



# TO THE BAG

## RE-REVIEWING THE LESSONS OF HISTORY

To the *Bag*:

Montgomery Kosma's article, "Our First Real War," published in the Winter 1999 *Green Bag* (2 GREEN BAG 2D 169), still provides a valuable survey of constitutional disputes surrounding President Jefferson's measures against the Barbary pirates. In the late 1990s, Kosma's account must have seemed particularly well suited for an "entertaining journal of law," since the Pasha of Tripoli could then be seen as "Thomas Jefferson's 'Saddam'" – as Kosma, in fact, called him.

If Kosma were retelling this episode today, however, he would probably have included a few aspects of the story that now seem more piquant in the light of later developments.

There is, first, the argument of the American consul in Tunis, William Eaton, who urged the Jefferson administration to launch a land-based attack on Tripoli to overthrow Pasha Yusuf and replace him with his exiled older brother. In urging this first American venture in regime change, Eaton did not say, in so many words, that an American expeditionary force would be "greeted as liberators." But he did say, in the somewhat more formal language of that time, that the subjects of Pasha Yusuf were extremely "discontented" and so, when the American force arrived, they "would rise *en masse* to receive" their new, American-sponsored ruler.<sup>1</sup>

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<sup>1</sup> Abraham Sofaer, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* (Ballinger, 1976), p. 217.

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The 1804 invasion, spear-headed by a detachment of U.S. Marines, gave the Marines the second line of their “Hymn” – “to the shores of Tripoli.” But it did not actually prompt a rising by the subjects of Pasha Yusuf. The fact that Jefferson’s cabinet did not endorse the invasion – Eaton organized it more or less on his own initiative – might speak well for the “realism” of those statesmen. But they did not commit to a very clear alternative, either, evidently assuming that hard challenges could be managed by a diplomatic offensive. The conflict with Tripoli was tamped down – and American land forces withdrawn – after a new treaty with Pasha Yusuf was negotiated in 1804. A decade later, American warships had to be sent back to Tripoli to establish a more secure peace.

According to Eaton, his proposal for a full-scale invasion was not so much rejected as evaded by the Cabinet. Attorney General Levi Lincoln tried to inspire him instead with “predictions of a political millennium which . . . was to usher in upon us as the irresistible consequence of the goodness of heart, integrity of mind, and correctness of disposition of Mr. Jefferson. All nations, even pirates and savages, were to be moved by the influence of his persuasive virtue and masterly skill in diplomacy.”<sup>2</sup>

The lessons of history are always worth reviewing – and then re-reviewing, when we’ve experienced more history, ourselves.

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## “NEW YALE” OR “NEW-YORK”?

To the *Bag*:

Do you think that the “New Yale Judicial Repository,” described in the *Albany Law Journal* of 1870 as having been “begun in September 1818 and discontinued in the following January” – and noted in *The Original Law Journals*, 12 GREEN BAG 2D 187 – might in fact be

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<sup>2</sup> Henry Adams, HISTORY OF THE UNITED STATES IN THE FIRST ADMINISTRATION OF THOMAS JEFFERSON (Library of America, 1986), p. 594.