



THE SUPREME COURT
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Advisory Board for Federal Judiciary History Volume Meets

The goal of completing a one-volume history of the Federal Judiciary is moving closer to becoming a reality. In February 2014, the Advisory Board for the project met in the Lawyers' Lounge at the Supreme Court Building with all members of the Board participating in the meeting. This meeting provided an opportunity for advisory board members to meet together, express their individual visions and hopes for the volume, and to interview one of the team of three authors.

The Advisory Board consists of three prominent and experienced federal judges, complimented by a group of important scholars. The Hon. Laura Taylor Swain, from the U.S. District Court for the Southern District of New York; The Hon. J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit; and The Hon. Diane P. Wood, U.S. Court of Appeals for the Seventh Circuit, serve with Daniel P. Ernst, Professor of Law, Georgetown Law; Laura Kalman, Professor of History, University of California at Santa Barbara; Edward A. Purcell, Jr., Joseph Solomon Distinguished Professor of Law, New York Law School; and Russell Wheeler, Visiting Fellow and President, Governance Institute, Brookings. All members of the Board participated in the meeting, and most attended in person. Professors Kalman and Purcell participated by teleconference. Members of the Board were joined that day by Judge Jeremy Fogel, Director of the Federal Judicial Center (FJC), Jeffrey P. Minear, Counselor to the

Chief Justice of the United States, David McBride of Oxford University Press, and David T. Pride, Executive Director of the Historical Society.

The project is coordinated by two managing editors as representatives of the two organizations collaborating on the production of the book: The Supreme Court Historical Society and the Federal Judicial Center. The editors, Bruce Ragsdale of the FJC, and Clare Cushman, Director of Publications for the Society, serve as conduits for information and questions for the authors and members of the Advisory Board, and perform essential editorial tasks including review of the manuscript.

David Pride gave an account of the genesis of the project. A review of the Society's organizational documents at the request of then-President Ralph I. Lancaster identified this as one of the important unfulfilled goals identified in 1974. The members of the Executive Committee determined that the Society was now in a position financially to pursue this objective, and Mr. Pride was directed to consider how this could be accomplished.

Working with Ms. Cushman, Mr. Pride said it soon became clear that a partnership between the Society and the FJC would provide the ideal way to create the volume. Ms. Cushman and Mr. Ragsdale were selected to serve as the managing editors for the book. They carefully considered possible authors, and identified a trio of scholars to pen this work. The



Steve Petteway/Collection of the Supreme Court

Members of the Advisory Board (left to right): author Peter Hoffer, Bruce Ragsdale, Clare Cushman, Judge Laura Taylor Swain, Judge Jeremy Fogel, Daniel Ernst, Judge J. Harvie Wilkinson III, David McBride and Judge Diane P. Wood.

A Letter from the President



The year 2014 has already seen a number of interesting Society programs, and activities are moving ahead at what seems an unusually fast pace. One of the most exciting developments is the significant progress our authors and the Advisory Board of Editors are making on the **History of the Federal Judiciary**.

As you read on the first page of this issue, the early days of the year witnessed a meeting of the Advisory Board of Editors for this new volume. That is a significant milestone in the journey to complete this important book, the first draft of which was submitted well ahead of deadline. On behalf of the Society, I would like to express our deep gratitude to the authors and to each of the members of the Advisory Board for his or her willingness to devote meaningful time to insure that the volume will provide an outstanding reference book on the judicial branch of the federal government for decades to come.

On April 9, the Society co-sponsored a panel discussion with the Supreme Court Fellows Alumni (see page 4 for an article about that program). Justice Samuel Alito hosted the event and made introductory remarks. Judge John M. Ferren, Senior Judge of the District of Columbia Court of Appeals, acted as both the moderator and as a panelist for **Judging Judges: Writing Judicial Biography in the Modern Age**. The discussion focused on the challenges and methodologies involved in writing judicial biographies. Judge Ferren, author of **Wiley Rutledge: Salt of the Earth Conscience on the Court**, was joined by three other experienced authors: Clare Cushman, the Society's Director of Publications and the editor/contributing writer to the Society's **Supreme Court Justices: Illustrated Biographies**; Stephen Wermeil, Professor of Practice in Constitutional Law at American University Washington School of Law and author of **Justice Brennan: Liberal Champion**; and Alexander Wohl, author of **Father, Son, and Constitution: How Justice Tom Clark and Attorney General Ramsey Clark Shaped American Democracy**.

Each panelist explained his or her personal experience and the challenges peculiar to writing a judicial biography. A lively discussion addressed the process of collecting resource materials, the value of conducting personal interviews, appropriate criteria for determining what should be included and omitted, and the need to be alert to the risk of

allowing personal bias to intrude. The participants discussed this process not only through the lens of their personal experiences but also made observations about reading the work of other biographers.

