

## *To the Bag*

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 The conflict with Tripoli was tamped down – and American land forces withdrawn – after a new treaty with Pasha Yusuf was negotiated in 1804.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”?

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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.

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the “New-York Judicial Repository,” published from Sept. 1818 to Feb/March 1819? This would, among other things, explain the otherwise mystifying appearance of the word “New” in the title – there had not been a “Yale Judicial Repository” for this “new” one to succeed – and the almost perfect congruence of the dates of beginning and cessation also suggest that this may just have been a confusion in the title.

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### BY ANY OTHER NAME WOULD JUDGE AS WELL

To the *Bag*:

I enjoyed the dueling articles in which Professors Davies and Fisher debate whether a harsh Chief Justice Rehnquist berated counsel for calling him “Judge” and a kindly Justice Stevens comforted the beleaguered advocate by observing that “the Constitution makes the same mistake.”<sup>1</sup>

I fault no former clerk who readily believes and retells a story that magnifies a former boss’s best traits. But it does seem that Professor Davies has the best of it. All of Professor Fisher’s examples involve corrections after someone referred incorrectly to Chief Justice Rehnquist himself.<sup>2</sup> He must be wrong, therefore, simply to affirm a sort of transcendental accuracy of the anecdote by concluding that “[w]hether that person was Chief Justice Rehnquist or someone else is not of central importance.”<sup>3</sup> It is at least close to centrally important, since Justice Stevens’s punchline (the whole point of the tale) just doesn’t work under these circumstances. The Constitution *does* reference the “Chief Justice,” who, under Article

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<sup>1</sup> Ross E. Davis, *Obi-Wan Stevens vs. Darth Rehnquist*, 13 GREEN BAG 2D 263 (2010); Jeffrey L. Fisher, *Of Facts & Fantasies*, 14 GREEN BAG 2D 53 (2010).

<sup>2</sup> Fisher at 56 & n.20.

<sup>3</sup> *Id.* at 58-59.