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Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering

Theodore M Cooperstein

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Theodore M. Cooperstein
Assistant U.S. Attorney
Southern District of Florida

The United States Constitution grants to the Congress the power, among others, to issue "Letters of Marque and Reprisal."[1] Although the practice seems to have fallen into disuse in this century, it was an important tool of national power for the federal government created by the Framers, who placed great import on the federal government's role in protecting international commerce and in enforcing international law.

Privateering played a significant role before and during the Revolutionary War, and it persisted in American history as an economical way to augment naval forces against an enemy in wartime. A significant outgrowth of the practice of privateering was the body of law resulting from prize court adjudications. United States courts, in deciding title to ships and goods taken prize, determined issues both of domestic and customary international law. In this manner the federal courts significantly shaped the role of international law in the United States jurisprudence as well as assured the role of the United States in the ongoing development of customary international law. Case law concerning prizes and privateering is accordingly a useful vehicle to examine the interplay of U.S. constitutional law and customary international law as they both developed through the Nineteenth Century.

Changes in the methods of warfare during the Twentieth Century diminished the role of privateering. But the Congressional authority to issue Letters of Marque and Reprisal remains. As a means to commission private actors to augment national forces in

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[1] The Congress shall have Power ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water ....

U.S. Const. art. I, sec. 8. Individual States are forbidden this same power:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal ... .

international crises, the Letter of Marque and Reprisal could yet have modern applications. It remains for innovative executive and legislative experiment to revive the ancient practice in a form befitting modern international problems.

Definitions and Background

A *privateer* is a "vessel owned, equipped, and armed by one or more private individuals, and duly commissioned by a belligerent power to go on cruises and make war upon the enemy, usually by preying on his commerce."[2] The legal documents commissioning the private person to use force on behalf of the sovereign against other nations have come to be known as "Letters of Marque and Reprisal."

While both *marque* and *reprisal* are conjoined in the phrase and often thought to be synonymous, their derivation shows the concepts underlying them to have been separate and quite broader than mere privateering. Their common source goes back to the development of modern nation states and contemporary notions of international law.

Modern nation states emerged in the Sixteenth and Seventeenth Centuries as the responsible actors in international law, epitomized by the 1648 Peace of Westphalia that ended the Thirty Years War in Europe.[3] Between nations, the State, personified by the monarch or other head of state, represented and was responsible for any of its individual constituent members. An individual injured by the act or omission of another nation's sovereign, or by extension, that foreign sovereign's subject, was first to look to his own

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Id. art. I, sec. 10.

[2] Black's Law Dictionary 1195 (6th ed. 1990).

ruler for relief; that ruler, as a proper international actor, could then seek relief on his subject's behalf.[4] That relief (as it often still does today) could result from diplomatic exchanges. If the requested sovereign refused relief for the injury, the victim's ruler could then authorize a customary form of self-help, referred to as the "law of marque."

The law of marque essentially allowed the injured party to make himself whole by seizing the goods or property of the wrongdoers, or by extension their countrymen, in satisfaction of the victim's claim. In the international context, letters of marque and reprisal permitted an individual to pass the frontiers (*marches* (Fr.) or *Marks* (Ger.)) in order to effect the compensatory taking.[5]

In more extreme cases of dissatisfaction, the ruler could take the professed injury as cause for war. In any war between nations, the principal enemies were the respective sovereign rulers, but the citizens or subjects of each State were considered enemies as well: "[W]hen war broke out, every one found himself an enemy of every one upon the other side."[6] Ultimately, the practice of nations evolved so that sovereigns authorized individuals to seize commercial property on the high seas belonging to subjects of the

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[3] See *generally,* Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, International Law Cases and Materials (1993).

[4] If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation either in its body or its members, he does no less injury to that nation than if he injured it himself.
2 E. Vattel, The Law of Nations ch. II, sec. 72 (Neuchatel & London 1758).

[5] Black's Law Dictionary, *supra,*note 2 at 972; 3 Hugo Grotius, De Jure Belli ac Pacis iv-v (1625). Stated another way:

When a subject had been wronged by a fellow-subject, and the prince was too weak or too inert to punish the wrong-doer, he frequently delivered to the plaintiff what were called letters of reprisal, which substantially allowed him to take the law into his own hands and keep what he could get.
Francis R. Stark, *The Abolition of Privateering and the Declaration of Paris,* in 8 Studies in History, Economics and Public Law 227, 273 (Columbia Univ. 1897).

[6] Stark, supra note 5, at 233

enemy State.[7] The practice had dual advantage in that it both indemnified the captor and weakened the resistance of the enemy State.[8]

Letters of marque and reprisal rooted themselves firmly in the Common Law of England. The Norman Kings of England historically had called upon the Channel coastal towns to provide ships in war, but found their crews at times uncontrollable in their depredations. Henry II issued the first "licenses" in 1243 to "annoy our enemies by sea or by land," subject to the sharing of one-half of any gains with the Crown.[9] These licensees were true privateers in seeking gain and profit, for they had no personal injury motivating their actions.

The first English "letter of mark" issued in 1295 after the seizure by Portuguese of a merchant ship driven by weather into the port of Lagos, Portugal. After the King of Portugal appropriated to himself one-tenth of the spoil, rather than redress the claim, the English merchant petitioned and received from the English King's lieutenant "letters of marque" authorizing him for five years "to mark, retain and appropriate" any Portuguese and their goods until he had obtained satisfaction. In confirming the grant, the King required that any surplus beyond the merchant's claim should be accounted for to the King.[10]

While there was initially a substantive distinction in English law between privateers and letters of marque, the two measures soon blended. The privateer was a recruit for bounty only in time of war; the letter of marque was a "measure short of war"

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[7] 2 Vattel, *supra* note 4 at ch. VII, sec. 81 ("Even the property of individuals is, in the aggregate, to be considered as the property of the nation, with respect to other states.").
[8] Stark, *supra* note 5, at 234.
[9] *Id.* at 271.
[10] *Id.* at 272.

that did not breach international peace. The privateer sought gain in which the King shared. The letter of marque sought compensation for a private wrong, the surplus of which was to be accounted for but not necessarily given over to the King.[11] Yet the commission given a privateer assumed the name of the license generally, so that "from reprisals to mark was but a step; and as the practice of a letter of mark was almost identical with that of a privateer, the two ideas became fused."[12] During the Fourteenth and Fifteenth Centuries, the responsibility for issuing the King's letters of marque developed within the creation of the Court of Admiralty, which exercised a special marine jurisdiction.

By the time of the settling of English colonies in America, many privateers conducted themselves much as pirates, the only difference lying in their possession of a commission or letter of marque. No less an historical personage than Sir Francis Drake enhanced his personal fortune by preying upon the Spanish in the New World while furthering the English competition for colonies and trade.[13] But the ascendancy of the Royal Navy after defeating the Spanish Armada in 1588, coupled with the growing burden of the Lord High Admiral's statutory share of prizes, reduced both the need and the attractiveness of privateering.

Privateering practice had in the meantime spread to the English colonies. The colony of Rhode Island considered applications for privateer commissions as early as 1694.[14] Royal governors received commissions as vice-admirals from the Lord High Admiral in England, and thereby had power to grant letters of marque "to suitable persons

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[11] *Id.*at 274.
[12] *Id.* at 275.
[13] *Id.*at 282-85.

under adequate safeguards."[15] Royal instructions accompanied the letter of marque, detailing the amount of bond or security required to assure the compliance of the privateer to what were the contemporary "rules of engagement," and specifying the procedures and amounts to be paid to the Crown as its share of the prize. [16] The privateer was to bring a prize ship and its cargo entire into port in Britain or an English colony for adjudication. In Britain, the High Court of Admiralty took jurisdiction and determined the value of the prize, the validity of its capture, and the shares to be distributed between the privateer and the Crown. (The privateer and his crew's shares were governed in turn by the contract of enlistment.)

In America, royal governors customarily appointed admiralty judges to sit in cases of prize; in colonies not under royal or proprietary government, the common law courts took cognizance of the admiralty jurisdiction. Appeal from a colonial admiralty court could be had in the London High Admiralty Court, or after 1708, a special body of privy councilors commissioned as the Lords Commissioners of Appeal in Prize Cases.[17]

Other European powers during this time had also used letters of marque and privateers in their naval wars. The importance of maritime commerce as both cause and means of sustaining European wars meant that privateering and prize adjudication figured

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[14] *Id.*at 288.

[15] Privateering and Piracy in the Colonial Period: Illustrative Documents x-xi (John Jameson, ed. 1923) [Hereinafter Jameson].

[16] *E.g., id*. at 347 (instructions to privateers from HM George II).