Judge Ferren noted that he was persuaded to write a biography of Wiley Rutledge by a law librarian who touted Rutledge's legible handwriting, and the availability of an abundance of papers that had not been utilized by other scholars previously. Professor Wermeil, a writer for the *Wall Street Journal* for more than a decade, reflected the significance of his experience as a journalist in his comments and in the preparation of his volume. Mr. Wohl, a former Supreme Court Fellow, discussed the ways in which his experience working with the judicial branch of government provided him insight into the operation of the judiciary. As the editor of a reference work featuring short biographical profiles of all the Justices, Ms. Cushman offered her perspective on the challenges of describing a Justice's life and jurisprudence in a brief essay. She also made a pitch for would-be biographers to consider writing state-of-the-art volumes on Justices Willis Van Devanter, William R. Day, George Sutherland and Edward Sanford.

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On April 9, panelists (left to right) Judge John M. Ferren, Stephen Wermeil, Clare Cushman and Alexander Wohl were photographed with Justice Samuel A. Alito, Jr., the host of the discussion **Judging Judges**.

Quarterly

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Managing Editor Kathleen Shurtleff
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authors are three notable academics, Prof. Peter Charles Hoffer, Prof. N.E.H. Hull, and Prof. William James Hoffer. Each has extensive publication credits and impressive academic qualifications and credentials, and collectively, their accomplishments are formidable. Serendipitously, the authors are husband, wife and son, respectively. Interviews were conducted, and a contract was executed between the Society and the authors. Preparation of the manuscript has progressed rapidly and the Society has now entered into a contract to produce the book with the prestigious Oxford University Press.

At the meeting, members of the Advisory Board had the opportunity to ask questions, and to express personal views about the composition and focus of book. Professor Peter Hoffer represented his co-authors, and provided insight into the scope of the research and the selection criteria used for inclusion in the manuscript. Prof. Hoffer also outlined the professional qualifications of each member of the author team, noting that each is an historian, two hold a Ph.D., and all have research and teaching experience at the university level.

Author-team members are united in their view that creating a narrative work is the best way to engage the intended audience: the federal court family, including judges, staff, and the federal bar; teachers and their students; and a general audience interested in the history of public affairs in the United States. Tasked with preparing a one-volume history of such a large organization with a lengthy history, the authors have been forced to be highly selective, focusing on the essential themes of federal court history and aimed at the interests of the likeliest audiences. This required resolving some basic questions about balance and proportionality. These questions include: How much emphasis should be placed on the Supreme Court in a narrative that considers the entire federal court system? How much attention should be devoted to the role of Congress in defining the organization and jurisdiction of the federal courts? The decentralized character of the federal judicial system and the variations among district and circuits make it difficult to generalize about litigation patterns, caseloads, case management, and the role of judges. How might the narrative history balance recognition of this historical lack of uniformity with the need for a synthesis of the work of all the federal courts?

In attempting to resolve these questions, the authors set up criteria for the kinds of documents and sources that would be helpful in creating such a history. All three came to the conclusion that utilizing primary source materials was essential to creating an outstanding volume. Sources they have consulted include manuscripts, letters, newspapers, and the papers of Judges, all of which provide rich insight giving greater depth to accounts found in secondary sources. However, secondary sources, including the works of famous scholars, jurists, judges and heads of commissions, have

also been accessed. While these materials often provide rich details and information, they do not always cite primary source material, making it hard to document the accuracy of the information. With the passage of time, however, secondary sources become de facto primary source material and often include material that was deemed of special interest at the time they were written, which provides insight into the development of public perception and opinion.

Shortly after research began, the authors realized that a history of the federal judiciary could easily encompass 2000 pages or more, but the goal of the completed product is to create a volume no greater than 600 pages in length. The work was divided and each author was assigned specific chapters to write based on his or her individual areas of expertise. Given the assignments, the judgment of what was to be included in those chapters and how it should be approached, was made largely by the assigned author. As a group, the authors determined they would use only the best of the secondary sources to restrict the length of the finished product. Four cardinal rules were identified for the selection of materials to be included: 1) Utilize material that originated with a member of the Bar, a Judge, notes of a congressional debate or statute; further the materials would be included only if they played a vital role in the work of the courts or their development. 2) Review and select cases that were significant at the time. 3) Select cases that are representative of time and/or place. 4) Favorite cases of the authors.

The team completed a lengthy outline and submitted it to the managing editors and Advisory Board for review in September 2013. While researching and writing this outline, the authors contacted colleagues to request comments, suggestions and criticisms on the developing manuscript. These comments have contributed to an evolving concept of how the book should be shaped and directed to best serve the intended audience. Among the issues raised by all reviewers and commentators are changes in access to the courts, and especially to judges with life tenure in the wake of the increased reliance on magistrate judges, and the decline of the trial. Debates on access to the federal courts date back to the founding era, and the authors feel this theme of access should play a part in the narrative history.

The meeting provided an opportunity for the Board members to discuss the project, gain a greater understanding of what the authors plan, and make suggestions. The authors incorporated those suggestions and views as they prepared a second draft. Ms. Cushman and Mr. Ragsdale will review the manuscript for style and content, and then each member of the Advisory Committee will review it and make comments and corrections as part of the collaborative process. The goal of publication by end of calendar year 2015 appears attainable, and Oxford Press is preparing marketing plans. Both the Society and the FJC plan to create educational and professional development programs for social studies teachers which will greatly expand its utility and significance.

