State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates

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The first “purpose” of the United Nations set forth in Article 1(1) of its Charter is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace.” Article 2(4) outlaws all aggressive uses of force. This reflects a radical departure from the prevailing legal regime of earlier centuries, which recognized a sovereign state’s inherent legal right to resort to force and imposed a duty of neutrality on all states not involved in a conflict.

Today, as America faces asymmetric threats to its security often characterized by the tactics of terrorism, there is wisdom to be found in the writings of one of America’s greatest Founding Fathers, Thomas Jefferson. He foresaw the principle of nonintervention in the internal affairs of other states, the utility of multilateralism and collective security arrangements, and the importance of dealing decisively with acts of aggression or terrorism, lest they become parents to others. A brief discussion of Jefferson’s contributions in this area is particularly relevant to the theme of the present issue of the Chicago Journal of International Law, as Jefferson led America in its first battles with state-sponsored international terrorism. In so doing, he relied upon a combination of

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2 “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” United Nations Charter, art 2(4).
3 The Barbary regencies would attack commercial ships on the high seas and enslave any surviving foreigners who were not protected by treaties purchased by tribute. The brutal nature of these actions against noncombatants was designed to instill fear in the hearts of foreign governments and their peoples alike in order to persuade them to purchase peace treaties with the regencies.
regular forces (navy and marines) and unconventional/covert warfare to present his adversaries with the choice between abandoning their predation or losing their jobs and perhaps their lives. In the process, he showed the world that the most promising path to peace, when confronted by terrorism, is unity and strength, and paved the way for the restoration of freedom of the high seas.

I. SETTING THE STAGE

One of the many parallels to the modern American war against terrorism is that Jefferson's problem was exacerbated by a long history of European weakness during which payments of tribute and ransoms promoted a growth industry of terrorism. The Barbary regencies had preyed upon European commerce—and were generously rewarded for having done so—for two centuries before the United States of America arrived on the scene as an independent actor. The revolutionary victory deprived America of the protection of the British flag—like other European powers, the British were paying tribute to secure unmolested transit on the high seas. This lack of protection, combined with the increase in American commerce, and the fact that American merchant ships "carried not an ounce of shot" to defend themselves made the new nation's commerce particularly attractive for plunder.

In October 1784, the American merchant brig Betty was seized on the high seas and taken with its crew of eleven to Morocco. Lacking both a naval force to protect American commerce and the ability to compel the American states to furnish the necessary funds to provide for a navy, the Continental Congress ultimately decided to follow the European lead and authorized $80,000 to "negotiate peace" with Morocco to obtain the release of the prisoners. Not

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4 The term "weakness" here refers to a lack of will rather than a lack of strength. Just over a century ago, historian Stanley Lane-Poole wrote:

It is not too much to say that the history of the foreign relations of Algiers and Tunis is one long indictment, not of one, but of all the maritime Powers of Europe, on the charge of cowardice and dishonour..... That all the maritime Powers should have cowered and cringed as they did before the miserable braggarts... and should have suffered their trade to be harassed, their lives menaced, and their honour stained by a series of insolent savages, whose entire fleet and army could not stand for a day before any properly generalled force of a single European Power, seems absolutely incredible, and yet it is literally true.

Stanley Lane-Poole, The Story of the Barbary Corsairs 256 (G.P. Putnam's Sons 1890).

5 For useful background on this issue, see id at 257-59.


8 Lane-Poole, The Story of the Barbary Corsairs at 274 (cited in note 4).

9 See, for example, Peterson, Thomas Jefferson at 310-11 (cited in note 6).

10 Id at 311.
surprisingly, two weeks after the crew of the *Betsy* was freed, cruisers from Algiers seized two other American vessels with 21 hostages. The conditions of imprisonment were such that, by the time peace was purchased in 1796, only 85 of the 131 American hostages that had been imprisoned in Algiers remained alive.\(^\text{11}\)

As word spread across the North African coast that the Americans had signed a treaty to pay tribute to Algiers, the other Barbary states quickly threatened to prey upon American vessels unless they received equally generous treatment.\(^\text{12}\) Particularly troublesome in this regard was one Yusuf Karamanli, Bashaw of Tripoli, who had seized power upon the death of his father in 1796. Six years earlier, Yusuf had murdered his older brother Hasan, and he held the family of his eldest brother Hamet—who had been out of the country at the time of their father's death—as hostages to dissuade the rightful heir from returning and asserting his claim to power.\(^\text{13}\)

The few surviving historical accounts suggest that Yusuf Karamanli bore some of the character traits attributed to modern tyrants like Saddam Hussein. He was reportedly “feared and hated” in Tripoli,\(^\text{14}\) and one American diplomat who dealt with him extensively described him as “a large, vulgar beast,” “a bully,” and “a cur who can be disciplined only with the whip.”\(^\text{15}\)

One of Yusuf’s first acts as Bashaw was to sign a treaty of “firm and perpetual peace and friendship”\(^\text{16}\) with the United States on November 4, 1796, which was ratified with the unanimous (23 to 0) advice and consent of the Senate on June 7 of the following year.\(^\text{17}\) Article 10 of this treaty specified that no “periodical tribute or farther payment is ever to be made by either party.”\(^\text{18}\) Article 12 provided that in the event of a dispute neither party would resort to arms, but that the dispute would be submitted to the Dey of Algiers for binding resolution.\(^\text{19}\) Documents referenced in the treaty acknowledged a receipt for a


\(^{\text{12}}\) Lane-Poole, *The Story of the Barbary Corsairs* at 275 (cited in note 4).


\(^{\text{16}}\) Treaty of Peace and Friendship, art 1, 8 Stat 154, 154 (1797).

