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A Little-Known Landmark Ruling of Historic
Dimensions

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Little v. Barreme, decided by the U.S. Supreme Court in 1804, may be among the least familiar landmark rulings ever rendered, but it settled momentous constitutional and legal questions that plumb the depths of American history.

In an opinion written by the great Chief Justice John Marshall, the Court held that it is for Congress, not the president, to decide when to initiate war and author lesser military hostilities. It held that the president, in his capacity as Commander in Chief, is bound by the statutory instructions, directions and limitations imposed by Congress, and has no authority to exceed those limitations. And, in the first American case to raise the question, the Court rejected a military officer's defense of "superior orders" to justify execution of an unlawful order, even if issued by the president. In short, Little v. Barreme was a blockbuster.

The Quasi War between the United States and France, waged between 1798 and 1800, raised important issues about the authority of Congress over matters of war and peace and the deployment of military force. Legislation enacted by Congress during this period authorized President John Adams to seize vessels sailing "to" French ports. But President Adams exceeded his statutory authority by issuing an order that directed American ships to capture vessels sailing "to or from" French ports. Captain George Little carried out the presidential order and seized a Danish vessel that was sailing from a French port. He was sued for

damages by the owner of the ship and the case came to the Supreme Court.

Chief Justice Marshall acknowledged that the case was a difficult one for him. He observed that his "first bias" was to hold that, although President Adams's instructions "could not give a right, they might yet excuse" a military officer such as Captain Little from liability for damages. In other words, Marshall assumed an "implicit obedience, which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system." Marshall's sympathy for Little, grounded on the laws of the nation that require obedience to superior orders, however, gave way to the influential views of his fellow Justices, and he changed his mind. "I have been mistaken," Marshall noted, "and I have receded from this first opinion." He concluded: "The instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

In words that resonate throughout American history, in times tranquil and chaotic, the Court held that a president may neither violate the law nor authorize its violation. President Richard Nixon's claim during the Watergate crisis, it may be recalled, that he possessed as chief executive the power to order unlawful acts, never gained legal traction, violated the rule of law and found no foundation in our constitutional architecture.

The Court's opinion in *Barre* reaffirmed its previous precedents that only Congress could initiate military hostilities on behalf of the American people. Importantly, Congress, in the exercise of that authority—the war power, derived from the War Clause in Article I, section 8—might also determine what presidents may and may not do in the conduct of war. As important as the Commander in Chief Clause of Article

II is, it does not authorize the president to ignore or flaunt congressional directions or instructions. Indeed, the president is bound by statutory commands.

The difficulty that Chief Justice Marshall felt in writing the Court's opinion holding Captain Little liable for damages, may have been shared by Congress which, in 1807, passed a private bill to reimburse Little for damages assigned to him. There was no legislative history to shed light on that congressional act.

The nettlesome problem of superior orders had long plagued lawmakers and legal commentators. In 1625, Hugo Grotius, deemed "Father of the Law of Nations," had written in his magisterial treatise on The Law of War and Peace, which proved influential in American pre-conceptions of what became known as international law, found no basis in law to justify superior orders. Yet British and early American law took a different tack. In 1789, Congress enacted a statute that directed military officers to "observe and obey the orders of the President of the United States." In sync with that sentiment, Congress passed in 1799, a law which stated that any officer "who shall disobey the orders of his superior on any pretense whatsoever," shall be subject to death or other punishment. Not much wiggle room for soldiers.

In 1800, after Captain Little had seized the Danish vessel, Congress enacted legislation that clarified American law about an officer's duty to obey orders. This statute provided that officers were not expected to obey all commands. Rather, they were specifically prohibited from obeying "unlawful orders" that were issued by their superiors.

In the controversies about "superior orders" that have ensued in America and elsewhere, many have wondered whether this legal interpretation is too

burdensome for soldiers untutored in the law. For others, as it was for Chief Justice Marshall, a superior officer or official might not order a subordinate officer to do what a superior officer is forbidden from doing.

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