

THE CONFEDERATE LAW OF PRIZE

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ABSTRACT

This essay describes the prize law of the Confederate States of America. Due to the Union’s blockade of the South’s coastline, Confederate judges heard very few prize cases. But when they did, they closely hewed to the prize law of the United States.

KEYWORDS

Confederate States of America, Key West, Letters of Marque, Privateering, Prize Law, Ransom Bonds, Reprisals, U.S. Civil War, Union Blockade, William Marvin

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I. INTRODUCTION

In this special issue of the *British Journal of American Legal Studies*, Professor Robert M. Jarvis documents the effort of the Confederate States of America (“CSA”) to establish a prize court at Key West.¹ Although this initiative failed, the CSA did have a prize law system.

II. COPYING THE FEDERAL BLUEPRINT

On paper, there was nothing special about the CSA’s prize law system.² It was adopted wholesale from that of the United States, from which the Southern states were attempting to secede. Its constitutional foundations were taken verbatim from the Constitution of the United States, both assigning the power to grant letters of marque to the national legislature³ and explicitly foreclosing member states from issuing their own.⁴ Both constitutions treated as one-and-the-same the sovereign’s power to grant letters of marque and the sovereign’s power to grant reprisals.⁵

¹ See Robert M. Jarvis, *The Confederate Admiralty Court at Key West*, 12 BRIT. J. AM. LEGAL STUD. 227 (2023).

² For very accessible descriptions of the Anglo-American versions of the laws of capture and prize in their heyday, see DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE AGE OF FIGHTING SAIL* (1999); RICHARD HILL, *THE PRIZES OF WAR: THE NAVAL PRIZE SYSTEM IN THE NAPOLEONIC WARS 1793-1815* (1998).

³ Compare CSA CONST., art. I, § 8, cl. 11 with U.S. CONST., art. I, § 8, cl. 11.

⁴ Compare CSA CONST., art. I, § 10, cl. 1 with U.S. CONST., art. I, § 10, cl. 1.

⁵ A letter of marque is one thing; a reprisal is something else altogether. The former is a wartime commission; it licenses what would otherwise be condemned in international law as piracy. The latter was once apt for times of peace, or at least periods of low intensity armed conflict. When granted a reprisal by his or her sovereign, a private citizen was authorized to pursue retribution from a foreigner by whom he or she had been wronged, typically by forceful seizure of property abroad.

The CSA Constitution followed the U.S. Constitution in assigning the power to grant both licenses to their respective Congresses in a single stroke. See Shavana Musa, *Tides and Tribulations: English Prize Law and the Law of Nations in the Seventeenth Century*, 17 J. HIST. INT’L L. 47, 47-48 (2015); Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 222-24, 227-28 (2009); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1701-03 (2009); Arnold D. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 TRANSACTIONS GROTIUS SOC’Y 29, 35-36 (1925).

Separate and apart from the foregoing are “belligerent reprisals,” that is, acts unlawful in time of war by an aggrieved combatant designed to deter future violations of the law of war by the enemy. See Philip Sutter, *The Continuing Role for Belligerent Reprisals*, 13 J. CONFLICT & SECURITY L. 93, 95 (2008); Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 185-87 (2003).

President Jefferson Davis threatened a belligerent reprisal when he warned President Abraham Lincoln that if the crewmembers of the privateer *Savannah* were executed as pirates, he would order the execution of an equal number of Union prisoners of war. See Letter of President Jefferson Davis to President Abraham Lincoln, Richmond, Virginia, July 6, 1861, in 1 MESSAGES AND PAPERS OF THE CONFEDERACY INCLUDING THE DIPLOMATIC CORRESPONDENCE 115-18 (James D. Richardson ed., 1906); 3 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND

The statute that endowed Confederate courts with prize jurisdiction reflected the same presumption that cases of prize were cases of “admiralty and maritime jurisdiction,” as the Supreme Court of the United States had made clear in 1794.⁶

The act of the Confederate Congress delegating the power to issue letters of marque to the Confederate president; regulating privateering; and governing the sale of prizes repeats practically verbatim the antecedent federal statutes on the same subjects.⁷ Section 10 of the same act, offering to the officers and men of any private armed ship a reward for the destruction of an enemy warship, appeared first in the Act of August 2, 1813,⁸ and section 14, discounting import duties on goods captured by private armed ships, appeared first in the Act of August 2, 1813.⁹

Five days after the Confederate Congress established the prize court at Key West, it passed an “Act to provide for the organization of the Navy.” Section 9 of that act adopted all the federal laws pertaining to the U.S. Navy in force at the time.¹⁰ Thus, the federal law assigning most of the sovereign’s claim to prize money to the officers and men of a capturing warship of the U.S. Navy,¹¹ dictating its distribution, and directing the rest to a disability pension fund, also became law for the Confederate Navy.

