III

The United States of America and the Law of Piracy

The Basic Framework

The United States of America was governed by basic conceptions of English law during the days of the formation of the Union, and the leading drafters of the Articles of Confederation in 1777 and the Constitution in 1787 were lawyers trained in English law.

Under the Articles of Confederation, each of the thirteen newly independent states retained "every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States."[1] State laws with regard to "treason, felony, or other high misdemeanor" were preserved and extradition obligations accepted; there was no equivalent extradition obligation among the states of the confederation with regard to ordinary crimes.[2] This language seems to rest on an archaic definition of "felony" and an evolving conception of the impact of the Statute of Treasons of 1352 as it might apply to states not ruled by a king.[3] "Piracy" was not included. Instead, "piracy" was treated as both a kind of public war and special sort of common crime. While the states were forbidden to maintain vessels of war in time of peace except as authorized by the representatives of at least nine of the thirteen states in a formal meeting of the "Congress,"[4] or issue any "letters of marque or [*sic*; and?] reprisal" in the absence of a declaration of war by the Congress,[5] an exception was made for the case when any particular state should "be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United states in Congress assembled, shall determine otherwise."[6] The courts to deal with cases of alleged piracy, however, were not to be courts of the states. The power was expressly given to the Congress of all the states for:

> Establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States [but not state militias or warships] shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures. . . .[7]

To the degree the provision authorizing states to commission their vessels of war to defend them from infestations of "pirates" might be construed as a derogation from the power of the Congress alone to determine on peace and war, the power of the states was preserved,[8] but that derogation does not seem to have been intended to affect the jurisdiction of maritime and prize courts established by the Congress or authorize the states to establish competing courts.[9] On the other hand, treating "piracy" as if a branch of maritime warfare cannot have been intended to affect the residual powers of the states to denominate as "piracy" whatever they chose within their territorial jurisdiction, and establish courts to try alleged offenders under state law. The congressional courts were authorized only to try "piracies and felonies committed on the high seas," apparently intended to refer to areas beyond the territorial jurisdiction of any particular state. There is no closer definition of "piracy" in the Articles of Confederation and no known significant practice.

The confusion between "piracy" as a sort of unlicensed belligerency and "piracy" as a municipal law crime equivalent to robbery seems to have been maintained, with both definitions existing side by side, and naval suppression existing side by side with municipal tribunals. The distinctions were presumably worked out in practice depending on where any particular accused "pirate" was taken and by whom, and under what license the taker operated.

James Madison's *Reports on the Debates in the Federal Convention of 1787*[10] records the discussion preceding the adoption of the Constitution. According to that source, a "Committee of Detail" chaired by "Mr. Rutlidge" (*sic*)[11] on 6 August 1787 presented a working draft with the following provision:

> *[Art.] VII Sect. I.* The Legislature of the United States shall have the power . . . To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations. . . .[12]

This clause is quite separate from the proposed clause authorizing the legislature to "make war," but appears immediately after a clause authorizing the legislature "To make rules concerning captures on land and water." The authority of the Supreme Court in the Rutledge Committee's draft was to extend "to all cases arising under laws passed by the Legislature of the United States" and also "to all cases of Admiralty and maritime jurisdiction," among other things; the legislature was to be empowered to assign any part of this jurisdiction to such inferior courts as it might establish.[13]

The "piracy" clause was brought before the Convention on 17 August. Madison moved to strike the words "and punishment" after "declare the law." Two delegates expressed concern only over the effect of the deletion on counterfeiting (apparently construing the suggestion to strike the phrase in both places where it appears in the clause). One of them pointed out that

without the phrase there might be no legal authority to punish counterfeiters of foreign currency. Since the only reference in the provision to counterfeiting is restricted to "the coin of the United States," it seems that delegates to the Convention and Madison in his notes were considering counterfeiting foreign currency as an offense "against the law of nations." It is clear that territorial limits on jurisdiction were a concern; that a foreign power would have no jurisdiction to apply its law in the new federation, and if the federal government did not have the express power to punish the counterfeiters of foreign paper or coin some states of the union might become havens for counterfeiters. The argument that seems to have carried the day merely pointed out that in writing a constitution it was not necessary to be as meticulous as in drafting a statute. Madison's motion was carried 7-3 with three states abstaining.

Governeur Morris of Pennsylvania then moved to strike out "declare the law" and insert "punish" before the word "piracies." That motion also carried 7-3. Madison and Edmund Randolph[14] then moved to reinsert the word "define" before "punish" arguing that the definition of "felony at common law is vague" and in places "defective." There is no hint that anybody conceived of "piracy" as a crime at international law, but only as a felony at English Common Law. There was no doubt entertained by anybody that the Congress of the United States could exercise a legal power to define not only "piracy," but apparently to define "offences against the law of nations." The Madison and Randolph amendment passed unanimously.[15]

It is difficult to understand either the reference to "common law" or the assumption that the United States, a single entity in the world, had the legal power to define and punish offenses against the "law of nations" if those two phrases are taken in any other context than that of Blackstone. If the "law of nations" meant merely the national law of all states, there could be no problem; but if it were intended to mean the law determined by treaty, diplomatic correspondence and the practice of states in the international order there are obvious technical legal difficulties in the language as adopted on 17 August. The problem with the phrase "common law" is easier once it is recalled that since 1536 in England "Common Law" procedures were used in the trials of piracies and "felonies" within the jurisdiction of the Admiral. The English constitutional struggle focusing on the traditions and political subordination of the various courts in England at the time of Lord Coke and the Stuart Kings, thus the technical distinctions between "Common Law" and "Civil Law" as the law applied in Admiralty courts, had lost meaning. By time of Blackstone, the phrase "Common Law" had acquired a normal meaning referring to nonstatutory law applied throughout England, but not necessarily the law applied only by specific courts.

The more important question, that of bringing the power of the Congress to make law into harmony with the international legal order was raised again

on 14 September 1787 by Governeur Morris moving to strike out "punish" before the words "offences against the law of nations" so as to have the words he had proposed successfully a month before simply carry their meaning on through the entire clause. But James Wilson, also of Pennsylvania,[16] objected on the ground that "To pretend to *define* [emphasis *sic*] the law of nations which depended on the authority of all the civilized nations of the world, would have a look of arrogance, that would make us ridiculous."[17] Morris replied that the word "define" "is proper when applied to *offences* [emphasis *sic*]; the law of nations being often too vague and deficient to be a rule." The motion by Morris passed very narrowly, 6-5, with Pennsylvania opposed: The word "punish" was retained as applied to "Piracies and Felonies committed on the high Seas," but was deleted from the text as applied to "Offences against the Law of Nations."[18] The clause as adopted, and now contained in the Constitution is as follows:

> The Congress shall have the Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.[19]

The authority of the Congress to provide for the punishment of counterfeiting appears elsewhere, and applies only to counterfeiting the securities and current coin of the United States; there appears to be no authority in the Congress to make laws against counterfeiting foreign currency unless that is considered an offense against the law of nations or part of the power of the Congress elsewhere in the Constitution.[20]

The power of the Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water appears in the clause of the Constitution immediately following the clause relating to piracy and offenses against the law of nations. There was no reference to piracy in the discussion of that provision as recorded by Madison.

All cases of "admiralty and maritime jurisdiction" are reserved to the federal courts,[21] and treason is defined as "only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[22] Further refinement of all these sweeping words was left to the Congress and the courts.

Piracy as such was not discussed when the Convention passed unanimously the provision that "all Treaties made under the authority of the United States shall be the supreme law of the several states and of their citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions."[23] The minor alterations that resulted in this language being condensed to the form in which it appears in the Constitution were apparently the work of the "Committee of Stile [*sic*; style] and Arrangement," which had reported its proposed text on 12 September 1787.[24] There is no known record of the deliberations of that Committee. The final language says: ". . . all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby. . . . "[25]

From this brief summary, it is possible to conclude that the framers of the American Constitution, insofar as they focused on the question at all, conceived "piracy" to be something different from "offenses against the law of nations," but rather falling into a like category with "felonies committed on the high seas." Precisely what was left of the category "offenses against the law of nations" seems very unclear; indeed, it appears to have been considered unclear by most of the delegates at the Constitutional Convention. To those who accepted the Blackstone conception of "piracy" being an offense against the law of nations, but the "law of nations" being merely a collective term for national laws that were similar in all civilized nations, like the law merchant, there would have been no problem of analysis or interpretation. To those like James Wilson whose conception of the "law of nations" involved obligations owed by states in the international legal order to their sister states, the power of the Congress to define any of its terms must have seemed inconsistent with the power of the Executive to negotiate with foreign governments and to send and receive diplomatic missions, since diplomatic correspondence was necessarily conceived as part of the law-making process of that "law of nations." Wilson's analysis was rejected 6-5 in the one instance in which the problem was discussed as far as surviving records indicate. The law-making process of the law between states (to revert to Zouche's term) was apparently conceived by the framers of the Constitution to be confined to treaty, and there was no discussion of the development of the law relating to "piracy" (or any "offenses against the law of nations") in the discussion of the treaty-making power or the binding force within the Union of treaties made under the Constitution.

This analysis is more or less borne out by Federalist No. 42 (written by James Madison) which addresses the powers of the federal government relating to intercourse with foreign nations. The question addressed in the Federalist is, Why should these particular powers be given to a central authority and not reserved to the states? The answer with regard to the powers to make treaties and to send and receive ambassadors, said Madison, was self-evident; they "speak their own propriety," and merely repeat powers already conceded to a central authority in the Articles of Confederation.[26] As to the power to define and punish piracies and felonies committed on the high seas, Madison argued that "the provision of the federal articles [i.e., the Articles of Confederation] on the subject of piracies and felonies, extends no farther than to the establishment of courts for the trial of these offences."[27] And, he went on, "The definition of piracies might perhaps without inconveniency, be left to the law of nations; though a legislative definition of them, is found in most municipal codes."[28] By distinguishing between the "law of nations" and "most municipal codes" Madison seems to have denied the relationship between the two sources of substantive law considered inherently linked by Blackstone and a narrow majority of the

Convention. But Madison went no further, and it appears that he did not regard the issue as sufficiently pressing in 1788 to be an obstacle to the states adopting the new Constitution. He seems to have regarded "piracy" as a "crime" in fact defined by the "law between states." But he has left us no other clue as to how he believed that law was evidenced and what its jurisdictional terms and substantive provisions might have been.

This glib reference to "piracy," reminiscent of the remark by Justice Potter Stewart of the United States Supreme Court nearly two hundred years later regarding pornography, that he could not define it, but he knew it when he saw it, can be contrasted with the somewhat more elaborate treatment Madison gave "felonies on the high seas," a definition of which he felt was "evidently requisite:"

> Felony is a term of loose signification even in the common law of England; and of various import in the statute law of that kingdom. But neither the common, nor the statute law of that or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity therefore, the power of defining felonies in this case, was in every respect necessary and proper [for the central government].[29]

As to "offenses against the law of nations," Madison seems to have conceived them as not applicable to individuals at all, but possible sources of public conflict if a single state could determine for itself the propriety of its public acts that impinge on the sovereignty of a foreign power:

> These articles [of Confederation] contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations.[30]

There is no other word in the Federalist addressed to that provision of the Constitution, or any explanation of why it should be within the power of the Congress, rather than the Executive and perhaps the Senate through diplomatic negotiation and treaty, to define "offenses against the law of nations" as so conceived.

The difficulties of defining "piracy" became apparent when the first Congress attempted to implement these provisions by statute. The problems of jurisdiction and criminal law enforcement's needs for some degree of specificity in setting out the precise limits that a person could transgress only at risk of punishment by public authorities of a government with limited powers, could no longer be assumed away or covered over with Blackstonian or Madisonian generalities.[31]

"Piracy" as a Municipal Law Crime in the United States

The Court System. The Judiciary Act of 24 September 1789,[32] section 9, gave to each of the thirteen original federal "District Courts" exclusively of the

courts of the several states, cognizance of all "crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas" where the punishments did not exceed 30 stripes with a whip, a fine of $100, or imprisonment of six months. In addition to this rather minor criminal jurisdiction, the District Courts had civil jurisdiction in "all civil causes of admiralty and maritime jurisdiction" (but not superseding state Common Law jurisdiction in any cases of overlap), and concurrent jurisdiction with state courts and federal Circuit Courts "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[33] The Districts were grouped into three "Circuits," and the Circuit Courts were presided over by a District Court Judge and two Supreme Court Justices. These Circuit Courts were given original jurisdiction over "all crimes and offences cognizable under the authority of the United States" with some irrelevant exceptions, and concurrent jurisdiction with the District Courts over crimes within their original jurisdiction. They also served as appeals courts from District Court cases.[34]

The Substantive Law of 1790

The Definition. The substantive law relating to "piracy" was the Act of 30 April 1790, the pertinent part of which says:

> 8. . . . That, if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon and being thereof convicted, shall suffer death . . . [35]

Sections 10 and 11 of that Act extend the same punishment to "any person" knowingly assisting or advising any other person "to do or commit any murder or robbery, or other piracy aforesaid, upon the seas" and provide for imprisonment and fine for those who help the "pirate or robber" after the fact. Under section 12, a separate offense subjecting the offender to imprisonment and fine is created for "any person" who commits manslaughter upon the high seas, or attempts to corrupt any member of a ship's company to yield to pirates or to turn pirate or to trade with any pirate knowing him to be such, and any "seaman" who confines the master of any ship or endeavours to "make a revolt in such ship."

There appear to be no statutes requiring those hunting pirates to get letters of marque and reprisal or any other license from the federal authorities.[36]

The notion that "piracy" was a gap-filling legal conception relevant only when no territorial jurisdiction applied, and that the normal rules of jurisdiction would apply to limit a state's jurisdiction to traditional bounds, i.e., not to apply to the acts of foreigners without minimal contacts with the United States on which criminal jurisdiction could be based, appeared very early despite the "any person" language of the statutes. A Captain Hickman (nationality not specified) in 1792 appears to have landed in the French colony of Martinique and absconded with some slaves, which he landed in Georgia and tried to sell. The Attorney General, Edmund Randolph, advised Secretary of State Thomas Jefferson on 1 November 1792 that "the offence would seem to be piracy; but it may prove, when the precise place of its commission shall be fixed, to be of a merely municipal kind," implying that the French jurisdiction would exclude American even though the "pirate" was caught within the territorial jurisdiction of an American court. The opinion also sheds some light on the original intention of the provision of the Judiciary Act of 1789 extending the jurisdiction of District Courts to the tort claims of aliens alleging the tort to be a violation of the law of nations. Randolph instructed the United States Attorney (the federal District Court's prosecuting official) in Georgia "To prosecute the culprits *criminaliter*, as far as the law will permit," and Randolph went on:

> If the criminal process should be insufficient to procure [the restitution of the slaves to their owner in Martinique], to institute the necessary civil process for the like purpose, with the approbation of the owners or their agent. The last remark is made in order to impose the expense of a suit upon the individuals interested, rather than to assume any responsibility on the United States.[37]

Apparently, the alien tort claims provision was envisaged by Randolph as a supplement to criminal process to permit the victim of a wrongful taking abroad to recover his property when the tort law of the place of taking and the tort law of the United States coincided and the taker or the property was in the territorial jurisdiction of American courts. It would have had obvious applicability to aliens seeking to recover their goods from "pirates" as well as from those taking their property abroad, but seems to have rested on Blackstone's naturalist conception of the "law of nations."

Further indications exist of the jurisdictional limits felt to be implicit in the international system and not overcome by general words applying to "any person" in statutes relating to "piracy." In 1795 some Americans who had helped plunder the British colony of Sierra Leone were apprehended in the United States. Attorney General William Bradford advised Edmund Randolph, now Secretary of State:

> So far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* [emphasis *sic*] within the jurisdiction of the district and circuit courts of the United States; and, so far as the offence was committed thereon, I am inclined to think

that it may be legally prosecuted in either of those courts in any district wherein the offenders may be found. But some doubt rests on this point. . . . [38]

Again, the relationship between criminal and civil jurisdiction was noted, and Bradford went on:

But there can be no doubt that the company or individuals who have been injured by these acts . . . have a remedy by a *civil* suit in the courts of the United States; jurisdiction having been expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations . . .; and as such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where *viva voce* testimony alone can be received as legal proof.[39]

The first hint that "piracy" might be a crime of universal jurisdiction as far as the United States was concerned came in 1798 when the Attorney General, Charles Lee, advised the Secretary of State, Timothy Pickering, that an extradition request from Great Britain for three "murderers" under the terms of the Jay Treaty of 1794,[40] could be denied:

The criminal tribunals of the United States are fully competent to try and punish persons who commit murder on the high seas, or piracy, as may appear from the 8th . . . [section] of the act of 30th April, 1790. One of the persons (Brigstock) is a citizen of the United States; and it is not to be reasonably expected that his country will not exercise the right of trying him. . . . [The other two may also be Americans.] But, supposing them to be foreigners, the stipulation in the 27th article [of the Treaty of 1794] is not applicable to their case; and as they are triable in the courts of the United States . . . I deem it more becoming the justice, honor, and dignity of the United States, that the trial should be in our courts.[41]

The hint is not too broad. Not only was there an undoubted link of nationality on which to base jurisdiction over Brigstock, and what seems to be a hope that the same link would be found with regard to the other two, but the crime involved in the British request was not "piracy" at all; it was "murder" within the terms of the treaty. The rationale does not flow from an analysis of the crime of "murder on the high seas" being included in the concept of "piracy" and therefore subject to universal jurisdiction, but, although it is not clear what the basis was for American jurisdiction if not nationality, from a direct jurisdiction asserted over "murderers" whose acts were committed on the high seas. The assertion of a universal jurisdiction over "murder" on the high seas, if such it was intended to be, was based on the competence of American courts as set forth in the statute of 1790, not on any analysis of public international law or any measuring of the statute's provisions against the legal powers under public international law of the United States to assert jurisdiction over the criminal acts of foreigners on the high seas. Apparently the desire to uphold that jurisdiction as a matter of American policy, and to state it in terms that would apply equally to "piracy" and, indeed, any other "crime" defined by an American statute, would serve equally well as a direct assertion of universal jurisdiction. The logic of the opinion would support the

effectiveness in American law of any statute applying to any person on the high seas, and seems to challenge the British government to find a reason in international law why the American assertion was wrong. No British response to this position has been found.

Indeed, on closer examination, the position taken by Attorney General Lee seems to have been both unnecessarily broad and unnecessarily narrow. If the accused committed their "murder" from or in an American vessel, and British assertions of jurisdiction were based on some effects on British subjects or in a British vessel, there would seem to have been an overlapping jurisdiction. If the "murder" had been done solely in a British vessel with no American contacts other than the nationality of one of the accused murderers, the assertion seems extreme that American jurisdiction existed over accused (possibly British) foreigners for their acts in a British vessel (presumably, from the fact of the extradition request) on the basis that "the high seas" was within concurrent territorial jurisdiction of all states including the new United States of America. Such an assertion, denying the exclusiveness of flag state jurisdiction over its own nationals in its own vessels on the high seas, seems a formula for universal policing of everything at sea, and was surely more than the United States would have conceded to Great Britain with regard to American nationals in American vessels. Although the full facts are not before us, it seems likely that Lee was making a broader argument for new national pride and policy reasons than a closer examination of the case and more mature judgment would warrant.

Narrower arguments were available. The same treaty of 1794 in fact devotes several articles to the treatment of privateers and pirates. If it had really been Lee's position that the accused were "pirates," and not "murderers" subject to extradition under the peculiarly narrow terms of the treaty, the terms related to "pirates" would have applied and extradition denied on the narrow ground that the treaty envisaged a distinction between the two crimes and that the "murder" provision simply did not apply. Why Lee chose to make a wide assertion of American jurisdiction over "murderers" on the high seas as distinct from "pirates" is not known, but extreme "positivism" by policy-oriented officials not charged with judicial responsibilities can be seen from time to time in many newly independent states (and occasionally in some very old states), and there is no reason to think that the officials of the United States of America in its early days were immune from the same urge to flex the muscles of statehood until its full implications were reached.

A similar position was asserted by Attorney General Lee a few months later, when the United States Attorney in Yorktown, Virginia, asked for guidance with regard to the ship *Nigre*, taken as a prize by the U.S.S. *Constitution* during the undeclared war with France and found to be of doubtful flag. On 20 September 1798 Lee replied (sending a copy to the

Secretary of State), that if the ship is a "pirate," all its crew, of any nations, can be tried in the United States Circuit Court for Virginia. Property rights in the ship and her cargo, on the other hand, were directed to be submitted to the District Court in Virginia "according to the laws of congress, and the usage and practice of admiralty in prize cases."[42]

That Lee's policy-maker-positivist approach was not universally shared in the United States in the 1790s is evident from the terms of the Treaty of 1794 itself. The principal American negotiator of that Treaty with Great Britain was John Jay, the first Chief Justice of the United States Supreme Court (1789-1795). It is therefore not surprising that many of its terms were devoted to technical legal problems of assuring that property claims deriving from possible illegal captures at sea by both sides, as well as many other problems of debt collection and land tenure, were addressed. Three articles are pertinent to this study.

Article 19 deals with men of war and privateers who commit outrages against the persons of the other side under color of their commissions. In such a case, the treaty provides that "they shall be punished, and shall also be bound in their persons and estates to make satisfaction and reparation for all damages, and the interest thereof, of whatever nature the said damages may be." Nowhere in the article are they referred to as "pirates" or as "deemed to be" or "treated in the same way as" "pirates." It appears that all action in excess of a commission was to be compensated by "sufficient security by at least two responsible sureties, who have no interest in the said privateer" placed before a "competent judge." It is possible that under an approach such as this, Captain Kidd would have gone free, although that is doubtful in view of the emphasis in his trial given to his failure to submit his captures to a prize court.[43]

Article 20 deals directly with "pirates" as such:

> It is further agreed that both the said contracting parties shall not only refuse to receive any pirates into any of their ports, havens, or towns, or permit any of their inhabitants to receive, protect, harbor, conceal or assist them in any manner, but will bring to condign punishment all such inhabitants as shall be guilty of such acts or offences.
>
> And all their ships, with the goods . . . taken by them and brought into the port of either . . , shall be seized . . . and shall be restored to the owners . . . even in case such effects should have passed into other hands by sale, if it be proved that the buyers knew or had good reason to believe or suspect that they had been piratically taken.

It appears to be assumed in this article that the definition of "pirate" was known to both parties, and from the emphasis on returning property to its owners it appears that the definition was related to wrongful takings of property—robbery within the jurisdiction of Admiralty courts, presumably. There is no hint of a broader definition in the text.

This reading of article 20 of the 1794 Jay Treaty is verified by article 21:

> And if any subject or citizen of the said parties respectively shall accept any foreign commission or letters of marque for arming any vessel to act as a privateer against the other party, and be taken by the other party, it is hereby declared to be lawful for the said party to treat and punish the said subject or citizen having such commission or letters of marque as a pirate.

It would appear that the national legislation of each party making it "piracy" for their respective nationals to accept privateering commissions from third parties to act against their own country[44] was not regarded as codifying a more general rule of international law forbidding adventurers taking foreign commissions, but only as an aspect of the national law related to treason.[45] The fact that such activity was regarded as not covered in the preceding article referring generally to "piracy" without any definition, but was the subject of an article of its own, and that a very limited one merely expanding the national rule to cover acts undertaken against only the other party under color of a foreign commission, seems to indicate that the drafters of the treaty did not regard taking a foreign commission as part of the basic conception of "piracy" in 1794. Article 21 itself did not even clearly say that the forbidden activity by subjects or citizens of each was "piracy," but only that if either party were injured by such activity it could lawfully as far as the treaty partners were concerned treat and punish a perpetrator of the other nationality as it would treat one of its own people acting under such a commission against the capturing state, "as a pirate." Thus it appears that to the drafters of the Jay Treaty of 1794, "piracy" was indeed a crime punishable by the municipal law of either party, but the jurisdictional rules and the applicability of the law to foreigners, including those of the other treaty partner's nationality, were not clear, and the substance of the "crime" itself was related to the English legal conception of "piracy" being a municipal law crime equivalent within the traditional English Admiralty jurisdiction to robbery on land. It did not clearly include "murder."