[17] 3 William Blackstone, Commentaries on the Laws of England *69 (Legal Classics ed. 19883) (1746).. An illustrative case in the U.S case reports is *Taxier v. Sweet,* 2 U.S. (2 Dall.) 81 (Pa. 1766). In that case, the Pennsylvania Supreme Court heard from the owner of a merchant ship taken prize, adjudicated in the colonial admiralty court, and later reversed on appeal by the Lord Commissioners of Appeals. The ship and goods having been long sold by the time the judgment of prize was reversed, Taxier brought a common law action of trover to recover for his losses; the Pennsylvania Supreme Court unanimously ruled that there was jurisdiction in the common law court to hear the matter even though it was a former subject of admiralty jurisdiction, and proceeded on two to one vote to award damages to Taxier for the wrongful capture of his ship and goods, as determined earlier by the Lords Commissioners of Appeals.

in customary international law of war. The special nature of prizes in admiralty and their relation to international affairs set them apart from other areas of English law. Prize cases brought into conflict claims of different sovereigns: "[T]his being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it."[18]

The Seven Years War, also known as the French and Indian War, fought from 1756 to 1763, saw an immense revival of privateering. Many in both England and America capitalized on privateering as a speculative investment.[19] The War was in part fought over, and took place within, the American colonies and their maritime trade routes. Britain allied with Prussia to fight France and her ally Austria, and each side preyed upon the other's shipping on the high seas. Significantly, in this war the belligerent nations acted to prevent neutral nations from taking cargoes formerly transported in (now less safe) belligerent flag merchant ships. Great Britain announced in 1758 its "Rule:" That neutral ships carrying cargoes to enemy colonies were no less vulnerable to seizure at sea than enemy ships. As a result, the Dutch and to a lesser extent the Spanish trade, that had not been earlier guaranteed by treaty in time of peace, suffered greatly.[20] The issue of enemy goods in friendly vessels was to recur in the American Revolution and indeed became a central issue in American foreign policy throughout the Nineteenth Century.[21]

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[18] 3 Blackstone 69.

[19] Stark, *supra* note 5, at 292; Jameson, *supra* note 15, at viii ("In some of our colonial wars, as in those of the Revolution and of 1812, American privateering assumed such proportions as to make it, for brief periods, one of the leading American industries.")

[20] Stark, *supra* note 5, at 294.

[21] The issue was one of general applicability to all seizures at sea, whether by privateers or by public warships, which of course were also acting to intercept and seizure enemy shipping in wartime. This paper limits its focus to the identity and authority of the private actors, as opposed to the public naval force, and

American Revolution to the Constitutional Convention:

Setting the Rules

Foreign trade and commerce was a chief concern of the American colonies in their fight for independence. The British Rule restricting neutral colonial commerce during the Seven Years War presaged the later Navigation Acts and other legislation of Parliament that burdened American shipping and trade. The Continental Congress took no small umbrage at the British decision to seize ships and cargoes destined for rebellious colonies, as well as the British attempts to close ports such as Boston outright.[22] The Congress viewed these measures as tantamount to economic acts of war, and retaliated by calling for its own embargo of British goods in America.[23]

The Congress in 1775, at an early point in the War, and prior to declaring independence, directed and authorized privateers to cruise against and seize "all such ships of war, frigates, sloops, cutters, and armed vessels as are or shall be employed in the present cruel and unjust war against the United Colonies, " as well as transport vessels, "and all vessels to whomsoever belonging," carrying military and naval stores, provisions, "or other necessaries" to the British Army or Navy.[24] No privateer could cruise without first obtaining a commission from Congress or persons appointed for that purpose.[25] Congress recommended that the respective colonies establish courts to try

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assumes that the rules of property seizure at sea in international law remain identical for both types of actors.

[22] 4 J. Cont. Cong. 229-30 (Mar. 23, 1776); 3 J. Cont. Cong.. 371-72 (Nov. 23, 1775).

[23] 4 J Cont. Cong. 321, 331, 575.

[24] 3 J. Cont. Cong. 373 (Nov. 25, 1775). Cargoes only were to be seized, excepting when the vessel's owner was American or resident in America, causing seizure of the ship as well.

[25] *Id.*

prize cases, reserving an appeal in all cases to the Congress.[26] Privateers were to take their prizes to court for the colony in whose waters the prize was taken, or if taken on the high seas or abroad, to the American port most convenient. Privateers who fitted out vessels at their own expense kept one-third of the prize, and the remainder went to either the colony or the Congress, depending on the source of the commission. For capture of a British warship, the privateer merited one-half of the prize.[27]

The following year, in 1776, Congress renewed the authorization for privateers, citing as cause the continued belligerent acts of Britain toward American shipping and commerce, and finding '[i]t being therefore necessary to provide for their defence and security, and justifiable to make reprisals upon their enemies, and otherwise to annoy them, according to the laws and usages of Nations."[28] The Congress excluded from the target class any vessel bringing settlers or supplies to the American colonies, or "who are friends to the American cause."[29] The resolution also extended eligibility for prize awards to any Army detachment that should seize a British vessel.[30]

Congress approved a form of commission and instructions to commanders of private ships of war ten days later.[31] Later ordinances of Congress further detailed provisions for capture of enemy goods in neutral vessels, recapture and salvage of American goods or vessels previously captured by the British, adjudication of prizes

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[26] *Id*. at 373-74.
[27] *Id.* at 374-75.
[28] 4 J. Cont. Cong. 229-30 (Mar. 23, 1776).
[29] *Id.* at 231.
[30] *Id.*
[31] 4 J. Cont. Cong. 247 (April 2, 1776). Privateers were required to give bonds and sureties that "nothing be done by the said [privateer] or any of the officers, mariners, or company thereof, contrary to, or inconsistent with the usages and customs of nations, and the instructions."

taken by parties without formal commissions, and award of shares of prize money to crews of Navy warships.[32] Congress also specified that

> The rules of decision in the several courts shall be the resolutions and ordinances of the United States in Congress assembled, public treaties when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe. Public treaties shall have the pre-eminence in all trials.[33]

In the Articles of Confederation, Congress and the newly independent States formally codified, in explicit detail, their acceptance and reliance upon privateering. Article IX of the Articles of Confederation stated

> The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, ... – of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated -- [and] of granting letters of marque and reprisal in times of peace.[34]

The same Article IX later provides as well that nine States in Congress must vote approval for issuance of Letters of Marque and reprisal in peacetime.[35]

The States themselves were generally prohibited from acting without Congress concurring:

> [N]or shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that

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[32] 21 J. Cont. Cong. 1153-1158 (Dec. 4, 1781); *see also* 20 J. Cont. Cong. 361-64 (Instructions to privateers).
[33] 21 J. Cont. Cong. 1158; *see also* 19 J. Cont. Cong. 314 (Mar. 27, 1781).
[34] Arts. of Confederation art. IX. Note the availability of letters of marque and reprisal during times of peace.
[35] *Id*.

> occasion, and kept so long as the danger shall continue, or until the united states in congress, shall determine otherwise.[36]

Throughout the Revolutionary War, privateering provided a major source of employment and wealth for many maritime colonies. Foreign trade that the embargo on Britain had stifled, revived with the seizure of British goods and cargoes.[37] In the summer of 1777 alone, American privateers took 464 ships.[38] The success of privateers compensated for British seizures of American military supplies, while also subsidizing a significant portion of the economy.[39] One historian has even noted permanent demographic influence: In Massachusetts, where many prewar merchants holding Tory sympathies had fled, a new class of wealthy arose from privateering to take their place.[40]

As in any thriving business activity, disputants called upon the courts to set rules for conduct and redress wrongs. Owners of letters of marque and the vessels that sailed under the commissions were liable for the violations of those commissions. The master and crew of the privateer vessel could in turn prove liable to the owner for their misfeasance.

The case preserved in the U.S. Reports concerning the privateer and prize ship *Betsey* amply illustrates these common law principles. One Silas Talbot, commanding the privateer *Argo*, took as prize the *Betsey*, which was itself a British commissioned privateer (an "armed letter of marque vessel"). As *Argo* took her prize, three other American privateer brigs witnessed the capture from afar. Those three closed in on the

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[36] *Id.* art. VI; Forrest McDonald, Novus Ordo Seclorum 270 (1985).
[37] Jackson Turner Main, The Sovereign States, 1775-1783 231 (1973).
[38] *Id*. at 247.
[39] *Id*. at 265 ("The privateers captured marketable products at little cost to the country.").
[40] Forrest McDonald, We the People 185 (1968).

Betsey, flying British flags, chased off the *Argo*, then took *Betsey* as their own prize. The interlopers brought the *Betsey* in to New York for prize adjudication, specifically instructing the prize master to avoid ports into which they suspected the *Argo* might sail.[41]

Captain Talbot filed his claim against the owners of the three brigs in admiralty court of the State of Pennsylvania. The Pennsylvania Supreme Court found jurisdiction for the proceeding under both the ordinances of the Continental Congress and the statutes of independent Pennsylvania.[42] The brigs' crews accordingly were found guilty of trespass in taking the lawful prize of *Argo* from her, and the brigs' owners made to pay over to Captain Talbot her value.[43]

Following sound principles of agency, the owners sought indemnity in their own suit against the master and crews of the three brigs.[44] Again the Pennsylvania high court found the sailors liable, in that they knew or should have known the *Argo* to be a friendly privateer who got to the *Bestey* first.[45] The Court established in the process that "the master or commander of a privateer or letter of marque may lawfully stop the ship of a friend, examine her papers, the people on board, the cargo, etc., in order to discover, whether she belongs to a friend or an enemy."[46] But in so doing, "[r]easonable care, attention, prudence, and fidelity are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or in his mariners,

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[41] Talbot v. Commanders and Owners of Three Brigs, 1 U.S. (1 Dall.) (Pa. 1784).
[42] *Id*. at 103, 107.
[43] *Id.* at 109.
[44] Purviance v. Angus, 1 U.S. (1 Dall.) 180 (Pa. 1786).
[45] Id. at 183.
[46] Id. at 184.

he is responsible in a civil action."[47] The master and crew were accordingly liable for gross negligence in interfering with Captain Talbot's prize and thereby obligating the brig owners for Talbot's damages.

