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United States v. Steinmetz: The Legal Legacy of the Civil War, Revisited

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UNITED STATES V. STEINMETZ: THE LEGAL LEGACY OF THE CIVIL WAR, REVISITED

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I. INTRODUCTION

One of the enduring and yet unresolved issues concerning the Civil War is its legal nature: Was it an insurrection or an international war?[1] During the war and since, the United States courts have repeatedly been called upon to determine the status of property which was under the control of the Confederacy and

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1. An insurrection is an "organized and armed uprising for public political purposes." ALFRED H. KELLEY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 408 (4th ed. 1970). Insurgents do not possess the belligerent rights of sovereign states and are subject to prosecution as criminals under the United States Constitution. *Id.* at 409. An international war, by contrast, is a conflict between two sovereign states, each possessing full belligerent rights according to international law. *Id.*

its agents during the Civil War. In the process of making such determinations, the courts have reopened questions about the war's legal status. *United States v. Steinmetz*[2] is such a case.

In December 1990 the United States filed an action in replevin under the admiralty jurisdiction of the United States District Court for the District of New Jersey seeking the return of a bell believed to be the ship's bell from the Confederate raider *C.S.S. Alabama*.[3] The *C.S.S. Alabama* was sunk by the Union ship *U.S.S. Kearsarge* off the coast of Cherbourg, France, in June 1864 in a celebrated Civil War naval battle.[4] The defendant, Steinmetz, an antique dealer, had obtained the bell in 1979 in England and brought it back to his home in New Jersey.[5] The district court found for the United States.[6] The judgment of the district court was subsequently affirmed by the Court of Appeals for the Third Circuit.[7] As we shall see, the *Steinmetz* case forced the courts to confront the ambiguous legal status of the Civil War but not, ironically, to resolve it.

In February 1861 decades of sectional conflict culminated in the formation of the Confederate States of America by seven southern states which had seceded in the aftermath of Abraham Lincoln's election as president. Advocates of secession had long contended that secession was constitutional and that the federal government and foreign powers alike would be obliged to recognize the legality and sovereignty of a government of the seceded states.[8] In March 1861, in his first inaugural address, President Lincoln countered this claim with his insurrection theory. President Lincoln declared that secession was legally void and that any acts against the United States taken by the seceded states and their newly formed government would be considered "insurrectionary" and treasonous.[9]

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2. 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

3. *Steinmetz*, 973 F.2d at 215.

4. United States v. Steinmetz, 763 F. Supp. 1293, 1294 (D.N.J. 1991), *aff'd*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

5. *Steinmetz*, 763 F. Supp. at 1297.

6. *Id.* at 1300.

7. *Steinmetz*, 973 F.2d at 224.

8. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 37-41, 234-35, 239-40 (1988).

9. ABRAHAM LINCOLN, HIS SPEECHES AND WRITINGS 582-83 (Roy P. Balser ed., Kraus Reprint Co. 1969) (1946).

After hostilities broke out in April 1861, Lincoln and other Northern leaders clung, in their rhetoric, to the notion that the war was nothing more than an insurgency—the United States never formally declared war, refused to recognize as sovereign the Confederate States of America, and consistently referred to Confederates as traitors.[10] As the war progressed, however, Northern rhetoric was increasingly at odds with Northern policies. The federal government found it impractical to treat the Confederates as criminals and treated them instead as belligerents.[11]

Nowhere was the gulf between rhetoric and policy more evident than in the conduct of the war on the high seas. In one of his first official acts after the Confederate bombardment of Fort Sumter, President Lincoln announced the blockade of the Southern ports.[12] To do so was, according to international law, virtually to recognize the belligerent status of the Confederacy.[13] But Lincoln refused to concede that the blockade had such legal implications. In announcing the blockade, he also declared:

> [I]f any person, under the pretended authority of the said [Confederate] States, or under any other pretense, shall molest a vessel of the United States, or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy.[14]

The punishment for piracy, as for treason, was death.[15] Thus, with Lincoln's establishment of the blockade, the dual theory of the Civil War was born.

The forging of this dual theory of the war by the executive

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10. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 59-65 (rev. ed. 1964).

11. MCPHERSON, *supra* note 8, at 387-88.

12. *See* MCPHERSON, *supra* note 8, at 313.

13. *See* RANDALL, *supra* note 10, at 69. In the nineteenth century, as in the earlier times, the principles of international maritime law were not codified and were the subject of bitter debate among contending nations. See JOHN HATTENDORF, MARITIME CONFLICT IN THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 101-13 (Michael Howard et al. eds., 1994). While the exact nature of belligerent rights was in dispute, in practice, belligerents typically asserted the right to seize enemy property, to institute a blockade, and to take prisoners of war.

14. Proclamation No. 4, 12 Stat. 1258, 1259 (1861).

15. Act of May 15, 1820, ch. 113, § 2, 3 Stat. 600; Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510.

branch was no accident. President Lincoln and the Union Congress recognized that for political reasons it was impossible to concede full belligerent status to the Confederacy because this would amount to a recognition of sovereignty and thus, implicitly, of the legality of secession. On the other hand, it was impractical to fight a full-scale war as if it were an insurrection. Such an approach would presumably have forced the United States to put on trial for treason every person involved in the Confederacy's war effort. By fighting the war as if both sides were belligerents while at the same time insisting that it was a mere insurrection, the United States could simultaneously exploit both the practical and the political expediencies.[16]

The United States Supreme Court had an opportunity to resolve the contradiction in the United States position in a case early in the war that challenged the legal basis for the blockade. In the *Prize Cases*,[17] the owners of four ships captured by United States forces pursuant to the blockade challenged the seizure of their vessels on the ground that without a prior declaration of war by Congress, Lincoln's creation of a blockade, which is recognized under the law of nations as an instrument of war, was unconstitutional and therefore invalid.[18] The owners argued that if there was no war, then Lincoln could not usurp the role of Congress by taking it upon himself to "declare war . . . and make rules concerning captures on land and water."[19] The Supreme Court in the *Prize Cases* resolved the issue of the war's legal status primarily on practical grounds, recognizing the Confederacy as a belligerent power and stating that the defendants

> cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.[20]

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16. *See* HENRY D. SHAPIRO, CONFISCATION OF CONFEDERATE PROPERTY IN THE NORTH 3 (1962).

17. The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha, The Schooner Brilliante, 67 U.S. (2 Black) 635 (1862) [hereinafter *Prize Cases*].

18. *Prize Cases*, 67 U.S. (2 Black) at 643-44.

19. *Id.* at 647 (quoting U.S. CONST. art. I, § 8, cl. 11).

20. *Id.* at 669-70. The Court also suggested that Congress's ratification of the blockade in July 1861 retroactively authorized the blockade. *Id.* at 670-71.

Most interesting for these purposes, however, was the Court's approbation of the United States's dual treatment of the war. While recognizing the Confederacy's *de facto* belligerent status, the Court also supported and reinforced the ambiguity that marked the United States's characterization of the war:

> Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents .... When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.[21]

Thus, the Court determined, it is in the nature of civil war that belligerent status is granted to the insurgents *sub silentio* while the sovereign continues to call them traitors:

> It is not the less a civil war, with the belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations.[22]

The *Prize Cases*, it might be said, constituted the first challenge to the contradictory approach that the United States employed in its conduct of the Civil War and resulted in the federal government's first success at turning back such a challenge. *United States v. Steinmetz*,[23] 130 years later, constituted the latest such challenge.

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21. *Id.* at 666-67 (emphasis omitted).

22. *Id.* at 669.

23. 763 F. Supp. 1293 (D.N.J. 1991), *aff'd*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

II. THE EXPLOITS OF THE *ALABAMA*

The *Steinmetz* case, no less than the *Prize Cases*, had its origins in the blockade, for the blockade in large part accounts for the controversial origins of the Confederate raider *Alabama*. When the blockade was established in April 1861, the fledgling Confederate States of America had no navy of which to speak.[24] Not only did the Confederacy lack a maritime tradition, a merchant marine, and a shipbuilding industry, but it was denied, by the formidable Northern navy's blockade, access to its own ports. Under such adverse conditions, Confederate Secretary of the Navy Stephen R. Mallory had to rely on clever subterfuge and help from allegedly neutral foreign powers in order to build a navy.[25]

In May 1861, Mallory dispatched special agent James D. Bulloch to Liverpool, England, to arrange for the building of Confederate ships in English shipyards. What Mallory had in mind was the construction of a fleet of high-speed cruisers which could disrupt Northern commerce and run the blockade.[26] Britain's Foreign Enlistment Act,[27] which prohibited British shipyards from outfitting warships for belligerent powers, technically made Bulloch's mission illegal.[28] But together with some powerful British supporters who welcomed the opportunity to undermine United States naval strength, Bulloch found a loophole in the law—he would build his Confederate steamers in British ports but outfit them with their guns and ammunition elsewhere.[29]

The first Confederate raider built in Britain under Bulloch's aegis was the *C.S.S. Florida*. The *Florida*, disguised as a mer-

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24. WARREN F. SPENCER, THE CONFEDERATE NAVY IN EUROPE 2 (1983); RAPHAEL SEMMES, THE CONFEDERATE RAIDER *ALABAMA*: SELECTIONS FROM MEMOIRS OF SERVICE AFLOAT DURING THE WAR BETWEEN THE STATES 27 (1962).

25. WILLIAM M. FOWLER, JR., UNDER TWO FLAGS: THE AMERICAN NAVY IN THE CIVIL WAR 40-44 (1990).

26. SPENCER, *supra* note 24, at 3-4.

27. Foreign Enlistment Act, 59 Geo. 3, ch. 69 (Eng.).

28. *See* SPENCER, *supra* note 24, at 9. This was the basis upon which the Geneva Arbitration Tribunal in 1872 awarded damages to the United States against Great Britain. SPENCER, *supra* note 24, at 9, and *infra* notes 75 and 201.

