

# THE CONSTITUTION AND THE LAWS OF WAR DURING THE CIVIL WAR

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## INTRODUCTION

In the courts and legal academy, interest in the Civil War has increased greatly in the last decade, and it is not hard to understand why. The 9/11 attacks were by far the most spectacular and deadly military attacks on the mainland United States since the Civil War. Both the conflict against al Qaeda and the Civil War were untraditional; in both, it was contested whether they amounted to “war” in the sense used in the Constitution and public international law, and what effect that had on government powers and individual rights. Lines between combatants and noncombatants were blurry in both conflicts, often intentionally so. Because significant aspects of both conflicts occurred on U.S. soil and involved American citizens (the Civil War much more so, obviously), the federal courts were from the outset asked to rule on the legality of executive and congressional actions.

The Supreme Court has issued four important decisions regarding the war on terror: *Hamdi v. Rumsfeld*,<sup>1</sup> *Rasul v. Bush*,<sup>2</sup> *Hamdan v. Rumsfeld*,<sup>3</sup> and *Boumediene v. Bush*.<sup>4</sup> In all four, the Court found and

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1 542 U.S. 507 (2004) (upholding military detention in the United States of a U.S. citizen captured in Afghanistan fighting for the Taliban because Congress had authorized it, but finding that the Due Process Clause required more procedural protections than the military had granted to date).

2 542 U.S. 466 (2004) (holding, contrary to its previous consideration of the statute, that Congress’s general habeas corpus act gave U.S. courts jurisdiction to entertain habeas petitions from noncitizens detained outside their territorial jurisdiction—here, persons held at the Guantanamo Bay, Cuba, U.S. military facility—as unlawful enemy combatants).

3 548 U.S. 557 (2006) (holding that the military commission trial of the man alleged to have been Osama bin Laden’s bodyguard and driver violated U.S. statutes requiring substantial equivalence of procedure in military commissions and courts-martial and requiring adherence to the international laws of war).

enforced novel constitutional, statutory, or international rights for alleged terrorist enemies of the United States. In all four, the Justices relied on precedents and authorities from the Civil War and engaged in detailed debate about their meaning. The scholarly literature about war-on-terror legal issues is rife with references to Civil War precedents. Two which have been very prominent in the post-9/11 debates are the Supreme Court's decisions in the *Prize Cases*<sup>5</sup> and *Ex parte Milligan*.<sup>6</sup> The former held that President Lincoln had the authority to invoke belligerent rights akin to those in international wars—that is, the rights and powers that the laws of war allow sovereign nations to use in their mutual conflicts—to blockade the ports of seceded states in the spring of 1861 against Confederate and neutral shipping, without Congress having first declared or otherwise noticed the beginning of a war between the states.<sup>7</sup> (Enemy vessels or cargo seized validly under the international laws of war were referred to as “prizes” of war, because they generally accrued to the financial benefit of the captors—hence the “*Prize Cases*.”) The Court rejected claims by U.S. citizens resident in Virginia that individual constitutional rights prohibited the seizure of their property; the Court held that, war existing *de facto*, the U.S. government could treat them as military enemies without any rights because they resided in enemy territory.<sup>8</sup> The *Prize Cases* featured prominently in Justice Thomas's dissents in both *Hamdi* and *Hamdan*, and in internal memoranda of the Bush Administration's Department of Justice—said to stand for the proposition that the President has illimitable constitutional power to choose how to respond to attacks on the United States.<sup>9</sup>

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4 553 U.S. 723 (2008) (holding that Congress's removal of jurisdiction over habeas petitions of noncitizens detained at Guantanamo as unlawful enemy combatants was an unconstitutional deprivation of the right of access to the writ). For more on these four cases, see Andrew Kent, *Supreme Court Holds That Noncitizens Detained at Guantanamo Have a Constitutional Right to Habeas Corpus Review by Federal Civilian Courts*, AM. SOC'Y INT'L L. INSIGHTS, June 20, 2008, <http://www.asil.org/insights080620.cfm>.

5 67 U.S. (2 Black) 635 (1863).

6 71 U.S. (4 Wall.) 2 (1866).

7 See *Prize Cases*, 67 U.S. (2 Black) at 668–71.

8 See *id.* at 672–74, 680.

9 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 684 (2006) (Thomas, J., dissenting); *Hamdi v. Rumsfeld*, 542 U.S. 507, 581, 584, 588 (2004) (Thomas, J., dissenting); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001), *available at* <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf>; Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel & Robert J. Delahunty, Special Counsel, Re: The President's Constitutional Authority

The second case, *Milligan*, held unconstitutional the military commission trial of an Indiana resident, not enrolled in the Confederate armed forces, who was accused of plotting in Indiana to attack federal facilities to steal weapons and liberate Confederate prisoners of war.<sup>10</sup> In a reversal of its posture in the *Prize Cases*, the Court rejected the Executive's claim that the laws of war overrode any otherwise applicable individual constitutional rights and allowed military jurisdiction over Milligan and his coconspirators. The meaning and contemporary precedential value of *Milligan* was extensively debated in *Hamdi*.<sup>11</sup> Justice Kennedy relied on it in his opinion for the Court in *Boumediene* and his important concurrences in *Hamdan* and *Rasul*.<sup>12</sup> *Milligan* and its sweeping rhetoric—"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances"<sup>13</sup>—has been repeatedly invoked in recent scholarship to show the almost self-evident unconstitutionality of post-9/11 national security policies of the Executive and Congress. Another Civil War-era legal authority which has received extensive attention in post-9/11 litigation and scholarship is the Union Army's codification and applications of the international laws of war.<sup>14</sup>

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to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm>.

10 *Milligan*, 71 U.S. (4 Wall.) at 118–31.

11 See *Hamdi*, 542 U.S. at 521–23, 530 (plurality opinion of O'Connor, J.); *id.* at 566–68, 570–72 (Scalia, J., dissenting); *id.* at 584–85 (Thomas, J., dissenting).

12 See *Boumediene v. Bush*, 553 U.S. 723, 769, 794 (2008); *Hamdan*, 548 U.S. at 645 (Kennedy, J., concurring in part); *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring in the judgment).

13 *Milligan*, 71 U.S. (4 Wall.) at 120–21.

14 An authoritative source for the Army's interpretation of the laws of war is the treatise, first published in 1886, by the assistant judge advocate of the Army, Colonel William Winthrop, which excerpted and commented on military orders and legal opinions by the Army's lawyers during the war. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (Washington, D.C., W.H. Morrison 1886) (two volumes). Winthrop was cited over thirty times by the Justices in the four post-9/11 war-on-terror cases. Another important source of the Civil War military's views of the laws of war is the so-called Lieber Code. Issued in 1863 as General Orders No. 100, this codification of the laws of war for the Union Army was drafted by Francis Lieber (a Columbia University professor and influential pro-Union publicist), reviewed by a board of Army officers, and approved by President Lincoln. See General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (Washington, D.C., Gov't Printing Office 1898), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Instructions-gov-armies.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf). The Lieber Code was cited in the two most important opinions in *Hamdi*,

With all this attention to legal precedents from the Civil War, one might expect that their meaning and significance would by now be well understood. But the opposite is the case. Contemporary courts and commentators generally have at best incomplete, and at worst fundamentally misconceived, views about war powers doctrines of the Civil War era.

In contrast with the Supreme Court's small output of war-on-terror decisions, the Court during and after the Civil War decided over 300 cases arising from the war. Each decision was a small part of a vast and complicated series of legal debates that ended up spanning decades. Detailed debate about the legality of war measures of the U.S. government was a daily occurrence in Congress, the administration, and the press before the Confederates had ever fired on Fort Sumter. Once Lincoln initiated the Union's military responses in April 1861, the volume and intensity of debate increased exponentially and lower federal courts became involved. By March 1863, when the *Prize Cases* came down, the legality of the blockade had been thoroughly mooted for two solid years and upheld in Congress, the lower federal courts, and the most authoritative northern journals and papers. By late 1866, when *Milligan* was decided, questions about the jurisdiction of military commissions over U.S. citizens had been front-page news for over five years. Understanding *Milligan*, the *Prize Cases*, and other war powers decisions of that era requires a great deal of background knowledge about legal and policy debates arising from the war. They have proved to be quite difficult to understand for modern readers.

The past is a foreign country, as the saying goes. And the relevant past, knowledge of which allows one to understand *Milligan*, the *Prize Cases*, and the rest of the Court's corpus of work about the war, is truly a *terra incognita*. Both decisions involved the interaction of the international laws of war, the constitutional rights of individuals, the constitutional war powers of the U.S. government, and the jurisdiction of federal courts. Conventional understandings today about these legal regimes and their mutual interactions often bear little relation to the Civil War generation's.

Today, a judicially enforced Constitution is seen as a kind of universal providence. The Supreme Court recognized that the 9/11 attacks and Congress's Authorization for the Use of Military Force put the United States in a state of "war" against al Qaeda, the Taliban, and

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is discussed frequently in recent legal scholarship, and has been lauded in the popular press as "Lincoln's laws of war" that "Bush attempted to destroy." John Fabian Witt, *Lincoln's Laws of War*, SLATE, Feb. 11, 2009, <http://www.slate.com/id/2210918>.

affiliated groups and individuals.<sup>15</sup> In *Hamdan*, the Court even bound the U.S. government to comply in this conflict with so-called Common Article 3 of the Geneva Conventions of 1949.<sup>16</sup> Notwithstanding, the Supreme Court held that even these military enemies of the United States—who it had already protected by at least some parts of the international laws of war—have a U.S. constitutional right to invoke the habeas jurisdiction of federal courts to challenge the constitutionality of their detention or trial by the U.S. military.<sup>17</sup> Today the clear trend in the Court and legal academy is “globalist”—viewing the reach of the Constitution’s protection of individuals as unaffected by geography, citizenship, or hostility to the United States<sup>18</sup> and construing the document as if it were an international human rights instrument.<sup>19</sup> The Bush Administration’s claims that federal courts lacked jurisdiction to hear habeas cases filed by noncitizens detained at Guantanamo Bay as military enemies and that these detainees lacked constitutional rights because of their presence outside the sovereign territory of the United States were considered shocking and even “un-American.”<sup>20</sup> The very words of condemnation used by critics of these

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15 See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)); *Hamdan*, 548 U.S. at 593, 599 n.31.

16 See *Hamdan*, 548 U.S. at 629–30. Common Article 3, which provides certain baseline humanitarian protections in “armed conflict[s] not of an international character,” is “common” to all four Geneva Conventions of 1949. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

17 See *Boumediene*, 553 U.S. at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) (“[A]bsent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”); *Ex parte Quirin*, 317 U.S. 1, 24–25 (1942) (“[The Government] insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President’s Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. [But] neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”).

18 See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 469 (2007).

19 See Eric Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP CT. REV. 23, 33–34.

20 See *Countdown with Keith Olberman* (MSNBC television broadcast June 22, 2007) (statement of Prof. Neal Katyal, *Hamdan*’s attorney), transcript available at <http://www.msnbc.msn.com/id/19415786> (“I mean, the administration’s argument is that Guantanamo is an [sic] legal black hole where they can do whatever they want to those people. That’s a fundamentally reprehensible idea. That’s why you know,

legal claims—the administration was attempting to construct a “‘legal black hole’”<sup>21</sup>—suggest the depth of the assumption of access for all to judicially enforced constitutional rights. Given this modern assumption, it is natural to read *Milligan’s* grandiose description of a universal Constitution<sup>22</sup> as confirmation that the Court of the Civil War era had the same views.

But that would be a mistake. The Civil War Court’s true view of the scope of the Constitution in wartime was much more accurately described by Charles Sumner, the influential abolitionist and “radical” U.S. Senator from Massachusetts, than by *Milligan’s* famous rhetoric. In 1861 and 1862, building on earlier speeches given by his friend and mentor John Quincy Adams—Adams had explained to startled southerners how slavery could lawfully be destroyed by Congress’s exercise of belligerent rights during wartime<sup>23</sup>—Sumner expounded a theory about the operation of the Constitution and international law in times of peace and war on the rights of individuals. According to Sumner, “[r]ebels in arms are public enemies, who can claim no safeguard from the Constitution, and they may be pursued and con-

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those noted liberals, Colin Powell, Condoleezza Rice, the secretary of defense, Roberto—you know, Robert Gates, are saying, Close Guantanamo now, because that is really fundamentally un-American to say, These people have no rights whatsoever, being held at Guantanamo.”).

21 Kate Zernike, *McCain and Obama Split on Justices’ Ruling*, N.Y. TIMES, June 13, 2008, at A23 (quoting Sen. Barack Obama).

22 *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”).

23 In 1836 Adams spoke in the House of Representatives:

[T]here are two classes of powers vested by the constitution of the United States in their Congress and executive government: the powers to be exercised in time of peace, and the powers incidental to war . . . [T]he powers of peace are limited by provisions within the body of the constitution itself. . . . [T]he powers of war are limited and regulated only by the laws and usages of nations.

*J. Q. Adams’ Speech on the Texan and Indian Wars and Slavery*, 6 LIBERATOR (Boston) 97 (1836). The speech was widely reprinted. See, e.g., *Speech of John Quincy Adams*, NAT’L ENQUIRER (Phila.), Aug. 3, 1836, at 1. On other occasions, Adams again explained to his southern colleagues that while in peacetime Congress lacked authority to limit or abolish slavery in the states, during a foreign invasion, a large-scale slave insurrection, or a “civil war,” the federal government or an invading foreign government could, under its “war power,” and “according to the laws of war,” emancipate slaves in certain circumstances as a war measure. John Quincy Adams, *Remarks in the House of Representatives* (April 14–15, 1842), reprinted in THE ABOLITION OF SLAVERY 3, 4 (William Lloyd Garrison ed., Boston, R.F. Wallcut 1861).

quered according to the rights of war,”<sup>24</sup> that is, the international laws of war. “[T]he Constitution is made for friends who acknowledge it, and not for enemies who disavow it; and it is made for a state of a peace, and not for the fearful exigencies of war,” Senator Sumner explained.<sup>25</sup> When Congress and the President invoked their constitutional power to wage war, the U.S. government’s actions were, he said, subject to “no limitation except the rights of war.”<sup>26</sup>

Note Sumner’s suggestion that the international laws of war in some way displace constitutional limitations on government power when applied to wartime enemies. The Court in *Milligan* seemingly scoffed at this idea, rejecting the government’s assertion that military jurisdiction was proper under the “laws and usages of war” because Milligan and his coconspirators had allegedly plotted to attack U.S. Army facilities in Indiana, a loyal state threatened by Confederate guerillas from Kentucky and elsewhere and its own home-grown traitors:

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.<sup>27</sup>

In this passage *Milligan* seems to speak just of residents of the loyal states of the Union having an immunity from being subject to the laws of war. But the Court elsewhere in *Milligan* seems eager to emphasize the Constitution “covers with the shield of its protection *all* classes of men, at *all* times, and under *all* circumstances.”<sup>28</sup> And yet I maintain that the Court’s true view in Civil War cases was much closer to Sumner’s than what is suggested by these passages in *Milligan*.

To read *Milligan* but understand that the Court accepted most of Sumner requires immersing oneself in the legal and political materials of the Civil War era: congressional debates; legal opinions of executive officers like the Attorney General and President; contemporary

24 CONG. GLOBE, 37th Cong., 2d. Sess. 2964 (1862) (statement of Sen. Sumner).

25 *Id.*

26 *Id.* at 2189–90.

27 *Milligan*, 71 U.S. (4 Wall.) at 121.

28 *Id.* at 120–21 (emphasis added); *see also id.* at 118–19 (“No graver question was ever considered by this court, nor one which more nearly concerns the rights of the *whole* people; for it is the birthright of *every* American citizen when charged with crime, to be tried and punished according to law. . . . [If the civil laws] are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety.” (emphasis added)).

pamphlets, speeches, and books by academics, politicians, editors, and other opinion leaders; and the briefs and decisions in the mammoth number of cases arising from the Civil War that the Supreme Court decided during the period from the war through the end of the nineteenth century. It also requires recovering mostly forgotten frameworks for deciding, first, how the Constitution, customary international law, and the larger U.S. legal system interacted and, second, for whose benefit, and at what times and places, individual rights under the Constitution were available.

After this Introduction, Part I introduces certain foundational principles of law that shaped how lawyers of the Civil War generation understood the novel situations presented by the Great Rebellion. The Constitution was not the universal providence of the oppressed of the world that it is imagined to be today. At the Founding and through the time of the Civil War, the Constitution and laws of the United States did not provide protections to or create obligations for most noncitizens, including all who remained outside the country or who were military enemies of the United States. Only U.S. citizens and resident or sojourning noncitizens who owed “allegiance” or “obedience” to the government and its laws were within the “protection” of the Constitution and other municipal law and could seek to enforce those rights through the courts. The United States interacted with foreign nations, nonresident noncitizens, and military enemies not through domestic legislation and courts, but through the executive branch conducting policy based on discretion and, where applicable, international law. In peacetime, treaties and the customary law of nations were applicable sources of international law; during war, a subset of the law of nations prevailed, namely the laws of war (also known as the usages of war, belligerent rights, and the like).<sup>29</sup>

For a U.S. citizen, the protection of the Constitution and other municipal laws was not permanent, but nearly so. Generally, protection was understood to continue even when a citizen levied war against the United States or adhered to its military enemies—even

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29 See 2 WINTHROP, *supra* note 14, at 1 (“By the general term Law of War is intended those principles and usages which, in time of war, define the rights and obligations, and regulate the relations, not only of enemies—whether or not in arms—but also of persons under military government or martial law and persons simply resident or being upon the theatre of war.”); William Whiting, Re-Construction of the Union: Letter to the Union League of Philadelphia (July 23, 1863), in 1 REBELLION RECORD SUPP. 739, 742 (Frank Moore ed., New York, G.P. Putnam 1864) (using “the laws of war” and “the belligerent law of nations” as synonymous terms).

when a citizen committed treason.<sup>30</sup> A citizen in arms against his country could, under this theory, claim a right to be treated not as a military enemy but as a criminal—to be indicted and tried, if at all, only in civilian court where he or she would be entitled to all applicable procedural protections of the common law and Constitution. Of course even citizen-criminals could be pursued with deadly force when they violently resisted the laws of the United States. But they would remain subject by default to civilian rather than military jurisdiction, with its requirements of a presumption of innocence and rules that barred punishment absent a finding of individualized culpability by the courts. When the Civil War began, it was strongly held in many quarters that the U.S. government could only respond to it as a law enforcement matter and that no rebel could be attacked, detained, or tried without solid reason to believe he was individually culpable.