In prizes and admiralty, as in so many areas, the Articles of Confederation gave the United States and Congress responsibility or authority, but denied the means of enforcement. Even though the admiralty appeals court was the only national judicial body created by the Congress,[48] its authority to rule on lower state court admiralty decisions came in to dispute. The Continental Congress urged States to take steps to establish prize courts and otherwise adhere to international law,[49] but had no power to go further.

One persistent example of this powerlessness arose in a dispute between privateers and merchant owners from New Hampshire and Pennsylvania, respectively, first recorded in the opinion of the Pennsylvania Supreme Court in *Doane's Administrators v. Penhallow*.[50] The New Hampshire privateers had taken as prize the *Susannah* and brought her and her cargo for condemnation in the New Hampshire prize court. The Congressional Court of Appeals reversed the condemnation and directed return of the ship to her Pennsylvania owner; the New Hampshire privateers ignored the appeals court and sold their prize.[51]

The owners next went to Pennsylvania, attached the property of the privateers in Philadelphia, and sued at common law, seeking payment on their appellate judgment.

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[47] Id. at 185.
[48] 20 J. Cont. Cong. 761 (Jul. 18, 1781).
[49] *Id*. at 1136 (Nov. 23, 1781).
[50] 1 U.S. (1 Dall.) 218 (Pa. 1787).
[51] *Id.*

The privateers claimed the appeals court had no jurisdiction in face of the protest of the New Hampshire legislature, and of the absence of Congressional power to create an appeals court before the formal ratification of the Articles of Confederation.[52]

The Pennsylvania Supreme Court ordered the merchants to show cause for their common law action, and thereafter dissolved the attachments and dismissed the suit. The Court's reasoning was two-fold: First, the prize condemnation was the sovereign act of a sister State entitled to "full faith and credit."[53] Second, the question at the heart of the dispute, whether there was a lawful prize, was solely one of admiralty (or international law), not common law. For these reasons, the Pennsylvania court declined to decide the matter and held instead that it had no authority to enforce or execute the sentence of the Congressional court of appeals, "that being the proper judicature to carry into effect its own sentences."[54] The dispute had to wait for its resolution on the establishment in 1789 of a new federal court system.[55]

Given the established practice and authority for letters of marque and reprisal in the Articles of Confederation, and the widespread popularity of privateering in the Revolution,[56] the practice and power were decidedly noncontroversial during the framing of the Constitution. At least one delegate to the Continental Congress, Robert Morris of Pennsylvania, had profited from privateering investments, [57] as had General Washington himself.[58] Two delegates to the 1787 Convention in Philadelphia had also invested in privateers: Nathaniel Gorham of Massachusetts, after the loss of his first fortune to

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[52] *Id.*
[53] *Id*. at 219.
[54] *Id*. at 221.
[55] *See* text accompanying note 67 *infra*.
[56] Stark, *supra* note 5, at 343 ("New England, in fact, had begun to live on privateering.").

British Army raids, regained wealth in privateering; John Langdon, through privateering, had become one of the wealthiest men in New Hampshire.[59]

All sides to the Constitutional ratification debate considered letters of marque and reprisal both a natural component of the national war power and a concurrent aspect of the authority to raise a navy or enforce international law. The practice receives its first specific mention during the Constitutional Convention proceedings as part of the drafts first enumerating the federal war power,[60] and remained there throughout the process. The final Constitution tightened restrictions on the States to bar them from issuing letters of marque[61] as it strengthened the federal role by granting exclusive jurisdiction in admiralty and prize to federal courts.[62] The Congressional authority to issue letters of marque and reprisal remained explicit, alongside the powers to define and punish offenses against international law and to declare war.[63]

The ratification debates over the Constitution were notable with respect to letters of marque and reprisal only in that neither side saw a problem with them. The anti-federalists acknowledged the need for letters of marque within the general war power as a Congressional power; indeed, they could not dispute them as already held by the Congress under the Articles of Confederation.[64] The federalist advocates of ratification,

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[57] Main, *supra* note 37, at 249.
[58] Stark, *supra* note 5, at 343.
[59] F. McDonald, *supra* note 40, at 38, 43.
[60] J. Madison, Records of the Debates in the Federal Convention of 1787 558 (Aug. 17, 1787), 723 (Sep. 14, 1787); *cf. id*. at 564 (remark of Elbridge Gerry "concerning letters of marque, which he thought not included in the powers of war" and suggesting the topic be referred to committee expressly in addition to war powers).
[61] U.S. Const. art. I sec. 10.
[62] *Id.* art. III sec. 2.
[63] *Id*. art. I sec. 8.
[64] *See, e.g.,* The Anti-Federalist Papers and the Constitutional Convention Debates (Ralph Ketcham ed. 1986).

for their part, acknowledged the absence of dispute on this point, even to grudgingly compliment their opposition.[65] Letters of marque, among other war powers, were granted to the federal government for "security against foreign danger" and "[t]he palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure, which has spared few other parts."[66]

The Napoleonic Wars and the War of 1812: Armed Neutrality and Targets of Capture

The first instance of prize and privateering to come before the new federal Supreme Court was the aforementioned dispute in *Penhallow v. Doane*.[67] Undaunted, the hapless merchant Penhallow had renewed his claim against the privateers in the United States District Court for New Hampshire, sitting in admiralty. The District Court, affirmed by the ruling of the Circuit Court, recognized and enforced the ruling of the Articles of Confederation prize appeals court, and ruled for the merchant. Appeal to the United States Supreme Court followed.

Penhallow v. Doane provided the Court with the opportunity to establish continuity across the successive federal governments, while at the same time to reassure both domestic and international observers that the United States adhered to customary

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[65] The Federalist No. 80 at 306 (A. Hamilton)(Legal Classics ed. 1983) (1788) ("The most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly Affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present [Articles of] [C]onfederation submitted to federal jurisdiction.").

[66] The Federalist No. 41, *supra* note 65, at 39, 44 (J. Madison). *See also* David Gary Adler, *The Constitution and Presidential Warmaking, in* The Constitution and the Conduct of American Foreign Policy 183, 189-190 (D.G. Adler & Larry N. George eds. 1996)("the Framers considered the power to issue letters of marque and reprisal sufficient to authorize a broad spectrum of armed hostilities short of declared war.").

[67] 3 U.S. (Dall.) 54 (1795).

international law. The Court reviewed the acts of the Continental Congress and the authority for them: "As to war and peace, and their necessary incidents, Congress by the unanimous consent of the people, exercised exclusive jurisdiction." The States having first acceded to it, and then expressly ratified it by terms in the Articles of Confederation, the Congress's power over privateering was established.[68]

With that power to issue letters of marque, Congress had also the responsibility to answer for it. "The truth is, that the states, individually, were not known or recognized as sovereign by foreign nations ...; the states collectively, under Congress ..., were acknowledged by foreign powers as sovereign."[69]

A privateer who accepted a Congressional letter of marque necessarily submitted to Congressional authority:

> If he accepts from Congress a commission to cruise against the enemy, he must be responsible to them for his conduct. If under color of said commission, he had violated the law of nations, Congress would have been called upon to make atonement and redress. The persons who exercise the right of authority of commissioning privateers, must, of course, have the right or authority of examining into the conduct of the officer acting under such commission, and of confirming or annulling his transactions and deeds. [70]

The New Hampshire privateers were ultimately responsible to Congress, and therefore subject to the rulings of the court of appeals that Congress had established.[71]

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[68] *Id.* at 81.
[69] *Id.*
[70] *Id.*(Paterson, J.); *id.* at 111(Blair, J.)("Whoever has the right of commissioning and instructing must certainly have the right of controlling, of confirming or annulling the acts of him who accepts the commission, and acts under it.").
[71] *Id.* at 85 ("The decree being made by a court, constitutionally established, of competent authority, and the highest jurisdiction, is conclusive and final."). By this reasoning, the Court also postponed deciding questions of state sovereignty, focusing on the direct relationship between the Congress and the individual. The issue of Supreme Court review of State court rulings was not laid to rest until the ruling in Cohens v. Virginia, 19 U.S.(6 Wheat.) 264 (1821), if not until the Civil War.