These provisions of the Jay Treaty were in fact personally drafted by John Jay.[46] The distinctions between privateers exceeding their commissions, nationals accepting foreign commissions, and "pirates" reflected instructions drawn up by Edmund Randolph as Secretary of State pursuing an outline prepared by Alexander Hamilton.[47]

Pinckney's Treaty, the Treaty of 27 October 1795 between the United States and Spain, follows a similar pattern with variations. There is no provision regarding persons on either side exceeding their privateering commissions. Nor is there any provision requiring each side to bring "pirates" and those who consort with them to condign punishment. The reasons for these omissions are not clear from available secondary material. In place of Jay's statute-like language regarding the return to owners of ships and goods "if it be proved that the buyers knew or had good reason to believe

or suspect that they had been piratically taken" is a much more general obligation seeming to envisage either national enforcement through implementing legislation along the lines of Jay's language, or simple political handling without the involvement of courts and judges:

> Each Party shall endeavor by all means in their power to protect and defend all Vessels and other effects belonging to the Citizens or Subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover and cause to be restored to the right owners their Vessels and effects which may have been taken from them within the extent of their said jurisdiction whether they are at war or not with the Power whose Subjects have taken possession of the said effects.[48]

Some indication that the principles of this article were intended specifically to apply to "pirated" goods and vessels, and not just those of foreign privateers, is in a later article specifically applying the general principles to "pirates," but with no greater legal detail of a sort that would be helpful to a judge:

> All Ships and merchandize of what nature soever which shall be rescued out of the hands of any Pirates or Robbers on the high seas [49] shall be brought into some Port of either State and shall be delivered to the custody of the Officers of that Port in order to be taken care of and restored entire to the true proprietor as soon as due and sufficient proof shall be made concerning the property thereof.[50]

Another article treats "pirates" as if a natural hazard comparable to weather:

> In case the Subjects and inhabitants of either Party with their shipping whether public and of war or private and of merchants be forced through stress of weather, pursuit of Pirates, or Enemies [*sic*], or any other urgent necessity for seeking of shelter and harbor to retreat . . . they shall be received and treated with all humanity. : . .[51]

The only other mention of "pirates" in the Treaty seems to be in article 14, closely paralleling article 21 of Jay's Treaty. It concludes that a citizen or subject of either side taking commissions or letters of marque to act against the subjects or property of the other side "shall be punished as a Pirate."[52] This seems considerably more direct than the equivalent term of Jay's Treaty which merely made it lawful as a matter of bilateral treaty for each party to treat an illegal licensee of the other nationality as a "pirate," but did not require such treatment, and seems much more doubtful that such treatment was proper as a matter of international law. Since there are no known prosecutions for "piracy" under these provisions, and no known diplomatic correspondence concerning the interpretation of these terms of the two treaties, it seems unnecessary to analyze the differing conceptions of the negotiators of the two documents any further.

American courts in the first decades of the 19th century tried to translate the statutory language into rules that could be administered to achieve the political results they supposed were intended. In doing so, they did not have the freedom of policy-making positivists like Attorney General Lee to interpret their conceptions of law into clear rules on the basis of their perceptions of the political interest of the United States or pride in their

hard-won independence. The most articulate judges took a basically "naturalist" view when trying to expand by interpretation the conceptions embodied in the language of the statute, but were held back by the deep Common Law traditions of judicial restraint and various natural law perceptions antithetical to expansive interpretations, like the notion that an accused criminal must have clear notice of the substance of the rule he is supposed to have transgressed. The judges were deeply split in their perceptions of the natural law and the balance to be struck by the competing legal, as well as policy, interests.

The leading judge seeking to expand the definition of "piracy" and the jurisdiction of American courts to deal with it, was Joseph Story of Massachusetts, who sat on the Supreme Court 1811-1845. In two cases in 1812 he set out his reasoning.

The first case involved a taking by the defendants, Tully and Dalton, of an American vessel, the *George Washington*, while Uriah P. Levy, its Captain,[53] was not on board. Since he was not put in "fear," as the Common Law of "robbery" would have required (the taking was thus more akin to the Common Law crime of embezzlement—the unlawful taking by a person with right to possession), to the degree "piracy" was supposed to be only "robbery" within Admiralty jurisdiction, the taking was not "piracy." Judge Story charged the jury in the Federal District Court that "at the common law, the offence of piracy consisted in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to a felony there."[54] This, of course, treats the entire operative part of the statutes of 1536 and 1700 as if containing a single definition of "piracy," making even the least "felony" within the jurisdiction of the Admiral into a capital offense. There is no known precedent for that position in English cases, and no evidence that the Congress intended that result when passing the statute of 1790. Nonetheless, Judge Davis concurred with Story and the two defendants were convicted of "piracy."

The logic used by Story and Davis deserves some closer examination. Story's assertion, that piracy was an offense at Common Law and as such was identical to depredation upon the high seas which if committed on land would have amounted to felony there, was taken verbatim from Blackstone.[55] But where a careful analysis of the precedents shows Blackstone to have written more than the actual cases would bear, apparently accepting as persuasive, at least, some of the more extreme dicta of Sir Leoline Jenkins as to the definition of "piracy" under English municipal (but not technically "Common") law, Story used Blackstone's summary as a base for further expansion of the concept. "It was not necessary by the common law," Story wrote, "that the offense should be committed with all the facts necessary to constitute the technical crime of robbery."[56] Abandoning this line of logic before facing the obvious problems of showing which facts should be

disregarded in holding something technically not "robbery" within the Admiral's jurisdiction to be nonetheless "piracy" as a matter of Common Law, Story adverted to the statute of 1790. In his view the "crime" of "piracy" in the United States from 1790 on included the acts of "any . . . mariner of any ship [who] . . . shall piratically and feloniously run away with such ship"[57] regardless of whether such running away had been "piracy" at English Common Law. All that was needed under the statute, said Story, was "piratical and felonious intent."[58] The logic by which statutory language under which the adverbs "piratically and feloniously" which modify the act, "run away," become indicators of "intent" is not entirely clear, but it does not seem outrageous. Story did not explain the linkage, which presumably rested on distinguishing between running away with the vessel to avoid a loss to the owners, which would not be a crime, and running away with an intent to convert the vessel or cargo to the mariner's own use, which Story felt should be a crime, even if not "piracy." He concluded merely: "After much reflection . . . I remain of the same opinion that I expressed at the trial," affirming as part of an appeal panel in the Circuit Court the charge to the jury he had given as a trial judge in the District Court.

But there is a missing step; the intent to convert the ship or cargo coupled with the running away might well properly be denominated a crime, but was it "piracy," warranting a death penalty? Judge Davis focused on that question, concurring with Story's conclusion on the basis of a citation to Molloy which, in the original, says merely:

> If a Ship shall ride at Anchor, and the Mariners shall be part in their Ship-Boat, and the rest on shore, and none shall be in the Ship, yet if a Pirat shall attacque her and rob her, the same is Piracy.[59]

While it might well be argued that this passage in Molloy is part of a series of sections fixing technical limits to the crime of "piracy" and not intended to be used as a basis for expanding the definition by analogy to cases in which the technical definition of "robbery" could not be applied to the acts treated in particular statutes and isolated cases as if "piracy," there is room for opinions to differ. Tully was hanged and Dalton eventually pardoned because the judges were convinced he was contrite.

Another case (in 1818, U.S. v. Howard and Beebee),[60] illustrates the definitional problems inherent on the Act of 1790. Defendants were pilots in Delaware who had guided a suspicious vessel to anchorage and were now accused of helping the absconded master and crew of that vessel in violation of section 12 of the Act of 1790 forbidding assistance to "pirates." The question was whether, to fit section 12, the "pirates" being helped had to have been shown to have violated section 8,[61] thus whether a full-scale hearing had to be held on the misdeeds and the legal classification for those deeds of people not before the court. Bushrod Washington, like Story a participant in the Supreme Court majority decision in U.S. v. Palmer shortly before,[62] had to

retreat like Story from his expansive naturalist position. Like Story he did so in practice while trying to preserve his position in theory. In the Palmer case, the acts of foreigners against foreigners only was held not to be "piracy" within the intent of section 8 of the Act of 1790, according to Washington, apparently mixing the jurisdictional problem with the question of the substantive definition of the term. Continuing along the same line, Washington charged the Jury that if the defendant is properly within the scope of American jurisdiction, and in this case he clearly was since "the pilot boat is an American vessel, and the persons on board were citizens of the United States," then "The *pirate* [*sic*] with whom the confederacy and correspondence takes place, may, in our opinion, be any sea robber or pirate, according to the general law of nations." Section 12 was thus severed from the restricted meaning of section 8 as it emerged from the Palmer case. But were the absconded persons "pirates" according to the general law of nations? To that question, Washington admitted doubts that only a jury could resolve. They might have been privateers acting solely against Spain "under a commission from the revolutionary government of South America (which would not amount to acts of piracy)," of the legal possessors of property which they were taking to their own use without the violence necessary to fit a charge of "piracy," merely criminals by the law of the flag of the vessel they had abandoned. These and other doubts he laid before the jury, which acquitted the defendants.[63] The charge was never appealed to higher courts, thus the question of whether a general international law of "piracy" existed under which American courts could even indirectly exercise a universal jurisdiction over the acts of foreigners directed solely against foreigners beyond the limits of the Palmer case as expanded in the Klintock case, to be discussed below, was not completely resolved.

Jurisdiction. It would appear from U.S. v. Tully and Dalton[64] and from the passage in Molloy cited by Judge Davis that the English conception of the jurisdiction of the Admiral in England, which extended to all navigable waters, was applied to foreign waters also; that the phrase "high sea" had a somewhat different meaning than it has today, when it is distinguished from territorial waters.

That this broad interpretation of the phrase "high sea" was in fact the interpretation held by Story and other expansive interpreters of the law needed to suppress "piracy," seems clear. In the other case in 1812, U.S. v. Ross,[65] the vessel was only a half mile from shore when the crew stabbed a passenger, and from two to six miles from shore when they threw his body overboard. Story declined to resolve the case on the basis of technicalities regarding the assault (stabbing) and the greater distance from shore when the passenger actually died or his body was disposed of. Instead he asked rhetorically whether the Act of 1790, section 8, in referring to "the high seas" was intended by the Congress to include foreign harbors. His answer was Yes. It means, he said:

> [A]ny waters on the sea coast which are within the boundaries of low water mark; although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government. Such is the meaning attached to the phrase by the common law; and supported by the authority of the admiralty, perhaps to a more enlarged extent.[66]

To the extent this language was applied only to an American flag vessel and acts within it, it seems to be addressing a different set of facts than those envisaged by the jurisdictional provisions of the Act of 1790, section 8. To the extent it was addressing facts within the contemplation of that statute, Story's reasoning seems inconsistent with the language of the statute, which clearly distinguishes between "high seas" and "any river, haven, basin, or bay," and specifically requires that in either case the act, to be within the terms of the statute must be "out of the jurisdiction of any particular state." In sum, his conclusion supports universal jurisdiction with regard to "piracy," defined in the Tully and Dalton case to cover all Common Law felonies that might be committed on the "high sea," and views the "high sea" as including foreign territorial waters; there is no language of limitation with regard to the flags of the vessels involved or the nationality of the accused or their victims. To the extent that construction rests on statutory language merely interpreted in the light of American municipal law (including the inherited concepts of English Common and Admiralty Law), it would seem to place the United States in a position of world policeman with regard to all felonies (by American definitions) occurring in any navigable waters. The underlying assumption seems to be the natural law of personal security, commerce and property, with overlapping jurisdiction available to all states to safeguard those natural rights. It is Molloy carried beyond Molloy himself,[67] to the far reaches of Jenkins.[68]

That this was in fact his view was confirmed some 20 years later when Story, in U.S. v. Pedro Gilbert & Others,[69] held that the British had overlapping jurisdiction with the United States in a case in which he appears to have assumed that there were no British contacts at all except as world policeman. Despite the American legislation to be discussed below superseding the Act of 1790 in large part, Story applied the same section, section 8, of that Act, so the case is perhaps better discussed here than in its chronological place.

The defendants were Captain and crew of a Spanish vessel which had allegedly attacked and robbed an American vessel on the high seas. The Spanish vessel was later found in port in Africa fitted out for slave trade, and a British warship acting under arrangements between Great Britain and Spain for the suppression of the slave trade arrested the crew and took them to England. The British then transferred the prisoners to the United States for trial on the American charge of "piracy" growing out of the first incident. The legality of the "extradition," or administrative transferrence of custody, was not at issue. The degree to which the British might have had jurisdiction

to try the accused for their attack on an American vessel was raised as a point by the defendants seeking to overturn their American conviction, and Story addressed the point in a long footnote:

> The British Government, on this occasion, finding [Spanish] persons in England in custody of one of its own officers, accused of piracy on an American vessel, chose to send those persons here, where the best evidence could be obtained, and where the greatest facilities and advantages for their trial were to be found. Over piracy, all nations exercise equal jurisdiction and the British Government might justly have exercised it in this case. But they preferred, that the offenders should be tried by the citizens of that country against whom the offence had been committed. . . . [Reciting the difficulties and dangers faced by the British commander, Captain Trotter, in capturing the accused.] Now what inducement had Captain Trotter to encounter all this, but a high sense of public duty, not merely to his own country, but to the commercial world.[70]

It is apparent that to Story there was not only universal jurisdiction to apply to "pirates" a municipal law that reflected what he must have felt to be universal prohibitions against unlicensed violence at sea, but there were no inhibitions to that application except the practical ones of marshaling evidence. The decision not to try the accused in England was based not on any lack of a legal interest in their activities against a foreign vessel, but only on the practicalities of the particular case. The legal interest seems to have been felt to derive from a universal duty to the "commercial world" to safeguard property rights based on natural law, and not the particular law of any country. Since the defendants were in fact transferred to the custody of, and taken to trial in, the United States, a country that clearly had the legal interest necessary to support such action against Spanish or other objection on much narrower grounds, as the country whose property law had been violated by the Spanish attack on an American flag vessel, this long passage was unnecessary to the disposition of the issue. Moreover, in view of the position on this point of extraterritorial reach of American criminal jurisdiction, and the way in which "piracy" was regarded as an "American" rather than an "international" crime by the majority in the Supreme Court in cases to be discussed below, this footnote by Story can probably best be regarded as an expression of a deeply felt "naturalist" position by a learned jurist who had lost the jurisprudential argument at a higher level. While Story's position never was adopted as the legal position of the United States Supreme Court, and in the Pedro Gilbert case was expressed as mere dictum, thus did not take a position of legal significance for purposes of analyzing the law as it was actually applied, that approach has continued to seem persuasive to many jurists regardless of the dominance of positivism as the philosophy of the Supreme Court. Story's approach certainly represents a strain of legal thought that has been influential in the evolution of the law regarding "piracy" in the United States.

Since the statute of 1790 was taken by 1812 to define "piracy" for purposes of American trials, and trials of accused "pirates" could not be the subject of

foreign complaint based on the substance of the law defining "piracy" unless the accused "pirate" were considered to be beyond the proper reach of American prescriptive jurisdiction, the key question before the American courts was the proper reach of that jurisdiction. Story's approach, that all states have adequate territorial jurisdiction in navigable waters anyplace (by defining "high sea" to include a foreign bay or roadstead) subject only to the overlapping jurisdiction of other states, but not any notion of the territorial state having exclusive jurisdiction over its ships or close-in waters, was not wholly accepted even in the United States. Indeed, one of the very first surviving opinions of an American Attorney General, and one of the most emotional, was an opinion by Edmund Randolph dated 14 May 1793 to Secretary of State Thomas Jefferson holding that Delaware Bay (and by like logic Chesapeake Bay) was "internal waters of the United States and capable of being closed to foreign vessels" and totally subjected to American law.[71] Since Story's language was not restricted to instances of "piracy," but rested on assertions of the Admiral's historical jurisdiction in English law for all felonies (which Story defined as "piracy"—all felonies within the Admiral's historical jurisdiction as viewed in England) it must have seemed intemperate to some of his colleagues concerned with limiting foreign exercises of jurisdiction in American bays and roadsteads.

The question received a definitive answer construing the Act of 1790, section 8, in 1820. Bushrod Washington, sitting as a District judge in Philadelphia, had charged a jury in 1819 along the same lines Joseph Story would have used, that Peter Wiltberger, who killed a seaman on board an American vessel at anchor in the Tigris River in China, about 35 miles inland, 14 miles below Canton, was acting on the "high sea" within the sense of the Act of 1790. Wiltberger was convicted.[72] On appeal ultimately to the Supreme Court, the conviction was reversed squarely on this point. The Court, which included Justice Story, was unanimous; testimony to the persuasiveness of Chief Justice Marshall, who wrote the opinion, and the intellectual honesty of Justice Story when persuaded of his error. Marshall took a strict positivist position. The criminal statutes must be construed strictly to protect individuals from the exercise of arbitrary power by judges. "The power of punishment is vested in the legislative, not the judicial department," he wrote. The legislative purpose in enacting the statute of 1790, section 8, was not to assert jurisdiction over everybody any place, but only in a certain place, the high sea and rivers, havens, basins or bays outside the jurisdiction of any state. The Tigris River being wholly within the jurisdiction of China, the American courts cannot derive jurisdiction over the statutory offense from the words of the statute. Therefore, Wiltberger went free.[73] Henry Wheaton, probably the most celebrated American scholar of international law of the first half of the nineteenth century, wrote a long analysis of the issue. In his view both Story and Marshall were right and

Story's retreat was not a retreat in principle: English Admiralty jurisdiction indeed extended into foreign ports, and American Admiralty jurisdiction could do the same. But, he concluded, the statute of 1790 did not go so far. Since federal criminal law in the United States rested on statute and not on Common Law except as embodied in statutes, the lesser description of jurisdiction contained in the statute limited the jurisdiction to less than the court could have exercised at English law. The fact that the Congress apparently did not intend to allow the court to exercise its full jurisdiction in cases of "piracy" in foreign waters meant that the court could not exercise its power over cases envisaged in the statute of 1790 beyond the limits set in that statute.[74] Another statute could go farther without creating any legal problems in the international legal order, in his view. But as long as no statute in fact went farther, that issue would not have to be resolved. Wheaton apparently gave no weight to the policy and possible legal reasons why the Congress had not authorized the exercise of jurisdiction by American courts in cases occurring in foreign navigable waters. It seems noteworthy that Wheaton did not argue the obvious bases for jurisdiction, the flag of the vessel and Wiltberger's American nationality. Indeed, since the incident occurred within an American vessel, it is not clear why any international concept of "piracy" was thought to be involved, or any inhibition on applying American Admiralty prescriptions. Wheaton's sympathies obviously lay with the jurisprudential approach taken by Story as the entire point of his comment was to preserve the theoretical possibility of universal jurisdiction based on territorial principles and natural law against a Supreme Court majority (including Story himself) that had carefully taken a very different position.

The question as to whether American jurisdiction covered acts by foreigners on the high sea against victims who were not Americans reached the Supreme Court in 1818. The holding in U.S. v. Palmer, et al.,[75] among many other points,[76] included the important rule of construction phrased by Chief Justice Marshall as follows:

> The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law?... [No.] [N]o general words of a statute ought to be construed to embrace [offenses] when committed by foreigners against a foreign government.[77]

Justice William Johnson dissented, going even further than Marshall and the majority in denying power to the legislature. In his view "congress cannot make that piracy which is not piracy by the law of nations in order to give jurisdiction to its own courts over such offences."[78] A consensus was reached in the "Certificate" customary at the time to blend the views of all the justices together on the broadest common position:

> [T]hat... the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a

> vessel belonging also exclusively to the subjects of a foreign state, is not piracy within the true intent and meaning of the act [of 1790, section 8] . . . and is not punishable in the courts of the United States.[79]

Shortly afterwards, indeed, after the passage by the Congress of further legislation whose effect was to overrule the quoted part of U.S. v. Palmer[80] but relating to facts occurring before that later legislation took effect, the Supreme Court reduced the impact of U.S. v. Palmer by asserting American jurisdiction in cases in which no particular foreign jurisdiction would serve despite the fact that the accused "pirates" and their victims were not American nationals. Chief Justice Marshall spoke for a unanimous Court in U.S. v. Klintock, a case involving a vessel sailing under the nominal control of an unrecognized Mexican authority during a revolution in Mexico, but exceeding any reasonable powers that could have been based on the laws of war. Klintock had seized a Danish ship *"animo furandi,"* and "not . . . *jure belli.*"[81] The capturing vessel was clearly "foreign." Marshall wrote:

> Upon the most deliberate reconsideration . . . the Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the 8th section [of the Act of 1790], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatsoever, is within the meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.[82]

The Certificate concludes:

> That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruizing piratically and committing piracy on other vessels.[83]

The case illustrates the problems of judges caught between a natural law orientation and positivist one. By natural law approaches, the rule towards which the Court was striving seems more or less clear. There is, in that conception, an underlying law forbidding interference with property as defined by any national legal system or by natural law, but that natural law of property yields to the positive law of any state within whose territorial or other traditional jurisdiction (such as the nationality of the possessor of the physical property) it comes. On the high sea, the law of the state whose flag is flying over a vessel authorized by that law to fly it, governs. A person acting outside that vessel, thus outside the flag-based jurisdiction traditionally analogized to territorial jurisdiction, can interfere in property rights only by

superimposing some other state's positive law on the positive law of the flag state. This could be done by capture or, perhaps, even sinking the first vessel and taking the property on board the capturing vessel or replacing the captured vessel's flag with the captor's. The law of naval captures and privateering evolved in Europe to prescribe the necessary rules as between the states of Europe and other states participating in the European legal order, such as the former European colonies in the Western Hemisphere and, if they wanted to participate in the system, the Muslim states of the Mediterranean Sea and some other societies that fit the pattern elsewhere, such as Thailand and China. Disputes over the lawfulness of the capture at sea and the proper disposition of captured property could as among these states be resolved by diplomatic negotiation, counter-captures under limited letters of marque and reprisal, or even the ultimate arbitrament of war. To the naturalist judges of the United States Supreme Court in the early nineteenth century, the word "piracy" could properly be used to attach legal results to captors outside the system; those who sought to change property rights by naval capture but who lacked the authority of a state within the system to supersede the law of the flag state of the captured vessel with any new positive law. And natural law would retain the rights to property in the holder prior to the capture. The function of the international law of "piracy," as it was then conceived, was thus to fill a gap in the legal order; to render punishable as "outlaws" those who operated outside the system and whose actions were inconsistent with the law within the system. All that was necessary for "standing" was that the acts of the "pirates" impinge upon the system somehow. Normally this was considered to flow from their taking of property against the rules of the system, i.e., without the authority of a state behind them, and from people whose property rights were blessed by the positive law of a state within the legal order.

But the system, the legal order of Europe in the early nineteenth century, required "standing" of any "state" within the system before a municipal legal rule could be applied. In the case of captures at sea, the need for "standing" was supplied by some legally sufficient contact with the event, normally the connection, posited to rest on a fictitious "social contract," between the victim of the depredation and some state within the system. Attempts by "naturalist" jurists, like Story, to rationalize each state's authority to police the seas, foundered on the hard rocks of the legal order itself, which limit each state's jurisdiction to those cases in which the state has "standing." Rhetoric of both naturalists and positivists in the late 17th century has been noted in which the legal order's requirement for "standing" was disregarded, but U.S. v. Palmer appears to be the first case in which a systematic treatment of the question was attempted in the context of a real case, and American "standing" was found lacking despite the apparent positivist decision by the Congress in 1790 to disregard the international legal order in authorizing

American courts to suppress an undefined "piracy." The naturalist reaction, to find "standing" in U.S. v. Klintock by applying natural law as part of Blackstone's concept of the "law of nations"—the natural law that is reflected not in the system of international distributions of authority to states, but in the common municipal laws of all states participating in the system—filled the gap. Under that approach, all states would have had equal rights to apply their municipal laws related to "piracy," defined as robbery within the municipal law jurisdiction of the "Admiralty," that branch of the municipal court system that applied municipal law rules, including the law merchant and other rules labeled part of the "law of nations" by Blackstone, to the acts of foreigners against foreigners all on board foreign vessels, but only when the accused "pirates" had no state system within the legal order to license the taking in question. And even when the accused "pirate" was found flying the Jolly Roger or some false, non-authorized national flag, or flag of some unrecognized authority (i.e., some pretender to authority not accepted by the capturing state as empowered within the legal order to issue a license), the natural law background remained strong in Marshall and Story. The accused must have been caught engaged not in a taking that might be justifiable but for the lack of recognition, but in a taking that was robbery by the English municipal law of robbery, involving *animum furandi,* the intention to take for personal gain. Apparently, no middle ground was seen between such a taking and a taking *jure belli,* by the law of war, which was not "piracy" even if the taker did not have a license issued by a recognized authority.

Clearly, the system implied in U.S. v. Klintock was incomplete; many fact patterns can be imagined that do not fit neatly into the categories supposed by the Supreme Court to fill the field. The principal gap fell in the contemplation of the availability of the law of war to unrecognized belligerent rebels such as the American forces had been a generation before—would it not have seemed monstrous to Chief Justice Marshall's generation if John Paul Jones had been hanged by the British not as a rebel but as a mere "pirate?"[84]

The Substantive Law of 1819

The Attempt to Avoid Problems of Definition, Jurisdiction and Foreign Commissions. The immediate result of U.S. v. Palmer in the halls of the Congress was the passage of a statute that simply ignored all the legal problems. The Act of 3 March 1819[85] provided:

> Sec. 5. . . . That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall upon conviction thereof . . . be punishable with death.[86]

The Act of 1819 was limited in time to one year, and this section was continued without limit of time by section 2 of another statute passed on 15 May 1820.[87] This last Act with minor amendments, is still in force.[88] Instead of

defining the substantive law of "piracy," it refers to a definition supposed to be contained in the "law of nations;" instead of addressing the jurisdictional point raised by Justice Johnson and acknowledged in the Supreme Court's Certificate, it takes an assertive "positivist" position as to the extent of national jurisdiction apparently based on universality.