Part II examines the legal uncertainty at the beginning of the war about the legal nature of the secession and insurrection; the legal rights of the rebels; and the legal powers of the U.S. government to respond. Was the insurrection crime, war, both, neither? Did secession create a new and independent nation—the Confederate States of America (CSA)—or was secession void and of no effect? Were the rebels in arms citizen-traitors, citizen-enemies, foreign enemies, or something else entirely? And what of the inhabitants of seceded states who had not actively participated in rebellion; was the conflict “personal”—only directed against active rebels—or was it “territorial,” akin to a nation-to-nation conflict in which all the citizens of each contending party are the enemies of each other? Could the United States respond to the insurrection as a “belligerent,” using the powers of war; as a “sovereign,” using only law enforcement powers; or both? Or, if secession were a constitutional right, as the rebels claimed, would any U.S. government response constitute unconstitutional “coercion”? Who was empowered to decide all of these difficult legal questions, and under what body of law? All of this was up for grabs in 1861 and 1862. The Supreme Court did not decide a case about any of these questions until spring 1863, in the *Prize Cases*.

Parts III and IV show that, contrary to the suggestion in some modern scholarship, the legal theories concerning the nature of the conflict and the legal rights of residents of the CSA adopted by the Executive, congressional leaders, elite northern opinion, and ultimately the Supreme Court (in the *Prize Cases* and other decisions)

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30 See U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies . . .”).

were *not* novel,<sup>31</sup> strained,<sup>32</sup> “frightening,”<sup>33</sup> or a “license [for] presidential dictatorship,”<sup>34</sup> much less simply wrong.<sup>35</sup> Nor were the legal theories adopted somehow *sui generis*, either to the specific facts of the Civil War or because they treated international law as crucial to understanding constitutional war powers.<sup>36</sup>

In 1864, the *Monthly Law Reporter* observed that Americans had “never had occasion before this to study the Constitution in the aspect in which this gigantic rebellion presents it . . . . [W]e now are compelled to read the Constitution anew in the light of this great fact.”<sup>37</sup> Previously unnoticed and unexamined powers, and previously obscure legal relationships implicit in the constitutional design, were discovered in the wartime years—but nearly every discovery was decried as an unconstitutional innovation by some segments of Congress, the press, the state legislatures, and the courts. Supporters of the war from across the political spectrum became tired of the constant refrain that war measures violated the Constitution.<sup>38</sup> In 1863, Lincoln wrote with much understatement that “the Constitution is not in its application in all respects the same in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security.”<sup>39</sup> According to Governor Oliver Morton of Indiana,

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31 See Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 53, 77–78, 88 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

32 Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1847 & n.277 (2005).

33 David P. Currie, *The Civil War Congress*, 73 *U. CHI. L. REV.* 1131, 1138 (2006).

34 Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 *U. ILL. L. REV.* 1135, 1145–48.

35 See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 85 (1990) (referring to Lincoln’s order to blockade Southern ports and apply the international laws of prize to the conflict with the rebels as one of his “well-chronicled usurpations of constitutional authority”).

36 See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 273–75 & n.290 (1985); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 75–76 (1990); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 *U. PA. L. REV.* 863, 919–20 (2006); Lee & Ramsey, *supra* note 31, at 92.

37 *The Legal Status of the Rebel States Before and After Their Conquest*, 26 *MONTHLY L. REP.* 537, 537 (1864).

38 Senator Lyman Trumbull berated some of his colleagues because “in this Senate, time and again, the Constitution [is] interposed for the protection of armed rebels,” *CONG. GLOBE*, 37th Cong., 2d. Sess. 3360 (1862), an absurdity as Trumbull and many others saw it.

39 Letter from Abraham Lincoln, President of the United States, to Erastus Corning and Others (June 12, 1863) [hereinafter Letter from Lincoln to Corning], in 2

a key Lincoln ally in a state with strong antiwar, Democratic tendencies:

Some politicians seem to ignore the fact that there is a vast difference between war and peace, and insist that war shall be carried on just as we carry on peace. They do not comprehend that war, from its very nature, involves the exercise of powers, which, in times of peace, are unnecessary, and are prohibited. . . . War and peace are antagonistic states, and each has its conditions, privileges, and immunities, which are antagonistic to those of the other; and while our Constitution is formed, and provides mainly for peace, yet it recognizes and provides for the possibilities of war.<sup>40</sup>

The Constitution grants Congress and the President very broad-sounding powers to carry on war and suppress insurrections,<sup>41</sup> but generally does not specify what, if any, limits exist on their exercise or when they might be invoked. The task of fleshing out the government's approach to the war—the task of reading the Constitution anew in light of the war—was taken up by leading members of Congress, legal academics, newspaper editors, members of Lincoln's cabinet, U.S. Army lawyers, and the President himself. Part IV details how the theories described by Charles Sumner (and many others) came to prominence and then ultimate acceptance by the three branches of government.

The theory that was developed undermined certain older conceptions about constitutional protection and allegiance, but was arguably the only way to reconcile conflicting legal regimes with each other and with the unprecedented facts of the war. The United States was

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ABRAHAM LINCOLN: COMPLETE WORK 345, 349–50 (John G. Nicolay & John Hay eds., New York, Century Co. 1894).

40 SPEECH OF GOV. OLIVER P. MORTON AT THE UNION STATE CONVENTION HELD AT INDIANAPOLIS, IND., FEBRUARY 23, 1864, at 14 (1864).

41 See U.S. CONST. art. I, § 8, cls. 1, 10–15 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . . define and punish . . . Offences against the Law of Nations; . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . . raise and support Armies; . . . provide and maintain a Navy; . . . make Rules for the Government and Regulation of the land and naval forces; [and] provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . .”); *id.* art. II, §§ 2–3 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States [and] take Care that the Laws be faithfully executed . . .”); *id.* art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.”).

clearly engaged in war; the armies assembled were among the most powerful the world had ever seen. Unless it intended to give in to secession, the United States would have to exercise the type of destructive military powers usually reserved for international wars. As was its right, the United States denied the validity of the rebellion and asserted that secession had no legal effect. The states were still part of the Union and residents of the CSA were still U.S. citizens. Obedience was still owed. The rebellion was, therefore, criminal, and the overriding war aim was to restore the preexisting constitutional relations of peacetime and the dominion of the law. The U.S. government would—must—exercise war powers, but also civil, law enforcement powers. It addressed the rebels as a belligerent in war and as a sovereign seeking submission to law. Rebellion was both war and crime. The United States would not choose between these legal frameworks; it would adopt both at once.

Sumner and others articulated a “dual” theory of the conflict and of the U.S. government’s powers: when responding to war-like attacks by its own citizens, the United States had the discretion to choose how to respond: either as a “sovereign” or a “belligerent.” The “rebels in arms” were “criminals” because they were committing treason and also “enemies because their combination has assumed the front and proportions of war.”<sup>42</sup> The U.S. government, it was argued, may choose “to proceed against them in either character, according to controlling considerations of policy.” Then here is the rub: “If we treat them as criminals, then we are under the restraints of the Constitution; if we treat them as enemies, then we have all the latitude sanctioned by the rights of war;” indeed, “the rights against enemies, founded on war . . . are absolutely without constitutional limitation.”<sup>43</sup> The choice of means was discretionary; the applicable legal regime flowed from the choice of means made by the U.S. government.

This has become known as the theory of the “dual status” or “double character” of the Civil War.<sup>44</sup> Most aspects of this theory were mooted and adopted by lower federal courts in 1861 and 1862, in cases concerning maritime prizes, habeas corpus petitions, and criminal prosecutions for treason and piracy. All of this set the stage for the Supreme Court, in 1863 in the *Prize Cases*, to validate the dual status theory of the war.

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42 CONG. GLOBE, 37th Cong., 2d. Sess. 2189–90 (1862) (statement of Sen. Sumner).

43 *Id.* (emphasis omitted).

44 See 1 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION* 300 (7th ed. 1991); JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 224 (rev. ed. 1963).

Part V begins with a close reading of the *Prize Cases* and explores aspects of the decision missed when one does not approach it with the context provided by the dual-status doctrine and related legal and political concepts. The Part shows that the Court in the *Prize Cases* and numerous other decisions adopted the dual-status legal framework enunciated by Sumner and others and applied it to dozens of different factual and legal situations raised by the Civil War. The Part ends by reconsidering *Milligan*.

## I. LAW OF THE FOUNDING AND ANTEBELLUM PERIODS

This Part discusses certain foundational principles of law that shaped how lawyers of the Civil War generation understood the novel situations presented by the Great Rebellion. A series of interrelated, constitutive legal frameworks existed since before the Founding, concerning the legal status of aliens, the obligations and benefits of allegiance to the U.S. government, the territorial and personal scope of individual rights against U.S. government power, and the important conceptual distinctions between domestic and international law and between civil and war powers.<sup>45</sup> The Anglo-American common law and the law of nations were their primary sources. The U.S. Constitution recognized these principles and frameworks in its structure and in certain parts of its text, but for the most part they were implicit and assumed. “Interpreting the Constitution in light of background principles known to the Founders is nothing new.”<sup>46</sup> In fact, it is quite common to interpret constitutional principles as partial incorporations of “aspects of the common law or law of nations.”<sup>47</sup>

At the Founding and in the antebellum era, the U.S. Constitution was emphatically not the universal providence of the oppressed of the world that it is imagined to be today. The globalist vision seen in *Boumediene* and the writings of many influential legal scholars today<sup>48</sup> is deeply inconsistent with the way the Constitution was understood in the eighteenth and nineteenth centuries. Constitutions, including the U.S. Constitution, were “municipal”—domestic—law, and as such did not provide protection to military enemies and most noncitizens,

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45 Kent, *supra* note 18, at 486.

46 Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 58 (2009).

47 *Id.* (providing examples). For other examples, see AKHIL REED AMAR, AMERICA’S CONSTITUTION 121, 329–33 (2005), using the common law to understand provisions of the U.S. Constitution; MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 223–28, 346–55 (2007), using the law of nations to understand provisions of the U.S. Constitution.

48 See Kent, *supra* note 18, at 463, 481–85.

including all who remained outside the country.<sup>49</sup> One of the most important constitutional questions of the Civil War was how the CSA and its residents fit into these frameworks. The CSA thrust off allegiance to the United States, claimed to have become a foreign nation, and treated residents of the loyal states as enemy aliens who were wholly outside the protection of the law. The U.S. government did not concede the independence of the CSA, of course, but was at war with it; and, in handling the terrifyingly violent consequences of the South's repudiation of allegiance, the U.S. government needed to determine whether or when residents of the CSA might still be U.S. citizens within the protection of the Constitution, laws, and courts of the United States. The Union's legal theories are discussed in Part IV, below. This Part sets out the antebellum framework within which lawyers and other citizens of the Civil War era understood the legal questions and worked out their theories.

#### A. *Allegiance and Protection*

Only U.S. citizens and friendly aliens residing or traveling within the United States were under the "protection" of the municipal—that is, domestic—laws of the United States.<sup>50</sup> The class of people protected by the Constitution and other municipal law was limited to those who owed allegiance or obedience to the U.S. government. Only persons within protection because of their allegiance had standing to invoke the protection of the courts; were shielded by rights under the domestic constitution and laws; and were entitled to call upon the government for physical protection from harm, for example when traveling abroad.<sup>51</sup> And only persons within allegiance and protection were liable to punishment under a nation's domestic criminal laws.<sup>52</sup> Allegiance and protection were therefore said to be reciprocal.<sup>53</sup> Professor Hamburger has recently demonstrated that this

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49 See, e.g., ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY (1800), reprinted in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 1055, 1070 (Charles S. Hynemen & Donald S. Lutz eds., 1983) ("The restrictions of the [U.S.] constitution are not restrictions of external and national right, but of internal and municipal right.").

50 See Kent, *supra* note 18, at 486. Municipal law—also known as the law of the land—included the Constitution, most statutes of Congress, state constitutions and statutes, and the common law.

51 See Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1826–29, 1833–40 (2009).

52 See *id.* at 1838–39.

53 See, e.g., *Cohen v. Wright*, 22 Cal. 293, 325 (1863) ("The Government owes the duty of protection to the people in the enjoyment of their rights, and the people owe

framework, derived from English common law and the law of nations, was understood in the United States to be one of the conceptual foundations upon which the U.S. and state constitutions were adopted during the Founding period.<sup>54</sup>

U.S. citizenship was what paradigmatically carried with it allegiance and protection. But an alien from a friendly nation could, when visiting or residing within the United States, be bound to a “temporary allegiance” and therefore entitled to temporary protection of the Constitution and laws.<sup>55</sup> Besides U.S. citizens and friendly aliens in the United States under temporary allegiance, all other people were not under the protection of the municipal laws, including the U.S. Constitution’s protections of individual rights.<sup>56</sup> So an alien outside the United States; an alien whose home country was at war with the United States, regardless of the individual’s physical location; and, again regardless of the individual’s physical location, an alien whose home country was *not* at war with the United States but who had, by his individual conduct, showed himself to be hostile to the United States, had no protection of the laws or access to the courts.<sup>57</sup>

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the correlative duty of obedience and support to the Government. The one is dependent upon the other.”); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 93 (Philadelphia, Philip H. Nicklin 2d ed. 1829) (noting “the reciprocal compact of allegiance and protection”). For a full discussion, see Hamburger, *supra* note 51, at 1834–46.

54 See Hamburger, *supra* note 51, at 1844–47, 1976. The foundational nature of these principles is seen in the legal decisions and discussions of the Civil War era, discussed in Parts IV and V below, where they continue to be used to determine who has rights under the U.S. Constitution.

55 See *id.* at 1898–1901. Consistent with this, friendly aliens in the United States who owed temporary allegiance had access to the protective writ of habeas corpus and other individual constitutional rights, so long as they remained in the United States. See *id.* at 1888; Kent, *supra* note 18, at 486.

56 See Kent, *supra* note 18, at 486.

57 See, e.g., *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 399 (1863) (“The restrictions in the constitution upon the powers of the government were designed to protect the people of the United States, and not aliens resident abroad. The protection received by aliens, residing abroad, with reference to their property here, is due to international comity, and not to the constitution of the United States.”); 33 *ANNALS OF CONG.* 1042 (1819) (statement of Rep. Baldwin) (referring to British subjects executed by General Andrew Jackson during a U.S. military raid into Spanish-owned Florida and rejecting the claim that “the Constitution and laws of the country” had been violated because “neither have any bearing on the case of these men. They were found and executed outside of the territorial limits of the United States, where our laws or Constitution have no operation, except as between us and our own citizens, and where none other could claim their benefit and protection.”); *id.* at 1044 (statement of Rep. Baldwin) (“[Jackson] has violated no Constitutional provision. It was not made to protect such men; they are no parties to it; owe it no obedience; and can claim no

The United States treated them based on the standards of international law—the customary law of nations and treaties during peacetime and, in wartime, a subset of the law of nations, variously known as the laws of war, the usages of war, belligerent rights, and the like.<sup>58</sup>

### B. *Municipal and International Law*

Generally speaking, the national government was understood to exercise two basic types of power or jurisdiction: (1) domestic or municipal, and (2) external or extraterritorial, also referred to as “national” or “international.” To simplify for the sake of clarity, domestic affairs were governed by domestic law and international affairs, insofar as they were governed by law rather than policy, were governed by international law.<sup>59</sup> A sharp distinction between the law governing foreign affairs and domestic affairs appears to have been common ground among American courts, political officials, and commentators.<sup>60</sup> A nation’s domestic, legislative regulatory power was understood to be territorially limited; for most purposes, its power and obligation stopped at the international border.<sup>61</sup> Within its territory, the national legislature established civil government to regulate the peacetime affairs of its citizens. A core tenet of the theory of republican government was that the rights and duties during peace of U.S. citizens in the United States could only be regulated by the national government through preexisting legislation of Congress.

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protection from it.”); *id.* at 693 (statement of Rep. Smyth) (discussing the same incident and contending that the Constitution and laws of the United States “were formed for the people of the United States. They have no force in Florida [then Spanish territory]. . . . Nor do those laws protect enemies in time of war.”). After serving in the House, Henry Baldwin was appointed by President Jackson to the U.S. Supreme Court.