Notwithstanding the terms of the Congressional letter of marque, the nature of a prize determination by a court of admiralty bound the privateer as well as all others. "The sentence of a court of admiralty, or of appeal in questions of prize, binds all the world, as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive to all persons."[72] Just as a court would enforce the prize ruling of a competent foreign prize court, it was incumbent on an American court to enforce the ruling of the prior admiralty court of appeals. That court had been duly constituted by the Continental Congress and had full authority as a court of admiralty to judge the privateers' commission. The Supreme Court, in its first prize case, accordingly reinforced the responsibility of a commissioned privateer to the federal government for his acts and conduct, and in turn, reasserted the responsibility of the United States to the community of nations for the conduct of its commissioned privateers.

The newly created government soon confronted issues arising from the Wars of the French Revolution and the Napoleonic Empire. The United States tried to maintain a precarious neutrality between France and Britain, which powers both sought to dominate the maritime trade and deny it to her opponent. American ships sailing for British or French territories in both Europe and the Americas increasingly faced peril of seizure by privateers and warships. Britain restored the "Rule of [the War of] 1756" and began to impose restrictions on neutral carriage of goods, designed to starve France, and known as

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[72] 3 U.S. at 86; *see also id*. at 91 (Iredell, J.)("A prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences, in cases clearly coming within its jurisdiction.")

the "Orders in Council." France retaliated with her own "Continental System" prohibiting neutral commerce with England.[73]

The United States responded in two fashions: to restrict the acts of its own citizens that might favor a belligerent or reward objectionable actions against U.S shipping; and to act more assertively against the European powers with what naval force the United States then had. The resulting case law established important precedents for the role of international law in constitutional jurisprudence.

President Washington first proclaimed United States neutrality on April 22, 1793, promising "prosecution to be instituted against all persons who shall, within the cognizance of the Courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them."[74] Congress passed a Nonintercourse Act in 1794, prohibiting United States citizens from shipping their goods to France, as part of an embargo designed to deny Europe the benefits of, and punish depredations on, American trade.[75] At the same time, neutrality acts prohibited the acceptance of foreign commissions by Americans, and forbade the arming or fitting out of armed vessels within United States territory with the intent to sail against a belligerent nation with whom the United States remained at peace.[76]

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[73] The French edicts are also referred to as the Berlin and Milan Decrees.

[74] 1 Am. State Papers, Foreign Relations: Documents, Legislative and Executive, of the Congress of the United States [1789-1833] 140

[75] 4 Stat. 244 (1794); 9 Stat. 243 (1809); 10 Stat. 186 (1810); *cf.* Cargo of the Brig Aurora Burnside, 11 U.S. (7 Cranch) 382 (1813)(reconciling effect of successive statutes).

[76] 1 Stat. 381 (1794). *See generally,* Charles G. Fenwick, The Neutrality Laws of the United States (1913).

The Supreme Court upheld enforcement of the neutrality statutes as the proper act of a sovereign nation pursuing her duties in international law. In *Talbot v. Jensen*,[77] the Court declared that

> the United States are neutral in the present war; they take no part in it; they remain common friends to all the belligerent powers, not favoring the arms of one to the detriment of the others. An exact impartiality must mark their conduct toward the parties at war; for, if they favor one to the injury of the other, it would be a departure from pacific principles, and indicative of a hostile disposition.[78]

For this reason the Court condemned the sailing of American citizens under foreign letters of marque as privateers in service of a foreign belligerent power: "These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of nations."[79]

Adhering to these principles caused the Court to also limit the effect of these statutes in some circumstances. One defendant who sold a ship, fitted out for war in premature anticipation of the coming conflict with Britain, but ultimately sold to an alien who used it as a French privateer, could not be held liable under the law without showing of intent or collusion to violate United States neutrality.[80] And a commander of a United States warship who seized a neutral merchantman in belief she was truly an American flag vessel and therefore in violation of the Nonintercourse Acts, found himself liable for damages to the neutral's owner for interrupting the voyage. In a ruling of some consequence for future United States officers, the Court held the captain liable despite the

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[77] 3 U.S. (3 Dall.) 133 (1795). The Talbot named in this case appears to be none other than the former captain of the *Argo*, *see* note 41 *supra* and accompanying text.
[78] *Id*. at 155.
[79] *Id.* at 156; *see* 3 Vattel, *supra* note 4, sec. 229 (foreigners who take privateering commissions solely for profit are infamous and piratical)
[80] Moodie v. The Alfred, 3 U.S. (3 Dall.) 307 (1796)(per curiam). *But see* United States v. Guiet, 2 U.S. (2 Dall.) 321 (1794)(conviction for conversion of merchant ship into vessel of war).

issuance of Presidential instructions authorizing the conduct, because those Presidential instructions in the Court's view did not comport with the underlying statute.[81]

A lasting precept of statutory interpretation arose from the case of *Murray v. Schooner Charming Betsy*.[82] Here again, a United States naval commander recaptured a ship from a French privateer, and seized her as an American built vessel violating the Nonintercourse Acts. The ship had been built in Baltimore, and sold to an expatriate American who claimed Danish citizenship, resident in St. Thomas. Captain Murray believed that fact to be of no avail and took the *Charming Betsy* to Philadelphia for condemnation.

In applying the statute, and determining whether the restrictions it placed on Americans could be levied against one who claimed neutral, Danish citizenship, Chief Justice Marshall stated a principle that continues today as regards the interaction of United States law and international law:

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.[83]

Chief Justice Marshall accordingly restored the owner of *Charming Betsy* so as not to allow the statute to work a violation of Danish neutrality under international law. Captain Murray, in turn, was left liable to damages for seizure of the vessel.[84]

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[81] Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804)(Marshall, C.J.).
[82] 6 U.S. (2 Cranch) 64 (1800)(Marshall, C.J.).
[83] *Id.*
[84] An act of Congress reimbursed Capt. Murray for the damages in recognition of his good faith. *Id*. at 126 n.

While policing the acts of Americans with respect to the belligerents, the United States also sought to prohibit belligerent ships from infringing on American neutrality. Tensions with France reached a state of undeclared war, in which the President authorized United States warships to sail against French warships and privateers. In so doing, they often recaptured from French privateers neutral vessels that the courts then adjudicated against the claims of the American commander for prize and salvage costs. In one such case, *Bas v. Tingy*,[85] the amount of salvage to be awarded depended upon the choice of statute. One act concerning recapture from an "enemy" entitled the crew to one-half of the recaptured property, while another statute granted only one-eighth.[86]

Faced with the question whether France was then an "enemy," the Court made an important observation concerning international conflicts and the use of force independent of formal declarations of war.

> [H]ostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war, ... Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power.[87]

While United States warships might pursue French ships on the high seas, still the international law was enforced as to those vessels and their prizes which put into

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[85] 4 U.S. (4 Dall.) 37 (1800).

[86] *Id.*; 4 Stat. 472; *cf.* Talbot v. The Amelia, 4 U.S. (4 Dall.) 34 (1800).

[87] 4 U.S. at 40-41(Washington, J.); *see also id.* at 43 ("it is a limited, partial war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases.")(Chase, J.); *id.* at 45 ("An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. .... As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations.")(Paterson, J.). *Cf.* Talbot v. Jensen, 3 U.S. at 160 ("no hostilities of any

American ports. The Court prohibited proceedings against public warships in accordance with principles of sovereign immunity;[88] the most famous of these cases is still among the principal cited authorities for sovereign immunity of foreign governments in the United States.[89] On the other hand, it was a concerted policy of the United States not to grant sanctuary in its ports to any belligerent ship or its prizes that might jeopardize American neutrality.[90] On conclusion of a treaty with France that ended the period of hostilities, all pending prize claims, even those ruled upon yet still subject to appeal, were terminated, and the ships restored to France.[91]

Tensions with Great Britain followed the opposite trend and led to the War of 1812. Britain's continued enforcement of the Orders in Council together with the Royal Navy's practice of impressment, or seizure of American sailors to serve on British vessels, combined to push the Congress to declare war in 1812.[92] In the same resolution declaring war, Congress conferred authority on the President "to issue to private armed

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kind, except in necessary self-defense, can lawfully be practiced by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority.").

[88] United States v. Peters, 3 U.S. (3 Dall.) 121 (1795)(per curiam)("vessels of war ... are only answerable to the sovereign in whose immediate authority they were, and from whom they derived their authority."); *see* Talbot v. Jensen, 3 U.S. at 159 ("whether the ship was lawfully a prize or not, is for some court of the French republic alone to determine, ... the United States have no right to decide a dispute between the Dutch and the French, in regard to a capture on the high seas."). *See also* Fenwick, *supra* note 76, at 29.

[89] Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

[90] 1 Papers of James Madison, Secretary of State Series 4 March - 31 July 1801 268-69, 271 (Robert Brugger, Robert Crout, Dru Dowdy, Robert Rutland, Jeanne Sisson eds.1986)("no right exists for [prizes of a belligerent] to remain beyond a reasonable time, if disagreeable to us; and that it is neither our duty nor our intent to grant to prizes made on our coast, & which can hardly be considered in any better light than indirect depredations on our commerce[,] any further indulgence than is strictly enjoined by obligations of treaties & the law of nations or by the dictates of humanity."

