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THE CIVIL WAR IN U.S. FOREIGN RELATIONS LAW: A DRESS REHEARSAL FOR MODERN TRANSFORMATIONS

THOMAS H. LEE*

INTRODUCTION

The importance of the Civil War in the constitutional history of the United States is universally acknowledged. Disagreement principally concerns characterization. Does the post-bellum Constitution—including the Civil War Amendments—represent a fundamental transformation of the preexisting constitutional regime?¹ Or is it more accurate to characterize the post-bellum Constitution as, for the most part, the liquidation of the meaning of the original, founding Constitution?² On the second view, fundamental transformation is limited to abolishing the slavery institution and its incidents. This includes from an individual rights perspective the constitutional guarantees of equality, due process, and the franchise; and on a structural level recalibration of the national-state power balance.

Regardless of one's position in this debate, it seems fair to say that all discussion so far has been confined to the question of change and continuity in the domestic Constitution. By "domestic" I mean the Constitution as it applies to the regulation of: (1) relations among the three branches of the national government in their governance of the country (separation of powers); (2) relations between national and state governments (federalism); and (3) the relations between the government (both national and state) and American citizens (individual rights). The domestic focus seems justified: it was, after all, a "civil" war.

But the American Civil War also had a significant international dimension. The Confederate States of America claimed from the start that secession made

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1. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–100 (1998).

2. See, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360, 364–65 (1981).

them an independent sovereign nation.³ And to validate and maintain this status, the Confederate States desperately sought official recognition by foreign countries, international trade, and military aid and alliances, especially with Great Britain and France.⁴ Conversely, it was a high priority for the United States of America to prevent the Confederacy from achieving these objectives. Accordingly, from the start of the war, Abraham Lincoln ordered a naval blockade to interdict all maritime trade to southern ports despite preexisting treaties of amity and commerce with, and the specter of military action against, neutral foreign countries;⁵ and the State Department lobbied the European powers to deny recognition of the Confederate States.⁶

These positions were notable departures from the general trend of U.S. foreign policy since the founding. The United States had traditionally championed neutrality and the free-trade rights of neutrals (even with belligerents), refrained from threatening military action against the European great powers, and encouraged the speedy recognition of organized rebellions in the Western Hemisphere (typically Latin American ex-colonies).⁷ Whether these settled patterns inhabited the hinterland or the heartland of what was permissible under the Constitution, it seems at least possible that the same debate about the Civil War's transformative effect *vel non* on the domestic Constitution might be had about the foreign affairs Constitution—the Constitution as it regulates interactions between the United States and its citizens on the one hand, and foreign states and citizens on the other.

Why, then, has the Civil War's significance in the interpretation and evolution of the foreign affairs Constitution been altogether ignored? There are plausible reasons for the oversight. First, the foreign policy issues implicated in the war were important but secondary to the domestic nature of the conflict and its politics. Second, and relatedly, the Civil War's impact on the constitutional framework for foreign policy governance was not as dramatic as its effect on domestic governance; there are no Civil War Amendments in the foreign relations sphere. Third, unlike the domestic Constitution, insights and developments in the foreign affairs Constitution generated by the Civil War (whether we call them transformations or liquidations) were not continuously in the spotlight in the decades immediately after the war. Rather, they were largely forgotten as the Union dismantled its

3. See D.P. CROOK, *THE NORTH, THE SOUTH, AND THE POWERS 1861–1865* (1974); DEAN B. MAHIN, *ONE WAR AT A TIME: THE INTERNATIONAL DIMENSION OF THE AMERICAN CIVIL WAR* 19 (1999).

4. See MAHIN, *supra* note 3, at 17, 20.

5. Proclamation No. 4, 12 Stat. app. 1258 (Apr. 19, 1861).

6. See MAHIN, *supra* note 3, at 12.

7. See LESTER D. LANGLEY, *AMERICA AND THE AMERICAS: THE UNITED STATES IN THE WESTERN HEMISPHERE* 32, 34 (1989).

armies and fleets, turned inward to heal and westward to expand, and reverted to the country's comfortable habit of pacific isolationism in relation to Western Europe.⁸ But the interpretations and the issues that inspired them would reappear later in the modern history of the United States as it reengaged the great powers and ultimately assumed a leading role in world politics.

What were these important Civil War interpretations of the foreign affairs Constitution? This Article will explore four examples, all of which appear in the *Prize Cases*⁹ decided by the U.S. Supreme Court in March 1863 at the midpoint of the Civil War.

But first let me explain why it is proper to focus on what seems to be an obscure and narrow judicial decision about U.S. naval operations to illuminate the general question of the Civil War's impact on the U.S. constitutional law of foreign relations. For the most part, even those legal scholars such as James Randall, who have addressed the constitutional questions raised by the American Civil War, have focused on the war on land, most notably on such famous and oft-discussed matters as the Lieber Code and the Emancipation Proclamation.¹⁰ But as historians like Stuart Bernath have implicitly acknowledged, it was with respect to the United States' military actions at sea that we see most clearly how American statesmen, jurists, soldiers, and sailors of the time thought that the Constitution constrained or empowered their dealings with foreign nations.¹¹ And, of course, by contrast to the landlocked questions, we have in the *Prize Cases* a real-time decision of the Supreme Court to shed insight into their views.