The new statute was immediately applied. A foreign vessel putting out from "Buenos Ayres," the state now called Argentina formed out of the Spanish Vice-Royalty of La Plata by 1816, was seized by mutineers including Americans and turned to general "cruizing" without any commission from anybody. The question was the amenability of the crew to the jurisdiction of the American court before which both non-Americans and Americans had been taken. Chief Justice Marshall sitting as an appeals judge in the Federal Circuit Court in Virginia concluded:

> It was impossible that the act [of 1819] could apply to any case if not to this. The case was undoubtedly piracy according to the understanding and practice of all nations. It was a case in which all nations surrendered their subjects to punishment which any government might inflict upon them, and one in which all admitted the rights of each to take and exercise jurisdiction. Yet the standard referred to by the act of congress . . . must be admitted to be so vague as to allow of some doubt. The writers on the laws of nations give us no definition of the crime of piracy.[89]

In view of Marshall's doubts as to the substance of the law, the jury was instructed to give a special verdict as to the facts alone, and the case was referred to the Supreme Court for argument as to whether there was any such thing as "the crime of piracy, as defined by the law of nations" within the meaning of the Act of 1819.[90]

At the Supreme Court level the case was called U.S. v. Smith and became the leading case construing the Act of 1819. Justice Joseph Story wrote the Court's opinion. He wrote:

> There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled determinate nature . . . [R]obbery or forcible depredations upon the sea, *animo furandi,* is piracy.[91]

His citations include a footnote seventeen pages long in which are cited many of the works analyzed above, including Blackstone, the trials of Dawson, Kidd and Green, and the writings of Grotius and Wooddeson, among others.[92] To support the assertion that the English Common Law of piracy is identical with the substantive crime of "piracy" at international law he cited Hedges's and Jenkins's charges to juries quoted above,[93] and Blackstone.[94] There seems to be no independent legal argument other than long quotations from the various ancient authorities, and no distinction is drawn as to the jurisprudential bases for the various opinions or their possible inappropriateness to the narrow facts to which those opinions were applied. But Story's citations focusing on Marshall's single observation relating only to "the writers on the laws of nations," but not to the law of nations, or

international law, itself, seems to have convinced all but one of his colleagues on the bench. The one dissenter was Justice Henry Livingston, who read the words of the Constitution strictly to authorize the Congress to define "piracy," not just to refer to a foreign law, international law, for this purpose. In his view, a criminal statute, violation of which might result in hanging, should define the prohibited acts directly.[95] The Certificate which issued disregarded Livingston's position and found the reference to the law of nations in the statute of 1819 to be sufficient, and that law sufficiently clear, to justify hanging Smith, Chapels and the others.[96]

The decision in U.S. v. Smith appears to have broken a logjam of "piracy" cases, all of which were summarily handled by the Supreme Court immediately afterwards. From the opinions loosely tied together in this series of cases under one heading, U.S. v. Pirates,[97] it is clear that Justice Johnson was not fully convinced by Story and that there were many loose ends still remaining in the American approach to defining "piracy" and the scope of American courts' jurisdiction under the Act of 1819. Justice Johnson found an American legal interest sufficient for "standing" in all the cases but one, and in that case the facts were found to bring the situation within the scope of U.S. v. Klintock—the defendants having acted so as to lose all national character. In U.S. v. John Furlong alias John Hobson[98] the Certificate is explicit in finding a particular American basis for extending jurisdiction over the acts of the Irish defendant against an English victim:

> [I]t was not necessary that the indictment charge the prisoner as a citizen of the United States, nor the crime as committed on board an American vessel, inasmuch as it charges it to have been committed *from* [emphasis added] on board an American vessel, by a mariner sailing on board an American vessel.[99]

The American contact was the flag of the attacking vessel. In the one case in which no American contact equivalent to this could be found, U.S. v. David Bowers and Henry Mathews, U.S. v. Klintock was the sole authority needed to support a Certificate holding:

> That the act [of 1790] does extend to piracy committed by the crew of a foreign vessel on a vessel exclusively owned by persons not citizens of the United States, in the case of these prisoners, in which it appears that the crew assumed the character of pirates, whereby they lost all claim to national character or protection.[100]

The other cases all involved major American contacts making it unnecessary to explore the possible incorporation of any rules of international law into the municipal law of the United States.

Justice Johnson appears to have had serious reservations about U.S. v. Bowers and Mathews. In an unclear separate opinion adverting to the one case in which all the defendants are foreigners on board vessels owned by foreigners, he wrote that in his view U.S. v. Palmer was the controlling precedent rather than U.S. v. Klintock, apparently disagreeing with the majority that the foreign "pirates" had wholly cast aside their national

allegiances. Johnson nonetheless seemed to be willing to join with the majority on the strange rationale that while murder would not be triable in the United States other facts being the same, "piracy" being such a horrible crime in its very nature was amenable to American jurisdiction.[101] But why "robbery" is to be considered more horrible than "murder," and how revulsion at the substance of the crime translates into rules of jurisdiction which must be resolved before any court erected by any municipal system can hear the substance of any accusation, is unexplained.

Justice Story's expansive view of American jurisdiction to right the wrongs of the world was reflected also in two other cases in this series upholding jury verdicts that labeled as "high seas" for the purpose of "piracy" charges, roadsteads within three miles of a foreign state's coast: "[F]or, those limits, though neutral to war, are not neutral to crimes."[102] The logic of U.S. v. Ross[103] was apparently felt to be persuasive, perhaps in part because the Court remembered the origins of the American three-mile limit in a series of Secretary of States' almost arbitrary selections of a distance within which foreign gunboats could be excluded without offending any foreign powers in order to support American neutrality.[104] The notion that the Admiralty jurisdiction of all states extended as a matter of overlapping territorial jurisdiction to the navigable waters of the entire globe, rather than merely within the vessels of the various states, seems to be implicit in the holding.

Substance Reexamined. In one respect the expanded view supported by Story lost in this series of cases. The definition of the substance of the crime of "piracy" asserted by Story in U.S. v. Tully and Dalton[105] to include all "felonies" committed within Admiralty jurisdiction, not merely "robbery," was rejected by Story himself when forced to review the "writers" in U.S. v. Smith.[106]

Congress adopted as a matter of positive law Story's view of the utility of the legal label "piracy" to condemn whatever crimes the municipal law system of the United States wanted to attach the label (and its legal results) to without regard for the historical evolution of the concept or the jurisprudential concerns that run through the earlier writings. The most notable legislation concerned the slave trade. Story loathed slavery as a matter of natural law. While little could be done to abolish slavery within any particular state of the new Union under the positive law compromises of the Constitution of 1787, the Congress had the power to regulate foreign commerce and as early as 22 March 1794 had enacted a law forbidding the involvement of any person within the United States in the carriage of slaves in commerce between the United States and any foreign country.[107] On 10 May 1800 another Act forbade any American citizen or resident serving on board a foreign slave-trading vessel or holding any interest in the foreign slave trade.[108] The piracy statute of 1819 does not mention the slave trade. But the renewing statute of 15 May 1820 expressly makes it "piracy" with a penalty

of death for Americans to be engaged in the slave trade abroad or to detain a "negro" or "mulatto" with the intent to enslave (except for the recapture of persons (!) already held in slavery by the operation of the law of a state of the United States).[109] This use of the word "piracy" in connection with the international slave trade presumably represents an attempt by Story and others to develop the international law, as the "law of nations," by changing the municipal law of the United States, using the label, and hoping that other states in the international legal order would follow suit. To the extent that was the aim, it failed.[110] The American legislation remained municipal law in the United States, but the treatment of American active participants in the foreign slave trade as "pirates" before American courts did not make it "piracy" at international law any more than treason against the established order of England was made "piracy" in the international legal order by the hanging of James's (and Louis XIV's) Irish privateers in 1693.[111]

The interplay between American municipal law resulting from the statutes of 1819 and 1820, and the international law regarding the slave trade, and the retreat Story was forced into against his own inclinations was made clear shortly afterwards when an American naval vessel under Lieutenant Stockton seized a French slaver off the coast of Africa and France denied American jurisdiction to consider the case. Story upheld the American jurisdiction in principle, but turned the vessel over to France with an elaborate opinion seeking to bind France to apply its municipal anti-slave-trade laws passed as a result of British pressures and the Congress of Aix-la-Chapelle.[112] Story's reasoning is naturalist in holding the slave-trade to be a violation of the law of nations (because illegal under the law of all civilized states as well as in its nature inconsistent with Christian and universal moral principle). But he finds positivist reasons in policy for not applying the American municipal law: "The American courts of judicature are not hungry after jurisdiction in foreign cases, or desirous to plunge into the endless perplexities of foreign jurisprudence." He did not mention "piracy" or explain why the perplexities of foreign jurisprudence would be pertinent to a "law of nations" case.[113]

The issue appears to have been laid to rest in 1855. In that year a vessel sailing under the American flag was taken to Philadelphia under arrest for participating in the slave trade. The master of the vessel, Darnaud, was tried for "piracy" under the Act of 14 May 1820 secs. 4 and 5.[114] There was evidence that he was actually of French nationality despite the laws of the United States restricting masters' licenses for American flag vessels to American nationals. There was also a good deal of confusion as to the true ownership of the vessel, and it seems likely that a true American owner had attempted to mask his illegal operations behind various foreigners to whom title had been given, but not control or the legal capacity to transfer title further. Judge Kane charged the jury with regard

to the applicability of the American statute by which participation in the slave trade was made a species of "piracy:"

> [N]o State can make a general law applicable to all upon the high sea. Where an act has been denounced as crime by the universal law of nations, where the evil to be guarded against is one which all mankind recognize as an evil, where the offence is one that all mankind concur in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts. Thus the robber on the high seas, the murderer on the high seas, the ravisher on the high seas, pirates all of them, recognizing no allegiance to any country, because the very act violates their allegiance to all their fellow men, if caught, may be punished by the first taker. And so too, if the nations of the so-called civilized world, who are fond of calling themselves the whole world, and of arrogating to themselves somewhat too readily all the rights that belong to the whole world, could for once unite in defining that some one act should be regarded as a crime by all, it may be that after such an agreement by all the world, the courts of any one nation might without reference to the nationality of the individual undertake to punish the offence he had committed.
>
> But so soon as we leave these crimes of universal recognition, the jurisdiction of a State over the acts of men upon the high seas becomes circumscribed.
>
> But it is only in the two cases, where the individual accused is himself a citizen . . . or where the property upon which the individual was found perpetrating a wrong was properly recognized as American . . . that the United States can make a law which would be binding upon all citizens or which could be enforced by courts of justice; and I do not hesitate to say, after something of mature consideration, that if the Congress of the United States, in its honorable zeal for the repression of a grievous crime against mankind, were to call upon the courts of justice to extend the jurisdiction of the United States beyond the limits I have indicated, it would be the duty of courts of justice to decline the jurisdiction so conferred.
>
> That the offence is called in our particular statute piracy, does not vary the legal position. . . . Piracy is essentially an offence against the universal law of the sea. It assumes that the individual has thrown off his allegiance to mankind. He is the enemy of all who meet him. The slave trade, however horrible it may be, is not within that category.[115]

Under this charge, Darnaud was acquitted of "piracy."[116] The attempt of Justice Joseph Story to structure the American courts' approach to the international legal order in such a way as to enforce against foreigners whatever assertion of jurisdiction the Congress might see fit to make for policy reasons failed. The logic espoused by Judge Kane seems clear; it is based upon the existence of an international legal order that withholds from states the power to legislate with regard to the acts of foreigners abroad except in very narrowly prescribed cases. Participation in the slave trade, because consistent with the international legal order, even if horrible and possibly sinful, even if a violation of the law of nations in the Zouche-Blackstone-Story sense of violating the municipal laws of all states, was not inconsistent with the international legal order; indeed it was part of the trade between states that is a reason for the existence of the international legal order. Thus, to Kane it must have seemed that Castlereagh was wrong at Aix-la-Chapelle and France and Sir William Scott were right:[117] The law of

nations as it was reflected in the international law of the mid-nineteenth century was not conceived as the natural law evidenced by the concurrence of municipal legislation of all "civilized" states; it was the positive law, with no moral component divorced from the assent of states, evidenced by treaty or practice which in turn depended on political evaluations of the desirability of concluding the treaty or engaging in the practice.

It is perhaps worth noting explicitly that the Zouche-Blackstone idea that the law of nations, in the sense of the natural law evidenced by unanimity in the municipal laws of "civilized" states on some particular point, was part of "international law" in the sense of the law between states, seems to have bred more confusion than clarity in the minds of the naturalist jurists of the early 19th century. To legislators grappling with the practical problem of making rules for the governance of their societies, the idea that their rules, when coinciding with the equivalent rules of similar societies, represented the expression of some higher law and not of political choice was, to say the least, strange. They knew the argument and compromise that had been involved in drafting the rules and enacting them (through whatever political process). They also knew that what seems an incomplete trend or evidence of imperfect understanding of the underlying rules to a judge, teacher or other outsider, was more likely the balance of the political forces whose cooperation was necessary to the consensus process of legislation; that "imperfection" or "incompleteness" in expressing the "natural law" was evidence of the misperception of the outsider as to the "natural" rule, because the arguments that had resulted in the "imperfection" or "incompleteness" were sufficiently compelling, and reflective of important social interests, to be as "natural" as the arguments supporting a more sweeping rule. The evidence of the American experience of this time seems to have meshed with the evidence of British experience of the late 17th century and of this time as well, that rules of "international law" cannot be made binding on other states by the act of legislation or even judicial pronouncements of a single state or even a large majority of states. Thus, while a positivist approach to assertions of national interpretations of the law and its utility to express national policy even in international affairs resulted in legislation that used the word "piracy" in a sense desired by the national law-makers and in the hope of results in the international legal order,[118] that hope was futile. The structure of the international order, giving to each state the same powers of interpretation, make national legislation incapable of expressing "natural law" in a sense persuasive on others who do not share the identical perception of the "natural law." The argument by Blackstone, Story, Castlereagh[119] and others is thus circular; it rests on the *a priori* acceptance of the rule by the state seeking to be bound to it by international law arguments based on principles already found unpersuasive to its municipal legislature.

This is not to say that the naturalist argument regarding underlying principles is wholly mistaken, only that its application to specifics can never be presumed.[120] The 1945 Statute of the International Court of Justice, which is binding on all members of the United Nations and a few other states as treaty law even if not codifying generally accepted formulae, requires the Court to apply "general principles of law recognized by civilized nations" as part of the body of rules contained in international law.[121] Whether those "general principles" have anything to do with "piracy," and whether, if they do, they can be applied to anything else, remains doubtful in the light of the experience of the United States in trying to use them to expand the concept to cover the foreign slave trade and felonies other than "robbery" and in areas other than the high seas outside the territorially-based assertions of jurisdiction of any state, and to persons and incidents not related in legally significant ways to the state seeking to apply its law (or its conception of the international law) of "piracy."

Jurisdiction Reexamined. Story's reasoning in the *La Jeune Eugenie*, declining to exercise over a wholly French vessel the American jurisdiction asserted in the Act of 1820,[122] seems to reflect the policy underlying the distribution of legal powers, the jurisdiction of national courts and the problem of "standing" inherent in the international legal order. It is thus more compelling as a demonstration of the limits of "natural law" than of the substantive law regarding the slave trade that Story felt truly reflected "natural law," and which he declined to apply despite asserting a universal American jurisdiction both to legislate and to enforce American "universal" law against foreigners abroad. As Story's reasoning demonstrates, it is possible to assert this distribution of legal powers in the international legal order to rest on either natural law growing out of the structure of international society, or positive law—the convenience of the enforcing state in a particular situation—thus it is not necessary to resolve the jurisprudential disputes as to the best model to posit for an understanding of the international legal order. The policy argument given by Story will be very strong in any particular case. It, in turn, rests on unstated perceptions as to the convenience of the state system and narrower conceptions of territorial jurisdiction than he was willing to admit openly.

If this is so, then the "crime of piracy, as defined by the law of nations" seems to be simply the extension of municipal laws relating to crimes labeled "piracy" for historical reasons, largely resting on confusion and polemics, and related to the international legal order by another confusion between the "law of nations" and the "law between states" the former being merely a collection of the similar municipal laws of states which regard themselves as the sole members of the system. The similarities seem to rest on policy reasons related to the needs of commerce, not on underlying natural moral and legal principles. Indeed, ironically, the underlying principles seem more nearly

related to the unwritten constitutional order of international society, and make the conception of a substantive "natural law" valid for all states because reflecting immutable substantive principles, inconsistent with the system and an impediment to a clear understanding of it. Story himself seems to have reached this conclusion by 1834.[123]

In some other respects, what Story could not win by traditional legal argument based on natural law, he and his supporters were able to win briefly through changes in the positive law; by the blend of law, morality and policy in legislation by the United States Congress. The Act of 15 May 1820,[124] in addition to extending indefinitely section 5 of the Act of 1819,[125] and otherwise regulating the exercise of the powers of the President to authorize captures at sea, contained a new provision codifying Story's view as to the territorial reach of American Admiralty jurisdiction:

> Sec. 3. . . . That if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows,[126] commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be judged to be a pirate; . . . And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore commit robbery, such person shall be adjudged a pirate.[127]

The possibility of a clash of jurisdictions was noted with a proviso:

> *Provided*, that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county [*sic*; this was obviously copied from the statute of 1536], or authorize the courts of the United States to try any such offenders, after conviction or acquittance [acquittal], for the same offence, in a state court.

But the references to counties and to state courts makes it likely that what was in the mind of the Congress was not a clash between the United States and foreign countries, but between Federal and state authorities within the United States alone. On the other hand, the United States had not authorized any courts under the Constitution, except military tribunals and counsular courts, to hear criminal cases arising outside of the territorial jurisdiction of the United States and the high seas.[128] Thus the degree to which the territorial view of Admiralty jurisdiction, urged by Story and evident in many of the writings and cases noted above, was actually adopted by the Congress is doubtful.

As was pointed out with regard to the positivism of Gentili, where concepts of natural law and inherent limits to sovereignty are not regarded as persuasive, policy arguments frequently are persuasive to reach the same results. It is frequently better to refrain than to exercise an assertable jurisdiction when inordinate expenses must be borne to transport witnesses and inordinate delays are involved when a court cannot be set up in the area of the acts over which a state seeks to apply its law. The British had solved the problem in 1700 by authorizing the establishment of colonial tribunals to hear

"piracy" cases. In 1820 the United States did not have the same resources or distant interests involving sea power that the British felt. And even the most assertive positivist in the administration or the Congress at that time would not have urged that America establish a land-based court in territory ruled by a foreign sovereign with his own judicial system; to supersede, or even supplement a foreign judicial system and apply American law in a foreign sovereign's territory were major steps involving treaties[129] or the extension of national sovereignty, colonization or imperial expansion, in disregard of local authority.[130] The diplomatic and military consequences of such a policy made it inadvisable to apply it in distant territory at that time.[131]

The practical restraints the international legal order, with its emphasis on territory as the prerequisite for enforcement jurisdiction, fixes upon the legal powers of states to legislate effectively within that order through arguments based on the natural law evidenced by coinciding municipal legislation, are implicit in the leading American text of the period. Chancellor James Kent of New York in the first edition of his *Commentaries on American Law* (1826)[132] regarded the public law of nations as "enforced by the censures of the press, and by the moral influence of those great masters of public law, who are consulted by all nations as oracles of wisdom" and ultimately by "the penal consequences of reproach and disgrace" and the hazards of "open and solemn war by the injured party." But offenses that can be committed by individuals he considered as enforced by the "sanctions of municipal law," specifying not individual acts of unneutral service when the state is seeking to maintain neutrality, or similar acts violative of national policy alone, but "violations of safe conduct, infringement of the rights of ambassadors, and piracy."[133] "Piracy" he defined merely as robbery, or a forcible depredation on the high seas, without lawful authority, and done "*animo furandi*," citing U.S. v. Smith as authority for the assertion[134] and he asserted with Story that "There can be no doubt of the right of Congress to pass laws punishing pirates, though they may be foreigners, and may have committed no particular offence against the United States."[135] But he applied that broad language only to cases noted above in which the "pirate" had lost all his national character by acting "in defiance of all law, and acknowledging obedience to no government or fiat whatsoever." The Acts of 1790 and 1819 as continued and expanded in 1820 he noted:

> Did not apply to offences committed against the particular sovereignty of a foreign power; or to murder or robbery committed in a vessel belonging at the time, in fact as well as in right, to the subject of a foreign state, and, in virtue of such property, subject at the time to its control. But it [the Act of 1790] applied to offences committed against all nations, by persons who, by common consent, were equally amenable to the laws of all nations.[136]

He thus repeated the compromise on the Supreme Court noted by Wheaton, that allowed the wide assertion of jurisdiction urged by Story to

survive alongside a restrictive interpretation of the statutes under which that jurisdiction was interpreted to avoid a clash with foreign jurisdictions. And he emphasized the restriction by referring to the "particular sovereignty" of other states as a limit to American assertions, and to "common consent" as the basis for a wider exercise of jurisdiction if it were ever to be attempted.

Foreign Commissions and Unrecognized Belligerents[137]

The Statutes. The historical experience of the United States with unrecognized belligerents being classified as "pirates" dates back to 1777, with the licensees of the Continental Congress itself so classified by British statute.[138] Those statutes envisaged the detention of American privateers as "pirates," with a possibility of criminal trial at Executive discretion in England. There appear to have been no prosecutions for "piracy" as a crime either under the law of England or under international law growing out of the licensed activities of American privateers during the War. American privateers conducting captured vessels into neutral ports during those years were either welcomed on terms of equality with other belligerent vessels or turned away after British protest. The British authorized reprisals against Dutch shipping in retaliation for the Dutch refusing to deny port facilities to American privateers; but there seems to be no instance of a licensed American privateer actually being treated as a criminal.[139] In one instance British correspondence protested host state favors to an American naval officer as a breach of international obligations related to "piracy," but the context is political and the legal argument seems obscure.[140]

The use of the word "pirate" in what appears to have been a municipal criminal or administrative law context, but actually as a mere pejorative, and as a legal basis in either British municipal law or international law (certainly municipal law; international law to the extent the privateers licensed by the Continental Congress were conceived to be exercising belligerent rights) for holding political prisoners without calling them prisoners of war, was thus familiar to the statesmen of the United States from the moment of independence.

The United States, as a new state in the international order, preferred not to use the legal word in this way but did use it as a political pejorative without legal implications. Among the earliest treaties of the United States under the Constitution of 1787, aside from the Jay Treaty and Pinckney's Treaty with Great Britain and Spain respectively,[141] were the treaties with the "states" of the North African Mediterranean littoral, the Barbary states.[142] The word "pirate" was often used in the political rhetoric surrounding the so-called War with the Barbary Pirates, but in the actual conduct of hostilities, the normal laws of war and diplomatic and military intercourse were followed; the word seems to have reflected popular emotion only, not any legal classification.[143]

The American statute of 1790[144] contained a provision dealing with privateering done under color of a foreign commission. It was restricted in terms to American citizens taking such commissions, and thus rested its

"standing" on the nationality of the accused "pirates." It separated conceptually the problem of commissions from the problems of "piracy" unauthorized by any public authority, thus for a full understanding of the American attitude towards depredations done by foreigners also under color of a foreign commission it is necessary to set it forth here:

> 9. . . . That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death.[145]

This provision was left unchanged by the revisions of 1819 and 1820. The principle was expanded in 1847 during the war between the United States and Mexico of 1846-1848 through which the United States acquired California, New Mexico and Arizona, and ended Mexican claims to Texas. At that time the United States, as a matter of municipal law, extended the treatment as "pirates" even to foreigners acting under valid commissions by foreign governments if those commissions were inconsistent with the provisions of a treaty to which the United States is a party:

> That any subject or citizen of any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished before any circuit court of the United States . . . in the same manner as other persons charged with piracy.[146]

The statute of 1790 and its continuations apply only to Americans and, after 1847, some foreigners acting against the United States. Its provisions do not reflect any acknowledged underlying customary law. A British assertion that Americans serving on French privateers in 1794 were "pirates" was denied by the United States;[147] similarly, a French decree of 6 June 1803 classifying as a "pirate" vessel any privateer sailing against France two-thirds of whose crew were not subjects or citizens of a country at war with France, was considered by the United States to be inconsistent with the law of nations.[148] The question of Americans acting under foreign commissions against foreigners was answered as far as the United States was concerned by the Neutrality Act of 5 June 1794[149] under which various unneutral acts by individuals within the territory of the United States were forbidden, including the fitting out of privateers to cruise against foreign powers. But only acts within the territorial jurisdiction of the United States were affected as it was apparently the American policy to regard mercenary activity by Americans, including privateering under foreign license (which could be very profitable indeed to the successful privateer), to be neither forbidden by any conception of the law

of nations applicable to individuals nor any violation of American neutrality under international law as applicable between states.[150]

By 1854 it appears that even the British had accepted the American position that a regularly issued commission would remove the charge of "piracy" from nationals acting under third country commissions against yet other countries, and such a situation would not violate the neutrality of the privateers' own state if that state's territory or its own affirmative public policy were not involved.[151] Of course, municipal law or treaty could commit a state to a different policy. In addition to various policy arguments, such as the possibility that Great Britain might some day want to be able to employ American seamen in British privateers sailing against a third power, the Americans argued successfully that "By the law of nations, as expounded both in British and American courts, a commission to a privateer, regularly issued by a belligerent nation, protects both the captain and the crew from punishment as pirates."[152]

The Early American Experience. There is no American statute relating expressly to foreigners sailing under foreign commissions other than these. Thus, a legal gap was left with regard to foreigners sailing under commissions of foreign authorities who are not accepted by the political branches of the government of the United States as the representatives of foreign states. To the extent those foreign privateers act only against foreign shipping, not only would the United States lack standing to try them for "piracy" under any definition, but even if the jurisdictional problem were regarded as solved by calling them stateless under the approach taken in U.S. v. Klintock,[153] the lack of *animo furandi*, an essential element of the crime of "robbery," would seem to take the privateers with doubtful license out of the conception of "piracy" as it evolved with regard to the "classical" application of Admiralty jurisdiction to hang foreigners acting abroad for violations of a municipal law relating to property rights on board ships of the prosecuting state. A different conception is involved relating less to the municipal law of "robbery" or "murder," and more to the international law of war involving unrecognized political societies or groups forming themselves into governments but not yet in control of all the levers of the political society they claim to govern. The conception relates in the statutes to Americans engaging in "hostility" against the United States, or foreigners "making war" on the United States in disregard of treaty obligations of their own state. The uses of the word "piracy" in this very different context than the "robbery within the jurisdiction of the Admiral" definition, caused a confusion of thought that persists to today.