58 See Kent, *supra* note 18, at 486.

59 See *id.* at 499–501. Note that the federal government could control the domestic effects of international law and relations with foreign nations and people through mechanisms such as legislation and judicial proceedings. See, e.g., U.S. CONST. art. I, § 8, cls. 10–11; *id.* art III, § 2. On the federal government’s control over the domestic effects of international law, see generally Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 930–38 (2007).

60 See Kent, *supra* note 18, at 499–501.

61 See *id.* at 491. This was a function of the law of nations and international comity, as well as other factors. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (“No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.”).

Neither unbridled executive discretion nor bare judicial lawmaking (over crimes) was constitutionally permissible.

In the international realm, these concepts were reversed. Legislation and other municipal laws could not bind foreign countries and foreigners outside the United States. The executive branch had primacy in this international state of nature<sup>62</sup> and conducted foreign relations guided principally by discretion and international law.<sup>63</sup> The customary law of nations and laws of war gave substantial flexibility to the Executive because the substantive rules were so much more permissive than they are today.<sup>64</sup>

### C. *War and the Alien*

While lawfully domiciled or peaceably passing through the United States during peacetime, an alien was generally deemed to owe “temporary allegiance” to the government and therefore was under the temporary protection of that sovereign’s constitution and laws.<sup>65</sup> This understanding was deeply rooted in American fundamental law well before the Founding era,<sup>66</sup> and continued to be through the nineteenth century.<sup>67</sup> The temporary allegiance—and therefore the

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62 See Kent, *supra* note 59, at 887–89 (describing how the international system and man’s state of nature, as described by Locke and others, were analogized).

63 Congress could, of course, restrict by legislation many foreign affairs activities of the Executive. Congress has the authority to declare war, raise and maintain armies and navies, authorize letters of marque and reprisal, regulate captures on land and water, make rules for the government of the armed forces, regulate foreign commerce, and the like.

64 On the permissive view of the law of nations towards war, including the view that self-defense power is essentially unlimited and offensive war a legitimate instrument of statecraft, see Kent, *supra* note 59, at 886–91.

65 See Hamburger, *supra* note 51, at 1847 (“Not only did all citizens have a right to protection, but also, if foreigners came to the country in a manner that created a presumption of allegiance to the government and its law, they too had a right to protection. Other foreigners, however, even if visiting, had no right to protection.”); Kent, *supra* note 18, at 503 (describing how, during the American Founding period, friendly alien residents or visitors were generally understood to be “under the protection of the sovereign’s municipal laws so long as they are within the country”).

66 See Hamburger, *supra* note 51, at 1898–1901; Kent, *supra* note 18, at 486, 502–04.

67 See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898) (“Chinese persons, born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are ‘subject to the jurisdiction thereof,’ in the same sense as all other aliens residing in the United States.”); *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) (“The term ‘per-

protection too—ended when the alien left the country. Another way of saying the same thing is that aliens outside the United States had no rights under the U.S. Constitution.<sup>68</sup>

If an alien's home country went to war with the United States, the alien became an "enemy alien" to the United States and hence out of the protection of the laws.<sup>69</sup> This operated by legal presumption. An alien temporarily within protection and owing allegiance to the government of the United States because of nonhostile, prewar presence here, was presumed to owe an overriding allegiance to his or her home country and therefore was, as against the United States, presumed during war to be an enemy "in law" or enemy "by law" simply by virtue of citizenship. And *a fortiori*, aliens outside the United States were also presumed to be alien enemies. Whether inside or outside the United States, an alien presumed by law to be an enemy who actually engaging in hostile actions against the United States was also an enemy "in fact." And whether aliens "were presumptively or actually in hostility, their enemy status left them without any right to protection, including the protection of the laws," such as the U.S. and state constitutions.<sup>70</sup> The rule that an alien enemy had no standing in

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son,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) ("Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility."); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 153–54 (1872) ("All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection."); 1 WILLIAM CHARLES WHITE, *A COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS* 78 (Boston, Munroe, Francis & Parker 1809) ("Allegiance and protection are correlatives; Inasmuch, therefore, as an alien owes only a local and temporary here, the law gives both his person and property a protection, only commensurate with that allegiance.").

68 See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*370 ("[A]s the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire."). See generally Kent, *supra* note 18, at 486 (discussing the distinction between resident and nonresident aliens).

69 See, e.g., *Hutchinson v. Brock*, 11 Mass. (10 Tyng) 119, 122 (1814) ("An enemy to our sovereign shall not have the use or advantage of his laws.").

70 Hamburger, *supra* note 51, at 1864; see also ADDISON, *supra* note 49, at 1071 ("[A]lien enemies have no rights."); 1 BLACKSTONE, *supra* note 68, at \*372–73 ("[A]lien enemies have no rights, no privileges, unless by the king's special favor,

court during wartime was frequently reiterated by American courts<sup>71</sup> and the most influential antebellum treatise writers.<sup>72</sup> Lacking both

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during the time of war.”). It was possible for nonhostile alien enemies to receive the permission of the government to enter or remain here during a war, and if granted, this license excepted the alien enemy from most of these harsh rules and instead put him or her under the protection of the local laws and he or she owed temporary allegiance. *See, e.g., Crawford v. The William Penn*, 6 F. Cas. 778, 779 (C.C.D.N.J. 1815) (No. 3372) (“The general rule of the common law of England is, that an alien enemy cannot maintain an action in the courts of that country, during the war, in his own name. . . . This rule appears to be inflexible, except where the alien enemy is under the protection of the king; as where he comes into the kingdom after the war, by license of the sovereign; or being there at the time of the war, is permitted to continue his domicile.”). For noncombatant or otherwise unthreatening enemy aliens, the implicit permission of the government to remain in the country and exercise municipal rights was often assumed in the absence of evidence to the contrary. The President’s failure to exercise his power granted by the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577, 577, to detain and deport any alien enemy, appears to have been assumed to be implicit permission to remain. *See Kent, supra* note 18, at 530–31.

71 *See, e.g., The Adventure*, 12 U.S. (8 Cranch) 221, 228 (1814) (indicating that British subjects cannot make a claim in a U.S. prize court during the war between the United States and Great Britain); *Johnson v. Thirteen Bales*, 13 F. Cas. 836, 838 (C.C.D.N.Y. 1814) (No. 7415) (applying the following common law rule to bar British alien enemies from making a claim in prize court: “This claim to the protection of our courts does not apply to those aliens who adhere to the king’s enemies. They seem upon every principle to be incapacitated from suing either at law or in equity. The disability to sue is personal. It takes away from the king’s enemies the benefit of his courts, whether for the purpose of immediate relief, or to give assistance in obtaining that relief elsewhere.”); *Ex parte Newman*, 18 F. Cas. 96, 96 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 10,174) (“[A]n alien enemy . . . has no legal standing in court to acquire even inchoate rights.”); *Levine v. Taylor*, 12 Mass. (11 Tyng) 8, 9 (1815) (“That the plaintiff is an alien enemy may be pleaded in disability of his person. As long as the war continues, he cannot maintain any action in our courts.”); *Cruden’s Ex’r v. Neale*, 2 N.C. (1 Hayw.) 338 (1796) (holding that alien enemies are excluded from our courts of justice during the hostilities); *Wilcox v. Henry*, 1 Dall. 69, 71 (Pa. 1782) (“An alien enemy has no right of action whatever during the war.”); *Wall v. Robson*, 11. S.C.L. (2 Nott & McC.) 498, 502 (Const. Ct. App. 1820) (“[I]n time of war no action can be maintained by an alien enemy . . .”).

72 *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 68 (New York, O. Halsted 2d ed. 1832) (noting the doctrine that an enemy lacks *persona standi in judicio*); THOMAS SERGEANT, CONSTITUTIONAL LAW 116 (Philadelphia, P.H. Nicklin & T. Johnson 2d ed. 1830) (“[A]n alien enemy cannot sustain a suit in the courts of the United States.”); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 51, at 52 (Boston, Little, Brown & Co. 10th rev. & corrected ed. 1892) (“An alien friend has a right to sue in any court; an alien enemy is incapable of suing while he remains an enemy, at least unless under very special circumstances.”); HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 211 (New York, R. M’Dermut & D.D. Arden 1815) (stating that an alien enemy is “totally *ex lex*” and lacks “*persona standi in judicio*” even in courts applying the law of nations, unless granted a specific exception by the government).

standing and any enforceable rights, an alien enemy could not seek a writ of habeas corpus.<sup>73</sup> *A fortiori*, the same was true for an alien who was in fact hostile, such as a combatant in the foreign nation's military—when captured, a prisoner of war.<sup>74</sup> Prisoners of war had “no municipal rights” that courts or other branches of government in the United States would recognize.<sup>75</sup>

Because the obligations and benefits of the law were reciprocal, certain privileges and exemptions did flow to aliens, even enemy aliens, who were not under temporary allegiance and protection. Being outside protection of the laws meant also that the alien was “not accountable at law.”<sup>76</sup> They could not sue to contest their treatment or otherwise protect themselves with law, but also could not be criminally prosecuted under this country's domestic criminal laws for wartime conduct.<sup>77</sup>

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73 See Hamburger, *supra* note 51, at 1864, 1893; Kent, *supra* note 18, at 527–30.

74 See Hamburger, *supra* note 51, at 1888 (“[H]abeas was not available to aliens outside allegiance and protection and, indeed, could never be given to some of them, notably prisoners of war, whose status was incompatible with allegiance. They did not owe allegiance and therefore did not have the protection of the law.”). See generally *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (No. 9895) (“The courts of England . . . will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious.”); GEORGE HANSARD, A TREATISE ON THE LAW RELATING TO ALIENS, AND DENIZATION AND NATURALIZATION 101 (London, V. & R. Stevens & G.S. Norton 1844) (“[A]n alien enemy while prisoner of war is not entitled under any circumstances to be discharged upon a habeas corpus; and he cannot maintain any action at all.”); SERGEANT, *supra* note 72, at 285 (“Prisoners of war . . . are not entitled to the privilege of a writ of *habeas corpus* . . .”).

75 *Lockington's Case*, Bright (N.P.) 269 (Pa. 1813), *in* 5 AM. L.J. 92, 97 (1814) (holding that enemy alien merchant was entitled to habeas corpus review of his detention, but noting that a prisoner of war would not be entitled to use habeas because they have “no municipal rights to expect from us”), *aff'd* *Lockington v. Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1813) (No. 8448), *in* 5 AM. L.J. 301 (1814). The reciprocal treatment and exchange of prisoners of war were frequently the subjects of negotiation by high diplomatic or military officials of the United States and the foreign enemy government. It was unthinkable that courts would have jurisdiction to determine the legality of their detention, conditions of confinement, or the like.

76 Hamburger, *supra* note 51, at 1861.

77 *Id.*; *cf.* *Holland v. Pack*, 7 Tenn. (Peck) 151, 153 (1823) (describing Indians of a tribe at war who were prisoners of war and treated “not as offenders against the laws of this state or of the United States”); RAWLE, *supra* note 53, at 141 (“The citizen who unites himself with a hostile nation, waging war against his country, is guilty of a crime of which the foreign army is innocent; with him, it is treason, with his associates it is, in the code of nations, legitimate warfare.”).

Military actions such as killing and destruction of property, committed by soldiers duly enrolled in a government's military service, were protected by the combatant's privilege, unless those actions violated the laws of war.<sup>78</sup> But an alien combatant who was not attached to a sovereign's military or who waged war in an unlawful manner (such as by intentionally attacking civilians) had no protection from punishment under domestic criminal law or the international laws of war.

#### D. *The Antebellum Law of Treason and Rebellion*

Under general principles of Anglo-American law in the Founding and antebellum periods, a citizen could not be deemed out of protection of the laws even when committing an egregious breach of allegiance such as adhering to the United States's military enemies or levying war against the United States. The traditional rule was that such an individual was subject to criminal prosecution for treason or lesser crimes—and when prosecuted was entitled to all concomitant procedural and substantive rights under the constitution or laws<sup>79</sup>—but could not be subject to military detention or trial. A citizen could

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78 Enemy aliens lawfully enrolled in their home country's military, and who waged war lawfully, were when captured subject to only nonpunitive detention as prisoners of war and protected by the combatant's privilege from being criminally charged for any ordinary and lawful acts of warfare. The term "combatant's privilege" (or synonymous terms like "belligerent's privilege") refers to the right of lawfully enrolled military combatants to kill or commit other harmful acts against the enemy in war which, if committed in peacetime or by a person not enrolled in the armed forces, would constitute municipal crimes like murder or arson. This customary rule was codified for the Union Army during the Civil War in the Lieber Code: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." See Lieber Code, *supra* note 14, art. 57; see also *id.* art. 82 ("Men, or squads of men, who commit hostilities . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war . . . are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."). Lieber's codification of the combatant's privilege is still today cited as a basis for the same rule in the modern laws of war. See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 42 (2010).

79 The U.S. Constitution, for example, imposes procedural protections, heightened proof requirements and limits on punishment in treason cases, see U.S. CONST. art. III, § 3, and generally provides many criminal procedural protections, see, e.g., *id.* art. III, § 2, cl. 3 (petit jury); *id.* amend. V (grand jury, due process, no double jeopardy, privilege against self-incrimination).

be a “traitor” but could not be an “enemy,” that is, someone out of the protection of the law.<sup>80</sup>

This protection of the law was not all positive for the traitorous citizen: a traitor levying war against the United States ran the risk that the United States would not treat him as a lawful belligerent, meaning that he would lack the combatant’s privilege for acts of violence during combat and, when captured, would not be entitled to be treated as a prisoner of war. Moreover, citizens owing allegiance who engaged in insurrection or war against the United States could be opposed by military force, if necessary. No one had a constitutional immunity from the U.S. government fighting fire with fire.<sup>81</sup>

## II. LEGAL UNCERTAINTY AT THE OUTSET OF THE CIVIL WAR

Even before the Civil War began, legal debates had erupted about the constitutionality of secession, the status of seceded states and the

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80 A few state court cases arising from the War of 1812 against Great Britain help illuminate these antebellum understandings. The cases involved U.S. citizens, not enrolled in the armed forces of any nation, who were arrested by the U.S. military in the United States on charges of spying or otherwise aiding British forces. See *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813). For analysis of the current relevance of these cases, see Larson, *supra* note 36, at 884–85; Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison’s Forgotten War*, 98 Nw. U. L. REV. 1567 (2004). Under U.S. and international law, the British were enemies of the United States, see Act of June 18, 1812, ch. 102, 2 Stat. 755, and U.S. citizens’ actions were certainly forms of providing aid or comfort to them. In other words, their alleged conduct was cognizable as treason in domestic U.S. courts. In each case, the New York state court held that the detention by the military was illegal. As is often the case with premodern judicial decisions, the exact basis of the holdings is somewhat unclear. A statute of Congress allowing military trial for alleged spies was, at that time, limited in application to noncitizens, so by inference military trial of the U.S. citizen detainees was banned by Congress. See Act of Apr. 10, 1806, ch. 20, § 2, 2 Stat. 359, 371. It (also) appears that both courts held or assumed that some other form of law, perhaps the Constitution or the common law, did not allow citizens—who were presumptively in allegiance and under the protection of the United States and its laws—to be tried for treason by the military. See Wuerth, *supra*, at 1580–83.

81 See *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849) (“[U]nquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions . . . . The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.”).

remainder of the Union, and the constitutional power of the national government to oppose secession. Abraham Lincoln was elected President in November 1860, but the lame-duck James Buchanan would serve until early March. In November, South Carolina and Georgia began taking steps to secede and raise military forces.<sup>82</sup> Buchanan's Attorney General, Jeremiah Black, delivered a formal legal opinion that secession was unconstitutional and limited military force could be used in aid of the criminal justice authorities if federal property or personnel were threatened or laws defied.<sup>83</sup> Black concluded, however, that if federal courts closed and executive officers resigned, leaving no criminal processes to be aided by the use of troops, any further military activity ordered by the President or Congress would be "wholly illegal" and "simply making war" upon the seceded states and their people.<sup>84</sup> These "hostilities carried on by the Central Government" against a seceded state "would be *ipso facto* an expulsion of such State from the Union," and because it treated the state "as an alien and an enemy, she would be compelled to act accordingly."<sup>85</sup> Under this perverse rule, the national government must concede defeat and independence to rebelling states—precisely what they wanted—the instant the rebellion gathered enough force to shut down federal courts and offices.

In December 1860, South Carolina declared it had seceded from the Union and sent troops to seize federal property. That same month, federal judges and other officials began to resign their offices and Georgia called for a convention to form a new nation from the southern states.<sup>86</sup> Buchanan essentially did nothing. By the beginning of February, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas had also seceded and their governments raised independent military forces and seized federal arsenals, forts, post offices, vessels, and other property.<sup>87</sup> That month saw the creation of the Confederate States of America (CSA); the convocation of the Congress of the CSA; and the election of Jefferson Davis of Mississippi as the provisional president.<sup>88</sup> "Our separation from the old union is

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82 See E.B. LONG & BARBARA LONG, *THE CIVIL WAR DAY BY DAY* 12–13, 17 (1971).

83 See *Power of the President in Executing the Laws*, 9 Op. Att'y Gen. 516, 518, 520–22 (1860).

84 See *id.* at 522–23.

85 See *id.* at 525.

86 See LONG & LONG, *supra* note 82, at 11–17.

87 See *id.* at 11–30; see also, e.g., *General Political Intelligence*, N.Y. TIMES, Feb. 23, 1861, at 2 (reporting the seizure of the federal arsenal at Little Rock, Arkansas, by soldiers acting under orders from the governor).

