

**RE-RETHINKING THE *PRIZE CASES*: SOME REMARKS IN  
RESPONSE TO PROFESSOR LEE**

STEPHEN I. VLADECK\*

Of course there can be no question that the Civil War is an enormously important event in American history in general, in American constitutional history in particular, and in the history of American constitutional foreign relations law, at the most specific. I think that is just axiomatic and needn't detain us long.

And of course the *Prize Cases*<sup>1</sup> was a really important decision. And I think Tom's paper does more than his remarks did to really underscore why it was such an important case.<sup>2</sup> Tom mentioned that the Court divided five to four. And, indeed, he says that the disagreement wasn't actually that major. The nine Justices all agreed that the blockade was legal. They just disagreed about *why* the blockade was legal. And this, I think, is where the consequences matter.

Had the majority recognized (as the dissenters wanted) that the blockade was legal because the government had authority to institute the blockade under international law, that would've meant that the Supreme Court was lending its imprimatur to the notion that the Civil War was a "real" war—that it was a war between sovereign nation-states. And if you were the Lincoln Administration in the early winter of 1863, the thing you feared the most was Britain and France diplomatically recognizing the South; it was Britain and France starting to send supplies to the South; it was Britain and France potentially even coming into the war on the side of the South. And until Gettysburg and Vicksburg, victories that came for the North after the *Prize Cases* was decided, this was still a very serious possibility—and one that scared the bejesus out of Seward and Lincoln, and the rest of Lincoln's Cabinet.

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\* Associate Professor, American University Washington College of Law. This response is a transcription of the remarks Professor Vladeck made in response to Professor Thomas H. Lee's presentation at the *Saint Louis University Law Journal* Symposium on The Use and Misuse of History in U.S. Foreign Relations Law. Audio and video recordings of the participants' contributions to the Symposium are available at <http://law.slu.edu/conf/history/schedule.html#contenttop>.

1. 67 U.S. (2 Black) 635 (1863).

2. See Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53 (2008).

So the *Prize Cases* was decided in this context where the Court had to walk this incredibly delicate line between, on the one hand, unanimously believing that Lincoln *did* have the legal authority to institute the blockade, and on the other hand, not wanting to issue a decision that could've actually undermined the blockade and undermined the theory on which Lincoln was fighting the war. On that reading, it's easy to see why the *Prize Cases* was so enormously important, too.

The question for today, though, is whether the *Prize Cases* is an important part of our understanding of the Civil War and foreign relations law. And here is where I think I start to part company with Tom. Because as important as I think the decision in the *Prize Cases* is, and as important as the Civil War is, I'm not so sure how important they are together.

Let me start with Tom's take-away points. Take-away point number one: that all three branches of the federal government were complicit during the Civil War in fairly radical changes to the laws of war.<sup>3</sup> I think that's right, and it's hard to dispute. I'm not so sure, though, that the *Prize Cases* is an important moment in this narrative. As I mentioned before, there's already legal wrangling over the nature of the war, including a fascinating decision by the D.C. Circuit in 1861 called *The Tropic Wind*,<sup>4</sup> where the court is already moving toward this new, different conception of the war. There's also the familiar argument that things had already changed before the Civil War—i.e., that the Crimean War had already had a profound impact on the most advanced scholars' understanding of the international laws of war. And the Crimean War was in the mid-1850s. So I think the *Prize Cases* is a reflection of this trend, rather than the moment that we can point to as the turning point.

The second point is, I think, actually the most important—and also the most controversial: the question of executive deference.<sup>5</sup> We might also understand this as the key question in the *Prize Cases*, i.e., the source of Lincoln's power to impose the blockade. There are a couple of different views of this issue. Tom's remarks suggest his reading of the decision, which I think is a fairly standard reading, namely that the court saw the President's power to impose the blockade as coming mostly from his inherent constitutional authority—as coming from some idea that as Commander in Chief, it's his job in a crisis situation to step in and assert himself.

As Tom knows (and as some of you know), I have a slightly different take on this issue. I've written in the past, and I continue to believe, that there's a passage in the *Prize Cases* that we, although not Tom, tend to leave out of our discussion of the decision, which is the role of these two bizarre little statutes

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3. See *id.* at 56–57, 70–71.

4. *United States v. The Tropic Wind*, 28 F. Cas. 218 (C.C.D.D.C. 1861) (No. 16,541a).

5. Lee, *supra* note 2, at 68–71.

from 1795 and 1807, the so-called “Insurrection” or “Militia Acts.”<sup>6</sup> Now, what’s weird about the *Prize Cases* is how Grier’s majority opinion dances around whether it’s the Constitution that’s doing the work, whether it’s the statutes that are doing the work, or whether it’s international law that’s doing the work.

