

The Promise and Perils of Prize Law

Maritime law is but a small part of modern legal practice and legal academia. The American admiralty bar is small, tight-knit, and specialized. British maritime practice can often focus on marine contract and insurance disputes, a legacy of hosting Lloyd's of London. When legal academics address maritime law at all, it is usually with respect to public international law; they only rarely address the prosaic adjudication of disputes involving individual vessels. The longstanding practice of naming lawsuits after the vessel at issue, like the exquisitely titled case of the *Charming Betsy*, discussed below, seems a quaint anachronism in the modern world.¹ It is tempting to think of maritime law as an old-school curiosity occasionally litigated by monied interests. This, however, misunderstands the impact of maritime law in world history and its continuing effect today.

When courts and scholars address the history of modern international law, they typically discuss the early international consensus against piracy. States banded together against pirates, declaring them to be, in the words of the first-century BCE statesman Cicero, *hostis humani generis*—the enemy of all mankind—and therefore entitled to no legal protection. By placing themselves outside the law, pirates were always and everywhere at risk of being attacked by fire and steel, captured, and summarily hanged or worse. While modern human rights law disapproves of capital punishment, pirates remain the primary example of international cooperation, and an early coalescing of international law.

Many centuries later, another international consensus formed against the slave trade and slave traders were also subject to arrest and prosecution. Scholars and courts correctly cite these early examples of international cooperation as the first steps towards what has become modern international law. This early cooperation among nation-states led to modern international legal tools such as legal adjudications between nation-states, and individuals being able to sue for private remedies across international borders. This arc of legal history is an ennobling tale, starting from state-level actions against the universal harms of piracy and slavery.

Though correct as far as it goes, that standard telling is incomplete. Missing from the traditional account is the role that adjudications of maritime captures—prize courts—played in developing international law. Prize adjudications of individual vessel disputes

affected both private actors and nation-states, as well as relationships among states. To explore that history, a discussion of prize law follows, focused on the late-eighteenth and early-nineteenth century, including how prizes were handled in British, early American, and French courts, as contrasted with vessel captures in the Mediterranean by the so-called Barbary states of North Africa. While English, American, and French prize courts generally performed similar functions, their differences occasionally led to mischief and even armed conflict. That historic risk and reality of international conflict arising out of prize law can be seen even in the modern era.

As discussed below, the nexus between prize law and international armed conflict is not a mere artifact or curiosity. Historians and legal scholars alike could easily overlook prize law as a dated form of adjudication from a bygone era. However, a close look at the development of prize law in different places throughout the world reveals how prize law affected international relations during the age of sail. Prize law and its lessons continue to affect international security today, and shape thinking about how to address tomorrow's security challenges. A list of online resources is provided in an appendix.

What is Prize Law?

Imagine a sea battle in the age of sail: two vessels from warring nations meet on the ocean. They fire cannons as they close the range and get alongside one another. A boarding ensues, one ship's crew subdues the other and captures the unfortunate ship. There may be significant loss of life and injury to both crews, not to mention physical damage to both vessels. Assuming the losing ship can still float, it is taken as a "prize" of war for the victor. The victor sends a "prize crew" comprising a usually young officer and a small contingent of sailors to take custody of the vanquished ship. The prize crew is responsible for sailing the prize to a friendly port, often in company with the victor, while keeping a sharp eye on the vanquished crew to prevent them from retaking their captured ship. The prize crew would typically hoist its own national ensign above the ensign of the prize, showing both colors to represent the fact of their victory. The prize sails into a friendly port, and the victorious ship sooner or later regains its prize crew and sails off to continue its mission.

For most of the standard histories, that is where the story of the prize ends. On occasion, the histories may mention a prize court, or prize money, but the references are typically fleeting and mysterious. Most writers avoid the intricacies of the adjudication of a prize. This unfortunate narrative practice deprives the reader of important context.

The short explanation is that a "prize court" would adjudicate the captured vessel and determine whether the capture constituted "lawful prize." The prize court might be one of the victor's national or colonial courts abroad, or a neutral nation might be asked to conduct prize proceedings over a vessel captured nearby. In a paradigmatic warship-on-warship battle, lawful prize might be easily determined if the prize were an enemy vessel. More



Image 1: The Captured HMS Royal Prince brought into Dutch waters after the Four Days battle, 4 June 1666, by Willem van de Velde (the Younger), between 1670 and 1707, oil on canvas. Note the Dutch flag flying over the dipped English (red) naval ensign at the stern, indicating the English ship is a Dutch prize. Source: Created by William Bainbridge Hoff (d. 1903). In the Public Domain, used under provisions of license at https://upload.wikimedia.org/wikipedia/commons/b/b8/Willem_van_de_Velde_%28the_Younger%29_-_The_Captured_HMS_Royal_Prince_brought_into_Dutch_waters_after_the_Four_Days_battle%2C_4_June_1666.jpg.

often, though, prizes were civilian vessels flying the enemy's flag, or even neutral colors, and their port of origin or destination may (or may not) make the ship a lawful prize. When merchant ships were involved, the vessel owner or cargo owner might be allowed to participate in the prize proceeding, predictably arguing the innocence of their ship or cargo. If a vessel were condemned as lawful prize, the successful ship's captain and crew would enjoy a share of the value of the captured vessel, a payout referred to as "prize money."² The percentages and procedures for prize money ebbed and flowed over time and in different countries, but the fact of the victorious vessel's captain and crew receiving a personal share of prize money is the important point. If a prize court declared a ship not to be lawful prize, the captain of the victorious vessel could be personally answerable for damages to the owner of the unfortunate ship and its cargo.³ This once-vital, now-neglected area of law governing the capture and adjudication of prizes at sea is called "prize law."

Prize law had additional complications, such as the existence of privateers in the age of sail. Privateers were privately armed vessels, sailing under a letter of marque⁴ or similar

government-issued document⁵ that authorized the ship to cruise against an enemy nation and capture enemy vessels. Just as the captain and crew of a public ship of war (naval vessel) was entitled to collect prize money, so, too, was a privateer, though the distributions of prize payments aboard a privateer were typically greater than naval shares. A skeptic might argue that privateering was just piracy under a thin veneer of legality, a criticism often leveled against privateers over the centuries, sometimes quite fairly.

Notwithstanding the potential for abuse, a naval captain or privateer profiting from taking enemy prizes was simply an accepted fact at the time. This profit motive in warfare is not as odd as it may first appear. Centuries ago, private recompense for public acts was quite common. In early modern Europe, both civil and ecclesiastical officials could reasonably expect to profit from their offices. These private payments for public acts often were not graft and corruption as we understand it today. Rather, public officials—including tax collectors, prosecutors, and jailers—could lawfully profit from their positions as an understood perquisite of the job.⁶ In that context, the idea of a public warship or private armed vessel capturing a foreign vessel, to the personal benefit of the captain and crew, is just another example of an earlier paradigm. Even so, historians are often loath to point out how the existence of prize money gave a ship's captain an obvious personal financial incentive to conduct armed combat at sea.⁷

It is precisely this interplay of public and private motives that required prize courts to carefully adjudicate whether captured vessels were lawful prize. A prize court that was too skeptical of captures would stymie the initiative of the captains of naval vessels and privateers alike. A prize court too permissive of questionable captures could encourage too much risk-taking, courting the outbreak of open hostilities with a neutral nation. It is precisely this balance that placed prize courts in the age of sail in a central role in the initiation or continuation of international hostilities.