88 LONG & LONG, *supra* note 82, at 31–33.

complete,” Davis said, and any force which attempted to oppose independence would “smell Southern powder, feel Southern steel.”<sup>89</sup> Before Lincoln was inaugurated on March 4, the CSA had military officials on the ground in South Carolina directing preparations to attack the lone federal outpost there, Fort Sumter.<sup>90</sup> The Confederates bombarded Fort Sumter on April 12, and it surrendered the next day.<sup>91</sup>

#### A. *Was the Insurrection Crime, War, or Both?*

Aroused by the attack, popular opinion in the North supported military measures to reestablish the Union. But many people who rejected Black’s vision of a helpless federal government nevertheless thought that the legal framework concerning allegiance, protection, and treason required that the insurrection be treated as a purely domestic affair to be handled by limited military force in aid of law enforcement, governed by “municipal” laws and rules including individual rights provisions of the Constitution.

Lincoln, of course, rejected the constitutionality of secession and believed he had the authority and duty to use force to restore the Union. In a proclamation on April 15, responding to Fort Sumter, he described an obstruction of the laws in certain southern states by private criminal conspiracies that exceeded the power of the criminal justice system to handle.<sup>92</sup> He announced that the militia and regular military units would enforce the laws of the United States; appealed to “all loyal citizens” in all parts of the country to assist in restoring the rule of law; and promised to protect the persons and property of “peaceful citizens in any part of the country.”<sup>93</sup> But this policy embodied in the proclamation—to assert continued sovereignty over all of

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89 *Important from Montgomery; Speech of Hon. Jefferson Davis*, N.Y. TIMES, Feb. 18, 1861, at 8. Having cut itself free from the “dead body” of the North, Davis said, the South would make its independence recognized “by treaty or arms.” *General Political Intelligence*, *supra* note 87.

90 Just after Lincoln’s inauguration, the Congress of the CSA approved legislation for “the establishment and organization of the army of the Confederate States.” *See Congress of the C.S.A.*, N.Y. TIMES, Mar. 15, 1861, at 1.

91 LONG & LONG, *supra* note 82, at 56–57.

92 *See* Proclamation No. 3, 12 Stat. app. 1258, 1258 (Apr. 15, 1861) (stating that the laws of the United States “are opposed” in seven states “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by law”).

93 *Id.*

the states, refuse to recognize their secession, and to enforce criminal laws by means of military force—contained the seeds of expansion.<sup>94</sup>

Four days later, on April 19, Lincoln inaugurated a more aggressive strategy. In the interim, Jefferson Davis had declared that he would issue letters of marque to allow seizure of enemy (northern) shipping.<sup>95</sup> Rebels attacked federal facilities in Virginia, Arkansas, and elsewhere, and large-scale prosecession violence was breaking out in Baltimore.<sup>96</sup> Lincoln's April 19 proclamation still described the problem facing the federal government as the obstruction of civil law, but this time named it "an insurrection" and indicated that this insurrection was coherent and organized, not the work of unaffiliated bands of outlaws.<sup>97</sup> The President stated that he pursued "the same purposes before mentioned," including the restoration of civil law and protection of "the lives and property of quiet and orderly citizens."<sup>98</sup> But this seemed not precisely true. For Lincoln now announced a blockade of the ports of seven states in insurrection, to be enforced by the U.S. Navy against domestic and foreign vessels,<sup>99</sup> and stated that his legal authority derived from both "the laws of the United States and the law of nations."<sup>100</sup> The Supreme Court would later suggest that by this blockade proclamation the President's view of the conflict

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94 Jefferson Davis soon referred to Lincoln's proclamation as a "declaration of war" because it denied the legality of the CSA. See LONG & LONG, *supra* note 82, at 67.

95 *Id.* at 60–61.

96 *Id.* at 61–62.

97 See Proclamation No. 4, 12 Stat. app. 1258, 1258–59 (Apr. 19, 1861) (stating that "a combination of persons engaged in such insurrection" were taking illegal action "under the pretended authority" of certain named "States").

98 *Id.* at 1259.

99 Lee and Ramsey explain:

"Blockade" in the nineteenth century was a term of art under the international laws of war. . . . It encompassed the use of armed force to interdict seaborne passage to and from the ports and coasts belonging to . . . the enemy. The naval forces enforcing a valid blockade had the right to stop and search all ships, whether friendly, enemy or neutral, bound for, or departing from, the enemy's ports or coastline. They could capture vessels and cargoes they identified as "contraband of war," that is, susceptible of military use. They could also capture any vessels and cargoes that attempted to run the blockade, regardless of whether they were contraband.

Lee & Ramsey, *supra* note 31, at 60.

100 Proclamation No. 4, 12 Stat. app. at 1259; see also Proclamation No. 5, 12 Stat. app. 1259 (Apr. 27, 1861) (expanding the blockade to cover Virginia and North Carolina). At the time of the Civil War, "it was generally accepted that a blockade could only be asserted in a state of war because it meant the use of coercive force to deny both the enemy and neutral nations the peacetime right of free commercial intercourse." Lee & Ramsey, *supra* note 31, at 60.

had shifted from seeing it as “personal” (against individual rebels) to “territorial” (against the CSA and its component states and people) and his response had shifted from law enforcement (governed by municipal law) to a policy of “war” (governed by international law).

There was no clear demarcation noticeable at the time. The President and Congress, when it reconvened in July, pursued policies of war and law enforcement simultaneously. Some war policies treated all residents of the CSA as enemies, merely because of their residence, while others used war powers only against culpable individuals. The dual nature of the government’s approach to the conflict flowed naturally from the fact that it was a civil war. The preexisting relationship of protection and obedience that a legitimate government has with rebels in a civil war is, of course, entirely absent in a foreign war. As a result, war aims are different in civil and foreign wars. Both Lincoln and Congress agreed from the outset that the purpose of the war was to reestablish the *status quo ante*, that is, a peaceful Union with civil laws obeyed and enforced by civil means and the constitutional rights of all citizens respected.<sup>101</sup> Acts of rebellion inevitably constitute violations of criminal laws. The legitimate government understandably wants to both deny the independence of the rebelling districts and use all means at its disposal to end the revolt, and therefore employs the tools of law enforcement. But because of the vast scope of the rebellion, it could not be put down without war, and war by its nature harms both the guilty and the innocent.

So while Congress enacted new criminal statutes to more effectually punish culpable individuals,<sup>102</sup> it also authorized or endorsed actions against the people of the CSA as a whole, such as the President’s policy of waging commercial war against the entire Confederacy by blockade. Congress authorized the President to proclaim states or parts of them to be in insurrection, thereby making illegal all com-

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101 See An Act to Increase the Present Military Establishment of the United States, ch. 24, § 6, 12 Stat. 279, 281 (1861) (suggesting a purpose to bring the revolted states and people back into the Union and reestablish the temporarily displaced “constitutional authority of the Government of the United States”); An Act to Provide for the Suppression of the Rebellion Against and Resistance to the Laws of the United States, ch. 25, § 1, 12 Stat. 281, 281 (1861) (suggesting that until the laws of the United States could be enforced again “by the ordinary course of judicial proceedings,” the President would be authorized to use military means against the rebels); An Act to Provide for the Payment of the Militia and Volunteers Called into the Service of the United States, ch. 2, 12 Stat. 255 (1861) (approving Lincoln’s calls for militia and regular troops); see also Proclamation No. 3, 12 Stat. app. at 1258 (announcing that the new troops would be used “to cause the laws to be duly executed”).

102 See, e.g., Act of July 31, 1861, ch. 33, 12 Stat. 284 (punishing individuals who conspired to overthrow the U.S. government).

mercial dealings between them and residents in loyal states, upon his finding that the “insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States . . . nor such insurrection suppressed by said State or States.”<sup>103</sup> The President soon issued such a proclamation. Having established the complicity of the state governments in the insurrection,<sup>104</sup> the entire population of the insurgent states became “enemies” of the United States, though they still were U.S. citizens. By this new statute, the President’s proclamation pursuant to it, and his previous blockade proclamation, which had invoked powers available in international wars under the laws of war, the vessels and cargoes of any resident of the insurgent states could be seized on the high seas and forfeited to the United States.<sup>105</sup>

At the same time that the war was tending toward a territorially defined struggle between the populations of each section of the country, the President took actions which treated as military enemies certain people in loyal northern states. In late April, Lincoln famously authorized his General-in-Chief to suspend the writ of habeas corpus in Maryland, a Union state, because both unorganized mobs and organized bands of armed men were attacking federal troops and property and threatening to cut off Washington, D.C. from the rest of the North.<sup>106</sup> Even when the arrestees had apparently acted as part of organized military units, the military arrests were enormously contro-

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103 Act of July 13, 1861, ch. 3, § 5, 12 Stat. 255, 257.

104 As early as his April 19 and April 27 proclamations on the blockade, Lincoln had noted the potential complicity of state governments, referring to crimes committed “under the pretended authority” of certain named “States” (April 19) and “by persons claiming to act under authorities of the States of Virginia and North Carolina” (April 27). See Proclamation No. 4, 12 Stat. app. 1258; Proclamation No. 5, 12 Stat. app. 1259. In his July 4 address, Lincoln referred to the CSA as an “illegal organization” which had initiated a “war” against the United States. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) [hereinafter Lincoln, Message to Congress], in 2 ABRAHAM LINCOLN: COMPLETE WORKS, *supra* note 39, at 55, 55.

105 But still some war measures proceeded on the basis of individual culpability rather than collective association by residence in seceded states. The Confiscation Act of August 1861 (First Confiscation Act) directed the President to seize or capture as prize the real and personal property of rebels wherever found; but whereas the blockade proclamation made enemies out of every resident of the CSA no matter the person’s individual conduct or loyalty, the Confiscation Act required a showing that the property was knowingly or intentionally used to aid insurrection. See An Act to Confiscate Property Used for Insurrectionary Purposes, ch. 60, § 1, 12 Stat. 319, 319 (1861).

106 See Order from President Abraham Lincoln to Lt. Gen. Winfield Scott (Apr. 25, 1861), in 2 ABRAHAM LINCOLN: COMPLETE WORKS, *supra* note 39, at 38, 38 (directing the general to prevent the government of Maryland from arming people to

versial.<sup>107</sup> Over the course of 1861, Lincoln would authorize the suspension of habeas corpus in militarily important areas of many other Union states, including Delaware, Pennsylvania, New Jersey, New York, Massachusetts, and Missouri.<sup>108</sup>

### B. *Legal Theories Available to the U.S. Government*

In the Civil War, the targets of the U.S. government's lethal force, military detention, property confiscation, or other coercion were U.S. citizens or resident foreigners. Prior to the war, all of them would have had enforceable rights under the Constitution and laws of the United States because of the reciprocal nature of their allegiance to the United States and protection by the government and the Constitution and laws. Therefore when the conflict began, questions arose about whether they retained some or all of their prewar constitutional rights. The answer depended upon the legal status of the CSA. Had secession made it an independent nation, foreign to the United States, all residents of the CSA would have lost the protection of the Constitution. But the Lincoln administration and Congress denied

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fight against the United States and authorizing "in the extremest necessity, the suspension of the writ of *habeas corpus*").

107 In the case of John Merryman of Maryland, Chief Justice Taney and Lincoln came to loggerheads when the U.S. military, on Lincoln's orders, refused to produce Merryman in Taney's courtroom for a habeas corpus hearing, and Taney issued a blistering decision declaring that the President had acted unconstitutionally by purporting to suspend the writ on his own authority. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). See generally BURRUS M. CARNAHAN, *ACT OF JUSTICE* 51–53 (2007); HAROLD M. HYMAN, *A MORE PERFECT UNION* 168–69 (1973); CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64*, at 844–50 (1974). Merryman was a Lieutenant of the Baltimore County Horse Guards, and apparently led armed bands in the burning of bridges and destruction of telegraph lines in Maryland in order to cut off Washington, D.C. from the rest of the Union. See CARNAHAN, *supra*, at 51. Even though Lincoln demolished Taney's constitutional reasoning in his masterful "all the laws but one" address, see Lincoln, *Message to Congress*, *supra* note 104, and even though Taney's impetuous actions in *Merryman* were almost certainly driven by disgraceful, extrajudicial motives—his support for slavery and secession and desire to undermine the Union war effort, see BRIAN MCGINTY, *LINCOLN AND THE COURT* 65–91 (2008); SWISHER, *supra*, at 850–52—the *Merryman* decision is celebrated by many civil libertarians as a paragon of devotion to the rule of law. See, e.g., Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 *HOFSTRA L. REV.* 1605, 1613–14 (2004).

108 See, e.g., Order from President Abraham Lincoln to Lt. Gen. Winfield Scott (Apr. 27, 1861), in 2 *ABRAHAM LINCOLN: COMPLETE WORKS*, *supra* note 39, at 39, 39 (authorizing the commanding general to suspend the writ of habeas corpus anywhere along the military line from Philadelphia to Washington, D.C.).

that secession was legal and used military force to reverse it. The CSA and its northern sympathizers complained when the U.S. government at first refused to consider captured Confederate soldiers and sailors legitimate prisoners of war and instead instituted some criminal proceedings for treason and piracy.<sup>109</sup> Many southerners and antiwar northerners also complained that various war measures—those that sovereign nations used against each other in public international wars, such as maritime blockade and property confiscation, including the emancipation of slaves<sup>110</sup>—infringed the alleged individual constitutional rights of the rebels, rights they retained, it was argued, because the U.S. government had denied that they were foreign enemies and so was required to treat them as citizens within protection of the municipal law.<sup>111</sup> There were also disputes about the legal authority under which the occupying Union army could govern captured Confederate territory.<sup>112</sup>

The U.S. government's negative view of secession was clear: it was simply illegal and void. That much was certain. But it was difficult to articulate the Union's affirmative positions in any kind of detail. Tricky legal questions were intermingled with equally knotty diplomatic, military, and domestic political considerations.<sup>113</sup>

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109 See CARNAHAN, *supra* note 107, at 61–70; RANDALL, *supra* note 44, at 65–66, 92–94; SWISHER, *supra* note 107, at 868–76; see also *The Privateer Savannah*; *Arguments on Both Sides*, N.Y. TIMES, Oct. 28, 1861, at 3 (reporting arguments in a case over whether rebels were lawful belligerents).

110 Both confiscation acts allowed the confiscation of slaves and other real and personal property of rebels through quick in rem proceedings. See First Confiscation Act, ch. 60, 12 Stat. 319 (1861); Second Confiscation Act, ch. 195, 12 Stat. 589 (1862). For discussion of the operation and constitutionality of the acts, as well as their use to free slaves, see ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION 40–46, 59–60, 70–72, 125–29 (2004); HYMAN, *supra* note 107, at 159–60; RANDALL, *supra* note 44, at 69–72, 275–80, 347–51, 361, 369–74, 383–85. See generally DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY (2007) (concerning the law and policy of Union and CSA property confiscation).

111 It was also routinely alleged that the Union's war measures infringed constitutional rights of the states. For instance, when Lincoln requested troops to put down the revolt, in a proclamation issued on April 15, 1861 just after Fort Sumter fell, governors of states of the upper South like North Carolina—which had not yet seceded—and border states like Missouri—which teetered at the brink of secession before remaining in the Union—denounced the call for troops and their use against the insurrection as unconstitutional. See DAVID HERBERT DONALD, LINCOLN 297 (1995).

112 See GUELZO, *supra* note 110, at 40–46; HYMAN, *supra* note 107, at 163–68.

113 Because the overriding diplomatic concern was to prevent foreign recognition of the independence of, and aid to, the CSA, see CARNAHAN, *supra* note 107, at 43, the United States tried to insist that the insurrection was a purely local affair. But it had already become apparent that military considerations required the Union to exercise powers of war. The legality of all of this, especially the blockade's interference with

Having rejected Jeremiah Black's view of the Constitution, the U.S. government needed a new one to take its place. Between 1789 and 1861, the United States experienced no domestic violence of sufficient scale and scope to be considered a civil war. Notwithstanding the lack of any directly comparable prior conflict, U.S. courts and commentators had nevertheless found some occasions to analyze the legal distinctions between mere armed resistance to the laws or rebellion, on the one hand, and civil war, on the other. This occurred in a few cases concerning America's Revolutionary War against Great Britain and litigation arising from one of the many wars of independence which emergent Central and South American nations fought against their European colonial masters during the first half of the nineteenth century.

The law of nations drew a distinction between civil war and lesser forms of internal violence. As a federal court explained in 1818: "[W]hen one portion of an empire rises up against another, no longer obeys the sovereign, but, by force of arms, throws off his authority, and is of sufficient strength to compel him to resort to regular hostilities against it, a state of civil war exists, as distinguished from rebellion."<sup>114</sup> When an internal conflict assumed the proportions of civil war, third party nations could and often did declare a policy of neutrality and recognize each side as lawful belligerents exercising rights under the law of nations and laws of war.<sup>115</sup> Some respected authorities on the law of nations and laws of war suggested that it might be

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neutral commerce, could only be defended to neutral powers by conceding that the United States was at war, not just dealing with domestic criminals. Complicated domestic politics also made it difficult to articulate an appropriate and consistent legal view of the conflict. The U.S. government determined to end the insurrection as quickly as possible. This could only be accomplished with massive military force. But Lincoln thought, correctly, that the border states would view the United States as the aggressor if it immediately initiated a large-scale mobilization and deployment of military force. Because the border states were slave states, it was imperative that they not believe that Lincoln intended to quickly march a huge army southwards to smash the slave system. And keeping the border states in the Union was viewed by Lincoln, again correctly, as essential to success in the conflict, for geographic, manpower, and ideological reasons.