The Supreme Court Fellows Program and the Society: A Continuing Collaboration

By Melissa Aubin*

Since 1973, the Supreme Court Fellows Program has provided a unique opportunity each year for four talented individuals to contribute to and study federal court administration from the inside. In recent years, the Program has expanded its outreach to a broader set of prospective applicants. In addition to mid-career lawyers and academic leaders, the Program seeks applications from newer attorneys pursuing public service or academic careers. We are asking members of the Supreme Court Historical Society, which already does so much to support the Fellows Program, to help spread the word.

The core structure and fellowship appointments remain unchanged. The Supreme Court Fellows Commission selects four individuals to spend a year participating in the work of agencies at the heart of administration of the federal courts. Fellows are placed in the Supreme Court of the United States, the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission. The Program provides Fellows with hands-on exposure to judicial administration, policy development, and education. The Program also offers opportunities for each fellowship class to attend Supreme Court oral arguments, get to know the Supreme Court community through social events, participate in luncheons with public officials, and share in valuable education programs produced by the Supreme Court Historical Society. As Fellows contribute to the work of their agencies, they learn from each other how the participating organizations fulfill their missions. The Program allows Fellows to develop tools and expertise that they can readily transfer to their careers in academic settings, public service, or private practice after the fellowship year.

The Supreme Court Fellows Commission has recognized that legal career paths, especially for academia and public service, have changed. Younger candidates can benefit from and enhance the Program. The application process is now open to recent law school graduates and to recent PhD recipients in political science, history, or other related fields. The Program encourages applications from attorneys who are completing one or more judicial clerkships and who seek to broaden their understanding of the judicial system through exposure to federal court administration. The application pool for the 2014-2015 Fellows class was outstanding, and we expect the Program to continue to benefit from an expanded pool of candidates.

When Chief Justice Warren Burger founded the Supreme Court Historical Society, he envisioned that it would share interests in common with the Fellows Program, and a close collaboration between the organizations continues. Over the decades, the Society has graciously co-sponsored the Supreme Court annual Fellows Program Lecture and Dinner, included Fellows in its intellectual and cultural community,

and sponsored the Supreme Court Fellows Alumni Association, which is chartered by the Society.

The highlight of the fellowship year is the annual Supreme Court Fellows Program Lecture and Dinner, which takes place in late February. The lecture typically features a topic of interest related to Supreme Court practice or the federal judiciary generally. Timely and broadly drawn, the topics attract attorneys, alumni, law professors, judges, and members of the public. Past lectures include “Full Court Press: Perspectives on Covering the Supreme Court,” featuring reporters Joan Biskupic, Jess Bravin, and Pete Williams (2013), and “Legal Advocacy,” featuring Justice Antonin Scalia and Bryan Garner (2012).

The 2014 annual events included a public program on February 27, 2014, at the Newseum entitled, “The Foreign Intelligence Surveillance Court: A Conversation with Judge John D. Bates.” Newseum CEO James Duff and Judge Bates, former Presiding Judge of the Foreign Intelligence Surveillance Court, joined in a wide ranging discussion about the nature and purpose of the court, its caseload and procedures, review of its decisions, and recent proposals to reconsider how the court operates.

That evening, participants gathered at the Supreme Court for a reception and dinner program, which Chief Justice John G. Roberts, Jr., and Justice Sonia Sotomayor attended. Supreme Court Fellows Program Commission Chair, retired U.S. District Judge Irma Gonzalez, spoke to the guests about her service as Chief Judge of the Southern District of California and offered inspirational advice about how to improve our communities through public service. Judy Sloan, Professor of Law at Southwestern Law School in Los Angeles, California, and former Commissioner, presented the Supreme Court Fellows Program Distinguished Service Award to Matthew Duchesne, outgoing President of the



Steve Petteway/Collection of the Supreme Court

The 2013-2014 Supreme Court Fellows, from left to right: Michael Shenkman (Supreme Court); Dave Sidhu (U.S. Sentencing Commission); George Everly III (Administrative Office of the U.S. Courts); Stephanie Tai (Federal Judicial Center).

Supreme Court Fellows Alumni Association, in appreciation of his work supporting the changes to the Fellows Program.

How can members of the Supreme Court Historical Society continue to help? Please spread the word about the Fellowship opportunity and encourage qualified candidates to learn more about the program and to apply. The current Supreme Court Fellows and our community of alumni are deeply grateful for everything the Society does to support the Fellows Program.

The Fellows Program is administered by the Office of the Counselor to the Chief Justice in cooperation with the other three participating agencies, and with the assistance of the Society. Further information is available by accessing the Supreme Court's website, www.supremecourt.gov.

**Melissa Aubin was a Supreme Court Fellow 2008-2010, and joined the staff of the Counselor to the Chief Justice in 2013.*



Newseum CEO James Duff and U.S. District Judge and Director of the Administrative Office of the U.S. Courts John D. Bates, discuss the Foreign Intelligence Surveillance Court at the Supreme Court Fellows Program Lecture on February 27, 2014.

