Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822

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On January 24, 1817, Don Juan Stoughton, the Spanish consul in Boston, wrote to his colleague in Baltimore, Don Pablo Chacon, to thank him for his recent efforts in supplying Stoughton with information about the *Mangore*, a private armed vessel recently arrived in the Chesapeake. Stoughton believed that the privateer was responsible for the capture of a Spanish-owned merchant ship that had recently turned up in Massachusetts. Stoughton had recently filed suit in federal district court to recover the vessel and its cargo on behalf of the rightful owners, but to do so he had to establish that, in the course of its recent expedition, the *Mangore* had violated federal law prescribing American neutrality. In addition to providing intelligence in this matter, Chacon had secured local counsel to represent Stoughton at depositions of privateer crew members being taken in Baltimore.

Stoughton complained about the "hard labor" he had been forced to undertake "in this troublesome business," which fell to him "as a duty incumbent on me when any such case requires exertions for the good of the country we represent in our Public capacity." Stoughton added, however, that Chacon's latest letter gave him hope that "thro' the wise interposition of Government a final stop will soon be put to those iniquitous proceedings so contrary to the laws of nations at amity with each

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Law and History Review February 2012, Vol. 30, No. 1

doi:10.1017/S0738248011000666

other."[1] He did not specify the "interpositions" he had in mind, but at that moment both the Spanish and Portuguese ministers to Washington were furiously lobbying the Madison administration to put a stop to the recent surge of privateering from the United States on behalf of the revolutionary governments of South America. The Iberian diplomats were working on several fronts, demanding that customs officers prevent privateers from leaving port and that federal district attorneys initiate prosecutions against those who had already captured prizes at sea; in addition, the Portuguese minister was directly responsible for President Madison's recent request that Congress strengthen the nation's neutrality laws to better deal with the privateering crisis.

It is not clear, however, why Stoughton was bullish on the prospects for success of such government-to-government efforts. Despite Chacon's certainty that the Baltimore collector of customs had all the evidence needed to establish the *Mangore's* violation of United States neutrality, the ship had been allowed to sail on a new privateering expedition. Chacon had even applied to the attorney general in Washington, but his remonstrances had been ignored.[2] Even when federal officials had responded positively to such entreaties, success had proved elusive. An attempt to indict a privateer ringleader had failed entirely, even though top executive branch officials agreed that allowing him "to go at large with impunity" would give Iberian diplomats justifiable cause for complaint.[3] The federal district attorney for Maryland had instituted a forfeiture action against the *Mangore* in federal court in mid-January, but the court determined that the government had produced no evidence that the *Mangore* had violated United States neutrality, and ordered that the vessel be restored to the privateers pending further proceedings.[4] And President Madison's new neutrality legislation was encountering stiff opposition in Congress from the supporters of South American independence.

January's grim news would soon give way to more pleasant tidings, however. Stoughton's lawyer in Boston reported that the district court

1. Stoughton to Chacon, January 24, 1817, Harvard Business School Baker Library, Don Juan Stoughton letterbooks (hereafter DJSH), vol. 4.

2. Chacon to Elias Glenn, September 3, 1816, National Archives and Records Administration (hereafter NARA) College Park, State Dept. Correspondence, Notes from Foreign Consuls, Spain; Chacon to Stoughton, January 15, 1817, Ms. 1218, Boston Public Library, Rare Books Department.

3. Opinion of the Attorney General, July 23, 1816, NARA College Park, Opinions of the Attorney General, Richard Rush; Wirt to Monroe, July 11, 1816, Library of Congress, William Wirt Papers (microfilm).

4. *United States v. Swift alias Mangore*, order filed January 21, 1817, NARA Philadelphia, District Court for Maryland (hereafter USDC-MD), Admiralty Case Files, 1817–1818.

for Massachusetts had awarded him the ship and cargo captured by the *Mangore*, for the benefit of the Spanish owners. The lawyer offered his particular congratulations, for the judge's extensive opinion recognized and affirmed all the legal principles upon which Stoughton had based his claim. Stoughton was probably not surprised; only a month earlier he had assured the owners of another Spanish merchant ship seized by privateers that he would undoubtedly recover it, a prediction soon confirmed by the district court. Having served as Spain's representative in New England since 1795 and having recovered numerous vessels caught up in the Atlantic warfare of the era, Stoughton was by this time an experienced litigator in federal court.[5]

As this article establishes, the outcome in this case was by no means unique. Rather than depend upon "the wise interposition of Government" to put a stop to privateering against Spanish and Portuguese commerce, throughout the period covered here representatives of the Iberian monarchies in the United States turned to private claims-making, under the federal courts' admiralty jurisdiction, in order to discourage Americans from their predations. Frustrated with the intransigence, or impotence, of executive branch officials—who consistently responded to Iberian demands for interdiction of privateers by asserting that the deep principles of American constitutionalism prevented them from taking the actions requested—consular officials turned to the judiciary, with notable success. Whereas criminal prosecutions of privateers by the federal government rarely resulted in conviction, consuls had a high win rate in the dozens, if not hundreds, of suits they filed to recover Spanish and Portuguese property. This "consular litigation," as I term it, translated the endemic violence of the high seas into private claims over the legal status of captured persons, vessels, and goods. In a period when the political branches were engaged in a delicate balancing act and were reluctant to take decisive action, private legal claims advanced in federal court were the primary means by which Iberian representatives were able to bring American state power to bear against their enemies.

Consular suits were not necessarily a form of early nineteenth century impact litigation, however; there is little indication that Iberian representatives sought out and developed test cases in order to shape the evolution of

5. William Sullivan to Stoughton, February 13, 1817, Bostonian Society, Don Juan Stoughton Papers (hereafter DJSBS), DJS Correspondence, 1817; Stoughton to the Widow Roberts, December 14, 1816, DJSH vol. 4; and *United States v. 8 bags of cocoa*, NARA Boston, United States District Court for Massachusetts, Final Record Book (hereafter USDC-MA, FRB), 9:263.

Supreme Court doctrine in ways beneficial to their interests. The consuls who figure in this episode were the official representatives of sovereign European powers, but they were not members of a professional diplomatic corps; they were largely American businessmen engaged by the Iberian empires to promote their political objectives on a part-time basis. And the consuls were equally commercial agents for Spanish and Portuguese merchants scattered across the Atlantic world, charged with safeguarding the financial interests of their principals by every means available.[6] Consular litigation was therefore very much ends oriented, and its practitioners adopted a pragmatic approach to legal processes that allowed room for negotiation and compromise when the circumstances dictated. At the nexus of war, revolution, and commerce, the primary goal in litigation was not to create good law, it was to use law to recover the goods.[7]

That said, precisely because this episode occurred in a period during which political instability was rampant across the Atlantic world but the United States itself was not formally at war, consular litigation was the primary mechanism through which the federal courts articulated the fledging nation's juridical relationship with the established and insurgent polities of the revolutionary Atlantic world. Consuls pursued a number of cases on appeal to the Supreme Court, resulting in important decisions in doctrinal areas impacting not only the competing claims of international litigants, but also structuring the foreign relations of the United States itself. In resolving the claims of private parties, federal courts were repeatedly called upon to define the nation's rights and obligations under treaties and the law of nations vis-à-vis the Iberian empires, to determine the attributes of sovereignty properly accorded to the colonial people of South America in their struggles to redefine their relationships to those empires, and to precisely identify the prohibitions official neutrality imposed on Americans who sought to participate in those conflicts. And in putting

6. For background on the Spanish consular service in the early United States, see Sean T. Perrone, "The Formation of the Spanish Consular Service in the United States (1795–1860)," in *Consuls et services consulaires au XIXe siecle*, ed. Jorg Ulbert and Lukian Prijac (Hamburg: DOBU Verlag, 2010), 203–17, and Stanley Faye, "Consuls of Spain in New Orleans," *Louisiana Historical Quarterly* 21:3 (July 1938): 677–684.

7. This kind of litigation was not a new phenomenon; although underreported in the scholarly literature, private litigation in admiralty courts over privateering had been a feature of legal practice in Europe and elsewhere for at least two centuries. On Alberico Gentili's representation of Spanish merchants in English admiralty courts, see Lauren Benton, "Legal Problems of Empire in Gentili's Hispanica Advocatio," in *The Roman Foundations of the Law of Nations*, ed. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 269–82.

those questions before the courts, consular litigation obliged federal judges to trace out the limits of their own authority to exercise jurisdiction over disputes arising from the persistent turmoil of the revolutionary Atlantic.

Accordingly, this episode offers us an opportunity to consider the history of the federal courts from a different perspective than those to which we are accustomed. The limited corpus of scholarship on the lower courts in this period addresses them almost exclusively in a domestic frame.[8] Constitutional and legal histories that do consider the judiciary in its international dimension tend to track cases in the Supreme Court with a view toward crafting narratives of doctrinal development that elucidate the legal thinking of the justices.[9] A handful of efforts give greater attention to the lower courts' role in United States foreign relations, but view it as one fundamentally shaped by domestic inter-branch negotiations about the proper allocation of constitutional authority.[10]

In closely investigating the mechanics of consular litigation in this period, this article seeks to re-situate the federal courts in the international, maritime, and commercial world in which they operated. As recent scholarship has begun to reveal, federal constitutional development in the early United States was profoundly shaped by the new nation's relationship to the broader community of "civilized nations."[11] Along these lines, this

8. See, for example, Dwight F. Henderson, *Courts for a New Nation* (Washington, D.C.: Public Affairs Press, 1971); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789–1816* (Princeton: Princeton University Press, 1978); Wythe Holt, "'To Establish Justice': Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts," *Duke Law Journal* (December 1989): 1421–1521; and Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," *Law and History Review* 4:2 (Autumn 1986): 223–265.

9. See, for example, G. Edward White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–1835* (New York: Macmillan Publishing Co., 1988); Benjamin Munn Ziegler, *The International Law of John Marshall: A Study of First Principles* (Chapel Hill: University of North Carolina Press, 1939); and R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985).

10. See William R. Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* (Columbia: University of South Carolina Press, 2006); Casto, "The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Privateers," *American Journal of Legal History* 37:2 (April 1993): 117–57; and David Sloss, "Judicial Foreign Policy: Lessons from the 1790s," *Saint Louis University Law Journal* 53:1 (Fall 2009): 145–194.