President Jefferson drew a fine line between active privateers, and those with commissions or letters of marque that did not partake of belligerent activity in U.S. waters, "whose character was peaceful, their purpose for the time being commercial only."; *id*. at 269.

[91] *E.g.,* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

[92] 2. Stat. 755 (1812). Ironically, Britain had repealed the Orders in Council, removing Congress's stated cause of war, but the news failed to reach Washington, D.C. before war was declared. This gave rise to an equitable argument by some merchant vessels seeking to avoid prize condemnation, who argued

vesels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States."[93]

Congress elaborated on this eight days later with an act regulating the details of such commissions.[94] In addition to the usual provisions for privateers to post bond, filings with the Secretary of State, and the bringing in of prizes for adjudication in United States District Courts, the act offered a bounty of $20 per man alive on board hostile ships at the beginning of the engagement leading to their capture; and required journals of cruises be kept and shown on demand to United States public vessels, and obedience to any instructions issued by the President.[95] Presidential instructions specifically stressed the need to respect neutral rights (which was one of the reasons for the United States' declaration of war): "You are to pay the strictest regard to the rights of neutral powers and the usages of civilized nations .... You are particularly to avoid even the appearance of using force or seduction with a view to deprive such [neutral] vessels of their crews or of their passengers. ..."[96]

The immediate call for privateers represented not just the economic interests of the war and the merchant marine, but also was a necessary response to the weak state of the U.S. Navy in 1812. "The poverty of the three Federalist administrations and the political principles of the three Republican administrations which succeeded them,

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(unsuccessfully) that Britain's repeal of the casus belli should have worked a grace period for them to complete their voyages before becoming legitimate targets.

[93] *Id.;* Stark, *supra* note 5, at 347.

[94] 2 Stat. 759 (1812); Stark, *supra* note 5, at 347.

[95] 2 Stat. 759; Stark, *supra* note 5, at 347.

[96] Stark *supra* note 5, at 347; *see also* 1 Policy of the United States Toward Maritime Commerce in War 37 (Carlton Savage ed. 1934)("commanders of armed ships were thus left to determine for themselves, from general knowledge and such published authorities as were available to them, what were the neutral and belligerent rights in question, subject of course to adjudication by a prize court.").

prevented the development of any substantial Federal navy."[97] Fortunately, the American sailing class was well suited to man ships of war when the call came, due to the independent and self-sufficient nature of American sailing vessels, especially after the period of armed neutrality required defense or flight from both British and French privateers.

> Wherever an American seaman went, he not only had to contend with all the legitimate perils of the sea, but he had also to regard almost every stranger as a foe. Whether this foe called himself pirate or privateer mattered but little. French, Spaniards, Algerines, Malays, from all alike our commerce suffered, and against all, our merchants were forced to defend themselves. The effect of such a state of things, which made commerce so remunerative that the bolder spirits could hardly keep out of it, and so hazardous that only the most skilful and daring could succeed in it, was to raise up as fine a set of seamen as ever manned a navy. .... Altogether, there could not have been better material for a fighting crew than cool, gritty American Jack."[98]

The prosecution of privateering in the War of 1812 gave rise to further occasions for the Supreme Court to delineate the practice of letters of marque and adjudication of prizes. Claimants challenged the condemnation of their vessels as prize on varied grounds, ranging from the nature or effect of the privateer's commission and instructions; to the nature or character of the vessels and their owners; to the general principles of international law.

In his opinion for the Court in *The Thomas Gibbons*,[99] Justice Joseph Story evaluated the President's authority to issue instructions to privateers under the Prize Act

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[97] Stark, *supra* note 5, at 347.

[98] Theodore Roosevelt, Naval War of 1812 53-54 (Naval Institute Press 1987) (1882). This history remains a leading reference on the naval warfare of this war, and was written by the future President while a senior at Harvard College. *See also id.* at 368 (describing attributes and tactics of privateer ships); *id.* at 370-71 (recounting particular privateer successes in naval combat); *id.* at 418 ("privateersmen" of Jean Lafitte contributed to the victory in 1815 at New Orleans by manning artillery for General Andrew Jackson); *id.* at Appendix 447 (discussing relative combat ability of American war vessels from 1777 to 1812).

[99] 12 U.S. (8 Cranch) 421 (1814).

of 1812. President Madison, as a result of the British repeal of the Orders in Council, had directed that privateers and warships should spare from attack "any vessels belonging to citizens of the United States coming from British ports to the United States laden with British merchandise."[100] The libellants, or captors, of the *Thomas Gibbons*, argued that their commissions had granted them a general right of capture against all enemy vessels or vessels trading with the enemy, which it would not be within the President's power to restrict.[101] The Court disagreed, and held "It is very clear that the President has, under the prize act, the power to grant, annul, and revoke, at his pleasure, the commissions of privateers." These commissions are "qualified and restrained by the power of the President to issue instructions. The privateer takes it subject to such power, and contracts to act in obedience to all the instructions which the President may lawfully promulgate."[102] Justice Story added the justification of public policy to the statutory analysis:

> It has been the great object of every maritime nation to restrain and regulate the conduct of its privateers. They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies.[103]

Notwithstanding the validity of those restrictions, in a later case the Court upheld the seizure of American goods by a privateer who had no actual notice of the instructions, distinguishing Presidential instructions in that respect from general laws.[104] The same

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[100] *Id.* at 422.
[101] *Id.* at 428.
[102] *Id.*
[103] *Id.* at 429.
[104] The Mary and Susan, 14 U.S. (1 Wheat.) 146 (1816)("all agree that some notice is necessary and that notice must precede the capture. ... Not so with laws; their power floats on the atmosphere we breathe.")(Johnson, J.).

case also noted that the President might grant commissions to a privateer who was not a United States citizen.[105]

When a question did arise concerning the validity of a privateer's commission, the claimant challenging the condemnation had no standing to dispute the regularity of the commission, or a lack of one.[106] The Court determined that question was one "between the government and the captors, with which the claimant had nothing to do."[107] Once the prize was properly determined as enemy or otherwise forfeit, "the government may, if it chooses, contest the right of the captors by an interlocutory application after a decree of condemnation has passed, and before a distribution is decreed."[108] The claimant's proper role instead is to meet his burden of proof concerning neutrality;[109] failure of proof beyond a reasonable doubt in this regard forfeits the seized property.[110]

On evaluating the validity of captures, the courts looked to the proof of facts such as where the prize ship was seized;[111] whether force was necessary to capture, and if there were a minimum number to a prize crew;[112] and whether any circumstances of the cargo might mitigate against condemnation. [113] Vessels exposed themselves to capture when

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[105] *Id.* at 57 ("this court can see no reason why an alien enemy should not be commissioned as commander of a privateer. There is no positive law prohibiting it; and it has been the universal practice of nations to employ foreigners, and war deserters, to fight their battles.").
[106] The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821).
[107] *Id.* at 66 (Story, J.).
[108] *Id.*
[109] *Id.* at 77 ("the onus probandi of a neutral interest rests on the claimant.").
[110] *Id.* at 77-78.
[111] The Joseph, 12 U.S. (8 Cranch) 451, 455 (1814)(capture permitted anywhere "within the jurisdictional limits of the United States, or elsewhere on the high seas")(Washington, J.).
[112] The Alexander, 12 U.S. (8 Cranch) 169 (1814); The Grotius, 12 U.S. (8 Cranch) 456 (1814).
[113] The Rapid, 12 U.S. (8 Cranch) 1155, 1163 (1814) ("it is enough to support the condemnation in this case, that the act of Congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume belligerent character.").

they sailed under an enemy license;[114] took on goods they knew to be of enemy origin;[115] or sailed without justification into enemy territory.[116]

But the right of capture follows enactment of positive law and regulation, and it does not arise automatically on declaration of war.[117] Congress must exercise its legislative authority with specific reference to captures. In discussing this point in the opinions in *Brown v. United States*,[118] Chief Justice Marshall, for the majority, and Justice Story, in dissent, highlighted the essential nature of the "letters of marque and reprisal" clause of the Constitution. Justice Story believed the clause was "merely explanatory, and introduced ex abundanti cautela [in an abundance of caution]."[119] For Story considered "[T]he power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect. If the Constitution had been silent as to letters of marque and captures, it would not have narrowed the authority of Congress."[120] Because the President, as Commander-in-Chief, could rightfully order seizure of enemy property found abroad, Justice Story reasoned, it was an immediate war power to be exercised anywhere in accordance with usage and the law of nations.[121]

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[114] The Julia, 12 U.S. (8 Cranch) 181, 190 (1814); The Joseph, 12 U.S. (8 Cranch) 451.
[115] The Rapid, 12 U.S. (8 Cranch) at 162 ("The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it.").
[116] The Alexander, 12 U.S. (8 Cranch) at 179 (capture affirmed after "[i]n open sea, unpressed by any peculiar danger, with full knowledge of the war, she changes her course and seeks an enemy's port.")(Marshall, C.J.).
[117] Brown v. United States, 12 U.S. (8 Cranch) 110, 125 (1814)("war gives the right to confiscate, but does not itself confiscate the property of the enemy.")(Marshall, C.J.); *id.* at 126 ("the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found.").
[118] *Id.*
[119] *Id.* at 150 (Story, J., dissenting).
[120] *Id.*
[121] *Id.* at 153 ("When the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect.").