Ironically, the first form in which the key questions arose was with regard to commissions issued by the United States itself in 1798 authorizing privateers to cruise against French shipping.[154] Under the Constitution of 1787, the American Congress has the legal power in the United States "To

declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[155] On 7 July 1798 the Congress legislated "That the United States are of right freed and exonerated from the stipulations of the treaties . . . heretofore concluded between the United States and France."[156] Two days later the Congress authorized the President to "instruct the commanders of the public armed vessels . . . employed in the service of the United States, to subdue, seize and take any armed French vessel" and to grant equivalent authority through "special commissions" to the owners of "private armed ships and vessels of the United States."[157] Since there was no Declaration of War, the legal question was posed as to whether American commissioners acting under commission in the public interest, and not as licensed individuals in a "reprisal war,"[158] could claim the rights of lawful combatants and whether Frenchmen captured by American privateers were to be treated as soldiers under the laws of war. In addition, the question arose as to whether an American taking a French commission or aiding the French was guilty of "treason" or of "piracy" under the "hostility" provision of section 9 of the Act of 1790. The Attorney General, Charles Lee, addressed the questions in an opinion sent to the Secretary of State, Timothy Pickering, on 21 August 1798:

> Sir: Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* [*sic*] maritime war between France and the United States, but a maritime war *authorized* [*sic*] by both nations. Consequently, France is our enemy; and to aid, assist, and abet that nation in her maritime warfare, will be treason in a citizen or any other person within the United States not commissioned under France. But in a French subject, commissioned by France, acting openly according to his commission, such assistance will be hostility . . . [he] must be treated according to the laws of war.[159]

The Latin American Wars for Independence. It being more or less established, thus, that as far as the United States was concerned, the facts should determine the legal classifications pertinent to any particular situation, and that the political act of "recognition" through the formal attaching of classifications like "war" to a factual situation was a clarifying and at times determinative step, but that the failure to make a formal "declaration" was not determinative, the courts found themselves in some difficulty during the wars for independence of the Spanish colonies in the Americas.

The *Romp* of Baltimore sailed under a commission from the revolutionary government of Buenos Ayres and, as the *Santafecino*, cruised successfully against Spanish shipping. The laws of maritime warfare were fully observed. Available records do not indicate why the terms of Pinckney's Treaty with Spain were not applied to make the American involvement in the voyage of the *Romp* equivalent to "piracy,"[160] but when the crew was arrested on 1817

and charged with "piracy" Chief Justice Marshall, sitting as a Circuit Judge in Virginia, found the major issue to be whether the commission from Buenos Ayres was significant legally in the absence of "recognition" by the political branches of the American government, and whether, if not, the "robberies" against Spain committed by the *Romp*'s crew fell within section 8 of the 1790 statutory definition of "piracy:"

> The commissions should go to the jury, merely as papers found on board the vessel. But on the main question . . . that a nation became independent from its declaration of independence, only as respects its own government. . . . That before it could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence. That, therefore . . . the seals attached to the commissions in question prove nothing.[161]

As to the law of "piracy" that would apply if the commissions were found by the jury not to endow the crew with an immunity from the law of "piracy" for the purposes of the case, Marshall reviewed section 8 of the Act of 1790 and concluded in the light of a split of opinion between Justices Bushrod Washington and William Johnson that the law is "doubtful" as to whether to be "piracy" the depredation must be one that would be punishable by death if committed on land.[162] With this confusing instruction he sent the case to the jury, which took only ten minutes to return a verdict of not guilty.

The legal questions were given a much more elaborate treatment about a year later in U.S. v. Palmer et al. As to the substance of the question as to whether the phrase "punishable by death" in the Act of 1790 section 8 modified the word "piracy" as well as the phrase "any other offences," Johnson, in his dissent to U.S. v. Palmer, took the opportunity to reiterate his views conscientiously opposed to capital punishment.[163] He also reiterated his interpretation of the Constitution to withhold from the Congress the power to make that "piracy" which by the law of nations is not "piracy" in order to give jurisdiction to its own courts over such offenses[164] and went much further with regard to the question of commissions by unrecognized public authorities:

> When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance. . . . The proof of a commission is not necessary to exempt an individual serving aboard a ship engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons: he must answer that to his own government.[165]

It is not clear whether the majority agreed with Johnson on these last points; Chief Justice Marshall exercised his usual genius for finding words that would satisfy all parties and resolve the case without actually taking a position. As noted above, the majority agreed with Marshall that acts by

foreigners exclusively against foreign individuals or vessels "is not a piracy within the true intent and meaning of the act" of 1790 section 8.[166]

But what of Amercan defendants and foreigners who take American property at sea under a doubtful foreign commission? As to these, Marshall wrote:

> [I]f the government [of the United States] remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.... This would transcend the limits prescribed to the judicial department.[167]

This reiteration of the position taken so futilely a few months before in U.S. v. Hutchings at the Circuit Court level, was modified and expanded somewhat when Marshall drafted the "per curiam" Certificate to take account of Johnson's views and conclude the case by giving guidance for the future. After holding that acts by foreigners exclusively against other foreigners are not "piracy" within the sense of section 8 of the Act of 1790 (not mentioning whether "piracy" at general international law), Marshall wrote for the Court:

> [W]hen a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the union remains neutral, but recognizes the existence of a civil war, the courts of the union cannot consider as criminal those acts of hostility, which war authorizes, and which the new government directs against its enemy.[168]

As in U.S. v. Hutchings, Marshall (carrying the whole Court with him) concluded that the seal on a purported commission may be proved by such evidence as the circumstances permit even if there is no clear "recognition" of the seal-granting authority by the political branches of government, and if it cannot be proved, then the defendant may nonetheless otherwise prove himself to be in government service.

This opinion did two important things from the point of view of this part of the analysis: (1) It impliedly applied the municipal law "robbery" conception to the international law concept of "piracy" by allowing that any commission, or even mere government service without a commission, could negative the *animus furandi* necessary for a "piracy" conviction at American law; and (2) while repeating the subservience of the judicial branch to the other two branches of the American Federal government, it allowed juries to construe the silence of those other branches as consent to whatever the jury might find to be the legal classifications for the purposes of the particular case best flowing from the facts introduced in evidence before the court. Thus, while allowing the political departments of government to "recognize" as facts for the entire government a labeling system that might bear no relationship to the labels that a jury objectively viewing the evidence might

find, the legal system was not to be crippled by the inability of the political officers of government to make up their minds as to the labels that would do most to advance American policy interests. They could continue to be as positivist as they pleased, but the law using the traditional tools of naturalism, reason and fundamental principle derived from conscience and experience, could act when policy did not intervene. The result of this approach was to separate the law of "piracy" from the law of war, which was conceived to apply to all public contentions of arms whether or not declared and whether or not all parties were "recognized" as states or governments.[169]

In the light of the history of the American revolution and the policy followed during the undeclared war with France, this was hardly earthshaking, but it caused considerable confusion to the political arms, which felt they might be losing control of reality by permitting the judiciary to affix legal labels on the basis of evidence instead of on the basis of policy as examined by the political representatives of the Union. On 6 November 1818, shortly after the decision in U.S. v. Palmer et al. was announced, the Attorney General, William Wirt, responded to a request for legal guidance from Elias Glenn, the Federal District Attorney for Baltimore, in a case involving American privateers sailing under licenses issued by the organization headed by Jose Gervasio Artigas, the leader of the Uruguayan independence movement involved in struggles against the governments of Buenos Ayres and Portugal (which was still sovereign in Brazil). The easy answer might have been to rest not on the law of "piracy," but on the American Neutrality Act of 1794 forbidding American nationals taking foreign colors while in the United States.[170] But, this statute had only a very narrow territorial application, did not apply to American nationals abroad, and was aimed at preserving the neutrality of the United States by forbidding American *territory* to be used for foreign enlistments or fitting out foreign warships. The only reference to "piracy" in the act is in its section 9: "[N]othing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty or other law of the United States."[171] The strictly territorial applicability of this statute had been assumed in 1796 by Attorney General Charles Lee, who had felt it necessary to explain why it was necessary to preserve the neutrality of the United States by controlling even the actions of foreign seamen; his language, while so general that it might be read to apply to foreign seamen abroad, cannot have been intended to apply so broadly because the neutrality of the United States cannot have been conceived to have been affected by that, and it is neutrality that is the subject:

> Mariners may be said to be citizens of the world; and it is usual for them, of all countries, to serve on board of any merchant ship that will take them onto pay. . . . In the acts of Congress passed for punishment of crimes against the United States, it is observable that *mariners* [*sic*] are forbidden to serve on a foreign ship of war, letter of marque, or

> privateer, but are left at liberty to serve on board a vessel merely engaged in commerce.[172]

To Wirt, the enlistment under Artigas's licenses was illegal under the act of 1794, but if not, then it must have been "piracy" under the act of 1790, section 9. Since it is not clear that the place of enlistment was within the territory of the United States, it is not clear how the 1794 act was conceived to apply; and since it is not clear that any victim of the privateers was American, it is hard to see how section 9 of the act of 1790 could apply. But Wirt seems to have been obsessed with his reading of U.S. v. Palmer et al. and U.S. v. Hutchings:

> If the prisoners fail in showing that our government had admitted the existence of a civil war between Artigas and Portugal, then the principles laid down in Palmer's case . . . can have no application.[173]

In that case, wrote Wirt, Marshall's position in the *Romp* case will result in a conviction for "piracy." In case that argument seemed unconvincing, Wirt found another by citing Vattel for the proposition that "the citizens of the United States cannot mingle in that war, on this hypothesis, without being guilty of piracy." But the citation given by Wirt does not support his conclusion, since it forbids only foreign recruitment, not enlistment.[174]

Wirt raised also the possibility that if all else failed the American adventurers might be considered "pirates" under an unspecified Act of 1817. The only Act that might fit his description provides:

> That if any person shall, within the limits of the United States, fit out and arm, . . . any such [*sic*; there is no prior referent in the statute to justify the "such"] ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or any colony, district or people, to cruise or commit hostilities . . . against the subjects, citizens, or property, of any prince or state, or of any colony, district or people with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor.[175]

He seems to have overlooked the limiting language "within the limits of the United States."[176] This series of confusions and citations to inapplicable statutes and writings seems good evidence of the desire of the Administration of President James Monroe to find a basis in the law for controlling the adventures of Americans in the free-wheeling revolutionary days of the early 19th century Western Hemisphere without additional legislation. Indeed, it seems likely that stronger legislation to limit North Americans' adventures in Latin America could not have been passed through the Congress, in which representatives from the less sedate members of American society had a stronger voice than in the Virginia lawyer's appointed executive branch. Marshall's ambiguities were not sufficient. The defendants were acquitted without the jury leaving their seats, much to the fury of the Secretary of State, John Quincy Adams, who felt the acquittal showed a lack of character and ability in all those involved in the prosecution, including William Wirt, and the judges in the case; William Pinckney, the defense counsel, was

regarded by Chief Justice Marshall and Justice Joseph Story as the greatest advocate to appear before them.[177]

Examples of the practical difficulties of administering the terms of section 8 of the Act of 1790 were given above,[178] and the ambiguities were substantially increased by the possibility that a foreign commission might authorize the depredations observed or suspected by American licensees seeking to capture "pirate" vessels. As early as 1813, Bushrod Washington had tried unsuccessfully to use section 8 of the Act[179] to limit the excessive zeal of foreign privateers. In U.S. v. Jones[180] a jury in Philadelphia had before it a defendant from a vessel which had despoiled a Portuguese ship although, according to Washington, in the political struggle giving rise to Jones's foreign commission Portugal was a "neutral" as far as the United States was concerned. The facts are not entirely clear, but the defendant appears to have been an American, and Washington sought to have him bound by American neutrality not to participate in a struggle among foreign public authorities. No act of the Congress squarely touched the situation and Washington was in the same dilemma Wirt would try to bluster his way out of in 1818. Washington cited Jenkins, Molloy, Wooddeson and the Kidd case,[181] "which latter case," he wrote, "though decided at Common Law, is clearly bottomed upon the principles of the maritime law of nations, with which the Common Law in this respect agrees."[182] The fact of the defendant's commission having authorized depredations against Portuguese vessels Washington instructed the jury to be irrelevant if the defendant "knows, or ought to know, the orders to be illegal." The act of "piracy" under the Act was apparently not necessarily either murder or robbery, but included any other act which would have been punishable by death if committed on land. Washington seems to have felt that this language of the Act of 1790 did not expand the international law of "piracy" but codified it.[183] The verdict was for acquittal, apparently on the basis of a possible mistaken identity between Jones and another defendant named Hancock, and some serious question about the credibility of some witnesses,[184] so possible legal errors in the charge were never appealed to higher courts.

Evolution of the Labels. Among the "piracy" cases dealt with at the Supreme Court level immediately after U.S. v. Smith in 1820[185] was U.S. v. Griffen and Brailsford, in which the charge was applied to an American fitting out a vessel in an American port to cruise under a foreign commission against a foreign power at peace with the United States. The facts are not fully set out, but the Supreme Court's decision was that even if the "piracy" laws did not apply, the Neutrality laws of the United States did,[186] and the defendant concerned was "not protected by a commission from a belligerent from punishment for any offence committed by him against vessels of the United States."[187]

Another was U.S. v. Holmes,[188] in which the Supreme Court avoided the problem of having the judicial branch *via* a jury decision "recognize" the legal

power of an unrecognized authority (Buenos Ayres again) to issue valid commissions in disregard of the silence of the political branches of government by applying the rule of U.S. v. Klintock.[189] Apparently it was hoped that a jury would find that "the vessel . . . had, at the time of the commission [of the offense], no real national character but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatsoever."[190]

It seems likely that the Supreme Court's difficulties dealing with these cases reflected a deep jurisprudential split between Story and Washington, the "naturalists," taking an expansive view of American jurisdiction to apply an international law of "piracy" to foreigners who interfered with foreign shipping in disregard of the legal order's normal demand for some "standing" in the state whose judicial arm had the accused "pirates" before it, and the "positivists," Johnson and Marshall, who insisted that, regardless of judges' perceptions of abstract "justice," "reason" or the presumed needs of society, the jurisdiction of the American courts was restricted to such cases as the Congress by legislation had given to it, and who interpreted the intention of the Congress narrowly. The compromise as of 1820 was to allow jurisdiction in those cases in which American "standing" could be supported in the usual way plus those in which no other state in the international legal order could assert a greater "standing" or legal interest. The limits of this approach were reached when the defendants derived their authority for committing depredations at sea from commissions issued by unrecognized foreign officials; the "naturalists" wanted to consider those cases as within American judicial purview, the "positivists" did not.

Wheaton in 1836 attempted to summarize the American view and ended with the same split between broad assertion of jurisdiction and narrow citation to practice that was the result of the jurisprudential division within the Supreme Court. He wrote:

> Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by armed vessels of any particular state, and brought within its territorial jurisdiction for trial in its tribunals.[191]
>
> This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. . . . The crimes of murder and robbery, committed by foreigners on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subjects, but in possession of a crew acting in defiance of all laws, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under the law of nations in the courts of any nation having custody of the offenders.[192]

The interplay between the American municipal law and the international law of "piracy" as it might apply to political actors with commissions issued by unrecognized governments at this period was illuminated in a case decided

by a unanimous Supreme Court, opinion by Justice Johnson, in 1821. The *Bello Corrunes* was a Spanish ship, captured in 1818 by an American sailing under commission issued by the authorities of Buenos Ayres in a ship that had been fitted out in the United States in violation of the Neutrality Act of 1794.[193] It ran aground on Block Island, at the Eastern end of Long Island Sound, as a group of its original crew seized control back from the American licensee of Buenos Ayres. The claimants in an Admiralty proceeding thus were the original Spanish owners, on the argument that the capture was "piracy" because the authorities in Buenos Ayres had no legal power to issue a commission; the American licensee, on the basis of his capture of the vessel; and the group of original crewmembers, who claimed compensation as salvors for the original owners by virtue of their recapture of the ship from "pirates" just before she ran aground. The learned counsel before the Supreme Court included Daniel Webster and Henry Wheaton for the Spanish owners and the "salvors" respectively, both arguing the original seizure to have been "piracy" under article 14 of Pinckney's Treaty.[194] The decision was for the Spanish owners not on the ground of the intervening capture having been "piracy," but on the ground of the American captor having violated article 14 of the Treaty and the implementing statute of 14 June 1797,[195] and the salvors not having shown that they truly intended to return the vessel to its Spanish owners rather than keep it for themselves.[196] Johnson indicated that the Treaty deeming to be "piracy" any American privateering against Spain under license from any "Prince or State" with which Spain shall be at war was problematical because Spain refused to consider its troubles with Buenos Ayres to amount to "war," or Buenos Ayres to be the government of a "state." But, he said, whatever the problems in punishing these acts as "piracy," they are clearly prohibited "and intended to be stamped with the character of piracy."[197]

Meantime, as to the relationship between reality and legal labels, in the 1820 case of the *Josefa Segunda*[198] the Supreme Court reiterated in even stronger terms the approach taken by Marshall in U.S. v. Palmer et al. The *Josefa Segunda*, suspected of preparing to violate American laws regarding the slave trade, was taken into an American port. Rival claimants for the vessel, in addition to its captors, were its original Spanish owners and its immediate possessors, who were the prize crew put aboard by a Venezuelan privateer. To defeat the claim of these last, an argument was made that the Venezuelan capturing vessel, the *General Arismendi*, was a "pirate" because the licensing Venezuelan authorities had not been "recognized" by either Spain or the United States as a government; that there was no "recognized" state of war between Spain and any local authorities in Venezuela, and that even if all of this were not so, the *Josefa Segunda* had never been formally taken before a Venezuelan or any other prize court and therefore the legal Spanish title had never been divested. Justice Henry Livingston for the Supreme Court brushed aside all these formal legal arguments:

> Although not acknowledged by our government as an independent nation, it is well known that open war exists between them [the Venezuelan local claimants to authority] and his Catholic Majesty, in which the United States maintains strict neutrality. In this state of things, this Court cannot but respect the belligerent rights of both parties; and does not treat as pirates, the cruizers of either, so long as they act under, and within the scope of their respective commissions.[199]

The lack of actual condemnation before a prize court was considered irrelevant because "a condemnation in a Prize Court of Venezuela was inevitable."[200] This was judicial naturalism with a vengeance. "War" was considered a legally significant "fact," not a legal status. American "neutrality" appears also to have been treated as a "fact" despite the appearance of status language. The reference to both the facts of war and of American neutrality is immediately followed with a reference to "this state of things" compelling legal results, the respect for the "belligerent rights of both parties." If this was not a judicial "recognition" of the status of the Venezuelan authorities as a "party" to a legal "war," it is hard to see what would have been. It differs from a declaration by the Executive branch of the American government only in that it is legally valid for the particular case alone, not necessarily for other purposes or other cases. The case also shows the decreasing importance of the forms of the law, the Prize court proceedings, to the "naturalist" jurist. Until this time, the American capture of the *Josefa Segunda* from a privateer prior to the legal title in the vessel and its cargo being changed by some national Prize court would have had the same legal result as a rescue from "pirates": Return of the vessel and cargo to its legal owners and payment by them of "salvage" to the recaptors. Instead, the result in the *Josefa Segunda* in practical terms was the defeat of Spanish title (by presuming the result of a Venezuelan prize court—and presuming sufficient legal status in the authorities of Venezuela to hold one) and the defeat of the title claimed by the *General Arismendi*'s owners and company by virtue of the violation of the American anti-slave-trade laws in the territorial waters of the United States, and thus the full value of the vessel and its cargo to the American captors and government under those laws. Presumably this is the same result the political branches of the American government would have wanted to reach by the discretionary application of legal labels in a positivist mode, and, by restricting the labels to the particular case, avoided international political complications that handling by the executive branch alone in diplomatic correspondence and administrative action would have entailed. And yet, it seems apparent that to a large degree the Supreme Court was exercising a political discretion, attaching labels not, perhaps, for strictly policy reasons, as a self-conscious executive might have done, but finding colorable reasons in a naturalist mode for attaching the labels most likely to be welcomed by the administration of President Madison. Presumably they are the same reasons that a positivist would have chosen in diplomatic correspondence with Spain, although in that case tempered by apprehensions

of reciprocal treatment by Spanish authorities with regard to American vessels captured by America's enemies and not yet formally condemned, and perhaps also by concern lest the Spanish authorities for their own policy reasons "recognize" the international legal capacity of various American Indian tribes or other groups which it was in the United States political interest to suppress without reference to the rules of international law.

The Supreme Court itself did not maintain this exaggerated role in the discretionary business of attaching legal labels relating to international affairs. Once the political branches had "recognized" the war of independence between Spain and its American colonies, and proclaimed United States neutrality, the Court could skip back to its more comfortable role as a judicial branch of government concerned with applying American municipal law and only such international law as American municipal law required it to apply. The case marking this retreat was the *Santissima Trinidad* and the *St. Andre*.[201] Justice Story delivered the Court's unanimous opinion. The case involved an American-built ship, the *Independencia* sold to James (Diego?) Chaytor, of originally American, now nuclear, nationality, who held a commission from the authorities of Buenos Ayres. Story wrote:

> Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States and, therefore, is not entitled to have her ships of war recognized by our courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of . . . intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights.[202]

But the fitting out of the *Independencia* and a companion vessel in the United States was a violation of the American Neutrality Act even if not a violation of article 14 of Pinckney's Treaty[203] and Story argued that the American Neutrality Act was but one country's legislation expressing the underlying principles of all civilized countries (or, at least, all countries participating in the international legal order as conceived by Story) and, therefore, was simply part of the "law of nations" as conceived by Blackstone. Thus, while rejecting the characterization of Chaytor as a "pirate" under article 14 of Pinckney's Treaty, and, by virtue of its public character rejecting the characterization of the *Independencia* as a "pirate" vessel, he held that the wrongful fitting out of the vessel in the United States "is a violation of the law of nations, as well as of our own municipal laws" and that violation "infects the captures subsequently made with the character of torts, and . . . requires restitution."[204]

As to the property rights adjudicated by a foreign prize court, Story and the Supreme Court retreated considerably from the glib dismissal of the foreign legal process evident in the presumption of condemnation and the giving of

current effect to the merely anticipated legal action in the *Josefa Segunda*. The *Santissima Trinidad* had been captured by the *Independencia* and, with the consent of all parties in the United States, had been sold there with the money received replacing the vessel as the object of this Admiralty *in rem* proceeding. During the pendency of the proceeding a Prize court in Buenos Ayres had in fact condemned the vessel *in absentia*. The Supreme Court did not object to the action of the Buenos Ayres court, ruling rather surprisingly that a belligerent Prize court could legally act when a prize is physically elsewhere, in a neutral port. But Story found two reasons why that Prize court action was ineffective: (1) the vessel, having already been submitted to an Admiralty court, it was no longer in the hands of the captor, so the *res* essential to an *in rem* action was missing, (2) the property was already in the hands of an American court, and the supervening action of a foreign court cannot oust the American court of its jurisdiction: "It would be an attempt to exercise a sovereign authority over the court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality."[205] The first reason seems inconsistent with the reasoning of the court in the *Josefa Segunda*, where the act of the foreign prize court was anticipated and had never occurred even during the American proceedings. The second goes to the question of jurisdiction, not substance, and it is hard to see why an otherwise valid legal act should be denied legal effect as a matter of national honor in an Admiralty proceeding whose primary object is to evaluate conflicting claims to property rights resting on foreign laws. Title to the vessel was restored to its original Spanish owners, thus, although they did not in fact get their ship back, they got the money that had replaced it in the action.