\(^{\text{17}}\) See *Journal of the Executive Proceedings of the Senate of the United States of America, 1789–1805* (June 7, 1797), available online at <http://memory.loc.gov/cgi-bin/query/t?ammem:blaw:@field (DOCID+@lit(q001383)));> (visited Apr 1, 2003).

\(^{\text{18}}\) Treaty of Peace and Friendship at art 10 (cited in note 16).

\(^{\text{19}}\) "In case of any dispute arising from the violation of any of the articles of this treaty, no appeal shall be made to arms; nor shall war be declared on any pretext whatever. But if the consul residing at the place where the dispute shall happen, shall not be able to settle the
one-time payment of forty thousand Spanish dollars, assorted watches, rings, and fancy cloth.\(^{20}\) Additionally, there was a “Note” in which the United States promised that each time a new Consul was appointed to represent the United States in Tripoli he would bring twelve-thousand Spanish dollars and specified quantities of artillery, anchors, pine and oak boards (wood being scarce in the desert), and other valuable commodities.\(^{21}\) This, of course, provided a strong incentive for the Bashaw to quarrel with any American diplomat as an excuse to declare him \textit{persona non gratis} and set the stage for a successor with a new installment of treasure.

In July 1797, John Leander Cathcart was appointed American Consul to Tripoli and William H. Eaton became Consul at Tunis. Despite the clear provisions of the treaty, the Bashaw expressed displeasure that other Barbary leaders received nicer gifts and suggested that if further tribute were not forthcoming, he would find it necessary to declare war on the Americans. The threats intensified beginning in the summer of 1799 and continuing into 1800. In January 1801, he again threatened to cut down the flagpole in front of the American house (the method by which war was formally declared), and in February he formally repudiated the “perpetual” treaty of 1896 and demanded as an alternative to war a new treaty accompanied by $250,000 plus an annual tribute of $50,000. Soon thereafter, Cathcart was informed by a messenger, “The door of the palace is closed to you until you pay the Bashaw his due,”\(^{22}\) and the Bashaw wrote personally to the American President lamenting the absence of new gifts and stating that “if only flattering words are meant without performance, every one will act as he finds convenient.”\(^{23}\)

Finally, on May 10, 1801, the Bashaw announced that he was declaring war against America, and four days later the flagpole at the US consulate was chopped to the ground. Washington didn’t learn of the declaration of war for more than a month, as there was no wireless radio, intercontinental telegraph, or air transportation to relay such information. However, as the Bashaw would soon learn, the election of 1800 was not a positive development for the future of piracy along the Barbary coast.


\(^{21}\) Note, available online at <http://www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1796t.htm> (visited Apr 1, 2003).

\(^{22}\) Edwards, \textit{Barbary General} at 86 (cited in note 15).

\(^{23}\) Irwin, \textit{The Diplomatic Relations of the United States With the Barbary Powers} at 97 (cited in note 7).
II. Thomas Jefferson: The New Sheriff in Town

The problem of the Barbary pirates was not new to Thomas Jefferson, who took office as the nation’s third President on March 4, 1801. He had dealt with it as George Washington’s first Secretary of State (1790–1793); but even before that, as US Minister to France (1784–1789), he had listened to shocking accounts of the barbaric treatment of American merchant seamen enslaved in North Africa and was frustrated that nothing could be done to help them. As early as 1786, he had favored trying to “effect a peace” with the Barbary pirates “through the medium of war,” arguing that paying tribute was beneath the dignity of the new nation and would contribute to disrespect by others that might ultimately lead to war with a European power. In Jefferson’s view, both “justice and honor” favored a military response.24

While in Paris, Jefferson exchanged several letters with Secretary of State John Jay, US Minister to Great Britain John Adams, and others on this issue. In a December 15, 1784, letter to Jay, Adams argued that those who thought “it would be more manly to fight them” had “more spirit than prudence.”25 In another letter, he reasoned that it was not “good economy” to spend “a million annually to save one gift of two hundred thousand pounds.”26

Jefferson, too, took an economic approach, but understood there was more involved than money. He explained:

The question is whether their peace or war will be cheapest? But it is a question which should be addressed to our Honor as well as our Avarice? Nor does it respect us as to these pyrates only, but as to the nations of Europe. If we wish our commerce to be free and uns insulted, we must let these nations see that we have an energy which at present they disbelieve. The low opinion they entertain of our powers cannot fail to involve us soon in a naval war.27

On several occasions Adams suggested that he might prefer Jefferson’s approach were it reasonably possible to protect American commerce by force, but he noted that the new nation had no navy and probably also lacked the political will to persevere in such a policy. On July 3, 1785, he wrote Jefferson:

The policy of Christendom has made cowards of all their sailors before the standard of Mahomet. It would be heroical and glorious in us to restore courage to ours. I doubt not we could accomplish it, if we should set about

24 Id at 47. See also Letter from Thomas Jefferson to John Adams (July 11, 1786), reprinted in Julian P. Boyd, Mina R. Bryan, and Fredrick Aandahl, eds, 10 The Papers of Thomas Jefferson 123 (Princeton 1954).
25 Quoted in Allen, Our Navy and the Barbary Corsairs at 35 (cited in note 13).
26 Quoted in Irwin, The Diplomatic Relations of the United States With the Barbary Powers at 46 (cited in note 7).
it in earnest; but the difficulty of bringing our people to agree upon it, has ever discouraged me.  

These debates continued into the Washington administration when Jefferson called for a military response, but Washington agreed with Adams that it was wiser to simply follow the European practice of giving in to their demands. As the years passed, it became increasingly clear that the problem could not be solved by buying “perpetual” treaties of peace, as these adversaries lacked honor and would merely respond to payoffs with increased demands. Jefferson believed that giving presents to the Barbary powers was “money thrown away,” as “there is no end to the demand of these powers, nor any security in their promises.”