But Chief Justice Marshall prevailed in his opinion that a declaration of war was not self-executing with regard to seizures of enemy property: "When war breaks out, the question, what shall be done with enemy property in our country is a question rather of policy than of law. ... [I]t is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written."[122] Accordingly, the Court found that "the power of confiscating enemy property is in the legislature,"[123] and when the legislature has not acted, the executive was thereby limited as to seizing enemy property.

The Court similarly refused to act in face of Congress's failure to exercise the power to define offenses against the law of nations. On encountering, in the case of *Williams v. Armroyd*,[124] a challenge to the condemnation of an American vessel by a French admiralty court, Chief Justice Marshall declared the general rule that "the sentence of a competent court, proceeding in rem, is conclusive with respect to the thing itself, and operates as an absolute change of the property."[125] The Court was bound to recognize a foreign admiralty judgment, notwithstanding "that the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case in a court which cannot revise, correct or even examine that sentence."[126] For, even though Congress had passed a resolution decrying Napoleon's Milan Decree as offensive to the law of nations and the rights of neutrals, "the legislature has not chosen to declare sentences of condemnation, pronounced under this unjustifiable decree, absolutely void.

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[122] *Id.* at 128.
[123] *Id.* at 129.
[124] 11 U.S. (7 Cranch) 423 (1813).
[125] *Id.* at 432.
[126] *Id.* at 433.

It has not interfered with them. They retain therefore the obligation common to all sentences whether erroneous or otherwise, and bind the property which is their object."[127] In enforcing and recognizing customary international law, the Court also thereby asserted the primacy of the U.S. Constitution over that law.[128]

Similar principles of sovereignty in international law prevailed in the case of the warship *L'Invincible,*[129] and in a way brought the Court full circle back to the earlier period of undeclared war with France. *L'Invincible*, commissioned by France, was successively captured by British cruisers and recaptured by American privateers, *twice*. Upon her trial as a prize to the American privateers, the French consul sought her return, and an American owner claimed her as his ship – wrongfully taken by the French prior to the War and her commissioning.[130] The Court considered itself bound by the precedent of the *Schooner Exchange v. M'Faddon*,[131] and the principle of sovereign immunity. However the vessel might have been taken by the French, it became the vested property of a sovereign power upon adjudication by a French prize court; because, under international law, "neutrals are bound to withhold their interference between the captor and the captured," it accordingly also "becomes unlawful to devest [sic] a captor of possession even of the ship of a citizen, when seized under a charge of having trespassed upon belligerent rights."[132] In such cases, "the decision has uniformly been that it is a question exclusively proper for the courts of the capturing power."[133]

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[127] *Id.* at 434.
[128] *Cf.* The Paquete Habana, 175 U.S. 677 (1900)(U.S. courts will apply customary international law in the absence of Congressional enactment or Constitutional provisions to the contrary).
[129] 13 U.S. (1 Wheat.) 238 (1816).
[130] *Id.* at 239.
[131] 11 U.S. (7 Cranch) 116 (1812).
[132] 13 U.S. at 255.
[133] *Id.* at 261.

Following the conclusion of the War of 1812, the next fifty years saw little emphasis in constitutional law on international matters, particularly issues of privateering and letters of marque. The nation's jurisprudential attention turned inward to domestic issues of state versus federal authority, and explication by the Court and scholars alike of these issues. But the provision for letters of marque and reprisal did not disappear entirely.

In his definitive treatise on the Constitution, Justice Joseph Story continued the established acceptance of the power as an inherent component of the national war power.

> As the United States are responsible to foreign governments for the conduct of our own citizens on the high seas, and as the power to punish offences committed is also indispensable to the due protection and support of our navigation and commerce, and the States, separately, are incapable of affording adequate redress in such cases, the power is appropriately vested in the General Government.[134]

Continuing his dissent from *Brown v. United States*, [135] Justice Story reasserted that "[t]he power to declare war would, of itself, carry the incidental power to grant letters of mark and reprisal, and to make rules concerning captures, in a general war."[136] But, he went on to elaborate,

> Such letters are also sometimes granted by nations, having no intention to enter into a general war, in order to redress a grievance to a private citizen, which the offending nation refuses to redress. In such a case, a commission is sometimes granted to the injured individual, to make a reprisal upon the property of the subjects of that nation to the extent of his injury. It thus creates an imperfect state of hostilities, not necessarily including a general warfare.[137]

In Justice Story's view, while the "letters of marque and reprisal" clause was not strictly necessary, given Congress's power to declare war, neither was a prior

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[134] Joseph Story, A Familiar Exposition of the Constitution of the United States § 183 at *119 (1840).
[135] 12 U.S. at 150.
[136] Story, *supra* note 134 at *121.

Congressional declaration of war necessary to the exercise of the power to issue letters of marque and reprisal.

Other writers, supporting the strict construction of the Constitution and the supremacy of the States within the Union, also had occasion to cite the reasoning which had prevailed over Story's dissent in *Brown v. United States*. Because the Constitution specifically enumerated these war powers, it was said, the federal government could not be said to have received general powers from the sovereign people. "As the powers of making war and peace were necessary, it became necessary also to provide for them, not as emanations form the principle of sovereignty in governments, but as delegated powers conferred by the social sovereignty, or natural right of self-government."[138] The specific mention of the power, in this view, evidences that the power was not inherent; and therefore, the argument was put forth to challenge any derivation of additional domestic powers for the federal government by virtue of a purported international sovereignty.[139] The dispute is incidental to the present topic, and in any event, the acceptance on all sides of the availability in the United States government of letters of marque and reprisal in international conduct continued.

Privateering continued to appear on the docket as well during this period, primarily as a result of Latin American wars of independence. These cases sought to reaffirm the relevant neutrality legislation as updated, and to continue the principles established during the Napoleonic Wars and the War of 1812. The Court continued the

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[137] *Id.*

[138] John Taylor of Caroline, Construction Construed and Constitutions Vindicated *280 (Richmond 1820)(Da Capo New York 1970).

rule of *L'Invincible* that "to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize."[140] But the Court at the same time declared that the United States as a neutral nation retained a right of "examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture."[141]

U.S. citizens who sailed under commissions from foreign powers captured their prizes unlawfully, and were made to disgorge them as tortious gains.[142] Individuals without valid commissions, or otherwise ineligible to receive valid commissions, were deemed pirates and subject to the laws governing that crime.[143] But in the case of civil wars, such as the South American countries' rebellions against Spain, the Court acknowledged that individuals could legitimately act on the part of a belligerent insurgency. However, the Court necessarily "must view such newly-constituted government as it is viewed by the legislative and executive departments of the government of the United States" in due deference to the separation of powers.[144]

The status of privateering both in the United States and abroad remained the same until the end of the Crimean War in 1856. During the Mexican War, the United States

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[139] *Id.* ("As it was thought necessary to delegate powers in relation to war to the federal government, it is plain that without such a delegation, the framers of the Constitution did not conceive that the federal government would possess any powers at all in relation to war.").
[140] The Estrella, 17 U.S. (4 Wheat.) 298, 307 (1819).
[141] *Id*. at 309.
[142] The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822); The Bello Corrunes, 19 U.S. (6 Wheat.) 152 (1821).
[143] United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818); *see also* 1 James Kent, Commentaries on American Law *91 (Legal Classics ed. 1986)(New York 1826); 3 Vattel, *supra* note 4 § 229.
[144] United States v. Palmer, 16 U.S. at 643.

issued no letters of marque, while Mexico did.[145] Few if any Europeans took Mexican letters of marque, knowing that treaties between the United States and European powers declared that their citizens who served as privateers against the signatory countries while the two nations were at peace, could be treated as pirates.[146] The general peace in the Western countries during this half century meant no further need arose to address the international law of privateering until the next outbreak of a major European war, the Crimean War.

The Declaration of Paris and the American Civil War: Privateers or Pirates?

The general peace prevailing in Europe after the Congress of Vienna ended in 1854 with the Crimean War. Of the major belligerents, France and Britain both held considerable naval power and maritime commercial interests. Their opponent Russia did not approach them in either arena. It accordingly cost France and Britain little to declare that neither would use privateers in their war against Russia. But they did fear the fitting out of privateers in the United States. In response to their expressed interest to enter into agreements banning Americans' involvement, the United States, while pointing to the existing neutrality laws on the books as sufficient safeguard.[147] Russia similarly declared it would refrain from issuing letters of marque.[148]

The public navies of Britain and France were more than adequate to the task of blockading Russian commerce in both the Baltic and Black Seas. Their success, however, revived the concerns of the armed neutrals, especially in Scandinavia and

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[145] Henry Wheaton, Elements of International Law sec. 359 n.173 (Richard Henry Dana ed. Boston 1866).
[146] *Id.* (U.S. treaties with Spain, Prussia, Sweden and the Netherlands).
[147] *Id.*; Stark, *supra* note 5, at 359. The U.S. also declined, "thinking it necessary to reserve to itself the right to use privateers in aid of its small navy." Wheaton, *supra* note 145, sec. 359 n.173 (*citing* Message of President Franklin Pierce, 1854, Ex. Doc. No. 103, 33d Cong. Am. Register, 1854).

northern Europe, who then, as in the Napoleonic Wars, sought to pursue trade opportunities during war unmolested.