The general directions to Confederate privateers issued by President Davis were identical to those that had been issued by President James Madison during the War of 1812.¹²

CONFEDERATE ARMIES 5-6 (2d Ser. 1902). See also WILLIAM MORRISON ROBINSON, JR., *THE CONFEDERATE PRIVATEERS* 133-51 (1928) [hereinafter *CONFEDERATE PRIVATEERS*].

⁶ “The Judges being decidedly of opinion, that every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court. . . .” *The Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794). By means of a sweeping reception statute (Act of Feb. 9, 1861, ch. 1), “[A]ll the laws of the United States of America, in force and in use in the Confederate States of America on the first day of November [1860], and not inconsistent with the Constitution of the Confederate States, be and the same are hereby continued in force until altered or repealed by the Congress.” Presumably, this made the rule of *The Betsey* the law of the Confederacy.

⁷ Compare Act of May 6, 1861, ch. 3, in 2 *THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA, FROM THE INSTITUTION OF THE GOVERNMENT, FEBRUARY 8, 1861, TO ITS TERMINATION, FEBRUARY 18, 1862, INCLUSIVE* 100-04 (James M. Matthews ed., 1864) (on letters of marque, prizes, and prize goods), and Act of May 14, 1861, ch. 18, *id.* at 112-13 (on the sale of prizes) with Act of June 26, 1812, ch. 107, 2 Stat. 759, and Act of Jan. 27, 1813, ch. 13, 2 Stat. 792.

⁸ See ch. 55, 3 Stat. 81. These bounties often are confused with prize money. They are earned by destroying a target, not capturing it. They follow engagements with warships, not encounters with merchantmen. They are payable from the national treasury, not from a court’s registry. By its subsequent legislation, the Confederate Congress raised the stakes for private armed ships by promising an additional 20% of the value of any enemy warship destroyed, as assessed by a board of naval officers. See Act of May 21, 1861, ch. 50 (on letters of marque, prizes, and prize goods), in Matthews, *supra* note 7, at 150.

⁹ See ch. 49, 3 Stat. 75.

¹⁰ See Act of Mar. 16, 1861, ch. 58, § 9, in Matthews, *supra* note 7, at 70-75.

¹¹ See Act of Apr. 23, 1800, ch. 6, 2 Stat. 45 (1800).

¹² Compare also President’s Instructions to Private Armed Vessels, in 14 *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 285 (1st Ser. 1885) (per CSA Secretary of State Robert A. Toombs) with President’s Instructions to Private Armed Vessels, 15 U.S. (2 Wheat.) 80 (1817) (per U.S. Secretary of State James Monroe).

Counterparts to the 14 standing interrogatories for use in cases of prize before the CSA District Court for the District of Georgia¹³ are to be found among the 32 standing interrogatories for use in such cases in the U.S. District Court for the Southern District of New York.¹⁴

Likewise, counterparts to the 22 rules for use in cases of prize and capture in the CSA District of Georgia¹⁵ are to be found among the 25 rules for use in such case in the U.S. Southern District of New York.¹⁶

III. THE PRIZE LAW OF THE UNITED STATES

At the outbreak of the Civil War, the prize law of the United States was what it had been for 46 years, that is, what it had been at the end of the War of 1812.¹⁷ It (and the prize law of the Confederacy) differed in one important aspect from that shared by many European powers. The prize law common to both American antagonists reserved a sovereign's discretion to grant letters of marque. At a conference held in Paris in 1856, several European powers had agreed to refrain from the future issuing of such letters, thereby withdrawing their endorsement for war at sea by private armed vessels, or "privateers."¹⁸ Many other nations subsequently signed on. Still others renounced the practice without formally becoming a party to the declaration. Among the few holdouts with appreciable stakes in the matter was the United States.

IV. THE PRIZE LAW OF THE CSA

When war broke out, the Union, possessing a considerable fleet of warships, declared a blockade and renounced privateering. The Confederacy, lacking such a fleet, condemned the blockade and recruited privateers. Meanwhile, having forsworn privateers of their own, neutral sovereigns closed their ports to prizes captured by either side.¹⁹ Once the Union blockade became effective, Confederate courts were left with little opportunity to try prize cases,²⁰ stunting development by

¹³ See CONFEDERATE PRIVATEERS, *supra* note 5, at 345.