11. See, for example, David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *New York University Law Review* 85:4 (October 2010): 932–1066. On transatlantic legal culture in the Age of Revolution, see Jeremy Adelman, *Republic of Capital: Buenos Aires and the Legal Transformation of the Atlantic World* (Palo Alto: Stanford University Press, 1999); Laurent Dubois, *Colony of Citizens: Revolution and Slave*

article offers an account of the legal ties that bound the early federal courts—and therefore the early American republic—to their neighbors around the Atlantic. Accordingly, this article focuses its attention on the ways in which the court's role in United States foreign relations was shaped by large-scale transatlantic dynamics funneled into quotidian litigation, in which private parties went to court to realize the best possible outcomes in the collision of maritime commerce and inter-imperial war.[12] By forcing the federal courts to confront the deep legal and political issues of the period, Iberian consuls insured that the judiciary would play a significant role in structuring the United States' international relationships, while at the same time the litigation the consuls instituted shaped the development of the courts themselves.

I. A Delicate Neutrality

In the wake of the fall of the Spanish Bourbons to Napoleon in 1808, Spain's colonies in the Americas began to rebel against peninsular authority. With the restoration of monarchical authority across Europe in the wake of Napoleon's defeat in 1815, anxiety over European intentions in the Americas dominated the diplomatic agenda in Washington. Shortly before becoming secretary of state, John Quincy Adams declared—somewhat melodramatically—that "[w]e have therefore enemies in almost every part of the world, and few or no friends anywhere." Moreover, "[w]ith Spain we are … on the verge of war."[13] Although Spain and the United

Emancipation in the French Caribbean, 1787–1804 (Chapel Hill: University of North Carolina Press, 2004); and Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2006).

12. There are two recent exceptions to the general scholarly inattention to the events discussed in this article. Stoughton's effort to recover one particular vessel is the focus of Sean T. Perrone, "John Stoughton and the *Divina Pastora* Prize Case, 1816–1819," *Journal of the Early Republic* 28:2 (Summer 2008): 215–41, which ably reveals the lengths to which Stoughton went to win that case and highlights in particular the difficulties Stoughton had in his relationships with commercial agents in Spain and the United States. In addition, David Head, "Sailing for Spanish America: The Atlantic Geopolitics of Foreign Privateering from the United States in the Early Republic" (PhD diss., University of Buffalo, 2010), offers an impressively researched account of American privateering in this period. In contrast to these two works, this article focuses on Iberian consular litigation more generally and its relationship to the federal government's efforts at interdiction and prosecution, as a means of illuminating the crucial role the federal courts played in resolving international legal disputes arising from the myriad conflicts of the Age of Revolution.

13. Adams to William Plumer, January 17, 1817, in Worthington Chauncey Ford, ed., *The Writings of John Quincy Adams* (New York: Macmillan Company, 1913–1917), 6:139–44;

States had re-established formal diplomatic relations in December 1815, at the time tensions between the two countries were nonetheless running high. United States military action in Florida under Andrew Jackson had enraged the Spanish, and even efforts to oust European filibusters from the Florida coast—ostensibly to Spain's benefit—had incurred the displeasure of King Ferdinand's administration.[14] The stakes were especially high given the outstanding territorial claims to be resolved stemming from the Louisiana Purchase; throughout the privateering crisis, United States diplomats on both sides of the Atlantic were engaged with their Spanish counterparts in protracted negotiations that eventually resulted in final approval of the Transcontinental Treaty in 1822.

Consequently, the question of what kind of relations the United States should have with the revolutionary governments of South America, including whether to grant them formal diplomatic recognition, was one of great delicacy. James Monroe, the former secretary of state who became president just as the crisis was reaching its apogee, was inclined to heed public opinion supporting South American independence; Adams, who served as secretary of state for almost the entirety of Monroe's presidency, was more cautious, intent on maintaining a "fair and honest neutrality." Although Adams appreciated American enthusiasm for the cause of liberty, in drawing an analogy to earlier popular support for the French Revolution, he expressed dismay over the "ardent spirits who are rushing into the conflict, without looking for consequences."[15]

Adams had a specific group of "ardent spirits" in mind. With the advent of peace in Europe and North America, American privateers who had plied the waters of the Atlantic throughout the era of the Napoleonic Wars were

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on United States involvement in the revolutions in Latin America, see Charles Griffin, *The United States and the Disruption of the Spanish Empire, 1810–1822* (New York: Columbia University Press, 1937); James E. Lewis, *The American Union and the Problem of Neighborhood: The United States and the Collapse of the Spanish Empire, 1783–1829* (Chapel Hill: University of North Carolina Press, 1998); and Arthur Whitaker, *The United States and the Independence of Latin America, 1800–1830* (Baltimore: Johns Hopkins University Press, 1941).

14. For Adams's justification of Jackson's conduct, see his letter to Don Luis de Onis of July 23, 1818, in *Writings*, 6:386–92. On Jackson's actions in Florida more generally, see David S. Heidler and Jeanne T. Heidler, *Old Hickory's War: Andrew Jackson and the Quest for Empire* (Mechanicsburg: Stackpole Books, 1996).

15. Adams to Peter Paul Francis de Grand, January 21, 1818, in *Writings*, 6:289; Adams to John Adams, December 21, 1817, in *Writings*, 6:276. On the differences between Monroe and Adams as noted by the French ambassador to the United States, Hyde de Neuville, see his letter of December 11, 1817 to the French Minister of Foreign Affairs, in Jean Guillaume Hyde de Neuville, *Memoires et Souvenirs du Baron Hyde de Neuville* (Paris: E. Plon, Nourrit, 1888), 2:329.

forced to return to more pedestrian maritime pursuits.[16] The revolutionary governments fighting against Spain and Portugal lacked naval power. In a marriage of convenience, ship owners, captains, and seamen in the United States lent their services to the South American rebels. Agents of the revolutionary governments arrived in the United States with commissions signed and sealed by the appropriate authorities, but with the spaces for the ship and captain's names left blank. The agents would deliver commissions to ship owners and captains, who would fill in the missing information and then set sail for the shipping lanes traveled by Iberian merchant vessels. The two primary sponsors of this privateering were the former Spanish province of Buenos Ayres, which declared its independence in 1816 as the United Provinces of South America, and rebels under the leadership of Jose Gervasio Artigas in the Banda Oriental (later known as Uruguay), who were fighting against both the Spanish and Portuguese monarchies.[17] Accordingly, both Spain and Portugal had a strong interest in preventing American privateers from sailing under South American commissions.

The seizure and sale of ships at sea was regulated by the law of prize, under which both regular military vessels and privateers commissioned by a government had authority to capture vessels belonging to nations with which the authorizing power was at war, subject to the constraints of treaties, domestic law, and the law of nations. Generally speaking, captured vessels had to be brought into courts of the authorizing government in order to be formally condemned as a valid prize and then disposed of as the captors saw fit. In practice, however, this did not always happen; at times bad weather, lack of supplies, impatience, or greed would lead the crews sailing prizes to take the captured ship into the nearest friendly or neutral port, oftentimes looking to plunder all salable goods and abandon the vessel itself. Such prizes often ended up in ports in the United States, and therefore within the admiralty jurisdiction of the federal district courts, to be adjudicated by a single judge. Criminal prosecutions of privateers, however, were tried before a jury in the circuit court,

16. On American privateers during the War of 1812, see Jerome R. Garitee, *The Republic's Private Navy: The American Privateering Business as Practiced by Baltimore During the War of 1812* (Middletown: Wesleyan University Press, 1977).

17. For a recent study of these privateers, see Head, "Sailing for Spanish America"; see also Charles C. Griffin, "Privateering from Baltimore During the Spanish–American Wars of Independence," *Maryland Historical Magazine* 35:1 (March 1940): 1–25; and Agustin Beraza, *Los corsarios de Artigas* (Montevideo: Imprenta Nacional, 1949). On Artigas and privateering, see Lauren Benton, "Strange Sovereignty: The Provincia Oriental in the Atlantic World," in *20/10: El Mundo Atlantico y la Modernidad Iberoamericana* (in Spanish, forthcoming 2012).

with a justice of the Supreme Court presiding along with the local district court judge.[18]

For consuls seeking to interdict privateering, private suits in admiralty had several distinct advantages over criminal prosecutions. Admiralty litigants faced a lower burden of proof than the government faced in a criminal case, and the case would be tried before a judge alone, lowering the risk that local sympathy for privateers would affect the outcome. The admiralty actions that are the subject of this article were primarily based on violations of the 1794 neutrality law passed by Congress in the wake of the United States' first experience with foreign privateering.[19] Most notably, the law prohibited the arming or fitting out of any ship to be employed in the service of a foreign state to commit hostilities upon the people or property of a state with which the United States was at peace. Supreme Court cases from the 1790s had established the general principle that restitution was the appropriate remedy for captures made in violation of United States neutrality, and, with only a minor modification in 1797, this statute was in effect at the time the South American privateering crisis came to a head.[20]

II. Problems of Enforcement

A. Interdiction

Although private actions under the courts' admiralty jurisdiction offered consular officials a means of recovering their constituents' property,

18. U.S. Const., Art. III, Sec. 2; Judiciary Act of 1789, sec. 9, 1 Stat. 73; see generally, Garitee, *The Republic's Private Navy*; Henry Wheaton, *A Digest of the Law of Maritime Captures and Prizes* (New York: R. M'Dermut & D.D. Arden, 1815).

19. In response to the outbreak of war between revolutionary France and Great Britain in 1793, the Washington administration issued a neutrality proclamation, stipulating that the United States would not take sides in the conflict. At the same time, however, French emissary Edmond-Charles Genet sought to recruit and arm American mariners and ships to serve as privateers against the British, and instructed French consuls in major ports in the United States to establish prize courts. For the next year the government was embroiled in a controversy over whether citizens who enlisted as privateers could be criminally prosecuted for violating United States neutrality without Congressional action. Passage of the neutrality statute in 1794 resolved this issue. See Harry Ammon, *The Genet Mission* (New York: W.W. Norton, 1973). The federal courts' significant role in this episode is detailed in Castro, *Foreign Affairs and the Constitution*; Sloss, "Judicial Foreign Policy"; and the documents collected in Maeva Marcus and James R. Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789–1800* (New York: Columbia University Press, 1989).