The first of the four U.S. foreign relations law insights of the *Prize Cases* that this Article will discuss is the notion that international law provides a basis for the President's exercise of military force in a manner neither specifically enumerated in the Constitution nor preauthorized by congressional enactments. The specific military action was the proclamation of a naval blockade that applied not only to active Confederate belligerents but also to loyal U.S. citizens residing in seceding or soon-to-secede states and to foreign neutral citizens.¹² The second insight is the notion that federal constitutional law protections for U.S. citizens, such as the Fifth Amendment prohibition on the taking of private property, may be displaced by the international laws of war even in a category of conflict—civil war—not seemingly governed by international law and with respect to noncombatant U.S. citizens who claimed

8. See MAHIN, *supra* note 3, at 12.

9. The *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

10. See J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed., Peter Smith 1963) (1926).

11. See STUART L. BERNATH, *SQUALL ACROSS THE ATLANTIC: AMERICAN CIVIL WAR PRIZE CASES AND DIPLOMACY* (1970).

12. Proclamation No. 4, 12 Stat. app. 1258 (Apr. 19, 1861).

to be loyal. The third is the idea that the President may, consistent with the Constitution, unilaterally disregard or suspend the operation of on-point provisions in peacetime treaties in times of war, such as suspending—by the proclamation of blockade—terms in treaties of amity and commerce committing the United States to allow the merchant ships of its treaty partners free entry to its ports. The fourth is the role of judicial deference to the Executive in its interpretations of international law, both treaties and the customary international laws of war, particularly with respect to executive interpretations that appear to “push the envelope” in terms of what might be viewed as permissible under the prevailing rules of the laws of war. This Article will address each in turn after a short description of the facts and legal issues in the *Prize Cases*.

I. THE *PRIZE CASES*

On April 19, 1861, exactly one week after Confederate troops opened fire on Fort Sumter in Charleston Harbor, South Carolina, Abraham Lincoln proclaimed a blockade of ports in the seven southern states that had already seceded.¹³ The operative language in the proclamation sounds evasive. Lincoln stated that he “deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and of the law of nations in such case provided.”¹⁴ Lincoln’s proclamation also explicitly referenced an April 17, 1861 proclamation issued by the Confederate President Jefferson Davis inviting “all those who may desire” to apply for letters of marque and reprisal to attack Union shipping.¹⁵ Lincoln’s reference to Davis’s prior “threat[] to grant pretended letters of marque . . . to commit assaults on . . . good citizens of the country lawfully engaged in commerce on the high seas”¹⁶ was important from a laws-of-war perspective, as it might be used to justify his own proclamations of blockade as a reciprocal reprisal. On April 27, 1861, using identical language, Lincoln extended the blockade to the ports of Virginia and North Carolina in light of the imminent secession of those states.¹⁷

13. *Id.* The seven states were South Carolina, Georgia, Alabama, Florida, Louisiana, Mississippi, and Texas. *Id.*

14. *Id.* at 1259.

15. *Id.* at 1258–59 (referencing Jefferson Davis, *By the President of the Confederate States: A Proclamation* (Apr. 17, 1861), reprinted in 1 *THE MESSAGES AND PAPERS OF JEFFERSON DAVIS AND THE CONFEDERACY INCLUDING DIPLOMATIC CORRESPONDENCE, 1861–1865*, at 60, 61 (James D. Richardson ed., Chelsea House-Robert Hector Publishers 1966) (1905)).

16. *Id.*

17. Proclamation No. 5, 12 Stat. app. 1259 (Apr. 27, 1861).

Congress was recessed at the time of Lincoln's blockade proclamations.¹⁸ When it reconvened without delegations from the seceded states in a special month-long summer session starting July 4, 1861, it was dominated by Northerners.¹⁹ Within a week, this Congress passed resolutions granting the President the prospective power to declare parts of the country in "insurrection" and to proscribe commerce to and from such parts.²⁰ Congress also debated a proposal to ratify all of Lincoln's unilateral wartime measures: an April 15 request for 75,000 militiamen from state governors;²¹ a May 3 call for 42,000 federal volunteers;²² the suspension of the writ of habeas corpus in Maryland in reaction to pro-secession riots in Baltimore in April,²³ and the April 19 and 27 blockade proclamations.²⁴ It was Lincoln's suspension of habeas corpus that excited the most heated exchanges in the national Legislature. For reasons that remain obscure, Congress did not enact a specific statute ratifying Lincoln's measures but rather approved them in a roundabout rider tacked onto a statute increasing pay for federal troops.²⁵ The provision stated that "all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized."²⁶

Although Lincoln did not authorize significant military action on land until Congress convened, the Navy moved to enforce the blockade immediately. The *Prize Cases* concerned the U.S. Navy's capture of four cargo-bearing merchant ships between May 17 and July 10, 1861,²⁷ prior to Congress's July 13 and August 6 statutes approving the President's military actions. Two of the ships, the *Amy Warwick* and the *Crenshaw*, were owned by United States citizens who lived in Virginia but swore loyalty to the Union—an allegiance

18. See RONALD C. WHITE, JR., *THE ELOQUENT PRESIDENT: A PORTRAIT OF LINCOLN THROUGH HIS WORDS* 104 (2005).

19. See *id.* at 112; 12 *THE STATUTES AT LARGE, TREATIES, AND PROCLAMATIONS OF THE UNITED STATES OF AMERICA* 255 (George P. Sanger ed., Boston, Little, Brown, & Co. 1863) (explaining that the President called a session of Congress to begin on July 4, 1861).

20. Act of July 13, 1861, ch. 3, §§ 5–6, 12 Stat. 255, 257.

21. Proclamation No. 3, 12 Stat. app. 1258 (Apr. 15, 1861).

22. Proclamation No. 6, 12 Stat. app. 1260 (May 3, 1861).

23. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 25 (1998).