29. CHESTER G. HEARN, GRAY RAIDERS OF THE SEA: HOW EIGHT CONFEDERATE WARSHIPS DESTROYED THE UNION'S HIGH SEAS COMMERCE 6-7, 52-53 (1992).

chant vessel, left Britain and headed for the Bahamas, where she was outfitted with weapons. She then successfully ran the Union blockade and picked up a crew at Mobile, Alabama.[30] Following the example set by earlier Confederate cruisers such as the *C.S.S. Sumter*[31] and *C.S.S. Nashville*, both of which had been converted from merchant ships to warships in Confederate ports, the *Florida* soon established herself as a dreaded foe of Union shipping interests.[32] In her brief career, she captured some twenty-five prizes, most of which she torched and sunk.[33] In November 1864, the *Florida* was captured by Union forces and subsequently sank when a United States Army steamer crashed into her.[34]

Even as the *Florida* campaigned on the high seas, a second, more modern Confederate cruiser, the *C.S.S. Alabama*, was being built in the Liverpool Laird shipyards.[35] Able to sail swiftly under steam or sail or a combination of both; large enough to sustain herself without frequent stops in port; armed to take on warships as well as merchant vessels, the *Alabama* was by far the most powerful of the Confederate cruisers.[36] While allegedly taking some civilians on a trial run, the *Alabama*, whose construction had been carefully tracked by British and American officials, left Liverpool on July 29, 1862.[37] After leaving her civilian passengers on a tug, the ship headed to the Azores, where she was armed and put under the command of Captain Raphael Semmes.[38]

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30. FOWLER, *supra* note 25, at 284; SPENCER, *supra* note 24, at 34, 46.

31. Raphael Semmes, the future captain of the *Alabama*, was assigned command of the *Sumter* in April 1961. SPENCER, *supra* note 24, at 32.

32. FOWLER, *supra* note 25, at 284.

33. HEARN, *supra* note 29, at 100. *But see* FOWLER, *supra* note 25, at 284 (stating that the *Florida* sunk 37 ships); SPENCER, *supra* note 24, at 165 (55 ships).

34. HEARN, *supra* note 29, at 148-52; FOWLER, *supra* note 25, at 284-86.

35. HEARN, *supra* note 29, at 102-09; FOWLER, *supra* note 25, at 286-87.

36. FOWLER, *supra* note 25, at 286-87. The *Alabama* was 230 feet in length, 32 feet in breadth, 20 feet in depth, and drew, when fully provisioned, 15 feet of water. SEMMES, *supra* note 24, at 33.

37. EDNA BRADLOW & FRANK BRADLOW, HERE COMES THE *ALABAMA* 16 (1958); FOWLER, *supra* note 25, at 287-88.

38. FOWLER, *supra* note 25, at 286-88. Semmes had already achieved renown as captain of the *Sumter*. *See supra* note 31 and accompanying text. Lieutenant John McIntosh Kell and most of the other officers on the *Alabama* had likewise served on the *Sumter*. The rest of the *Alabama*'s crew consisted largely of British sailors who had been persuaded by promises of prize money to join Semmes. *See* BERN ANDER-

The *Alabama* quickly lived up to Confederate expectations. She took her first prize, the whaler *Ocmulgee*, on September 5, 1862, and set her afire. For nearly two weeks, until the whaling season in the Azores drew to a close, the *Alabama* struck blow after blow to the Northern whaling fleet, destroying ten ships in all. Because the oil from whales, which was used in lamps, was in particularly great demand during wartime, the Northern people keenly felt the effects of the *Alabama*'s destruction.[39] The *Alabama* next headed to Newfoundland and then into the Gulf of Mexico, making a number of captures on the way.[40] In the Gulf of Mexico, she engaged and defeated the *U.S.S. Hatteras*, the only victory for a Confederate cruiser over a federal warship on the high seas.[41] She racked up an impressive list of captures off the coast of Brazil and in the Indian Ocean, then made her way in January 1864 to the Cape of Good Hope.[42]

By 1864, the *Alabama* had done a stunning amount of damage to Northern commerce. She had captured and burned forty-six United States ships, at an estimated cost to the United States of more than $3,000,000.[43] The ship herself was in dire need of an overhauling—in almost two years on the high seas she had never visited a Confederate port and taken the time for major repairs—but her reputation was stronger than ever.[44] In Cape Town, Semmes proudly recounted in his memoirs "much curiosity was manifested to see the ship . . . . [C]rowds gathered to look curiously upon her and compare her appearance with what they had read of her."[45]

The international press had followed the *Alabama*'s every move from afar, denouncing her tactics but conceding their effec-

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SON, BY SEA AND BY RIVER 192 (1962).

39. FOWLER, *supra* note 25, at 288; HEARN, *supra* note 29, at 165-66; BRADLOW & BRADLOW, *supra* note 37, at 32, 35.

40. FOWLER, *supra* note 25, at 288; *see also* HEARN, *supra* note 29, at 165-71 (documenting the capture of the *Ocean Rover*, *Alert*, *Starlight*, *Weathergauge*, *Altamaha*, *Benjamin Tucker*, *Courser Virginia*, and *Elisha Dunbar*).

41. FOWLER, *supra* note 25, at 288; HEARN, *supra* note 29, at 188.

42. FOWLER, *supra* note 25, at 288-89.

43. HEARN, *supra* note 29, at 195, 209.

44. SEMMES, *supra* note 24, at 366; HEARN, *supra* note 29, at 209; JOHN M. TAYLOR, CONFEDERATE RAIDER: RAPHAEL SEMMES OF THE ALABAMA 193 (1994).

45. SEMMES, *supra* note 24, at 330.

tiveness.[46] As he sailed away from the Cape of Good Hope towards Europe in 1864, Semmes was delighted to read in an English newspaper a positive assessment of the Confederate cruisers by the President of the British Board of Trade. "According to his statistics," Semmes recounted, "we had destroyed, or driven for protection under the English flag, in round numbers, one-half of the enemy's ships engaged in the English trade. We did even greater damage to the enemy's trade with other powers."[47] Buoyed by such assessments and yet alarmed by recent Confederate reverses on land, Semmes headed for Cherbourg, France, and what would be his final battle.[48]

III. THE BATTLE OF THE *ALABAMA* AND THE *KEARSARGE*

On June 11, 1864, the *Alabama* passed through the English Channel and entered the harbor of Cherbourg, France. Semmes had intended to unload the prisoners from the last two merchant ships[49] which he had captured and burned en route from Cape Town, to undertake a complete overhaul and repair of the *Alabama*, and to release his crew for a well-earned vacation.[50] But because the docks at Cherbourg were entirely state-owned, Semmes first had to obtain the permission of the French government to dock his ship.[51] Unfortunately for Semmes, Emperor Napoleon III was away at Biarritz in southern France and could not be reached immediately to grant permission for the *Alabama* to dock.[52] It was this delay, and the French government's subsequent decision not to allow Semmes to dock, that forced the *Alabama* to remain anchored inside the Cherbourg harbor and provided the Union with its long-awaited opportunity to put an end to the *Alabama*'s devastating exploits.

While the *Alabama* was heading for France, the Union man-

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46. *See* BRADLOW & BRADLOW, *supra* note 37, at 36-37.

47. SEMMES, *supra* note 24, at 364.

48. *See* SEMMES, *supra* note 24, at 362, 366.

49. The *Rockingham* and *Tycoon* were the *Alabama*'s final prizes. *See* BRADLOW & BRADLOW, *supra* note 37, at 98.

50. *See* BRADLOW & BRADLOW, *supra* note 37, at 98.

51. *See* HEARN, *supra* note 29, at 221; BRADLOW & BRADLOW, *supra* note 37, at 98.

52. HEARN, *supra* note 29, at 221.

of-war, *U.S.S. Kearsarge*, was on duty in the English Channel. This third-rate "screw-sloop,"[53] considered too slow for blockade duty, was sent to the North Atlantic to track down Confederate raiders.[54] In September 1863 it arrived at the harbor of Brest, France, to watch over the *Florida*, which was docked there for repairs.[55] The *Kearsarge*'s captain, John A. Winslow, spent the next nine months patrolling the French harbors at Brest, Cherbourg, and Calais to prevent Confederate vessels docked there from leaving.[56] In June 1864 the *Kearsarge* was positioned in the English Channel watching over the Confederate cruiser *C.S.S. Rappahannock* which was docked in the harbor off Calais awaiting further orders.[57] Upon hearing of the *Alabama*'s proximity, Winslow moved his patrol to Cherbourg. Arriving on June 14, 1864, and positioning the *Kearsarge* just inside Cherbourg harbor, Winslow was prepared to prevent the *Alabama* from leaving the harbor.[58] Instead, Semmes decided to do battle and communicated his intentions to Winslow.[59]

On June 19, 1864, after preparing for battle, the *Alabama* steamed out of Cherbourg harbor, accompanied into international waters by the French iron-clad frigate *Couronne*.[60] In the preceding days the news of the coming battle had circulated throughout France. Thousands of onlookers arrived and lined the harbor to watch the battle. One spectator, John Lancaster, an Englishman vacationing with his family, sailed his yacht, the *Deerhound*, out of the harbor ahead of the *Alabama* to position her within close range of the battle site.[61]

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53. SPENCER, *supra* note 24, at 169.

54. FOWLER, *supra* note 25, at 290; HEARN, *supra* note 29, at 37.

55. HEARN, *supra* note 29, at 111.

56. SPENCER, *supra* note 24, at 169.

57. SPENCER, *supra* note 24, at 184.

58. SEMMES, *supra* note 24, at 368; Report from Captain John A. Winslow to Secretary of the Navy Gideon Welles (June 19, 1864), *in* 3 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION 59 (Series I 1896) [hereinafter OFFICIAL RECORDS].