20. Act of June 5, 1794, 1 Stat. 381; and Act of June 14, 1797, 1 Stat. 520. On United States neutrality generally, see Charles G. Fenwick, *The Neutrality Laws of the United States* (Washington, D.C.: Carnegie Endowment for International Peace, 1913).

from early on Iberian diplomats made it abundantly clear that they wanted the federal government to interdict and punish United States privateers. By early 1817, Monroe, as secretary of state to James Madison, had received numerous demands from Don Luis de Onis, the Spanish minister to the United States, that the administration act more vigorously to stop Americans in Baltimore and New York from preparing privateering expeditions against Spanish commerce. Onis asserted that federal officers in eastern seaboard cities—and in Baltimore especially—were failing to perform their legal duties in allowing privateers to enter and leave port. Monroe responded to these entreaties by acknowledging the gravity of the situation but claiming limited ability to stop the privateers.[21]

The problem was not simply one of capacity, however. Monroe assured Onis that he had already asked the relevant federal officials in the cities mentioned to investigate the ambassador's allegations and take action, but because the officers had found no evidence that the persons in question intended to raid Spanish merchant ships, to take the preventative steps Onis requested would be inconsistent with both "the laws of the United-States" and with what was "due to the government of His Catholic Majesty." Sounding what would be a common refrain throughout this episode, Monroe noted that federal officials could only take action within the bounds set by statute and the Constitution. Recognizing this difficulty, the Portuguese minister-plenipotentiary in Washington, José Francisco Correa da Serra, recommended to the Madison administration several changes in the neutrality laws that would make interdiction easier. Although the precise content of Correa da Serra's legislative recommendation is not known, he reminded Monroe of Portuguese neutrality in the War of 1812, and impressed upon his counterpart Portugal's desire that American privateering come to a halt.[22]

President Madison agreed that statutory changes were needed, and subsequently advised Congress that "the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as

21. Monroe to Onis, July 30, 1816, in William R. Manning, ed., *Diplomatic Correspondence of the United States Concerning the Independence of the Latin-American Nations* (New York, Oxford University Press, 1925), 1:36; Onis to Monroe, January 2, 15, and 16, 1817 in *The Case of Great Britain as Laid before the Tribunal of Arbitration* (Washington: Government Printing Office, 1872), 3:167–71; and February 10 and 11, and March 14 and 26, 1817 in *Case of Great Britain*, 3:171–77. Onis's similar complaints about filibustering expeditions being organized in Louisiana dated back to 1815. See, for example, Onis to Monroe, December 30, 1815, in *American State Papers*, 1, *Foreign Relations*, 4:422–423.

22. Monroe to Onis, July 30, 1816, in Manning, *Diplomatic Correspondence*, 1:36; and Richard Beale Davis, "The Abbé Correa in America, 1812–1820," *Transactions of the American Philosophical Society* 45:2 (1955): 105.

a nation at peace."[23] The administration requested legislation requiring that ship owners suspected of fitting out their vessels in order to violate United States neutrality be obliged to post bond guaranteeing that they had no such intent, and empowering federal officers to detain ships "indicating strong presumption of an intended breach of the law." As things currently stood, Monroe explained, lawbreakers could only be punished after the fact, and because of "the difficulty of obtaining the necessary evidence to establish facts on which the law could operate," few prosecutions had been instituted. He specifically suggested that Congress look to similar preventative measures enacted a decade earlier in an attempt to prevent American merchants from trading with France and England.[24]

Introduction of the proposed legislation touched off a fierce debate, one that continued to rage a year later when Congress considered a bill designed to consolidate the extant neutrality statutes. Opponents of the new legislation alleged that it was unconstitutional to allow detention without sufficient evidence, on "mere suspicion," and that granting such powers to "subaltern officials" of the government vested in them dangerously broad authority to harass innocent merchants. Moreover, it was for judges, not federal officers, to determine whether there were adequate grounds for suspicion of criminal intent, by weighing the evidence presented in court by the government.[25] Intermingled with concerns that the enforcement provisions constituted an unconstitutional expansion of executive branch authority were fears that such perversions came at the behest of foreign powers, in furtherance of their *own* political objectives. Opponents hinted darkly that the bill "had its origin in treason and disaffection," instigated by those "devot[ed] to kingly governments and hostil[e] to Republican principles," and they declared that "Spain had no right to expect us to introduce

23. Madison to Congress, December 26, 1816, in *Annals of Congress*, 14th Cong., 2nd Sess., 1079–80. Several years later, Monroe recalled to Adams that Correa da Serra had been the inspiration for the changes to the neutrality law. Monroe to Adams, in *Writings*, 6:147.

24. Monroe to John Forsyth, Chairman of Committee on Foreign Relations, January 6 and 10, 1817, in *Annals of Congress*, 14th Cong., 2nd Sess., 1080–82. On the earlier embargo efforts, see 2 Stat. 499 (1808); Burton Spivak, *Jefferson's English Crisis: Commerce, Embargo, and the Republican Revolution* (Charlottesville: University of Virginia Press, 1979); and Douglas Lamar Jones, "'The Caprice of Juries': The Enforcement of the Jeffersonian Embargo in Massachusetts," *American Journal of Legal History* 24:4 (October 1980): 307–30.

25. *Annals of Congress*, 14th Cong., 2nd Sess., 728–29, 736–37, 750; 15th Cong., 1st Sess., 1412, 1421; "An Act to more effectually to preserve the neutral relations of the United States," March 3, 1817, 3 Stat. 370; and "In addition to the Act for the punishment of certain crimes against the United States, and to repeal the acts therein mentioned," April 20, 1818, 3 Stat. 447.

. . . provisions so much at variance with correct principles." Henry Clay, the speaker of the House and leader of the pro-independence faction, suggested renaming the law "an act for the benefit of His Majesty the King of Spain." In the end, however, the measure passed the House 83 to 62 with the bond and detention provisions included, and it had an easier time in the Senate, suggesting that there was at least a certain amount of political will in Washington to prevent American privateering.[26]

Nonetheless, the Iberians still faced serious difficulties in persuading federal officials to put a stop to the seizures. Onis circulated copies of the neutrality statute to all consuls shortly after its passage. Soon after, the consul in Norfolk, Don Antonio Argote Villalobos, asked William Wirt, the federal district attorney for Virginia, to prevent privateers currently fitting out in that port from leaving. Wirt referred Argote's complaints to Charles Mallory, the Norfolk customs collector, as the official with immediate responsibility for the matter, but he reminded the consul that "[t]he government of the U.S. being one of laws, merely, the officers of that government have no discretion independent of the laws."[27] Mallory had in fact just received orders from the secretary of state, instructing him to investigate two ships recently arrived in Norfolk by looking for evidence of wrongdoing and anything that would "reveal their character."[28] Although Mallory apparently took some action to delay the privateers' departure, he told Argote that he could not prevent ships from leaving without solid evidence of an intent to violate United States neutrality. In response, Argote asserted that such facts were "a matter of public notoriety, known to every body," and astutely queried whether, under the new statute, Mallory was not empowered to act on "just ground of

26. *Annals of Congress*, 14th Cong., 2nd Sess., 726, 746, 753; 15th Cong., 1st Sess., 1421, 142–6; and 14th Cong., 2nd Sess., 205, 770. On general hostility towards privateering in this period, see Nicholas Parrillo, "The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century," *Yale Journal of Law & Humanities* 19:1 (Winter 2007): 1–95.

27. Onis to consuls, March 13, 1817, Virginia Historical Society, Papers of the Spanish Consulate in Norfolk, Virginia, 1795–1846 (hereafter PSC), section 3, box 5, folder 64; Argote to Mallory, April 10, 1817; Argote to Wirt, April 10, 1817, in Manning, *Diplomatic Correspondence*, 3:1935–36; and Wirt to Argote, April 14, 1817, Library of Congress, William Wirt Papers. It is not clear that collectors made use of their expanded powers. Several months after the 1817 statute was passed, the collector of customs in Providence, Rhode Island wrote his Boston counterpart to ask whether it was his practice to take bonds under the act; the answer was no. Thomas Coles to Henry Dearborn, October 13, 1817, NARA Boston, Customs Collectors, Letters Received, Collectors & Others, 1772–1882.

28. Rush to Mallory, March 28, 1817, in case file for *Chacon v. 89 Bales of Cochineal*, Library of Virginia, United States Circuit Court Records (5th Circuit), 1790–1861.

suspicion, without that positive evidence which is only necessary before a court of justice."[29]

Here Mallory replied at length, responding to each point of evidence enumerated by Argote against the privateers by demonstrating how such information could just as easily indicate that their activities were perfectly legal. For example, Argote alleged numerous facts to show that the captain of one of the ships, James Chaytor, was from Baltimore. Mallory, however, found Chaytor's claim to Buenos Ayrean citizenship to be plausible, asking Argote rhetorically: "[H]as a citizen of the United States the right to expatriate himself, and enter into the service of a foreign country?" Although Mallory disclaimed any authority to offer a definitive answer to the question, he cuttingly added that "there can be but little doubt in this country, whatever be the antiquated notions prevailing upon the subject in the old Governments of Europe."[30]

Thus Wirt and Mallory—similarly to officials in Washington—deployed a particular characterization of the American legal system as a means of holding Iberian diplomats at arm's length. Although federal officials certainly took to heart Iberian demands for governmental action, they asserted that the separation of powers and the requirements of due process prevented them from taking the specific steps foreign diplomats requested. In a letter to Onis, Adams later elaborated on the constitutional restrictions on the exercise of state power: "The question, what aggression will in any individual case be deemed piratical is, by the nature of our Institutions, to be determined by the Judicial Department of the Government."[31] The oft-professed fidelity to separation of powers and the rule of law was not the only reason that federal officials in Atlantic seaports failed to prevent privateers from sailing. As the Congressional debate over the neutrality legislation demonstrated, many in the United States supported the revolutionary governments in South America and had little sympathy for the Catholic king of Spain. The Monroe administration's reluctance to act decisively against the privateers was as much a result of domestic politics as it was international relations.