24. Proclamation No. 4, 12 Stat. app. 1258 (Apr. 19, 1861); Proclamation No. 5, 12 Stat. app. 1259 (Apr. 27, 1861).

25. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326 ("An Act to increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for other purposes.").

26. *Id.*

27. *The Prize Cases*, 67 U.S. (2 Black) 635, 636–39 (1863).

the Government did not question.²⁸ The *Crenshaw* was captured leaving Richmond for Great Britain with a cargo of tobacco owned mostly by Virginians on May 17, 1861.²⁹ The *Amy Warwick* was captured with a cargo of coffee owned by U.S. citizens in Virginia on July 10, 1861, en route to Virginia from Rio de Janeiro.³⁰ The other two merchant ships were owned by private foreigners from neutral countries—the *Hiawatha* by a British subject and the *Brillante* by a Mexican citizen.³¹ The *Hiawatha* was captured on May 20, 1861, leaving Richmond for Great Britain with a cargo of tobacco owned by British and Virginian interests.³² The *Brillante* was captured anchored in Biloxi Bay on June 23, 1861.³³ The U.S. Government argued that the ship was preparing to breach the blockade outward to Mexico from New Orleans with a cargo of flour owned by Mexicans.³⁴ Upon capture, all four ships were sailed into Union ports and “condemned” in actions before federal district judges acting as prize courts.³⁵

The ship and cargo owners made several arguments in the federal courts against the legality of the condemnations of their property. First, the Virginian ship and cargo owners of the U.S.-flagged *Amy Warwick* and *Crenshaw* asserted that, as loyal citizens of the United States, the taking of their property was not governed by the international laws of war permitting capture of enemies’ property at sea, but rather by the Fifth Amendment.³⁶ Second, the *Crenshaw* claimants—along with the British and Virginian *Hiawatha* claimants—argued inadequate notice, their respective captures on May 17 and May 20 off the coast of Virginia having come very shortly after Lincoln’s April 27 proclamation of blockade.³⁷ Both of these arguments implicitly presumed the validity of the blockade under international and domestic law but sought to craft an equitable exception. The third argument was made by the Mexican owners of the *Brillante* and her cargo of flour—represented by Washington, D.C. lawyer James Carlisle.³⁸ The *Brillante* claimants directly contested the very validity of the blockade itself by asserting that the circumstances of the rebellion at the relevant time did not constitute a “state of war” under international law, that the President did not have the power to

28. See *id.* at 637–38, 651.

29. See *id.* at 637; ROBERT BRUCE MURRAY, LEGAL CASES OF THE CIVIL WAR 4 (2003).

30. See *Prize Cases*, 67 U.S. at 637; MURRAY, *supra* note 29, at 6.

31. *Prize Cases*, 67 U.S. at 638.

32. See *id.*; MURRAY, *supra* note 29, at 5–6.

33. See *Prize Cases*, 67 U.S. at 638–39; MURRAY, *supra* note 29, at 4.

34. See *Prize Cases*, 67 U.S. at 638–40, 678–80.

35. See *id.* at 636–37; MADELINE RUSSELL ROBINTON, AN INTRODUCTION TO THE PAPERS OF THE NEW YORK PRIZE COURT, 1861–1865, at 49–50 (1945).

36. See *Prize Cases*, 67 U.S. at 671–74.

37. See *id.* at 637–38.

38. See *id.* at 639.

declare the blockade under U.S. constitutional law, and that the Treaty of Guadalupe-Hidalgo committed the United States to allowing free trade between all Mexican and U.S. ports, including those in the seceded states.³⁹ Carlisle also argued that the *Brilliant* had no intent to run the blockade.⁴⁰

All the owners lost in the district courts and appealed.⁴¹ The Supreme Court consolidated the four cases for argument in February 1863.⁴² In a 5-4 decision published the next month, the Court upheld the specific captures and, more importantly, the general legality of the blockade.⁴³ Justice Robert Grier wrote the majority opinion in favor of the Government;⁴⁴ Justice Samuel Nelson wrote a dissent for himself and three other justices including Chief Justice Roger Taney.⁴⁵

II. INTERNATIONAL LAW AS THE SOURCE OF THE PRESIDENT'S POWER TO DECLARE A BLOCKADE

A "blockade" is the use of armed force to prohibit seaborne passage to and from the ports and coasts belonging to the enemy. The land-based analogue is a siege. Under the contemporaneous laws of war, just as one country could not lay siege to the cities of another with its armies unless the two were at war with each other, the customs of the time held that one country's navies could not blockade the ports of another unless they were in a "state of war."⁴⁶ Even then, just as it might be argued that humanitarian customs and morality required besieging armies to permit the passage of food and medical supplies, the laws of war at sea recognized that a blockade was technically limited to the interdiction of cargo of military value to the enemy, which was called "contraband."⁴⁷

Any ship seeking to "run" the blockade by evading the naval forces enforcing it could be captured and condemned in a prize court along with its cargo so long as the ship's owners or crew had notice of the existence of the blockade.⁴⁸ Cargo owners were liable to have their cargo condemned if they had notice of the blockade and of the ship's intent to run it. In theory, a merchantman carrying non-contraband cargo of no military value could declare

39. *See id.* at 641-50; MURRAY, *supra* note 29, at 7-9.

40. *Prize Cases*, 67 U.S. at 639-40.

41. *Id.* at 637.

42. MURRAY, *supra* note 29, at 6-7.

43. *Prize Cases*, 67 U.S. at 671, 674-82.

44. *Id.* at 665-82.

45. *Id.* at 682-99.

46. *See id.* at 665-66.

47. *See* John B. Hattendorf, *Maritime Conflict*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 98, 106 (Michael Howard et al. eds., 1994).