III. JEFFERSON’S LOVE FOR PEACE AND PREFERENCE FOR ECONOMIC SANCTIONS

Thomas Jefferson was fundamentally a man of peace, known for his observation that “[i]f there be one principle more deeply rooted than any other in the mind of every American, it is, that we should have nothing to do with conquest.” More than a century before the UN Charter would outlaw international aggression, Thomas Jefferson denounced “the atrocious violations of the rights of nations, by the interference of any one in the internal affairs of another.” That was radical thinking in 1823.

When war with England seemed imminent near the end of Jefferson’s tour as Secretary of State, he proposed what today would be termed “economic sanctions” as an alternative to force. In a letter to Tench Coxe, he wrote:

As to myself, I love peace, and I am anxious that we should give the world still another useful lesson, by showing to them other modes of punishing injuries than by war, which is as much a punishment to the punisher as to the sufferer. I love, therefore, ... [the] proposition of cutting off all communication with the nation which has conducted itself so atrociously. This, you will say, may bring on war. If it does, we will meet it like men; but

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30 Letter from Thomas Jefferson to Wilson Cary Nicholas (June 11, 1801), reprinted in Paul Leicester Ford, ed, 8 The Writings of Thomas Jefferson 62, 63 (G.P. Putnam’s Sons 1897).
it may not bring on war, and then the experiment will have been a happy one.33

IV. COLLECTIVE SECURITY APPROACH

The concept of collective security and defensive alliances like NATO and the Rio Pact are assumed by many to be products of the twentieth century; but here, too, Jefferson was ahead of his time. In 1786, Jefferson proposed such a treaty as a means of deterring or defeating armed aggression by the Barbary Pirates against international commerce.34 He explained that “the object of the convention shall be to compel the piratical States to perpetual peace, without price”—that is to say, without paying ransom—and “to guarantee that peace to each other.”35 Jefferson proposed that each party to the treaty authorize its minister to the court of Versailles to participate in a committee or council for effecting the treaty, with decisions being made by majority vote. He suggested further that the collective group first direct its joint actions against Algiers—the strongest of the Barbary regencies—and wrote: “When Algiers shall be reduced to peace, the other piratical States, if they refuse to discontinue their piracies, shall become the objects of this convention either successively or together, as shall seem best.”36

Although the scheme was well received in parts of Europe, it ultimately failed, because under the Articles of Confederation the American Congress lacked the legal power to compel the states to supply the necessary resources to sustain such a commitment. Indeed, it was in part to rectify such shortcomings under the Articles of Confederation that the Philadelphia Convention was ultimately convened in 1787 to write the Constitution.

V. PEACE THROUGH STRENGTH

As “peace activists” again man the barricades around the world to protest the actions of the United States, Great Britain, and their coalition partners to enforce the law of the UN Charter against Iraq, it is useful to recall that Thomas Jefferson, like so many of his contemporaries, believed that if a nation wishes to be free and live in peace it must be able to defend itself and be willing to protect

33 Letter from Thomas Jefferson to Tench Coxe (May 1, 1794), reprinted in Andrew A. Lipscomb and Albert Ellery Bergh, eds, 9 The Writings of Thomas Jefferson 284, 285 (Thomas Jefferson Memorial Association 1903). Later, as President, Jefferson sought to stave off war by persuading Congress to enact the Embargo Act of 1807.
34 See William Kirk Woolery, The Relation of Thomas Jefferson to American Foreign Policy 29–33 (Johns Hopkins 1927).
35 Thomas Jefferson, Proposals for Concerted Operation Among the Powers at War With the Piratical States of Barbary (Nov 1786), reprinted in Andrew A. Lipscomb and Albert Ellery Bergh, eds, 17 The Writings of Thomas Jefferson 145, 146 (Thomas Jefferson Memorial Association 1903).
36 Id at 147–48.
its rights. The issue was not whether we preferred war or peace, but whether we would have the option of peace in the absence of a credible ability and willingness to defend our rights. In a 1793 letter to James Monroe, he wrote:

I believe that through all America there has been but a single sentiment on the subject of peace and war, which was in favor of the former. The Executive here has cherished it with equal and unanimous desire. We have differed perhaps as to the tone of conduct exactly adapted to the securing it.37

Like President Washington, Jefferson believed that “[t]he power of making war often prevents it, and in our case would give efficacy to our desire of peace.”38 He understood that war could result both from our own wrongs and from the wrongs of other states, and emphasized to President Madison that “it has a great effect on the opinion of our people and the world to have the moral right on our side.”39 His strategy for peace while Minister to France was set forth eloquently in a 1785 letter written to John Jay, Secretary of State for the Continental Congress:

Justice … on our part, will save us from those wars which would have been produced by a contrary disposition. But how to prevent those produced by the wrongs of other nations? By putting ourselves in a condition to punish them. Weakness provokes insult and injury, while a condition to punish it often prevents it. This reasoning leads to the necessity of some naval force, that being the only weapon with which we can reach an enemy. I think it to our interest to punish the first insult: because an insult unpunished is the parent of many others. We are not at this moment in a condition to do it, but we should put ourselves into it as soon as possible.40

VI. PRESIDENT JEFFERSON AND THE BARBARY PIRATES

Jefferson's success in the election of 1800 gave him the opportunity to try the policy of peace through strength that he had been advocating throughout his government career. According to his own handwritten notes, his very first cabinet meeting, on March 15, 1801, was devoted to a discussion of whether