Even had the political will to stop privateering been present in Washington, it is not certain that the results would have been different. As had been demonstrated a decade earlier during the Jeffersonian embargo, the federal government's law-enforcement apparatus was

29. Mallory to Argote, Apr. 11, 1817; Argote to Mallory, April 12, 1817, in Manning, *Diplomatic Correspondence*, 3:1937.

30. Mallory to Argote, April 14, 1817, in Manning, *Diplomatic Correspondence*, 3:1938; on changes in the doctrine of expatriation in this period, see James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), 249–84.

31. Adams to Onis, April 17, 1819, in Manning, *Diplomatic Correspondence*, 1:97.

ill-equipped to prevent persons in the United States from engaging in maritime activities that ran counter to White House foreign policy objectives. There were simply too few personnel to effectively police a coastline over a thousand miles long; at the time, the members of Congress outnumbered the federal district attorneys, marshals, and judges combined. In addition, although in his role as secretary of state Adams often defended governmental inaction against the complaints of Iberian diplomats, in private he accused various Baltimore officials of being sympathetic to the privateers, if not colluding with them outright. In his diary he noted with disgust that customs inspectors accepted gifts from merchants concerned in privateering and smuggling. Adams's ire aside, such collusion must not have come as a surprise; in the nation's port cities, stringent enforcement of federal laws regulating commerce often gave way to a politics of accommodation among merchants and federal officials.[32] In the end, the Atlantic seaboard was simply too porous, geographically and politically, for the federal government to be able to prevent its citizens from fitting out privateer ships.

B. Prosecution

Unable to prevent privateers from sailing out of United States ports, Iberian diplomats ratcheted up the pressure on administration officials to bring the marauders to trial for violations of federal piracy and neutrality statutes. Onis made clear to Monroe that restoration of the captured vessels alone would be insufficient; criminal sanctions were necessary to effectively deter people in the United States from taking up arms against Spain. Not content to let American criminal justice run its own course, Onis inundated the secretary of state with evidence demonstrating that privateers were breaking the law. For his part, Correa da Serra furnished the Madison administration with key evidence implicating Thomas Taylor, the ringleader of a consortium of Baltimore merchants who had outfitted several privateer ships supplied with commissions from the revolutionary government of Buenos Ayres.[33]

32. Diary entry of March 29, 1819, in *Memoirs of John Quincy Adams: comprising portions of his diary from 1795 to 1848* (Philadelphia: J.B. Lippincott & Co, 1874), 4:314. On the "politics of accommodation" at the customhouse, see Gautham Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution" (PhD diss., University of Chicago, 2008).

33. Onis to Monroe, February 10, 1817, in *Case of Great Britain*, 3:185; Onis to Rush, April 4, 1817; Onis to Adams, November 2, 1817; Onis to Adams, June 9, 1818, in Manning, *Diplomatic Correspondence*, 3:1927, 1951, 1967; and Davis, "The Abbé Correa in America," 104–6.

In response to this diplomatic pressure, federal district attorneys along the eastern seaboard instituted criminal prosecutions against a number of suspected privateers. But if either the White House or the Iberians believed that such action would effectively restrain maritime depredations, they were to be disappointed. Initially, the district attorney in Baltimore was unable to obtain an indictment against Thomas Taylor. The government was able to secure indictments in Virginia against several of the crew members of one of his ships, but despite a key legal ruling favorable to the prosecution from Chief Justice John Marshall (presiding in his capacity as a circuit court judge), the jury acquitted the defendants only ten minutes after retiring to deliberate. Why the Virginia jury came to this rapid conclusion is unknown, but during the course of the trial Marshall had acknowledged that the phrasing of the federal piracy statute rendered it uncertain whether it actually prohibited robbery on the high seas; the jury, which was empowered to find law as well as fact in capital cases, was bound to acquit when "either was doubtful."[34]

The outcome was no better when the government finally secured an indictment against Taylor and several of his Baltimore associates. The trial received a tremendous amount of coverage in newspapers all along the East Coast; a letter to a Baltimore paper described it as "altogether one of the most extraordinary … that ever took place in this Republican land."[35] Attorney General William Wirt, who normally only argued cases on behalf of the federal government before the Supreme Court, received a special fee to travel to Baltimore and personally try the case. He also spent a significant amount of time in the fall of 1818 helping the local district attorney prepare for trial, corresponding regularly about the case's progress and at one point providing a detailed legal opinion laying out the strengths and weaknesses of possible indictments under the relevant statutes. Wirt ended up spending so much time on the trial that he neglected his private practice and, by his account, performed his other official duties in a "very slovenly manner."[36]

34. "An act for the Punishment of certain Crimes against the United States," April 30, 1790, 1 Stat. 112; Glenn to Madison, September 7, 1816, in *Annals of Congress*, 14th Cong., 2nd sess., 1084–85; and *United States v. Hutchings*, 2 Wheeler C.C. 543, 26 F. Cas. 440 (C.C. D. Va. 1817).

35. "Important Law Case," *New-York Spectator*, December 1, 1818, 3; and Letter to the Editor, "Commodore Taylor's Case," *Baltimore Patriot*, November 30, 1818, 2.

36. Adams, diary entry of March 29, 1819, in *Memoirs*, 4:314; Glenn to Wirt, October 9 and November 13, 1818, NARA College Park, Records of the Attorney General, Letters Received, Maryland, Private Citizens, 1812–25; Wirt to Glenn, October 12 and November 6 and 9, 1818, NARA College Park, Records of the Attorney General, Letters Sent, microfilm M699; Wirt to Glenn, 1 Op. Att'y Gen. 249 (1818); Wirt to Littleton Waller Tazewell, October 15, 1818, Library of Virginia, Tazewell family papers,

The Monroe Administration's willingness to pay Wirt a special fee to try the case indicates just how serious it was about prosecuting privateers, though there is evidence that Wirt's involvement was also facilitated by a side payment from the Spanish and Portuguese ministers in Washington.[37] The decision to involve the attorney general was likely motivated, in part, by the fact that Taylor and his associates had engaged William Pinkney, the former attorney general and a man many considered to be the leader of the federal bar to defend them. Adams noted in earlier cases that Pinkney, as "standing counsel for all pirates," had "saved all their necks" by "browbeating and domineering over the courts." In later recounting Taylor's trial, he railed that Pinkney dominated the "feeble, inefficient" judges "like a slave-driver over his negroes." Pinkney's talents were apparently decisive with jurors as well; after several days of evidence and argument the Taylor jury acquitted him and his co-defendants without retiring to deliberate, inspiring boisterous rejoicing in the audience. Failure did not sit well in Washington; as Adams bitterly noted in his diary, Wirt "made the public pay him fifteen hundred dollars for losing the causes."[38]

The initial results in the Supreme Court were equally unpromising. While Stoughton, the Boston consul, was filing suit in district court to recover a quantity of gold and silver that had been looted from a Spanish vessel, the circuit court sitting in Boston was considering a piracy indictment against several crew members of the capturing privateer. Facing the same statutory ambiguity Marshall had earlier confronted in Virginia, the circuit court certified several questions to the Supreme Court for final decision, rather than proceed to trial. Writing for the Court, Marshall found that the 1790 piracy statute did not give the federal courts jurisdiction over crimes committed by a foreigner against a foreign person or vessel; Congress had intended to "punish offences against the United States, not offences against the human race."[39] In a fluid maritime context

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1623–930, Box 3, Folder 13; and Wirt to Reverend Rice, February 1, 1822, in John P. Kennedy, *Memoirs of the Life of William Wirt* (Philadelphia: Lea and Blanchard, 1850), 2:135.

37. Elias Glenn to Wirt, November 13, 1818; and [Robert?] Swift to Wirt, December 1, 1818, in NARA College Park, Correspondence of the Attorney General, Letters Received, Maryland Private Citizens, 1812–1825.

38. Adams, diary entry of March 29, 1819, in *Memoirs* 4:314; and *Commercial Advertiser* (New York), December 8, 1818, 2. On Pinkney, see Charles Warren, *A History of the American Bar* (Boston: Little, Brown, and Co., 1913): 382–83.

39. *United States v. Palmer, et al*., indictment, NARA Boston, United States Circuit Court for Massachusetts, Final Record Book (hereafter USCC-MA, FRB), 10:390–91; and *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 612, 631 (1818). Marshall's view was not shared by all his colleagues; Joseph Story, in particular, consistently argued that the United States and other sovereign nations had universal jurisdiction to prosecute and punish pirates under domestic law. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); and Alfred P.

in which the national affiliations of people, vessels, and goods were difficult to establish, the narrowing construction applied by the Court to the piracy statute served to limit its usefulness in dealing with privateering.

More significantly, reversing the position he had taken in the Virginia trial of Taylor's crew, Marshall declared that a revolutionary government need not have secured official recognition from the executive branch in order for the federal courts to grant it belligerent rights; all that was required was that the executive acknowledge that a state of civil war existed. Therefore, Buenos Ayres and other revolutionary governments had the sovereign authority to issue privateering commissions, rendering it far more difficult for Iberian diplomats to argue that the privateers were merely pirates masquerading as patriots. Seizure on the high seas of a Spanish or Portuguese vessel was a presumptively valid exercise of belligerent rights under the laws of war, and the Boston defendants were soon released from custody on a writ of habeas corpus. Although the government did secure convictions against a number of privateers a few years later, the majority of these were for crimes, such as murder on board ship, that were unambiguously contrary to domestic law and the law of nations.[40] Even the Supreme Court acknowledged the "difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the U.S. who take from a State at war with Spain, a commission to cruise against that power."[41]

Iberian representatives were not pleased with these results. Onis accused the federal judiciary of issuing arbitrary decisions, to which Adams pointedly replied instead that "the deficiency has been … in the proofs of the facts which you have stated." Correa da Serra, the Portuguese ambassador, requested that President Monroe consider setting up a special commission to deal with the privateers, because it was "impossible" for them to obtain justice from the courts; if extrajudicial measures were not taken, he threatened, relations between the two countries would sour considerably. Monroe took offense, resenting that a foreign diplomat would cast aspersions on the conduct of the federal judiciary, and Adams instructed the ambassador that appointing such a commission would be consistent with

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Rubin, *The Law of Piracy*, 2nd ed. (Irving-on-Hudson: Transnational Publishers, 1998), 150–58.