59. SEMMES, *supra* note 24, at 368.

60. SEMMES, *supra* note 24, at 370-71. The French were greatly concerned with maintaining their neutrality and were determined that the battle not occur in French waters. *See* SPENCER, *supra* note 24, at 10-13; SEMMES, *supra* note 24, at 370.

61. SEMMES, *supra* note 24, at 371. It was the *Deerhound* that rescued Captain Semmes after the battle. *See infra* note 73 and accompanying text.

The battle that ensued was quick and decisive. When the *Alabama* was seven miles from the shore, the *Kearsarge*, ready and waiting, turned and steamed directly toward her. When the *Kearsarge* was about one mile away, the *Alabama* opened fire.[62] The *Kearsarge* stopped her approach at about 900 yards and returned fire.[63] Both ships fought with their starboard batteries throughout the battle.[64] Although on the surface it appeared that the warships were almost equally matched,[65] the *Kearsarge* had a secret weapon. Concealed on its hull under wooden planking lay rows of iron chain mail. This armor made the *Kearsarge* virtually impervious to the raking fire of the *Alabama*'s battery, causing most of the shots to ricochet off the ship and land in the sea.[66]

For a little over an hour the ships fought in circles moving westward around a common center with their broadsides facing each other.[67] Finally, as the fires on the *Alabama* were rapidly being extinguished by the water pouring into the engine room, Captain Semmes made one last attempt to turn and head for neutral waters but was cut off by the *Kearsarge* which quickly positioned herself between the sinking ship and the shore. Recognizing defeat and sinking fast, the *Alabama* lowered her flag

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62. SEMMES, *supra* note 24, at 372-73; Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (July 30, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 79.

63. Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (July 30, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 79.

64. SEMMES, *supra* note 24, at 373.

65. SEMMES, *supra* note 24, at 369. The *Alabama* had 149 crewmen and eight guns (six 32-pounders, one 8-inch, and one rifled 100-pounder) and the *Kearsarge* had approximately 160 crewmen and seven guns (two 11-inch, one 28-pounder rifle, and four light 32-pounder guns). Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (June 20, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 59. SEMMES, *supra* note 24, at 369.

66. One shell from the *Alabama* lodged in the stern post of the *Kearsarge* and, but for a defect in its cap, might have proven fatal had it exploded. Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (June 20, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 59; SEMMES, *supra* note 24, at 378. In his memoirs, Semmes proudly asserts that this shell was the only trophy that the enemy ever got from the *Alabama*. SEMMES, *supra* note 24, at 762. Never did he suspect that over a century later, another trophy from the *Alabama* would find its way into the hands of the federal government.

67. SEMMES, *supra* note 24, at 373; Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (July 30, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 79.

and raised the white flag of surrender.[68] Semmes wrote in his memoirs that even after this offer of surrender, the *Kearsarge* fired upon the *Alabama*. Winslow, by contrast, claimed that after the *Alabama*'s flag was lowered, the *Alabama* continued to fire. Fearing some ruse, Winslow did not let up until he saw the *Alabama*'s lifeboats lowered.[69]

As the ship went down, the wounded were lowered into boats and Semmes gave the order "Every man save himself who can!"[70] Semmes described the descent of the *Alabama*:

> A noble Roman once stabbed his daughter, rather than she should be polluted by the foul embrace of a tyrant. It was with a similar feeling that Kell and I saw the *Alabama* go down. We had buried her as we had christened her, and she was safe from the polluting touch of the hated Yankee![71]

No one from the *Kearsarge* ever boarded the *Alabama*, so as she sank she carried to a watery grave all of her cargo and accouterments.[72]

Semmes and thirty-nine of his crew were picked out of the water by the English yacht *Deerhound* which, much to the surprise of Captain Winslow, then turned toward England and ferried its soggy passengers to freedom in Southampton. Semmes was feted by the English and subsequently promoted to Admiral by the Confederacy.[73] The remaining prisoners were taken back to France and paroled by Winslow who claimed he had neither the room nor the men necessary to guard them.[74] For this he was roundly reprimanded by the United States Secretary of the Navy, Gideon Welles:

> In paroling the prisoners, however, you [Winslow] committed

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68. SEMMES, *supra* note 24, at 373.

69. Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (June 21, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 60. For these conflicting accounts, compare Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (July 30, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 80 with SEMMES, *supra* note 24, at 373.

70. SEMMES, *supra* note 24, at 379.

71. SEMMES, *supra* note 24, at 381.

72. *See* SEMMES, *supra* note 24, at 375.

73. SPENCER, *supra* note 24, at 189-90; SEMMES, *supra* note 24, at 374.

74. Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (July 30, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 78.

> a grave error. The *Alabama* was an English-built vessel, armed and manned by Englishmen; has never had any other than an English register; has never sailed under any recognized national flag since she left the shores of England; has never visited any port of North America, and her career of devastation since she went forth from England is one that does not entitle those of her crew who were captured to be paroled. This Department expressly disavows that Act. Extreme caution must be exercised that we in no way change the character of this English-built and English-manned, if not English-owned, vessel, or relieve those who may be implicated in sending forth this robber upon the seas from any responsibility to which they may be liable for the outrages she has committed.[75]

Nevertheless, Captain Winslow was promoted to the rank of Commodore and continued his watch over Confederate vessels in Europe for the balance of the war.[76] Within a year of the sinking of the *Alabama*, the Civil War ended and the belligerents began the slow and painful process of reconstructing the nation.

IV. THE ODYSSEY OF THE *ALABAMA*'S BELL

In 1979, Richard Steinmetz, an antique dealer from Westwood, New Jersey, was in England at an antique gun show when another dealer approached him and told him that he knew the whereabouts of the bell from the Confederate raider *Alabama*.[77] His curiosity piqued, Steinmetz traveled to Hastings, England, where he saw the bell, inscribed with *C.S.S. Alabama*, and received documentation as to its authenticity. Steinmetz went to great lengths to confirm the authenticity of the bell. He traveled to Greenwich where he studied the plans of the *Ala-*

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75. Letter from Secretary of the Navy Gideon Welles to Captain John A. Winslow (July 12, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 75. This interpretation of Britain's responsibility for the devastation visited upon American interests during the war by the *Alabama* formed the basis for the United States's recovery of $15.5 million awarded by the Geneva tribunal which arbitrated the famous *Alabama Claims* case. J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 671-77 (2d ed. 1964).

76. *See* Letter of Acting Master Sumner to the President of the United States (Feb. 23, 1865), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 82.

77. United States v. Steinmetz, 973 F.2d 212, 215 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

bama and to Guernsey to interrogate local residents.[78]

He was told that in 1936 a fisherman named Lawson from the Isle of Guernsey, one of the British Channel Islands off the western coast of France, dove down and retrieved the brass bell from the *Alabama*.[79] With war rumors in the air, the demand for certain metals was high and Guernsey fishermen found it more profitable to strip brass and copper from sunken wrecks than to ply the sea for haddock.[80] Lawson, however, apparently traded the bell for drinks at a local bar. The bar was subsequently bombed by the British when Guernsey fell into German hands during World War II. After the war, the bell was once again salvaged and exchanged hands until it ended up with an antique dealer in Hastings, England.[81] The information Steinmetz gathered, together with the condition and style of the bell and the fact that it was covered with nicotine (which was consistent with its sojourn in an English pub) convinced him of its authenticity.[82] He then obtained the bell in a barter deal for approximately $12,000 worth of antique guns.[83]

Upon his return to the United States, Steinmetz offered the bell to the United States Naval Academy, but the Academy was not in a financial position to purchase it. Eleven years later, Steinmetz decided to put the bell up for auction at the Harmer Rooke Gallery in Manhattan.[84] The gallery placed a full-page advertisement for the item in its catalogue.[85] This time, the United States Naval Historical Center in Washington, D.C., learned of the auction and immediately claimed that the bell was the property of the United States.[86] The bell was delivered over to the district court in New Jersey and litigation ensued.

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78. *Id.*

79. *Id.*

80. United States v. Steinmetz, 763 F. Supp. 1293, 1297 (D.N.J. 1991), *aff'd*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

81. *Steinmetz*, 973 F.2d at 215.

82. Transcript of Summary Judgment Proceedings at 64, United States v. Steinmetz, 763 F. Supp. 1293 (D.N.J. 1991) (90-5036), *aff'd*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

83. *Steinmetz*, 973 F.2d at 215.

84. *Id.*

85. United States v. Steinmetz, 763 F. Supp. 1293, 1297 (D.N.J. 1991), *aff'd*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

86. *Steinmetz*, 973 F.2d at 315.

At that time, there had been no formal determination as to the authenticity of the bell. Steinmetz clearly had been convinced of its authenticity when he bought it. The government, presumably in order to insure that it would own this potentially significant artifact, stipulated to the authenticity of the bell for the purposes of litigation. Later evidence, however, has cast some doubt upon its authenticity, and there are ongoing efforts to make a final determination.[87] Because of the stipulation, however, the issue of authenticity was neither briefed by the parties nor addressed by the courts.