114 *Juando v. Taylor*, 13 F. Cas. 1179, 1182 (S.D.N.Y. 1818) (No. 7558); *see also* EMMERICH DE VATEL, *THE LAW OF NATIONS* § 292, at 424 (Joseph Chitty trans., Philadelphia, T. & J.W. Johnson & Co. 1858) (1758) ("When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him,—or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms,—this is called a civil war." (emphasis omitted)).

115 *See, e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 337 (1822) ("The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between

mandatory for the government to accord belligerent rights to its revolting opponent in a civil war.<sup>116</sup>

But other important authorities, including a Supreme Court decision by Chief Justice Marshall and the widely respected treatise on the law of nations by the Swiss diplomat Vattel, supported a slightly different proposition, that when responding to an internal rebellion or civil war, a government may at its discretion act as either a sovereign (under municipal law), a belligerent (under the international laws of war), or both.<sup>117</sup> In other words, the government might employ ordinary criminal prosecutions, military powers governed by the laws of war, or both to subdue the rebels. For the Lincoln Administration in 1861, additional legal support for the theory that governments had both belligerent and sovereign rights turned out to be surprisingly close at hand, in the person and writings of Henry W. Halleck, who rejoined the U.S. Army in fall 1861 as a major general,<sup>118</sup> just a few months after his treatise on international law, written during a

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the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war . . .”).

116 See VATTEL, *supra* note 114, §§ 293–294, at 424–25 (“A civil war breaks the bands of society and government, or, at least, suspends their force and effect: it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. . . . This being the case, it is very evident that the common laws of war,—those maxims of humanity, moderation, and honour, which we have already detailed in the course of this work,—ought to be observed by both parties in every civil war.”); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 73 (Philadelphia, Carey, Lea & Blanchard 1836) (stating that during civil war, contending sides have “all the rights which war gives to public enemies”).

117 See *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272–73 (1808) (stating, in a case arising from the seizure of a vessel and cargo by a French privateer as part of France’s response to the rebellion of its colony, Santo Domingo: “[A]dmitting a sovereign who is endeavouring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law, and of the proceedings under it, will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.”); VATTEL, *supra* note 114, §§ 290, 294, at 423, 425 (stating that in internal conflicts, including civil wars, the sovereign may criminally prosecute rebels under municipal laws, but suggesting that clemency is the wiser course).

118 See CURT ANDERS, *HENRY HALLECK’S WAR* 33–34 (1999).

sojourn in private law practice, had been published.<sup>119</sup> There was a clear limit, however, to the relevance of these authorities. They announced rules of international law, but in the United States the Constitution was the supreme law of the land, and many argued that it would be violated if the government exercised belligerent rights and treated rebelling U.S. citizens as military enemies.<sup>120</sup>

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119 Halleck initially commanded the vast Department of the West and in July 1862 would be promoted to be General-in-Chief, the highest rank in the Union Army. *Id.* at 143–44. His treatise would eventually go through multiple editions and printings and be one of the two or three most authoritative American works on the laws of war into the twentieth century. His 1861 edition stayed close to the teachings of Vattel and decisions of Marshall: where a rebellion has grown large enough to “assume[ ] the character of a public war, as defined and recognized by the law of nations, it is the general usage of other states to concede to both parties the rights of war.” H.W. HALLECK, *INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* § 25 (New York, D. Van Nostrand 1861) (emphasis omitted). These belligerent rights did not displace the established government’s power to prosecute rebels under domestic criminal law. Instead, Halleck wrote:

[B]elligerent rights may be superadded to those of sovereignty, that is, the contending parties may exercise belligerent rights with regard to each other and to neutral powers, while, at the same time, the established government of the state may exercise its right of sovereignty in punishing, by its municipal laws, individuals of the insurgent or revolting party, as rebels and traitors.

*Id.*

120 It happens that this view has resurfaced recently in debates about enemy combatant detention post-9/11. It is said in recent scholarship that “[u]nder the constitutional law of treason, any person who is potentially subject to an American treason prosecution must be tried in a civilian court and may not be detained by the military as an enemy combatant or subject to military tribunals.” Larson, *supra* note 36, at 867. This constitutional rule was allegedly “consistently recognized” in Anglo-American law “[u]ntil the twentieth century.” *Id.* at 873. Similar assertions were made in the amicus brief of U.S. Criminal Scholars and Historians submitted in support of the habeas corpus petition of Ali Saleh al-Marri to be released from military detention in the United States. Al-Marri is a national of Qatar who recently admitted that—as the U.S. government had long alleged as the basis for his military detention—he entered the United States in September 2001 at the direction of Khalid Sheikh Mohammed to plan and carry out terrorist attacks. See Associated Press, *Former ‘Enemy Combatant’ Pleads Guilty in Ill.*, USA TODAY, Apr. 30, 2009, [http://www.usatoday.com/news/nation/2009-04-30-enemy-combatant\\_N.htm](http://www.usatoday.com/news/nation/2009-04-30-enemy-combatant_N.htm). According to the brief, the “American constitutional tradition” and “[c]ommon law history” establish that a citizen or noncitizen within the United States can be held by military authorities instead of the civilian justice system “only if he owes no duty of allegiance to the United States”—and even then, only if he was an “open combatant[.]” Brief of Amici Curiae U.S. Criminal Scholars and Historians Advocating Reversal in Support of Petitioners at 4–5, *al-Marri v. Wright*, 534 F.3d 213 (4th Cir. 2008) (No. 06-7427).

III. THE WAR OF IDEAS: THE LAWS OF WAR DISPLACE THE  
CONSTITUTION WHEN THE UNITED STATES ACTS MILITARILY  
AGAINST ENEMIES

In summer 1863, the solicitor of the War Department, William Whiting, wrote in a widely publicized letter to the Union League of Philadelphia, that “[t]wo wars are still waged between the citizens of the United States—a war of Arms and a war of Ideas.”<sup>121</sup> This was even more true in 1861 and 1862, before the Supreme Court had decided the *Prize Cases* and before Whiting and like-minded statesmen, pamphleteers, professors, and other theorists of the war powers of the Union had fully developed and promulgated their views.

From early in the Civil War, northern supporters of the administration picked up the theories of Marshall, Vattel, Halleck, and John Quincy Adams and began to articulate that the U.S. government had the right to choose whether to respond to the rebellion with methods of war, peace (law enforcement), or both. Because secession was unconstitutional and failed to void the allegiance owed to the United States, rebels could be punished by the criminal law, including the law of treason. It was universally agreed that when the U.S. government suppressed rebellion through the criminal justice system, rebels were protected by all applicable rights of U.S. citizens. The United States could not demand allegiance (by enforcing its domestic criminal laws) without granting protection. But law enforcement could not alone suppress the Confederate armies. The war powers of Congress and the President needed to be invoked. But war waged against U.S. citizens was, under some traditional understandings, theoretically impossible, because citizenship carried with it constitutional protection from being treated as military enemies. During 1861 and 1862, an increasing number of lower federal courts and prominent statesmen and theorists rejected this idea that the Constitution was a shield for traitors but not a sword for the legitimate government. They argued that rebellion on such a massive scale caused rebels to forfeit the protection of the Constitution and other municipal laws. The war powers of the U.S. government, and the legal regime accompanying them—the laws of war—displaced constitutional rights of rebels, whenever and wherever the government chose to respond to the rebellion by military means. And they also held that rebels could be subjected to the criminal law even though, on the field of battle, their armies were treated as belligerents by the U.S. military. These doctrines—developed in a welter of media such as speeches in Congress,

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121 Whiting, *supra* note 29, at 739.

newspaper editorials, pamphlets and broadsides, legal briefs, military orders, private letters, and decisions in the lower federal courts—corresponded with the views and policies of the President, and were eventually adopted by the Supreme Court.

A. *The Union's Lawyers, Statesmen, and Theorists*

The Union was lucky to have a group of immensely talented lawyers, statesmen, and commentators to articulate its legal positions. Many of these men were of such stature and brilliance that they remain well known today; others have been obscured by time, but were no less impressive when it mattered. The roster included the President and his cabinet—Lincoln, Chase, Seward, Stanton;<sup>122</sup> officials in the War Department and Army—Lieber, Halleck, Holt, Whit-

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122 President Lincoln was himself a brilliant constitutional lawyer and his cabinet contained several giants of the law. Treasury Secretary Salmon P. Chase was one the dominant figures of his age. Lincoln described him as “about one and a half times bigger than any other man I ever knew.” G. Edward White, *Reconstructing the Constitutional Jurisprudence of Salmon P. Chase*, 21 N. KY. L. REV. 41, 41 (1993) (internal quotation marks omitted). Before the war, Chase was Governor of and a U.S. Senator from Ohio and a devoted abolitionist lawyer. From 1861 to 1864 he served at Treasury, and then for nine years, until his death, as Chief Justice of the United States. See generally JOHN NIVEN, *SALMON P. CHASE: A BIOGRAPHY* (1995). “Among Republicans, only Charles Sumner, William H. Seward, Thaddeus Stevens, and Abraham Lincoln equaled [Chase’s] contemporary stature.” Michael Les Benedict, *Salmon P. Chase as Jurist and Politician*, 21 N. KY. L. REV. 133, 133–34 (1993). Like Chase of Ohio, Seward of New York served his home state as governor, U.S. Senator, and abolitionist lawyer in the antebellum period. He then was Secretary of State from 1860 to 1869. See generally DORIS KEARNS GOODWIN, *TEAM OF RIVALS* (2005). Before the war, Edwin M. Stanton, a Democrat, was a successful lawyer and briefly a pro-Union Attorney General for President Buchanan. From 1862 to 1868, he was an extraordinarily effective Secretary of War. President Grant appointed him to the Supreme Court in 1869, but Stanton died before taking his seat. See generally BENJAMIN P. THOMAS & HAROLD M. HYMAN, *STANTON* (1962).

ing;<sup>123</sup> members of Congress—Sumner, Stevens, Trumbull;<sup>124</sup> and journalists—Garrison, Greeley.<sup>125</sup>

It was universally understood that only because the rebel enemies were U.S. citizens was it even debatable whether they had individual constitutional rights.<sup>126</sup> It was inconceivable that foreign combatants

123 Lieber and Halleck are described above. *See supra* notes 14, 119. Joseph Holt—a pro-Union, antislavery Democrat, native of Kentucky—served as Postmaster General and briefly, Secretary of War, under President Buchanan. In 1862, Lincoln made him Judge Advocate General of the U.S. Army—its chief lawyer. By all accounts he was tremendously efficient and incisive. Lincoln tried to make him Attorney General in 1864, but Holt declined. *See* GOODWIN, *supra* note 122, at 675; HYMAN, *supra* note 107, at 190–92. William Whiting was a prominent Harvard-trained Boston lawyer when, in 1862, Lincoln asked him to become solicitor of the War Department. When the war began, Whiting had started speaking and writing about the constitutional powers of the President and Congress to invoke belligerent rights under the laws of war to put down the Rebellion. His opinions were immediately influential in Washington; his thoughts became pamphlets and then a book, which grew over time, as events unfolded. Eventually entitled *War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason and Slavery*, it went through forty-three printed editions in eight years of war and Reconstruction, and “its leading doctrines . . . received the sanction of the highest courts in the land.” MEMOIR OF THE HON. WILLIAM WHITING 7 (Boston, David Clapp & Son 1874); *see also* HYMAN, *supra* note 107, at 193–94.

124 Sumner is described above in the Introduction. *See generally* DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR (1960). Thaddeus Stevens was a powerful member of Congress from Pennsylvania from 1859 to 1868 and Chairman of Ways and Means during the war. A lawyer for the oppressed before coming to Congress, once in Washington Stevens was, like his ideological ally in the Senate, Charles Sumner, an indomitable Republican “radical,” fierce proponent of total war against rebels and slavery, a determined advocate for confiscation of rebel property, emancipation of slaves, enlistment of black soldiers in the Union Army, black suffrage, and adoption of the Thirteenth and Fourteenth Amendments. *See generally* HANS L. TREFOUSSE, THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN (1997). Lyman Trumbull—U.S. Senator from Illinois (1855–1873), chair of Judiciary during the war, former justice of the Illinois Supreme Court—was highly respected for his legal skills and judgment. He was an important spokesman for radical Republican wartime policies like confiscation and emancipation, though he himself, a once and future Democrat, did not identify as a radical. *See* HAMILTON, *supra* note 110, at 29–31.

125 William Lloyd Garrison, an uncompromising Massachusetts abolitionist, edited the country’s leading antislavery newspaper, the *Liberator* (1832–1865). *See generally* HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY (1998). Horace Greeley founded and edited the *New York Tribune*, the most influential newspaper in the country in the 1850s and 1860s. *See generally* ROBERT CHADWELL WILLIAMS, HORACE GREELEY: CHAMPION OF AMERICAN FREEDOM (2006).

126 *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 943 (1862) (statement of Sen. Trumbull) (“There would be no difficulty in determining our rights as against them if they were an independent nation; but what makes the difficulty is the relation which

in an international conflict against the United States would receive protection from the Constitution, even if present within the United States.<sup>127</sup> Certainly noncitizens outside the United States—even if not enemies—could not possibly have any protection from the Constitution.<sup>128</sup> As shown in Part I, during the Founding and antebellum peri-

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the persons in arms against the Government bear to it, that is as enemies, and at the same time as citizens. That is what seems to embarrass some minds.”); CONG. GLOBE APP., 37th Cong., 2d Sess. 140 (1862) (statement of Sen. Doolittle) (contending that the Constitution forbids confiscation in the nature of an attainder for treason, but “where citizens have gone abroad to foreign countries, and have there, outside of our jurisdiction, engaged in acts of hostility to us . . . it would be within our power to declare persons guilty of such acts in foreign countries beyond our jurisdiction no longer citizens of the United States, *alien enemies*, and to escheat their lands to the United States, and their assigns forever.”); *id.* at 122 (statement of Rep. Allen of Ohio) (“If the people of the seceding States were aliens, and we had a right to deal with them as such under the law of nations, we would have a right to capture their property wherever found. . . . [But w]e cannot treat loyal Union-loving citizens as enemies, because they reside in disloyal States.”).

Because it was often simply assumed that foreign enemies fighting the United States lacked any constitutional rights, analogizing the rights of Confederates in arms to those of foreign enemies was a shorthand way of stating that rebels in arms had no constitutional rights. *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 1557, 1560 (1862) (statement of Sen. Trumbull) (stating that the United States could exercise the same belligerent rights against CSA forces as when “waging war against a foreign nation”).

127 *See, e.g.*, Lieber Code, *supra* note 14, art. 40 (“There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.”); CONG. GLOBE, 37th Cong., 2d. Sess. 2964 (1862) (statement of Sen. Sumner) (“If the enemies against whom we are now waging war were not our own fellow-citizens—if they were aliens unhappily established for the time on our territory—there would be no fine-spun question of constitutional immunities. . . . [I]f the war on our part were . . . in subordination to those provisions of the Constitution which were devised for peace, it is evident that our Government would be unable to cope with its enemy. It would enter battle with its hands tied behind its back. Of course, in warfare with people of another country, Senators would not require any such self-sacrifice.”); *cf.* WILLIAM WHITING, THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY 47 (Boston, John L. Shorey 1862) (“To determine what are the rights of different nations when making war upon each other, we look only to the law of nations. The peculiar forms or rights of the subjects of one of these war-making parties under their own government give them no rights over their enemy other than those which are sanctioned by international law. In the great tribunal of nations, there is a ‘higher law’ than that which has been framed by either one of them.”).

128 *See supra* note 68; *see also* CONG. GLOBE, 38th Cong., 1st Sess. 1768 (1864) (statement of Rep. Broomall) (“Our Government is indeed one of limited powers, but only so with respect to its own citizens. Toward other nations its powers are absolute. It is limited in its administration of civil law; but as a belligerent it is under no more restraint than Russia or France [i.e., absolutist governments]. The limitations of con-

ods, it was a longstanding principle of the common law and the law of nations, understood to be incorporated into the Constitution, that foreigners were outside the protection of the Constitution and laws—unless by temporary allegiance during peaceful presence in the United States, with the consent of the government, they came temporarily under protection. They were dealt with under international not municipal law. These foundational principles were accepted fully by the Civil War generation and guided the North’s thinking about the constitutional status of the citizens who were waging war against the United States. As U.S. citizens, rebels owed allegiance to the U.S. government and were, if the antebellum theory held, entitled to the protection of the Constitution, laws, and courts. But that antebellum view did not survive the first year of war.

### 1. Rebels in Arms

The principle that foreign combatants engaged in war against the United States had no rights under the Constitution or other municipal laws was generally assumed to apply to rebels in arms during the Civil War. For instance, in an influential speech in spring 1862, Senator Sumner contended that “[r]ebels in arms are enemies, exposed to all the penalties of war, as much as if they were alien enemies.”<sup>129</sup> The problem of protection/allegiance was addressed by countless authors and speakers who contended that violent rebellion caused the forfeiture of constitutional rights:

[N]o man can, at the same time, be our enemy, deserving our utmost wrath, and a friend, entitled to our support and protection. *Rebels in arms against the Constitution, must not be spoken of, as men having constitutional rights.* . . . [W]hile the loyal citizen retains all his constitutional and legal rights, as in peace, the armed rebel, ha[s]

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stitutional Government have no outside application whatever.”); Charles Sumner, *Our Domestic Relations; Or, How to Treat the Rebel States*, 12 ATLANTIC MONTHLY 507, 508 (1863) (stating that California and New Mexico, while still Mexican territory because the treaty of peace and cession of 1848 had not yet been ratified, was “beyond the jurisdiction of our Constitution” and “there was no constraint from the Constitution” on the U.S. military occupation).