It seems clear that by taking a "naturalist" line, labeling "belligerency," and thus subject to the laws of war as they apply between states, the fighting between a group seeking governmental authority and a group losing control over the territory and population its constitution presumed that it ruled, on the basis of "objective" facts rather than policy arguments, the Supreme Court had made the label "piracy" irrelevant to questions arising out of the acts of the licensees of unrecognized authorities. When the policy-making branches of the American government agreed on the basis of its own positivist, policy, arguments there was no difficulty. There is no case known to have arisen over a conflict of labels between the courts and the policy-making branches of the American government.

This evolution was probably helped by an equivalent evolution in England, where Sir William Scott in 1819 had come to similar results in similar (but very complex) circumstances. A British ship, the *Hercules* was commissioned by Buenos Ayres to cruise against Spanish shipping. It had sold various captured vessels without first submitting them to Prize court hearings in Buenos Ayres. It was arrested by a British naval vessel for a claimed breach of the revenue laws of Barbados and taken to the British Admiralty court in

Antigua for adjudication among the captor seeking his share under a British statute regarding naval captures to enforce revenue laws, the British owner of the cargo, the British captain of the vessel for the vessel itself, the Spanish Ambassador for the Spanish crown and owners of vessels and cargo plundered by the *Hercules*, and a local attorney for the particular Spanish owners of identifiable cargo plundered from a particular vessel. In the Antigua court, the Navy captain won. The case was taken to England on appeal. Sir William Scott found the Antigua Admiralty court had lacked jurisdiction under British law to hear a case involving a breach of Barbados revenue laws, and held for the British owner of the vessel and the bulk of its cargo. Immediately, the Spanish Ambassador and the other Spanish claimants appealed again claiming the *Hercules* to have been a "pirate" vessel when it captured their property on the ground that the authorities in Buenos Ayres had no legal power to issue a valid commission.

Scott's solution was to eliminate the law of "piracy" from the case and restrict that law to the "criminal law" context which was only part of its origin in English municipal law. The international law aspects of the case he held to be questions of property law only, on which he proposed to hold further hearings. As a result of this decision, the report notes, "Some further proceedings were had . . ., but owing to a compromise which took place between the several parties, it did not again come on for discussion."[206] In reaching this result, Scott had some pertinent things to say about the law of "piracy" as conceived in England at this time:

> It is to be observed, likewise, that piracy has long ceased to be practiced in any considerable extent. There is said to be a fashion in crimes; and piracy, at least in its simple and original form, is no longer in vogue. Time was when the spirit of buccaneering approached in some degree to the spirit of chivalry in point of adventure; and the practice of it, particularly with respect to the commerce and navigation and coasts of the Spanish American colonies, was thought to reflect no dishonour upon distinguished Englishmen who engaged in it. . . . But whether the numerous fleets, which in later times have been maintained by the European States, or the prevalence of juster notions, and gentler manners, and commercial habits, have cleared the ocean of this nuisance, the fact is certain, that the records of our own criminal Courts shew that piracy is become a crime of rare occurrence, hardly visible for above a century past, but in the solitary instances of a few obscure individuals. Pirates, in the ancient meaning of the term, are literally *rari nantes* on the high seas. . . . Now, piracy is certainly not considered as a felony at the common law . . . [I] will hear the case for restitution.[207]

Thus, by relegating "piracy" to the strict criminal law context and denying Common Law jurisdiction (by virtue of the Act of 1536, which Sir William Scott regarded as excluding the Common Law courts and the normal Admiralty courts from the cases of alleged "piracy" as crime), and viewing the Admiralty courts as strict property courts in the same way as had been done by Sir Julius Caesar some 150 years earlier,[208] the legal efficacy of the word even to justify the preservation of property rights of the victims of

illegal captures at sea was eliminated. His reasoning does not depend on the lack of *animo furandi*, but on lack of jurisdiction and the fundamental irrelevancy of the concept to the kind of case resulting from captures under licenses issued by doubtful public authorities.

A similar approach was taken in 1826 by the American Supreme Court, again unanimously and again under an opinion written by Justice Story, when an American naval claimant sought to justify the taking of a Portuguese merchant ship on the ground of its "piratical" behavior. While Story was much less certain than Scott of the total obsolescence of the law of "piracy," he restricted the notion in the case of a foreign vessel, flying a flag to which it is authorized, to when that vessel was engaged in "a private unauthorized war." Under this opinion, the Supreme Court decreed the return of the vessel to its Portuguese owners, but released the American Navy captain from liability for damages resulting from his wrongful, but reasonable, taking of the vessel.[209]

The same result followed a year later with an accompanying rationale apparently even more strongly influenced by Scott's reasoning in the *Hercules*. The *Palmyra*, sailing under a Spanish commission, had been taken on the high seas by an American warship in 1822 after minor resistance. The *Palmyra*'s commission had been issued to a different vessel under a different commander, and had expired; it had then been renewed and issued to the *Palmyra* by a minor Spanish official of undocumented authority. Acting under that commission, the *Palmyra* had plundered two French vessels, the *Coquette* and the *Jeune Eugenie*. The American captor, Lieutenant Gregory, brought the *Palmyra* in for adjudication, and the owners of the *Palmyra* sued him for damages, claiming American interference with her voyage was unjustified and the case, since it did not involve any American legal interest, beyond the jurisdiction of American courts. Justice Story delivered the Supreme Court's opinion. As to substance, the court held that the burden on the captor to prove the *Palmyra* was a "pirate" vessel had not been borne, thus the acquittal of the vessel and its crew was confirmed; mere irregularity in the ship's papers and her excessive action against the two French vessels did not constitute "piracy."[210] But the statute under which Lieutenant Gregory acted authorized the President to instruct the commanders of American public vessels to take only vessels with armed crews "which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure."[211] This use of "piratical" as an adjective caused obvious problems, and Story pointed out that the case was not a criminal case, but an *in rem* Admiralty proceeding in which the actual charge of "piracy" was not being determined. The question thus resolved itself not to an issue of the law of nations or the precise definition of "piracy," but to a narrower question of the intent of the Congress expressed in the statute. As to the international law, Story concluded that "whatever may be the irregularities, . . . such

commission . . . ought, in the courts of neutral nations, to be held a complete protection against the imputation of general piracy." As to the *in rem* proceeding, he went on, "[T]aking the circumstances together, the Court thinks that they presented, *prima facie*, a case of piratical aggression . . . within the acts of Congress, open to explanation indeed . . . ; Lieutenant Gregory, then, was justifiable in sending her in for adjudication, and has been guilty of no wrong calling for compensation."[212]

Implicit in this holding was an extension of American jurisdiction to foreign vessels suspected of "robbery at sea" against other foreign vessels with no clear American interest in the transaction. Story's conception of universal criminal law jurisdiction over "pirates" seems to have been adopted by the Court as a whole. But again, the case was not presented squarely; it was not in fact a criminal prosecution and the *Palmyra* was restored to its owners despite the doubtful commission and the firmly stated view of the Court that "Her [the *Palmyra*'s] exercise of the right of search on these [French] vessels was irregular and unjustifiable."[213] Thus, the case can be interpreted to stand for something very close to the opposite of what Story wanted. The assertion of universal American police jurisdiction was not necessary for the result and stands as mere dicta; and the need for some clear public authority to license interference with navigation on the high sea was reduced to a mere need for the semblance of such authority which a "neutral nation" could not properly question. A relationship of belligerency between the flag state of the "privateer" (or "pirate") and the victim would come close to making moot the question of licenses. Story preserved the possibility that a "privateer" might become a "pirate" even if acting only against vessels of an authority at war with the authority issuing the commission, but the likelihood seems remote of ever being able to present a convincing case on the point, and none has been found.

On this last point, the trend of the law seems to have been against Story and his attempt to extend the Supreme Court's assertions beyond the cases before it to cover general policing jurisdiction. In 1829 a prosecution of an individual of possible American nationality for "piracy against a French vessel on the high seas" (apparently all the acts took place within a single vessel) resulted in an acquittal "for want of jurisdiction"[214] under a charge that made the nationality of the defendant the key to jurisdiction under the acts of 1790, section 8, and 1820, section 3. Dallas, the prosecuting attorney for the United States, agreed that there was no case against the defendant under a charge of "piracy by the law of nations" because he was "indicted as a citizen of the United States, for violating the laws of the United States." The District Judge, Hopkinson, interpreted U.S. v. Palmer et al. to exclude from the scope of the 1790 Act a crime by a foreigner on board a foreign vessel, and interpreted U.S. v. Klintock to be consistent with that approach. The extension of the statute to cover vessels of no flag in U.S. v. Holmes he

construed as limited to that; it did not extend the act to cover vessels of a known foreign flag. While the act of 1819 extended American jurisdiction to cases of "piracy" at international law, Hopkinson argued the Congress "had felt the force of the reasoning in Palmer's case; and may have doubted the policy or propriety of extending their penal law beyond their own vessels, leaving it to other nations to do the same with theirs."[215] He construed the later acts of Congress to conform to this view, and concluded that acts wholly within a foreign vessel "sailing under the flag of a foreign state, whose authority is acknowledged, is not piracy within the true intent and meaning of that [1820] act, and this court hath no cognizance to hear, try, determine and punish the same."[216]

Story had a final chance to try to establish the jurisdiction of United States courts over foreigners acting solely against foreign shipping, and to expand the definition of "piracy" to include more than robbery and murder across jurisdictional lines at sea in 1844. The Brig *Malek Adhel* bound on a commercial voyage from New York to California apparently attacked at least five other vessels on the high sea. Two of the victims were British-owned and one Portuguese (two were American-owned), but actual depredation and plunder was alleged only with regard to the Portuguese vessel; the others were apparently fired on only to sink them or harass them. Although the *Malek Adhel* was in fact American-owned, and thus there need have been no doubt regarding jurisdiction, Story construed the Act of 1819 as extended in 1820, second section, which authorizes American warships to seize "any vessel or boat . . . which shall have committed any piratical aggression . . . upon any other vessel" to apply without regard to any issues of standing:

> The policy as well as the words of the act equally extend to all armed vessels which commit the unlawful acts specified therein.[217]

As to the substance of the offense, Story interpreted the adjective "piratical" to include:

> The class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. . . . If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*.[218]

Of course, the case did not involve "piracy" as such; it was not a criminal proceeding but an *in rem* proceeding. The lower court decree condemning the vessel as a punishment authorized by the statute, but releasing its cargo to the innocent owners, was affirmed. The funds received from sale of the vessel were used to indemnify the captors for their costs and charges; it appears that the victims suffered no provable losses other than to their dignity.[219]

The question of the validity of a commission issued by an unrecognized authority arose again most poignantly when Texas declared its independence

of Mexico. In 1836 an armed schooner, the *Invincible*, captured an American brig, *Pocket*, bound for a Mexican port within the territory claimed by Texas. The President (Andrew Jackson) asked Attorney General Benjamin Butler whether the *Invincible* was a "pirate." His answer was that under Section 9 of the Act of 1790 Americans involved in the action of the *Invincible* would be considered "pirates" by the law of the United States[220] (whatever their situation under international law), but that the situation was different for Texans (or rebelling Mexicans, as they legally were):

> Where a civil war breaks out in a foreign nation, and part of such nation erect a distinct and separate government, and the United States, though they do not acknowledge the independence of the new government, do yet recognize the existence of a civil war, our courts have uniformly regarded each party as a belligerent nation, in regard to acts done *jure belli*. Such may be unlawful, when measured by the laws of nations or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States; but the parties concerned are not treated as pirates.[221]

This approach, relieving the privateers of the unrecognized government of Texas of the legal results of "piracy" on the basis of their deriving their authority to act from the laws of war and their adherence to a public organization engaged in that belligerency, was asserted to be valid despite the fact that the interference with American shipping "would seem to be an infraction of the treaty made in 1831 between the United States and the United Mexican States, (of which Texas was then a constitutent [*sic*] part), and there may be other reasons for doubting its legality as an act done in the right of war."[222] The point was that once the relations between Mexico and the Texas authorities were considered "belligerent," the law of war applied and "piracy" was incompatible with belligerency as long as the "pirates" were acting, not necessarily in full conformity with that law, but within that system of law. They might be "war criminals," but not "pirates." That the law of war applied between Mexico and the authorities of Texas was determined by Attorney General Butler as a matter of strict positivist logic:

> The existence of a civil war between the people of Texas and the authorities and the people of the other Mexican States, was recognized by the President of the United States at an early day in the month of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican government.[223]

Attorney General Butler thus did not examine whether the facts viewed objectively justified this American classification of relations between Texas and the rest of Mexico, but accepted the classifications given by the policy officers of a political branch, the executive, as the basis for his legal analysis. This approach, relying on policy officers for the basic classification system, and then interpreting the law of war to exclude "piracy" even for acts done in excess of any commission or of the power of the belligerent to issue a commission restricts the scope of the law of "piracy" essentially to two areas:

(1) the municipal law relating to robbery within the jurisdiction of the municipal Admiralty courts, and (2) whatever might remain of the original Roman and Mediterranean conception of "piracy" as the behavior of states or belligerents defined by a positive law system as outside the group governed directly by the system.

This approach was not restricted to American executive branch officials. It was taken by an Italian Umpire in 1863 rejecting a claim by American investors (chiefly Cornelius Vanderbilt) against Costa Rica arising out of the war of 1856 between that country and Nicaragua in which American property in Nicaragua had been destroyed. In 1854 the government of Nicaragua had been overthrown by adventurers led by William Walker, an American. In the words of CDR Joseph Bertinatti, the Umpire in the later arbitration, "The new government of Nicaragua . . ., though illegitimate and piratical in its origin, . . . was in fact . . . the only government of that state."[224] Costa Rica intervened in 1856 to oust the "Rivas-Walker" government of Nicaragua. For reasons that are not clear, the American investors then seem to have convinced the Rivas-Walker Government to "nationalize" their property in Nicaragua and hand it over to a second private company organized under Nicaraguan law by the same investors. The property was eventually destroyed by Costa Rica in the war. The American investors' legal theory in the arbitration appears to have been that the Rivas-Walker government was merely a group of "pirates," therefore incapable of changing property rights; that the destruction of the Americans' property by Costa Rica was therefore the destruction not of property legitimately used by the Rivas-Walker people or those legal persons deriving title from them, but of "neutral" property not legitimately the object of belligerent operations.

This attempt to manipulate the legal labels to insulate American investors from the consequence of their own political activities in Nicaragua was rejected by CDR Bertinatti on several grounds. One, that the Corporation created under Nicaraguan law was Nicaraguan, and that the law of claims did not permit foreign investors to assert the neutrality of their indirectly owned property, is irrelevant to the current study.[225] Another, that "the fact, which is more eloquent than words, shows that it was a *public war and a regular war,* fought as such on both sides according to the civilized usages of warfare" and that during the conflict the United States "recognized the Rivas-Walker government, not only as *belligerent*, but also as the regular government of Nicaragua" can be seen to defeat the use of the concept of "piracy" as a basis for denying governmental competence to a *de facto* authority for the purpose of private claims.[226] The importance of this approach will become apparent in the next section.

The United States position regarding the use of the legal word and concept of "piracy" in cases of political rising, based probably on the Revolutionary war experience, reviewed above was absolutely to deny the propriety of the

word. In 1838 Canadian and American raiders based in New York State skirmished with British forces in Canada. In the correspondence that followed, Mr. H.S. Fox, the British Minister in Washington, referred to British-Canadians "defending the British territory from the unprovoked attack of a band of British rebels and American pirates."[227] Daniel Webster, the American Secretary of State, replied:

> But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the Government, against which the standard of revolt is raised, cannot be denominated pirates, without departing from all ordinary use of language in the definition of offences.[228]

At the time, Great Britain in no way had "recognized" any degree of belligerent status in the Canadian rebels, and the United States was entirely at peace with Great Britain, referring to the problems in Canada as "civil commotions," not "war" or "belligerency."[229]

Civil War of 1861-1865. The entire question of the validity of a commission issued by an unrecognized authority, and the possibility that the legal results of "piracy" could be attached to an attack under color of such a commission, even if not *animo furandi*, but instead *animo belligerandi*, arose in the United States during the Civil War of 1861-1865, and the entire naturalist-positivist debate broke out again. This time, there was an ironic twist in that the arguments that were persuasive to the slavery-hating Story, who felt until the cases and his work on conflict of laws theory convinced him otherwise, that the natural law of property gave universal scope for American action against "piracy," now became attractive to the slavery-justifying Confederate States and their sympathizers. From their point of view, the actual hostilities occurring between the states of the southern Confederacy on the one hand and the rump of the Union on the other should determine legal labels regardless of the policy reasons that might be advanced in the north for preferring a different set of labels. Their "naturalist" argument was that the substantive law arises from facts and traditions that judges are able by training and empowered by Constitutional law and tradition to find and declare; that under that law, the actions of southern privateers and navy commissioners were public, not *animo furandi*, and fit the labels involved in a legal status of belligerency; they were entitled to be treated as prisoners of war if caught; their legal captures could convey valid title after Prize court proceedings. To the unionist judges, the political branches of the American government had the legal power to determine the classifications of events, and the courts were bound to apply the law growing out of those classifications. If the Confederate authorities were unrecognized, their commissions were simply pieces of paper authorizing nothing; depredations done under color of those commissions could thus be classified "piracy."

The question arose when President Lincoln declared a blockade of the Southern states' ports on 19 and 27 April 1861.[230] The Proclamations of 19 and 27 April said respectively:

> Now, therefore, I . . . deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and of the law of nations,

and

> [A]n efficient blockade of the ports of those States will also be established.[231]

The Congress did not act until 13 July 1861, when it "empowered" the President "to close the port or ports of entry" in any customs collection district of the United States[232] and "to declare that the inhabitants of [a] State, or any section or part thereof, . . . are in a state of insurrection against the United States" and that commerce unlicensed by him "shall cease and be unlawful so long as such condition of hostility shall continue."[233] The issues were the Constitutional power of the President to impose a blockade prior to the empowering legislation by the Congress, whether the Presidential or Congressional actions amounted to a "Declaration of War" within the sense of the Constitution and international law,[234] and whether Confederate States blockade runners and bearers of Confederate letters of marque were "pirates" or otherwise violators of international law as well as being criminals under the municipal law of the United States.[235]

The Supreme Court was deeply split, not on sectional lines, but on lines of legal theory. The "naturalist" position was taken by the 5-4 majority in The Prize Cases.[236] Judge Robert Grier of Pennsylvania wrote the majority opinion,[237] upholding the legal effect of the "blockade" on the ground that:

> A blockade *de facto* actually existed, and was formally declared and notified by the President. . . . It is not the less a civil war, with belligerent parties in hostile array, but it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors.[238]

Support for this position was found in the American treatment of licensees of the unrecognized governments of rebelling Spanish colonies during the 1810s and 1820s.[239] Mocking the practical implications of the "positivist" position by which all Confederate organization was a mere criminal conspiracy against the laws of the Union, Grier pointed out the absurdity of considering soldiers of the United States in the field to be "executioners" chasing down those accused of "treason." Reciprocally, he pointed out that the Confederates claimed belligerent rights at sea, and could not be heard now to deny the belligerent rights of the Union as "*unconstitutional*!!!" [*sic*].[240] The result of this analysis was the conclusion that the status of the unrecognized belligerent need not be determined, but that "the belligerent party who claims to be sovereign may exercise both belligerent and sovereign

rights."[241] Thus the "naturalist" approach was interpreted to allow "belligerent rights" to the Union without limiting the "sovereign rights" of the Union. The approach would give the same "belligerent rights" to the Confederacy, but not necessarily "sovereign rights"; to compose the Supreme Court majority it was not necessary to go that far and actually hold that the Confederacy had "belligerent rights" equivalent to those of the Union.[242] The result of this approach in practice was that a Virginia vessel whose captain had not known the war had begun was condemned (The Brig *Amy Warwick*); another Virginia vessel outward bound with cargo owned by northerners was condemned but her cargo restored as not "enemy property" (The Schooner *Crenshaw*); a British vessel was condemned on the ground that she had violated the blockade order after notice, as a mere business risk—to finish loading (The Barque *Hiawatha*); and a Mexican vessel was condemned for knowingly entering a blockaded port (Biloxi, Mississippi) without a permit (The Schooner *Brilliante*).[243]

The dissent by Justice Samuel Nelson of New York[244] took a straight "positivist" line. Lincoln's declaration was not classifiable as a blockade *jure belli* because there was no legal status of war, no Declaration of War by the Congress, when he made his proclamations. They represented more a municipal law closure of ports "in the nature of a blockade." The Act of Congress on 13 July 1861 was legally sufficient to serve as a Declaration of War under the Constitution, he said, but came too late to endow Lincoln's proclamations with legal effect against the four vessels before the court. According to the dissenters, the two vessels owned by "neutrals" should have been released to their owners because a strictly internal proclamation with strictly territorial application was not enough to bring the law of belligerent prize into play. With regard to the ships owned by Americans from the Confederate States, Nelson and the others in the narrow minority would have released them on the ground that the President's proclamations exceeded his Constitutional powers and were a legal nullity in the United States.[245]

This split of legal thinking is evident throughout the American Civil War. On 3 July 1861, after President Lincoln's Proclamations asserted some belligerent rights in the Union and before the ambiguous legislation that the Supreme Court majority of one could regard as equivalent to a Declaration of War for the purpose of authorizing the President to begin a blockade effective against both Americans and neutral foreigners, the Confederate warship *Sumter* burned a Union merchant vessel, the *Golden Rocket,* triggering a series of insurance claims. The policy covered hazards of "the sea, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes or people, of what nation or quality soever, barratry by the master . . . " and some other risks, but an additional provision amended all that by making an exception to coverage if the vessel were subject to "capture, seizure or detention . . . " regardless of the other stipulations of

the policy. The question was whether the burning by Confederate forces at a time the Union authorities did not even unambiguously concede a status of belligerency, much less a legal power in any Confederate authorities to license depredations under the laws of war against Union shipping, fell within the exception. In Dole v. New England Mutual Marine Ins. Co.[246] a Massachusetts court held that the term "capture" as used in the policy could describe the taking by the commissioner of one side in "an actually existing state of war between it and the government of the United States," finding support for this naturalist conclusion in the fact that the authority of the Confederate leadership to conduct a war according to the international rules had been recognized by "two of the leading nations of Europe" (Great Britain and France). As an objective matter, therefore, it would be possible for a jury to conclude that the "capture" exception applied, and the case was ordered to trial.[247] The possibility that this way of handling the situation might lead to an inconsistency between the classifications of the judicial branch of the American Government and the other two branches of that government did not seem to be considered seriously, apparently because the case was viewed as a matter simply of interpreting an insurance contract, not of interpreting the foreign relations or legal status of the United States against the Confederate States, neither of whose public authorities in any guise was a party to the suit.