40. *United States v. Palmer, et al*, 16 U.S. at 631–35; and "Law Intelligence," *New-Bedford Mercury*, April 24, 1818, 4. The members of one prize crew were convicted for murder after they got drunk celebrating the Fourth of July and threw their captain overboard. *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820); and *The Trial of William Holmes, Thomas Warrington, and Edward Rosewain, on an Indictment for Murder on the High Seas* (Boston: Joseph C. Spear, 1820).

41. *The Bello Corrunes*, 19 U.S. 152, 152–53 (1821).

neither the Constitution "nor with any practice usual among civilized nations."[42] In rebuffing Correa da Serra, then, Adams traded on familiar themes: Federal officers would do everything in their power to vindicate the rights of foreigners, but that power was circumscribed by unassailable principles of American constitutionalism as well as international norms. The administration's hands were tied; diplomatic considerations—no matter how pressing—could not trump legal restraints on the exercise of state power.

III. Going to Court

A. Litigation

If the federal government was unwilling—or unable—to put a stop to American privateering, then Iberian representatives would have to do it themselves. Henry Clay had alluded to this possibility in his opposition to the 1817 neutrality law: If, he said, there were any doubts about whether the original 1794 neutrality statute prohibited participation by citizens of the United States in the South American conflict, that determination should be made by the Supreme Court, an institution to which "the Agent of His Majesty Ferdinand VII knows very well how to go." Clay was correct; shortly after the 1817 statute passed, Stoughton wrote to his agents in Cadiz, assuring them that although the captors of one of the vessels he had recovered in Boston were appealing to the Supreme Court, he had little doubt that the high tribunal would follow the circuit court and affirm the district court's decision.[43]

Stoughton's easy confidence belied the difficulty of his enterprise. Recovering Spanish property in federal courts was complicated and time consuming. Privateers knew that they could not legitimately dispose of cargo in the United States without the captures having been deemed good prize in a court of the sovereign power from which they received their commission, so valuable goods ended up scattered along the eastern seaboard as the captors attempted to secrete their booty into domestic markets by any means available. For example, a hoard of easily liquidated specie found on the merchant ship *Industria Rafaelli* was loaded into the capturing privateer *Congresso* to be brought directly into Baltimore,

42. Adams to Onis, October 31, 1818, in Manning, *Diplomatic Correspondence*, 1:80; Adams to Monroe, August 30, 1820; Monroe to Adams, September 25, 1820; and Adams to Correa da Serra, September 30, 1820, in *Writings*, 7:68, 73.

43. *Annals of Congress*, 15th Cong., 1st Sess., 142 6; Stoughton to the Widow Roberts, May 23, 1817, DJSH vol. 4.

while a skeleton crew was put aboard the *Industria* and purportedly ordered to bring the vessel to Buenos Ayres, where she and her remaining cargo could be legally condemned as a valid prize. The prize crew, however, steered instead for the Maine coast, home to one of the crew members, who went ashore upon their arrival. A few days later he returned with several boats, which proceeded to divest the ship of all its cargo in piecemeal fashion. The crew then abandoned the ship, only to have three members arrested a short time later in Boston. During their voyage to New England they had found additional specie hidden on the ship, and news traveled quickly of ordinary seamen walking around town with thousands of dollars in their pockets.[44]

In order to recover the scattered property, Stoughton instituted at least three actions in the Massachusetts district court: two to recover the specie the crew members had taken from the *Industria* and a third for a quantity of rum that had been unloaded by boat. He also brought two actions in the district court for Maine, where most of the cargo had landed. The smugglers responded by filing actions of their own—against which Stoughton was forced to defend—seeking a salvage award for having "rescued" the rum and some equipment from the disabled and sinking ship. For its part, the government brought civil forfeiture actions against the two boats involved in the smuggling, for violation of the revenue laws; meanwhile, the crew of the United States revenue cutter that interdicted the smugglers pressured Stoughton for a share of the proceeds he would recover, threatening legal action of their own if he did not provide them with "a reasonable compensation" for their exertions. In short, everyone wanted a piece of the action. Nor were the sprawling proceedings restricted to New England; the *Congresso*, the capturing privateer, was libeled by the United States in the federal district court for Maryland, for violations of United States neutrality.[45]

Filing a "libel," as an admiralty claim was called, on behalf of the putative Spanish owners was only the first step Stoughton had to take. Although a foreign consul could claim property on behalf of his nationals

44. *Stoughton v. Sundry specie from Industria Raffaelli*, libel of Stoughton, claim of Diggs, USDC-MA, FRB, 10:95–99, 108–11; and "More of the Spanish Ship," *Newburyport (MA) Herald*, September 16, 1817, 2. These were the criminal defendants in *United States v. Palmer*, 16 U.S. 610, discussed earlier.

45. *Stoughton v. Sundry specie from Industria Raffaelli*; *Stoughton v. 280 Spanish dollars*; *Stoughton v. 42 pipes of rum*, USDC-MA, FRB; *Stoughton v. Three boxes segars*; *Stoughton v. McLellan*, USCC-MA, FRB; *McLellan v. 42 pipes of rum*; *Knights v. Three Anchors*; *United States v. Sloop Abby*; *United States v. Sloop Betsey*, USDC-MA, FRB; Benjamin Trevett to Stoughton, January 18, 1819, DJSBS, DJS Correspondence, 1819; and *United States v. Orb alias Congresso*, USDC-MD, case files 1817–1818.

without specific authorization from the property owners, Stoughton still had to find out who the owners were and get permission to have the eventual proceeds paid out to him. If neither the vessel nor any of its original crew made it into port, Stoughton would have to write to his agents in Spain seeking this information. Additional work was required to gather the evidence necessary to have the property restored. Privateers invariably claimed that, as duly commissioned agents of the sovereign revolutionary governments, the vessels and cargo they captured were legitimate prizes of war, and there were no grounds for a federal court to award restitution to the owners.[46] Although the libels filed by Stoughton and other consuls always dutifully, albeit vaguely, argued that the capture in question violated the law of nations and provisions of the 1795 treaty between Spain and the United States as grounds for restoration, the dispositive legal issue was invariably whether the captors had violated United States neutrality in arming and sailing their ships.

Accordingly, Stoughton and his colleagues took numerous depositions from crew members and others in order to establish that the capturing ship was owned or manned by Americans, or that it had been built, armed, fitted out, or had its equipment augmented in the United States, usually in Baltimore. Sometimes, as in the case of the *Industria*, depositions from the crew were sufficient to establish such facts, although in that case Stoughton's lawyer also questioned the customs collector and the arresting officer in Boston as well as eyewitnesses in Portland regarding the circumstances of the ship's arrival in United States waters. The case file for the *Industria* also includes copies of papers from a proceeding in Maryland in which the district court decreed that the capturing privateer had violated United States neutrality. In fact, the Massachusetts court, recognizing that Baltimore was the hub of privateering activity, ordered that the announcement of Stoughton's suit against the *Industria* be published both there and in Boston. Oftentimes crucial testimony and documents came from locations across the Atlantic world.[47]

Given the complexity and high stakes involved, consular litigants generally hired the best legal talent they could find. Stoughton's primary lawyers were William Sullivan, a state legislator and prominent member of the Massachusetts bar, and George Blake, the federal district attorney for

46. Stoughton to the owners of the brig San Jose, July 9, 1816, DJSH vol. 4; *Stoughton v. Sundry specie from Industria Raffaelli*, claim of Diggs, USDC-MA, FRB, 10:108–11.

47. *Stoughton v. Sundry specie from Industria Raffaelli*, USDC-MA, FRB, 10:145–59; USDC-MA, FRB, 10:100–102; USDC-MA, FRB, 10:159–68; Stoughton to the Widow Roberts (Cadiz), July 9, 1816; and Stoughton to Roig Sabrino (Havana), February 14, 1818, DJSH vol. 4.

Massachusetts from 1801 to 1829.[48] In fact, Iberian representatives regularly engaged government attorneys, in their private capacities, to represent them in federal court; in addition to Blake, the district attorneys for Maryland, Virginia, and South Carolina were on the Spanish payroll during this period.[49] Many of the leading members of the Supreme Court bar—including Wirt, the attorney general—argued cases involving privateer captures.[50] The desire for top-rank legal representation is not surprising, as many of these cases involved huge claims. One privateer took close to $4,000,000 in cargo from only three ships. Another discovered $400,000 of gold and silver in a single captured vessel. In a missive to Adams, Onis estimated one prize to be worth over $1,000,000; another million-dollar prize took four weeks to unload upon its arrival in Buenos Ayres.[51]

Looking at the district court dockets overall, however, what is striking is the number of smaller claims consuls also pressed, where the returns were minimal. In the *Industria* collusive smuggling case discussed earlier, Stoughton not only libeled the major portions of the cargo that landed in Maine, but a smaller portion that had ended up elsewhere. That cargo turned out to be worth less than $5000, and once all the expenses associated with the court-ordered sale were deducted, barely half that was left for the owners to recover. Stoughton also opposed a salvage claim brought by one of the smugglers, who were seeking compensation for having "saved" three anchors and a few other items from the ship before it was lost. This was not simply Stoughton's predilection; the Portuguese consul based in Baltimore libeled a ship and cargo in Maine that ended up recovering little

48. "William Sullivan," *Proceedings of the Massachusetts Historical Society* (Boston: Massachusetts Historical Society, 1840), 2:150–60; William T. Davis, *Bench and Bar of the Commonwealth of Massachusetts* (New York: Da Capo Press, 1974 [Reprint of the 1895 ed. published by Boston History Co., Boston]), 1:436.

49. Pablo Chacon to Robert Stanard, December 12, 1820, PSC, section 11, box 19, folder 82; Statement of legal expenses, June 29, 1818, PSC, section 11, box 19, folder 84; and *Zamorano v. Sundry Goods*, NARA Philadelphia, Records of the United States Circuit Court for Maryland, Appeals Docket, November 1819.