English Prize Law

Historically and today, admiralty courts typically entertain lawsuits—historically called libels—brought against a vessel itself.⁸ Once the admiralty suit has begun, the admiralty court issues an arrest warrant against the vessel, and an agent of the admiralty court goes to physically arrest the vessel. The court then begins its procedures to announce the lawsuit, to ensure that creditors are put on notice, and justice slowly but inexorably grinds forward. But it is the arrest and taking custody of the vessel that is the hallmark of initiating an admiralty suit.

English admiralty courts began with a High Court of Admiralty (one each in London and Scotland), which devolved into local, subordinate admiralty courts to try cases, with appeals still running to the High Court of Admiralty. Considering the hallmark requirement of a vessel arrest, England's early system worked well enough for local disputes into the

mid-seventeenth century. At the time, many English admiralty cases were litigated over ships anchored in the pool of London, a stone's throw from the heart of the capital itself.⁹ However, arresting and adjudicating a vessel in distant waters was more challenging.

With a burgeoning empire and attendant worldwide shipping, admiralty disputes arose in the Mediterranean, the West Indies, and eventually in the American colonies. If the High Court of Admiralty itself were the sole forum to adjudicate each admiralty case, the cost and delays of such litigation—principally, sailing home for the pleasure of a contested trial—would delay justice and deter claimants. Therefore, the English system of admiralty and prize courts¹⁰ relaxed gradually over the 1600s, so that by 1693 prizes could be sent even to neutral ports for adjudication,¹¹ and subordinate “Vice Admiralty Courts” were established at the edges of the English empire, including its colonies and in the Mediterranean.¹²

As the English admiralty devolved its power to remote vice admiralty courts, common law attorneys in England staked their claim to prosecute maritime disputes arising in English home waters. As early as 1604, common law judges denied admiralty jurisdiction to adjudicate a vessel collision case occurring in the Thames. By the time of the Stuart Restoration in the late 1600s, river and harbor cases were routinely retained by the common law courts, and only collisions in the open sea were routinely left to the admiralty.¹³ A consensus emerged by the 1750s that collision cases from the Thames or indeed any navigable river in England would be heard in the civil courts, and admiralty cases were limited to disputes arising on the high seas.¹⁴

As seen above, the English admiralty system evolved from a centralized forum for adjudication, to an outward-looking court concerned primarily with vessels plying the open ocean. This evolution was necessitated by the spread of empire and influenced by domestic concerns about which forum ought to adjudicate maritime disputes. With this evolution of admiralty and prize courts in mind, the discussion can turn to how privateers and royal naval captains took, adjudicated, and benefitted from their prizes.

Like the relevant courts, the English practice of awarding prize money evolved over the centuries. Before the advent of a national navy, early English history records the crown contracting “the keeping of the seas” by private sea captains.¹⁵ This private contracting for naval warfare evolved into the practice of privateering, where the privateer split the value of a prize among its captain and crew, with a portion to the crown. As a standing navy came into existence and evolved, so too did the practice of dividing prize money among the warship's captain and crew, again with portions also set aside for the admiral or the crown. A privateer's division of prize money was typically controlled by a contract between the vessel owner and the privateer captain, and the prize courts typically did not intrude on this private contractual matter. As might be expected, Royal Navy captains and crews typically retained less of the value of a prize than their privateer counterparts would retain. After all, privateers often answered to private shipowners who funded the venture and expected a substantial share of prize money.¹⁶

The English system of prize money was an express incentive for a ship—naval or privateer—to prey upon the state’s enemies.¹⁷ It is therefore perhaps no surprise that the English government would often intervene in prize court adjudications. One glaring example of government interference was with Judge Bullock, who arrived in Jamaica in 1758. Soon after his arrival, word spread that Bullock had been ordered to condemn all ships under the Dutch flag. As if trying to confirm the rumor, Bullock promptly attempted to condemn Dutch ships that his predecessor had previously acquitted.¹⁸ The judge went on to make prize case rulings harmful to the financial interests of the island’s colonial elites. Consistent with his condemnation of the Dutch ships, Judge Bullock explained that, as an officer of the crown, he was duty-bound to increase crown revenues—apparently regardless of the merits of any particular case. The Jamaica Council, which represented the same class of monied elites suffering from these prize rulings, was not impressed. The council recommended that Bullock be reprimanded for holding such a blatantly partisan opinion, notwithstanding that their common political masters in England might very well have desired the judge to hew to that precise view.¹⁹

The quick demise of Judge Bullock’s judicial career in Jamaica shows the risk of countervailing local concerns. By 1759, the year after he arrived in Jamaica, Judge Bullock was suspended. This time, however, the cause of his trouble was for *failing* to follow directions from government officials. When the vessel *Flag of Truce* was before Judge Bullock, a Royal Navy admiral wrote to the judge to instruct him on the admiral’s preferred outcome. Considering how Judge Bullock had been openly partisan for the crown just the year before, the admiral may have understandably believed his recommendation would be followed, the case would come out to the admiral’s liking, and no one would find out about his intervention.

The exact opposite happened. Judge Bullock commented on the admiral’s letter during a court proceeding, naming the admiral publicly. He did the exact opposite of the admiral’s advice, and instead acquitted the *Flag of Truce* traders, which meant that no prize money would be awarded. For the political sin of consistently needling the local monied interests (whether by following or ignoring governmental meddling), the lieutenant governor suspended Judge Bullock and installed a different judge in his stead.

The entire concept of a prize court ought to have taken the adjudications of prizes out of the political realm, insulating the government from domestic and international pressure by relying on impartial arbiters of fact and law. However, this cautionary tale of Judge Bullock highlights just how difficult it was for a government to control prize adjudications.

This inability to control prize outcomes sounds at first blush like a good result: it shows institutional independence and impartiality. But recall, however, that prizes are captured by force in the first instance, so the entire enterprise of prize money depended on a state of actual or impending hostilities. If a nation-state cannot direct its armed actors carrying out those hostilities, it cannot effectively pursue its strategic aims in the conflict.

As will be seen below, the French and early American governments had both successes and difficulties pursuing their strategic aims through the use of prize money.

French Prize Law

While France and England spent much of this period at war, their regulation of privateering and the legal machinery of their respective prize courts were similar in many respects. There were some noteworthy differences. French law generally forbade taking of prizes without a commission from the French admiralty. Like the identical English requirement for a commission or letter of marque, this rule was intended to keep governmental control over the private use of force against the state's enemies. And like any good rule, it was proven by its occasional exception. For example, a particularly daring merchant captain who repelled an attacking vessel could turn the defense into an unexpected victory. In that rare instance, the French prize court could reward the merchant captain with the prize.²⁰

The recapture of prizes was another point of moderate difference with French prize law. With many naval ships and privateers of several nations sailing the same waters, it frequently occurred that a prize would be captured by one country, only to then be captured again by a naval ship or privateer from a third country. With a small prize crew, a vanquished captive crew still onboard the prize, and a potentially absent or damaged initial victor, it is easy to see how recapture would be a tempting target for any sea captain.