48. *See* I CARLTON SAVAGE, *POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR* 87-88 (1934).

its presence to the blockading squadron, submit to search, and be allowed to pass once the non-military nature of its mission was verified. But the breadth with which the blockading force could define “contraband” under the international maritime law of the time,⁴⁹ coupled with the doctrine of “contamination” (anything of military value onboard rendered the entire cargo condemnable),⁵⁰ meant that this was not a promising tack. And so in practical terms, the proclamation of a blockade entailed the complete stoppage of maritime trade to the blockaded enemy.

The antebellum United States, as a perennial neutral heavily reliant on maritime trade, had been the most vocal among the Eurocentric community of nations in advocating rules of international law circumscribing as much as possible the belligerent rights to blockade and its incidents.⁵¹ The normative appeal of the ideology of free trade was particularly strong among the liberal democracies of the mid-nineteenth century.⁵² This gave the Americans an ideological high ground in pushing their self-interested position. The “state of war” requirement meant that a country could not lawfully block international trade to another country absent war between the two countries, which was to be signified by a declaration of war by the country seeking to blockade. It could, without declaring war, pass municipal embargo legislation, but that would act only to cut off trade to the other country by the nation’s own citizens. The possibility that the necessary “state of war” under international law might be triggered by something other than a declaration of war by the governance institution authorized to declare war under a country’s municipal constitution was a key issue in the *Prize Cases*.⁵³

But as the current blockade rule illustrates⁵⁴ and as might be inferred by reference to the municipal analogue of embargo, one could claim that the power to order the stoppage of trade with another country, even by deployment of naval forces, is not necessarily a “war” power. It was international law that made it a war power, and no judge or litigant in the *Prize Cases* questioned the relevance of the international law rule, for instance, by asserting that the

49. Interestingly, the Navy Department never issued a list of contraband items during the War. The Treasury Department prepared a list in May 1862 to guide its customs collectors. *Id.* at 91–92.

50. *See* The Peterhoff, 72 U.S. (5 Wall.) 28, 37–38 (1866) (citing The Maria, (1805) 165 Eng. Rep. 901 (H. Ct. Adm.)).

51. *See* Hattendorf, *supra* note 47, at 107–09; SAVAGE, *supra* note 48, at 44–47.

52. *See* Hattendorf, *supra* note 47, at 109.

53. *See* The Prize Cases, 67 U.S. (2 Black) 635, 666–71 (1863).

54. A “state of war” may not be a strict requirement of blockade at customary international law today, as demonstrated by the U.S. Navy’s “quarantine” of Cuba during the Cuban Missile Crisis—a military operation that, in practical terms, was indistinguishable from blockade. Contemporary treaty law also presumptively authorizes the United Nations Security Council to order a blockade even in the absence of war. *See* U.N. Charter art. 42.

President could—or could not—proclaim the blockade regardless of whether or not the insurrection was itself a “war” in a qualifying sense under international law. Thus one might say that for the Court, international law defined and enhanced the scope of presidential war power. If so, that might suggest the case as precedent for the proposition that international law can *restrict* the scope of presidential war power as well.⁵⁵

There were two reasons why Lincoln’s decision to declare a blockade was viewed at the time as problematic.⁵⁶ First, Lincoln’s act of deploying a concept (blockade) from the international laws of war as they applied among independent sovereign states could be used by foreign nations as support for recognizing the Confederacy as an independent nation. It is worth recalling that a principal basis on which the French during the Revolutionary War justified recognition of the independent United States by “treating” with its commissioners in 1778 was that Great Britain had applied the laws of war to its conflict with its former colonies (albeit somewhat selectively) to include cartel agreements for the exchange of prisoners of war, armistices, and negotiated surrenders.⁵⁷ Indeed, it seems fair to say that by 1861 the law of nations had evolved to this more positivist principle of state recognition which, at the very least, had been the United States’ customary position, such as regarding revolutionary republics in Latin America prior to the Civil War.⁵⁸ If Great Britain and France were to recognize the Confederate States as an independent country, then they might be more inclined to give them military and economic assistance in their conflict with the Union.

The main alternative principle of state recognition under international law, in the mid-nineteenth century championed unsurprisingly by monarchies seeking to rein in domestic secessionist movements (e.g., Austria-Hungary, Spain), would have required the parent country formally to renounce its sovereignty over a seceding state or states before recognizing the latter’s membership in the community of nations. This was the British position in the American Revolutionary War,⁵⁹ although Great Britain had earlier indicated a

55. See MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 362–67 (2007) (suggesting that, under the Constitution’s original understanding, international law limited presidential power through the Take Care Clause); Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007) (suggesting that modern courts take international law into account in defining presidential powers).

56. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 351 (2005).

57. See HENRY WHEATON, *HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA; FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON, 1842*, at 290–92 (New York, Gould, Banks & Co. 1845).

58. See SAVAGE, *supra* note 48, at 42–44.

59. See WHEATON, *supra* note 57, at 291–92.

contrary view in its prompt recognition of the validity of the Netherlands' secession from Spain. But it had never been the American position on the international law of recognition prior to the Civil War, and by the mid-nineteenth century, although perhaps not retired altogether by desuetude, it was a distinct minority view among the great powers and perceived as reactionary and quaint.