38 Letter from Thomas Jefferson to George Washington (Dec 4, 1788), reprinted in Julian P. Boyd, William H. Gaines, Jr., and Joseph H. Harrison, Jr., eds, 14 The Papers of Thomas Jefferson 328 (Princeton 1958) This letter was mistakenly dated November 4 by Jefferson, who corrected his error in a subsequent letter of December 5. Id at 336. See also Letter from Thomas Jefferson to James Monroe (July 11, 1790), reprinted in Julian P. Boyd and Lucius Wilmerding, Jr., eds, 17 The Papers of Thomas Jefferson 25 (Princeton 1965) (“Whatever enables us to go to war, secures our peace.”).
two-thirds of the new American Navy—created by Congress during the Adams administration—should be sent to the Mediterranean to protect US merchant ships and perhaps more. The cabinet unanimously concurred in the desirability of the expedition and also agreed that if, upon arrival at Gibraltar, Captain Richard Dale learned that war had been declared against the United States, he was to distribute his forces "so as best to protect our commerce & chastise their insolence—by sinking, burning or destroying their ships & Vessels wherever you shall find them."\(^{41}\)

Commodore Dale (he was given the honorary title of "Commodore" because he commanded more than one vessel at the same time) was a superb choice to head the squadron sent to the Mediterranean, having distinguished himself as First Lieutenant to John Paul Jones aboard the *Bonhomme Richard*. Tasked with the assignment on May 20, 1801, he departed Hampton Roads on June 1 and reached Gibraltar a month later.

Reflecting Jefferson's strong commitment to morality and enhancing the rule of law in international relations, Dale was given strict orders to treat any prisoners with compassion, "humanity," and "attention."\(^{42}\) Shortly thereafter, Cathcart was instructed by Secretary of State Madison to refrain from initiating any negotiations so that the Bashaw would have to make the first move. Madison thought this would discourage any expectations of obtaining "the smallest contribution ... as the price of peace."\(^{43}\)

Historians report that the squadron "made a good impression on the Barbary Coast,"\(^{44}\) and when they appeared off Tripoli on July 24 "[t]he Pasha was a good deal disturbed and anxious to treat for peace."\(^{45}\) One week later, the American schooner *Enterprise*, commanded by Lieutenant Andrew Sterrett, won a decisive victory in a three-hour battle with a larger Tripolitan cruiser without a single American casualty.\(^{46}\)

Unfortunately, for reasons that are beyond the scope of this article,\(^{47}\) when Jefferson reported on Lieutenant Sterrett's engagement in his first annual report

\(^{41}\) Letter from Samuel Smith to Richard Dale (May 20, 1801), reprinted in Claude A. Swanson, ed., *1 Naval Documents Related to the United States Wars With the Barbary Powers* 465, 467 (GPO 1939).

\(^{42}\) Allen, *Our Navy and the Barbary Corsairs* at 93 (cited in note 13); Rodd, *General William Eaton* at 73 (cited in note 13).

\(^{43}\) Irwin, *The Diplomatic Relations of the United States With the Barbary Powers* at 113 (cited in note 7).

\(^{44}\) Allen, *Our Navy and the Barbary Corsairs* at 95 (cited in note 13).

\(^{45}\) This encounter was at the heart of Jefferson's December 8, 1801, report to Congress in his first annual message, but Jefferson's portrayal of Lieutenant Sterrett's orders was both at odds with the decision of his cabinet the previous March and clearly contrary to the actual orders found in naval records. See Robert F. Turner, *War and the Forgotten Executive Power Clause*, 34 Va J Int'l L 903, 910-12 (1994).

\(^{47}\) For a general discussion, see id at 910-15.
to Congress, he misrepresented the facts and gave the impression that the absence of congressional authorization for the mission left the squadron with only the power to fend off attacks on US ships. But as this writer has documented elsewhere, the consensus view of Jefferson’s cabinet was that the President needed no specific statutory authority to fight a war initiated or declared by a foreign state.

Indeed, Congress does not appear to have even been formally notified of the dispatch of two-thirds of the nation’s navy into harm’s way for more than six months, although there is no evidence of any effort to keep the mission a secret and it was widely reported in the press. Nor, for that matter, is there evidence that Congress was unhappy about not having been asked to authorize the initial deployment. While Congress did subsequently enact a variety of statutes authorizing the use of force as requested by Jefferson, few members of Congress seemed to view the confrontation as appropriate for a formal declaration of war. The primary effect of Jefferson’s misstatement to Congress has been to mislead future generations of scholars.

VII. THE “TWO YEARS’ SLEEP”

A very important lesson to be drawn from Jefferson’s war with the Barbary pirates is the importance of strong military leadership. After some initial successes, Commodore Dale returned to Washington in April 1802, just prior to the end of the enlistment period of his crew, and a new squadron—under the command of Captain Richard Morris—was dispatched to the Mediterranean with orders to wage war against Tripoli. Morris had all the social graces and ran a happy ship, but he had no stomach for war in North Africa. Indeed, he didn’t even set eyes on Tripoli for more than a year, even though he had been instructed to blockade the state.