50. *The Divina Pastora*, 17 U.S. (4 Wheat.) 52 (1819); *La Conception*, 19 U.S. (6 Wheat.) 235 (1821); *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152, 169–171 (1821); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 347–48 (1822); *The Arragonte Barcelones*, 20 U.S. (7 Wheat.) 496 (1822); *La Nereyda*, 21 U.S. (8 Wheat.) 108 (1823); *The Monte Allegre*, 22 U.S. (9 Wheat.) 616 (1824); *The Santa Maria*, 23 U.S. (10 Wheat.) 431 (1825); *The Gran Para*, 23 U.S. (10 Wheat.) 497 (1825).

51. For information on the value of prizes taken by Baltimore privateers, see generally Head, "Sailing for Spanish America," 92, 189–97. For the million-dollar vessels, see Onis to John Quincy Adams, November 2, 1817 and June 9, 1818, in Manning, *Diplomatic Correspondence*, 3:1951–1952, 1967–1969; and *Stoughton v. Barnes*, deposition of Peckner, NARA, Admiralty Case Files of the United States District Court for the Southern District of New York, 1790–1842, microfilm M919.

more than $3000 for the owners; the Spanish consul in Virginia sought recovery of property returning little more than $4000.[52]

At times Iberian persistence verged onto vindictiveness. In addition to going after the *Industria*'s cargo and equipment, Stoughton also sought to recover $280 carried into Boston by one of the members of the prize crew before he was caught and put on trial for piracy; it turned out that the money in question was the mariner's originally. Although John Chase, one of Thomas Taylor's Baltimore associates, escaped prosecution in 1818, the Portuguese consul not only successfully sought recovery of the prizes Chase had taken through seven different libel actions, but he later instituted a suit against the privateer captain personally to recover unpaid awards. As a result, Chase—who had captured Spanish property worth millions of dollars in the course of his career—ended up insolvent.[53]

This kind of full-scale legal assault, in which every possible claim was pursued, no matter how insignificant, suggests that litigation was very much a political strategy. Federal courts were the venue through which Iberian representatives pressured privateers and their associates as fully as possible, with significant success. Although it is difficult to determine the final outcomes of a number of the suits instituted, the available evidence indicates that judges routinely restored the captured property to the libeling consuls, on behalf of the owners. In Massachusetts, New York, and Virginia, consuls had almost a perfect record. Even in Baltimore, where public opinion ran strongly in favor of the privateers and various federal officers, including a district court judge, were alleged to have ties to them, consuls won at least seventy-five percent of the time.[54] In the Supreme Court, it was a clean sweep. Oftentimes the captors sought leave to appeal district court decrees awarding the libeled property

52. *Stoughton v. 42 pipes of rum*, USDC-MA, FRB, 11:17–27; *Knights v. Three Anchors*, USDC-MA, FRB, 10:529–31; *Vasques v. The Brig Paqueta de Oporto and Cargo*, NARA Boston, United States District Court for Maine, Final Record Book (hereafter USDC-ME, FRB), 10:11–13; and *Chacon v. Ship Providencia*, NARA Philadelphia, Admiralty Cases of the United States District Court for Virginia, Order book 1811–1819, 292–93.

53. *Stoughton v. 280 Spanish Dollars*, USDC-MA, FRB, 10:509–15; NARA Philadelphia, Minute Book of the District Court for Maryland, January 21, 1823; "Marshal's Sale," *Baltimore Patriot*, October 16, 1822, 3; *Baltimore Patriot*, December 31, 1822, 4; and Head, "Sailing for Spanish America," 196, 207.

54. See, generally, Head, "Sailing for Spanish America," 115–16. On the possible corruption of Baltimore officials, see Adams, diary entry of March 29, 1819, in *Memoirs*, 4:314. Adams did not go as far as a New York paper, which accused the judges who presided over the unsuccessful attempt to try Taylor for piracy of dining with the defendant during the proceedings. *Evening Post* (New York), December 2, 1818, 2.

to the consul, only to abandon the appeal before it was heard by the circuit court.[55]

One key ingredient for consular success was the sheer number of cases brought before the courts. In one of Stoughton's suits, Judge John Davis of federal district court for Massachusetts decreed a minimal salvage award to local fishermen who had saved some of the cargo of a Spanish vessel abandoned by privateers, although the judge acknowledged that in such cases salvage awards were usually "liberal." But owing to "several cases brought before this Court and from occurrences which cannot but have been noticed," he was aware of the privateers' penchant for circumventing admiralty courts through arrangements with local residents. Only two months earlier, Stoughton had been before the court seeking restitution of the property smuggled off the *Industria*. Although in the present case there was no evidence of collusion between the putative salvors and the original captors, the judge restricted the award so as reduce the incentives others might have to collaborate in the future.[56] In short, the court essentially took judicial notice of the "fact" that privateers often smuggled wrongfully captured goods into the United States in cooperation with local residents in United States port towns, and ruled accordingly. Thus, by having repeatedly brought to the court's attention the privateers' illegal behavior—but without any specific evidence of wrongdoing in the present case—Stoughton was able to secure a judge-made rule both beneficial to his private clients and damaging to Spain's political enemies. This was impact litigation of a different kind, however; rather than selectively pursuing certain cases with an eye toward securing a specific doctrinal outcome, Stoughton and his colleagues sought to generate legal momentum for their cause by inundating the federal courts with litigation highlighting the privateers' questionable activities. And it largely worked.

B. Negotiation

Despite this favorable track record, however, consuls appear to have been quite pragmatic in their legal strategies, carefully balancing the potential benefits of legal action against the anticipated costs. In 1819, the Spanish *chargé d'affaires* in Philadelphia ordered Stoughton to Nova Scotia to claim restitution of a vessel captured by a privateer. Having

55. See *Stoughton v. Schooner Nuestra Senora de la Cisa*, USDC-MA, FRB, 11:453; *Stoughton v. Sundry specie from Industria Raffaelli*, USDC-MA, FRB, 10:172; *Diggs v. Stoughton*, USCC-MA, FRB, 12:158; and *Stoughton v. Divina Pastora*, USCC-MA, FRB, 13:123.

56. *Howe et al. v. Brig Economia*, USCC-MA, FRB, 10:61–63.

learned, however, that the vessel had struck some rocks and the cargo had been partly lost, Stoughton, not wanting to waste his time on "an uncertainty," instead wrote to an associate in Halifax, granting him power of attorney to prosecute the claim. Stoughton instructed his correspondent to only pursue the matter if he felt confident that the proceeds would cover all the expenses and leave something for the owners.[57]

Stoughton's caution made sense; legal expenses often took a significant bite out of eventual returns. Cases could take years to fully litigate, and over time costs mounted, especially if the matter went all the way to the Supreme Court. Even when cases were resolved fairly quickly, the costs associated with litigation ate up a significant percentage of the proceeds. The usual procedure was for the court to order the sale of the property in question pending resolution of the case. The marshal of the court would then sell the vessel and goods at auction, and return the proceeds to the court. In one of Stoughton's cases, the goods were sold for close to $25,000, but the net amount returned to the court was less, the marshal having deducted over $5000 for various costs incurred, including $2500 in import duties, $500 for unloading and storing the goods, and $300 for the his personal commission on the sale.[58] Even after the proceeds were finally awarded to the victorious party, court costs were still to be paid. There was also the matter of Stoughton's own commission, which, in theory, was five percent of the net amount recovered, over $1000 in this case. And then there were the lawyers' fees; Stoughton paid Sullivan almost $1000 to shepherd this suit through the lower courts, and Daniel Webster $700 solely for arguing the appeal in the Supreme Court.[59] For more challenging cases, top lawyers could earn a commission on the eventual proceeds; one recovery earned Littleton Tazewell of Virginia nearly $5000. Even minor issues cost money; Stoughton paid William Sullivan $120 simply for filing a claim in an action that was resolved within a week.[60]

57. Stoughton to Stephen W. Deblois, August 31, 1819, DJSH vol. 4.

58. *Stoughton v. Divina Pastora*, marshal's return, USDC-MA, FRB, 9:545.

59. On the standard commission received by consuls in admiralty cases, see statement of W.B. Swett, et al., December 29, 1820, DJSH vol. 4; and account of proceeds from *Chacon v. 89 bales of cochineal*, PSC, section 11, box 19, folder 84. On Sullivan's fees, see *Stoughton v. Divina Pastora*, marshal's return, USDC-MA, FRB, 9:545; Sullivan receipt, January 13, 1819, DJSBS, Don Juan Stoughton Financial Receipts, 1796–1820; and statement of W.B. Swett, et al., December 29, 1820, DJSH vol. 4. On Webster's fees, see Stoughton to Malagamba, December 29, 1818, DJSBS, DJS Correspondence, August to December 1818; and Sullivan receipt, January 13, 1819, DJSBS, DJS Financial Receipts, 1796–1820.

60. Account of proceeds from *Chacon v. 89 bales of cochineal*, PSC, section 11, box 19, folder 84; Sullivan to Stoughton, November 24, 1817, DJSBS, DJS Correspondence, 1817.

Stoughton's reluctance to enter into unprofitable litigation was not, however, motivated solely by his fiduciary obligation to the rightful owners. He was often required to advance the funds needed to cover expenses and could not always rely on the good will of the owners for reimbursement. He learned this lesson the hard way. Being grossly misinformed about the value of one Spanish vessel he had libeled, Stoughton offered the captors $3000 to settle the case; when the vessel was sold by the court for far less he found himself with a deficit, and the owners in Havana, suspecting that he had colluded with the captors in the affair, refused to make good. After Stoughton's death in 1820, his widow was obliged to sue the owners' agent in Boston to recover the money owed. In one case, which Stoughton took all the way to the Supreme Court, the owners only paid him half the usual commission; it was not until his widow obtained testimonials regarding Stoughton's diligence that she secured the remainder. And it was not only private owners who failed to pay what consuls were owed; after Stoughton's death, his widow estimated that she was owed nearly $11,000 by the Spanish government for various expenses Stoughton had incurred in performance of his duties.[61]

Given the potential costs involved in litigation, it is not surprising that Stoughton generally preferred to settle a case, "rather than to continue increasing expenses by moving it from one court to another and run the risk after all delay of losing the suit." In one instance, his decision was shaped by the difficulty his Baltimore counterpart was having in securing evidence to prove that the capturing privateer was owned or had been fitted out in the United States. Upon the recommendation of "two of our most eminent judges of the law" he decided to accept the captors' demand of one third of the property. In another case, he paid the captors $800 to forego an appeal of his victory in the district court, $800 being the precise amount the attorneys on each side estimated it would cost to defend the appeal.[62]

Nor was Stoughton averse to seeking accommodation prior to instituting a suit. In early September 1817, shortly after the *Industria Rafaelli* affair came to light, he sent Blake, the federal district attorney, to Portland to track down and recover the cargo landed there by the smugglers who had colluded with the prize crew. Blake eventually met with the men who had removed the cargo from the vessel, but upon his return,

61. Mrs. Stoughton to James Drake, April 14, 1820 and November 7, 1820; William Sullivan to Mrs. Stoughton, January 1, 1820; Mrs. Stoughton to Don Anduaga, November 1821, DJSH vol. 4; and *Stoughton v. Schooner Emilia*, USDC-MA, FRB, 11:95.