In view of the high recognition risk involved in declaring a blockade, Lincoln considered but ultimately dismissed two other options. He might have opted not to have restricted international maritime trade to the Confederacy at all, contenting himself with a national embargo to cut off all interstate trade whether by land or water. Given the laughable state of the United States Navy in April 1861 (it had seventy-six seagoing vessels),⁶⁰ this might have struck some as the only realistic option. But the nature of the Confederate economy rendered this an unattractive course from the perspective of military strategy. Even as the broad expanse of the seceded states rendered invasion by land forces a daunting prospect, the South was heavily agrarian with little indigenous industry. It would need to export its agricultural products, most notably cotton and tobacco, and to import war material, manufactures, and industrial goods, in order to fight for and maintain its independence. To be sure, the cutoff of access to northern goods and manufactures was no small blow to the Confederate economy, but it would not suffice to strangle the South's livelihood, particularly in the event of a long and drawn-out war.

A more attractive option was to declare a closure of the key ports in the southern states. Port closures were effected by municipal action only, for instance in cases of quarantine because of infectious disease, and so they did not have the same international law recognition ramifications as a blockade.⁶¹ But by the same token, a foreign ship and its cargo that entered a "closed" port could not be punished or condemned under international law.⁶² (An American ship could be punished if the closure was supplemented by an embargo.) Additionally, a closure was limited merely to the issue of access to the port, and so it could only be effective if it could be enforced by the local authorities both by land (the docks, piers, etc.) and on water. But with the exception of New Orleans, the United States would not have the land forces to close any of the main southern ports until the very end of the war.⁶³ And so, in practical terms, a closure of the southern ports was not a real option.

The second reason why blockade was a particularly sensitive exercise of military force was because it was directed in large part at neutral nations and not just the enemy. To be sure, the objective was to deny the enemy access to

60. See GOODWIN, *supra* note 56, at 672.

61. See BERNATH, *supra* note 11, at 19.

62. See MAHIN, *supra* note 3, at 53.

63. See *id.* at 172-73.

supplies and the benefits of trade, but the means of doing so entailed cutting off the prerogative of peaceful neutral nations to engage in free trade. Moreover, in some instances the prerogative was explicitly guaranteed by the terms of bilateral treaties of amity and commerce between the blockading nation and the neutral at issue. A good example was the Treaty of Guadalupe-Hidalgo with Mexico, which had ended the Mexican-American War.⁶⁴

This aspect of blockade—infringing as it did upon the default rights of neutrals at classical international law—bore more than a passing resemblance to the issue of belligerent rights to transit neutral waters or territory under the doctrine of “innocent passage.”⁶⁵ Just as in proclaiming a blockade a belligerent encroaches upon the treaty and law-of-nations rights of a neutral to trade, in demanding (as opposed to requesting) passage through a neutral’s waters or territory a belligerent trespasses upon the international legal rights of the neutral to command and control its sovereign territory.⁶⁶ Indeed, it was this very issue of Germany’s belligerent transit through neutral Belgium that was the formal legal reason that brought Great Britain into the First World War on France’s side. From the United States’ perspective in the Civil War, these same two powers were the neutrals whose default rights were being infringed upon by Lincoln’s proclamation of a blockade.

Nor, despite Lincoln’s reference to the “pursuance of the laws of the United States” in his proclamations,⁶⁷ was a blockade of the sort he ordered authorized by any Congressional statute. Yes, there were venerable statutes on the books (from 1795 and 1807) that authorized the President to respond with armed force against enemies, foreign or domestic, who might invade or incite insurrection.⁶⁸ And it could be argued that, under the Commander-in-Chief Clause of the Constitution, the President might be justified in taking defensive actions against foreign invaders and domestic insurrectionists, even without the enabling statutes.

But because Lincoln’s blockade also deployed armed force against foreign neutrals and presumptively loyal Americans, it was clear that these statutes or a purely defensive constitutional war power would not suffice to authorize such a patently offensive use of armed force. In other words if Lincoln had proclaimed a blockade of the southern ports that would only apply to vessels flying the Confederate flag, the United States flag, or the flags of any foreign

64. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

65. See *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 139–43 (1812).

66. *Id.* at 140–41.

67. Proclamation No. 4, 12 Stat. app. 1258, 1259 (Apr. 19, 1861).

68. The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (referencing Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331–335 (2006))) and Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (current version at 10 U.S.C. §§ 331–335 (2006))); see Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 161–66 (2004).

allies of the Confederates, then the preexisting statutes or constitutional power would have sufficed. But the proclamation of blockade was acutely sensitive precisely because a principal target of the use of naval force was the private citizens of powerful neutral countries that the United States desired to prevent from becoming Confederate allies.⁶⁹ And, from the perspectives of Great Britain and France, the proclamation of blockade could only appear to be an offensive act of military force, since they had neither invaded the United States nor actively encouraged the Confederate insurrection.

In summary, by proclaiming the blockade in April 1861, Lincoln had committed a belligerent act that was unauthorized by the explicit words of the Constitution and unauthorized by congressional statutes. Nor could the act be grounded in some defensive gloss on his power as Commander in Chief, in light of the patently offensive use of armed force on the private citizens of neutral foreign countries that had neither invaded the United States nor actively aided insurrection. The proclamation carried with it not only the cost of offending those powerful neutral nations, but also the risk that they would characterize the invocation of the laws of war by the Union against the Confederacy as evidence in support of recognition of the Confederacy as a new independent member of the community of nations.

To mitigate the possibility of recognition blowback, Lincoln and his advisers articulated the theory that it was possible for the United States to exercise belligerent rights against the Confederacy without surrendering any claims to sovereignty rights.⁷⁰ This splitting of the bundle of international legal rights was something the founding Americans had ridiculed when the British had made the same point during the Revolutionary War. The British, on the occasions where they had afforded Americans laws-of-war accommodations, cast their compliance with those laws as a matter of policy grace, not international legal compulsion. Lincoln's invocation in this instance was importantly different, however, because he sought by invoking belligerent rights to implement more severe, not kinder, measures against rebels.