A similar result came out of another case arising out of the same incident in which a different insurance company was sued in Maine. In Dole v. Merchants' Mutual Ins. Co.[248] the Court concluded that the most extreme "positivist" position did nothing to require the Confederate commissioner to be classified a "pirate," although that classification was not ruled out:

> War is an existing *fact*, and not a legislative decree. Congress alone may have power to 'declare' it *beforehand*, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is any declaration of it or not. ... But in a *civil* war, those who prosecute hostilities against the established government are also traitors. And their acts are robbery or murder on the land, or piracy on the sea. [With regard to the burning of the *Golden Rocket*], such a felonious and forcible taking on the high seas was piratical and belligerent, and in either case was a capture and a seizure, within the terms of the warranty [emphasis *sic*].[249]

The fact that the actions of the political branches of government were ambiguous, indicating differing views as to the legal relations that applied between the Union and the Confederacy in the minds of all concerned, was bluntly recognized in another case arising out of the maritime depredations of a Confederate raider, the *Jeff Davis*. In Fifield V. Insurance Co. of State of Pennsylvania,[250] Judge Woodward wrote:

> I suppose that any government, however violent and wrongful its origin, which is in the actual exercise of sovereignty over a territory and people large enough for a nation, must be considered as a government *de facto*.[251]

He then reviewed the two views of secession that had split the lawyers of the political arms of government and concluded that:

> [I]t would be very difficult so to generalize the various, discrepant, and sometimes inconsistent measures that have been taken against the rebellion as to enable us to declare whether the President and Congress regard the seceded states within or without the Union.[252]

The instant case presented a perfect example, in that the crew of the *Jeff Davis* had already been convicted of "piracy" by the judiciary, but the President, "after the conviction of the crew of the *Jeff Davis* for piracy . . . interposed and restored them to the authorities of the Confederate States." He did not pardon them; "he treated them as public enemies, and thus, . . . recognized the belligerent rights of the power that sent them forth. . . . "[253] The court concluded that the capture was "belligerent" and not "piracy," applying the labeling system it construed out of the actions of a policy-making branch of government overruling the judiciary in the very fact situation before the court.[254]

President Lincoln's exchange of the convicted "pirates" in the case of the *Jeff Davis*[255] does not stand alone. Under instructions from Judges Grier and Cadwalader in a case in Pennsylvania in 1862, convictions were obtained on a "positivist" charge of "piracy" against a Confederate raider named Smith and others. Under an agreement between the two judges and the prosecuting authorities, the prisoners were not sentenced but were transferred to military control as prisoners of war.[256] A Confederate adventurer named Burley (or Burleigh) was extradited from Canada to the United States in 1864 under the "piracy" provision of the Webster-Ashburton Treaty, but Judge Fitch of Ohio at the trial held that his acts were "belligerent" and not "piracy" because lacking "*animum furandi.*"[257]

While the Prize Cases enabled the Union forces to institute and enforce a blockade of Confederate ports against neutral vessels, and state court judges of varying persuasions were able to vent their frustrations against the Confederate authorities in harsh words without actually doing violence to the apparent intentions of the innocent parties whose contracts were before the courts for interpretation, Federal District court judges were facing the same difficulties on the lower levels. Two cases in 1861 will illustrate the confusion. In Massachusetts, District Court Judge Sprague charged a Grand Jury with regard to the Confederate seamen whose separate cases were to be presented:

> If war is actually levied, all those who perform any part, however minute, or however remote from the scene and who are actually leagued in the general conspiracy are to be considered as traitors.[258]

He then went on to define "pirates:"

> Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the constitution . . . enables the United States to perform this duty, as one of the family of nations. Pirates are called and recognized as enemies. They carry on war, but it is not natural

> war; and they are not entitled to the benefit of the usages of modern civilized international war. There being no government with which a treaty can be made, or which can be recognized as responsible for the acts of individuals, the individuals themselves are held amenable to criminal justice, and liable to be put to death for the suppression of their hostilities. If a number of persons, large or small, associate together, and undertake to establish a new government, and assume the character of a nation, and as such to issue military commissions, any other nation may, according to its own view of policy or duty, either utterly refuse to recognize the existence of such assumed government, and treat all who, acting under it, commit aggressions upon the ocean, as mere pirates; or each nation may fully recognize such new government; or it may adopt any intermediate course between these two extremities,—to some extent, and for some purposes, recognize the existence of the new government, while in other respects, and for other purposes, it rejects its pretensions to be deemed a nation. Some of the nations of the earth, and particularly Great Britain, have taken this intermediate course in relation to the self-styled 'Southern Confederacy.' . . . She in no degree interferes with the manner in which we shall treat either our own citizens or foreigners who may be engaged in this conflict, even although [*sic*] such foreigners be British subjects. She leaves us to deal with them as traitors or pirates, according to our own sense of justice and policy. Against this her position, we have nothing to urge under the law of nations or treaty stipulations.[259]

Judge Sprague then went on to review the pertinent Federal legislation of the United States, including the "piracy" statutes of 1790, 1820 and 1847,[260] leaving it to the Grand Jury to determine on the particular facts that might be presented to it whether any individuals ought to be indicted for "piracy" or "treason" under the laws of the Union for their actions in support of the Confederacy. It seems plain that the principal result of this charge was to reduce the question of the proper legal classification to one of municipal law, and that law for the purposes of a Grand Jury empaneled under the Constitution was the law of the Union.

How this approach worked in practice in Massachusetts is not known beyond the evidence noted with regard to Fifield v. Insurance Company of State of Pennsylvania that some convictions for "piracy" were obtained at least in Pennsylvania, and that President Lincoln did not regard himself as bound by the rigid view of American classifications adopted by Judge Sprague and others, but treated even convicted "pirates" under this view as "belligerent enemies" subject to parole and repatriation without "pardon" under the laws of the United States.

A rather less rigid view was taken by the Federal courts in New York. In the Federal District Court for the Southern District of New York Justice Nelson charged a petty jury regarding the same Federal statutes and continued as follows:

> Now, if it were necessary, on the part of the Government, to bring the crime . . . [of the Confederate raiders] within the definition of robbery and piracy, as known to the common law of nations, there would be great difficulty . . . upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only—the United States—which falls far short of the spirit and intent, as we have seen,

> that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the Act of Congress [of 1820] prescribes as a crime, and may be denominated a statute offence, as contra-distinguished from that known to the law of nations. . . . [As to whether there is a legal state of war between the Union and the Confederacy, that, according to Judge Nelson was a matter for] the departments of our Government that have charge of our foreign relations—the Legislative and Executive departments. . . . [U]ntil those departments have recognized the existence of the new Government, the Courts of the nation cannot.[261]

But the precedents of the Spanish colonies in America seemed to Nelson to raise confusing issues. The political arms of the United States government had not "recognized" any status in the revolted Spanish colonies with legal implications until 1822.

> Prior to this recognition, and during the existence of the civil war between Spain and her Colonies, it was the declared policy of our Government to treat both parties as belligerents . . ., equally entitled to the sovereign rights of war as against each other.[262]

Not only was he unable to state where this policy was "declared" prior to 1822, but it appears that the Act of 1822 by which the independent status of the former Spanish colonies was "recognized" by the Congress made no difference in the courts. He implied that absent recognition there is no change in the prior legal relationship, thus that the Confederate raiders could not be regarded as authorized by either the law of an unrecognized Confederate government or by the international law of war prior to the "recognition" of a status of war by the political branches of government. But the facts that had resulted in the courts treating the commissioners of the Spanish colonies as belligerents as long as their depredations were aimed, within the terms of their commissions, solely against Spanish shipping, despite the silence of the political branches of the American government, apparently spoke loudly to some members of the jury. In U.S. v. Baker and others, "The jury were discharged, without being able to agree on a verdict."[263]

British judges had similar problems in classifying the American struggle within the system adopted by the political branches of the British government to try to reflect facts and policy in a coherent pattern of law. In May 1864 the United States sought extradition of a group of Confederate raiders who had seized an American merchant ship and then claimed asylum in England.[264] The Webster-Ashburton treaty of 1842[265] provided for the extradition of those accused of "Piracy" in Article X when the offense had been committed within the jurisdiction of either party and the person accused of committing it were found within the other. The extradition request was denied, but on such technical grounds that the suspicion must exist that the British court found itself in a dilemma between the classifications of "piracy" and "belligerency" and did not want to face the case squarely. Three judges wrote separate opinions for the majority. Judge Crompton pointed out that the question of whether the acts of depredation were "piratical" or "belligerent," with

evidence that the captured goods were taken for the personal use of the accused, and not taken for submission to a Prize court, must be one for a jury. Then, instead of holding that there was enough evidence (or not enough) to warrant extradition and the submission of the case to an American jury on a charge of "piracy," he construed the Treaty and statute to refer only to cases which could be tried *only* in the jurisdiction of the requesting state and not in the jurisdiction of the "asylum" state: " . . . 'committed within the jurisdiction of the United States of America' I own, appears to me to mean within the *peculiar* jurisdiction of the *United States*, and would not be properly used if the common jurisdiction of every maritime nation in the world were meant [emphasis *sic*]." Since all maritime nations, in his view, had equal legal powers to try "pirates," the "piracy" intended by the Webster-Ashburton Treaty must mean only municipal law "piracy," not "piracy *jure gentium*." Interpreted this way, "piracy" to be extraditable under the terms of the treaty[266] must be a crime, like murder, punishable independently under the laws of the treaty partners but not committed within the prescriptive jurisdiction of both at the same time. Crompton thus seemed to presume that the international law regarding "standing" did not apply to "piracy," and that the only sort of "piracy" that would come within the terms of the treaty was that which was analogous to taking a commission from a foreign power to act against fellow-citizens as embodied in both British and American statutes.[267] Why taking a commission from a rebelling "authority" did not satisfy this requirement, he did not say. Indeed, his opinion is filled with apparently unsupported assertions, such as, "Suppose these persons rose up in mutiny, that is no less a piracy against the law of nations, and all other powers have the same jurisdiction to punish, although the ship is part of the territory of the country to which she belongs."[268]

Judge Shee agreed on the basis of the word "asylum" in the treaty and statute that "piracy *jure gentium*" was not covered and found that the American statutes of 1790 and 1819-1820 give a basis for this interpretation by distinguishing between "piracy on the high seas," which was "piracy *jure gentium*," and robbery in the waters appertaining to the United States. In his opinion, the Tivnan defendants looked like "pirates *jure gentium*," and not like "pirates" under American law because their acts occurred on the high seas. Judge Blackburn came to the same conclusion and found a way to avoid applying the American statutes of 1790 and 1819-1820 as overlapping the British statutes to bring the offense within the terms of the treaty and statute:

> But looking at the evidence, what was done by the prisoners is either taking the ship for plunder, which would be piracy *jure gentium*, in which case there is no power in us by statute to give them up, or an act of war, and consequently not triable anywhere. For although the Confederated States are not recognized as an existing power, yet they are as belligerents.[269]

Chief Justice Cockburn dissented, but solely on the ground that in his interpretation the treaty and statute provided adequately for the extradition of "pirates *jure gentium*." He pointed out that there were ample reasons for such a provision, such as the difficulties of trial in one jurisdiction when all the witnesses are in the other. As to the relationship of "piratical intent" to "belligerent intent," that, in his view, was a question for the jury.[270]

Reviewing the case as a whole, and considering that something very like extradition had in fact taken place in 1834 with regard to "pirates" totally independently of the treaty of 1842,[271] and that the defendants were not tried for "piracy" in England at all, the impression is left that extradition was refused because the British judges did not trust American courts to make the distinction that Chief Justice Cockburn indicated would be their duty, and that the British classification of events during the American Civil War would be disregarded by American courts bound by American classifications of the same events to deprive the Confederate raiders of the privileges of "belligerents" that the British felt they ought to have. The constant repetition that the prisoners might well be "*jure gentium* pirates" seems either an encouragement to the British authorities to try them before a British jury where the British classifications would have governed, or a politic sop to the American authorities requesting extradition, to indicate that the refusal was not based on British sympathies with the Confederate cause—whether or not that was in fact the case.[272]

The more or less definitive American classification of the Civil War did not come until thirteen years after the War ended. In Ford v. Surget[273] Justice Harlan for a unanimous court hit on an ingenious rationale. Although the Confederacy as such was legally a nullity as far as the Union was concerned, the governments of the individual states of the Confederacy remained governments under the American Constitution of 1787. The legal acts of the Confederacy, therefore, so far as they had legal effect within the individual states of the Confederacy, were entitled to all the respect of state laws under the Constitution. With regard to the military activities of the Confederate army, a "positivist" rationale was found for giving them legal effect:

> To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other,—that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, on the footing of those engaged in lawful war, [and exempting] them from liability for acts of legitimate warfare.[274]

Justice Clifford, in a separate concurring opinion, addressed the situation of the Confederate raiders directly. He began by citing the Prize Cases for the "naturalist" proposition that ". . . when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice

cannot be open, civil war exists, and hostilities may be prosecuted to the same extent as in public war."[275] He noted with approval the refusal of the Massachusetts Supreme Judicial Court, and the Pennsylvania and Maine Supreme Courts to hold the Confederate States' commissioners to be pirates,[276] and concluded:

> Exceptional cases supporting the opposite view may be found in the State reports; but they are not in accord with the decisions of this court, and are in direct conflict with the great weight of authority derived from [international law].[277]

Once again, as when viewing the attempt by Justice Story to preserve his universal-jurisdiction, univeral-standing, natural-law-of-property conception of the international law of "piracy" derived from the coinciding municipal laws of the principal European maritime powers, in the face of the judicial-deference-to-policy-makers approach taken by the majority of the American Supreme Court under Chief Justice Marshall, there appears to have been a Supreme Court Justice restructuring the facts to suit his preference for a conceptual approach. Once again, the grand framework seemed unable to gain the support of a majority of the Court, although, again, not expressly rejected either. Once again, the majority took a view of the law based not on underlying structures of justice or evidence of the conscience of mankind perceived through a selective citation to the opinions of others, but based on amoral policy. The rationale for legal classifications seen by the majority was not any perception of underlying principle, but a series of decisions by the policy branches of government expressed in inconsistent terms and occasionally resulting in inconsistent policies that maximized the self-importance of the policy-makers by regarding their practices as entirely volitional. The privileges of belligerency were "conceded" to the Confederate Army; the reasons for that "concession" were political: "the interest of humanity" and "to prevent the cruelties of reprisals and retaliation." It is clear that if those factors had been regarded as less weighty by the policy-makers, as indeed they were from time to time, the "concession" need not as a matter of law have been granted. This approach, visible with regard to "piracy" since the time of Gentili at least, we have called "positivism." And the same limits to the discretion of policy-makers are apparent, resting on reciprocity, the need to deal with a real world in which legal labels have strange effects if not related to some degree with facts, and the pressures from internal and external constituencies (in the case of the American Civil War, including the views of British statesmen and jurists with whom some contacts were economically and politically unavoidable, or avoidable only at exhorbitant cost to the Union).

The American Civil War experience was summed up by Richard Henry Dana[278] in 1866 when annotating a new edition of Wheaton's classic text:[279]

> The following propositions are offered, not as statements of settled law (for most of them are not covered by a settled usage of nations, by judicial decisions of present authority, or by the agreement of jurists), but as suggestions of principles:—
>
> I. The courts of a State must treat rebellion against the State as a crime. . . . If the acts are depredations on commerce protected by the State, they may be adjudged piracy *jure gentium* by the courts of the State. It is a political and not a legal question, whether the right to so treat them shall be exercised.
>
> II. The fact that the State has actually treated its prisoners as prisoners of war . . ., or has claimed and exercised the powers and privileges of war as against neutrals, does not change the abstract rule of law, in the Court. . . .
>
> III. If a foreigner knowingly cruises against the commerce of a State under a rebel commission, he takes the chance of being treated as a pirate *jure gentium*, or a belligerent. It is not the custom for foreign nations to interfere to protect their citizens voluntarily aiding a rebellion against a friendly State, if that State makes no discrimination against them.
>
> IV. If a foreigner cruises under a rebel commission, he takes the chance of being treated as a pirate or a belligerent by his own nation and all other nations, as well as by that he is cruising against. If his own nation does not recognize the belligerency of the rebels, he is, by the law of his own country, a pirate. If it does, he is not. . . . [T]he courts of each nation are governed by the consideration whether their own political authorities have, or have not, recognized the belligerency.
>
> V. Where a rebellion has attained such dimensions and organization as to be a State *de facto*, and its acts reach the dimensions of war *de facto*, and the parent State is obliged to exercise powers of war to suppress it, and especially if against neutral interests, it is now the custom for the State to yield to the rebellion such belligerent privileges as policy and humanity require; and to treat captives as prisoners of war. . . Yet this is a matter of internal State policy only, changeable at any time.[280]

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

The Later Practice. That this approach was carried over to international affairs is evidenced by the incident of the "Haytian insurgents" in 1869, when a circular dispatch from the government of Haiti attempted to convince the several diplomatic missions accredited to that country that the vessels of insurgents who had not been recognized by any other government "can not be considered according to the spirit of international maritime law otherwise than real pirates." The reply which the Secretary of State (Hamilton Fish) authorized the American Ambassador to Haiti to render said:

> We may or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*.[281]

The apparently absolute inability of a state to convince other states to adopt its evaluation of the facts as warranting the label "piracy" at international law, was demonstrated repeatedly, most amusingly (from a distance of 100 years) in an incident of 1873 when a German naval commander acted on a Spanish proclamation terming some insurgent vessels "pirates" in the Mediterranean Sea. He captured one and claimed it as German prize, but his own government disavowed the act. Mr. Frederick T. Frelinghuysen as Secretary of State in 1883, ten years later, advised the American Ambassador in Haiti that the incident demonstrated, if anything, an abuse of the Spanish legal power to classify events in Spain. He adopted Justice Nelson's opinion from U.S. v. Baker and Others[282] without citing it, saying that "The rule is, simply, that a 'pirate' is the natural enemy of all men, to be repressed by any, and wherever found, while a revolted vessel is the enemy only of the power against which it acts." He went on:

> While it may be outlawed so far as the outlawing state is concerned, no foreign state is bound to respect or execute such outlawry to the extent of treating the vessel as a public enemy of mankind. Treason is not piracy, and the attitude of foreign governments toward the offender may be negative merely so far as demanded by a proper observance of the principle of neutrality.[283]

It was even found possible within this general orientation to rationalize the recapture of an American vessel from an unrecognized "belligerent" who did not seem to be a "pirate" because animated by political and not personal goals. That was to treat the captor as if he did not exist! In 1885 some American ships near Colombia were seized by an insurrectionary force. Dr. Francis Wharton, the Solicitor of the Department of State, advised that the vessels could be legally retaken by the United States when on the high seas even though the crew cannot be regarded as pirates or as belligerents:

> But, while this is the case, and while it may be conceded that vessels seized by them on the high seas are seized under claim of right, yet, vessels belonging to citizens of the United States so seized by them may be rescued by our cruisers acting for the owners of such vessels in the same way that we could reclaim vessels derelict on the high seas.[284]

A different view at the same time denied the existence of any intermediary classification between "pirate" and "belligerent." That view ran into such difficulties that it was ultimately disregarded in the case in which it was pronounced, and, without acknowledgment or deeper analysis, Wharton's approach was applied to get the result he would likely have wanted. The *Ambrose Light*[285] was a ship sailing under license of unrecognized authorities competing for control of a part of the state of Colombia. It was seized in the

Caribbean by an American warship. No Americans were involved in the voyage of the *Ambrose Light*, and no Americans were victims of its activities. Judge Brown, of the Federal District Court in the Southern District of New York examined a huge selection of Supreme Court cases and publicists' writings (nearly all of which are analyzed above) to conclude that there was no intermediate legal position between "belligerency" and "piracy," and that the decision as to which of these alternative classifications were to be applied by American courts depended entirely on "recognition," although not necessarily the formal act of recognition by the United States government:

> [I]n the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical.[286]

On the other hand, he pointed out that this holding, which rested almost entirely on cases involving criminal charges under the Acts of 1790 and 1819-1820, was not related to any criminal charge:

> [T]his is a suit *in rem* for the condemnation of the vessel only; not a trial upon a criminal indictment of the officers and crew. . . . [C]ondemnation of the vessel as piratical does not necessarily imply a criminal liability of her officers or crew.[287]

Why the precedents in one area of law should apply in another area in which, by his own analysis the impact may be quite different and not reversable, is not analyzed.

The final oddity in the case is that all of the lengthy analysis was at the end discarded when some diplomatic correspondence between the United States and the defending government of Colombia was construed by the court to imply "recognition" of a status of belligerency favorable to the authorities commissioning the *Ambrose Light*. The vessel was not condemned as "piratical," but was returned to the officers and crew from which it had been taken.[288] Thus the case cannot represent more than yet another example of a learned judge using the opportunity of an interesting fact situation to expound a view of the law resting on "natural" principles divorced from reality, and finding that the best he could achieve was to show that his approach was not necessarily inconsistent with precedent and principle; that policy-makers, confronted with reality, had to make adjustments of policy to fit that reality, and the result was the creation of a legal pattern that brought about a sensible result in disregard of grand theories.

Summary and Conclusion. This, then, represents the "classical" American view of the law of "piracy." It is possible to assert that by the end of the nineteenth century, as far as the United States was concerned, the international law relating to "piracy," if there were any such law, existed only insofar as adopted by the municipal law of the United States. The act of adoption was in part statutory, as in the Acts of 1790 and 1819-1820, in part through judicial decisions interpreting the references in those Acts to the

"law of nations," and in part through diplomatic practice and internal practice of the United States during a period of ambiguously "recognized" belligerency. The "international law" of "piracy" as thus adopted into American law appears to have been in part the mere British municipal law relating to "robbery and murder within the jurisdiction of the Admiral" at English law, in part American statutes parallel to the English statutes of the time of William III terming "piracy" acts of treason or depredations analogous to treason undertaken under foreign license (which appear never to have been considered part of the "international law" of "piracy," probably because the particular acts involved would not be "crimes" by any other law than the law of the sovereign making the legislation), and in part the application to the interpretation of criminal statutes of the concept of "piracy" applied in England to property cases in which the taker of the property was considered to have no claim to it in an *in rem* action even if no criminal action was involved. The multiple confusions were caused in part by using a word, "piracy," that had a general pejorative meaning in vernacular usage since the early 17th century at least, and at least three distinct legal usages. It was compounded by the dilemmas in theory of those who would define "international law" to include the "natural law of nations" evidenced by parallel statutes in many countries, an approach rejected in practice during the early 19th century in connection with the slave trade both in Europe and America. It was further compounded by the conception of "naturalist" jurists that behind any rule of law reflecting moral values, there must lie a "perfect" model of which the rule is a mere reflection. This platonic approach to legal logic was rejected in practice by the more pragmatic jurists and publicists of the Anglo-American system, but remained so deep in the basic conceptions of "law" held by such eminent moralists and jurisprudential thinkers as Joseph Story, that it was never wholly forgotten or rejected. Rationales were developed for retaining this "idealist" conception in case after case in which it seemed to be irrelevant at best, morally interesting but legally deceptive normally, and obscurantist at worst. In practice, when a non-"idealist" statesman or judge was involved, the language of universality and conception of a perfect "international law" lying behind the imperfections of national legislation drop out with no apparent loss to coherence.

On the other hand, the dominance of moral-free "positivism" in the thinking of the states and pragmatic jurists who have governed the actual policies of the United States from the earliest days of the Constitution of 1787 was also limited. Not only was the strain of moralism never entirely eradicated from American legal thought, but references to "piracy" were found useful in political situations in which the combination of legal results and vernacular pejoratives served policy interests. The result in some cases, condemnations for "piracy" of political actors later treated as honorable political captives, could well look to many as a subservience of true "law" to

ill-conceived policy, making the statesmen and jurists appear more hypocrites than upholders of the moral standards or practical needs of society.

In the dynamic and competitive society of the United States, there was no way these different approaches could be combined into a single coherent jurisprudence; so necessarily, practical politics, thus "positivism," won in practice. The "naturalist" dicta of Story and others nonetheless remained for later generations to cite, and the jurisprudential battle went on.[289]

Notes

1. *Articles of Confederation*, adopted by the Congress on 15 November 1777, ratified by all the states and entered into force 1 March 1781, Article II, in 69th Cong., 1st Sess., House Doc. No. 398, *Documents Illustrative of the Foundation of the Union of the American States* (1927) 27.
2. *Id.* art. IV.
3. See notes I-165 and I-201 above.
4. *Articles of Conferation*, arts. VI(4) and IX(6).
5. *Id.* art. IV(5).
6. *Id.*
7. *Id.* art. IX(1).
8. *Id.* art. IX(1) first clause. The other exceptions referred to there include the recourse to "war" by any state "actually invaded by enemies" or which "shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted." *Id.* art. VI(5).
9. *Id.* art. IX(1). The power reserved to the states was only that power mentioned in art. VI. The power to establish maritime and prize courts is found in art. IX(1) alone, not in art. VI at all.
10. *Documents Illustrative* cited note 1 above, at p. 109 sq.
11. John Rutledge was the head of the delegation from South Carolina, former Governor of that state and at the time of the Constitutional Convention a judge. A frank character sketch of Rutledge by Major William Pierce of Georgia appears in *id.* at 106-107.
12. *Id.* 471, 475.
13. *Id.* 479.
14. Edmund Randolph was 32 years old and Governor of Virginia. He later became Attorney General of the United States. See below. An excellent biography is John Reardon, *Edmund Randolph* (1974).
15. *Documents Illustrative* 560.
16. Wilson is described by Major Pierce as "among the foremost in legal and political knowledge." *Id.* 101.
17. *Id.* 723.
18. *Id.*
19. Article I, sec. 8, cl. 10.
20. E.g., the power to regulate commerce with foreign nations, Art. I, sec. 8, cl. 3. This power has been exercised, and the counterfeiting of foreign currency and other documents in the United States is a criminal offense. 18 U.S. Code secs. 478-484, 486, 488-489, 492. This legislation was first enacted by the Congress only in 1884 (23 Stat. 22, 48th Cong., 1st Sess., Ch. 52) revised in 1909 (35(1) Stat. 1088 at 1117-1119, 60th Cong., 2nd Sess., Ch. 321).
21. Art. III, sec. 2, cl. 1.
22. Art. III, sec. 3.
23. *Documents Illustrative* 603 (*Madison's Debates*, Session of 23 August 1787).
24. *Id.* 702.
25. *Id.* 712; it appears in the *Constitution* as Art. VI, cl. 2.
26. Hamilton, Madison, Jay, *The Federalist* (1788, Cooke, ed. 1961) 279.
27. *Madison's Debates* 281. This seems rather an oversimplification by Madison. See text above at notes 7 and 9.
28. *Id.*
29. *Id.*
30. *Id.* 280-281.
31. One major study of the early statutes and their supersession and judicial expansion in the first three decades of the 18th century is Dickinson, Is the Crime of Piracy Obsolete?, 38 *Harvard Law Review* 334

(1925), sparked by the suggestion that rum running in violation of the Prohibition laws of the United States might be analogous to "piracy." Lacking the full background of the evolution of the conception of "piracy" before 1788, Dickinson's worthy work misses many of the major implications of these statutes and cases, unfortunately, so much of his research has had to be duplicated. I have condensed and focused this study as much as possible to avoid duplicating his analysis, but have repeated it with regard to the points of convergence and followed the line dictated by the sources and the focus of this study as to the points on which his emphasis on narrower issues and those timely only in the light of his special interests have made us diverge as to evidence and conclusions.