62. Stoughton to James Drake, June 15, 1818; Stoughton to James Stoughton, May 27, 1819; Stoughton to John Bernabeu, May 28, 1819, DJSH vol. 4; and *Davey v. 60 boxes of sugar*, USDC-MA, FRB, 10:340–41.

Stoughton deemed their settlement offer insufficient. Blake subsequently invited the smugglers to Boston to reach an accommodation in person. The smugglers politely declined, even though Blake gave his word that no legal process would be instituted against them during their visit.[63] One can only wonder whether such assurances, coming from a federal government attorney, inspired confidence or apprehension in the recipients, for Blake was not simply a messenger. Prior to contacting the smugglers, he reportedly demanded of every merchant in town that they produce the goods in question, and let it be known that a lawsuit would be instituted against the smugglers if they refused to negotiate a settlement. In fact, just prior to contacting the smugglers, Stoughton had filed three separate libels seeking recovery of different portions of the cargo. Stoughton may have had no qualms about bargaining with ostensible political enemies over the fruits of war, but such negotiations inevitably took place in the shadow of the federal courts.[64]

Stoughton's penchant for settlement was evident even when he was confident of winning a case. Shortly after the circuit court had affirmed an award in the capture of the ship *Divina Pastora*, he wrote to his agents expressing his confidence that the Supreme Court, to which the captors had appealed, would do the same. After all, the district court decree had been affirmed by Justice Story riding circuit, and he, according to Stoughton, "preside[d] at the sittings" in Washington. Nevertheless, the consul was fully prepared to settle the case, as the ship owner was eager to have the affair concluded. But despite Stoughton's belief that the captors had appealed precisely to force a settlement, no offer was forthcoming, and the case proceeded.[65]

As the hearing of the case drew near, Stoughton expressed even greater certainty that he would win. Advancing $700 to Webster to argue the case before the Supreme Court, he wrote to Onis, "augur[ed] the happiest results from [Webster's] well-known zeal and exertions." Perhaps more importantly, in the interim "[n]o event has happened of any political importance to give the case a different aspect than it had" when Justice Story affirmed the district court decree. Even when the Court adjourned the case for

63. *Stoughton v. McLellan*, deposition of Thomas McLellan; deposition of Arthur McLellan, USCC-MA, FRB, 13:178–81, 182–84.

64. *Stoughton v. McLellan*, deposition of Thomas McLellan, USCC-MA, FRB, 13:182–84; *Stoughton v. Sundry specie from Industria Raffaelli*, USDC-MA, FRB, 10:95; *Stoughton v. 42 pipes of rum*, USDC-MA, FRB, 11:17; and *Stoughton v. Three boxes segars*, USDC-ME, FRB, 4:210.

65. Stoughton to the Widow Roberts, May 23, 1817 and June 28, 1817, DJSH vol. 4. It is unclear whether Stoughton, as a Bostonite, had an inflated view of Story's position or whether he was actually an astute observer of the Court's internal dynamics.

another year, Stoughton remained sanguine, his contacts in the capital having assured him there was "little or nothing to fear of a change in the present state of affairs between the two countries." Accordingly, he asked associates in Spain to reassure the owners of the vessel that "the result cannot it is expected prove unfavorable," and requested that they remember all the difficulties he had encountered in litigating the case on their behalf.[66]

Stoughton's sensitivity to political developments, and his eagerness to secure the services of one of the country's greatest oral advocates, may have reflected a shift in his thinking about the purposes of this particular suit. Once the window for amicable settlement had passed, the political implications of the case trumped the private ones, and litigation would proceed irrespective of the financial calculus. His resolve in this case was well warranted. Because the original libel filed in the district court failed to cite federal neutrality law as a basis for deeming the capture illegal, Stoughton's claim for restitution would turn on whether the privateer violated the United States' neutrality as defined by the law of nations; a favorable ruling would broaden the grounds upon which Spanish claimants could assert the illegitimacy of privateer captures at sea.[67] It is therefore unsurprising that Stoughton later told a colleague that the expenses he had incurred in the *Divina Pastora* case "could not be avoided."[68] Pragmatism, it seems, had given way to principle.

If Stoughton's views on the expediency of settlement versus the importance of pursuing cases to a court-determined conclusion were flexible, other consuls may have had a more rigid conception of the goals of consular litigation. Understanding full well the financial calculus Spanish representatives had to undertake, in late 1817 James Chaytor, one of the leading Baltimore privateers, wrote to Pablo Chacon, Stoughton's longtime colleague and now the Spanish consul at Norfolk, asserting that recently arrived evidence from Buenos Ayres would provide incontrovertible proof that a ship Chacon was seeking to recover in Virginia was Chaytor's legitimate prize. But, Chaytor added, "litigious enquiries in all cases, and countries, are tedious, expensive, and presumably

66. Stoughton to Onis, January 24, 1818, DJSH vol. 4; Stoughton to the Widow Roberts, January 23, 1818; Stoughton to Thomas R. Tunis, February 9, 1818; and Stoughton to the Widow Roberts, April 6, 1818, DJSH vol. 4. For a detailed account of Stoughton's efforts, see Perrone, "*Divina Pastora* Prize Case."

67. *Stoughton v. Divina Pastora*, libel, USDC-MA, FRB, 9:510. The Court ultimately dodged this question, finding that because the libel was "too informal and defective . . . to pronounce a final decree on the merits," the case had be remanded to the district court to allow the libel to be amended. *The Divina Pastora*, 17 U.S. at 64–65.

68. Stoughton to the Widow Roberts, March 12, 1818; and Stoughton to James Stoughton, May 27, 1819, DJSH vol. 4.

inconvenient," and this suit, he warned, was "of such a nature, as may be spun out for several years, and in the end, we only find the shell, and not the oyster." Accordingly, he was willing to consider a settlement "in order to terminate an affair that has caused you, sir, as well as myself much trouble."[69]

Chacon's response was polite, but curt: "[T]he relations subsisting between us by reason of my official character impose it upon me as a duty to decline the proposals suggested by you." The consul's invocation of his "official character" suggests that the political nature of the conflict out of which the litigation arose precluded consideration of the sort of pragmatic concerns that often shaped Stoughton's thinking. Granted, it is difficult to know whether Chacon truly felt constrained by his role, or whether he simply was disinclined to consider a settlement because he liked his chances in court, but the evidence suggests that he understood the outcome to be in doubt. Prior to filing the libel he promised his lawyer Tazewell—a personal friend of President Monroe—an unusually large commission, in addition to his usual retainer, because the case involved "a nice legal point," one requiring a definitive answer that only the highest court in the land could give.[70]

C. Outcomes

Chaytor's prediction about the arduous course of litigation in that case was partly correct. Although the suit was not definitively decided for another five years, eventually Chacon won, securing a net return of $40,000 for the owners and a lengthy Supreme Court opinion from Justice Story.[71] As the consul predicted, one of the key issues decided by the Court was whether Chaytor's claim that his vessel was not a privateer, but rather a public armed ship of the government of Buenos Ayres, made a difference with respect to the violation of United States neutrality that Chacon alleged in his libel. As with all the litigation brought by Spanish and Portuguese consuls in the period, in seeking to recover the private property of Spanish subjects, Chacon forced the Court to confront the deep political and legal questions of the era.

69. Chaytor to Chacon, December 10, 1817, PSC, section 11 box 19 folder 83.

70. Chacon to Chaytor, December 15, 1817, PSC, section 11, box 19, folder 82; Chacon to Tazewell, July 26, 1817, PSC, section 11, box 17, folder 57. On Tazewell's friendship with Monroe, see for example the letters in the Library of Congress, Monroe Papers, series 4, box 1, Typescripts, 1795–1830.

71. Account of proceeds from *Chacon v. 89 bales of cochineal*, PSC, section 11, box 19, folder 84.

In order to reach the "nice legal point," however, the Court first had to determine whether the vessel was in fact a public ship. Only a year earlier Story had found that the bona fide sale of a *private* armed ship to a Buenos Ayrean owner had to be established by production of a bill of sale or some similar proof. In contemporaneous cases the Court articulated similar requirements for establishing that a vessel had been validly condemned by a prize court of competent jurisdiction.[72] But to hold *public* ships to the same standard, Story wrote, "would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy." Despite his doubts about the supposed purchase of the vessel by the Buenos Ayres government, proof in the form of a bill of sale was not required.[73]

Story's use of the term "foreign sovereign" to refer to Buenos Ayres is telling. As the Court often noted, formal recognition of the revolutionary governments of South America was a matter for the executive branch, but the Monroe administration was in no hurry to actually do so, for fear of jeopardizing relations with Spain and Portugal. Therefore, it was left to the federal courts to answer the most sensitive diplomatic question of the period: What quantum of sovereignty was to be properly accorded to the rebelling territories in Spain's crumbling American empire? In the failed Virginia prosecution of Taylor's crew members discussed earlier, Marshall held that judicial recognition of belligerent rights could only follow after formal recognition; accordingly, the government of Buenos Ayres "could not be recognized by the court as existing at all" and any privateering commissions issued under Buenos Ayrean authority were illegitimate.[74]

For reasons that remain unclear, however, Marshall soon switched course, and thereafter the Court repeatedly affirmed that an insurgent people in a state of civil war were to be accorded belligerent rights under the laws of war, including the power to issue commissions. But divining the existence of a bona fide civil war was not always easy, and courts were repeatedly obligated to make judgment calls as to whether the issuing authority was of sufficient legitimacy to deserve full belligerent rights. The Court repeatedly held that Buenos Ayres was in a state of civil war with Spain, and therefore had the authority to issue privateering commissions, as did the Republic of Venezuela. But the consuls' lawyers

72. *La Conception*, 19 U.S. at 239; *The Arragonte Barcelones*, 20 U.S. at 518–19; and *La Nereyda*, 21 U.S. at 168–70.