III. THE "PREEMPTION" OF THE CONSTITUTIONAL CLAIMS OF THE U.S. CITIZEN CLAIMANTS BY THE INTERNATIONAL LAWS OF WAR

The *Crenshaw* and the *Amy Warwick* had been flying the United States flag when they were captured.⁷¹ Both ships were owned by U.S. citizens who resided in Virginia but who claimed loyalty to the Union, a claim that the Government's lawyers did not challenge before the Supreme Court.⁷² The

69. See MAHIN, *supra* note 3, at 13–14 (indicating that “a foreign war was the last thing Lincoln and Seward wanted while they were engaged in a great civil war at home”).

70. See BERNATH, *supra* note 11, at 19.

71. See *Prize Cases*, 67 U.S. at 637, 680.

72. See *id.* at 637, 651, 680.

Crenshaw's cargo of tobacco was mostly owned by Virginians who claimed loyalty to the Union, as did the owners of the *Amy Warwick*'s cargo.⁷³ The *Hiawatha* was a British-owned ship, but a part of its cargo was owned by Virginians who similarly alleged loyalty.⁷⁴ The relevant cargo and ship owners asserted that takings of the property of loyal U.S. citizens should be regulated by domestic constitutional law, namely the Due Process and Takings Clause protections of the Fifth Amendment, and not by the "enemies' property" doctrine under the international laws of war.⁷⁵ This argument seemed particularly strong in the case of the U.S. citizen claimants in the *Crenshaw* and *Hiawatha* cases: these ships were captured leaving Virginia ports for Great Britain on May 17 and May 20, 1861,⁷⁶ six and three days respectively *before* Virginia's citizens approved secession from the Union by popular referendum on May 23, 1861.⁷⁷

The Government's lawyer, Richard Dana, argued in response that it was universally accepted under the international laws of war that enemy property could be seized, even if the individual owners were not taking part in hostilities (or even opposing them).⁷⁸ He asserted, without any direct support, that the same rule should apply in "internal wars."⁷⁹ The Government's position masked a major problem: in an "internal" war, by contrast to a foreign war, loyal citizens of a national government who happened to reside in so-called "enemy" states seeking secession could plausibly claim the protections of not only international law but also the nation's domestic constitution with respect to takings of their private property by governmental force. In other words, the Government assumed—without bothering to justify the assumption—that in a war of domestic complexion implicating the rights of U.S. citizens, the international laws of war displaced (or allowed the President to displace) rules of domestic constitutional law that would have regulated the subject during peacetime, at least insofar as such rules applied to states in secession. This was in essence Lincoln's legal argument justifying the Emancipation Proclamation, announced only a few weeks prior to the oral arguments in the *Prize Cases*.⁸⁰ Its premise also seems to contradict the U.S. government's antebellum interpretation of the laws of war to incorporate the customary principle that no private property—enemy or neutral—should be subject to condemnation in war.

73. *See id.* at 637, 680.

74. *See id.* at 638, 676.

75. *See id.* at 674–82.

76. *Prize Cases*, 67 U.S. at 637–38.

77. *See* JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 280 (1988).

78. *Prize Cases*, 67 U.S. at 650–51.

79. *Id.* at 654–56.

80. Proclamation No. 17, 12 Stat. app. 1268 (Jan. 1, 1863).

The Court concluded, however, that the U.S. claimants' assertion "that the Constitution and Laws of the United States are still operative over persons in all the States" rested on two dubious propositions "without foundation on the established law of nations."⁸¹ First, it was not true that just because a civil war exists, "the party belligerent claiming to be sovereign" can only exercise domestic sovereign rights and not any belligerent's rights (including the right of capture of enemy property) over the other party.⁸² By contrast, the Court asserted that "it is a proposition never doubted, that the belligerent party who claims to be sovereign [the United States], may exercise both belligerent and sovereign rights."⁸³

Second, it was also erroneous of the claimants to assert that "[w]hether property be liable to capture as 'enemies' property" in a civil war depends "on the personal allegiance of the owner."⁸⁴ Grier adopted Dana's underlying assumption of total war and articulated a distinctively positivist outlook. There was "a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power."⁸⁵ Any property belonging to any resident of that cordoned-off hostile territory, even an allegedly loyal U.S. citizen, was liable to be treated as enemies' property—"a technical phrase peculiar to prize courts"—because it "may be used to increase the revenues of the hostile power."⁸⁶ In reaching these conclusions, Grier accepted uncritically Dana's theory of enemies' property without considering the ramifications of the wholesale displacement of domestic constitutional law protections for residents of the rebellious states (including potential union loyalists) by the international laws of war.

IV. CUSTOMARY LAWS-OF-WAR PREEMPTION OF TREATIES OF AMITY AND COMMERCE

One of the arguments made by James Carlisle on behalf of the *Brilliant* claimants posited a tension between Lincoln's proclamation of blockade and a preexisting treaty ratified by the United States.⁸⁷ Carlisle implied that Article 17 of the Treaty of Guadalupe-Hidalgo of 1848 revived an 1831 Treaty of Amity and Commerce between United States and Mexico that opened the ports

81. *Prize Cases*, 67 U.S. at 672–73.

82. *Id.* at 673.

83. *Id.*

84. *Id.* at 674.

85. *Id.*

86. *Prize Cases*, 67 U.S. at 674.