¹⁴ See 15 U.S. (2 Wheat.) at 81.

¹⁵ See CONFEDERATE PRIVATEERS, *supra* note 5, at 349.

¹⁶ See HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 369 (1815).

¹⁷ See GERALD R. POWELL ET AL., CIVIL WAR BLOCKADE RUNNERS: PRIZE CLAIMS, AND THE HISTORICAL RECORD, INCLUDING THE DENBIGH'S COURT DOCUMENTS (2012); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 66 (2007).

¹⁸ See generally JAN MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING (2014); Cooperstein, *supra* note 5, at 244-47; Parrillo, *supra* note 17, at 57-62.

¹⁹ See LEMNITZER, *supra* note 18, at 123. See, e.g., 163 Parl. Deb. HC (3d ser.) (1861), cols. 471-72 (UK) (announcement of British policy by Lord John Russell, Secretary of State for Foreign Affairs).

²⁰ Scant but not nil. The CSA District Court for the Southern District of Georgia entertained four cases of prize. See Ritchie Williams, *Flotsam and Jetsam: Admiralty Cases in*

the judiciary of case law peculiar to the Confederacy.²¹

Confederate Georgia, 28 J. MAR. L. & COM. 617 (1997). The CSA District Court for the District of North Carolina dealt with nine libels for condemnation as prizes and one libel for salvage by recapture before Hatteras Inlet was sealed by the Union. See William Morrison Robinson, Jr., *Admiralty in 1861: The Confederate States District Court for the Division of Pamlico of the District of North Carolina*, 17 N.C. HIST. REV. 132, 133-38 (1940). The CSA District Court for the Eastern District of Texas entertained libels for the condemnation of 13 Union vessels seized in Galveston when that port was retaken on January 1, 1863. See Nowlin Randolph, *Judge William Pinckney Hill Aids the Confederate War Effort*, 68 Sw. HIST. Q. 14, 20-21 (1964).

In one case reported on only recently, that of the *Santa Clara*, the CSA District Court for the Southern District of Georgia indulgently condemned a prize notwithstanding the failure of its captors to present witnesses taken from their capture for examination by the prize commissioner, leaving the court with testimony only from the captors. Taking guidance from two decisions by the U.S. Supreme Court and one by Justice Joseph Story while riding circuit at the U.S. Circuit Court for the District of Massachusetts, CSA District Judge Edward J. Harden was persuaded that this dereliction was excused by necessity. See Williams, *supra*, at 622-26.

- ²¹ On the other side of the blockade, in the Union prize courts, business was booming. "By the end of the war, the Union Navy had captured or destroyed approximately 1,500 Confederate blockade runners." CHESTER G. HEARN, *GRAY RAIDERS OF THE SEA: HOW EIGHT CONFEDERATE WARSHIPS DESTROYED THE UNION'S HIGH SEAS COMMERCE* 4 (1992). U.S. Attorney Richard Henry Dana, Jr.'s exceptional grasp of prize law attracted Union captors to the U.S. District Court for the District of Massachusetts, and that court's active prize docket made Judge Peleg Sprague "one of the most respected maritime jurists in the nation." Jeffrey L. Amestoy, *The Supreme Court Argument that Saved the Union, Richard Henry Dana, Jr. and the Prize Cases*, 35 J. SUP. CT. HIST. 10, 14-15 (2010). "Relying extensively on Dana's brief and argument, Judge Sprague's opinion foreshadowed the legal theory that was ultimately to persuade a majority of the Supreme Court that the United States could invoke both belligerent and sovereign power against the Confederacy without a Congressional declaration of war." *Id.* at 15. See *The Amy Warwick*, 1 F. Cas. 799 (1862) (No. 341), *aff'd sub nom.* *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

In the U.S. District Court for the Southern District of New York, Judge Samuel Betts fashioned "the basis of the great revolutionary prize law which has reached such a height in our own day." Thomas Baty, *Judge Betts and Prize Law*, 11 TRANSACTIONS GROTIUS SOC. 21, 21 (1925). The leading American treatise on prize law during the Civil War was Francis Henry Upton's *The Law of Nations Affecting Commerce During War: With a Review of the Jurisdiction, Practice, and Proceedings of Prize Courts* (1862), written in response to a request by Judge Betts. See POWELL, *supra* note 17, at 63-64.