At trial, the government made two arguments for its rightful ownership of the bell. First, it argued that the *Alabama* was captured by the *Kearsarge* and therefore the Confederate vessel and all its property onboard passed to the United States at the

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87. There are a number of factors which raise questions about the bell's authenticity. First, it is only about one foot high. On a 230 foot ship, such a bell might not serve its presumed purpose of informing the crew of the hours of the day. Second, although the bell is engraved with the words "C.S.S. Alabama," it is unlikely that it was made or engraved in the Liverpool shipyard where the *Alabama* was constructed. This fact, however, can be reconciled with the secrecy involved in the construction of Confederate warships. It is quite plausible that the bell would have been constructed and engraved elsewhere and then put on the *Alabama* after construction, possibly in the Azores, where the ship took on its crew, or in Brazil or Capetown. In addition, there is a person in England who apparently is claiming to have duped Mr. Steinmetz into buying the bell by, among other things, drawing up false papers. The veracity of his claims, however, has not been fully investigated. Letter from Dr. William S. Dudley, Senior Historian, Naval Historical Center, to Susan Poser (Apr. 11, 1995) (on file with the *Alabama Law Review*).

The Navy Museum at the Naval Historical Center, located at the Washington Navy Yard in Washington, D.C., where the bell is currently on display, is investigating these issues and is in the process of gathering evidence in an attempt to make a determination as to the bell's authenticity. The investigation is under the direction of the Center's senior historian, Dr. William S. Dudley.

Meanwhile, a French maritime archaeological team has been recovering pieces of the *Alabama* and its cargo since 1984. In 1988, the *C.S.S. Alabama* Association, consisting of French and American experts, was formed under the auspices of the French Ministry of Culture and Communication to oversee the archaeological expedition. These recovery efforts were recently chronicled in an article entitled "The Wreck of the C.S.S. Alabama, Avenging Angel of the Confederacy," in *National Geographic*, December 1994. The French archaeologist leading the recovery efforts, retired French Navy Captain Max Guérout, had enough doubt about the authenticity of the bell that he made no reference to it in the article, going so far as to state that "[f]or 120 years the *Alabama* was considered lost. The water was too deep, the currents too wicked, to consider salvage." Max Guérout, *The Wreck of the C.S.S. Alabama*, NATIONAL GEOGRAPHIC, Dec. 1994, at 69. The recovery efforts have not to date, however, recovered a bell.

time of the battle.[88] Alternatively, the government contended that even if the fact that the *Alabama* sank without ever having been boarded by Union forces precluded a capture, the ship and its accouterments, the property of the Confederacy at the time of its sinking, automatically became the property of the United States at the end of the Civil War by operation of the doctrine of succession.[89] It is the latter doctrine, on which the court of appeals based its affirmance of the district court's judgment for the government,[90] with which this Article is primarily concerned.

In his appeal, Steinmetz countered the government's succession argument by contending that the *Alabama* was, by all Union accounts, not Confederate property but rather a privately owned pirate vessel and therefore not subject to the doctrine of succession.[91] Further, Steinmetz argued, even if the Confederacy did own the *Alabama*, the succession doctrine applies only to sovereign nations.[92] Because the Confederacy never acquired the status of a sovereign nation in the eyes of the Union, he argued, the succession doctrine was not applicable.[93]

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88. *Steinmetz*, 763 F. Supp. at 1297-98.

89. *Id.* at 1298.

90. *Steinmetz*, 973 F.2d at 223. The district court found for the government on both theories, accepting the government's argument that the *Kearsarge*, by positioning herself between the *Alabama* and the harbor and thereby preventing any escape by the *Alabama* before it sank, was in "constructive possession" of the *Alabama*. *Steinmetz*, 763 F. Supp. at 1298. As the appeals court noted, however, the theory of constructive possession had never been endorsed by a court in a situation in which a certain sign of surrender was not followed by actual possession of the vessel. *Steinmetz*, 973 F.2d at 217 (distinguishing The Rebeckah, 165 Eng. Rep. 158 (1799) and The Alexander, 1 F. Cas. 357 (C.C.D. Mass. 1813) (No. 164), *aff'd*, 12 U.S. (8 Cranch) 169 (1814)). Moreover, although the various accounts are conflicting, it is possible that Captain Winslow's fear that Semmes was not surrendering but rather attempting some *ruse de guerre* in lowering his colors, may have been well-founded. Semmes himself suggested that he did make one attempt to escape to shore. *See* SEMMES, *supra* note 24, at 384. He also stated that in striking his flag, he had merely offered surrender, which offer was never accepted because the *Alabama* sank too quickly. *See* SEMMES, *supra* note 24, at 384. If there was no real surrender, then the government's theory of constructive capture must necessarily fail. *See Steinmetz*, 973 F.2d at 217.

As credibility determinations were impossible for the court to make concerning the accounts of an event that occurred 130 years ago and were surely "skewed by unspent passions" of the participants, *Steinmetz*, 973 F.2d at 214, the court of appeals was wise to avoid making a determination of the capture issue.

91. *Steinmetz*, 973 F.2d at 218.

92. *Id.* at 220.

93. *Id.* at 218.

The government's succession argument forced the courts that heard this case to confront two fundamental questions central to the uncertain legal nature of the Civil War. First, were the Confederates on the high seas enemies or pirates? Second, how should the property amassed by the Confederacy over a four-year period be treated once the Confederacy was declared a nullity?

V. SUCCESSION

A. The Question of Piracy

The essence of Steinmetz's piracy argument was that the *Alabama* was the private property of traitors to the United States, traitors whose actions clearly defined them as pirates.[94] To designate the *Alabama* as a pirate vessel is, Steinmetz argued, to remain true to the rhetoric and policies of the federal government itself, which repeatedly characterized Confederate raiders as pirates, passed an antipiracy act, and even brought to trial Confederate seamen on charges of piracy. If the *Alabama* was not public property, he further argued, then the United States government had no claim to it and could not invoke the rule of succession as a justification for seizing the *Alabama*'s bell.[95]

Steinmetz mustered considerable historical evidence to support his assertion that the *Alabama* was a pirate vessel. Throughout the war, Union officials and the Northern press made it their practice to refer to all Confederate ships as pirate ships. On April 19, 1861, as President Lincoln announced the Union blockade of the South, he declared that all those who acted under the "pretended authority" of the Confederacy to "molest a vessel of the United States" would be prosecuted under piracy laws.[96] That is, rather than being treated as prison-

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94. *Id.* Piracy has been defined as an act of aggression unauthorized by the law of nations and "utterly without sanction from public authority or sovereign power." Harmony v. United States, 43 U.S. (2 How.) 210, 232 (1844); *see* 61 AM. JUR. 2D *Piracy* § 6 (1987).

95. *Steinmetz*, 973 F.2d at 218.

96. Proclamation No. 4, 12 Stat. 1258, 1259 (1861); *see supra* text accompanying

ers of war and paroled, exchanged, or imprisoned according to international law and custom, Confederate seamen would be tried for the capital crime of piracy, and if found guilty, would be executed.[97]

Congress followed Lincoln's lead with its enactment of "An Act to Protect the Commerce of the United States and Punish the Crime of Piracy."[98] The Act provided that captured Confederate commerce raiders were to be treated as pirate ships and established procedures by which such captured vessels would be condemned in United States courts before they legally became Union property.[99] Secretary of State William Seward and Secretary of the Navy Gideon Welles repeatedly referred to the *Alabama* as a pirate ship, and when Congress passed its resolution honoring Captain Winslow and the *Kearsarge*, it praised him for having brought down "the piratical craft *'Alabama.'*"[100] The Northern press considered the *Alabama*'s British origin proof of its piratical status.[101] The characterization of his men as pirates vexed the *Alabama*'s Captain Semmes, who wrote bitterly in his memoirs that "[t]hey could as logically have called General Robert E. Lee a *bandit* as myself a *pirate*; but logic was not the forte of the enemy, either during or since the late war."[102]

His bitterness notwithstanding, Semmes must have known that the Union rhetoric did have a certain political logic.[103]

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note 16.

97. *See infra* text accompanying notes 112-37.

98. Act of Aug. 5, 1861, ch. 48, 12 Stat. 314.

99. Ch. 48, § 2, 12 Stat. 314.

100. H.R.J. Res. 3, 13 Stat. 565 (1864). Seward based his charge of piracy on his belief that the *Alabama* was English property (having been built in an English port); she was in his mind not a Confederate warship but a "British pirate." BRADLOW & BRADLOW, *supra* note 37, at 18; *see* Report of Captain John A. Winslow to Secretary of the Navy Gideon Welles (July 8, 1864), *in* 3 OFFICIAL RECORDS, *supra* note 58, at 74.

101. TAYLOR, *supra* note 44, at 129.

102. SEMMES, *supra* note 24, at 45.

103. Notably, there were also commercial ramifications in the charges of piracy leveled against Confederate seamen. Since many of the insurance policies at the time contained piracy clauses, owners of ships harmed by Confederate raiders tried to use the government's rhetoric to their advantage. *See infra* note 184 and accompanying text. As Taylor explains: "[S]kippers and shipping companies alike sought to collect on their policies to no avail. The owner of the first ship Semmes [as captain of the *Sumter*] had burned, the *Golden Rocket*, had sued for compensation under a piracy clause but had lost in both state and federal courts." TAYLOR, *supra* note 54,

That rhetoric was intended to erase the customary line of distinction between pirates, privateers, and raiders (cruisers). Unlike pirates, who acted "without authority from any prince or state," privateers and cruisers, by definition, acted under the authority of sovereign states and obeyed the rules of war.[104] By designating Confederate ships as pirates and not privateers or cruisers, the Union sought to deny the legitimacy of the Confederacy. The term *pirate* was in essence a weapon in the battle for public opinion—to paint the Confederates as traitors and ruthless pirates would, Union leaders hoped, thwart Southern attempts to earn sympathy in the North and to win foreign recognition.[105]

Contrary to Northern rhetoric, or perhaps because of it, the Confederate government was very careful to establish its naval force legally and formally. In May 1861, the Confederate Congress authorized privateering—the destruction of private property at sea by privately armed vessels operating under a "letter of marque" or authorization from the Confederate government.[106] In order to regulate privateering, the Confederate government instructed privateers to bring their captured prizes to Confederate admiralty courts, where the claims of the various parties to a given capture could be adjudicated.[107] While Confederate privateers such as the *Savannah* and the *Jefferson Davis* did strike fear into the hearts of Northerners, privateering ultimately proved, because of the effectiveness of the Union blockade, to have little impact on the progress of the war.[108]

Far more devastating to Northern fortunes were the actions of cruisers such as the *Alabama*.[109] In contrast to privateers, cruisers were "owned by the government, and they were commanded by naval officers acting under a genuine commission."[110] Not only is it clear that the Confederacy financed the

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at 129. *See infra* note 133.