87. *See id.* at 643–44.

of the two countries to mutual commerce.⁸⁸ That treaty commitment, according to Carlisle, was not “suspended or abrogated by Act of Congress” or “in any degree disturbed by the National Legislature.”⁸⁹ In other words, Carlisle suggested that a treaty ratified by the President with senatorial advice and consent supplied an on-point rule that the Mexican ship *Brillante* could take its Mexican-owned flour from New Orleans to Mexico, and that rule could not be “suspended or abrogated” by a later-in-time presidential proclamation of blockade in the absence of explicit congressional authorization.⁹⁰

Interestingly, the Court did not address this particular argument, although in retrospect there were at least two plausible grounds to rebut Carlisle’s assertion. First, one might argue that Lincoln’s proclamation of blockade amounted to a partial termination of the earlier Treaty. As Professor Henkin has noted, “Presidents have claimed authority, presumably under their foreign affairs power, to act for the United States to terminate treaties . . . even in violation of international law.”⁹¹ But the examples Henkin lists—Franklin Roosevelt’s reactive denunciation of an extradition treaty with Greece in 1933 because of Greece’s prior failure to honor it and his denunciation of the Treaty of Commerce, Friendship and Navigation with Japan in 1939⁹²—involved colorable claims of reciprocal termination because of prior malfeasance on the part of the treaty partner. No such claim could be made with respect to Mexico under the Treaty of Guadalupe-Hidalgo. Moreover, in both cases the President specifically invoked the termination power,⁹³ something absent in Lincoln’s proclamations. Henkin’s third example, Jimmy Carter’s termination of the Defense Treaty with the Republic of China in 1979, also seems inapposite, since that termination was made with notice under the express terms of the Treaty.⁹⁴

A second possibility is that Congress did in fact abrogate the Treaty’s open-ports provision in its post hoc ratification of Lincoln’s actions during the 1861 special session. It is commonly accepted today that a later-in-time statute may override a prior treaty, although the key precedents so stating postdate the

88. *See id.* at 644 (referencing Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. XVII, Feb. 2, 1848, 9 Stat. 922 and Treaty of Amity, Commerce, and Navigation, U.S.-Mex., art. III, Apr. 5, 1831, 8 Stat. 410).

89. *Id.*

90. *Id.*

91. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 211–12 (2d ed., Oxford Univ. Press 1996) (1972).

92. *Id.* at 212.

93. *See id.* at 211–12.

94. *See id.* at 212.

Civil War.⁹⁵ If so, could it not be argued that Congress's retroactive approval of Lincoln's blockade imparted upon the presidential decision the same legal effect as a later-in-time statute? The argument is certainly plausible, but it is interesting to note that the Court's opinion in the *Prize Cases* does not make much of the retroactive statutes in general and indicates that the point was not necessary to its holding.⁹⁶ It may be that the reason for this lack of reliance on what would be the anchor of any modern justification of a President's wartime measures⁹⁷ was the possibility of an ex post facto violation: to the extent that the statutes authorized the condemnation of the property of U.S. citizens pledging their loyalty as enemies' property, it might be interpreted as a violation of Article I, Section 9's provision that no "ex post facto Law shall be passed."⁹⁸ The majority recognized that retroactivity would "have some weight on the trial of an indictment in a criminal Court," but suggested that such "precedents . . . cannot be received as authoritative" in a prize court proceeding.⁹⁹

V. JUDICIAL DEFERENCE TO THE EXECUTIVE IN FOREIGN RELATIONS LAW

What do the *Prize Cases* tell us about judicial deference to the President in foreign relations matters? The most immediately striking aspect of the *Prize Cases* is that the Court considered a constitutional challenge to the President's military actions during wartime and almost ruled against the President. And this attention came despite strong arguments by the President's counsel for judicial abstention (including, apparently, the suggestion that deciding the merits would make the Court an "ally of the enemy").¹⁰⁰ In the twentieth century, Justice William Douglas seized on this point to assert that the *Prize Cases* supplied support for a strong judicial role in monitoring presidential war powers.¹⁰¹

But although the Court made a show of deciding the merits, ultimately the majority opinion contains language of substantial deference to the Executive. The Court was quite willing to accept the President's characterization of the

95. See, e.g., *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 160 (1934); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899); *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 599 (1884).

96. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670–71 (1863).

97. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

98. U.S. CONST. art. I, § 9, cl. 3.

99. *Prize Cases*, 67 U.S. at 671.

100. *Id.* at 646.

101. E.g., *Holtzman v. Schlesinger*, 414 U.S. 1316, 1318 (1973) (Douglas, Circuit Justice) (citing *Prize Cases* for the proposition that, in Vietnam War cases, "[t]he question of justiciability does not seem substantial").

situation as war¹⁰² (even though at the time the blockade was proclaimed, shots had been fired only at a single fort and no one had been killed by hostile fire). Indeed, the majority agreed with U.S. Attorney Dana that the President's determination on this ground was conclusive on the Court, a point Justice Clarence Thomas has emphasized in his dissents.¹⁰³

On the other hand, notwithstanding the language of deference on the crucial question of whether the insurrection had progressed to the level of a full-blown civil war, the Court also referred to contemporaneous recognition of a state of war by foreign nations, the amorphous and evolving nature of a civil war, the disruption of the courts, and the commonsense obviousness of its conclusion before making the point about deference.¹⁰⁴ Indeed, one could easily argue that the executive deference point (like the alternative rationale of legislative ratification) was a throwaway placed late in the opinion as a nail in the coffin. Nor, for that matter, did the Court adopt the most pro-government position adopted by a lower court. Judge Sprague, in the federal district court for Massachusetts, appeared to suggest that it was completely discretionary to the Government to claim belligerent and sovereign rights as to Confederates, and to toggle back and forth between one and the other according to what best served its military interests.¹⁰⁵ "The temporary non-use[] of such [sovereign] rights [by treating rebel privateers as prisoners of war and not traitors and pirates] is not a renunciation of them, but they may be called into practical exercise at pleasure."¹⁰⁶