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Several journalists covered the event using social media, sending out live tweets. The evening — a lively, engaging and thought-provoking discussion — marked the Alumni Group's inaugural experience presenting a panel discussion of this nature. The Society was pleased to co-sponsor the event and help to make it such a success.

Two lectures in the 2014 Leon Silverman Lecture Series were presented in May 2014, one concerning *Dred Scott* and the other on the impact of the Civil War on Justice Oliver Wendell Holmes. The next issue of the *Quarterly* will furnish more detailed information on those programs (as well as the two lectures coming up this Fall) so I will only say that they were outstanding events. Fortunately, C-SPAN taped both programs, thus making them available to a far greater audience than we can seat in the Court Room. The *Dred Scott* lecture by Professor Lea VanderVelde is already available on the C-SPAN website, and the Oliver Wendell Holmes panel — comprised of Professors James McPherson, G. Edward White and Brad Snyder — soon will be.

This fall the Society will host its second New York Gala on October 28, 2014. The back page of this issue provides some details on the event, and additional information is

available on the Society's website www.supremecourthistory.org/society-info/recent-events. Please consider attending if your schedule allows. The first gala, in March of 2013, was a festive and wonderful evening, and the funds raised by these galas play an extremely important role in underwriting the costs associated with Society program activities, including the Summer Institute for Teachers, our programs and publications. One of our Vice Presidents, Dorothy Tapper Goldman, a noted collector of invaluable historical documents, will again allow the Society to display extremely rare documents from her collection — a **Slip Copy of the First Proposal for the Bill of Rights** as distributed to Congressmen in August 1789, and the leather bound **Journal of the Senate** containing the first approval of the Bill of Rights (these are not identical — two of the initially-proposed Rights did not make it through Congress). The opportunity to examine important pieces of history sets our galas apart. I hope to see many of you in New York on October 28, 2014. Whether you can attend or not, we are extremely grateful to all of you for your continuing support, as we work together to expand the scope of our activities and educational outreach.

Craig P. Joseph

WANTED

In the interest of preserving the valuable history of the highest court, The Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisitions Committee at the Society's headquarters, 224 East Capitol Street, N.E. Washington, D.C. 20003 or call (202)543-0400. Donations to the Acquisitions fund would be welcome. You may reach the Society through its website at www.supremecourthistory.org

Eyes on the Prize: The Story of Prize Law, the Prize Cases, and the *Alabama* Claims

By: Jim Josefson*
&
Artemus Ward*

“For England, for home, and for the prize!” yells Captain “Lucky Jack” Aubrey before boarding a French frigate in the 2003 film *Master and Commander: The Far Side of the World*. England and home we understand, but “the prize?” That concept is somewhat difficult to grasp in terms of 21st century legal thinking, for it refers to what seems like nothing more than a justification for legalized piracy. But as unlikely as it seems, from the early 17th century through the early 20th century, naval warships and privateers (private ships given an authorizing “letter of marque and reprisal”) could capture enemy ships, sell them with their cargoes, and then divide most of the proceeds between the captain and crew. In the War of 1812, for instance, US Navy ships and privateers grossed an estimated \$45 million in prize money—the equivalent of \$800 million in 2014 dollars. In other words, naval officers (using government-provided resources) or privateer captains (and their private investors) could become fabulously rich confiscating other peoples’ property in an entirely legal process, dutifully overseen by courts applying what was, at that time, the most highly developed area of international

law. And this system of legalized piracy was even practiced in the United States under specific Constitutional authority. Indeed, prize law was overseen by the Federal Judiciary, with U.S. District Courts acting as “courts of Admiralty” and the U.S. Supreme Court having final appellate jurisdiction. The most famous example is referred to as the *Prize Cases* of 1863, in which the Supreme Court upheld the condemnation of *The Crenshaw*, *The Hiawatha*, *The Amy Warwick* and *The Brilliante*, prizes taken in the early days of President Abraham Lincoln’s unilateral blockade.

When historians consider the *Prize Cases*, they tend to focus only on how the case contributed to the expansion of presidential power and whether that expansion is consistent with the Constitution’s investment in Congress of the power to wage war. The debates, therefore, fall into the tired dualisms of arbitrary power and law, passion and reason. But the broader history of the *Prize Cases*, and prize law more

generally, suggests more of the paradoxes that animate the drama in *Master and Commander*.

The movie, a loose adaptation of Patrick O’Brian’s novels about the British Navy in the Napoleonic Wars, portrays contradictions between the barbarism and venality of naval warfare and the virtue and high culture of the heroes are played out scene after scene. The British Tars, who fight for their ship and an England “under threat of invasion,” also fight for their ration of rum and their “share of the prize money,” a ship “loaded with gold and ambergris and all the gems of Araby.” The beautiful and brave aristocratic Midshipman Lord William Blakeney is also an 11 year-old child soldier who loses an arm. By the end of the film he wants to be

a “fighting naturalist,” combining the qualities of the ship’s doctor/natural philosopher and its sanguine captain. However, the captain and the doctor, order and reason, ancient regime and modern republicanism, are somehow friends. They trade point and counterpoint both literally and figuratively throughout the drama. One plays violin and the other cello in a song where the themes of one part

are somehow variations on the other. In the history of prize law, epitomized by the *Prize Cases* but also the *Alabama* Claims (the US pursuit of damages from Great Britain for building the *Alabama* and other Confederate raiders), we see the same parts are played, always intertwining and leading in interesting directions.