129 CONG. GLOBE, 37th Cong., 2d Sess. 2190 (1862) (statement of Sen. Sumner); see also *id.* at 2964 (“Rebels in arms are public enemies, who can claim no safeguard from the Constitution, and they may be pursued and conquered according to the Rights of War.”); Charles F. Blake, *Prerogative Rights and Public Law*, 25 MONTHLY L. REP. 129, 141–42 (1863) (regarding the “belligerent rights” of the U.S. government, stating that “[u]pon the men in arms against the government, it is permitted to employ the usual machinery of war. Whatever would be lawful against a foreign enemy, is lawful against them.”).

voluntarily withdrawn from the protection of the Constitution and submitted himself to the arbitrament of war.<sup>130</sup>

This view was so widely shared that I have been unable to find a single court decision in which a member of the military of the CSA sought, by habeas corpus or otherwise, to enforce alleged constitutional or other municipal rights in a U.S. court during the war. Notwithstanding the suggestions in Chief Justice Taney's *Merryman* decision, civilian courts simply had no power to liberate an enrolled enemy soldier from U.S. military control during the war.<sup>131</sup> Loyalists of all ideological stripes agreed that rebels had forfeited their constitutional rights. It was accepted by abolitionists and radicals,<sup>132</sup> moderate and con-

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130 GROSVENOR P. LOWREY, *THE COMMANDER-IN-CHIEF: A DEFENCE UPON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION AND AN ANSWER TO EX-JUDGE CURTIS' PAMPHLET 17* (New York, G.P. Putnam 1862).

131 See, e.g., Act of Mar. 3, 1863, ch. 81, §§ 1–2, 12 Stat. 755, 755 (providing that the President may suspend the writ of habeas corpus; that when it is suspended, a statement that the person is held by the U.S. military is a sufficient answer to a writ; and providing judicial processes for eventual release or criminal trial of detainees held by the Executive “otherwise than as prisoners of war” in loyal states); CONG. GLOBE, 37th Cong., 2d Sess. 18–19 (1861) (statement of Sen. Trumbull) (“The judicial tribunals have no right or power to interfere with the Army in the exercise of its power in suppressing an insurrection, by issuing writs of *habeas corpus* or otherwise [in areas where the President has exercised power delegated by Congress to call out troops to suppress insurrection.] [P]ersons captured by the military authorities in insurrectionary districts may still be retained as prisoners by the military power, without interference from the courts till their cases are finally disposed of, notwithstanding they may, for purposes of safety, or other reasons of State, be brought within districts where the judicial power is in full operation.”); CONG. GLOBE, 37th Cong., 1st Sess. 339–40 (1861) (statement of Sen. McDougall) (“[W]e have war, and there is a law of war. . . . There is a system of laws for peace, another for war. The right to the writ of *habeas corpus* is one of those that has no relation to the condition and necessities of war. It might be called a peace right. . . . It is, therefore, an established rule of law that the writ of *habeas corpus* does not run against a prisoner of war.”).

132 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 1881 (1862) (statement of Sen. Hale) (“I think the time has come when Congress should . . . show to armed rebels . . . that the Constitution and laws made for the protection of the rights of persons and property were made for the protection of those who were true to their allegiance, and not for the protection of those who threw it off and were fighting against it, and would subvert the Constitution and would destroy the country.”); CONG. GLOBE, 38th Cong., 1st Sess. 316 (1864) (statement of Rep. Stevens) (“[H]aving committed treason, renounced their allegiance to the Union, discarded its Constitution and laws, organized a distinct and hostile government, and by force of arms having risen from the condition of insurgents to the position of an independent Power *de facto*, and having been acknowledged as a belligerent by both foreign nations and our own Government, the Constitution and laws of the Union are abrogated so far as they are concerned, and . . . as between the two belligerents, they are under the laws of war and the laws of nations alone.”); CONG. GLOBE, 38th Cong., 1st Sess. 1768 (1864)

servative Republicans concerned with maintaining legal forms and due process during the war,<sup>133</sup> conservatives from border states,<sup>134</sup> and even many Democratic opponents of Lincoln's war policies.<sup>135</sup> Even staunch opponents of viewing the conflict as a "war" generally

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(statement of Rep. Broomall) (contending that rebels had "repudiate[d] allegiance" to the Constitution and "appealed from the Constitution and laws of the country to the laws of war," and therefore have no right to "the protection of the Constitution and laws"); Whiting, *supra* note 127, at 697 ("None of these rights, guaranteed to peaceful citizens by the Constitution, belong to them after they have become belligerents against their own government. They thereby forfeit all protection under that sacred charter which they have thus sought to overthrow and destroy." (emphasis omitted)); *Gen. Butler's Contraband of War*, 31 LIBERATOR (Boston) 131 (1861) (likely written by Garrison) ("[Rebels] have renounced the Constitution and the laws, are levying war against them, and against the nation which ordained, and its government which administers them. Protection and allegiance are correlative. The denial of one cancels the obligation of the other."); Letter from Robert Dale Owen to William H. Seward, Sec'y of State (Aug. 27, 1863), in 3 THE AMERICAN ANNUAL CYCLOPEDIA AND REGISTER OF IMPORTANT EVENTS OF THE YEAR 1863, at 838, 838 (New York, D. Appleton & Co. 1864) [hereinafter Letter from Owen to Seward] (stating that the rebels by their actions "forfeit[ed] their constitutional rights" and have "the same rights, and the same rights only, as alien enemies invading the United States . . . [under] the rights of war").

133 For instance, Edgar Cowan, a respected attorney and U.S. Senator from Pennsylvania, stated that

taking a prisoner of war, whether it be a foreign soldier taken upon our soil with arms in his hands, or a citizen of our own who has cut himself away from the Government and severed his allegiance, is precisely the same thing. Nobody ever supposed it was necessary to suspend the writ of habeas corpus in order to justify the military for such a proceeding.

CONG. GLOBE, 37th Cong., 1st Sess. 341 (1861) (statement of Sen. Cowan). As Senator Lyman Trumbull of Illinois put it, "[t]hat we have the right to exercise belligerent rights towards the persons and property of those in arms against the Government, and who are fighting for its overthrow, even the opponents of this bill [confiscating property of Confederates] admit." CONG. GLOBE, 37th Cong., 2d Sess. 1560 (1861) (statement of Sen. Trumbull).

134 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 3350 (1862) (statement of Sen. Wright) ("The Senator from Kentucky . . . puts the question whether a man has not his right, under the Constitution, to be tried; whether every man is not entitled to all the rights and privileges secured by the Constitution. Yes, sir; he is if he is an obedient citizen; but if he is a traitor he is not. If he is in rebellion against his Government, he is not entitled to the protection of the Government.").

135 See, e.g., ADDRESS OF THE DEMOCRATIC MEMBERS OF THE GENERAL ASSEMBLY TO THE PEOPLE OF INDIANA 11 (Indianapolis, Elder, Harkness & Bingham 1863) (on file with author) ("[T]he Democratic policy in conducting this war between a kindred people [would be] *fighting* and putting down *armed* rebels [and] love and kindness toward those not in arms," and "calling on the people of the South to abandon the leaders, return to the protection of the old flag, under all the guarantees of the Constitution.").

agreed as a practical matter that rebel combatants could be treated as military enemies because they conceded that deadly force was appropriate in law enforcement as well as combat.<sup>136</sup>

Though initially somewhat controversial in loyal states, the U.S. Army's application of the laws of war to guerrilla fighters in both loyal and rebel states became widely accepted.<sup>137</sup> The definition of guerillas was reasonably clear under the laws of war: combatants who were not formally enrolled in the military of a sovereign nation and whose methods of combat violated the laws of war—by failing to distinguish themselves from the civilian population, failing to be part of a regular chain of command, attacking civilians, committing robbery, granting no quarter to enemy soldiers, and the like.<sup>138</sup> The treatment of guerillas shows that all combatants serving the enemy were entirely out of protection of the Constitution and laws. Lawful methods for handling guerillas included: capture and trial by military commission for the

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136 See, e.g., CONG. GLOBE, 37th Cong., 3d Sess. 134 (1862) (statement of Rep. Yeaman) (describing the conflict as “a gigantic effort . . . to enforce the nation’s laws against citizens of the nation in rebellion” and stating that “[t]he President has called out the posse comitatus of the nation to assist him; and if rebels are killed in his attempt to arrest them, and to enforce the law, it is their own fault”); CONG. GLOBE, 37th Cong., 2d Sess. 3350 (1862) (statement of Sen. Powell) (“The Constitution of our fathers and the laws not only in the United States, but in all the States, guaranty to every man, high or low, rich or poor, guilty or innocent, patriot or traitor, the protection of the Constitution and the laws. . . . [T]he vilest traitor, the guiltiest murderer, the most contemptible thief, is *entitled* to all the guarantees that the Constitution and the laws throw about him. . . . I grant you if he has arms in his hands, is arrayed in battle against you, you may slay him; but then it is war.”). Because everyone agreed that rebels in arms could be killed or otherwise opposed militarily, it might make little practical difference how one precisely viewed their legal status. See CONG. GLOBE, 38th Cong., 1st Sess. 1767 (1864) (statement of Rep. Broomall) (stating that the country was involved in “civil war” as distinguished from “insurrection,” which states were governed by the “usages of war” and the “civil power,” respectively, and that “[u]nder both systems the insurgents may be shot down in being taken”).

137 See, e.g., RANDALL, *supra* note 44, at 175 (noting “little adverse comment” about trial by military commission in the loyal state of Missouri of civilians who burned bridges, destroyed telegraph wires, “furnished information to the enemy, or engaged in sniping and bushwhacking”). Guerilla warfare was prevalent in border states with mixed populations of different loyalties—Missouri, Kentucky, Tennessee, Virginia, West Virginia, and Arkansas.

138 See, e.g., GEORGE B. DAVIS, *OUTLINES OF INTERNATIONAL LAW* 242 (New York, Harper & Bros. 1887) (defining guerillas as “persons who . . . commit acts of hostility without the authorization of their government, or who carry on their operations in violation of the laws of war” (citation omitted)); HALLECK, *supra* note 119, at 386 (“Partizan and guerrilla troops, are bands of men self-organized and self-controlled, who carry on war against the public enemy, without being under the direct authority of the state. They have no commissions or enlistments, nor are they enrolled as any part of the military force of the state . . .”).

crime of unprivileged belligerency or for substantive misconduct such as murder or robbery;<sup>139</sup> capture and summary execution;<sup>140</sup> or capture and detention as regular prisoners of war, even though not entitled to that status.<sup>141</sup> If their unit has engaged in certain war crimes, guerillas might instead be denied quarter and simply killed on sight.<sup>142</sup>

## 2. Noncombants

The application to the civilian population of the South of belligerent powers under the laws of war was quite controversial.<sup>143</sup> Some critics of the war contended that only enemies in arms, and not civil-

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139 See, e.g., 2 WINTHROP, *supra* note 14, at 68–69; cf. Act of July 2, 1864, ch. 215, § 1, 13 Stat. 356, 356 (“[T]he commanding general in the field, or the commander of the department, as the case may be, shall have power to carry into execution all sentences against guerilla marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of war.”).

140 See, e.g., Lieber Code, *supra* note 14, art. 82, *quoted in supra* note 78; 2 WINTHROP, *supra* note 14, at 11 (stating that guerillas are “regarded as criminals and outlaws, not within the protection of the rights of war, or entitled, upon capture, to be treated as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt is clear or upon trial and conviction by military commission”).

141 See, e.g., DAVIS, *supra* note 138, at 242 (stating that guerillas’ “acts are unlawful, and when captured they are not treated as prisoners of war, but as criminals” (internal quotation marks omitted)).

142 See Lieber Code, *supra* note 14, art. 62 (“All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.”); *id.* art. 63 (“Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.”); *id.* art. 66 (“Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.”).

143 The southern population was reached various ways by U.S. government actions justified by the laws of war against enemies. Lincoln’s blockade treated the entire population of seceded states as enemies. The U.S. Army imposed martial law when it recaptured areas of seceded states, displacing civilian courts and government officials. This occurred in the first month of the war when U.S. forces took Alexandria, Virginia, located across the Potomac from Washington, D.C. See LONG & LONG, *supra* note 82, at 77. Congress, in July 1861, made illegal all intercourse—commercial or otherwise—between residents of states declared by the President to be in insurrection and residents of all other parts of the country. See *supra* note 103 and accompanying text. Congress’s Second Confiscation Act of 1862 directed the President to seize the real and personal property of certain named groups, including persons who thereafter gave aid and comfort to the rebellion. See *supra* note 110. The statute used these terms so broadly that many fairly ordinary interactions with the government or military of the seceded states or CSA would likely be reached. Cf. *United States v. Klein*,

ians who happened to be resident in seceded states, could be subjected to the war powers reserved for wars against foreign enemies. The theory was that the protections of the Constitution might be lost only if individually and voluntarily renounced. And while Confederates soldiers had clearly thrown off their allegiance and were in fact trying to destroy by force the U.S. government and the Constitution, mere civilians, it was argued, could not be presumed to be disloyal to the degree necessary to lose constitutional rights.<sup>144</sup> Others argued that the laws of war held sway and municipal rights were displaced only at the specific places and times where civilian courts were obstructed by actual war; for U.S. citizens, the laws of war could only be applied if necessary, and necessity would be strictly construed.<sup>145</sup> Still others contended that it followed from the Lincoln Administration's position that secession was void and that the seceded states and their people were still a part of the United States, that the laws of war could not be applied.<sup>146</sup>

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80 U.S. (13 Wall.) 128, 137 (1871) (stating that the Act covered “[a]lmost all the property of the people in the insurgent States”).

144 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 1615–16 (1862) (statement of Rep. Thomas) (“[N]o State can abdicate or forfeit the rights of its citizens to the protection of the Constitution of the United States or the privileges and blessings of the Union which that Constitution secures and makes perpetual. . . . He only is the enemy of the United States who is committing treason by levying war against the United States, or giving aid and comfort to those who do. The loyal, faithful subject of the United States, wherever on the soil of his country he may have his home, is not the enemy of his country.”); *Reconstruction*, 4 CONTINENTAL MONTHLY 684 (1863) (“The subject who renounces his allegiance can claim no protection. . . . Allegiance and protection are reciprocal and interdependent duties. . . . So that it might be quite correct to declare, in reference to the Southern rebellion, that a rebel has no rights which the United States is bound to respect.”); *id.* (“[S]uch persons . . . as voluntarily wage war upon it [the Constitution], can be strictly called enemies . . . . [But a]s to all men who have not participated in the rebellion, it is not easy to see how war, rebellion, usurpation, or any power on earth can destroy their rights under the Constitution.”).

145 See, e.g., Blake, *supra* note 129, at 143 (conceding that “the government of the United States may do against the rebels whatever is lawful against a public enemy,” but limiting this freedom from municipal or constitutional restraint to the time and place of actual war, when the civil courts are by necessity closed); see also B.R. CURTIS, EXECUTIVE POWER 28 (Boston, Little, Brown & Co. 1862) (to the same effect as Blake).

146 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 3349 (1861) (statement of Sen. Powell) (“Even if they were alien enemies, we could not act thus unless we violated every rule of Christian warfare. But, sir, they are not treated or regarded as alien enemies; you claim them as a part of our people. They are entitled, then, to all the provisions of the Constitution of your country, for I am sure no gentleman would be so illogical as to maintain the position that they are under the Constitution, a part of the Union, and are not entitled to all the panoply and all the shields that the Consti-

These views did not prevail. The argument that civilians in seceded states were not military enemies was undermined by at least four political facts: duly elected representatives of the people had, in each case, voted to secede; few residents of the Confederacy left their home states and went North on account of their loyalty to the Union; instead the people of the Confederacy expressed enthusiastic support for the war in countless ways; and the CSA and various seceded states took official actions to treat residents of the Union and loyalists in the South as military enemies.<sup>147</sup> These facts were woven into arguments based on constitutional and international law by the Union's war powers theorists. Daniel Gardner, a New York lawyer and author of a treatise on international law, used a typical formulation, writing that "the rebels, seeking to destroy our national Constitution and all law, have forfeited all rights of person and property under the Union, State and national laws they have repudiated."<sup>148</sup> Residents of the seceded states who aided and abetted the war effort of the Confederate armies had also forfeited their rights under the Constitution and laws.<sup>149</sup> No longer protected by municipal laws of the polity, the

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tution throws around the rights of the citizen."). Another view was that the CSA was at least *de facto*, if not *de jure*, an independent nation and was entitled to the same rights as all other sovereign nations.

147 For example, the CSA's Sequestration Act. See HAMILTON, *supra* note 110, at 82-139 (describing the Act, its legality, and its implementation).