On June 7, 1803, Morris went ashore under a white flag to talk with the Bashaw. Yusuf demanded $250,000 plus $20,000 a year and reimbursement for all of the costs of the war. Lacking any authority to negotiate, Morris returned to Gibraltar where he learned that the frustrated Jefferson had relieved him of command. A board of inquiry later found Morris guilty of gross negligence and recommended that he be court-martialed. Rather than approving the

48 See Thomas Jefferson, First Annual Message to Congress (Dec 8, 1801), quoted in id at 910–11.
49 Id at 912–13.
50 Among the dozens of scholars who have relied upon Jefferson’s first annual message to Congress as evidence that Commodore Dale sailed to the Mediterranean with very limited authority, see generally Rodd, General William Eaton at 80 (cited in note 13); Lane-Poole, The Story of the Barbary Corsairs at 276 (cited in note 4); Forrest McDonald, The Presidency of Thomas Jefferson 61 (Kansas 1976); Chidsey, The Wars in Barbary at 75 (cited in note 14).
recommendation of the board, the President—who referred to the period as the “two years’ sleep”—simply fired Morris.51

VIII. GENERAL WILLIAM EATON

If Captain Richard Morris showed little courage or initiative, William Eaton made up for it in spades. The forty-one year old protégé of Timothy Pickering (who had served as Secretary of State during the Adams administration) served as US Consul at Tunis from 1798 until 1803. He was, to say the least, not disposed to kowtowing to Yusuf Karamanli or any other Barbary tyrant. Indeed, he viewed his negotiating instructions under the Adams administration as so offensively weak that he wrote the Secretary of State and suggested that his role might be better filled by a slave: “[I]f we will have peace at such a price, recall me, and send a slave, accustomed to abasement, to represent the nation.”52

More than a century before British Army Lieutenant Thomas Edward Lawrence (“Lawrence of Arabia”) achieved legendary status promoting revolution in Iraq and Saudi Arabia, William Eaton learned the languages and culture of North Africa and (as Lawrence would later do) attired himself in flowing Arab robes—inspiring those who served under him to follow him and winning converts of those who at first dismissed him as an impractical dreamer. One biographer reports that Eaton “spoke at least four Arab dialects without an accent.”53 First Lieutenant P.N. O’Bannon, commander of a Marine detachment that followed “General” Eaton into war, wrote: “Wherever General Eaton leads, we will follow. If he wants to march us to hell, we’ll gladly go there.”54

When the Bashaw of Tripoli sent his army commander to inform Consul Cathcart that the door of the palace was closed to him until the Bashaw was given “his due,” one of Eaton’s biographers provides this account:

The bullying was more than William could tolerate. “Lisle,” he said, addressing the renegade Scotsman in English, “if any harm comes to Mr. Cathcart, I give you my solemn, personal word of honor that I shall hunt you down, put a noose around your neck and hang you from the nearest palm tree. If I can, I shall do it with the aid of the United States Army and Navy. If possible, I shall also enlist the services of the Royal Navy, which has grown tired of the blusterings of a traitor. But, if necessary, I shall do it alone!”55

51 Chidsey, The Wars in Barbary at 83–84 (cited in note 14); Henry Adams, 2 History of the United States of America During the First Administration of Thomas Jefferson 137 (Scribner’s Sons 1889); Peterson, Thomas Jefferson and the New Nation at 798–99 (cited in note 6).
52 Chidsey, The Wars in Barbary at 68 (cited in note 14).
54 Quoted in id at 3. Eaton’s highest government rank had been Army Captain, but he acquired the “courtesies” title as a result of his exploits in North Africa.
55 Id at 86.
On August 1, 1802—the same day that Lt. Sterrett won his naval victory—William Eaton achieved a similar success without a single ship under his command by simply announcing in Tunis, without the slightest authority, that Tripoli was in a state of blockade. Afraid of a run-in with American warships, merchant ship captains simply refused to accept cargo bound for Tripoli. When Commodore Dale learned of Eaton’s initiative he strongly approved. Eaton later wrote the Speaker of the House of Representatives in Washington: “I kept the enemy three months in a state of blockade when we had not a ship of war within three hundred leagues from his port; his chief commerce and whole supplies of provisions depending on Tunis.”

IX. UNCONVENTIONAL WARFARE AND AN ALLIANCE WITH HIS ENEMY’S ENEMY

Eaton’s greatest achievement was originally suggested by John Cathcart: an incredible land attack against Tripoli led by Yusuf’s elder brother Hamet. It reflects an important understanding about incentive structures: If you want to get the Bashaw of Tripoli (or, for that matter, the President of Iraq) to make concessions (like living up to treaty commitments), success is more likely if he perceives that he has something valuable at risk if the quarrel goes badly. One reason deterrence failed in 1990 was that Saddam Hussein had every reason to believe that the worst possible outcome of an invasion of Kuwait was that his forces would be ejected and some of them would lose their lives. He had already sacrificed close to half-a-million Iraqi soldiers in his aggression against Iran during the previous decade, and the potential for gaining control of Kuwait’s rich oil fields (a benefit he could internalize and use to fill his personal bank accounts) was hardly outweighed by the risk that more Iraqi soldiers would die in the process. Particularly after Secretary of Defense Richard Cheney fired the Air Force Chief of Staff for suggesting that Saddam might personally be a target and emphasized that the United States would not engage in “assassination,” Saddam had little reason to expect that he was personally at serious risk if he continued his aggression.

Professor John Norton Moore, the founding Chairman of the Board of the US Institute of Peace, whose theoretical work on the origins of war is among the most impressive in recent years, has observed that major aggression results when undeterred totalitarian or authoritarian tyrants perceive that war is in their self-

56 Irwin, The Diplomatic Relations of the United States With the Barbary Powers at 110 (cited in note 7).
interest because they can internalize benefits and externalize costs. To raise the perceived costs to the Bashaw of Tripoli in the early nineteenth century, Cathcart and Eaton proposed that they locate his elder brother, Hamet Karamanli, and signal Yusuf that if he did not immediately make peace and release all American hostages he risked losing his job and perhaps his life to the rightful heir to the throne.