English prize courts traditionally paid relatively little for a recapture. If an owner of a recaptured vessel paid a modest amount representing "salvage,"²¹ the owner would be entirely restored to their ownership rights. The effect of this was that recaptures were not particularly lucrative in English prize courts. By contrast, French prize courts adopted a twenty-four-hour rule. If recapture occurred within twenty-four hours of the initial capture, the victor was entitled to one-third the value of the recapture. If the recapture occurred more than twenty-four hours after the initial seizure, the French prize court would award the full value of the prize.²² It is not difficult to imagine how this significant difference in prize amounts might affect a captain's decision on when to commence an attempt at recapture.

French regulation of privateers also varied from the English rules. French privateering rules date back to at least 1543. By 1681 the rules were relaxed to allow the essentially unfettered division of proceeds between a privateer crew and the shipowner, and in 1693 the law changed again to establish a maximum share for members of the crew depending on their rank.²³ While English privateer crews typically took only their shares of prize money, French privateer crews typically drew a wage in addition to prize proceeds.²⁴

By the beginning of the Seven Years' War, French prize courts evolved a distributed system of prize courts similar to the English vice admiralty courts.²⁵ Those far-flung French fora developed local customs that varied considerably. For example, the governor of the Windward Islands in Martinique claimed to have achieved a mutually beneficial

arrangement for the distribution of prize proceeds, as if advertising his relaxation of the previous standard scheme of distributions. In Bordeaux in 1762, an officer was criticized for his attempted intervention in the distribution of privateer prize money. The criticism observed that the various local customs in French admiralty courts resulted in some crews receiving as much as one-third of the value of a prize, while others received only a tenth. These varying local customs seem to have resulted from the intervention of local officials, unmoored from any particular legal principle.²⁶ These examples show that, as was true of Judge Bullock in English Jamaica, both English and French prize courts suffered from the intrigues of local officials looking after their own interests. With this loose regulation of armed conflict, it is perhaps not surprising that prize courts would provide a newly independent nation with an opportunity for confusion, mistrust, and ultimately conflict with an erstwhile ally.

Early American Prize Law

In the United States today, each state is something of a mini-sovereign unto itself, for certain limited purposes. The California legislature sets its own laws, for example, about marriage and divorce, unemployment benefits, and insurance. California's state laws have no coercive effect over how other U.S. states administer their own internal state laws. Some areas of American law are written and enforced at the federal level, subject to enforcement across the nation. These nationwide laws include immigration, bankruptcy, and federal crimes, among others. This dichotomy of state as opposed to federal laws and enforcement is something of an accident of history, resulting from an attempt to respect the sovereignty of each of the original thirteen colonies when the people of those colonies entered into voluntary union under the U.S. Constitution.

Federal treatment of subjects like immigration and bankruptcy creates a nationwide standard. For example, an immigrant to the United States should be treated the same upon her attempted entry, regardless of which state happens to host the port of entry. Similar concerns apply to bankruptcy, patents, and, most relevant to this discussion, "all Cases of admiralty and maritime Jurisdiction," which the U.S. Constitution reserves for the federal courts.²⁷ The development of American prize courts shows how that judicial power evolved in the Revolutionary and Federalist periods of American history.

England had established vice admiralty courts in the American colonies during the eighteenth century. In addition to prize adjudication, they also took up private disputes within the admiralty jurisdiction.²⁸ Like typical admiralty courts, these colonial courts typically brought suit against the vessel or cargo itself, followed by an arrest of the property. Also typical of courts of admiralty, colonial vice admiralty courts did not utilize a jury.²⁹ These colonial vice admiralty courts were very busy adjudicating captured French vessels during Seven Years' War.³⁰

The advent of revolution between the colonies and England changed the legal landscape, which in turn affected the treatment of prizes in America. In order to harass the British, the Continental Congress and individual states commissioned both public and private vessels of war. Those ships inevitably captured prizes, which had to be adjudicated to maintain the formalities of prize awards and avoid the ready slander of being deemed a mere pirate.

From 1775 to 1780, the Continental Congress evolved a series of measures to handle prize proceedings, eventually settling on a “Court of Appeals in Cases of Capture.”³¹ Throughout this time, most of the states conducted prize trials in their own courts, whether set up as separate prize courts or in local civil courts.³² During the revolutionary period, a disappointed litigant could appeal a decision to the Continental Congress, initially in an ad hoc committee, then to a standing committee. The first such appeal happened to be filed on July 4, 1776—the same day the Declaration of Independence was signed.³³ This congressional appeal was replaced by the Court of Appeals in Cases of Capture, which in turn was replaced by the nascent federal court system. In the federal court system, prize appeals—like all appeals—ran to the newly established U.S. Supreme Court as the highest court in the newly independent land.

Even in the midst of its revolution and governmental formation, America entered into the Treaty of Amity and Commerce with France in 1778. The French victory in the battle of the Capes left Cornwallis’s army trapped at Yorktown and led to the British surrender to George Washington. Newly independent, America’s shipping trade increased as the new nation tried to establish neutrality and avoid foreign entanglements. This was not to last.

By 1796, in the midst of its own revolutionary fervor and facing down the British, the French Directorate declared that French prize courts would treat captured neutral ships the same way that British prize courts treated neutrals from the same nation. This was troubling for two reasons. First, British prize courts at the time were skeptical of claims of neutrality, so by following British skepticism, the French prize courts were likely to impinge on neutral shipping rights. Second, given the delay in communications of the era, this declaration would allow French prize courts to do whatever they desired, leaving neutrals like Americans with no predictability in a French court. The next year, the Directory renounced key provisions of the Treaty of Amity and Commerce and promulgated a list of reasons for which the French might condemn a neutral vessel.³⁴

The Americans and French traded allegations about irregularities in prize courts throughout the mid-1790s. French prize courts followed the Directory pronouncements and refused to let owners present a defense as was traditionally allowed.³⁵ Meanwhile, French privateers based themselves in neutral American ports. Consistent with an older tradition of neutral-port adjudication, those French privateers sailed their prizes into ports like Charleston for adjudication, whereupon British diplomats contested the resultant prize proceedings. This British prize litigation was costly, time-consuming, and almost uniformly

unsuccessful. Nonetheless, delaying these French prize cases in American courts accomplished with paper and words what could only be done expensively at sea with canvas and shot: French privateers were taken out of action for months at a time. French diplomats were enraged, blaming the American prize courts for entertaining these sham challenges. American officials claimed they were unable to help, due to the independence of the judicial branch, including the prize courts. One author describes these British prize lawsuits as an early example of “lawfare,” or warfare by way of law.³⁶

This breakdown of neutral rights, including the right to state a defense in a prize proceeding, and the use of prize courts as a type of war by other means, soon led to the short, sharp Quasi-War between the young United States and revolutionary France. As hostilities progressed from treaty violations to open hostilities, the American prize appeal system evolved from a congressional committee, to a regular Court of Appeals in Cases of Capture, which function was ultimately superseded by the Supreme Court. This institutional evolution was a difficult and rickety process, as several states passed laws purporting to limit a centralized appellate power, and at least five states openly defied the appellate process outright.³⁷ In 1809, the Supreme Court ultimately ruled that the orders of federal prize courts must prevail over state laws to the contrary.³⁸ That decision in a prize appeal, coming so early in American legal history, helped form the bedrock of federal supremacy within the United States.