148 DANIEL GARDNER, A TREATISE ON THE LAW OF THE AMERICAN REBELLION 6 (New York, J.W. Amerman 1862); see also THE WAR AND ITS MANAGEMENT: SPEECH OF HON. B. VAN HORN OF NEW YORK 5 (Washington, D.C., Scammell & Co. 1862) (addressing the House of Representatives on January 23, 1862 and saying, "[T]he citizens of the rebel States . . . have cast aside the Constitution of their country, under which, when loyal, they were entitled to protection, to all their rights guaranteed to them by that Constitution, and are no more entitled to our protection, being themselves outlaws by their own wicked and treasonable acts."); TRAITORS AND THEIR SYMPATHIZERS: SPEECH OF THE HON. BENJAMIN F. WADE OF OHIO 3 (Washington, D.C., Scammell & Co. 1862) (addressing the U.S. Senate on April 21, 1862 and stating that residents of seceded states are "entirely absolved from the protecting aegis of the Constitution" and that rebels and traitors "are beyond all law, they have repudiated all law, and the nation, in defence of its Constitution, its Union, and its flag, may resort to any means that God Almighty has put into their hands").

149 See DANIEL AGNEW, OUR NATIONAL CONSTITUTION: ITS ADAPTATION TO A STATE OF WAR OR INSURRECTION 17 (Philadelphia, C. Sherman, Son & Co. 2d ed. 1863) ("In time of peace [no "constitutional rights"] can be taken away, except by due process of law. But how are they affected by a state of war? The rebels and their abettors are citizens, who owe allegiance, but have cast it off. The civil authority is not adequate to reduce them, and force is resorted to by authority of law. The Constitution now turns against them, and the rights it guaranteed during peace, it now authorizes to be taken away, if necessary to reduce them to submission."); see also Order from W.T. Sherman, Commanding Major General, to Maj. R.M. Sawyer (Jan. 31, 1864), in 32 U.S. WAR

United States had “the same rights of war against the ‘Confederate States’ as we have against other nations, which rights are determined by the laws of nations solely, and not at all by the Constitution of the United States.”<sup>150</sup> The rebels had “forfeit[ed] their constitutional rights” and have “the same rights, and the same rights only, as alien enemies invading the United States . . . [under] the rights of war.”<sup>151</sup> In other words, the rebels had by their actions lowered themselves to equivalent status to aliens engaged in international war with the United States—a group paradigmatically without rights under the Constitution.<sup>152</sup> And the rebellion had brought into play a new legal regime—the regime of the laws of war—that heretofore in U.S. history had been reserved for foreign wars.<sup>153</sup>

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DEP’T, THE WAR OF THE REBELLION, ser. 1, pt. 2, at 278, 279 (Washington, D.C., Gov’t Printing Office 1891) (“[T]he people of the South having appealed to war are barred from appealing to our Constitution . . . They have appealed to war, and must abide by its rules and laws.”).

150 See SPEECH OF CASSIUS M. CLAY BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF ALBANY, N.Y. 15 (New York, Wynkoop, Hallenbeck & Thomas 2d ed. 1863) (on file with author).

151 Letter from Owen to Seward, *supra* note 132, at 838; see also CONG. GLOBE, 37th Cong., 2d Sess. 2190 (1862) (statement of Sen. Sumner) (“Rebels in arms are enemies, exposed to all the penalties of war, as much as if they were alien enemies.”); Blake, *supra* note 129, at 142 (regarding the “belligerent rights” of the U.S. government, stating that “[u]pon the men in arms against the government, it is permitted to employ the usual machinery of war. Whatever would be lawful against a foreign enemy, is lawful against them.”); Whiting, *supra* note 127, at 694–95, 701 (stating that the United States was authorized to treat a rebel as it would “an alien enemy” in wartime); Letter from Orville H. Browning to Abraham Lincoln (Sept. 30, 1861), in CARNAHAN, *supra* note 107, at 148, 153–54 (stating that the rebels “have no more right . . . to claim the protection of the Constitution and laws of the former government, than the citizens of a foreign state, at war with us would have a right to claim such protection”).

152 See, e.g., CONG. GLOBE APP., 37th Cong., 2d Sess. 167 (1862) (statement of Rep. Babbitt) (attacking as “wholly unfounded, and as contrary to the principles of national and municipal law as it is to the principles of equity and common sense” the “erroneous idea that rebels can claim for their property all the safeguards which the Constitution has thrown around that of loyal citizens. I deny that they have a right to interpose any such claim any more than would the subject of any foreign nation with which we might be at war.”); William M. Grosvenor, *The Law of Conquest; The True Basis of Reconstruction*, 24 NEW ENGLANDER 111, 120 (1865) (“[The rebels] have no longer any right of protection from our government or any right of citizenship under it, and become *de facto* foreigners. Against them the government possesses full belligerent rights under the laws of war.”).

153 See generally *The Laws of War*, 22 AM. L. REG. 265, 271–72 (1874) (“The Constitution recognises and, for their appropriate uses, adopts ‘the law of nations,’ and these include the laws of war. . . . The laws of peace, and the amendments to the Constitution for the security of life and property, apply in time of peace and in time of war

Being a civil war, the conflict was also quite different from an international war against a foreign foe. The Union looked forward to a time when the people of the South would return to their allegiance and hence their constitutional rights.<sup>154</sup> The purpose of the war was reparative. And since the United States maintained throughout the conflict that its sovereignty over the whole nation was undiminished, it retained the right to hold rebels accountable under municipal criminal law during or after the war. Therefore, the developing war power doctrine stated that the rebels had a “double character”: “They are at the same time belligerents and traitors, and subject to the liabilities of both; while the United States sustains the double character of a belligerent and sovereign, and has the rights of both.”<sup>155</sup> If and when the U.S. government criminally prosecuted its citizens, they were entitled to the many procedural protections of the Constitution; if the govern-

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where no war or state of war exists. But where war is actually flagrant, or a state of war, the laws of war prevail.” (emphasis and footnote omitted)).

154 See *The Venice*, 69 U.S. (2 Wall.) 258, 266–67 (1864) (argument of the United States) (stating that when “the power of the enemy has been broken” in a rebel territory and “the supremacy of the Government is everywhere established,” “the people and property once subject to hostile control may be released from the law of war, and restored to their rights under the Government”); Letter from H.W. Halleck, General-in-Chief, to W.S. Rosencrans, Maj. Gen. (Mar. 20, 1863), in 3 U.S. WAR DEP’T, *THE WAR OF THE REBELLION* ser. 3, at 77–78 (Washington, D.C., Gov’t Printing Office 1899) (suggesting that after the rebellion is put down in Tennessee, the state’s “loyal citizens” and those “who are willing to return to their allegiance” would be restored to “the rights which they have heretofore enjoyed under the Constitution, and to the protection which is afforded to persons and property by the glorious flag of the Union”).

155 *The Amy Warwick*, 1 F. Cas. 799, 803 (D. Mass. 1862) (No. 341), *aff’d sub nom.*, *Prize Cases*, 67 U.S. (2 Black) 635 (1863); see also *CONG. GLOBE*, 37th Cong., 2d Sess. 2964 (1862) (statement of Sen. Sumner) (describing the “double character” of the rebels, both “criminals” and “public enemies”); *CONG. GLOBE*, 37th Cong., 2d Sess. 943 (1862) (statement of Sen. Trumbull) (“We have toward these people in the rebellious States a twofold right. There would be no difficulty in determining our rights as against them if they were an independent nation; but what makes the difficulty is the relation which the persons in arms against the Government bear to it, that is as enemies, and at the same time as citizens. That is what seems to embarrass some minds. . . . We may treat them as traitors, and we may treat them as enemies, and we have the right of both, belligerent and sovereign, so far as they are concerned.”); Whiting, *supra* note 127, at 695 (“The United States are AT WAR with rebels, in the strictly legal and constitutional sense of the term, and have therefore all the rights against them which follow from a state of *war*, in addition to those which are derived from the fact that the rebels are also subjects. . . . [In civil war, the government] has the legal right to treat the insurgents both as subjects and as belligerents; and they therefore may exercise the full and untrammelled powers of war against their subjects . . .”).

ment chose to treat them as enemies, the Constitution was inapplicable and the laws of war held sway.<sup>156</sup>

*B. A Theory of Extra-Constitutional, Lawless Power?*

Critics contended that the Union's prevailing theory of war powers condoned total disregard of the Constitution during the war, or at least "extra-legal" or "extra-constitutional" measures.<sup>157</sup> (Some modern commentators still say the same thing.<sup>158</sup>) This was not only a gibe by partisans for the Confederacy—though it was often that. Thoughtful critics of war policies, like former Supreme Court Justice Benjamin Curtis, one of the dissenters in *Dred Scott*, also worried that the President (or sometimes Congress) had claimed the power to disregard the Constitution.<sup>159</sup> To some extent, this worry stemmed from assuming that Lincoln and other policymakers agreed with the incautious language of certain Union supporters. As is true in any charged political debate, some participants used extreme language—here, stating or implying that the Constitution could and should be violated to

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156 CONG. GLOBE, 37th Cong., 2d Sess. 2189–90 (1862) (statement of Sen. Sumner) ("If we treat them as criminals, then we are under the restraints of the Constitution; if we treat them as enemies, then we have all the latitude sanctioned by the rights of war. . . . [T]he rights against enemies, founded on war . . . are absolutely without constitutional limitation."); *id.* at 2190 ("What is done against them merely as *criminals* will naturally be in conformity with the Constitution; but what is done against them as *enemies*, will have no limitation except the rights of war."); *id.* at 2964 ("Rebels in arms are public enemies, who can claim no safeguard from the Constitution, and they may be pursued and conquered according to the rights of war. . . . All rebels are criminals, liable to punishment according to penal statutes, and in all proceedings against them as such, they are surrounded by the safeguards of the Constitution."); Whiting, *supra* note 127, at 697 ("[I]f the government elects to treat them [rebels] as subjects and to hold them liable only to penalties for violating statutes, it must concede to them all the legal rights and privileges which other citizens would have when under similar accusations; and Congress must be limited to the provisions of the Constitution in legislation against them as citizens."); *id.* (noting that the Suspension Clause, Due Process Clause, Takings Clause, Fourth Amendment, First Amendment freedom of speech and press rights, and the Second Amendment right to bear arms are said by some to remain rights of rebels as citizens, but "these provisions [are] not applicable to a state of war." (emphasis omitted)); *id.* ("The clauses which have been cited from the amendments to the Constitution were intended as declarations of the rights of peaceful and loyal citizens, and safeguards in the administration of justice by the civil tribunals.").

157 See, e.g., *The Unconstitutional Acts of the Present Government*, 61 KNICKERBOCKER MONTHLY 157 (1863) (attacking Lincoln's war measures, principally the Emancipation Proclamation, as "despotic" and based on the principle that "the President can override the Constitution").

158 See, e.g., Levinson, *supra* note 34, at 1145–48.

159 See CURTIS, *supra* note 145, at 30.

win the war.<sup>160</sup> But the prevailing view of statesmen and opinion leaders in the North was that the war was fought to restore the Union and the Constitution and therefore must be fought in conformity with applicable constitutional restrictions.<sup>161</sup> What many Copperheads and other war opponents failed to understand was that war often creates situations in which powers which would have been unconstitutional in peacetime become constitutional.<sup>162</sup> Also misunderstood was the Union's theory that the laws of war governed the U.S. government's uses of military power and, when they did, displaced previously applicable individual constitutional rights. This was often characterized by ideological and political opponents as simply a claim that the Constitution could be violated to win the war.<sup>163</sup> It was not that, though sometimes it sounded like it. Instead, the claim was that the Constitution itself called into play a new legal regime during wartime, the laws of war, which fleshed out the broad and vague constitutional provisions granting war powers and provided the applicable rules guiding the government's military measures.<sup>164</sup> The legal theory

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160 See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 329 (1862) (statement of Rep. Julian) ("The Constitution was made for the people, not the people for the Constitution. Cases may arise in which patriotism itself may demand that we trample under our feet some of the most vital principles of the Constitution.").

161 See, e.g., CONG. GLOBE APP., 37th Cong., 2d Sess. 167 (1862) (statement of Rep. Babbitt) ("[T]here exists no legitimate power in any department of this Government but by virtue of the Constitution; and the public safety can be secured only by the observance of its provisions, which are sufficiently ample for the purpose.").

162 See, e.g., *supra* text accompanying notes 39–40 (quoting statements by President Lincoln and Indiana Governor Morton).

163 Modern scholars repeat this error. See CURRIE, *supra* note 36, at 273–74, 275 n.290 (criticizing the majority in the *Prize Cases* for relying on international law and stating that its "argument that the ex post facto clause . . . had no application . . . sounds almost like an assertion that the Constitution was off during the emergency—a conclusion the Court would emphatically deny a few years later in *Ex parte Milligan*").

164 See, e.g., CONG. GLOBE, 37th Cong., 1st Sess. 378 (1861) (statement of Sen. Baker) ("[T]he Constitution deals generally with a state of peace, and . . . when war is declared it leaves the condition of public affairs to be determined by the law of war, in the country where the war exists. It is true that the Constitution of the United States does adopt the laws of war as a part of the instrument itself, during the continuance of war."); Whiting, *supra* note 127, at 697 ("[I]t must not be forgotten that the same authority [the Constitution] which provides those safeguards, and guarantees those rights, also imposes upon the President and Congress the duty of so carrying on war as of necessity to supersede and hold in temporary suspense such civil rights as may prove inconsistent with the complete and effectual exercise of such war powers, and of the belligerent rights resulting from them. The rights of war and the rights of peace cannot coexist."); *The Restoration of the Union*, 4 CONTINENTAL MONTHLY 444, 446 (1863) ("[P]ending a war, either foreign or civil, the Constitution itself confers

underlying the Union theorists' many references to a seemingly separate "Constitution of war," operating under the laws of war was not the simple-minded notion that the Constitution as a whole somehow had no application of any kind during wartime. The Constitution was understood to be always binding and in effect, in the sense that it created the U.S. government, empowered and limited its various branches, and structured the relations between the branches. There was only one Constitution. But this Constitution, "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs,"<sup>165</sup> allowed the government to exercise different powers, subject to different limitations, at different places and times.

Some present-day constitutional concerns about individual rights during wartime were not often heard during Civil War debates. Though the idea that "some individuals are beyond the protection of the law," including the Constitution, might today "seem illicit"<sup>166</sup> or even un-American,<sup>167</sup> it was widely accepted during the Civil War era. To be sure, many critics of the Union's war powers theories objected that residents of the CSA, especially civilians, must be deemed protected by the Constitution because of their U.S. citizenship and residence. But no one thought, for example, that foreign enemies would be so protected. The Constitution was not a global human rights document. Nor did the Civil War generation subscribe to another idiosyncratic modern idea, that the U.S. government's conduct is per se lawless if it is not subject to judicially enforceable restrictions.<sup>168</sup> This kind of judicial supremacy did not take hold until after World War II.

### C. *The Work of Lower Federal Courts in 1861 and 1862*

Judges of the lower federal courts were exposed to the Union's legal theories about war powers by briefing and oral argument in liti-

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extraordinary powers upon the Government—powers far transcending those which it may properly exercise in time of peace. These war powers, however, great as they are, and limited only by the laws and usages of civilized nations, are not extra-constitutional; they are expressly conferred, and are quite as legitimate as those more moderate ones which appropriately belong to the Government in ordinary times.”).

165 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

166 *Hamburger*, *supra* note 51, at 1827.

167 *See supra* note 20.

168 *See Boumediene v. Bush*, 553 U.S. 723, 764–65 (2008) (suggesting that the lack of judicially enforced constitutional rights at Guantanamo would allow “the political branches to govern without legal constraint”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring) (implying that the Constitution's separation of powers would be undermined if the military could detain or try individuals “without independent review,” i.e., without Article III judicial review).

gated cases and by the press's coverage of debates in Congress and among scholars and publicists. By 1862, most of the core legal propositions necessary to the Supreme Court's *Prize Cases* decision had been established in judicial decisions by federal district court judges, as well as a few Supreme Court Justices riding circuit. From courthouses in Boston, New York, Philadelphia, Baltimore, Washington, St. Louis, and elsewhere, federal judges' views about constitutional issues related to the war were disseminated in four ways: published jury and grand jury charges in treason and piracy prosecutions and decisions in habeas corpus and prize litigation. Newspapers often reprinted these decisions, ensuring that they would help inform the public debate.<sup>169</sup>

### 1. Decisions on Prize and Other Seizures

Starting soon after the blockade was announced on April 19, 1861, captured enemy and neutral vessels began arriving in ports on the eastern seaboard. After putting the vessel and cargo under the control of the U.S. district court, which had exclusive original jurisdiction in prize cases, the U.S. government would cause proceedings to be instituted to "condemn" the property. Persons who asserted ownership of part or all of the vessel or cargo (claimants, in the language of prize courts) soon challenged the constitutionality of the blockade. The U.S. district attorneys in Boston, New York, Philadelphia, Baltimore, Washington, and elsewhere had to articulate to the courts why the President had the constitutional authority to order the use of a military tactic reserved for times of "war." Prominent private lawyers were retained to assist in some of the cases, including William Evarts, who would go on to argue the *Prize Cases* before the Supreme Court and, after the war, to serve as Attorney General of the United States, Secretary of State, and a Senator from New York.