104. United States v. Smith, 27 F. Cas. 1134, 1135 (C.C.E.D. Pa. 1861) (No. 16,318); *see* TAYLOR, *supra* note 44, at 56.

105. *See* TAYLOR, *supra* note 44, at 71, 116.

106. ANDERSON, *supra* note 38, at 43-44.

107. ANDERSON, *supra* note 38, at 43-45; FOWLER, *supra* note 25, at 278. In 1863 the United States Congress passed a bill allowing President Lincoln to issue letters of marque to Union privateers. *See* BRADLOW & BRADLOW, *supra* note 37, at 35.

108. FOWLER, *supra* note 25, at 278-79; ANDERSON, *supra* note 38, at 43-45.

109. *See* ANDERSON, *supra* note 38, at 45.

110. 12 CONFEDERATE MILITARY HISTORY 99 (Clement A. Evans ed., 1899); *see*

building of raiders like the *Alabama*, but it is also clear that Semmes operated under a commission and that the *Alabama* sailed under a Confederate flag.[111] During the Civil War, the United States government persistently refused to recognize those facts in its rhetoric, for to do so would be to acknowledge the legitimacy of the Confederate navy and, by extension, of the Confederacy itself.

One irony of the *Steinmetz* case is that the present-day position of the United States with regard to Confederate sovereignty directly contradicts its Civil War era rhetoric. In the *Steinmetz* case, the United States based one of its claims to ownership of the *Alabama*'s bell on the assertion that the *Alabama* was—just as Semmes argued—indeed the public property of a legitimate nation, the Confederate States of America, and not a privately owned pirate vessel. Steinmetz contended, by contrast, that the United States had a legal obligation to uphold its wartime position. He argued for a consistency between Union wartime rhetoric and policy, reasoning that Union policies and laws, in harmony with Union rhetoric, designated Confederate vessels as piratical.[112]

Were the Union's policies with regard to Confederate pirates in fact in harmony with its rhetoric? The *Steinmetz* court answered this question in the negative, concluding that the Union's "references to piracy were more rhetorical than legal."[113] The Union did expend some effort backing up and enforcing its rhetoric about piracy. This effort included the prosecution of a number of Confederate crews for piracy. But rather than supporting Steinmetz's position, the outcomes of these trials demonstrate the motivation behind the piracy charges and the unwillingness of the Union, for political reasons, to carry the rhetoric to its logical conclusion. The most famous pirate trial, that of the crew of the *C.S.S. Savannah*, illustrates the gap between Union rhetoric and policy that typified the Union's dual theory of the war.

On the afternoon of June 4, 1861, the Confederate privateer

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supra text accompanying notes 30-48.

111. HEARN, *supra* note 29, at 153-60.

112. United States v. Steinmetz, 973 F.2d 212, 218-20 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

113. *Steinmetz*, 973 F.2d at 218-20.

Savannah, which had earlier captured the Union brig *Joseph*, was itself captured by the Union warship *U.S.S. Perry*. The thirty-two members of the *Savannah*'s crew were sent to New York, where they awaited trial on charges of piracy. Upon their arrival in New York, the pirates were marched in irons to the city jail, the Tombs, while a fascinated public watched from streets and windows. Throughout their stay at the Tombs, the pirates were objects of great media attention and public curiosity.[114]

On July 6, 1861, two weeks after the prisoners' ignominious arrival in New York, Confederate President Jefferson Davis angrily responded to the incident, writing to Lincoln:

> [T]his Government will deal out to the prisoners held by it, the same treatment and the same fate as shall be experienced by those captured on the *Savannah*; and if driven to the terrible necessity of retaliation, by your execution of any of the officers or crew of the *Savannah*, that retaliation will be extended so far as shall be requisite to secure the abandonment of a practice unknown to the warfare of civilized man, and so barbarous, as to disgrace the nation which shall be guilty of inaugurating it.[115]

The essence of Davis's complaint was that the *Savannah*'s seamen, incarcerated in a civilian jail and not a military one, were being treated as criminals and not as prisoners of war. Davis's letter was a tacit recognition that the United States did generally treat captive Confederate soldiers (as opposed to sailors) as prisoners of war, and thereby granted the Confederacy some *de facto* belligerent rights. Treatment of prisoners of war was relatively lenient in the first year of the war. Interrogations were often "gentle affairs," and it was common for a prisoner to be paroled pending an exchange—to be released if he vowed not to return to fighting until a prisoner on his own side had been released. The treatment of prisoners deteriorated as the war progressed, giving rise to prison camps such as Andersonville, a Confederate facility in Georgia infamous for its brutal conditions.[116]

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114. WILLIAM M. ROBINSON, JR., THE CONFEDERATE PRIVATEERS 49-57 (1928).

115. 2 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 432-33 (1870) (quoting letter of Jefferson Davis).

116. *See* GERALD F. LINDERMAN, EMBATTLED COURAGE: THE EXPERIENCE OF COMBAT IN THE AMERICAN CIVIL WAR 14-15, 237-38 (1987).

Davis's letter never received an official answer.[117] Ten days after he sent it, an indictment was handed down, charging the imprisoned privateers with ten counts of piracy in the capture of the *Joseph*.[118] Before the United States Circuit Court for the Southern District of New York, the prisoners pled not guilty to each of the counts, the conviction on any one of which was punishable, under a 1790 Act of Congress on piracy, by death.[119] Although the government wanted to try the case immediately to set an example for others undertaking "treason and piracy," the defense counsel, led by Algernon Sidney Sullivan and Daniel Lord, convinced the judge to continue the case until the fall term. The trial was set for late October.[120]

In October 1861, the case of the *Savannah* pirates went to trial.[121] The trial lasted for eight days under intense scrutiny from the press and the public.[122] The government's case was based on its claim that by capturing the *Joseph*, Captain Thomas Harrison Baker and the rest of the *Savannah*'s crew had committed acts of piracy and treason in violation of federal law.[123] The prosecution's argument was based on a denial of Confederate legitimacy.[124]

According to the defense, the crewmen were privateers because they operated under a letter of marque from a legitimate government. They had duly condemned the captured *Joseph* in an admiralty court in Charleston, South Carolina, and they showed none of the *animo furandi*, or intent to steal, that was required for piracy convictions. The defense argued in essence that "the attack on the brig *Joseph* was a belligerent act and not a piratical one."[125]

After an eight-day trial and twenty hours of deliberations,

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117. ROBINSON, *supra* note 114, at 134.

118. ROBINSON, *supra* note 114, at 133-37; John D. Gordan, III, *The Trial of the Officers and Crew of the Schooner "Savannah," in* SUPREME COURT HISTORICAL SOCIETY YEARBOOK 34 (1983).

119. ROBINSON, *supra* note 114, at 137, 140.

120. Gordan, *supra* note 118, at 35.

121. Gordan, *supra* note 118, at 38.

122. ROBINSON, *supra* note 114, at 146-47.

123. ROBINSON, *supra* note 114, at 142.

124. *See* ROBINSON, *supra* note 114, at 142 (stating that the prosecution never recognized the Confederacy as a separate nation).

125. ROBINSON, *supra* note 114, at 142, 144-45.

the jury could not agree on a verdict.[126] Since the prospect of a break in its deadlock was dim, the jury was dismissed and a retrial was set for the next term. The case was never retried.[127] The failure of the jury—made up of the Northern merchants whom privateering did most to hurt[128]—to return a guilty verdict is difficult to explain considering the fact that just a few days before its deliberations, guilty verdicts were handed down at similar piracy trials in Philadelphia.[129] Those trials concerned the most successful privateer of the war, the Confederate brig *Jefferson Davis*.[130] On July 6, 1861, the *Jefferson Davis* had captured the Northern schooner *Enchantress*.[131] The *Enchantress* was put under the command of prizemaster William W. Smith and a small prize crew. Their plan to take the *Enchantress* to Charleston went awry on July 22 when the *Enchantress* was retaken by the *U.S.S. Albatross*. Smith and his men were charged with piracy upon their arrival at the Philadelphia Navy Yard. On October 22, the Circuit Court of the United States for the Eastern District of Pennsylvania heard the case of *United States v. Smith* and after deliberating for four days, delivered a guilty verdict.[132] On October 28, three members of Smith's crew were likewise convicted; a third trial acquitted another member of the crew who proved his loyalty to the United States.[133]

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126. ROBINSON, *supra* note 114, at 146-47; Gordan, *supra* note 118, at 40.
127. Gordan, *supra* note 118, at 39-40.
128. Gordan, *supra* note 118, at 40.
129. Gordan, *supra* note 118, at 41; ROBINSON, *supra* note 114, at 147.
130. Gordan, *supra* note 118, at 41; ROBINSON, *supra* note 114, at 147-48.
131. ROBINSON, *supra* note 114, at 69.
132. ROBINSON, *supra* note 114, at 69, 84, 147-48.
133. ROBINSON, *supra* note 114, 147-48. Shortly after the capture of the *Enchantress*, another prize of the *Jefferson Davis*, the *S.J. Waring*, was recaptured by Union forces. Norman C. Delaney, *Privateers in* 3 THE ENCYCLOPEDIA OF THE CONFEDERACY 1269 (1993). The captured privateersmen aboard the *S.J. Waring* were charged with piracy, but like the men from the *Enchantress* they were eventually transferred from civil to military prisons. *Id.*