In addition to shaping American jurisprudence internally, American prize courts also shaped early American international relations and war powers. When the Quasi-War concluded, a significant case load of prize litigation remained in the courts. Two cases in particular provided opportunities for the Supreme Court to serve as a court of prize appeals in order to regulate the nation’s use of force.

At the height of the war in 1800, the U.S. Navy frigate *Constellation* captured the *Charming Betsy* on suspicion of carrying contraband. The *Charming Betsy*’s apparent owner, Jared Shattuck, was born in Connecticut, moved to the Danish possession of St. Thomas as an infant, married a Dane, and lived as a Danish subject. As with the disputes over neutral shipping that led to the Quasi-War, the lawfulness of arresting the *Charming Betsy* turned on neutral shipping rights. If Mr. Shattuck was an American citizen, then the vessel was subject to American law, arrest, and condemnation as lawful prize.³⁹ If Mr. Shattuck was a Danish citizen, however, the *Charming Betsy* would be a neutral ship, and not lawful prize.⁴⁰

Without definitively ruling on the owner’s citizenship, the Supreme Court found that Mr. Shattuck “made himself the subject of a foreign power,” so “the *Charming Betsy*, with her cargo, being at the time of her recapture the bona fide property of a Danish burgher, is not forfeitable,” and the vessel was not lawful prize.⁴¹ The court ordered the case remanded to the trial court for a computation of damages that the captain of the *Constellation* owed to the shipowner,⁴² though Congress later reimbursed the captain for those costs.⁴³ By so ruling, the Supreme Court upheld the importance of neutral shipping rights that had led



Image 2: Battle between U.S. frigate *Constellation* and French frigate *L'Insurgente*, in the Naval War with France, February 1799. This shows the *Constellation* (left) battling a French frigate during the Quasi War, just a year before the *Constellation* would capture the cargo vessel *Charming Betsy*. Source: Created by Rear Admiral John William Schmidt (1906–1981), U.S. Department of the Navy and National Archives, National Archive ID# 428-KN-2882. In the Public Domain, see <https://commons.wikimedia.org/wiki/File:USSConstellationVsL'Insurgente.jpg>

to the recent Quasi-War, while requiring American naval captains to honor those same neutrality principles—and risk violating neutrality at their personal financial peril.

Another exemplar case arose in late 1799, when the American frigate *Boston* captured the Danish vessel *Flying Fish*. At the time, an act of congress authorized the seizure of any vessel suspected of commerce with France or its possessions, if the vessel was “bound or sailing to any port or place within the territory of the French republic or her dependencies.”⁴⁴ The Secretary of the Navy forwarded a copy of the act to the *Boston*, along with written instructions to seek out vessels “bound to or from French ports.”⁴⁵

At the time of its seizure, *Flying Fish* was bound from a French port in Haiti to St. Thomas in what was then the Danish West Indies. The Supreme Court ruled that by arresting the *Flying Fish* while it was travelling from (but not to) a French port, the American captain went beyond the bounds of the act of Congress.⁴⁶ The written orders from the naval

secretary were no defense, because those “instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.”⁴⁷ As in the *Charming Betsy* case, the captain who wrongfully arrested the *Flying Fish* was also “answerable in damages to the owner of [the] neutral vessel.”⁴⁸ By deciding the *Flying Fish* case this way, the Supreme Court again underlined the importance of American naval vessels making only lawful seizures, and that deviating from that requirement would be personally expensive for the errant captain.

As seen above, American prize law developed from the English admiralty courts. American prize decisions provided the federal judiciary early opportunities to examine the nature of citizenship, and the interplay of legislative enactments and executive war powers. Due to the independence of the federal courts, including its prize docket, foreign powers like Great Britain could bring frivolous lawsuits to antagonize its enemy, to the detriment of both France and the United States. The lack of trust in the prize adjudication systems in both American and French courts became contributing factors leading to the Quasi-War between the United States and France.

Prize Law in the Barbary States

As seen above, the English, French, and American legal systems made allowance for prize adjudications as part of their standard maritime practices during at least the seventeenth through nineteenth centuries. But what about a part of the world with a completely different history, culture, religion, and geography? Though not much discussed in the literature, nations such as Japan, Egypt, and China implemented their own prize court systems, though these developed typically later than Western European and American counterparts. The commentaries do not note any appreciable departures in these later-developing courts, and they are generally seen as reflective of the developed law of nations.⁴⁹

By contrast, the so-called Barbary States in the age of sail—the Ottoman provinces of Algiers, Tunis, and Tripoli on the North African coast of the Mediterranean—developed their own unique sort of prize-taking, providing a contemporaneous counterexample. The Barbary States’ ship captures in the Mediterranean prompted European powers to take steps to contain them. So, did the Barbary States exercise prize law as was practiced by the European and American powers in the colonial era?

The answer seems to be both yes, and no. Around the same time that prize law and privateering were taking shape in the Atlantic, the Mediterranean coast of North Africa developed an elaborate diplomatic and military system, supported by and nominally subject to the Ottoman Empire. The Barbary states’ practice of taking prize bore some similarities to European prize, but there were stark differences as well. There is no question that the Barbary states captured ships and put the value of those captures to the use of the sponsoring officials. As early as the 1580s, Algiers, Tunis, and Tripoli were dependent

on seaborne attacks on Christian ships to fund government wages, furnish the governors' palaces, and bolster their harbor defenses. Christian seafarers captured in those attacks were forced to work as slaves making those improvements.⁵⁰ The Barbary corsair captains owed their sponsoring province a share of their captures, whether the captures were dry cargo or human captives.⁵¹

It might be tempting to use the taking of human slaves as the basis to draw a distinction between Western (Christian) and Barbary (Muslim) prize law and practices, but that is an oversimplification. There were significant differences in the nature of North African slavery and the chattel slavery practiced in the United States, the most obvious being that many Europeans could be and were ransomed. Moreover, the U.S. Supreme Court actually strengthened American slavery in the prize adjudication case of *The Antelope*,⁵² when it expressly refused to recognize the international consensus forming against the slave trade, thereby strengthening the institution of slavery in America. Considering the express endorsement of the slave trade in *The Antelope*, the western legal tradition can claim no moral superiority over Barbary prize-taking on the basis of the treatment of slaves in prize courts.