One of the themes in this story is that prize cases begin in violence but lead towards establishing legal boundaries that hem in violence and protect human rights. You might say it is a case study in politics. We can see this in the basic principles of international prize law as it had developed by the 18th century. Sovereign belligerent states had the right to capture enemy naval and merchant ships and make them prize, but they had to follow a detailed legal process to do so. This involved, first, taking a prize to a prize or Admiralty court in a home port or the port of an ally, where it would be sued *in rem* or “against the thing” (the ship itself). This



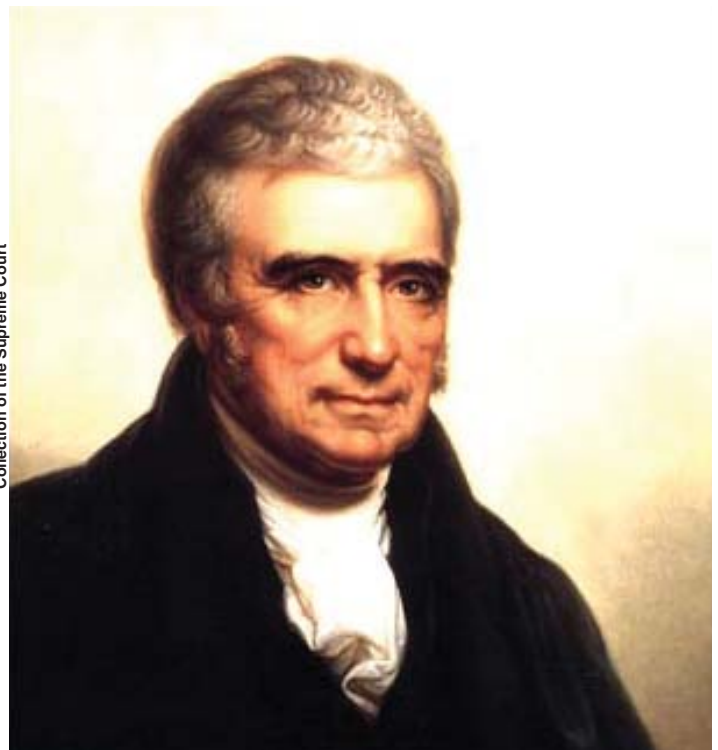
The CSS *Alabama*, one of the most successful Confederate raiders, was the name under which a number of similar issues were consolidated and adjudicated.

is why Supreme Court prize cases bear the name of the ship in question rather than the usual plaintiff vs. defendant appellation as exemplified by the case *The Rapid*, 12 U.S. (8 Cranch) 155 (1814). The case would begin with a libel alleging the ship was a lawful prize, either the property of an enemy nation or enemy citizens, bearing lethal contraband or running a blockade. Then the ship would be held by the court (perishable cargo would be immediately sold) until the ship was “condemned” (made legal prize) or restored to its original owners. The court’s decision was based on written testimony (“interrogatories”) collected by employees of the prize court called “commissioners.”

Crucially, to win a condemnation, the prize litigant only had to demonstrate a “reasonable suspicion” that the ship was an eligible prize, while the original ship owners had the burden of proof to show otherwise. But, except in rare instances, these were no kangaroo courts. Prize courts frequently decided against the prize captor and if the ship was not a good prize, had been despoiled prior to condemnation (so-called “breaking bulk”), or passengers and crew harmed, not only could the ship be returned but the captors could be forced to pay steep damages. The result was a system that empowered and legitimized force through a legal framework that protected individual rights across thousands of miles of ocean. State and private actors across the globe had an incentive to obey these rules because aggrieved parties could bring suit to enforce claims in the courts of any port a ship might call in. Ships without clear title could secure neither credit nor insurance. And all the parties knew that violations of the law of prize or mistreatment of neutrals, passengers, or crew could be met with similar treatment for their own nationals. Thus, the rules were followed with remarkable scrupulousity.

Even when states stretched the rules in their own interests, as Britain did, for instance, with the impressment of neutral sailors, the confiscation of neutral goods on enemy ships, the confiscation of enemy goods on neutral ships, or unfair blockade (making vessels prize without notice of blockade or without maintaining a legitimate blockading force), international law and *realpolitik* moved the prize system in a liberal direction. Great Britain, with its powerful navy and relatively weak Army, had an incentive to stretch its military advantage on the high seas. But other countries, especially the Netherlands and the United States with large neutral shipping fleets, could use a combination of diplomatic pressure, actual military conflict, and the evolving common law of prize courts to pursue free trade.