The ambiguous legal status of the Confederate raiders was adjudicated in another legal forum as well. In a number of cases involving insurance claims for the damage inflicted on Union merchant vessels by the Confederate raiders, various state courts had to determine whether capture by commissioned Confederate vessels fit into a provision in many policies which provided coverage for acts of piracy. These courts took a *naturalist* view of the war, finding that whether the raiders were called pirates or not, a war existed in fact and therefore the taking of a ship

Why did the New York jury not reach the same result as the Philadelphia jury? Legal scholar John D. Gordan, III attributes the hung jury in the *Savannah* case to the efforts of Justice Samuel Nelson, who sat on the panel of judges that heard the case.[134] Justice Nelson's instructions to the jury virtually conceded that the privateers were not pirates according to the "common law of nations" and implied that the indicted men could be convicted only if it was shown that they had acted for personal gain rather than as combatants.[135] Gordan speculates that Justice Nelson's political allegiance to the Democratic party might have clouded his legal judgment. Justice Nelson's behavior stands in sharp contrast to that of Justice Robert C. Grier, who presided over the *Jefferson Davis* case.[136] Gordan contends that Justice Grier, by defining piracy broadly, made it easier for the jury to convict.[137]

Clearly, the results of the *Savannah* and *Jefferson Davis* trials did not settle the question of whether Confederate ships were pirate ships. The *Jefferson Davis* convictions and the very fact of the *Savannah* trial certainly provide some support for Steinmetz's characterization of Union policies, while the hung jury in the *Savannah* case suggests that the Union's piracy argument was not entirely persuasive, even to Northerners. What the *Steinmetz* court found more compelling than the trial results as grounds for resolving the piracy issue were Union actions in the aftermath of the verdicts.[138] Although death was

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in the prosecution of the war amounted to a capture. *See, e.g.*, Fitfield v. Insurance Co., 47 Pa. 166 (1864) (arising out of the *Jefferson Davis* incident where the court found that a capture had occurred because a *de facto* war existed, despite the prior conviction of the crew of the *Jefferson Davis* for piracy). Thus, courts like *Fitfield* "appl[ied] the labeling system it construed out of the actions of a policy-making branch of government overruling the judiciary in the very fact situation before the court." ALFRED P. RUBIN, THE LAW OF PIRACY 178 (1988). *See also supra* note 103.

134. Gordan, *supra* note 118, at 40-41.

135. Gordan, *supra* note 118, at 40.

136. Gordan, *supra* note 118, at 41.

137. Gordan, *supra* note 118, at 41. In November 1861 four members of the crew of the captured Confederate privateer *Petrel* were charged with both piracy and treason; though indicted by a grand jury, they were never tried. ROBINSON, *supra* note 114, at 150-51. After the *Petrel* hearing, there were no additional piracy trials. ROBINSON, *supra* note 114, at 150-51.

138. United States v. Steinmetz, 973 F.2d 212, 218-19 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

the recognized penalty for piracy, the convicted crew members from the *Jefferson Davis* were not executed. In fact, none of the Confederate seamen convicted of piracy during the war was ever executed.[139]

Confederate President Jefferson Davis made sure that the consequences of any such executions would be severe. Shortly after he learned of the results of the Philadelphia and New York trials, Davis retaliated against Union threats. On November 9, 1861, he ordered the Confederate War Department to select fourteen high-ranking prisoners of war, one for every imprisoned privateersman, and to incarcerate them as "convicted felons." They were to remain in prison until the Confederate seamen were released. One Union man would be executed for every Confederate prisoner put to death.[140]

Davis's threat had the intended effect. In February 1862 all of the imprisoned privateers were transferred from the common jails to military prisons. Eventually they were exchanged and sent home.[141]

Captain Winslow of the *Kearsarge* was even more lenient to the men he captured in his battle with the *Alabama*—he paroled and released most of them. Much to the dismay of Navy Secretary Welles, Winslow allowed Semmes and the other principal officers of the *Alabama* to be rescued by the English yacht *Deerhound* and therefore escape capture and possible prosecution by the Union. Although Semmes had so often been called a pirate by the Union authorities, and although Welles sought to arrest him as one, Semmes was never prosecuted for piracy after the war. He received a full pardon in 1866 under President Andrew Johnson's lenient Reconstruction policies.[142]

The *Steinmetz* court found that the fate of the so-called pirates aboard Confederate ships like the *Alabama* demonstrates that the Confederacy possessed *de facto* belligerent rights, both in the eyes of the Union and in the eyes of the world.[143] President Lincoln had, for all intents and purposes, recognized that

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139. RANDALL, *supra* note 10, at 66.
140. ROBINSON, *supra* note 114, at 148-49.
141. ROBINSON, *supra* note 114, at 150-51.
142. HEARN, *supra* note 29, at 231-35.
143. *See* United States v. Steinmetz, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

belligerency the moment he imposed the blockade in 1861. Solicitor of the Navy Department John Bolles acknowledged after the war that the blockade itself had tied the Union's hands with respect to the Confederate pirates:

> By establishing a blockade of Confederate ports, our Government had recognized the Confederates as belligerents, if not as a belligerent state, and had thus confessed that Confederate officers and men, military or naval, could not be treated as pirates or guerrillas, so long as they obeyed the laws of war.[144]

Furthermore, members of the international community, including England, France, Spain, the Netherlands, and Brazil, all recognized the belligerency of the Confederacy.[145] The piracy trials were condemned in the British House of Lords as contrary to international law and the Lord Chancellor stated that if the United States government executed privateersmen as pirates it would be "guilty of murder."[146] The notion that international pressure helped to mold Union policy with regard to captured sailors is best summed up by historian J.G. Randall:

> From every standpoint it was found impolitic and indeed impossible to carry out this policy of punishing for piracy those who were in the Confederate service. It is thoroughly recognized in international law that those who operate at sea under the authority of an organized responsible government observing the rules of war may not be treated as pirates. Internationally, the Confederacy was a recognized belligerent, and to have its ships deemed piratical under the *jus gentium* was entirely out of the question.[147]

Moreoever, as Confederate Vice President Alexander

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144. 2 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW § 330, at 1082-83 (1906).

145. 1 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW § 66, at 184-86 (1906).

146. ROBINSON, *supra* note 114, at 135 (citation omitted).

147. RANDALL, *supra* note 10, at 65-66. This view is supported by Rubin who concludes:

> This approach, essentially leaving it to each municipal legal system to attach legal words of art as it chooses for policy reasons, and referring questions of legal policy within the American legal system to the arms of the government given policy discretion by the American Constitution, amounts to a total denial of the existence of any "international law" of "piracy." "Piracy *jure gentium*" seems to have become a conception of each state's municipal law to Dana.

RUBIN, *supra* note 133, at 184.

Stephens wrote after the war, whether fear of Confederate reprisals, a recognition of international law, or a "sense of humanity" ultimately shaped Union policies, such motivations will "be left forever to conjecture."[148] However, it is perfectly clear, as the *Steinmetz* court concluded, that the *Alabama* was not in any practical sense a piratical vessel.[149]

B. Ownership of the Bell

Having determined that the *Alabama* was the property of the Confederacy and not a piratical vessel, the *Steinmetz* court turned to the question of whether the United States succeeded to the ownership of the *Alabama* at the close of the Civil War.

Steinmetz made two principal arguments against succession: First, since the Union never recognized the Confederacy as a sovereign nation, succession, as it was defined in international law, could not occur.[150] Alternatively, Steinmetz argued that, according to the doctrine of succession, in order for the United States to have succeeded to the property of the Confederacy, it must also have succeeded to its debts and liabilities.[151] Section Four of the Fourteenth Amendment, however, clearly states that the United States would not take on any of the debts of the Confederacy.[152] Therefore, the succession doctrine could not operate between the United States and the Confederacy.

The *Steinmetz* court approached the question of the degree of sovereignty possessed by the *de facto* Confederate government by exploring the ambiguity in the succession doctrine and the various federal cases decided during and after the Civil War that dealt with the doctrine's application in this context. The court concluded that the succession doctrine was broad enough

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148. STEPHENS, *supra* note 115, at 434.

149. United States v. Steinmetz, 973 F.2d 212, 220 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

150. *Steinmetz*, 973 F.2d at 220. It is clear that the Confederacy was considered enough of an identifiable entity to be able to own property. *See* Whitfield v. United States, 92 U.S. 165, 169 (1876).

151. *Steinmetz*, 973 F.2d at 221.

152. U.S. CONST. amend. XIV, § 4. The amendment states: "[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, . . . but all such debts, obligations and claims shall be held illegal and void." *Id.*

and ambiguous enough to encompass the situation presented by the *Alabama*'s bell.[153] The court's treatment of the succession question was thus very much in the spirit of its treatment of another controversial issue that arose during and after the Civil War—the question of confiscation. The government's confiscation policy, enacted by Congress and dutifully enforced by the courts, took advantage of the ambiguous nature of the conflict in order to gain maximum control over Confederate property with minimum damage to the government's position that it was dealing with a rebellion. Because these themes recur in the way in which the *Steinmetz* court addressed the question of piracy and Confederate sovereignty vis-à-vis the doctrine of succession, a brief discussion of the federal government's approach to confiscation is merited.

