a legislator framing laws must grapple with this fundamental ambiguity. Henfield's Case, however, illustrates a different kind of ambiguity that is inherent in the judicial process. The fundamental problem of linguistic ambiguity arises after a particular rule is identified, but in Henfield the particular rule or fact that dictated the judgment of acquittal was never identified. Was he acquitted because serving on a French corsair was lawful, because Congress had not enacted applicable criminal sanctions, because he had changed his citizenship, or because he joined the Citoyen Genet without knowledge of President Washington's Neutrality Proclamation? No one knew the answer in 1793, and no one will ever know. The problem of ambiguity in Henfield was antecedent to the fundamental linguistic ambiguity that plagues the search for the meaning of a particular legal rule.

Henfield's antecedent problem of ambiguity cannot be dismissed as a function of the archaic eighteenth-century rule that criminal juries had final authority to determine the applicable legal rules. If every juror had agreed upon an acquittal based upon one or more of the four possible grounds of acquittal but there was no general agreement on any of the specific grounds, the jury presumably would nevertheless have acquitted. The ambiguity in Henfield was caused by the lack of a clear explanation of the basis for the court's judgment. No one knew which of the many plausible bases for acquittal was the proper explanation of the court's judgment. Henfield's antecedent problem of ambiguity arises from the fact that the primary purpose of adjudication is to resolve specific cases and not to pronounce or legislate applicable legal rules. In the words of the Constitution "the judicial Power of the United States . . . shall extend to . . . Cases [and] Controversies." Henfield involved a dispute between the United States and Gideon Henfield, and the court served its primary purpose with absolute clarity. Henfield won. No one knew why, but everyone knew that he was acquitted.

Our understanding of the judicial process has radically changed over the last two hundred years since Henfield was decided. Juries are no longer empowered to decide the law, and judges are now understood to possess lawmaker power. But the primary purpose of adjudication has not changed. Courts still decide cases or controversies arising from actual disputes between specific parties. Courts legislate laws when adjudicating cases, but there is no absolute need for courts to state clearly the basis for their decision. A court's primary purpose is the same as it was two

188. For example in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800), discussed in CASTO'S SUPREME COURT at 120-24, the Court explored the meaning of the work "enemy" in a statute regulating salvage awards respecting vessels recaptured from an enemy. See Act of Mar. 2, 1799, ch. 24, §7, 1 Stat. 709. Did the word encompass a nation against whom the United States had not declared war?
hundred years ago: to render a judgment.

In 1793 no one knew the legal basis for Henfield’s acquittal, but everyone knew that he was acquitted. *Goldwater v. Carter* 189 is a modern example of the same problem. President Carter had given notice of intent to terminate an important treaty, and Senator Goldwater asked the judiciary to block the termination. Goldwater’s theory was that the President lacked unilateral authority under the Constitution to terminate a treaty. The Supreme Court decided the case without plenary briefing or oral argument. Four justices believed that the case should be dismissed because the particular issue of presidential power was a political question. One justice concurred because he viewed the dispute as not yet ripe, and another concurred without explanation. Three other justices disagreed with the Court’s disposition.

To this day the nation lacks clear guidance from the Court on whether the President may or may not unilaterally terminate a treaty. 190 This is not say, however, that the Supreme Court in *Goldwater* failed to fulfill its Constitutional duties. The Court’s role is to decide judicial cases and controversies, and in *Goldwater* it did precisely that. There was nothing ambiguous about the Court’s fulfillment of its fundamental obligation. The case clearly and finally terminated in the dismissal of the plaintiffs complaint.

*Goldwater* illustrates another limitation to the judicial power that has lain in plain sight since the Constitution’s inception. The judicial function is usually understood to be the resolution of disputes, but the Constitution is more narrow. Article III limits the judicial power to judicial cases and controversies and does not extend the courts’ power to the underlying dispute between parties to litigation. Usually the distinction is inconsequential, but the difference was significant in 1793. In *Findlay* the court refused to address the lawfulness of the William’s capture but unambiguously dismissed the case. In *Goldwater* the Court did the same. Neither court addressed the lawfulness of the defendants’ actions, and neither court resolved the underlying dispute between the parties. Nevertheless both courts fulfilled their Constitutional duties by unambiguously deciding the judicial cases before them. 191

Most of the Case or Controversy requirements could be avoided if the judiciary were authorized to make general pronouncements of the law


190. See Louis Fisher, Constitutional Conflicts Between Congress and the President 242-45 (1997).

191. For an example of an ambiguous decision that did resolve the underlying dispute, see The Steel Seizure Case, 343 U.S. 579 (1952) in which President Truman’s nationalization of the steel industry during the Korean War was challenged as unconstitutional. Seven justices wrote opinions, but there was no majority opinion. Notwithstanding the disagreements among the justices, a majority believed that the seizure was unconstitutional. Under these circumstances the decision provides no authoritative guidance for future disputes, but the Court’s judgment clearly resolved the underlying dispute between President Truman and the Steel Industry.
independent of specific litigation, and the early Supreme Court justices frequently rendered advisory opinions in response to general or specific questions from the Executive Branch. The early justices’ practice, however, has long since been abandoned. Today the case or controversy requirement is universally understood to forbid advisory opinions by negative implication.\footnote{192} The modern understanding is generally traced to another chapter in the story of the Neutrality Crisis of 1793\footnote{193} and will be examined in a subsequent study.\footnote{194}

\footnote{192. See e.g., CHEMERINSKY’S FEDERAL JURISDICTION §2.2.}
\footnote{193. See e.g., id. at 49-50.}
\footnote{194. See WILLIAM CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL, ch. 7 & 10 (publication forthcoming).}