On the more immediate level of how the international law of prize was to be applied to the cases at bar, however, the Court was exceedingly deferential to the President. For instance, the owners of the *Brilliant* had argued that the

102. See *Prize Cases*, 67 U.S. at 670.

103. E.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 724–25 (2006) (Thomas, J., dissenting) ("The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his commander-in-chief authority that this Court is bound to respect." (citing *Prize Cases*, 67 U.S. at 670)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting) ("Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance [as to warrant a particular measure] is a question to be decided by him." (quoting *Prize Cases*, 67 U.S. at 670)); *id.* at 584 ("[The Court's] deference extends to the President's determination of all the factual predicates necessary to conclude that a given action is appropriate." (citing *Prize Cases*, 67 U.S. at 670)); *id.* at 588 ("[The Court is] bound by the political branches' determination that the United States is at war." (citing *Prize Cases*, 67 U.S. at 670)); see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 85 (1990) (finding in the *Prize Cases* "the Court's hint that the president's decisions could be considered political questions that it ought not review"). In this respect, the Thomas and Douglas readings of the *Prize Cases* decision are not easily reconcilable.

104. See *Prize Cases*, 67 U.S. at 669–70.

105. See *The Amy Warwick*, 1 F. Cas. 799, 803 (D. Mass. 1862) (No. 341).

106. *Id.*

ship had been anchored in Biloxi Bay when captured, awaiting a safe conduct to clear American waters for Mexico.¹⁰⁷ The pass should have been granted as a matter of course under the view of international maritime law that the United States had held before the Civil War, since it was a private neutral vessel carrying neutral-owned cargo to a neutral port. And the Court, as a prize court of last resort, had the authority to examine the facts of the case de novo. Secondly and more importantly, the majority readily accepted Dana's innovative theory of enemies' property to settle the *Amy Warwick* and *Crenshaw* cases. This acceptance came despite the absence of support on point for extending the concept to a civil war and the significant concerns voiced by the claimants' counsel regarding the use of international law to displace domestic constitutional protections for presumptively loyal U.S. citizens. The extent of executive deference as to prize law questions in these cases stands in stark contrast to the Court's opinion in the famous decision in *The Paquete Habana*, a case arising out of the Spanish-American War three decades later, in which it paid no deference to the Executive's litigating position that fishing vessels were lawful prizes under international law.¹⁰⁸

CONCLUSION

In the twentieth and twenty-first centuries, as the United States assumed a more active role as a great—and then a super—power in world politics, versions of the Civil War interpretations of the foreign affairs Constitution discussed above became orthodoxy without apparent awareness of their roots. Conservative constitutionalists, like John Yoo, have sought to validate certain aspects of the modern transformations in U.S. foreign relations law—such as the unilateral power of the Executive in foreign affairs—by reference to Founding-era precedents.¹⁰⁹ On the other hand, progressive constitutionalists, like Harold Koh, have decried the modern, pragmatic changes in U.S. foreign relations law, particularly the move to executive branch supremacy, as departures from the original foreign affairs Constitution, and in tension with bedrock constitutional principles.¹¹⁰ Other progressives have taken other approaches to cast the twentieth century transformations into doubt: Sarah Cleveland, for instance, has traced their roots to odious nativist nineteenth century doctrines and policies dealing with marginalized groups like Native Americans and immigrants.¹¹¹ I hope to have shown here that the modern

107. *Prize Cases*, 67 U.S. at 639–40.

108. *The Paquete Habana*, 175 U.S. 677 (1900).

109. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

110. KOH, *supra* note 103.

111. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1 (2002).

developments do have more weighty and mainstream antecedents than progressives believe in the Civil War interpretations set forth in the *Prize Cases*, but at the same time that these antecedents do not go as far as conservatives would like in justifying executive unilateralism and a disregard of international law.

Let me be clear about the ambiguity of what exactly the history of U.S. foreign relations law in the Civil War reveals. It does not, for instance, show unqualified acceptance of the shibboleth of an all-powerful, unencumbered Executive in foreign affairs even in times of war. Nor is it clear that judicial deference to the Executive in its interpretations of international law and other foreign relations matters, notwithstanding their invocation, is of central importance in the *Prize Cases*; it is important to grasp the context and ramifications of such deference. And, as a general matter, it is surely relevant that these interpretations were rendered under wartime conditions, when the Court has historically seemed a timid institution, and were forgotten almost as soon as they were rendered.

If the historical example of the Civil War interpretations of the foreign affairs Constitution yields anything of value to future generations, it may be the unanimous emphasis placed by all the major players in the Executive and Judicial Branches on contemporaneous international law as a legitimate referent and gap-filler in light of perceived ambiguity in the American constitutional document on the very important legal questions at issue. What is also clear is that, by contrast to the modern period, the state-based, war-permissive regime of international law at the time generally favored the Executive's interpretations which shaded to maximal use of armed force and war prosecution. Put another way, international law seemed to allow the President to do what U.S. constitutional law would not allow; this is different from now, where international law is perceived as limiting what the President might lawfully do in wartime under U.S. law alone. The underlying point may be that those constitutionalists, generally of a progressive, peace-favoring ilk, who support the role of international law in U.S. constitutional interpretation should be prepared to take the bitter with the sweet and accept the possibility that international law might support not only limitations on presidential war powers but also expansions of it.

RESPONSES