We’re not really historians. Historians would yell at us if we called ourselves historians. But, as legal-academic historians, we have this problem, which is that the opinion could be plausibly read as resting on any of these theories. At bottom, it’s an example of not the most articulate craftsmanship. So what I suggested in the paper I wrote way back when, was that the statutes actually are invoked by the majority as a delegation of authority to the President—as saying that, when there’s an insurrection, when there’s an uprising, there is a delegation of authority to the President to deal with the crisis, to figure out how to put it down, and to take those measures necessary to suppress the rebellion.<sup>7</sup>

Now, Tom’s response in this paper, which I think is a very important response, is that such authority wouldn’t necessarily extend to dealing with neutral shipping—that it might empower the President to take measures against the Confederates, but it may not actually empower him to take measures against French and English shipping.<sup>8</sup> I think that’s a hard question, for it begs the question of whether, when Congress gives the President the power to suppress an insurrection, he is limited to only dealing with the insurrectors. I think that’s a hard argument, but we could have a longer debate about it.

On the broader question of whether the *Prize Cases* recognizes this broad executive deference to decide which measures the President can and cannot take in a crisis situation, I think it’s really important to ask where that discretion is coming from. Is it the Constitution that’s delegating that discretion? Is it these bizarre little statutes that are delegating that discretion? Is it international law that is delegating that discretion?

Now, it seems to be clear from the *Prize Cases* that the answer is not the last one—that the authority to impose the blockade is not coming strictly from international law—because that’s what the dissent says.<sup>9</sup> In other words, Justice Nelson’s dissent says the only way President Lincoln could impose the blockade is under international law in a real war. And so, because we haven’t declared war, and there isn’t a formal state of war, Lincoln didn’t have the

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6. See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004) (citing Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331–335 (2006)) and Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (current version at 10 U.S.C. §§ 331–335 (2006))).

7. *Id.* at 177–80.

8. Lee, *supra* note 2, at 63–64.

9. See *The Prize Cases*, 67 U.S. (2 Black) 635, 688–90 (1863) (Nelson, J., dissenting).

authority to impose the blockade. Or at least, he didn't have the authority to do it without a declaration of war.

So we have this debate, and I'm totally willing to accept that there is a debate out there about whether Lincoln's authority to impose a blockade came from the Constitution or from the statutes. Ultimately, the post-*Youngstown*<sup>10</sup> answer is we don't have to answer that question. The post-*Youngstown* answer is that this is category one of the framework suggested by Justice Jackson's concurrence.<sup>11</sup> And so, we don't know which source of authority was key, but the branches were acting together, so we're fine.

Which leads me, ultimately, to one side note and then a segue. The statutes on which the Court at least partially relied in the *Prize Cases* were also believed at the time to be the source of the President's authority to recognize martial law. So there's actually a fascinating opinion by Attorney General Caleb Cushing in 1857 that says a lot of what Justice Grier says about the President's power to recognize that the situation on the ground is a state of war.<sup>12</sup> Cushing writes an opinion about martial law that says martial law is this thing that happens. The President doesn't declare martial law; he just recognizes that a state of martial law exists. And again, Cushing says the President's power to do that—the President's power to make this recognition, and to move along, and to respond—comes from these obscure statutes.<sup>13</sup>

So if one reads Justice Grier as trying to be consistent with Cushing (and I'm not trying to extol the virtues of Caleb Cushing as an Attorney General), then we come back to this notion that the real question is, where is the discretion coming from? This leads to Tom's third big point. If we're in category one, to use Justice Jackson's taxonomy, then the only question is, are there any limits on the government's power when the political branches are acting in concert? This is where Tom raises the potentially disturbing possibility that the *Prize Cases* is an example of the Supreme Court using international law to override constitutional rights.<sup>14</sup> I want to suggest that I don't quite think that's right.

There is this body of law called the "enemy property doctrine." The enemy property doctrine centers on a fairly uncontroversial idea, which is that you cannot bring a takings claim if your enemy property is destroyed during wartime. So if the Army Air Force bombed a German Messerschmitt plant during World War II, the owners of the plant cannot sue the United States in federal court for taking their property. It gets messier at the margins, but for our purposes, what bears emphasizing is that the *Prize Cases* is actually not the

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10. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

11. *Id.* at 635–37 (Jackson, J., concurring).

12. *Martial Law*, 8 Op. Att'y Gen. 365, 374 (1857).

13. *See id.*; *see also* *Insurrection in a State*, 8 Op. Att'y Gen. 8, 11–15 (1856).