Even in Key West, a Union port in a Confederate state, prize cases dominated the court's docket. In his autobiography, U.S. District Judge William Marvin recalled:

President [Lincoln] authorized [William H. French] the officer in command of the troops at Key West to declare martial law whenever he thought it best to do so. As soon as the existence of this order was made known, the leading secessionists left the Island and went to the mainland. The Unionists were now in the ascendancy and quiet and good order prevailed. I soon had an immense amount of work to do in deciding Prize cases. The most of the vessels captured for attempting to break the blockade of the Ports in the Gulf of Mexico and at Charleston and Savannah were brought to Key West for adjudication, and I had plenty of work to do up to the time of my resignation in 1863.

Without access to the only courts from which prize money could be won, Southern privateers lost their incentive to hunt Union shipping. Thus, they soon turned to the more lucrative business of running the blockade.²² As privateering ebbed, *guerre de course* (“commerce raiding”) was left to a handful of sea-going cruisers of the CSA Navy.²³

What prize law peculiarities did emerge from Confederate practice may be found in what might be called “captain’s law,” implied by capture decisions of the CSA Navy’s cruisers. Without judicial review ashore, a Confederate captor’s summary judgment on the spot became the final say on the prize’s legality, contrary to the rule then universally observed.²⁴ Error exposed those responsible to personal liability, albeit at some indefinite time and place.

Confederate commerce raiders burned most Union ships caught laden with cargo for Union shippers. They ransomed most Union ships found laden with cargo for neutral shippers, as well as most neutral ships laden with Union cargo (save for that qualifying as contraband).²⁵ A few captures were released as “cartel ships,” which relieved the CSA’s cruisers of mariners and passengers evacuated from earlier captures that had been put to the torch.²⁶

For its release, a ransomed vessel provided a bond. This was a promise in writing by the capture’s master, both personally and on behalf of the ship’s owners,

Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 FLA. HIST. Q. 179, 214 (1958) (footnote omitted).

²² See CRAIG L. SIMONDS, *THE CIVIL WAR AT SEA* 64-65 (2009); JOHN M. COSKI, *THE CONFEDERATE NAVY* 42 (2005); *CONFEDERATE PRIVATEERS*, *supra* note 5, at 249-50. See also John Paul Jones, *Into the Wind: Rhett Butler and the Law of War at Sea*, 31 J. MAR. L. & COM. 633 (2000).

²³ See generally Angus Konstam, *CONFEDERATE RAIDER 1861-1865* (2003); HEARN, *supra* note 21; Mark Mello, “A Compact with the Whales: Confederate Commerce Raiders and New Bedford’s Whaling Industry 1861-1865” (unpublished honors thesis, Bridgewater State University, May 9, 2017), available at http://vc.bridgew.edu/honors_proj/216.

²⁴ See Thomas Baty, *Neglected Fundamentals of Prize Law*, 30 YALE L.J. 34, 38 (1920).

²⁵ These practices conformed to two of the four principles agreed to by parties to the Paris Declaration of 1856. As explained *supra* text following note 18, neither the United States nor the CSA were parties but both belligerents found it expedient to adopt these two trending restraints on *guerre de course*.

Of 237 captures by the Confederate Navy’s nine cruisers, 39 were freed on bond. HEARN, *supra* note 21, at 311-17. The officers of the CSS *Alabama* estimated the total value of the vessels they burned to be \$4,613,914, and the total value of the vessels they bonded to be \$562,250. *Id.* at 316. The officers of the CSS *Shenandoah* estimated the total value of the vessels and cargoes they destroyed to be \$1,172,223, and the total value of the vessels they bonded (save one) to be \$118,600. *Id.* at 317.

²⁶ On December 23, 1862, for example, in the Windward Passage (between the islands of Cuba and Hispaniola), Raphael Semmes, the captain of the CSS *Alabama*, intercepted the SS *Ariel*, a large Union mail steamer en route to the Isthmus of Panama on a war department charter. Once aboard the *Ariel*, the *Alabama*’s boarding party found 500 passengers bound for California, as well as naval officers and 120 U.S. Marines ordered to the U.S. Navy’s Pacific Squadron. With no room aboard his cruiser for so many persons displaced by the *Ariel*’s destruction, Semmes paroled the enemy combatants and took a \$261,000 bond from the *Ariel*’s master before allowing her to proceed on her way. See RAPHAEL SEMMES, *MEMOIRS OF SERVICE AFLOAT DURING THE WAR BETWEEN THE STATES* 532-35 (1996) (1868); SPENCER C. TUCKER, *BLUE & GRAY NAVIES: THE CIVIL WAR AFLOAT* 282 (2006).

to pay a sum of money in the future in exchange for the ship's release and safe conduct. The ship served as collateral. The captor retained the original bill; the capture's master took a copy as evidence of the captor's promise of safe conduct.²⁷ In view of the alternative, the price of release was more or less whatever the capturing captain dictated.²⁸