Perhaps the only distinction that can be drawn sensibly is that western prize courts at least attempted to respect neutral shipping rights. However imperfectly American and French prize courts may have honored neutral rights, neutrality was nevertheless a fundamental assumption of the western prize court tradition. The Barbary pirates, by contrast, were not known for any such compunction. Other than the difference regarding neutral rights, however, the Barbary coast system of piracy, capture, and shares paid to the government seems similar to the end result of adjudications in European and American prize courts. At risk of moral relativism, one might conclude that the single biggest difference between prize practices among the Barbary pirates as opposed to European and American prize courts was simply a choice about which formalities the different systems chose to observe.⁵³

Modern and Future Applications of Prize Law

Prize proceedings are not a mere historical curiosity. Prize law remains valid in many jurisdictions today, albeit infrequently encountered. While modern prize law typically avoids personal profit, prize proceedings are still the mode of adjudication for captures at sea. With this modern, public-funding model, there is a contemporary, real-world example of prize proceedings in a politically volatile international conflict. Similarly, the well-developed international legal corpus of prize law and related issues of privateering seem to offer a starting point for legal and military theorists attempting to solve novel problems. Applying the historical and contemporary uses of prize law, an observer can anticipate some potential uses of prize law in some of the thorniest problems facing the contemporary world.

Modern Prize Law and the End of the Profit Motive

Since the age of sail, the personal profit motive has been largely removed from the use of force at sea. The 1856 Paris Declaration Respecting Maritime Law memorialized an evolving international consensus that forbade privateering under international law.⁵⁴ It is a common opinion that the Paris Declaration abolished privateering, but that opinion is both a misunderstanding of fact, and a misapprehension of the nature of international law.

In the modern Westphalian system, the nation-state is sovereign, and international law governs the interactions among nations. Nations may enter into bilateral and multi-lateral treaties, and so may bind their own governments—even their own people—to such voluntary regimes. Many examples abound, but they include becoming a United Nations member state, or a nation joining (or exiting) the European Union. Another more prosaic example of treaty law, voluntarily entered into, includes the 1856 Paris Declaration.

In addition to treaty law, much of international law is so-called “customary international law,” which develops over time as the legal norms of the international community. There is contemporary legal debate about how, and in what ways, a nation might opt out of customary international law.⁵⁵ At risk of simplification, derogation from stated international legal objectives may eventually undermine an international legal consensus. This is known as the “persistent objector,” whereby a state’s frequently stated and practically exercised objection to an evolving legal consensus may prevent that legal consensus from forming, or at least exempt the persistent objector from its effect.⁵⁶ Between treaty law and customary international law, a nation-state’s words and deeds are both relevant to forming international law.

Relevant to privateering in particular, within fifteen years of the Paris Declaration, Prussia initiated a new system of a volunteer naval militia, with shares paid to the private vessel owners and the crews. Considering Prussia was a signatory to the Paris Declaration, there was, and remains, debate about whether the Prussian volunteers were lawful (if irregular) military forces, or were an attempt to revive the renounced privateer system by another name.⁵⁷

While the Paris Declaration was not the last word on privateering or prize proceedings, the broader paradigmatic shift against captures for profit can be seen further in the United States’ experience. During the American Civil War soon after the Paris Declaration, there was Confederate privateering, as well as prize-taking and prize litigation in both the United States and the Confederacy. Naval combat in the Spanish-American war resulted in (for-profit) prize litigation. There were few American prize proceedings in the First and Second World Wars,⁵⁸ and by then the proceeds were payable to the government, rather than to the victorious vessels and crews.⁵⁹ This waning profit motive in naval combat shows state practice catching up with the sentiment of the 1856 Paris Declaration and is in accord with the broader trend against private recompense for performing public services.⁶⁰

Despite the end of the profit motive, prize law remains good law, albeit rare in practice. Rather than adjudicating payments to a victorious captor, however, prize proceedings are now primarily focused on the lawfulness of the vessel arrest, and the court either retains the vessel for the arresting government, or releases the vessel due to an improper arrest. Two modern examples show the ongoing application of prize law.

Contemporary Examples: The *Estelle* and *Zaytouna-Olivia*

In 2012, Israel was enforcing a blockade in the Mediterranean Sea to prevent resupply by sea of the Gaza Strip. Israel extended its blockade out to twenty nautical miles, which provided sufficient time to respond to and intercept any would-be blockade runner. The Israeli Navy had its chance when a Finnish sailing vessel named *Estelle* attempted to run the Israeli blockade. At the time, *Estelle* carried activists from several European nations who sailed for Gaza in a show of support for the Palestinians. As the Israeli Defense Force (IDF) closed, the *Estelle* was invited to proceed to the Israeli port of Ashdod rather than to its intended destination in Gaza. The *Estelle* refused to and continued on its intended course.



Image 3: Sailing Vessel *Estelle*, tied up at Korppolaismäki, Finland in 2006. The S/V *Estelle* would make its arresting trip to Israeli waters six years after this photo was taken. Source: Used under provisions of Wikipedia Creative Commons license granted by author Zache at https://upload.wikimedia.org/wikipedia/commons/7/77/Estelle_seen_from_Korppolaism%C3%A4ki.jpg

Its warnings and requests having been ignored, the IDF sent a boarding party to enforce its blockade, forcibly taking possession of the *Estelle* and bringing it to Haifa.

About ten months after capture, the Israeli government brought suit in the local district court to adjudicate the capture. *Estelle's* owners appeared in court to challenge both its authority to make adjudications as a prize court, and the months-long delay in bringing the condemnation action.

On the theory that Israel had succeeded Great Britain after the disestablishment of British Palestine, the Haifa court ruled that England's Naval Prize Act of 1864 applied to the vessel condemnation proceeding. The government did not fare so well on the claim of the delay in bringing the *Estelle* to trial, however, and the trial court ordered the ship released. In a 2016 appeal, the Israeli Supreme Court came to the same conclusions: applying admiralty law and international legal principles, the government's delay in bringing the condemnation proceeding required the *Estelle* to be released immediately, with payment of costs to the owners.⁶¹ The high court opinion in *The Estelle*, however, left room for a different case, with different facts, to yield a different result.

The Israeli government learned its lesson in the *Estelle* case. Just two months after that decision, the IDF seized the sailing vessel *Zaytouna-Olivia* which, like the *Estelle*, was attempting to break the Israeli blockade. The Haifa district court ultimately approved the seizure⁶² and in so doing affirmed Israel's ability to properly capture vessels at sea. More broadly, the *Zaytouna-Olivia* and *Estelle* cases together affirm the ongoing applicability of prize law to cases of modern vessel capture.