14. *Lee, supra* note 2, at 65–66.

most important Civil War case when it comes to enemy property. The most important Civil War case when it comes to enemy property is a case the Supreme Court decides way after the Civil War in 1887 called *United States v. Pacific Railroad*.<sup>15</sup> In *Pacific Railroad*, the Union Army destroys all of these railroad bridges around St. Louis to cut off the advance of the Confederate troops. And so after the war, the government rebuilds the bridges, and then sends the Pacific Railroad the bill. They say, “Well, these are your bridges. You should pay for them.” So there’s a fight about who’s liable to whom for the destruction of railroad bridges by the Union Army in advance of the Confederate march on St. Louis in 1864—and the Supreme Court ultimately says: Nobody.<sup>16</sup>

The modern enemy property doctrine is a bit of a mess, but it’s alive and well. For proof, we need look no further than a fascinating Federal Circuit decision from 2004 about Bill Clinton’s destruction of a Sudanese pharmaceutical plant in 1998, where the Federal Circuit says that President Clinton’s determination that the pharmaceutical plant is enemy property is not reviewable by the courts.<sup>17</sup> Getting back to Tom’s paper, though, I don’t mean to suggest that Tom isn’t right that enemy property is an important concept that emerges from the Civil War, and the notion that enemy property might actually trump constitutional rights that we thought we had.<sup>18</sup> I’m just not sure that the *Prize Cases* is the best example for that, especially compared to *Pacific Railroad* and the state of the enemy property doctrine today. As I’ve said, I think there are important developments taking place during this period, but maybe the *Prize Cases* isn’t the best example.

I’ve spent my time thus far talking about why I think the *Prize Cases* may not be such a big deal, at least for our topic today. So, why is the Civil War nevertheless so important? Let me give you three quick thoughts and then I’ll sit down. Big point number one: I think it cannot be overemphasized how significant the Civil War is in the growth of Congress’s power. David Currie, in the last law review article he published before he passed away, wrote about how it is during the Civil War that Congress starts embarking on legislative programs (many of which had nothing to do with the war) that were constitutionally controversial before the Civil War.<sup>19</sup> Congress creates a Department of Agriculture during the Civil War. Congress passes the Morrill Land Grant Act (which is responsible for most of the Big Ten) during the Civil War. Congress creates a national currency. Congress creates national banks.

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15. 120 U.S. 227 (1887).

16. *See id.* at 239–40.

17. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1369 (Fed. Cir. 2004).

18. *See Lee, supra* note 2, at 65–66.

19. *See* David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131 (2006).

All these things had been hugely controversial before the Civil War, yet all of a sudden, Congress enacts them, often without serious debate.

Why? Well, the opposition, for the most part, wasn't there. Now that has a huge impact on domestic policy, but I think it also has a long-term trickle-down effect when it comes to separation of powers questions across the board. It is because Congress is so empowered during the Civil War that we see these dramatic conflicts between Congress and President Johnson during Reconstruction. Congress is able to assert itself, and ultimately, I think, wins in the short term, only to lose in the long term in what is still one of the great, long-running fights between Congress and the President in American history. So that's point number one. Congress becomes a lot more powerful during the Civil War. And I think that has enormous ramifications going forward for the relationship between the political branches in foreign relations law.

Point number two, and this Tom *does* allude to in his paper, and I would encourage him to expand upon this: the Civil War is really at the heart of modern international humanitarian law.<sup>20</sup> If you reverse engineer the Geneva Conventions, they really start in the Lieber Code.<sup>21</sup> And the Lieber Code was a series of orders written out by Dr. Francis Lieber, the president of Columbia University, who convinced President Lincoln to adopt them. Lieber writes what is basically the basis for modern international humanitarian law, and for the most part, we followed it. Not because we had to. Not because there was some international law rule that we had to. Not because there was a constitutional reason to. But because Lincoln chose to. So there was sort of a moral imperative argument here. And maybe there's also an argument there were good policy reasons, too.

And this brings me to my last point. Part of why the Civil War is so important to us today is because, of all the conflicts that we've fought in American History, it is unique in one very important way: the historian James Garfield Randall refers to this as the dual theory of the Civil War.<sup>22</sup> In one breath, the Union's position on the Civil War is that it was a real war on the ground for purposes of belligerent status, but it was a rebellion/insurrection/something else for purposes of sovereignty. So the dual theory of the war was: we'll afford belligerent rights to the combatants, but not to the country. And this allowed the Union to both be humanitarian on the ground

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20. See Lee, *supra* note 2, at 59.

21. See General Order No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* 2 FRANCIS LIEBER, THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER: CONTRIBUTIONS TO POLITICAL SCIENCE 245, 247-74 (Phila., J.B. Lippincott & Co. 1881).

22. See JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 69-73 (rev. ed., Univ. of Ill. Press 1964) (1926).

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and to avoid the foreign-policy debacle that would have followed if they'd formally opened the door to the South being recognized as a country.

Why is this dual theory so important in going forward? Well, it shouldn't take too much convincing to suggest to you that we are also familiar today with a conflict where we see an argument that a conflict is a traditional armed conflict in some places, but is not actually a true international armed conflict when it comes to the interactions among the belligerents. And so I think there's a lot to be learned from the Civil War. I think Tom has written a great paper. I think the *Prize Cases* is also a great case. I think we just need to be careful not to throw it all in and read too much out of points that are open to historical question.

Thank you very much.