Therefore, when in 1856 the belligerents met at the Congress of Paris to end the Crimean War, they issued what has become known as the Declaration of Paris. The Declaration of Paris was and is notable as the first modern, widespread pronouncement of restrictions on the means of conducting war, and in that respect foreshadows the Hague Conferences and their results at the turn of the century.

The Declaration of Paris proclaims as its first article: "1st. Privateering is and remains abolished."[149] The initial parties to the Declaration were the belligerents of the Crimean War: Britain, France, Russia, Prussia, Austria, Sardinia, and Turkey. The nations party to the Declaration invited other nations to join, on condition that a joining nation must enter into no treaty with a nonparty nation on a related subject, which does not adopt the four principles of the Declaration.[150]

The Europeans invited the United States to accede to the Declaration. The United States, no differently from other nations,[151] viewed the Declaration in context of her relative naval strength. The United States had always reserved the right to use privateers to augment a small navy.[152]

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[148] Stark, *supra* note 5, at 359; Wheaton, *supra* note 145, sec. 359 n.173.

[149] Declaration of Paris art. 1 (1856); Stark, *supra* note 5, at 361; Wheaton, *supra* note 145 at 454 n.173.

[150] After the abolition of privateers, the remaining principles were: "2d. The neutral flag protects the enemy's goods, except contraband of war; 3d. Neutral goods, except contraband of war, are not subject to seizure under the enemy's flag; 4th. Blockades, to be binding, must be effective; *i.e*., maintained by a force sufficient to render approach to the enemy's coast really dangerous." Stark, *supra* note 5, at 361.

[151] Stark, *supra* note 5, at 361 ("Great Britain, as the strongest naval power, had the greatest interest in abolishing privateering, ... [the French] navy was the second in the world, and constantly increasing; and the Declaration, therefore, gave her an advantage in a maritime war with any of her neighbors except England. ... Russia, Prussia, Austria and Sardinia were no privateering states, and had more to fear from them as neutrals than to gain from them as belligerents.").

[152] Stark, *supra* note 5, at 356 (President Pierce declared that while capture of private property should remain lawful, the abolition of privateering was "a proposition to which this government should never

But the United States "counteroffered" that it would accede to the Declaration only on condition that all parties adopt the additional step of banning all seizures of private property not contraband at sea.[153] While Russia was willing to accept this (primarily because she was not then a naval power), followed by most European parties, the opposition of Great Britain to the proposed amendment prevented American accession. In 1857, President James Buchanan withdrew the American offer to join if the Declaration were amended.[154]

The Declaration remained therefore solely a restriction on who might legitimately seize property at sea, leaving to public warships the right to stop and to seize merchant shipping. The Declaration also applied only as and between the signatories, and did not affect their treatment of nonsignatory nations' vessels.[155]

As the United States neared civil war, it along with Mexico and Spain had refused to accede to the Declaration of Paris. When civil war became imminent, the British foreign minister approached the United States once more about joining the Declaration. Separate agreements between the United States and each of Britain and France, adopting the Declaration's four principles, were about to be signed in July 1861, when the United States balked at the additional statement of Great Britain that "the engagement will be

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listen."); Wheaton, *supra* note 145, sec. 359 at 454 n.173 ("The United States would not preclude itself from the use of privateers, in war with powers which maintained large navies; ... and it was the policy of the United States not to maintain large standing armies or navies in time of peace.").

[153] This was also referred to as the Marcy Amendment," after the U.S. Secretary of State who announced it. Stark, *supra* note 5, at 367; Wheaton, *supra* note 145, sec. 359 at 454 n.173.

[154] Wheaton, *supra* note 145, sec. 359 at 454 n.173.

[155] *Id.* ("The declaration is, however, only a compact between the parties in their relations with each other, and does not attempt to alter the international law on that subject. Consequently, neither of the nations who are parties to the declaration is authorized to treat as pirates the privateers of nations not parties to it, nor prohibited from itself using privateers in a war with such nations.").

prospective, and will not invalidate any thing already done."[156] The explanation of this gloss, requested by the United States, set a condition which Britain would not relent and the United States could not accept: Following the Confederate President's proclamation of April 17, 1861,[157] offering letters of marque to persons of all countries to cruise against Union shipping, the United States had declared Confederate privateers pirates. Britain had acknowledged the de facto belligerent status of the rebels. As

> the Confederacy was not a party to the Declaration of Paris, Great Britain must, in consistency, regard the Confederate privateers as lawful belligerents; while the United States, claiming sovereign jurisdiction over the Confederacy, and that all its inhabitants were subject to the laws and treaties of the United States, might argue that the parties to the Declaration would be bound, after the accession of the United States, to treat the privateers of the so-called Confederate States as pirates.[158]

The Confederate issuance of letters of marque thereby prevented the United States' accession to the Declaration of Paris.

Notwithstanding the diplomatic interchanges, the United States pursued and prosecuted Confederate privateers as pirates.[159] Those Confederate privateers proved to be limited in number and effect.[160] Few foreigners answered the call for privateers, knowing that their nations would not interfere to protect them against the stated intention of the United States to try them as pirates.[161] The vast majority of Southerners who took

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156 *Id.*

157 *Id.; see generally* William R. Robinson, Jr., Justice in Grey: A History of the Judicial System of the Confederate States of America (1941).

158 Wheaton, *supra* note 145, sec. 359 at 454 n. 173.

159 Robinson, *supra* note 157, at 26, 164-65 (trials and convictions of privateers held in the U.S. District Court for the Southern District of Florida, in Key West, Florida).

160 *Contra id.* at 211 ("The public cruisers of the Confederacy scoured the seven seas and well-nigh annihilated the carrying trade of the United States."). Col. Robinson rarely concealed his enthusiasm for his subject.

161 Wheaton, *supra* note 145, sec. 359 at 454 n.173.

letters of marque also took commissions as the regular Confederate Navy.[162] In practice, the Union blockade was so effective that Confederate warships could not take prizes back to an American port for condemnation; the custom arose to offer the capture's master a ransom bond, whereby he promised to pay the Confederate States the value of the ship and its cargo at the conclusion of the war.[163] Alternatively, cruisers just destroyed their captures.[164]

Although Congress granted President Lincoln the authority to issue letters of marque and reprisal, he declined to issue them.[165] Many prizes were taken by United States Navy warships however, and found their way into the federal courts. In reviewing these condemnations, the federal judiciary and the Supreme Court brought forward the body of practice and law in maritime seizure.

The Supreme Court, in the *Prize Cases*,[166] recognized the de facto belligerent status of the Confederacy.[167] Recognizing that civil wars are rarely, if ever, formally declared, and that by their nature one party seeks to deny the legal authority of the other, the Court proclaimed that the international law and rules of war nonetheless applied. This recognition not only afforded the rebels a claim to humane treatment, it legitimated the Presidential proclamation of a blockade in the eyes of international law. Domestically, the Presidential authority to declare such a blockade rested both in the President's duty to see that the laws be faithfully executed,[168] and in his inherent authority to defend the United States from attack or insurrection, especially when

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162 *Id.*
163 Robinson, *supra* note 157, at 211.
164 *Id.*
165 Wheaton, *supra* note 145, at 456.
166 67 U.S. (2 Black) 635 (1862).

Congress should not be in session.[169] Accordingly, most of the neutral ship and cargo owners who challenged the blockade and the resultant seizure of their property found no relief.

Lacking the libels of Union privateers seeking to condemn prizes, the courts instead applied the procedures and rules of admiralty to the claims of U.S. Navy crews to their shares of prize money. The precedents of English admiralty law remained the basis for United States practice,[170] and no claimant could take from a prize, which inures to the sovereign, without an affirmative statutory grant.[171] Only naval vessels within the actual engagement at sea might share in the prize; gunboats or transports assisting an inland or riverine operation did not regularly take part.[172] Salvage was awarded for the recapture of ships from Confederate privateers,[173] but only if the vessel were proven truly captured and not sold to the Confederacy.[174] The distinction remained between enemy goods taken on land, which were not automatically forfeit, and those taken prize at sea, which were.[175]

Following the Civil War, and for the remainder of the century, privateering continued its decline into disuse by the United States. In part, changes in the technology and tactics of naval warfare drove this change. The ascendancy of the iron clad and armored warship with longer range guns removed the need or opportunity for close-in combat or boarding of vessels. The development of the submarine hastened the

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167 *Id.* at 669-70.
168 U.S. Const. art. II, sec. 1.
169 67 U.S. at 670.
170 The Siren, 80 U.S. (13 Wall.) 389, 393 (1871).
171 *Id.*
172 Oakes v. United States, 174 U.S. 778, 788 (1898); The Steamer Anglia, Blatchford's Reports of Cases in Prize 566, 570 (C.C.S.D.N.Y. Oct.1863).
173 Kirk v. Lynd, 106 U.S. 315 (1882); The Schooner Hattie, Blatchford's Reports of Cases in Prize 579 (C.C.S.D.N.Y. Dec. 1863).
174 Oakes, 174 U.S. at 793 ("where there has been no capture, there can be no recapture").

remoteness of naval combat, and its effectiveness coupled with its inability to take on captured persons or goods made a disincentive for captures rather than merely sinking or destroying enemy shipping. The growing cost and complexity of the naval armaments also reduced the ability of private shipowners to make such changes to their own ships.