There seem to be at least three quite different conceptions of piracy implicit in the statutes, cases and practice of the United States which Dickinson regarded as a seamless whole: (1) "Piracy" as a municipal law crime (whether or not based on conceptions of international law or the "law of nations"); (2) "Piracy" as the acts of unrecognized belligerents, like the privateers of "Buenos Ayres" or, eventually, the naval arms of the Confederate States of America in 1861-1865 and (3) "Piracy" as the military activity of unrecognized or "barbarous" political societies, like the Barbary states (with regard to which the attitudes towards the Indian tribes of the American continent were relevant but unstated in diplomatic correspondence). In this study, these distinctions have been shown to have been implicit in the classical writings from Roman times and reflected in doctrine throughout history. That consciousness affects the focus of the entire work and makes Dickinson's analysis seem confused in places.

32. An Act to Establish the Judicial Courts of the United States, 1st Cong. 1st Sess. ch. 20, 1 Stat. 73.

33. 1 Stat. 76-77. The last quoted provision lay more or less moribund after the period now to be discussed until revived as a basis for extending United States federal courts' jurisdiction to a case involving torture by a Paraguayan official against a Paraguayan youth in Paraguay in 1976. Filartiga v. Pena-Irala 630 F.2d 876 (2d Cir. 1980). See Rubin, U.S. Tort Suits by Aliens Based on International Law, 21 *International Practitioners Notebook* 19 (1983). Other cases are being presented and the proper scope of the statute is a matter of considerable debate in 1987. See exchange between D'Amato and Rubin in 79(1) AJIL 92-113 (1985). An analysis of the relationship among admiralty, prize and tort law under the "law of nations" in the experience of the framers of the Constitution is Bourguignon, Incorporation of the Law of Nations During the American Revolution . . ., 71 AJIL 270 (1977). It seems to support Rubin's view. I am indebted to my colleague, Professor Leo Gross, for bringing this article to my attention.

34. Judiciary Act secs. 4 and 11, 1 Stat. 74-75, 78-79.

35. 1st Cong. 2d Sess., 1 Stat. 112.

36. As to the issuance of letters of marque and reprisal to privateers active against French vessels during the undeclared war with France of 1798-1800, see below at notes 154 to 159.

37. 1 *Attorney Generals' Opinions* (AG) (1841 ed.) 10 at 10-11. There are two official compilations of the earliest *Attorney Generals' Opinions*. The edition of 1841 is more complete with regard to volume 1. The same volume in the edition of 1852 is more commonly found in law libraries.

38. 1 AG 33, opinion dated 6 July 1795.

39. *Id.*

40. 12 Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949* (1974) 13; 8 Stat. 116. The precise term of the treaty involved was article 27, by which each side agreed to deliver up to the other "all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek asylum within any of the countries of the other . . ."

41. 1 AG (1841 ed.) 48-49, opinion dated 14 March 1798.

42. *Id.* 50-51. Lee two days later considered the possibility that the *Nigre* might turn out to be neither French nor a "pirate" vessel, but British. In that case, he suggested that if the court find that she has done "nothing contrary to the laws of nations or treaties, she will be acquitted" and go free. *Id.* 51-52. This last opinion, dated 22 September 1798, is not reproduced in the 1852 edition of *id.*

43. See text at notes II-60 sq. above. It will be remembered that Kidd had two commissions and that there is general language in the case and some other writings asserting that action in excess of a commission is "piracy." It may also be remembered that that language was criticized above and the result of the trial attributed to Kidd's disregard of his obligations to the commission-granting authority and not to excesses against his victims.

44. 11 & 12 Will. III c. 7 (1700) sec. viii, set out in text at note II-32 above and in Appendix I.B below; the American Act of 1790, cited note 35 above, says, in section 9:

> 9. . . . That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber, and on being thereof convicted shall suffer death.

This statute does not define "piracy," or any "crime" under international law, but, like the British

statute of 1700, makes criminal at American municipal law certain acts by American citizens against other American citizens only. It is not entirely clear what "piracy" means in this context, disjoined by "or" from the word "robbery," both apparently confined to "the high sea." See text at notes 137 sq. below at which the fuller range of foreign commissions will be discussed in a single section.

45. As to the English root of the idea, and the confusion between this sort of "treason" and the international law of "piracy," see text at note I-201 and ch. II above. The American view expressed in sec. 9 of the 1790 Act was identical, but the reasoning underlying it is not expressed in any known document. It probably merely adopts the British view of 1700, with which lawyers in the American colonies had been familiar for nearly a century.

46. Bemis, *Jay's Treaty* (1923, rev'd ed. 1962), Appendix III, comparison of Jay's Draft of September 30, 1794, with the Treaty Signed by Jay and Grenville on November 19, 1794, 391 at p. 426–432.

47. *Id.*, pp. 291 sq. Cp. instructions 4, 12, 14 at p. 293–4, 295.

48. 11 Bevans 516 at 508–519, art. VI. Grammar *sic*: "Each Party" should presumably have been plural: "The Parties severally."

49. Oddly, the Spanish original does not mention "robbers" only "*algunos Piratas en Altas Mar.*" See parallel texts in Bemis, *Pinckney's Treaty* (1926, rev'd ed. 1960), Appendix V, p. 343 at p. 350. Presumably, Pinckney thought the phrase "Robbers on the high seas" explained the word "pirates" while the Spanish negotiators construed the word "*Piratas*" to include some activity on land as well as on the high sea, and thus sought to restrict the application of the article as it might apply in Spanish Florida. But direct evidence to support these speculations is not available within the reasonable compass of this study.

50. *Id.* art. IX at p. 350.

51. *Id.* art. VIII.

52. *Id.* art. XIV.

53. Levy was barely 20 years old at the time. He led a remarkable life. See 11 *Dictionary of American Biography* 203–204.

54. U.S. v. Tully and Dalton, 1 Gallison 247 (1812) at p. 252.

55. Story cites 4 Blackstone, *op cit.* note II-153 above, p. 72. See text at note II-155 above.

56. U.S. v. Tully and Dalton, *op. cit.* 252. Per contra, Sir Charles Hedges, quoted at note II-60 above, required that the mariners "shall violently disposses the master." Story does not cite Hedges's charge in Rex v. Dawson on this.

57. *Id.* 254. The statutory language is set out above at note note 35.

58. *Id.*

59. *Id.* 256. Molloy, *op. cit.* note I-175 above 41, second paragraph of ch. IV sec. xvii. Molloy's support for this assertion is a statute of 14 Edw. III not more closely identified. The only statute of 14 Edw. III in any way pertinent to any of the questions addressed here appears to be 14 Edw. III st. 2 ch. 2 (1340) which implements chapter 30 of Magna Carta by providing for the safe reception and departure of "all Merchants, Denizens and Foreigners (except those which be of our Enmity)" who pay the prescribed taxes. 1 Pickering, *op. cit.* 508 ["*Et come y soit contenuz en la Grande Chartre qe toutz marchantz eient suave et seure conduyt daler hors de nostre roialme dEngleterre . . ., Nous . . . volons et grantons . . . qe touz marchantz denzeins et foreins, forspris ceux qe sont de nostre enemite, puissent sanz estre destourbe sauvement venir en le dit roialme . . .*"]. This does not appear to be the statute Molloy had in mind.

60. U.S. v. Howard and Beebee, 3 Washington 340 (1818).

61. *Id.*, p. 344 sq. No other section of the Act came near to fitting the facts.

62. U.S. v. Palmer et al., 16 U.S. (3 Wheaton) 610 (1818). See text at notes 75 sq. below.

63. U.S. v. Howard and Beebee at p. 346–349.

64. Cited note 54 above.

65. U.S. v. Ross, 1 Gallison 54 (1812).

66. *Id.* 627. Story's citations, principally to Coke's *Third Institute*, address the reach of the Admiral's jurisdiction in English law. He did not distinguish between the Admiralty jurisdiction on board English flag vessels in distant waters and foreign vessels in those waters, thus concluding that the Admiralty courts of all countries have overlapping jurisdiction in all navigable waters, even territorial and perhaps even internal waters of foreign states, regardless of the flags flown or the nationality of those involved.

67. See text at notes II-64 sq. above. Molloy thought territorial seas jurisdiction was exclusive in the territorial state.

68. See text at note II-72 above.

69. U.S. v. Pedro Gilbert & Others, 2 Sumner 19 (1834). In this case Judge Story was sitting as a judge of a Circuit Court in an appeal by seven defendants from their conviction after five out of the original 12 defendants had been acquitted following trial in an American District Court. Story denied the petition for a new trial for complex constitutional reasons involving double jeopardy, suggesting that the defendants' proper remedy after conviction on evidence insufficient to support an inherently contradictory result was to plead for a pardon from the Executive. These complexities of American Constitutional law lie beyond the scope of this study. It may be significant that Story's seminal book, *Commentaries on the Conflict of Laws*,

was first published also in 1834. Its introduction is invincibly "positivist," denying the existence of any universal laws except the choice of law rules themselves (p. 29, 33). But Story does not address the slave trade or "piracy" in that book. The naturalist view of the universality of the choice of law rules is now substantially modified. See D.F. Cavers, A Critique of the Choice-of-Law Problem, 47 *Harvard Law Review 173* (1933).

70. *Id.* note 1 on pp. 24-26. In fact the British did exercise jurisdiction in the case, but only over the property seized on board the "pirate" ship captured by Capt. Trotter within an African river. According to the recitation of facts, within a week after Pedro Gilbert and his friends had been convicted in the United States in October 1834 their personal property, which had been seized and held by Captain Trotter, was paid into the Registry of the appropriate British Admiralty Court by order of the Lords Commissioners of the Treasury. The question was whether the property, being "*bona piratarum*," was to be accounted by the Crown as miscellaneous Treasury receipts or as part of the "droits" of Admiralty. Dr. Lushington held for the Lord High Admiral. The Panda [1842] 1 W. Rob. 423; 3 BILC 771. The jurisdiction of an Admiralty Court to pass on title to property before the court was not in question and Lushington's reasoning sheds no light on British jurisdiction over accused "pirates." It is not clear why it took eight years from the time Pedro Gilbert was convicted until his property was legally disposed of.

71. 1 AG 15. It is instructive to read this opinion and speculate on the reasons its logic struck Americans as unpersuasive when uttered by Libya with regard to the Gulf of Sidra in August 1981.

72. U.S. vs. Peter Wiltberger, 3 Washington 515 (1819) at 515-518, 524.

73. U.S. v. Wiltberger, 18 U.S. (5 Wheaton) 76 (1820) at 94-95, 104.

74. *Id.* 106-116.

75. Cited note 62 above.

76. The violence in U.S. v. Palmer et al. was actually committed ashore, and there can be no doubt of the jurisdiction of the United States to make the perpetrators subject to American criminal penalties regardless of the definition of "piracy" under international law. The pronouncements for which the case is so often cited are dicta unnecessary for the decision.

77. *Id.*, p. 630-631, 632-633.

78. *Id.* 641-642.

79. *Id.* 643.

80. See text at note 86 below.

81. U.S. v. Klintock, 18 U.S. (5 Wheaton) 144 (1820), Marshall's words.

82. *Id.* 152.

83. *Id.* 153.

84. This possibility was not farfetched. See text at note 138 and see note 140 below.

85. 3 Stat. 510, 15th Cong., 2d Sess. ch. 77. It is reproduced at Appendix II. A below with Wheaton's notes.

86. *Id.* 513-514.

87. 3 Stat. 600, 16th Cong. 1st Sess. ch. 113. It is reproduced at Appendix II.B below.

88. 18 U.S. Code Sec. 1651: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." The entire text of this part of the current U.S. Code is reproduced at Appendix II.C below.

89. U.S. v. Chapels, 25 Fed. Cas. 399 at 403, Case No. 14,782 (1819).

90. *Id.* 404.

91. U.S. v. Smith, 18 U.S. (5 Wheaton) 20 (1820) at 161.

92. *Id.* Note a, p. 163-180.

93. See text above notes II-60 and II-70 above. Story's references to Wynne, *The Life of Sir Leoline Jenkins* (1724), seem consistently off by two pages from the original (1724) copy of Wynne available to me.

94. *Id.* 161-162.

95. *Id.* 164, 181-182.

96. *Id.* 183.

97. U.S. v. Pirates, 18 U.S. (5 Wheaton) 184 (1820).

98. *Id.* 203.

99. *Id.*

100. *Id.* 205.

101. *Id.* 195-197.

102. *Id.* 199-201.

103. See text at notes 65 and 66 above.

104. 1 Moore, *Digest of International Law*, 702-705 (1906), statements by Jefferson (1793), Pickering (1796) and Madison (1805). On the various bases claimed by states for exclusive zones of one sort or another, and the loss of persuasiveness for the distinctions during the 19th century, and the apprehension that they are now coming back into vogue again as the need for simplicity and certainty is overborne by various other considerations, see Rubin, Evolution and Self-Defense at Sea, in 7 *Thesaurus Acroasium* 107-116 (1977).

105. See text at note 54 above.

106. The degree to which Story had to retreat on this is made clear by reading his elaborate opinion for a unanimous Supreme Court in 1844 on the question of whether a ship was "piratical" whose undoubted depredations were prompted by a vindictive and petty captain more than by any desire for gold. Story applied the precise language of the statute of 1819, section 4, which makes it a "piracy" at United States Federal law to engage in any "piratical aggression, or piratical search, or piratical restraint, or piratical seizure, as well as a piratical depredation," to hold the ship condemnable as a piratical vessel. He released the cargo to its owners, who had had no part in the aberrations of the captain. But he did not attempt to find the "piracy" to be such at international law by virtue of being a "felony" within the jurisdiction of Admiralty as he had in U.S. v. Tully and Dalton. U.S. v. Brig Malek Adhel, 43 U.S. (2 Howard) 209 (1844), reproduced in 1 Deak 56. The case is analyzed at greater length in the text at notes 217-219 below.

107. 1 Stat. 347, 3rd Cong., 1st Sess., ch. 11.

108. 2 Stat. 70, 6th Cong. 1st Sess. ch. 51. The penalty for serving in a foreign slaver was up to 2 years imprisonment and $2,000 fine; the fine for holding a business interest in the foreign slave trade was double the value of the interest held. American vessels involved in that detestable trade were forfeit with half the value going to the government and the other half distributed to the captors as prize.

109. Cited at note 87 above, secs. 4 and 5, 3 Stat. 600-601. Quoted in Appendix II.B below.

110. See *The Antelope*, 23 U.S. (10 Wheaton) 66 (1825). The unanimous opinion written by Chief Justice Marshall, a Virginian, held the slave trade not to be a violation of the law of nations despite the American and British statutes calling it "piracy." For the analogous British case see The Le Louis [1817] 2 Dods. 210: "No lawyer, I presume, could be found hardy enough to maintain that an indictment for piracy could be supported by the mere evidence of trading in slaves. Be the malignity of the practice what it may, it is not that of piracy in legal consideration" (opinion by Sir William Scott). The British anti-slavery movement was spurred to other efforts, and the brilliant memorandum by Lord Castlereagh at the Congress of Aix-la-Chapelle in 1818 argued:

> If the moment should have arrived when the Traffic in Slaves shall have been universally prohibited, and if, under these circumstances, the mode shall have been devised by which this offence shall be raised in the Criminal Code of all civilized Nations to the standard of Piracy; they conceive that this species of Piracy, like any other act falling within the same legal principle, will, by the Law of Nations, be amenable to the ordinary Tribunals of any or every particular State; . . . the verification of the fact of Piracy, by sufficient evidence, brings them at once within the reach of the first Criminal Tribunal of competent authority . . .

6 BFSP 77-85 at p. 79. This argument failed, as Portugal refused to agree and other states, principally France, took the position that without Portugal there could be no consensus, and as a matter of positive law Portuguese conceptions of the permissability of the slave trade were as persuasive as British conceptions of its impermissability. Eventually the British were successful in suppressing the international slave trade not by natural law arguments based on the horrors of the practice and natural rights of all humans, but by treaties with Portugal, France and the others in which, in return for other things, permission was given to Great Britain to stop the trade in each country's vessels.

111. See ch. II above.

112. See note 110 above.

113. U.S. v. La Jeune Eugenie, 26 Fed. Cas. 832, No. 15,551 (D. Mass.) (1822). Story was sitting as judge in the Federal District Court in Massachusetts under the Judicature Act of 1789. The quoted language is taken from the photographic reproduction of the case in 1 Deak 144 at p. 153. As mentioned in note 69 above, Story's great work on Conflict of Laws, effectively destroying the logical underpinning of Cicero's natural law of nations, *jus gentium*, as an operative municipal law theory in a world of legally equal and independent states, did not appear until 1834.

114. Appendix II.B below.

115. U.S. v. Darnaud, 3 Wallace 143 (3rd Circ.) (1855) at p. 160-163.

116. *Id.* 178.

117. See note 110 above. France had insisted at Aix-la-Chapelle that whatever the moral evils of the slave trade, and whatever the French legislation on the subject, Great Britain could derive therefrom no legal right in the international legal order to stop French vessels on the high seas in order to suppress that detestable traffic. The French position was upheld by Sir William Scott in the *Le Louis*, cited above at the same note. It also underlay his refusal to consider condemning the *Hercules* [1819] 165 Eng. Rep. 1511, also in 2 Dods. 353. See text at notes 206-207 below.

118. See notes 110 and 117 above.

119. Quoted in part in note 110 above.

120. If the evils inherent in slavery could not be shown to be inconsistent with natural law in 1817 or 1825, and counterargument regarding racial superiority and moral benefits conferred on the slaves could block legislation in the United States to abolish the entire practice state by state, or forbid implementation

of the Fugitive Slave Law (see The Dred Scott Case, Scott v. Sandford, 60 U.S. (19 Howard) 393 (1857)), it is hardly surprising that doubts exist today as to the sanctity of private property or even the impermissability of torture as a matter of human rights law. But this is not the place for further analysis of the inability of the legal order to create a consensus through natural law reasoning where the conscience of mankind does not in fact agree.

121. Statute of the International Court of Justice, art. 38 (1) (c). This formula has its own history, of course, but it is not necessary for present purposes to trace it.

122. The case is cited at note 113 above. The statute is reproduced at Appendix II.B below.

123. Story, *Commentaries, loc. cit.* note 69 above.

124. Cited at note 87 above; reproduced at Appendix II.B below.

125. Set out in the text at note 86 above; reproduced in full at Appendix II.A below.

126. This would, of course, include the port of London.

127. This provision is still statutory law in the United States. 18 U.S. Code sec. 1653. Minor amendments were made in 1909 and 1948. The entire body of current United States positive law relating to "piracy" in the sense discussed in this study is in 18 U.S. Code secs. 1651-1661 and reproduced in Appendix II.C below. Those provisions of the Code relating to the President's authority to direct naval activity against "pirates" but not defining the term, are in 33 U.S. Code secs. 381-387.

128. The high seas enforcement jurisdiction of the United States remains vested in the District Court of the district of the United States in which the offender is arrested or first landed. 18 U.S. Code sec. 3238.

129. Consular courts with jurisdiction to settle legal disputes between nationals of the sending state alone are a very old Mediterranean institution. The first American consular court was established in Algiers by treaty dated 5 September 1795. 1 Malloy, *Treaties, Conventions* . . . (1910) 1. The treaty of 4 November 1796 with the Bey of Tripoli permits the establishment of consular "jurisdictions" by each party "on the same footing with those of the most favoured nations respectively." 2 Malloy, *op. cit.* 1784 art. IX at p. 1786. The treaty of August 1797 (no specific date in August) with the Bey of Tunis provides for the respective consuls to judge of "disputes" involving solely persons under his "protection," but if there is an offense that crosses nationality lines and involves killing, wounding or striking, the territorial sovereign has jurisdiction over the case and the consul a right merely to be present at the trial. Id. 1794, arts. XX-XXII at p. 1799.

130. The first American experience of this was in reaction to activities of "Citizen" Edmond C. Genet, the Minister of the revolutionary government of France to the United States 1792-1794. Among the exercises of French "sovereignty" in American territory which Secretary of State Thomas Jefferson complained of and which led to a demand for Genet's recall was the condemnation at his direction by French consuls in the United States of British vessels captured by French revolutionary privateers and sold by them to American buyers. Jefferson regarded the establishment of Prize Courts without the permission of the territorial sovereign as a violation of international law; Genet regarded that a mere quibble based on "aphorisms of Vattel." After protest, Genet was recalled by the French authorites. This affair is concisely summarized in 4 Moore, *Digest of International Law* (1906) 485-487.

131. The tale of American continental expansion at the expense of the Indian population and political organization of the continent is far beyond the scope of this study. American reluctance to assume the obligations of sovereignty outside the continent was not overcome until the very end of the 19th century. It took over forty years of policy argument and political manipulation for those interested in establishing American rule in Hawaii to convince an administration and two thirds of the Senate necessary for advice and consent to the ratification of an annexation treaty, to achieve it. 1 Moore, *Digest* 481-504.

132. 1 Kent, *Commentaries on American Law* (1826) Lecture IX at p. 169-179 focuses on "Offences against the Law of Nations."

133. *Id.* 170. He considered the slave trade to be "condemned by the general principles of justice and humanity," but *not* "piratical" or "absolutely unlawful by the law of nations." *Id.*

134. *Id.* 171.

135. *Id.* 174.

136. *Id.* 175.

137. The most nearly comprehensive study of this use of the term "piracy" in Anglo-American practice remains Lauterpacht, *Recognition in International Law* (1947, reprinted 1948) ch. XVIII. As was noted above at note 31 with regard to Dickinson's treatment of the American municipal statutes, Lauterpacht's balanced work suffers somewhat from a lack of historical perspective and seems to miss the depth of the jurisprudential argument. It has been felt necessary to duplicate and supplement his research with regard to the early materials and my conclusions are somewhat different.

138. 16 Geo. III c. ix (1777). This statute was renewed annually until 1782. 18 Geo. III c. i (1779); 19 Geo. III c. i (1780); 20 Geo. III c. v (1781); 21 Geo. III c. ii (1782). These statutes are published in 31 Pickering 312; 32 Pickering 1; *id.* 175; 33 Pickering 3; and *id.* 183.

139. 1 Moore, *Digest* 168-169. By 1779 the British were considered to have demonstrated by their applying the law of war to land engagements with the Continental Army that they considered the land

forces contacts to be governed by international law, not merely British municipal law as it might apply under the Statute of Treasons quoted at note I-201 above. Cp. the treatment of James II's land forces in Ireland in the 1690s, above esp. text at note II-20.

140. The British Ambassador in the Netherlands requested the Dutch to expel from Texel one "pirate, Paul Jones, of Scotland, who is a rebel subject and a criminal of the state" in October 1779. 10 *Dictionary of American Biography* 185. The Dutch did expel him, but did not arrest him for "piracy" or any other crime. They seem to have regarded the issue as solely one of maintaining Dutch neutrality in a "war" between others, even though the British regarded the situation as one of internal criminality among British subjects. The British view that "rebels" might be regarded as "pirates" seems consistent with the British legislation cited in note 138 above. The apparent rejection of this position by all the other European powers who were addressed on the issue is ambiguous. It might merely have been a denial by each power individually that the facts warranted the legal conclusion asserted by the British; it does not necessarily deny that rebels before achieving a degree of organization and success might be properly treated as "pirates" at international law as well as at the municipal law of the defending sovereign.

141. See text at notes 40-52 above.

142. Some are cited in another context at note 129 above. The treaties were that with Algiers of 5 September 1795 (8 Stat. 133); Tripoli of 4 November 1796 (8 Stat. 154); and Tunis concluded on an unspecified date in late August 1797 and 26 March 1799 (8 Stat. 157). The Treaty with Algiers was superseded in June/July 1815 (8 Stat. 224), and that new treaty superseded in turn on 23-24 December 1816 (8 Stat. 244). The Treaty with Tunis was amended in a Convention dated 24 February 1824 (8 Stat. 298). Treaty relations with Morocco were begun in January 1787 under the Articles of Confederation (1 Malloy 1206) and that Treaty remained in force for the new United States until superseded on 16 September 1836 (8 Stat. 484).

143. The confusion in thought represented by the glib use of the word "pirate" in connection with the Barbary states began in the last decade of the eighteenth century and lasts until today. For an interesting example of the rhetoric as it reached scholarly circles, see Paullin, *Commodore John Rodgers, 1773-1838* (1910, republished by the United States Naval Institute 1967) 93-169. Commodore Rodgers was actively involved in the "war" against the "pirates" of Tripoli that began in 1802 and ended in 1805. A parallel not involving the word "pirate" might be drawn to treaty relations and "wars" with the American Indian tribes at this time. All the early treaties between the United States and the Indian tribes of North America are collected in volume 7 of the American *Statutes at Large.* The legal relationships reflected in the treaty form were analyzed by Chief Justice Marshall in The Cherokee Nation v. The State of Georgia, 30 U.S. (5 Pet.) 1 (1831), concluding that "an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States" (p. 183). A more elaborate opinion resulting from an appeal by a citizen of Vermont from a conviction by a Georgia court applying its law to events within Cherokee territory, is Worcester v. The State of Georgia, 31 U.S. (6 Pet.) 515 (1832). In that case Marshall found jurisdiction in the Supreme Court and overturned the conviction on the ground that under the Constitution, treaties and federal statutes, the law of Georgia did not apply in the territory set aside for the Cherokee nation by the law of the United States. In a later case, the Supreme Court held that Federal legislation could supersede treaty stipulations with the Indian tribes, and there was no violation of either American municipal law or international law in that event. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). The Supreme Court in that case held that the Indians' sole redress was to appeal the questions of policy to the Congress (p. 621). It can be seen that while the legal label "pirate" was not used, the result implied by the use of the term—the submerging of the organized society to which it was attached to the legal system of its dominant neighbor—was achieved by interpretation of the Constitution and the subordination of the branch of law governing "treaties" with the victim society to the overarching law of the conqueror. In this way, the law of war could be argued to be not applicable to military relations with the victim society, but only a special category of the municipal law of the expanding state seeking to submerge its neighbor. Further analysis of this legal technique of engulfment as it applied to Indian tribes in North America is beyond the scope of this work.