The small but prominent coterie of American prize lawyers and the federal judiciary followed the contradictory relationship between prize law and liberalization seen since Hugo Grotius defended both in *Mare Liberum* (1609) and *De Indis* (later published as *De Jure Praedae: Commentary on the Law of Prize and Booty* in 1868). They litigated a surprising number of prize cases in the federal courts



Collection of the Supreme Court

Chief Justice John Marshall was an important figure in developing prize law which sought to protect and promote American trade interests.

long before the *Prize Cases*, since suits arising from the Revolution, The War of 1812, and the Quasi-War with France were prosecuted vigorously, sometimes over decades. The lawyers in the Bar of the Supreme Court who pleaded these cases were often advocates for the rights of neutrals and free trade in legal and political treatises as well as in the courts. They included Attorney General William Pinkney, Charles Lee (the younger brother of the Revolutionary War hero Light-Horse Harry Lee), Walter Jones (who still holds the record for most cases argued before the Court), and Philip Barton Key II (whose father Francis Scott Key was a prize lawyer as well as a lyricist).

On the federal bench, the most important figure in developing prize law and protecting American trade interests was, perhaps not surprisingly, Chief Justice John Marshall. His first case as Chief Justice, *Talbot v. Seeman* (1801), involved a neutral German vessel (the *Amelia*) that was seized by the French for carrying British goods during the Quasi-War of 1798-1800. The *Amelia* was captured from its French prize crew by “Old Ironsides,” the American super-frigate *Constitution* captained by Silas Talbot, and brought back to a prize court in New York. Talbot and his crew thought that, while not entitled to make prize of a neutral vessel, they were entitled to compensation under international prize law and two American statutes for having “salvaged” the ship for its Hamburg owners. Even though such salvage was standard practice, the exorbitant amount of compensation mandated by the law (one half its value) threatened the general principle of the rights of neutral vessels to trade in wartime.

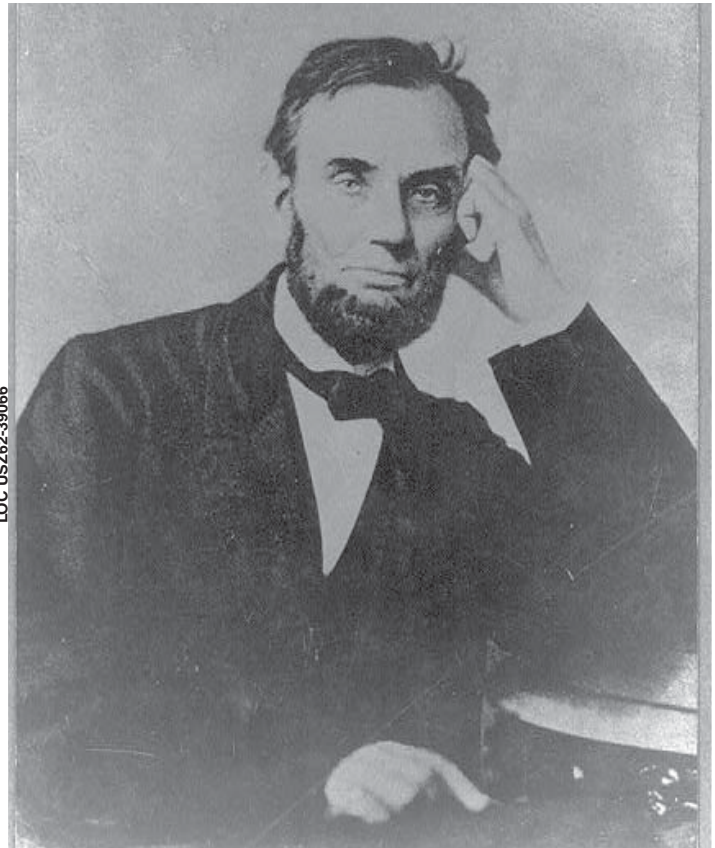
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Marshall was able to protect the rights of neutrals in this case by construing “the enemy” in one statute as an enemy of *both* the prize ship and the vessel claiming salvage. He wrote that, “By this construction the act of Congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.” Given the sanctity of those principles, and the fact that France was not at war with Hamburg, Talbot got only a sixth rather than half of the *Amelia’s* value.

Through the rest of his tenure Marshall continued to expand neutrals’ rights in the name of free trade. For instance, he held that the mere intention to visit a blockaded port was insufficient to merit condemnation. A neutral ship, in other words, had to be caught red-handed. And he also held that a neutral could stop at a blockaded port to inquire whether a blockade was effective (a convenient pretext if there ever was one). Marshall even protected a neutral’s right to ship goods in a militarized convoy without being subject to prize. In other words, Marshall significantly changed what it meant to be caught red-handed.