Eaton first raised the idea of using Hamet to put pressure on Yusuf with Secretary of State Madison in a letter dated September 5, 1801. In 1803, he returned to the United States to plead his case in person. It is clear that Jefferson and Madison approved the idea of making some use of Hamet, at least in general terms, but they apparently sought to keep what in a more recent era would be called “plausible deniability” and left much of the detail to Eaton’s discretion. Historians who have examined the record are divided over whether Jefferson or Madison knew of and actually approved what ultimately occurred. While several writers assert that the Hamet expedition was specifically approved by Washington, Jefferson’s biographer Merrill Peterson asserts that the President “refused to endorse” Eaton’s “audacious plan ... to lead a motley insurrectionary army overland against Tripoli.” Historian Henry Adams may have captured the reality in noting that Eaton’s orders were “vague” —probably intentionally so.

Whatever Jefferson’s intention, near the end of 1803 Eaton was appointed Navy agent for the United States on the Barbary Coast and was promised $40,000 to further some sort of operation involving Hamet. In furtherance of Eaton’s plan, Commodore Barron instructed Lieutenant Isaac Hull to lead a group of marines to accompany Eaton to Alexandria, Egypt, to try to locate

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61 John Locke, Second Treatise on Civil Government § 147, reprinted in Robert Maynard Hutchins and Mortimer J. Adler, eds, 35 Great Books of the Western World 59 (Encyclopaedia Britannica 1952). While Locke was arguing that this power could not be committed to the legislature, the same reasoning supports entrusting the battlefield commander with sufficient discretion to respond to rapidly changing developments without having to “phone home” for instructions at each new development.
Hamet. Hull and his party were instructed to “disguise the true object” of their mission, pretending to be on leave. In late February, Eaton made contact with Hamet and offered to assist him in regaining his throne, promising a sum of money as well to secure Hamet’s cooperation. The two entered into a “convention” that provided in part: “[T]he government of the United States shall use their utmost exertions so far as comports with their own honor and interest, their subsisting treaties and the acknowledged law of nations, to re-establish the said Hamet Pasha in the possession of his sovereignty of Tripoli.”

While some historians have observed that this agreement exceeded Eaton’s instructions, it is difficult to interpret the actual language used as committing the United States to do anything it did not conclude to be in its “interest.” In addition to initiating a covert operation with Hamet, to get the cooperation of Tunis, Eaton quietly promised its chief minister a payment of $10,000 if the operation succeeded. This idea, too, apparently originated with James Cathcart.

The dozen Americans then put together a motley band of roughly five hundred Arab and Greek mercenaries from about a dozen countries, and in early March 1805 set out on a five-hundred mile march across the Western Desert to Tripoli. As they traveled, the force grew to between six hundred and seven hundred fighting men with roughly another five hundred family members and “camp followers” making up the rear.

Eaton’s leadership skills were frequently put to the test during the arduous trip. As food and water supplies dwindled and the heat took its toll, there were demands for additional payments and threats of desertion. Eaton at one point cut off rations to the Arabs to end a threatened mutiny, and when Hamet refused to continue Eaton marched off into the desert without him—to be joined by a frustrated Hamet two hours later. The situation worsened on April 15, when the force arrived at Bomba to find that the promised American warships had not arrived. However, the Argus arrived early the next morning, and the next day the Hornet brought additional food and military supplies.

On April 25 they completed the sixty-mile march from Bomba to Derne, the second largest city in Tripoli, and learned that two-thirds of the city inhabitants were ready to welcome Hamet as their rightful leader. Knowing that the town was defended by a force of eight hundred and that Yusuf’s army was about to arrive from Tripoli, Eaton sent a message to the governor under a flag of truce offering terms in the hope of avoiding further bloodshed. Receiving in reply a message saying, “My head or yours,” Eaton’s force commenced an attack. The governor fled, and Eaton’s army soon took the city. Days later, Yusuf’s army of twelve hundred arrived from Tripoli and attacked Eaton’s army.

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62 Quoted in Allen, Our Navy and the Barbary Corsairs at 231 (cited in note 13).
63 Rodd, General William Eaton at 233 (cited in note 13).
but after Eaton's men demonstrated the accuracy of American cannon fire, Yusuf's men quickly lost their stomach for war. Eaton's army was prepared to move on Tripoli with the support of offshore US naval fire, when his entire operation was undermined from Washington.

From the start, one of the strongest critics of Eaton's plan was Colonel Tobias Lear, US Consul in Algiers, who believed that Hamet was simply too weak to be a viable ally against Yusuf and that the long march across the desert could not possibly succeed. Government leaders in Washington had no way of following Eaton's progress in the desert and didn't know that Commodore Edward Preble was doing a brilliant job of putting pressure on Tripoli. Indeed, Preble's blockade was so effective that the Barbary pirates had been shut down completely for months. But at the end of October 1803, the frigate *Philadelphia* ran aground off Tripoli during strong winds and was captured by the pirates.

News of this setback was a shock to Jefferson and no doubt contributed to the decision to authorize Lear to pursue a diplomatic solution in Tripoli. In fact, three months after it was captured, the *Philadelphia* was burned in a daring raid led by Lieutenant (later Commodore) Stephen Decatur in which scores of pirates were killed without a single American fatality and only one American sailor slightly wounded. Professor Forrest McDonald notes: "Lord Admiral Horatio Nelson, the greatest sailor of the entire era of fighting sail, called Decatur's raid 'the most bold and daring act of the age.'"64 But by the time news of Decatur's heroic escapade reached Washington, Lear had already been authorized to seek a negotiated peace.