73. *The Santissima Trinidad*, 20 U.S. at 335–36, 349–54.

74. *United States v. Hutchings*, 26 F. Cas. 440.

argued vehemently that judicial recognition should not extend further; otherwise "[e]very minute division of an empire might *per saltum* become a nation, claiming, and asserting, all the prerogatives of free and independent states. These new-fledged, self-constituted, unorganized hordes of people, perhaps only half civilized, might then well assert their claim to sit in the councils of the great family of nations." In some cases the Court agreed, declaring the ostensible Republic of Mexico, for example, to be "a republic of whose existence we know nothing."[75]

In confronting the deep questions of neutrality, sovereignty, and legitimacy raised by consular litigation, the federal courts also had to pass on their own jurisdiction to adjudicate the legitimacy of the high-seas captures at the center of these cases. The general rule in prize cases was that the legitimacy of a capture could only be adjudicated by the tribunals of the capturing nation.[76] Over the protests of the privateers, the Supreme Court repeatedly held, however, that federal courts properly took jurisdiction in these cases pursuant to an exception to the rule; when the capture violated the neutrality of the forum nation.[77] Such prohibitions were often established by treaty between the forum nation and the complaining belligerent, and, indeed, Spanish consuls consistently argued that American privateering violated the terms of the 1795 treaty between the two nations.[78]

In the present context, however, the federal courts consistently found that violations of the 1794 and 1817 congressional statutes alone were sufficient grounds for jurisdiction. Consular litigation in federal courts thus transformed laws aimed at shielding the United States from the havoc of Atlantic warfare into a sword to be wielded by European powers against their rebellious colonial subjects. To be sure, not everyone was comfortable with the manner in which consuls used private litigation as a means of bringing federal government power to bear against the South American revolutionaries. Story, for one, had doubts about the propriety of private parties, rather than the government itself, asserting claims in admiralty on the basis of a violation by the captor of United States neutrality law. But he also recognized that this litigation had become such a commonplace that any limitation on private rights of action available to

75. *The Santissima Trinidad*, 20 U.S. at 337; *The Josefa Segunda*, 18 U.S. (5 Wheat.) 338, 358–59 (1820); *The Gran Para*, 20 U.S. at 480; and *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 149 (1820).

76. *The Estrella*, 17 U.S. (4 Wheat.) 298, 307–09 (1819); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 261, (1816); and *Findlay v. The William*, 9 F. Cas. 57, 60–61 (D. Pa. 1793).

77. *La Nereyda*, 21 U.S. at 166; *The Estrella*, 17 U.S. at 307–09; and *The Divina Pastora*, 17 U.S. at 63–65.

78. *The Bello Corrunes*, 19 U.S. at 171–72; and *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 155 (1795).

consuls in federal tribunals would need to come from Congress, not the Court.[79]

Story's concession is understandable; as he knew perhaps better than anyone, maritime cases constituted a substantial portion of the business of the early federal courts. Not only were such cases regularly argued before the Supreme Court, but the dockets of the lower courts were crowded with admiralty actions, and those brought by Iberian consuls were almost invariably the most complex, lengthy, and expensive proceedings on the courts' dockets.[80] Accordingly, in deciding the status of the vessels and goods caught up in the forces of transatlantic conflict, the courts had to—or chose to—reach issues of a more mundane variety. For example, in the course of the *Santissima Trinidad* opinion, the Court not only laid down or affirmed several principles of law relating to admiralty, prize, and neutrality, but also ruled on the validity of contradicted eyewitness testimony. The *Divina Pastora* case that Stoughton doggedly pursued to Washington ended up being summarily remanded, but not before the Court had clarified the standards for a well-pleaded libel. Other opinions broached questions regarding waiver of claims, the finality of judgments for purposes of appeal, the proper writ required in order for courts to retake custody of contested property, and whether there were implied warranties on judicial sales of rotten tobacco.[81]

To a significant extent, then, consular litigation provided essential grist for the judicial mill of the early American republic. Rather than turning on finely wrought doctrinal argument or a carefully managed climb up the appellate ladder, Iberian consuls achieved results as much through the sheer multiplicity of cases they brought, impacting a range of legal issues. Suits in federal court were a means of bringing the privateering problem to the attention of the national government at a time when appeals to the political branches did little to restrain it. In turning to litigation to reduce the collateral damage to Iberian commerce wrought by the Atlantic wars of revolution, consuls obliged the federal courts to resolve of legal disputes

79. *The Santissima Trinidad*, 20 U.S. at 349–50.

80. Ariel Lavinbuk, "Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Analysis of the Supreme Court's Docket," *Yale Law Journal* 114 (2005): 877–78; USDC-MD, admiralty docket books, 1816–1820; and NARA, Admiralty Case Files of the U.S. District Court for the Southern District of New York, 1790–1842, microfilm M919.

81. *The Santissima Trinidad*, 20 U.S. at 338–40; *The Divina Pastora*, 17 U.S. at 64–65; *The Santa Maria*, 23 U.S. at 443–45; *The Palmyra*, 23 U.S. (10 Wheat.) 502, 503–04 (1825); *The Gran Para*, 23 U.S. at 499–501; and *The Monte Allegre*, 22 U.S. at 643–48.

implicating the United States' highly sensitive relations with its neighbors around the Atlantic World.

Conclusion

The privateering episode did not last long. Within five years of the outbreak of litigation, consuls had largely ceased filing suits in admiralty for restoration of captured property. The explanation for the abatement of privateering in this period is not entirely certain. Undoubtedly, consular success at preventing privateers from enjoying the spoils of their efforts made it difficult to continue. Privateering was a capital-intensive operation, and it was difficult to find financial backing for expeditions when the returns were doubtful. In 1820 one of the major sponsors wrote to an associate: "You do not appear to know how much anxiety I have had on acct. of my fears of suits brought by Spanish claimants, although I have openly pretended to the contrary." In addition, the Baltimore merchant community was especially hard hit by the Panic of 1819; a number of mercantile houses collapsed entirely, and those that survived were in no condition to fund the building and arming of ships of war.[82]

Perhaps more importantly, the Adams–Onis Treaty, which resolved the dispute over the status of Florida and the border between Spanish and United States territory, was ratified in early 1821, and Monroe recognized several of the revolutionary governments in South America shortly thereafter. Thus the major diplomatic concern with which American privateering had intersected had largely been resolved. Although a handful of privateering cases appeared in the federal courts in the remainder of the decade, they no longer had the same high stakes. With the growth of regular navies, privateering as a form of warfare went into a gradual decline over the course of nineteenth century; the only major privateering episode in subsequent American history took place during the Civil War.[83]

So what does this relatively brief episode in the history of early United States foreign relations tell us? Most obviously, that federal courts were a means by which foreign litigants repeatedly sought, and gained, access to American state power. Stonewalled by federal officials and unable to

82. David DeForest to Lynch, Zimmerman and Co., July 2, 1820 and November 9, 1820; and DeForest to William Crawford, August 1, 1820, Yale University, DeForest Papers. A number of privateers, however, continued fighting the Spanish on the high seas, serving as officers in the navies of the revolutionary republics. Head, "Sailing for Spanish America," 118–21, 200–208.

83. On the decline of privateering in the nineteenth century, see Parrillo, "The De-Privatization of American Warfare."

overcome the legal barriers to criminal prosecution, Iberian consuls resorted to private litigation as a means of redress. One way to think about the legal behavior described in this article, then, is as a form of early nineteenth-century lawfare. The Iberian monarchies—being too weak militarily to protect their merchants on the high seas, and too weak politically to compel the United States to put a stop to privateering by its citizens—turned to law as a means of countering their opponents' military activity.[84] The Supreme Court itself clearly recognized the importance of consular litigation in an age where transatlantic political and commercial relations were riven by war and revolution. In a decision affirming the legitimacy of consular representation of private property owners in federal courts, the Court noted that consuls were appointed by foreign sovereigns in order to "watch over the rights and interests of their subjects wherever the pursuits of commerce may draw them or the vicissitudes of human affairs may force them." Given that the United States was "a country where laws govern and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission."

As the Court recognized, however, consuls were not merely transatlantic projections of sovereign authority and their litigation practice was not simply a political strategem; although the consuls were certainly motivated, at least in part, by diplomatic objectives, their lawsuits were fundamentally a form of commercial lawyering. Although a consul's right to file suit on an owner's behalf was unquestioned, his right to receive, "in his national character," the proceeds of libeled property was "a question resting on other principles." In the absence of specific authorization from the rightful owner, as determined by the laws of the country he represented, "such a right would certainly not be recognized." Consuls were the duly authorized representatives of their governments in the United States, but they were also everyday commercial agents, limited in their powers by the agreements they concluded with their principals in Cadiz, Lisbon, Havana, and Recife.[85]

Inhabiting this dual role, consuls were the catalyst for the transformation of quotidian commercial disputes into judicial doctrine regulating the relations between sovereign nations and the rights and obligations enjoyed by governments and their citizens. Consular litigation, although perhaps

84. For a similar perspective on British efforts to oppose French privateering in the 1790s, see Sloss, "Judicial Foreign Policy." On lawfare generally, see Erika J. Myers, "Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War," *American Journal of Criminal Law* 35:2 Spring (2008): 201–40 and the collected essays in *Case Western Reserve Journal of International Law* 43 (2010).

85. *The Bello Corrunes*, 19 U.S. at 168–69.

characterized by the relatively higher political stakes of a struggle over authority and legitimacy in the Iberian empires, was, at bottom, borne of the everyday relationships of transatlantic mercantile exchange. By placing the federal courts at the nexus of war, revolution, and commerce, Iberian consuls insured that the courts would play a significant role in structuring the United States' relationship with its neighbors around the Atlantic, while at the same time the litigation the consuls instituted shaped the development of the courts themselves.