But that orientation would change with the Civil War. Just a week after the war commenced at Fort Sumter, Lincoln gave the order to implement General Winfield Scott’s Anaconda Plan, a blockade of the entire Confederacy from the Mississippi River to Virginia. The strategy was simple. The South was dependent on trading agricultural goods such as tobacco and cotton for manufactured goods from Europe and the North. Under international prize law, even neutral ships could be made prize if they were caught running a declared blockade, so an effective blockade would destroy the Southern economy and deny it access to the European weapons and material necessary to wage war. The first neutral to fall to the Plan was the *Hiawatha*: an English barque taking a load of tobacco back to Liverpool. She was swept up by the *Minnesota* on May 20, 1861 off Hampton Roads in Virginia, taken to a prize court in New York, and condemned as lawful prize.

But if the United States was becoming more sympathetic to the British position on neutral prizes, Great Britain was moving closer to the American one, for the Civil War placed the shoe on the other foot. Of course, the British wanted to maintain access to the cotton that kept the Midlands textile industry humming, but it also stood to profit from a neutral’s trade in ships and military supplies. Of course, many such wares would be contraband under international prize law, but the sorts of loopholes introduced by Marshall made this a surmountable obstacle for Britain and other European powers. Ships could be built without their cannons and the weapons and ammunition could be shipped separately to British possessions or neutrals in the Caribbean or Mexico. Indeed, this is exactly how the Confederates secured the Confederate raider *Alabama* and her sister ships at issue in the *Alabama* Claims.



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President Lincoln would not declare war on the “belligerent” Confederate States as it was tantamount to acknowledging their right to secede from the Union, a right he did not recognize.

Lincoln’s government desperately wanted to prevent these eventualities, but also did not want to press the issue too hard. The violation of the rights of neutrals might push Britain and France towards the worst possible outcome; the diplomatic recognition of the Confederacy, a formal alliance, and even the possibility of opening up European courts to Confederate prize crews. If these eventualities became realities, the war would certainly be lost.

The situation left Lincoln between a legal rock and a hard place. He could not declare war on the South for that would be tantamount to recognizing their right to secede from the Union. But the only way to completely interdict Southern trade with neutrals was to invoke a blockade, which was a belligerent right under international prize law for *wars* against other *nations*. So the blockade itself might be construed as *de facto* recognition of the Confederacy. However, Lincoln could not declare war without an act of Congress that could not be forthcoming until Congress was in session—an act that would, again, amount to recognition of the Southern States’ right to secede. The Hobson’s choices only piled up for the new President. For, if the Southerners were only insurrectionists, the crews of Confederate blockade runners, privateers, and naval vessels could be hung as traitors or pirates. However, meting out such harsh punishment would lead to Southern reprisals and would violate international prize law standards for the treatment of crews. But if Lincoln recognized Southern sailors as legal belligerents (as he

eventually did), that action would again be tantamount to recognizing Southern sovereignty in a way that might enable European investors to legally obtain Letters of Marque under international prize law. Indeed, it was precisely that argument that had been one pretext for France receiving American commissioners during the Revolution and the British seized on it themselves in declaring formal neutrality on May 13, 1861.

But if there were disadvantages to the blockade strategy, there were also advantages. If the quarantine were to be authorized by US statutes, say, a port closure, then neutrals would be subject to US law in US courts. This would, in effect, be a greater attack on neutral rights than a blockade. The blockade, in contrast, would fall under the rules of international law, which the British knew and, indeed, had over the centuries largely created as a way of pressing their perennial naval advantage. When consulted on the issue by Secretary of State William Seward, then-British ambassador Richard Lyons indicated that his government would prefer the blockade on these grounds.

Thus, in effect, the blockade strategy is paradigmatic of politics in general. It expands power generally, by hemming it in a particular way; by submitting to common rules concerning a common thing. The result is never as simple as force vs. freedom. You might say that all cases are, at heart, *in rem*. When Lincoln set out on the blockade strategy, he certainly claimed an awesome force, but the implication was that even captured Southern privateers could not be convicted of piracy.

All these legal issues came to a head in the *Prize Cases*, and they made the case important beyond the question we normally focus on: whether the President has the authority to wage war absent a Congressional declaration. The core irony of the case is that it validated a tremendous expansion of presidential power on the basis of the international law of war rather than (or at least in addition to) the Constitution or federal statute. The Court thereby displaced standing constitutional and treaty rights, such as the Fifth Amendment prohibition against government expropriation and a treaty with Mexico that gave the *Brillante* an ostensible right to trade at New Orleans, with international law, and it also created a standing rule of deference to the president's interpretation of international law. But what makes that expansion of power possible is precisely the way it also limited presidential and other centers of power by subjecting them to international legal standards, a possibility Michael D. Ramsey has argued is consistent with the Founders' intent.