An action to collect on a ransom bond might be brought *in personam* in a common law court against the capture's master, who would then implead the shipowner.²⁹ But it might also be brought *in rem* in any admiralty court, foreign or domestic,³⁰ provided that the pledged ship was within the reach of the court. Duress was no defense;³¹ indeed, to be enforced by an admiralty court, such bonds had to be necessary for the vessel's voyage to continue.³² The rebellion's suppression left these ransom bonds unenforceable.³³

²⁷ See A. Pearce Higgins, *Submarine Warfare*, 1 BRIT. Y.B. INT'L L. 149, 163 (1920-1921). The bond prescribed a port and a route thereto. Deviation nullified the safe conduct. See William Senior, *Ransom Bills*, 34 L.Q. REV. 49, 50 (1918).

²⁸ See Higgins, *supra* note 27, at 164. Because the practice might tempt British masters to relax the diligence with which they attempted to evade capture, it was outlawed in the time of George III. *Id.* Neither the United States nor the CSA followed suit.

Semmes's bonds, see *supra* note 26, called for payment to be made to the president of the Confederate States within 30 days of the war's end. See, e.g., *Ransom Bond of the U.S. Ship Bethiah Thayer, Captured by the C.S.S. Alabama, March 1, 1863*, in 1 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION 686 (1st Ser. 1894).

²⁹ See Senior, *supra* note 27, at 52-55; Alexander Tabarrok & Alex Nowrasteh, *Privateers! Their History and Future*, 2 FLETCHER SECURITY REV. 55, 56-57 (2015).

³⁰ See Tabarrok & Nowrasteh, *supra* note 29, at 57. Thirty of the captures burned by the CSA cruisers *Alabama*, *Shenandoah*, and *Sumter* were whaling ships out of New Bedford, Massachusetts. See Mello, *supra* note 23, at 33. Whalers were poor candidates for bonding because they visited foreign ports infrequently and unpredictably. Union whalers, therefore, were practically judgment proof.

³¹ See PETRIE, *supra* note 2, at 18-20; Tabarrok & Nowrasteh, *supra* note 29, at 55, 56.

³² See George F. Steckley, *Bottomry Bonds in the Seventeenth-Century Admiralty Court*, 45 AM. J. LEGAL HIST. 256, 259-60 (2001); R.G. Marsden, *Two Points of Admiralty Law*, 2 L.Q. REV. 357, 363 (1886).

³³ See Jonathan Spencer, *Hull Insurance and General Average—Some Current Issues*, 83 TUL. L. REV. 1227, 1263 (2009).

Regarding the \$261,000 ransom bond extracted by Semmes, see *supra* note 26, the owners of the *Ariel* declared general average and sought contribution. Adjustors apportioned both the bond and the expenses of its adjustment, taking security from one "Hyneman" among other cargo owners. The bond itself was never enforced, but before the Court of Commissioners of Alabama Claims Hyneman challenged the \$78.73 he had paid for the adjustment expenses. The commissioners ruled that the bond was adjustable as general average, validating the adjustment expense charge. See 2 ROB MERKIN, *MARINE INSURANCE: A LEGAL HISTORY* ¶ 13-141, at 491-92 (2021); FRANK W. HACKETT, *GENEVA AWARD ACTS: WITH NOTES, AND REFERENCES TO DECISIONS OF THE COURT OF COMMISSIONERS OF ALABAMA CLAIMS* 31-32 (1882); U.S. DEP'T OF STATE, *REPORT FROM THE SECRETARY OF STATE, WITH ACCOMPANYING PAPERS, RELATING TO THE COURT OF COMMISSIONERS OF ALABAMA CLAIMS* 45 (1877); *Decision in the Case of the Ariel Steamer Boarded by the Alabama*, N.Y. TIMES, Mar. 20, 1875, at 10. For the establishment, structure, and composition of the Court of Commissioners, see MERKIN, *supra*, ¶ 13-130, at 485 (discussing the Act of June 23, 1874, ch. 459, 18 Stat. 245).

V. CONCLUSION

Sensibly derivative but virtually stillborn, the Confederate law of prize nevertheless contributed to the strategic success of the Confederacy's *guerre de course*. It supplied the rules of engagement. The global threat from ranging privateers and cruisers it governed squeezed the market for marine insurance everywhere and directed shippers to neutral hulls, all too often permanently.³⁴ But it could not secure the South's secession.

³⁴ See SIMONDS, *supra* note 22, at 84-85; TUCKER, *supra* note 26, at 295.