On June 11, 1805, the *U.S.S. Constellation* arrived off Derne with a message from Commodore Rodgers dated six days earlier informing Eaton that a peace treaty had been signed on June 5 by Lear and Yusuf. Eaton was ordered to withdraw all of the Christians and Hamet's immediate party immediately. The Arab mercenaries were to be left ashore, abandoned to their fate. Historians disagree about whether they were immediately slaughtered or allowed to return home, but this aspect of the operation was hardly a high point of American honor.

Even though his operation was terminated before achieving total victory, Eaton's bold adventure had a great influence on the outcome of the war. Two days passed between the arrival of the *Hornet* with authorization for Lear to begin negotiations and Yusuf Bashaw's signing of a peace treaty aboard the *Constitution*. Six months earlier, before Eaton's expedition with Yusuf's brother, the Spanish consul in Tripoli had sent word to Lear that the United States could probably negotiate a favorable treaty. By the time Yusuf learned of Eaton's expedition, Yusuf was genuinely frightened and therefore even more willing to negotiate. When Lear presented a draft peace treaty, Yusuf agreed immediately

64 McDonald, *The Presidency of Thomas Jefferson* at 78 (cited in note 50).
to sign it—asking only the addition of one article promising that Eaton and his Americans would be withdrawn immediately and would no longer provide any support to Yusuf's domestic enemies.\textsuperscript{65}

The treaty was unprecedented in the relations of Western nations with the Barbary pirates. Even before Lear's arrival, the Bashaw had reduced his demand from three million dollars to sixty thousand dollars as the price of peace, but when Eaton presented him with a draft that provided for no payment for peace and no annual tribute it was promptly accepted. The treaty provided for the immediate exchange of all prisoners, and since the Bashaw held three hundred Americans while the Americans held only one hundred Tripolitans, Lear did agree to a payment of sixty thousand dollars for the difference.\textsuperscript{66} The treaty further provided that, in the event of future war, prisoners would be exchanged rather than enslaved and the party holding the most prisoners would be compensated at a fixed rate depending upon each prisoner's rank.\textsuperscript{67} Additional provision was made for the punishment of Tripolitan ship commanders who subjected any American to abuse or plundered property.\textsuperscript{68} On April 12, 1806—hours before President Jefferson's sixty-third birthday celebration—the Senate gave its consent to ratification by a vote of 21 to 8. President Jefferson quickly ratified the treaty.

\textbf{X. THE LEGACY}

In retrospect, Jefferson and Madison may have erred in undermining Eaton's bold adventure, although any difference in the final outcome probably would not have justified the additional loss of life that might have accompanied an attack on Tripoli. Like the 1991 decision to end Operation Desert Storm without pursuing the Revolutionary Guard to Baghdad and perhaps arresting Saddam Hussein as a war criminal, the wisdom of the decision to negotiate peace in 1805 can be debated. Several scholars have speculated that Lear could have had a treaty without the need to pay Yusuf sixty thousand dollars to obtain release of the three hundred American prisoners, and they are quite possibly right. Had President Jefferson and Secretary of State Madison been in possession of more timely and accurate information about the situation in the

\textsuperscript{65} Irwin, \textit{The Diplomatic Relations of the United States With the Barbary Powers} at 152 (cited in note 7); Adams, 1 \textit{The Formative Years} at 285 (cited in note 60) ("Immediately upon hearing that his troops had failed to retake Derne, he entered into negotiations with Tobias Lear, the American Consul-General at Algiers, who had come to Tripoli for the purpose; and on this occasion the Pasha negotiated with all the rapidity that could be wished. June 3, 1805, he submitted to the disgrace of making peace without being expressly paid for it.").

\textsuperscript{66} Treaty of Peace and Amity, art 2, 8 Stat 214 (1805).

\textsuperscript{67} Id at art 16.

\textsuperscript{68} Id at art 6.
Mediterranean, and had they possessed the ability to communicate on a real-time basis with Eaton and Lear, perhaps they would have taken a firmer stand.

Although bitter and feeling betrayed, General Eaton returned to America as a hero and for many months was feted at receptions around the nation. The Massachusetts legislature granted him ten thousand acres in what is now Maine, and Congress voted to settle his account equitably and to grant a small sum as well to Hamet. (Hamet also obtained the release of his wife and family from Yusuf pursuant to the treaty of peace.) When Congress learned of the details of the covert operation that contributed to the peace, the only criticism voiced was that Hamet had been treated shabbily and that the abandonment of the Arab mercenaries might make it more difficult to recruit such forces in the future should that ever become desirable. It is noteworthy that no one in Congress criticized the administration for sending two-thirds of the American Navy halfway around the world with authorization to attack foreign ships without even formally notifying Congress.

More broadly, the courageous American venture sent shockwaves across Europe and throughout the other Barbary states. Jefferson sent Stephen Decatur with a squadron to demand that Algiers abandon its efforts to extract tribute from America, and when the Bey asked for time to consider the American demand, the request was denied. A request for at least three hours elicited from Decatur the response: “Not a minute.” The Bey thereupon accepted the American demand—and his concession was quickly followed by the other Barbary states. Emboldened European leaders quickly announced their own refusal to continue paying tribute, and centuries of terror on the high seas soon came to an end.69

So many things have changed with the passage of two centuries that any effort to draw parallels between Jefferson’s policy of peace through strength and the modern problems of state-sponsored terrorism must be proffered with caution. Yet, some similarities are striking. For most of the 1990s, neither the United States nor its European allies were willing to seriously confront international terrorists or their sponsors. Rather than taking efficacious steps to enforce its resolutions requiring Saddam Hussein to accept the internationally supervised destruction of his weapons of mass destruction, the UN Security Council elected to pass resolution after resolution denouncing his behavior and demanding compliance. When al Qaeda and other Islamic terrorists attempted to blow up the World Trade Center in February 1993, attacked the U.S.S. Cole, blew up buildings housing American forces, and destroyed two American

embassies in Africa, the United States responded with strong words and little else.