Prize Law to Confront Current and Future Threats

Just as prize law has been recently reaffirmed by contemporary Israeli vessel captures, legal theorists believe prize law and related concepts, like privateering, might be employed to combat future threats that are not yet fully addressed in the law of armed conflict. Prize law and other traditional tools of international law, and maritime law in particular, are often analogized to uses in space because, like the high seas, space is considered outside the jurisdiction of any single nation-state.⁶³

Some of the most advanced areas of modern and future civil and military threats include space and cyberspace. In the space realm, the modern global positioning system (GPS) depends on a constellation of satellites to accurately give directions for myriad civilian uses, including driving directions and navigation. The U.S. military uses the same GPS constellation for the same purposes, as well as for targeting.⁶⁴ Potential adversaries well know the purpose of the GPS constellation, and there is a serious risk that future wars will include conflict in space specifically targeting GPS satellites.⁶⁵

Considering these security vulnerabilities in orbit, theorists have discussed the principles of prize law and neutrality, as well as privateering, for potential application in outer space. Analogizing orbiting satellites to vessels at sea, a strict application of traditional

admiralty principles would require arresting a satellite and bringing it physically within the jurisdiction of a prize court. At least one commentator believes this requirement would limit the effect of prize law in space.⁶⁶ This concern may be overstated, however, as modern admiralty courts are able to accept a bond in lieu of a vessel, allowing the lawsuit to proceed to judgment while the defendant vessel continues its voyage.

Other commentators see private space travel efforts like SpaceX and Virgin Galactic as potentially leading to the militarization of space by non-government entities. Just as privately armed ships became privateers on behalf of nations, it is foreseeable that private space vehicles could be armed, thus becoming space privateers.⁶⁷ This discussion of potential future armed uses of space, and the capture of prizes in orbit, will likely continue as public and private use of outer space develops.

Discussions about threats in cyberspace—government or corporate hacks, ransomware attacks, and similar cybersecurity issues—also reference prize law. Like the high seas and outer space, cyberspace is considered both a global commons that should be equally available to all humankind,⁶⁸ as well as a domain for potential conflict.⁶⁹ Unlike outer space, however, cyberspace has already seen many examples of the private use of force by rogue entities as well as those who act with more or less approval, or even outright sponsorship, of a host government. A market for private “hack-back” companies that can defend and counterattack in the cyber realm has already developed.⁷⁰ Governments who hire these hack-back companies seem to be following in the footsteps of sovereigns who centuries ago issued letters of marque to their privateers to employ private force for public ends. Still, as the need for legal justifications for cyber defense and counterattack in the interest of national defense become ever more apparent, the history of prize law is a good place to start looking for precedents.⁷¹

Conclusion

Prize law originated centuries ago to regulate captures at sea between warring nations. Though not uniform and far from perfect, it created a set of legal assumptions and procedures flexible enough to be applied to public and private armed vessels. This adaptability is seen in the same basic steps of a prize adjudication—arrest, judgment, disposition of the vessel—being followed by multiple nations over the course of centuries. Modern day Israel has incorporated these same steps in modern prize proceedings, despite there being no direct history of such proceedings in Israeli courts. That same adaptability may allow prize proceedings to be analogized and applied in outer space and cyberspace.

Regardless of what happens with the law of space and cyberspace, private force will likely proliferate in both domains. When it does, nations would be well advised to keep in mind the lessons that centuries of prize law can teach. Prize courts can be instruments of foreign policy and war, but they are difficult to manage. As seen with Judge Bullock in Jamaica and the Israeli cases of the *Estelle* and the *Zaytouna-Olivia*, governments have a

checkered track record when attempting to instruct an independent judiciary on how to rule in prize cases. When governments set private incentives for public actors, it can be no surprise that the actors must balance their private interest against their public duty, as American captains discovered after the decisions in the *Charming Betsy* and the *Flying Fish*. Any attempt to commission a “space privateer,” or contract governmental work to a cyber-space hack-back company, should look carefully at these lessons drawn from centuries of prize courts throughout the world.

Appendix

Additional Online Resources on Naval Combat, Vessel Captures, and Privateering:

- *The Commander’s Handbook on the Law of Naval Operations* [USA], https://www.gc.noaa.gov/pdfs/CDRs_HB_on_Law_of_Naval_Operations_AUG17.pdf.
- Edwin B. Forsythe National Wildlife Refuge Teacher Ranger Lesson Plan, accessed October 25, 2021, https://friendsofforsythe.org/wp-content/uploads/2021/03/EBForsythe_-Privateering-Lesson.pdf.
- Miranda Kaufmann, “Black Tudors: War, Privateering and Piracy,” *Future Learn*, accessed October 25, 2021, <https://www.futurelearn.com/info/courses/black-tudors/0/steps/224760>.
- Charles R. Lampson, “Privateers of the Revolution,” Massachusetts Society of the Sons of the American Revolution, accessed October 25, 2021, <https://www.massar.org/2011/06/23/privateers-of-the-revolution/>.
- Eliav Lieblich, “Guest Post: Update on Israel/Palestine and the Revival of International Prize Law,” accessed October 25, 2021, <http://opiniojuris.org/2014/09/14/guest-post-update-israelpalestine-revival-international-prize-law/>.
- “Piracy and Privateering with Elizabethan Maritime Expansion,” Fort Raleigh National Historic Site, accessed October 25, 2012, <https://www.nps.gov/fora/learn/education/piracy-and-privateering-with-elizabethan-maritime-expansion.htm>.
- “Pirate in the Caribbean,” *National Geographic* Resource Library, accessed October 25, 2021, <https://www.nationalgeographic.org/article/pirate-caribbean/>.
- San Remo Manual on International Law Applicable to Armed Conflict at Sea, accessed October 25, 2021, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce!OpenDocument>.
- UN Convention on the Law of the Sea, accessed November 12, 2021, https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

Cybersecurity and Privateering

- Florian Egloff, “Cyber Privateering: A Risky Policy Choice for the United States,” *Lawfare*, accessed October 25, 2021, <https://www.lawfareblog.com/cyber-privateering-risky-policy-choice-united-states>.
- Florian Egloff, “Cybersecurity and the Age of Privateering,” in *Understanding Cyber Conflict: Fourteen Analogies*, edited by George Perkovich and Ariel E. Levite (Washington, DC: Georgetown University Press, 2017), accessed October 25, 2021, https://carnegieendowment.org/files/GUP_Perkovich_Levite_UnderstandingCyberConflict_Ch14.pdf.
- Peter W. Singer and Allan Friedman, “Shiver My Interwebs: What Can (Real) Pirates Teach Us about Cybersecurity?” *Slate*, January 01, 2014, accessed October 25, 2021, <https://slate.com/technology/2014/01/cybersecurity-and-cyberwar-excerpt-what-real-pirates-can-teach-us.html>.

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NOTES

¹ Likely obscure to a non-specialist, this case is formally cited as *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 116–121 (1804).

² Sometimes there could be additional incentives such as “head money” and “gun money,” based on the number of people and guns captured, respectively.

³ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

⁴ The historical practice of a “reprisal” is related to the development of privateering. Historically, a citizen wronged by a foreign power might apply to his own sovereign to receive a “reprisal,” which is lawful authority to physically attack and seek recompense—or even retribution—from nationals belonging to the foreign, offending power. It is easy to see how a reprisal—in essence a warrant to conduct private warfare—can be put to good ends for both the wronged citizen and the sovereign willing to harm a foreign state but leery of risking outright warfare. Richard Pares, *Colonial Blockade and Neutral Rights, 1739–1763* (Oxford: Clarendon Press, 1938): 2–3. The development of reprisals

into privateering can be seen where the U.S. Constitution confers on Congress the power to “grant Letters of Marque and Reprisal.” U.S. Const. Art. I § 8. The term “reprisal” survives in another context in the modern law of armed conflict, referring to a limited use of force by a belligerent that would otherwise violate the law of war, if that force is in response to—a “reprisal” for—an earlier similar violation of the law of war. See Shane M. Darcy, “The Evolution of the Law of Belligerent Reprisals,” *Military Law Review* 175 (March 2003): 184.

⁵ The document that granted government permission for privateering was called different things at different times. The “letter of marque” was common, but sometimes a government might issue a “commission,” or other times a “letter of marque and reprisal.” In different contexts and at different times these documents might, for example, allow a privateer to cruise against an enemy nation’s warships and cargo ships the same as a public, naval warship, or it might simply allow an armed merchant vessel to opportunistically take the occasional enemy prize it might encounter on its standard trading route. Cataloging and distinguishing the various types privateering permissions across the centuries and in multiple nations is beyond the scope of this article.

⁶ See generally Nicholas R. Parrillo, *Against the Profit Motive* (New Haven: Yale University Press, 2013).

⁷ Hulbert Footner, *Sailor of Fortune: The Life and Adventures of Commodore Barney, USN* (Annapolis: Naval Institute Press, 1998): 73, on the Continental Congress’s regulations regarding a warship’s shares for a prize; and Frances Diane Robotti and James Vescovi, *The USS Essex and the Birth of the American Navy* (Holbrook: Adams Media, 1999): 51–52, with a similar discussion of prize shares in the early American republic. See also Christopher McKee, *Edward Preble, A Naval Biography, 1761–1807* (Annapolis: Naval Institute Press, 1996): 26, a candid discussion of how political pressure from a naval captain’s friends resulted in orders to sail for cruising grounds more likely to yield prizes.

⁸ This is referred to as a suit “in rem,” or against the thing itself. This is unusual in a common law system, as most lawsuits are between people or entities, not inanimate property. The *in rem* admiralty suit was and remains an exception to this standard practice.

⁹ George F. Steckley, “Bottomry Bonds in the Seventeenth-Century Admiralty Court,” *American Journal of Legal History* 45 (July 2001): 275–277 and 277, table 5.

¹⁰ There is a subtle historical distinction between “admiralty courts” and “prize courts.” Admiralty courts adjudicated private claims (called “instance cases”), such as vessel collisions or seaman’s wage claims. Historically, English prize courts were related to but separate from admiralty courts. As Lord Mansfield explained in *Lindo v. Rodney and another*, “the whole system of litigation and jurisprudence in the prize court, is peculiar to itself: it is no more like the court of Admiralty, than it is to any court in Westminster Hall.” 99 English Reports, 385 at 386. See Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775–1787* (Philadelphia: American Philosophical Society, 1977): 150; Pares, *Colonial Blockade and Neutral Rights*, 78. Though worth noting for historical interest, this distinction is not maintained in the remainder of this discussion, because, during wartime, the English admiralty courts acted as prize courts. For this reason, the terms “prize court” and “admiralty court” are used in concert and interchangeably by many authors and will be for the remainder of this discussion.

¹¹ A brief note about the concept of neutral ports and neutral shipping is in order. Throughout the relevant time period, the international community disagreed on the extent to which neutrality could be maintained. For example, when two nations (A and B) are at war, and a non-belligerent nation C ships its own goods on a “C-flagged” vessel, the vessel and the goods are neutral as to

both A and B. If either nation (A or B) arrests a vessel of the other country, a port in nation C—the neutral, non-belligerent in the war—might be called upon to adjudicate the prize under international legal principles.

However, what if nation A arrests a neutral (nation C) vessel in the vicinity of B, potentially sending goods into B during the war? Can nation A stop the vessel as it might be supplying its enemy? Or does the neutral (nation C) vessel carry goods that are neutral by definition, not subject to seizure? Might nation A's own prize courts treat such an arrest differently than nation C's prize courts?

These competing arguments over neutrality date back to before 1600. Hugo Grotius, *Commentary on the Law of Prize and Booty*, Martine Julia van Ittersum, ed. (Indianapolis: Liberty Fund, 2006). Responding to a perceived Portuguese overreach, the Dutch position favored neutrality, so that free ships carried free goods. This was the same position that early American traders pushed, right into the Quasi War with France, as discussed later in the article. Early American courts were concerned about both neutrality and the limits of domestic law, creating interesting results in prize adjudication cases, some of which are also discussed in the article text. By way of comparison, the British typically took a dim view of broad neutrality, often allowing captures of enemy goods wherever seized, and disregarding neutral rights.

These inconsistent views of neutrality raise a question—beyond the scope of this piece—about whether prize adjudications could actually be held according to international principles of “neutrality,” or whether they could only apply a local understanding of “neutrality” refracted through the lens of the forum nation’s particular legal context and history. For a summary of a 1950 Egyptian prize court wrestling with this sort of neutrality challenge, see James Farrant, “Modern Maritime Neutrality Law,” *International Law Studies* 90 (2014): 307, n.21.

¹² Pares, *Colonial Blockade and Neutral Rights*, 77–78.

¹³ Though beyond the scope of this discussion, this change resulted from a conflict of political and economic interests playing out in terms of court jurisdiction. George F. Steckley, “Collisions, Prohibitions, and the Admiralty Court in Seventeenth-Century London,” *Law and History Review*, 21 (Spring, 2003): 45.

¹⁴ Steckley, “Collisions, Prohibitions, and the Admiralty Court,” 65–67.

¹⁵ Pares, *Colonial Blockade and Neutral Rights*, 1.

¹⁶ Pares, 6–9.

¹⁷ E. B. Potter, *Sea Power* (Annapolis: United States Naval Institute, 1981): 16.

¹⁸ Pares, *Colonial Blockade and Neutral Rights*, 88.

¹⁹ Pares, 88.

²⁰ Pares, 3n3.

²¹ “Salvage” is an amount that a vessel owner pays a salvor for saving the vessel from peril. While it appears in seventeenth century cases, the term and concept are still in use today. Even today, owners of other vessels, tugboats, and commercial salvage companies will occasionally sue for salvage awards after rendering assistance.

²² Pares, *Colonial Blockade and Neutral Rights*, 29n2.

²³ Pares, *Colonial Blockade*, 8.

²⁴ Pares, *Colonial Blockade*, 10.

²⁵ See, e.g., José M. Luzón Nogué and María Dolores Sánchez-Jáuregui, “The Rediscovery of the ‘English Prize,’” in *The English Prize*, María Dolores Sánchez-Jáuregui and Scott Wilcox, eds. (New Haven: Yale University, 2012): 13, discussing a French prize proceeding conducted in Málaga in 1779.

[26](#) Pares, *Colonial Blockade and Neutral Rights*, 8.

[27](#) U.S. Constitution, Art. III § 2.