The effect is, again, paradoxical. The Court in the *Prize Cases*, essentially accepted (albeit by a 5-4 vote) in its entirety the dual theory of the Civil War urged on it by Richard Henry Dana Jr. The United States could deny the Confederate States' assertion of sovereignty even while (as a matter of practical necessity) it exercised belligerent rights against it and (only as an act of grace) *conferred* belligerence upon it. As a

result, Southerners were the enemy whose property could be confiscated under the due process of prize law rather than the Constitution. Nevertheless, the same logic led to the need for a more detailed articulation of the standards of international law in the form of *Instructions for the Government of Armies of the United States in the Field*, General Order № 100 written by Columbia University Professor (and Battle of Waterloo veteran) Francis Lieber. And these so-called Lieber Codes are the direct ancestor of the Hague Conventions of 1899 and 1907 and the Geneva Conventions. In effect, prize law as it developed in "the Civil War is really at the heart of modern international humanitarian law." The disposition of the *Alabama Claims* provides a similar illustration. We have already established that, under prize law, Great Britain could trade with both the US and the Confederacy as a declared neutral as long as her ships respected the American right of blockade and did not provide contraband military goods. Certainly this meant that Britain could not provide the Confederate States with naval warships without violating its neutrality and inviting war with America. But Britain's own laws did not seem to give her Government the authority to confiscate ships that could be outfitted as warships outside the Empire. This loophole was promptly utilized by the Confederate agent James Dunwoody Bulloch, who secured financing for, ordered, and helped design, the ships that would become the *Alabama*, the *Florida*, the *Georgia*, and the *Shenandoah*. The tale of how US Ambassador Charles Francis Adams discovered and nearly persuaded the British government to confiscate these vessels is worthy of a major motion picture on a par with *Master and Commander*. But the *Alabama* and her sister ships escaped his clutches and went on to win an estimated \$15 million in prize takings (almost all sunk because the blockade prevented access to Southern prize courts). When the war was over, the US Government demanded reparations from the British for these

Continued on Page 10



President Ulysses Grant appointed the American Commissioners to resolve the conflicts known internationally as the *Alabama Claims*. They were: (L to R) Robert Schenck, Ebenezer R. Hoar, George H. Williams, Hamilton Fish, Justice Samuel Nelson and J. C. Bancroft Davis.



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The *Alabama* is shown here under fire by an American ship the *USS Hatteras*. Built in England, the armaments that converted it from a schooner to a raiding vessel were installed surreptitiously outside of England. The *Hatteras* was sunk in this encounter, making the *Alabama* the only commerce raider to defeat a Union warship in open combat.

losses and some American politicians insisted on additional claims for indirect damages totaling from \$110 million (lost trade, insurance, reduced economic growth) to \$2 billion (based on the claim that these raiders prolonged the War by another 2 years).

This marked the nadir of US-British relations since the War of 1812. It was the most pressing of a long list of controversies that estranged the two nations, which included the enduring problem of American lust for the Canadian territories, competition with Canadian inshore fisheries, American support for Irish republicans, naturalization of Irish-Americans, and the persistent contempt of British royalists for their bumpkin cousins. Nevertheless, similarities of language and culture, the Grant Administration's hunger for a foreign policy success amidst scandal, and the ascendancy of William Gladstone's Liberal Party set the stage for a rapprochement that would lay the foundation for the so-called "Special Relationship" between the United States and the United Kingdom. The major outstanding differences were settled by the Treaty of Washington in 1871, which included provisions for binding arbitration to settle the *Alabama* Claims. The treaty was negotiated between five British representatives and five Americans, which included Supreme Court Justice Samuel Nelson and Grant's first Attorney General (and failed Court nominee) Ebenezer Rockwood Hoar. Of the arbitrators, one would be an American (the US chose Charles Francis Adams), one was chosen by the Emperor of Brazil, one by the President of the Swiss Confederation, one selected by the King of Italy, and only one would be British. The decision would be by majority vote.

It seems incredible that the British, at the height of the wealth and power of the Empire, would submit to an independent body in which they would very likely be outvoted. But they did and they were. The arbitration conference was held in Geneva between 1871 and 1872 and

the arbitrators voted 4-1 to award the United States \$15.5 million. Gladstone thought the decision "harsh in its extent and punitive in its basis" but in accepting both the arbitration and its determination he considered the apparent humbling of Great Britain "as dust in the balance compared with the moral example set" by going "in peace and concord before a judicial tribunal" instead of "resorting to the arbitrament of the sword."

So, again, somehow the quest for the prize led to a small advance in the development of international law and human dignity. Certainly the bloody 20th century proved that the hopes of some—that the Geneva arbitration would inaugurate a new peaceful "Federation of the World"—would be disappointed. Nevertheless, the success of the Treaty of Washington may have had a similar effect as the Lieber Codes did on the subsequent development of international law. But if the story is not cause for extravagant optimism, it is, nonetheless, both an entertaining drama and an example that (at its best) the law is neither reason nor force but politics—the means by which we make some sort of harmony out of discord. And, at the very least, it sheds some light on the legal and political issues surrounding the rousing order read by The Captain in *Master and Commander*: "Sink, burn, or take her a Prize!"

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Editors' Note: Owing to the limitations of space and other considerations, the accompanying footnotes for this article are posted on the Society's website, supremecourthistory.org, along with the article itself.



History.navy.mil by: Xanthus Smith

Ultimately the *CSS Alabama* was struck down by the *USS Kearsarge*. Captain Semmes and 40 of his crew were rescued by the British yacht the *Deerhound*, thus evading a trial and certain execution for piracy and treason

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