Like the Bashaw of Tripoli two centuries ago, Osama bin Laden and Saddam Hussein know the difference between words and deeds. After each new terrorist attack, American leaders seemed to draw a new line in the sand and announce: “Well if you cross this line we are really going to get angry!” When European states were persuaded to bring international terrorists to trial and secured convictions, the prisoners too often seemed to vanish out the back door of the prison in an apparent effort to avoid antagonizing other terrorists and perhaps precipitating new attacks. Before September 11, 2001, terrorists who attacked Americans had little reason to fear any serious consequences.

A new leadership team and the shock of the attacks on the World Trade Center and the Pentagon brought about a return to an American policy of peace through strength. Decisive military action in Afghanistan has had a positive impact both in deterring further acts of terrorism and in strengthening international determination and cooperation to bring an end to terrorism. Today’s terrorists, like the pirates of yore, are widely recognized to be the common enemies of all mankind. This is not to say that they have no protections under international law, as even pirates are protected from murder, torture, and other forms of inhumane treatment.

In the past quarter-century, overt state support of international terrorism has been dramatically reduced. In the mid-1980s, Libya’s Colonel Muammar Khadafﬁ was actively and rather openly supporting terrorism around the globe. In March 1986, United States warplanes attacked various targets in Tripoli and Bengazi. At a minimum, American ﬁrmness has made Khadafﬁ more discrete in his support for terrorism, and most experts seem to accept that his involvement in terrorist activities is at least greatly reduced today. Syria, too, appears to have reduced at least its overt support for terrorism. Iraq and Iran remain problematic, and the behavior of the world community in the coming months may prove decisive in determining whether either will ultimately be deterred.

One of the most dramatic differences between 2003 and Thomas Jefferson’s era is in the relative military power of the United States and its European allies. Today, without firm American leadership there is considerable doubt that European states have either the will or the military resources to bring an end to terrorism and other forms of lawbreaking in the Middle East. But additional successes under US leadership may possibly show the world that tyranny can be defeated and state sponsored terrorism deterred.

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70 I am not suggesting that America is rid of the threat of major acts of terrorism. On the contrary, I will be shocked if we are not attacked again. Indeed, while I may have been one of relatively few Americans who was not greatly surprised by the attacks of September 11, 2001, I have been greatly surprised that we have thus far avoided additional major attacks.
The great Chinese military theorist Sun Tzu taught more than twenty-five hundred years ago, "[T]o win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill." Deterrence should indeed be our ultimate goal. Jefferson was correct in observing that "an insult unpunished becomes the parent of many others," as he was also right in favoring multilateral responses to terrorism if that is possible. While the parallels are hardly perfect, there is much wisdom to be learned from his successful campaign to bring an end to state sponsored terrorism on the high seas two centuries ago.

XI. CONCLUSION

If there is one message to be drawn from Jefferson's success against the Barbary pirates, however, it is probably the importance of incentive structures. To deter a tyrant like Yusuf Karamanli or Saddam Hussein, they must be persuaded that their own fundamental interests are at risk if they do not obey the law. Threatening to kill some of their soldiers is not enough; a major price must be imposed upon regime elites if they are to be deterred.

This obviously becomes more problematic when the terrorists are willing to sacrifice their lives for their cause. But here too, if we are clever and a bit creative, deterrence may still work. First of all, it is not at all clear that the leaders of terrorist organizations are all that anxious to meet Allah. Osama bin Laden did not, after all, rush out to engage American forces when they entered Afghanistan and destroyed much of his infrastructure there. And even those fanatics who place little value on their own lives may be deterred in most instances. We must ask ourselves what they hope to gain by their terrorism, and make certain that when all of the dust settles the outcome is on balance a clear defeat for their cause. Thus, if Americans are attacked by terrorists who hope to bring about an end to American support for Israel, part of our response might be to increase support for Israel. Surely those involved in the planning of the September 11 attacks must have been shocked by the reality that America emerged from the tragedy more united and more determined to combat terrorism than ever before. They must recognize that their effort was counterproductive.

Many years ago, a story made the rounds about the great black comedian Dick Gregory. At the height of the civil rights movement, Gregory was performing in a club in the deep south when a man at a table near the front of the room yelled: "Sit down, Nigger!" Gregory paused, looked at the man, and then said: "say that again." The man obliged, and Gregory responded with a big smile. "Thank you, sir! You see, I have a clause in my contract with this

establishment that provides that I get an extra fifty dollars anytime anyone uses that word. You have just earned me an extra hundred dollars, and I can sure use the money. Thank you!” The audience roared with laughter and applause, the heckler was silenced, and the remainder of Gregory’s performance went smoothly. I do not honestly know if the incident ever occurred. I like to think it did, and if it did, it was a truly brilliant exercise of political warfare through intellectual jujitsu. And America needs exactly that kind of creative excellence in its current battle against terrorism.

We cannot bulletproof our society, and while there is much we can do to make their task more difficult it is extremely unlikely that we will be able to prevent determined terrorists from killing more Americans. Much has been done, and more is being done, to reduce the risks of terrorism. The chances of an American commercial airliner being hijacked in the near future are in my view slim. Our ports, tunnels, and bridges are more vulnerable. But as we seek to improve control of our borders and security at obvious points of vulnerability, we ought to also be sending out a clear message to terrorists who wish us harm. We cannot prevent you from killing some of us, but we can make sure that when the dust settles the cause for which you are fighting will suffer far more greatly than we do. If we can credibly communicate that message to our adversaries, and remain united at home, we ought to be able to effectively deter most acts of terrorism.