[28](#) Matthew P. Harrington, “The Legacy of the Colonial Vice-Admiralty Courts (Part II),” *Journal of Maritime Law and Commerce* 27 (April, 1996): 326; and Bourguignon, 150–151.

[29](#) When Parliament passed the Sugar Act of 1764, more types of cases—such as trade cases—were swept into admiralty jurisdiction. Under this law, seizures in the English home islands were tried in common law courts before a jury, while identical seizures in the colonies were tried by a vice admiralty judge. This expansion of vice admiralty jurisdiction was the root of the colonists’ complaint about a lack of jury trials noted in the Declaration of Independence, which faulted George III for “depriving us in many cases, of the benefits of Trial by Jury.”

[30](#) Harrington, 330.

[31](#) Joseph Modeste Sweeney, “A Tort Only in Violation of the Law of Nations,” *Hastings International and Comparative Law Review* 18 (Spring 1995): 459–60.

[32](#) Matthew P. Harrington, “The Legacy of the Colonial Vice-Admiralty Courts (Part II),” *Journal of Maritime Law and Commerce* 27 (April, 1996): 340–341.

[33](#) Bourguignon, *The First Federal Court*, 78–81.

[34](#) Michael A. Palmer, *Stoddert’s War: Naval Operations during the Quasi-War with France, 1798–1801* (Annapolis: Naval Institute Press, 2000): 4–5.

[35](#) Harrington, “The Legacy of the Colonial Vice-Admiralty Courts,” 328n110.

[36](#) This is a portmanteau of “law” and “warfare.” See David Sloss, “Judicial Foreign Policy: Lessons from the 1790s,” *Saint Louis University Law Journal* 53 (Fall 2008): 145, 174–76.

[37](#) Harrington, “The Legacy of the Colonial Vice-Admiralty Courts,” 342–343.

[38](#) *U.S. v. Peters*, 9 U.S. (5 Cranch) 115 (1809).

[39](#) If Shattuck were an American citizen, he would be subject to domestic American law, including a then-effective law against contraband. A smuggler’s captured ship and cargo would be subject to condemnation and prize proceedings like any other prize, even though the smuggler was American. As discussed in the text above, the legal holding of the case went the other way, absolving Shattuck and the *Charming Betsy* on jurisdictional grounds. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 116–121 (1804).

[40](#) Joel Richard Paul, *Without Precedent: Chief Justice John Marshall and his Times* (New York: Riverhead Books, 2018): 264–68.

[41](#) *Murray v. Schooner Charming Betsy*, at 120–21.

[42](#) *Murray v. Schooner Charming Betsy*, at 125.

[43](#) Paul, *Without Precedent*, 270.

[44](#) *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804).

[45](#) *Little v. Barreme*, at 178 (emphasis added).

[46](#) *Little v. Barreme*, at 179.

[47](#) *Little v. Barreme*, at 179; see also Paul, *Without Precedent*, 273–74 (emphasizing this passage).

[48](#) *Little v. Barreme*, at 179.

[49](#) See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900); and Farrant, “Modern Maritime Neutrality Law,” 204 n.21.

[50](#) Adrian Tinniswood, *Pirates of Barbary* (New York: Riverhead Books, 2010), 10.

[51](#) Tinniswood, 113; and G. N. Clark, “The Barbary Corsairs in the Seventeenth Century,” *The Cambridge Historical Journal* 8, no. 1 (1944): 32–33.

⁵² *The Antelope*, 23 U.S. (10 Wheat.) 66; 24 U.S. (11 Wheat.) 413; 25 U.S. (12 Wheat.) 546; see also Jonathan M. Bryant, *Dark Places of the Earth* (New York: Liveright, 2015).

⁵³ Theodore T. Richard, "Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy," *Public Contract Law Journal* 39 (Spring 2010): 411, 432–33.

⁵⁴ Richard, "Reconsidering the Letter of Marque," 430.

⁵⁵ C.L. Lim and Olufemi Elias, "Withdrawing from Custom and the Paradox of Consensualism in International Law," *Duke Journal of Comparative and International Law* 21 (2010): 143.

⁵⁶ Hitoshi Nasu, "The Regime of Innocent Passage in Disputed Waters," *International Law Studies*, 94 (2018): 243.

⁵⁷ Nasu, "The Regime," 243.

⁵⁸ Jonathan M. Gutoff, "Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto," *Journal of Maritime Law and Commerce* 30 (1999): 402–403.

⁵⁹ Richard, "Reconsidering the Letter of Marque," 428–429.

⁶⁰ Parrillo, *Against the Profit Motive*, 359–362.

⁶¹ "Israel: Supreme Court Orders Release of Ship Captured Attempting to Break Gaza Blockade," accessed July 17, 2021, at <https://www.loc.gov/law/foreign-news/article/israel-supreme-court-orders-release-of-ship-captured-attempting-to-break-gaza-blockade>.

⁶² Jeremy Bob Yonah, "Court sets new precedent against flotillas used to break IDF Gaza blockade," *Jerusalem Post*, accessed July 21, 2021, <https://www.jpost.com/Israel-News/Court-sets-new-precedent-to-deter-Gaza-flotillas-579888>.

⁶³ Wolff Heintschel von Heinegg, "Neutrality and Outer Space," *International Legal Studies* 93 (2017): 526n2 (commenting on the 1967 Outer Space Treaty); but see Sean McFate, *The New Rules of War* (New York: William Morrow, 2019): 69. Chinese legal scholars claim sovereignty indefinitely upwards, theoretically creating "Chinese space" high over its territory.

⁶⁴ McFate, *The New Rules of War*, 46, 55.

⁶⁵ McFate, 68–69.

⁶⁶ Heintschel von Heinegg, "Neutrality and Outer Space," 529–30.

⁶⁷ McFate, *The New Rules of War*, 138.

⁶⁸ Christopher R. Rossi, "A Particular Kind of Dominion: The Grotian Tendency and the Global Commons in a Time of High Arctic Change," *Journal of International Law and International Relations* 11 (Spring, 2015): 11.

⁶⁹ Heintschel von Heinegg, "Neutrality and Outer Space," 534.

⁷⁰ McFate, *The New Rules of War*, 137.

⁷¹ Paul Rosenzweig, "International Law and Private Actor Active Cyber Defensive Measures," *Stanford Journal of International Law* 50 (2014): 103, 112–113; Jeremy Rabkin and Ariel Rabkin, "Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea," *Chicago Journal of International Law* 14 (2013): 197; Christopher M. Kessinger, "Hitting the Cyber Marque: Issuing a Cyber Letter of Marque to Combat Digital Threats," *Army Lawyer* (August, 2013): 4; Joshua Parisi, "'WWW' Marques the Spot: Privateering as a Solution to Cryptocurrency Theft," *Southern Methodist University Law Review* 72 (2019): 895; and Michael Viets, "Piracy in an Ocean of Stars: Proposing a Term to Identify the Practice of Unauthorized Control of Nations' Space Objects," *Stanford Journal of International Law* 54 (2018): 181–184.