144. Cited at note 35 above.

145. See note 44 above. This provision, with minor changes, is still law in the United States. 18 U.S. Code sec. 1652. It is reproduced in Appendix II.C below.

146. Stat. 175, Act of 3 March 1847, 29th Cong., 2d Sess., ch. 51. This statute is still law in the United States. 18 U.S. Code sec. 1653. It is reproduced in Appendix II.C below.

147. 2 Moore, *Digest* 974, citing a letter dated 23 October 1794 by Edmund Randolph as Secretary of State.

148. *Id.*, citing a report dated 25 January 1806 by James Madison as Secretary of State.

149. The Act of 5 June 1794, 3rd Cong., 1st. Sess., ch. 50, 1 Stat. 381, was extended for two years by the Act of 2 March 1797, 5th Cong., 1st Sess., ch. 1, 1 Stat. 523, and further extended indefinitely by the Act of 24 April 1800, 6th Cong., 2d Sess., ch. 35, 2 Stat. 54. All three statutes were repealed by the Act of 20 April 1818, 15th Cong., 1st Sess., ch. 88, 3 Stat. 447. Also replaced by the Act of 1818 was another Neutrality Act,

An Act to Prevent Privateering Against Nations in Amity with, or Against Citizens of, the United States, dated 14 June 1797, 5th Cong., 1st Sess., ch. 5, 1 Stat. 523. The Act of 1818 also repealed the Neutrality Act of 3 March 1817, 14th Cong., 2d Sess., ch. 58, 3 Stat. 370. See note 175 below.

The Act of 1818 replaced these earlier statutes with a comprehensive Neutrality Act, preserving many of the terms of the previous legislation. The current annotated edition of the U.S. Code traces the provisions of 18 U.S. Code secs. 961 and 962 back to the Act of 1794. The language of secs. 958 and 959 also seems to have had its origin then. It would be tedious in this place to attempt to trace back to original sources all the terms in titles 18 and 22 of the U.S. Code that trace back to the Neutrality Acts of 1797–1818 and later.

150. John Paul Jones himself sailed under Russian commission against Turkey and Sweden as a regular officer of the Russian Navy in 1788 while maintaining in full his American citizenship. 10 *Dictionary of American Biography* 187. The Confederated American States were neutral in that conflict.

151. 2 Moore, *Digest* 976-977, memorandum of 16 March 1854 recording a conversation between the American Minister (Ambassador) at London, James Buchanan, and the British Foreign Secretary, Lord Clarendon.

152. *Id.* Buchanan does not appear to have cited the cases he had in mind.

153. See text at notes 81–83 above. That was the case in which section 8 of the Act of 1790 was construed to apply to foreigners acknowledging no state authority and attacking all victims indiscriminately, even if none of the immediate victims was American. Its logic rested on the Zouche-Blackstone-Story conception of the "law of nations."

154. Of course, in a sense the issues arose much earlier, in the licensing of privateers and the commissioning of Naval officers like John Paul Jones to raid British shipping during the revolution, when in British contemplation the American states and Continental Congress lacked legal authority to issue commissions without the express approval of the Crown. But Jones was not caught and there is no record of any American privateers actually being tried for "piracy" by an English court. See text at notes 138–140 above.

155. U.S. Constitution, Article I, sec. 8, cl. 11.

156. 5th Cong., 2d Sess., ch. 67, 1 Stat. 578. This American municipal legislation was not binding in France or on the French state as a matter of international law—the law between states. Presumably France and the United States Congress speaking for the entire union differed at this point as to the continued force of the alliance of 1778 (1 Malloy 479) and the Convention of 14 November 1788 (*id.* 490), which was formally ratified in 1790, after the new Constitution had gone into effect. The United States Supreme Court held in 1801 that the Act of 7 July 1798 abrogated this latter Convention as far as the United States was concerned even if France disagreed. Talbot v. Seeman, 5 U.S. (2 L. Ed.) 15, 1 Cranch 1 (1801).

157. Act of 9 July 1798, 5th Cong., 2d Sess., ch. 68, 1 Stat. 578.

158. See the classification system of Henry Marten, at note II-43 above.

159. 1 AG 49. As I read the penultimate quoted sentence an American acting against the United States with or without a French commission would be committing "treason;" a foreigner within the United States would be committing treason *unless* he had a French commission, in which case he would be a lawful combatant.

160. See text at note 52 above. Perhaps Pinckney's Treaty was disregarded because Marshall foresaw the problems that became evident in 1821. See text at notes 193–197 below.

161. U.S. v. Hutchings, 26 Fed. Cas. 440, No. 15,429 (1817) at pp. 441–442.

162. See text at note 35 above.

163. U.S. v. Palmer et al. cited note 62 above, at p. 636–637.

164. *Id.* at p. 641–624. See text at note 78 above.

165. *Id.*, dissent by Johnson 636 sq. at p. 641.

166. *Id.* 643, quoted in text at note 79 above.

167. *Id.* 635.

168. *Id.* 643–644.

169. Obviously, this result was identical to that reached by English jurists by 1729. See text at note II-47 above. From this point on, it seems clear that the classification of "pirate" for a person depredating at sea without the license of a recognized government was regarded as coming from specific treaty law or from municipal law applicable to nationals or purported nationals of the depredator's state only. No cases indicating a contrary view have been found, and the theoretical writings making broader assertions of the requirement of a license contain no argument or precedent beyond those fully considered above. Cf. Supreme Court's decision (by Justice Henry Livingston) in the *Josepha Seconda* discussed in the text at notes 198–200 below.

170. Cited at note 149 above.

171. *Id.*, p. 384. See note 149 above.

172. 1 AG 35 at 36. The opinion is dated 20 January 1796. The addressee is not specified; presumably it was Secretary of State Pickering.

173. 1 AG 181 at 182. William Wirt to Elias Glenn, opinion dated 6 November 1818.

174. Wirt cited Vattel, *op. cit.* note II-137 above, Book III, ch. ii, sec. 15: "[N]o one may recruit soldiers in a foreign country without the permission of the sovereign [*personne ne peut en enroller en pays étranger, sans la permission du Souverain*]."

175. Cited and placed in context at note 149 above. The quoted language is in the Act of 3 March 1817 and is repeated with a minor change in section 3 of the Act of 20 April 1818 that repealed the Act of 1817.

176. Similar limitations appear in the replacement statute of 1818.

177. Walker Lewis, John Quincy Adams and the Baltimore "Pirates," 67 *Am. Bar Assoc. Journal* 1011 (1981) at 1013. I am grateful to Professor Edward Gordon of Albany Law School and The Fletcher School of Law & Diplomacy for bringing this article to my attention. Apparently, the outcome of the case continued to rankle in the mind of John Quincy Adams. As Secretary of State in the Monroe Administration and author of the parts of Monroe's State of the Union Address announcing the Monroe Doctrine on 2 December 1823, he was probably responsible for the reiteration of Executive dominance over what the courts might call "piracy" by referring to both commissioned and "unlicensed" piracies being suppressed by American Naval action:

> Although our expedition, cooperating with an invigorated administration of the government of the island of Cuba, and with the corresponding active exertions of a British naval force in the same seas, have almost entirely destroyed the *unlicensed* piracies [emphasis added] from that island, the success of our exertions has not been equally effectual to suppress the same crime, under other pretenses and colors, in the neighborhood of Porto Rico. They have been committed there under the abusive issue of Spanish commissions. At an early period of the present year remonstrances were made to the governor of that island, by an agent who was sent for the purpose, against those outrages on the peaceful commerce of the United States, of which many had occurred.

2 J. Richardson, ed., *Messages and Papers of the Presidents* (1896, 1910) 776 at 783. It seems notable that both acts done unlicensed and acts done under "the abusive issue of" "commissions" are denominated "piracies," but that their legal results differ; the former were regarded as subject to immediate political action by the Navy, and the latter as subject to diplomatic remonstrance only, in the first instance. Despite the use of the word "crime," there is no mention of tribunals or their jurisdictional and substantive problems. This approach can be usefully compared with the British approach at the same period, when the word "pirate" was changing meaning and becoming a legal justification for political action in disregard of municipal criminal law and in increasing disregard of what had been thought to be the international law on the subject. See chapter IV below. I am indebted to my colleague, Professor Alan Henrikson of the Fletcher School of Law & Diplomacy, for bringing this paragraph of President Monroe's "Doctrine" speech to my attention.

178. Text at notes 53 sq. above.

179. See text at note 35 above.

180. U.S. v. Jones, 3 Washington 209 (1813).

181. Washington called it the Kyd case and cited 5 *State Trials* 313. No such case appears in *How. St. Tr.* (which was not in any event published until 1816) at that place, but from the context it seems clear that Washington was referring to the Kidd case rehearsed at length in chapter II above as it was reported in some earlier compilation.

182. U.S. v. Jones at p. 216. Of course, the Kidd case was decided not by Common Law but by an Admiralty commission using Common Law procedures under the Act of 1536. See chapter II above.

183. *Id.*, p. 215, 220. Cp. Story's naturalist expansion of the law he asserted to be the international law of "piracy" in U.S. v. Tully and Dalton discussed in the text at notes 54-59 above. The precise language of the Act is in the text at note 35 above: "... murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death." Story had expanded another clause of the definition relating to "piratically or feloniously" running away with a ship to include such running away even without the physical putting into fear that was necessary to meet the English Common Law of "robbery" definition normally used in English Admiralty courts. The Common Law definition of "felony" is complex: "Embezzlement" was not a felony, but a taking "*animo furandi*" by anybody not lawfully possessed could be. See 1 Hale, *Pleas of the Crown* (1685 ed.) 61-62. See notes I-134, I-165 and II-49 above.

184. U.S. v. Jones, p. 223.

185. See text at notes 91-96 above.

186. See note 149 above. The Act of 20 April 1818 was in force in 1820.

187. Presumably under the act of 1790, section 9. See notes 44, 135 and 18 U.S. Code sec. 1652 in Appendix II.C. below. U.S. v. Griffen and Brailsford, 18 U.S. (5 Wheaton) 184 (1820) at 204-205.

188. U.S. v. Holmes et al., 18 U.S. (5 Wheaton) 412 (1820).

189. Cited above at note 81.

190. U.S. v. Holmes at pp. 419–420. The last phrase, "any government whatsoever," seems to imply that the Buenos Ayres authorities would have been taken to be empowered legally to issue a commission, but the court believed that the jury might find that the depredation had occurred regardless of it. The position taken was essentially the same as in U.S. v. Klintock a few months earlier. See text at notes 81–83 above.

191. Wheaton cited for this only the letter by Jenkins analyzed at notes II-73 sq. above.

192. Wheaton, *Elements of International Law* (Text of 1836 with Dana's commentary of 1866 and additional commentary by George Grafton Wilson) (CECIL 1936) secs. 124–125 at p. 162–164. Wheaton's view was by 1836 somewhat narrower than that expressed in his comment on U.S. v. Wiltberger analyzed in the text at note 74 above.

193. Cited at note 149 above.

194. See text at note 52 above.

195. Cited at note 149 above.

196. The case was remanded to the Circuit Court for further proceedings on that point.

197. The Bello Corrunes, 19 U.S. (6 Wheaton) 152 (1821) at 171.

198. The Josefa Segunda, 18 U.S. (5 Wheaton) 338 (1820).

199. *Id.* at p. 358.

200. *Id.*

201. 20 U.S. (7 Wheaton) 283 (1822).

202. *Id.* 337.

203. See note 52 and text at notes 194 and 195 above. Not only was Chaytor's nationality unclear, and thus his being a "citizen of the United States" within the terms of article 14 doubtful, but Story, apparently erroneously, categorized the *Independencia* as a public warship of Buenos Ayres and not a mere privateer. *Id.* 346.

204. *Id.* 348-349.

205. *Id.* 355.

206. The *Hercules*, cited note 117 above, at 1519.

207. *Id.* 1518-1519.

208. See text at notes I-170 to I-172 above.

209. The *Marianna Flora*, 24 U.S. (11 Wheaton) 1 (1826) at p. 41.

210. The *Palmyra*, 25 U.S. (12 Wheaton) 1 (1827). Story did not speculate as to whether France might have had a valid claim against Spain for what he apparently conceived to be a violation of the laws of maritime warfare.

211. Statute of 3 March 1819, 15th Cong., 2d Sess., ch. 77 sec. 2, 3 Stat. 510 at pp. 512–513, extended by the statute of 15 May 1820, 16th Cong., 1st Sess., ch. 113 sec. 1, 3 Stat. 600. Story refers to them as chs. 75 and 112 respectively but there seems to be no doubt as to the language to which he was referring.

212. The *Palmyra* at 16–17.

213. *Id.* 16.

214. U.S. v. Kessler (Circ. Ct., D. Penn.) 26 Fed. Cas. 766, No. 15,528 (1829).

215. *Id.* 772.

216. *Id.* 774.

217. U.S. v. Brig Malek Adhel, cited at note 106 above, at 1 Deak 58–59.

218. *Id.*, 1 Deak 59.

219. *Id.* 64–65.

220. See text in note 44 and in text at note 145 above. Section 9 of the Act applies only to "any citizen" of the United States. Since it directs treatment as a "pirate" to any citizen who commits "piracy" or "robbery" against any other American citizen on the high seas "under color of any commission from any foreign Prince or State," the charge would stick even if there were no legal question of the capacity of the revolutionary government of Texas to issue such a commission. Of course, if there were no valid commission, section 8 of the Act of 1790, or section 5 of the Act of 1819, would apply and the Americans would have been "pirates" as far as the law of the United States was concerned. Section 8 of the Act of 1790 is quoted in pertinent part at note 35 above. The Act of 1819 is reproduced in full in Appendix II.A below.

221. 3 AG 120 at pp. 121–122, opinion dated 17 May 1836.

222. *Id.*, p. 122.

223. *Id.*

224. Accessory Transit Co. Claim, 2 Moore, *International Arbitrations . . .* 1551 (1898) at p. 1561.

225. It is highly relevant to an understanding of such later cases as the Delagoa Bay Arbitration, in which a Swiss arbitral tribunal reluctantly held itself to be bound by the terms of an arbitral *compromis* to accord to British and American investors in a Portuguese Corporation in Mozambique the very protection refused to American investors in Nicaragua in this case. See 5 Parry, ed., *British Digest of International Law* 535 at 560. The literature on the Delagoa Bay Arbitration is voluminous and seems to be comprised mostly of claimants' arguments that the *compromis* forced on Portugal represents a better expression of the underlying natural law protecting investors than the constitutional phases of the legal order protecting national

discretion with regard to national corporations in which foreigners have invested. The degree to which the international legal order gives an investor's state standing to protect investments made through companies of a nationalizing state, or a third state, is still a matter of considerable dispute. See The Barcelona Traction, Light and Power Company Case, (Belgium v. Spain), *I.C.J. Reports 1970* 1.

226. Accessory Transit Co. Claim, cited note 224 above. Quotations are from p. 1561-1563, italicized words *sic.*

227. Letter from Fox to Webster, 12 March 1841, 29 BFSP 1126 at 1127. This was the beginning of the famous correspondence in which Daniel Webster first formulated the phrase that has been taken to set forth the general international law of self-defense. It involved a band of British and Americans in a ship, the *Caroline*, planning a raid across the Niagara River from the New York shore. A British expedition raided the *Caroline* first in "self-defense" and sent her flaming over the falls. See 2 Moore, *Digest* 409-414.

228. Letter from Webster to Fox, 24 April 1841, 29 BFSP 1129 at 1135.

229. *Id.*

230. 12 Stat. 1258-1259. Proclamations No. 4 and 5.

231. The history of the word "efficient" in this context is complex and beyond the scope of this study. It reflects most immediately the language of the Declaration of Paris of 16 April 1856 by which 51 parties, including all the major European maritime states but not the United States, agreed that "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The American refusal to accept the Declaration went to other points than this. Roberts and Guelff, *Documents on the Laws of War* (1982) 24-27.

232. 12 Stat. 255 sq., 37th Cong., 1st Sess., ch. 3 sec. 4 at p. 256.

233. *Id.* sec. 5 at p. 257.

234. This provision of the Constitution is cited at note 155 above. Its relationship to definitions of "piracy" was not considered at the Constitutional Convention of 1787 as far as available records show.

235. The Proclamation of 19 April recites that "[A] combination of persons, engaged in such insurrection, have threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas." Proclamation No. 4 cited at note 230 above. The Proclamation seems to assume that the Confederate States' authorities had no legal powers at all.

236. The Prize Cases, 67 U.S. (2 Black) 635 (1862).

237. He was joined by Justices James Wayne of Georgia, Noah Swayne of Ohio, Samuel Miller of Iowa and David Davis of Illinois.

238. *Op. cit.* note 236 at pp. 666, 669.

239. *Id.* 669, citing the *Santissima Trinidad* discussed in text at notes 201 sq. above.

240. *Id.* 673.

241. *Id.*

242. That question created serious difficulties between the Union and Great Britain, when an American warship exercising belligerent rights to interdict contraband on neutral ships on the high seas removed as such "contraband" from the "Trent," a British ship, two Confederate emissaries, James Murray Mason and John Slidell. They were released after strenous British protest regarding the belligerent right of the Confederacy to send representatives abroad with diplomatic status, even if not received as the representatives of a "state" by any host government, and the impermissability of the Union exercising "belligerent" rights against neutrals while denying that a legal status of "belligerency" existed which would endow the other side with symmetrical rights. 7 Moore, *Digest* 626-630, 768-779; Adams, *The Education of Henry Adams* (1907-1918) 119-127. The Union Government (Secretary of State Seward) quickly apologized to Great Britain on the ground that even if there were a status of belligerency, this capture would have gone too far because there was no Prize court condemnation of Mason and Slidell as contraband. Mason and Slidell were released, thus implying the British were right, but avoiding a clear resolution of the labeling dilemma.

243. The Prize Cases, cited note 236 above, 647-680. There is much interesting detail omitted concerning the law of blockade, but that is not the subject of this study. The release of the *Crenshaw*'s cargo seems to confuse the law of blockade with the law permitting belligerent interdiction of only enemy property and neutral or friendly contraband on high seas.

244. The others joining with Justice Nelson were Roger Taney of Maryland (the Chief Justice and author of the Dred Scott decision), John Catron of Tennessee and Nathan Clifford of Maine.

245. The Prize Cases, cited note 236 above, 685-698.

246. Dole v. New England Mutual Marine Ins. Co., 88 Mass. (6 Allen) 373 (1863), 18 Deak 301.

247. *Id.* 309-310.

248. Dole v. Merchants' Mutual Ins. Co., 51 Me. 465 (1863), 18 Deak 314.

249. *Id.* 318, 326. Six judges concurred in the majority decision. Two dissented "holding that the taking was piratical, but not a capture . . . as understood in contracts of insurance." *Id.* 326.

250. Fifield v. Insurance Co. of State of Pennsylvania, 47 Pa. 166 (1864), 18 Deak 327.

251. *Id.* 329.
252. *Id.* 332.
253. *Id.* 332-333. See also 2 Moore, *Digest*, 1082-1083.
254. *Id.* 333.
255. See text at note 253 above. For a bit more on the incident, see 2 Moore, *Digest* 1082-1083, where it is also noted that problems of third countries classifying Confederate commissioners as "privateers" led the Confederacy to place all its raiders under the command of regularly commissioned Confederate Navy officers. Those problems did not relate to "recognition," or they would have survived the switch in subordination. They related instead to the terms of the 1856 Paris Declaration, cited at note 231 above, under which it had been agreed by the signatories (not including the United States) that "Privateering is, and remains, abolished." The Confederate States were obviously not in a political position that would enable them to carry on the diplomatic correspondence necessary to contest the application to them of this statement of general international law ("and remains") regardless of the arguments available to the United States and the Confederate States on the point.
256. 2 Moore, *Digest* 1079-1080.
257. The jury nonetheless found him guilty; Burley was either permitted to escape or to forfeit a small bail (the facts are not clear). 2 Moore, *Digest* 1081-1082.
258. 30 Fed. Cas. 1049, No. 18,277 (16 October 1861).
259. *Id.* 1049-1050.
260. Cited above at notes 35, 87 (extending the Act of 1819, cited at note 85) and 146.
261. U.S. v. Baker and Others (1861), 5 Blatchford, *Cases in Prize* 6 (1866) at 12, 14.
262. *Id.* 14.
263. *Id.* 15.
264. In re Tivnan and others, 5 Best and Smith 645 (1864). Lauterpacht, *Recognition in International Law* (1947) 302 note 3 refers to this case as In re Ternan and Others, citing 33 L.J.M.C. 201. It is not known whether the difference in name is an error by Best & Smith, the *Law Journal for Maritime Cases*, or Lauterpacht himself. 2 Moore, *Digest* 1080 refers to it as In re Tivnan.
265. 93 CTS 415; the treaty had been enacted as statute law in England by 6 & 7 Vict. c. 76 (1843).
266. Both England and the United States restrict the powers of their respective executives to "extradite" anybody for anything to those situations in which the executive authorities are authorized by municipal law under the respective constitutions to seize and transfer custody of an individual. 6 Whiteman, *Digest of International Law* (1968) 727 sq..
267. See above at notes II-32, III-44.
268. In re Tivnan, *op. cit.* note 264 above, at 685.
269. *Id.* 686 at 689 (Blackburn), 690-696 (Shee).
270. *Id.* 675 at 679-681.
271. U.S. v. Pedro Gilbert & Others, cited at note 69 above.
272. An identical result was reached in a Canadian case in 1863, the *Chesapeake, 2 Moore, Digest* 1080-1081.
273. Ford v. Surget, 97 U.S. 594 (1878). As a matter of executive interpretation, within the United States, the decision was made by 1872 not to try the Confederate privateers, including Captain Semmes of the *Alabama*, as pirates, at least in part on the ground that the blockade of 1861 had established a status of belligerency with which the legal notion of "piracy" was considered incompatible. 2 Moore, *Digest* 1082-1083.
274. Ford v. Surget, p. 605.
275. *Id.* 608.
276. *Id.* 618-620, citing the two Dole cases and the Fifield case discussed briefly at notes 246-254 above, and, among others: Dole v. New England Ins. Co., 2 Cliff. 394; Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 495 (1872); Mauran v. Insurance Co., 73 U.S. (6 Wall.) 1 (1868), 17 Deak 408; Monongahela Ins. Co. v. Chester, 43 Pa. St. 49; Hamilton v. Dillin, 88 U.S. (21 Wall.) 78 (1875); and Horn v. Lockhart, 84 U.S. (17 Wall.) 578 (1873).
277. Ford v. Surget, cited note 273 above, 622.
278. Dana was no stranger to the perils of navigation. In his great narrative of adventure as a sailor in 1834 he mentions outrunning "a small clipper-built brig with a black hull . . . armed, and full of men, and [who] showed no colours" in the South Atlantic about halfway between the Cape Verde Islands and Cape San Roque (Brazil). Dana, *Two Years Before the Mast* (1840) (Enlarged ed. 1869, Everyman reprint 1969) 16-17.
279. Wheaton, *op. cit.* note 192 above.
280. *Id.* 164 note 84 at p. 168.
281. 2 Moore, *Digest* 1086.
282. See note 261 above.
283. 2 Moore, *Digest* 1087.
284. *Id.* 1088.

285. The *Ambrose Light*, 24 F. 408 (S.D. N.Y. 1885), 18 Deak 112.
286. *Id.* 114.
287. *Id.* 117.
288. Cf. 2 Moore, *Digest* 1098-1099.
289. The " positivist" solution to the problem of "recognition" or "non-recognition" reflecting political interests rather than underlying perceptions of law motivating actual state behavior, evidenced well in the Union's giving captured Confederate soldiers and sea raiders *treatment* as prisoners of war, while withholding the formal grant of that *status* and calling them traitors and "pirates," did not come until the 20th century. It is implicit in the reasoning of William Howard Taft as Arbitrator between Great Britain and Costa Rica in the Tinoco Arbitration (1923), 18 AJIL 147 (1924), holding the British refusal to "recognize" Tinoco as the government of Costa Rica for political reasons did not derogate from the legal effect of British acts implying acceptance of Tinoco's position in Costa Rica. It is explicit in Kelsen's clear separation of "recognition" as a political act from "recognition" as a legal act. Kelsen, Recognition in International Law—Theoretical Observations, 35 AJIL 605 (1941). It is possible to go even further to distinguish "recognition" as a moral act from the other spheres. But that brings us to a realm of discussion unnecessary to enter in this study.