The growing trends in international law of warfare epitomized by the Hague Conferences also led many legal writers to optimistically advocate the formal abolition of privateering. Some authors, like Professor Stark, considered it a logical progression in the amelioration of warfare, to extend to naval war the general prohibition in land warfare of seizures of private property. In this regard, Professor Stark considered the Declaration of Paris a "half-measure."[176] Until all seizure of private goods at sea were declared impermissible, the Declaration of Paris was "inchoate, unfinished."[177] Until then, all countries retained the right to declare just which vessels shall constitute their public navy.[178]

American treatises on international law well up to the Twentieth Century echoed this view and argued for the obsolescence of privateering. But the international community was unable to agree: "With the advent of modern high-speed cruisers, however, this practice has fallen into disuse, and there is now no unanimity of opinion as to the right to convert a merchant ship into a vessel of war on the high seas."[179] It is interesting to note that the distinction remained between letters of marque for privateering and acts of reprisal short of war.

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[175] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).
[176] Stark, *supra* note 5, at 379.
[177] *Id.*
[178] *Id.* at 378.
[179] George Davis, Elements of International Law 294 (4th ed. 1915).

Reflecting this mood of the era, the Congress that declared war on Spain in 1898 expressly declined to authorize the issue of letters of marque and reprisal. The courts nonetheless reviewed prize claims from United States Navy warships.[180]

In *The Paquete Habana*,[181] the Court made the now famous pronouncement that federal courts will apply customary international law as binding in the absence of Congressional act or Constitutional provision to the contrary on the topic at issue.[182] The *Paquete Habana* was a Spanish fishing smack captured by the United States Navy 11 miles from Havana in the coastal waters of Cuba.[183] Her owners claimed she had been improperly taken prize, because customary international law of long standing had exempted local fishing vessels from the class of merchant ships subject to capture. The district court sitting in admiralty in Key West, Florida, ruled that without any specific exemption by "ordinance, treaty, or proclamation," it could see no reason as a matter of law why "fishing vessels of this class are exempt from seizure." [184]

On appeal, the Supreme Court observed that "by an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation or catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war."[185] The Court's opinion traces that ancient custom from the orders of Henry IV to

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[180] *E.g.,* The Manila Prize Cases, 188 U.S. 254 (1902); The Infanta Maria teresa, 188 U.S. 283 (1902); Steamship Buena Ventura, 175 U.S. 384 (1899); The Pedro, 175 U.S. 354 (1899).
[181] 175 U.S. 677 (1900).
[182] *Id.* at 700.
[183] *Id.* at 679.
[184] *Id.*
[185] *Id.* at 686.

his admirals in 1403, through contemporary American history.[186] The Court also described the continuous practice abroad of following the same exemption from capture, even to the 1894 Sino-Japanese War.[187] In face of such international precedent without a specific directive in American law, the Court found the shipowners' arguments compelling.

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations,

which could be found in the writings and commentary of international legal scholars and jurists.[188]

The Court deemed this approach particularly apt in the context of prize law and its precedents. "[T]he peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed."[189] In the context of the Spanish-American War, the Court found support for this view in a Presidential proclamation of April 26, 1898, regarding the War, which stated it "desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice," before setting forth certain other rules for the conduct of the war at sea.[190]

Of note for the present purpose is the dissent in *Paquete Habana* and its response to this point of the majority opinion. Chief Justice Fuller, joined by Messrs. Justices

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[186] *Id.* at 689 ("The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.").
[187] *Id.* at 700.
[188] *Id.*
[189] *Id.* at 703.

Harlan and McKenna, objected to the compulsory attribute put upon the international custom and usage, and cited to Chief Justice Marshall's opinion in *Brown v. United States*. The dissent disagreed "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." Rather, however uniform the international consensus, "it cannot be disregarded by [the sovereign] without obloquy, yet it may be disregarded. ... It is not an immutable rule of law, but depends on political considerations which may continually vary."[191]

Accordingly, the mere fact that the rest of the world did not consider fishing vessels fair targets of capture, was not to the dissenting justices sufficient, without a specific provision of law or the Constitution, to invalidate the *Paquete Habana's* seizure and condemnation. Nor was President McKinley's proclamation a clear restriction to that end, "but the reference was to the intention of the government not to resort to privateering, but to adhere to the rules of the Declaration of Paris."[192] The government therefore had sought to restrict <u>who</u> may cruise against enemy shipping, but not <u>what</u> enemy ships might be seized.[193]

Twentieth Century Epilogue: Revival and Future Use?

With the Spanish-American War, prize law, and as part of it, privateering, effectively disappeared from the courts. The modernization of arms and the centralization of modern war economies during the two world wars subsumed the private actor into the public war effort. Those private vessels that could be armed and converted

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[190] *Id.* at 712.
[191] 175 U.S. at 715 (Fuller, C.J., dissenting) (*quoting* Brown v. United States, 12 U.S. at 128).
[192] *Id.* at 716.

became quasi-public or outright commissioned naval vessels. With rare exception,[194] ships were not taken prize brought to American ports for condemnation. In none of those cases were privateers commissioned with letters of marque and reprisal.

But the failure of Congress to exercise the authority in this century does not mean the authority no longer resides in the Congress. At the time of the debate over accession to the Declaration of Paris, some opponents argued that a two-thirds vote of the Senate in ratifying the treaty, or even a joint legislative enactment of both houses, could not amend the Constitution to remove the express allowance of the practice. That proposition is undeniably true, as the only means for amending the Constitution are stated clearly within the document.[195] The power to issue letters of marque and reprisal remains in the Constitution, and whether for reasons of ignorance or inopportunity, recent Congresses have chosen not to employ it.[196]

Not having used the provision for letters of marque and reprisal does not necessarily mean that it no longer has any use. Most obviously, in a war the Congress might yet see virtue and economy in calling upon private ship owners to enlist in the

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[193] *See also* The Buena Ventura, 175 U.S. at 389 (1899) ("The refusal of this government [to accede to the Declaration of Paris] was founded in part upon the refusal of the other governments to agree to the proposition exempting private property, not contraband, from capture upon the sea.").

[194] The Steamship Appam, 243 U.S. 124 (1916). The Imperial German Navy seized *The Appam* at sea, liberating German prisoners of war aboard, and brought her to Norfolk, Virginia. The Germans claimed a right of refuge under the terms of the 1795 treaty between the United States and Prussia. The Supreme Court denied the ship safe haven and returned the ship to Britain, citing her transport to an American port as a violation of United States neutrality under the precedents of The Santissima Trinidad, 19 U.S. 283; L'Invincible, 13 U.S. 283; and The Estrella, 16 U.S. 298. *See also* Arnold W. Knauth, *Prize Law Reconsidered*, 46 Colum. L. Rev. 69 (1946) (suggesting a revival of prize law with eleven prize libels pending in U.S district courts as of December 1945).

[195] U.S. Const. art. V.

[196] *Compare* U.S. Cont. Amend. III. No reported case exists in the life of the republic of a challenge or application of the Third Amendment; yet there can be little doubt of its continued efficacy, if the United States should for whatever reason deem it necessary to quarter troops in private homes during peacetime.

cause. The occasion, now as before, would best be one involving an enemy with vulnerable trade and shipping but little naval power.

Perhaps less literally, though, it is important to recall the broader original scope of the letter of marque and reprisal. As a means to authorize private actors to seek international justice and use force in a public cause, it may yet have utility. This is especially true given the applicability of letters of marque and reprisal to actions not necessarily nautical and to situations short of war. Congress might commission persons to enforce international arrest warrants, such as those recently issued for war criminals. Commissions might augment United States effort at border control or the interdiction of smuggling contraband items from drugs to special nuclear materials. In an expansive interpretation, Congress might commission specialists to respond to attacks upon the United States in new arenas like cyberspace and information warfare. In all such instances, the commissioner is amenable to regulation and direction by the executive branch, and the body of law establishes precedent for liability on violations of the terms of one's commission, Presidential directions, or international law.

Conversely, centuries of international practice establish liability on the part of a nation for the acts of its commissioned private actors in violation of the terms of their letters of marque and reprisal. This comports to the modern problem of state-sponsored terrorism and may provide further legal basis in support of its suppression.

The Letter of Marque and Reprisal has a long history and a permanent legacy in the operation of the United States Constitution. While it may have gone dormant, it may yet rediscover utility and vigor.

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