One of the earliest pieces of legislation after the outbreak of the Civil War dealt with the confiscation of property. On August 6, 1861, Congress passed "An Act to confiscate Property used for Insurrectionary Purposes,"[154] providing for the confiscation of any property used or intended to be used in aiding or abetting the "insurrection."[155] The Act also declared that slave owners would forfeit their right to own slaves if those slaves were permitted to work in any way connected with the Confederacy's war effort.[156] A second confiscation act was passed on July 17, 1862,[157] and presented a trickier problem of interpretation. On the one hand, the second confiscation act referred to the war as a rebellion and its early sections dealt with treason.[158] Congress set forth punishment, including the freeing of slaves, for those convicted of aiding the rebellion.[159] The confiscation por-

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153. *Id.*; *see also* discussion *infra* notes 180-203 and accompanying text.

154. Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

155. *Id.*

156. *Id.*

157. Act of July 17, 1862, ch. 195, 12 Stat. 589.

158. *Id.*

159. The treatment of slaves was replete with its own contradictions. The 1861 Act treated slaves as property for the purposes of the forfeiture of slave owners' rights if the slaves worked in aid of the rebellion, but the forfeiture did not make the slaves the property of the United States, as other property became upon confiscation. *See* Act of July 17, 1862, ch. 60, 12 Stat. 319. Congress's silence on this point implied that the slaves became free upon the forfeiture of the slave owners' rights. Thus, through its confiscation legislation, Congress undermined slavery without declaring itself on the legality of the institution in general. *See* SHAPIRO,

tion of that act considerably broadened the definition of those persons whose property would be confiscated to include persons holding an official title in the government or army of the Confederacy and civilians who offered any support whatsoever to the Confederacy.[160] According to the second act, the Union could confiscate all manner of traitors' property, regardless of whether that particular property was used directly to aid the rebellion, or whether it was located within or outside of the seceded states.[161] This would seem to imply that Congress was exercising its municipal powers to punish those convicted of the crime of treason. As such, defendants in such cases apparently would be entitled to a trial and all of the due process protections of the Fifth and Sixth Amendments.[162]

On the other hand, however, the second confiscation act prescribed that judicial proceedings under the law would be *in rem*.[163] As in admiralty and revenue cases, proceedings would be against the property at issue rather than its owner. Thus, the owner was not in fact entitled to all of the constitutional protections accorded criminal defendants. Still, sections five through seven of the act also seemed to prescribe punishment for certain acts because they made confiscation contingent not solely on the use of certain property but on the status or actions (e.g., holding a particular office or aiding the rebellion) of the owner.[164] Thus, the second confiscation act contained an inherent ambiguity as to the legal status and legal rights of those

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supra note 16, at 12-13.

160. 12 Stat. 589, 590 (1862).

161. *Id.*

162. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense." U.S. CONST. amend. VI.

163. 12 Stat. 589, 591 (1862).

164. 12 Stat. 589, 590 (1862). In fact, Lincoln was skeptical of the 1862 law. RANDALL, *supra* note 10, at 280. Prior to its passage he objected to, among other things, *in rem* proceedings against property in a measure that clearly was intended to punish the rebels. RANDALL, *supra* note 10, at 280.

supporting the Confederacy and their property.

Although the courts adjudicated confiscation cases during the war, the constitutionality of the confiscation legislation was not determined until after the war. In 1870, in *Miller v. United States*,[165] the Supreme Court took the opportunity to decide this legal issue in the context of the dual theory of the war that the government, through all three branches, had been developing ever since the *Prize Cases*.

In determining whether the United States could condemn the property of rebels, the Court began with the assumption that the right to condemn enemy property during war was an accepted practice in international law.[166] Moreover, the Constitution gave Congress the power to declare war and "make Rules concerning Captures on Land and Water."[167] In international wars the definition of an enemy is simply one residing in enemy territory, and the property of such persons is subject to confiscation.[168] Confiscation is justified in those circumstances as

> an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.[169]

Thus, in order to be subject to confiscation, the owner need have done nothing more than simply reside in enemy territory; he need not have committed any crime or used his property in any certain way. In a civil war, the Court noted, a person's geographical location is not necessarily a fair indicator of whether he is an enemy or whether his property is subject to use by the enemy.[170] In order to determine what property is subject to confiscation, Congress had to define *enemy*, and in so defining

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165. 78 U.S. (11 Wall.) 268 (1870).
166. *Miller*, 78 U.S. (11 Wall.) at 306-07.
167. U.S. CONST. art. I, § 8, cl. 11.
168. *Miller*, 78 U.S. (11 Wall.) at 310.
169. *Id.* at 306.
170. *Id.* at 311-12.

that term, it designated certain acts as prerequisites, one of which was aiding or abetting the rebellion.[171] Thus, the *Miller* Court concluded, confiscation was not a punishment for those acts; rather, those acts were the way that Congress defined an enemy.[172] Once the definition was set, the enemy's property could be confiscated just as it could be in an international war.[173] By this logic, the Court turned an affirmative intentional act of an individual into a mere description of property.

In *Miller*, the Supreme Court had to go one step beyond its analysis in the *Prize Cases*. In the latter case, the Court condoned Congress and the President's dual definition of the war.[174] It held that when the blockade of Southern ports was initiated, there was in fact a war going on, thereby entitling the President and Congress to exercise war powers in establishing a blockade even though the United States could also treat the Confederates as traitors and punish them under the municipal law.[175] In addressing the question of the validity of *in rem* proceedings under the confiscation acts in *Miller*, the Court approved the dual status of those aiding the Confederate cause both as enemies and as traitors:

> [W]hen it [a rebellion] has become a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as *descriptio personarum*, the words "rebels" and "enemies," in such a state of things, are synonymous.[176]

Thus, one who aided the rebellion could be tried as a traitor and in that proceeding given due process protection as required by the Fifth and Sixth Amendments, but at the same time his property could be confiscated as if he were an enemy. In the

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171. Act of July 17, 1862, ch. 195, 12 Stat. 589, 590.

172. *Miller*, 78 U.S. (11 Wall.) at 312-13.

173. *See id.* at 306-07. Notably, despite the insistence that the Confederates were being treated as enemies in an international war, the federal government taxed the Confederate states in order to raise war revenue and when they were not paid, it levied huge penalties, in addition to forfeiting the property in question. *See* RANDALL, *supra* note 10, at 317.

174. Prize Cases, 67 U.S. (2 Black) 635, 666-71 (1862).

175. *Prize Cases*, 67 U.S. (2 Black) at 666-67. *See supra* discussion at notes 17-22.

176. *Miller*, 78 U.S. (11 Wall.) at 309.

latter proceeding, because of his status as an enemy, no due process protection was required. *Miller* set forth a legal justification, based on the *Prize Cases*, for imposing a dual status, not only in regard to the nature of the war, but also as to the nature of the enemies.

Although the *Steinmetz* court did not analyze *Miller* in its opinion, the *Steinmetz* opinion is very much in the spirit of the earlier case. The sweeping confiscation law passed by Congress in 1862 gave the federal government broad powers to take property belonging to "rebels."[177] Because the Confederacy at the time was a fledgling government that desperately needed the financial support of its private citizens in order to survive, the ability of the United States government to seize private property in a fairly routine way presented a serious threat to the Confederate cause.[178] The Supreme Court's retroactive interpretation of the second confiscation act provided a legal justification for the Union's wartime position that the federal government could utilize this powerful tool of war without jeopardizing its claim to continuous sovereignty over its enemy.

Whereas confiscation deals with the right of the United States to take enemy property during the war, the question of succession deals with the government's right after the war to the property that once belonged to an enemy who, for all intents and purposes, had disappeared and ceased to exist. In determining the contours of succession, courts developed a theory that, like their approach to confiscation, acknowledged the sovereignty of the Confederacy only insofar as it served the United States and preserved its own flexibility in the exercise of that sovereignty.

Succession, as the *Steinmetz* court's discussion reveals, is not a well defined doctrine. Generally speaking, the question of succession arises in three situations: when a state ceases to exist; when a state is succeeded by another state; or when the identity of the state continues in consequence of changes in its

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177. *See* Act of July 17, 1862, ch. 195, 12 Stat. 589, 590 and *supra* text accompanying notes 158-65.

178. *See Miller*, 78 U.S. (11 Wall.) at 306. The *Miller* Court stated that "[t]he whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government."

legal order as of government, territory, or population.[179]

Scholars do not agree, however, about the extent to which the successor state inherits benefits and liabilities from the extinction of a state which had the legal status of an international person. Some scholars have argued that the successor state takes on the liabilities as well as the benefits of the extinct state: "Change of government does not affect the personality of the State, and hence a successor government is required by international law to perform the obligations undertaken on behalf of the State by its predecessor."[180] By contrast, others have stated that although "certain rights and duties actually and really devolve upon an International Person from its predecessor . . . no general rule can be laid down concerning all the cases in which a succession takes place. These cases must be discussed singly."[181]

In the *Steinmetz* case, the United States contended that it was entitled to the property that the Confederate government had amassed.[182] In order to determine the proper ownership of the bell, the *Steinmetz* court had to determine what theory of succession the United States had adopted, knowingly or unknowingly, after the Civil War.

A number of cases arose after the Civil War in which ownership by the United States of property previously owned by the rebel government was at issue.[183] In these cases, the courts' understanding of the succession doctrine was that when succession occurred, not only the property but also the debts and obligations attached to that property passed to the successor state.[184] This interpretation of the doctrine is evident in *United States v. Huckabee*.[185] Huckabee had sold his iron works to the Confederacy for $600,000 in Confederate money. The United States captured the property, forfeited it under the 1861 con-

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179. 2 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 754 (1963).

180. 1 D.P. O'CONNELL, INTERNATIONAL LAW 456 (1965).

181. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 158 (H. Lauterpacht 8th ed. 1955).

182. United States v. Steinmetz, 973 F.2d 212, 214 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

183. *See, e.g.*, United States v. Huckabee, 83 U.S. (16 Wall.) 414 (1872); Leathers v. Salver Wrecking Co., 15 F. Cas. 166 (C.C.S.D. Miss. 1875) (No. 8, 164).

184. United States v. Huckabee, 83 U.S. (16 Wall.) 414 (1872); Leathers v. Salver Wrecking Co., 15 F. Cas. 166 (C.C.S.D. Miss. 1875) (No. 8, 164).

185. 83 U.S. (11 Wall.) 414 (1872).

fiscation act, and subsequently sold it to Lyons. The Court, although finding it had no jurisdiction to hear the case, essentially affirmed the ownership of the iron works in Lyons.[186] In explaining that the United States derived its title from the capture of the iron works and that the title was finalized with the subsequent defeat of the Confederacy, the Court stated:

> [I]f the nation is entirely subdued, or in case it be destroyed and ceases to exist . . . [the rights of the conqueror] are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property.[187]

This understanding of succession was adopted by the court in *Leathers v. Salvor Wrecking Co.*,[188] a federal case from Mississippi decided in 1875. *Leathers* held that the United States had succeeded after the war to the ownership of a private steamer pressed into service by the Confederate government because the Confederate government had fully paid the owner for the boat.[189] The language of that case, unlike the *Steinmetz* case, seemed to imply that if the boat had not been fully paid for by the Confederacy, the United States might not have succeeded to it:

> If the steamer *Natchez* was impressed into the service of the Confederate States government, and was burnt and sunk whilst in that service, and if full compensation for the vessel's loss was paid to the libelant by that government, the property of the wreck thereafter belonged to it; and at the close of the war, became the property of the government of the United States, which thereupon acquired a right to dispose of the wreck as it saw fit.[190]

Research has not uncovered any cases from the United States in which the court was faced with a claim by the United States to property owned by the Confederacy but without clear title.

There are, however, as the *Steinmetz* court pointed out, some English cases after the Civil War in which the United

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186. *Huckabee*, 83 U.S. at 414.
187. *Id.* at 434.
188. 15 F. Cas. 116 (C.C.S.D. Miss. 1875) (No. 8, 164).
189. *Leathers*, 15 F. Cas. at 116.
190. *Id.*

States claimed property which had been owned by the Confederate government.[191] The English courts acknowledged that the United States had the right of succession to the public property of the Confederate government, subject however to the debts and obligations attached to that property.[192] In *United States v. McCrae*,[193] for example, the English Court of Chancery found in favor of McCrae, a Confederate agent who had advanced money on behalf of the Confederacy for the purchase of certain goods.[194] Since the United States refused to pay McCrae the money owed to him by the Confederacy, the United States was not permitted, the court ruled, to succeed to the goods in question. The court said:

> But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.[195]

Steinmetz argued that these cases, as well as the dictum in the American cases about succession including debts, failed to consider the language of the Fourteenth Amendment which forbade the United States from taking on any of the debts of the Confederacy.[196] Section Four of the Fourteenth Amendment clearly states that the United States would not "assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States."[197] There is scarce legislative history to this part of that famous amendment. It is clear, however, that although other sections of the Amendment were fiercely debated,

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191. United States v. Steinmetz, 973 F.2d 212, 221 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993) (citing United States v. McCrae, 8 L.R.-Eq. 69 (1869); United States v. Prioleau, 35 L.R.-Ch. 7 (1865)).

192. *Steinmetz*, 973 F.2d at 221.

193. 8 L.R.-Eq. 69 (1869).

194. *McCrae*, 8 L.R.-Eq. at 69.

195. *Id.* at 75; *see also* United States v. Prioleau, 35 L.R.-Ch. 7, 11 (1865) (stating that the cotton owned by the Confederacy with a lien held by members of an English firm was property of the United States, subject to all of the conditions and liabilities to which the property is subject).

196. *Steinmetz*, 973 F.2d at 221.

197. U.S. CONST. amend. XIV, § 4.

there was a general consensus among the Republican framers of the Amendment, and President Johnson alike, that the Confederate debt should be repudiated and the national debt validated.[198]

The Fourteenth Amendment's repudiation of the Confederate debt was interpreted by the courts to negate contracts involving Confederate bonds,[199] but there appears to be no evidence that repudiation was ever tied to the issue of the North's succeeding to the property of the Confederacy. Although the Amendment had been passed by the time all of the cases relied upon by the *Steinmetz* court were decided, none of them even mentioned the debt clause.

Rather than confront the issue of whether section four of the Fourteenth Amendment prevented the United States from invoking the succession doctrine, the *Steinmetz* court dealt only with the question of succession as it arose in this case.[200] Since there was no allegation that the Confederacy had not fully paid for the *Alabama* and its bell,[201] the United States could succeed to it even under a definition of succession that includes debts. *Steinmetz* went beyond *Leathers* by recognizing the prob-

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198. *See* JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 26-27 (1956). Republicans feared that if blacks were not given the vote, Southerners and sympathetic Northern Democrats would form a majority in Congress and, along with demanding compensation for their emancipated slaves, repudiate the national debt. *See* BENAJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 283-85 (1914). Thus, the Fourteenth Amendment includes a statement of the validity of the national debt. *See id.*

199. *See, e.g.*, Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883).

200. *See Steinmetz*, 973 F.2d at 221-22.

201. *Id.* at 221. Steinmetz argued that there were in fact liabilities attached to the *Alabama* when it sank in 1864. *Id.* These liabilities were the claims by neutral shipping for unlawful acts committed by the *Alabama*. *Id.* at 215. What Steinmetz overlooked was the fact that the United States actually considered those claims to be against Great Britain, which had facilitated the building and arming of the *Alabama* and similar vessels. *Id.* This claim was the basis for the Treaty with Great Britain, 17 Stat. 863 (1871), which established an international arbitration panel and led to the payment by Great Britain of $15.5 million to the United States for the depredation of the *Alabama* and her sister ships. *Id.* Thus, it may be that the succession theory, as stated by the *Huckabee* and *Leathers* courts, as well as the English courts, is the correct one, but that in the case of the *Alabama*, the liabilities lay elsewhere in a third party, that is, Great Britain. This theory still leaves open the question of how the Fourteenth Amendment would be interpreted were a court ever faced with a succession claim by the United States where outstanding liabilities attached to the property in question.

lem posed by the Fourteenth Amendment, but, like *Leathers*, it left that question open:

> Even though there may be some question as to the exact contours of the succession doctrine as applied by the United States after the Civil War, in the case of the ALABAMA there were no outstanding liabilities for which the United States might have been responsible had it asserted its title to the ALABAMA right after the war. Steinmetz does not allege that the ALABAMA was not fully paid for by the Confederacy.
>
> It follows that whether or not historians would regard the international law of succession as applicable here, the succession doctrine, as explicated and applied by the United States Supreme Court with respect to the Civil War, entitled the United States to all property acquired by the Confederacy.[202]

VI. CONCLUSION

The judicial interpretation of the blockade and the confiscation acts reinforced the strong alliance among the three branches of government that was necessary to enable the federal government to prosecute the war to its fullest advantage. The federal courts assumed the role of placing the imprimatur of legality on the various methods used by the federal government to prosecute the war, no matter how attenuated the legal reasoning had to be. Similarly, as the decision in *Steinmetz* demonstrates, just as the federal government refused to limit itself to one theory about the nature of the conflict during the war, it also did not adopt and maintain a single theory for its resolution. A peace

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202. *Steinmetz*, 973 F.2d at 221-22 (footnote omitted). The *Steinmetz* court relied to some extent on Randall who makes the argument that it is inappropriate to consider the United States's actions after the war as acts of a successor *per se*:

> [T]o argue that the United States should have taken over the Confederate debt would be to assume that the Confederate States had existed before the war as an established international person, and had then been conquered and absorbed by the United States. Even then, prevailing international practice would have suggested that Confederate debts incurred for the war itself should not be assumed. . . . The defeat of such a rival government did not amount to the overthrow or absorption of an existing "state" in the international sense. As to the principle of state-continuity, it was preserved in the fact that the United States was not supplanted in its control over the South.

RANDALL, *supra* note 10, at 238 n.51.

treaty, which might have defined the nature of the conflict and set out terms for reconstruction, was never drawn up or signed.[203] Rather, Congress and the President addressed discrete issues in postwar legislation and in the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution (the first section of the Fourteenth Amendment, which laid out the broad concepts of equal protection and due process, is the exception). The courts, in adjudicating disputes that implicated the broader legal contours of the war, were left with the task of creating some legal order out of the federal government's various policies. This order, in turn, reinforced and supported the flexibility that the government needed in order to gain full advantage over the South both during and after the war. Like their predecessors in the *Prize Cases* and *Miller*, Steinmetz and the amici[204] who supported his case emphasized the United States's official refusal to recognize the Confederacy and attempted to get the court, in essence, to force the federal government to limit itself to one legal theory about the nature of the Civil War. What they failed to appreciate was the great latitude that the courts gave to the United States in defining the nature of the war and its resolution. This flexibility, as the *Steinmetz* case demonstrates, continues to be the unifying theme in the continuing questions about the legal nature of the Civil War.

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203. As the Court in *Huckabee* stated, "as the confederation having been utterly destroyed no treaty of peace was or could be made, as a treaty requires at least two contracting parties." United States v. Huckabee, 83 U.S. (16 Wall.) 414, 434 (1872).

204. The *amici curiae* aligned with Steinmetz were the American Sports Divers Association, Federation of Metal Detector & Archeological Clubs, Alliance for Maritime Heritage Conservation, International Scuba Association, Eastern Dive Boat Association, and North-South Trader Civil War Magazine. *Steinmetz*, 973 F.2d at 217. Writing in support of the United States's position were the National Trust for Historical Preservation in the United States, Society of Professional Archeologists, Society for Historical Archaeology, Advisory Council on Underwater Archaeology, Society for American Archaeology, and Council of American Maritime Museums. *Id.*