The administration was overwhelmingly successful before the lower federal courts. In decisions upholding captures as lawful prizes of war, lower courts fully accepted the developing theories of the administration and its supporters about the belligerent rights of the United States against rebels. The claimants made similar arguments in every case. For instance, in mid-June, 1861, in the case of the British vessel the *Tropic Wind*, which had been seized for violating the blockade of Virginia's ports, the owners argued that the blockade was illegal. They started with the undisputed proposition that a blockade is a belligerent right under the law of nations, and can only be

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169 See, e.g., *The Law Relating to Prize Vessels; Opinion of Judge Betts*, N.Y. TIMES, Oct. 1, 1861, at 5; *The Privateer Savannah; Arguments on Both Sides*, *supra* note 109.

invoked when there is “a public war.”<sup>170</sup> Because the independence of the Confederacy was not recognized by the United States or any foreign nation, and because only Congress “alone can declare or recognize war,” the insurrection was a mere “municipal” event and the President lacked authority to characterize it as war in the international sense.<sup>171</sup> Claimants in other cases made similar arguments, but as U.S. citizens, contending that the Constitution allowed the government to treat citizens levying war only as traitors subject to the civilian justice system but not military force or other belligerent rights.<sup>172</sup> It was also urged that U.S. states had a constitutional right not to be treated as an enemy by the central government.<sup>173</sup>

The most forceful rejection of these arguments came from Judge Peleg Sprague of Massachusetts and Judge Samuel Rossiter Betts,<sup>174</sup> sitting in Manhattan where a large number of prize cases were filed. Decisions by both judges were reviewed and upheld by the Supreme Court in the *Prize Cases*. The argument that only Congress could put the United States in a state of public war was, wrote Sprague, “a manifest error. It ignores the fact that there are two parties to a war, and that it may be commenced by either.”<sup>175</sup> It also ignored the Treason Clause of the Constitution, which Sprague noted contemplates that “war” against the United States might be begun by domestic traitors.<sup>176</sup> Many federal judges confronting these arguments in prize cases emphasized that the President had not sought war but that it had been thrust upon the United States by the secession of the states, by the formation of the CSA, and its military attacks on Fort Sumter and elsewhere.<sup>177</sup> When war came, the Commander-in-Chief Clause

170 *United States v. The Tropic Wind*, 28 F. Cas. 218, 218–19 (C.C.D.C. 1861) (No. 16,541A) (argument of Mr. Carlisle for claimants).

171 *Id.* at 219.

172 *See, e.g., The Hiawatha*, 12 F. Cas. 95, 97, 100 (S.D.N.Y. 1861) (No. 6451).

173 *Id.* at 99–100.

174 Judge Betts’s important August 1861 decision in *The Hiawatha* disposed of common legal questions in nine consolidated cases, among them two that would go to the Supreme Court. He also wrote at length on the legal issues involving the Constitution and laws of war in other prize cases. *See The Sarah Starr*, 21 F. Cas. 462, 464 (C.C.S.D.N.Y. 1861) (No. 12,352), *aff’d in part*, *The Aigburth*, 1 F. Cas. 226 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1863) (No. 106), *and rev’d in part*, *The Sarah Starr*, 21 F. Cas. 471 (C.C.S.D.N.Y. 1863) (No. 12,353).

175 *The Amy Warwick*, 1 F. Cas. 799, 803 (D. Mass. 1862) (No. 341), *aff’d sub nom., Prize Cases*, 67 U.S. (2 Black) 635 (1863).

176 *See id.*; *see also* U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies . . .”).

177 *See The Sarah Starr*, 21 F. Cas. at 464–65 (“The hostilities commenced upon the United States by the seceded or Confederate States of the South have produced a

placed on the President the duty to meet and repel it.<sup>178</sup> According to Judge Cadwalader of Philadelphia, “when hostilities actually waged against the constitution and laws assume the dimensions of a general war, [the President] must prosecute opposing hostilities, offensive as well as defensive, upon such a proportional scale as may be necessary to re-establish, or to support and maintain, the government.”<sup>179</sup> To be clear, the rebels’ actions had not themselves invoked the war powers of the U.S. government and allowed the application of rights under the international laws of war. Rebels could not choose how the government would respond to their provocations. It was the President’s decision, or perhaps duty, to meet force with an appropriately forceful response that brought into play new legal powers and legal relations of a state of war.

Having initiated a war, residents of seceded states failed to convince the judges that they had a constitutional immunity from being attacked as military enemies and a right to be dealt with only as wayward citizens under domestic criminal law. Judges Sprague and Betts also rejected two additional, related claims, offered in alternative to the claim of peacetime constitutional rights. Assuming, for the sake of argument, said the claimants, that the U.S. government could treat its citizens as enemies, it followed that the United States (1) could not also claim the right to the rebels’ continuing allegiance and require them to obey municipal laws, like the law against treason, and (2) must grant the rebels “all the immunities” of lawful “international belligerents,” like the right to use military force without being subjected to criminal penalty. According to Betts:

The insurrectionists become enemies of the United States government by open hostilities waged against it, without losing their subjection to it individually as citizens. Government represses their rebellion and treason legitimately by force of arms and war, because the magnitude and force of the revolt is beyond the control of the law and civil magistracy.<sup>180</sup>

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state of war between the two communities, as consequent to which the United States are authorized to employ against their enemies the means of resistance and attack which are justifiable under the law of nations, by land or naval forces. A blockade of the ports of their enemy is one such lawful means, and is incident to the war power, and may be imposed by the president *flagrante bello*, without any act of the legislature declaring it . . .” (emphasis added); see also *The Hiawatha*, 12 F. Cas. at 98 (referring to “insurgent and rebel forces” who “carr[ied] on hostilities against the United States); *The Amy Warwick*, 1 F. Cas. at 803 (explaining the beginning of the Civil War as attacks on forts and custom-houses by a “traitorous confederation”).

178 *The Amy Warwick*, 1 F. Cas. at 803.

179 *The Parkhill*, 18 F. Cas. 1187, 1197 (E.D. Pa. 1861) (No. 10,755A).

180 *The Hiawatha*, 12 F. Cas. at 100.

Jeremiah Black's defeatist legal reasoning had been reversed. For Black, as soon as courts and other civil processes could not function because of the magnitude of the insurrection, the U.S. government was constitutionally disabled from taking any other action and the rebels had won their independence; and if the U.S. government acted unlawfully by using military force anyway, then that too had the legal effect of granting independence to the rebels and dissolving the Union. Under Black's view, for the U.S. government it was 'heads' they win, 'tails' you lose. By contrast, under the new rules emerging from prize litigation and public debates in 1861 and 1862, the United States, not the rebels, was in the legally privileged position. It could put down rebellion by military force, treating rebels as public enemies, and the rebels could not complain because their rebellion had caused the problem. The United States could also continue to employ law enforcement means as well, at its discretion, because it retained the right to the allegiance of the rebels: "[Rebels] are at the same time belligerents and traitors, and subject to the liabilities of both; while the United States sustains the double character of a belligerent and sovereign, and has the rights of both. These rights co-exist, and may be exercised at pleasure."<sup>181</sup> The implications of the United States's "double character" for the constitutional property rights of rebels was, for them, a bit grim. The property of all residents of seceded states became, under the laws of war, "enemy's property" (sometimes called just "enemy property") which could be seized on the high seas and condemned in prize courts, thereby transferring title to the captors. Numerous residents of the CSA appeared before federal district courts in prize cases pleading that they were in their "private sentiments . . . loyal citizen[s] of the United States, opposed to the Rebellion."<sup>182</sup> Courts ruled again and again that this was no defense to capture.<sup>183</sup> Subjects of neutral nations who had commer-

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181 *The Amy Warwick*, 1 F. Cas. at 803.

182 *The Prince Leopold*, 19 F. Cas. 1334, 1335 (S.D.N.Y. 1861) (No. 11,428).

183 *See, e.g., The North Carolina*, 18 F. Cas. 346, 346 (S.D.N.Y. 1861) (No. 10,316A) (residents of insurgent states are "public enemies" of the United States, even though "denying that they were insurgents, and asserting that they were true and loyal citizens of the State of Virginia"); *The Hiawatha*, 12 F. Cas. at 100-01 (holding that residents of the insurgent states and districts are "enemies of the government, notwithstanding their residence within the Union; and the property possessed and held by them thus becomes property of the enemies of the government, subject to confiscation when arrested at sea . . . because of their residence, without regard to their private sentiments"); *see also, e.g., The Prince Leopold*, 19 F. Cas. at 1335; *The Parkhill*, 18 F. Cas. at 1195; *The Lynchburg*, 15 F. Cas. 1173, 1174-75 (S.D.N.Y. 1861) (No. 8637A).

cial domicile in a rebel state also had their property condemned as enemy's property.<sup>184</sup>

## 2. Piracy and Treason Prosecutions

At the beginning of the Civil War, there were a few prosecutions of Confederates for piracy (privateering against U.S. shipping) and treason. Threats of retaliation on captured U.S. soldiers or sailors ultimately convinced the United States to treat captured rebels as prisoners of war,<sup>185</sup> but before then some law was made by judicial decisions and published petit and grand jury charges. It was established by Judge Sprague and Justice Robert Grier, sitting on circuit, that the federal courts must defer to the political branches' view whether the CSA had the international rights needed to turn illegal piracy into legal privateering under a sovereign's commission.<sup>186</sup> In other words,

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184 *The Sarah Starr*, 21 F. Cas. at 465–66 (involving a British subject domiciled in South Carolina).

185 See CARNAHAN, *supra* note 107, at 65–67. Legal difficulties prosecuting treason also help explain the limited use of this strategy against rebels. Consider the case of Charles Greiner, a resident of Georgia, prosecuted in federal court in Philadelphia for treason for allegedly “muster[ing] in military array” with Georgians in December 1860 and helping capture a U.S. fort. *United States v. Greiner*, 26 F. Cas. 36, 36 (E.D. Pa. 1861) (No. 15,262). The court in this widely watched case held that the Sixth Amendment barred the government from prosecuting Greiner anywhere but Georgia, where the federal courts were of course closed indefinitely.

186 See *United States v. Smith*, 27 F. Cas. 1134, 1135–36 (C.C.E.D. Pa. 1861) (No. 16,318) (charging that a privateer's commission was a defense to piracy only if “the legislative and executive departments” viewed the rebelling territory as a sovereign nation and instructing that “[t]he fact that a civil war exists for the purpose of suppressing a rebellion is conclusive evidence that the government of the United States refuses to acknowledge their right to be considered” a sovereign state); *The Law Against Piracy*, 24 MONTHLY L. REP. 14, 18 (1861) (reprinting grand jury charge delivered in Circuit Court for the District of Massachusetts on May 15, 1861 that charged that the court could not recognize “any State or association of States, as having the rights of a belligerent, or as carrying on legitimate warfare,” when “other departments of the government” characterize them “as rebels, and lawless aggressors,” and use force to subdue them).

Justice Samuel Nelson—who would write the dissenting opinion in the *Prize Cases*—took a different view in a jury charge regarding Confederate privateers indicted as pirates. Nelson agreed with Grier and Sprague that courts were bound to accept the decision of the executive and legislature whether a nation was recognized as independent, because it “involve[d] the determination of great public and political questions, which belong the departments of our government that have charge of our foreign relations.” See *United States v. Baker*, 24 F. Cas. 962, 966 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1861) (No. 14,501). But unlike his colleagues on the federal bench who instructed jurors that, as a matter of law, the United States had not recognized the independence of the CSA, Nelson left the question open for the jury to

whether the CSA was a foreign nation or not was a political question. Grier also suggested that the United States could pursue a two-pronged strategy against the Confederate forces: it could wage a “civil war” against Confederates as “enemies,”<sup>187</sup> and, at the same time, retain the discretion to prosecute them in civilian courts as U.S. citizens who had violated the municipal criminal laws.<sup>188</sup>

#### IV. THE SUPREME COURT ENTERS THE WAR

##### A. *The Prize Cases*

In March 1863, nearly two years after the attack on Fort Sumter, the Court decided its first case about the government’s conduct of the war.<sup>189</sup> Known as the *Prize Cases*<sup>190</sup> because it concerned the Navy’s

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decide, even when the jury returned to ask “whether, if the jury believed that civil war existed, and had been so recognized by the act of our government . . . it may influence their verdict.” *Id.* In the *Prize Cases*, Nelson would insist that only Congress was authorized to decide that the United States was at war and could therefore exercise the powers a belligerent had under the laws of war. But in New York City in October 1861, that great question of constitutional law was for Nelson simply a fact question for a jury.

187 Grand jury charges about treason in 1861 suggested that the federal judiciary was receptive to viewing rebels as military “enemies” of the United States. Under one traditional understanding of the law of treason, the “levying war” component of treason referred to U.S. citizens and others in allegiance who attacked the U.S. government, while the “adhering to the enemies” component applied only to citizens who joined a foreign enemy which was attacking the United States. *See United States v. Greathouse*, 26 F. Cas. 18, 22 (Field, Circuit Justice, C.C.D. Cal. 1863) (No. 15,254). By charging grand juries under the “adhering” clause, *see, e.g.*, Charge to Grand Jury-Treason and Piracy, 30 F. Cas. 1049 (C.C.D. Mass. 1861) (No. 18,277) (Sprague, J.); SWISHER, *supra* note 107, at 859 (noting July 1861 grand jury charge of Justice John Catron, sitting on circuit in St. Louis), judges might have signaled that rebels were akin to foreign enemies and hence that the CSA was, or was similar to, a foreign nation.

188 *See Smith*, 27 F. Cas. at 1135–36. Justice Nelson did not fully accept the doctrines of the Union’s theorists and the majority of his colleagues on the federal bench. A grand jury in November 1861 previewed the legal theory found in his dissent in the *Prize Cases*. According to Nelson, while a traditional international war made all of the citizens of each belligerent country the public enemies of the other, this was true only “in a qualified sense” in civil wars. Charge to Grand Jury-Treason, 30 F. Cas. 1034, 1035 (C.C.S.D.N.Y. 1861) (No. 18,271). In civil wars, the only persons in the insurrectionary districts who may be considered and treated as “enemies” by “the mother government” were those who did not “adher[e] to their allegiance” but instead were “implicated in the rebellion.” *Id.* In other words, combatants could be treated as enemies, but civilians could not.

189 By the time the Court heard argument in the *Prize Cases*, over 540 vessels had been seized pursuant to the blockade, *see Report of the Secretary of the Navy* (Dec. 1, 1862), in CONG. GLOBE APP., 37th Cong., 3d Sess. 11, 20 (1862), and over 800,000

seizure of four vessels as prizes pursuant to the blockade ordered by Lincoln, the decision was, as anticipated, an important moment in the war.<sup>191</sup> Two seized vessels and their cargoes were owned by residents of Richmond, Virginia; one was taken on May 17, 1861, and the other on July 10. A British vessel and cargo were captured leaving the blockaded port of Richmond on May 20, and, finally, a Mexican vessel and cargo were seized on June 23, trying to escape the blockaded port of New Orleans.<sup>192</sup> Property of the Virginians—who were U.S. citizens—lawfully could be seized as enemy property if there existed a state of public war and the United States could validly treat residents of seceded states as public enemies.<sup>193</sup> The foreign vessels and cargo lawfully could be seized for violating the blockade if there existed a state of public war and the United States had complied with certain formalities regarding blockades required by the law of nations.<sup>194</sup>

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men were in arms for the Union within those parts of the United States where combat was then or recently had been occurring, *see* Report of the Secretary of War (Dec. 2, 1862), *in* CONG. GLOBE APP., 37th Cong., 3d Sess. 28, 28 (1862). This must have influenced the Court's determination in the *Prize Cases* that a formal state of "war" existed between the United States and the CSA.

190 67 U.S. (2 Black) 635 (1863).

191 The Court had three new Lincoln appointees—Samuel Miller, David Davis, and Noah Swayne—but of the remaining six, all were Democrats, three were from slave states (including Chief Justice Taney), and five had recently sullied their reputations—at least as far as many Republicans were concerned—in the *Dred Scott* case. *See generally* Lee & Ramsey, *supra* note 31, at 64 (describing the Justices who heard the case).

192 *See Prize Cases*, 67 U.S. (2 Black) at 637–38 (reporter's summary); *id.* at 675–76, 678, 680 (majority opinion).

193 Professors Lee and Ramsey correctly note that the people of Virginia had not yet gone to the polls and voted to secede on May 17, when one of the Virginian vessels was seized. *See* Lee & Ramsey, *supra* note 31, at 75–76. Their suggestion that this calls into question the legality of the seizure is not warranted, however. One month before the prize seizure, Virginia's special convention for considering secession voted to secede, and then instructed the prosecession governor to call out militia to resist federal encroachments on Virginia territory. *See* LONG & LONG, *supra* note 82, at 60. The next day, April 18, the U.S. Customs House and Post Office in Richmond and two U.S. vessels on the James River were seized by Virginia's forces. *Id.* at 61. Over the next ten days, Generals Robert E. Lee and Joseph E. Johnston took command of Virginia troops; the federal arsenal at Harper's Ferry was seized; and the Virginia secession convention voted to accept Jefferson Davis's suggestion that Richmond become the capital of the CSA. *See id.* at 61–66. In these circumstances, President Lincoln was surely justified in treating Virginia as already in insurrection in his blockade proclamation of April 27. *See* Proclamation No. 5, 12 Stat. app. 1259 (Apr. 27, 1861).

194 The foreign neutral's vessels and cargo could have been seized for other reasons, not presented by the facts of their cases, for example, for carrying contraband of war.

But by a 5-4 vote, the Court in the *Prize Cases* sustained the legality of the President's blockade and accepted the dual-status doctrine.<sup>195</sup> The first question addressed was whether the President had the authority to institute a blockade that would be recognized as such by the law of nations. This could be seen as two separate but related inquiries. One arose under international law: did the blockade meet the criteria of the law of nations? This was a potentially dispositive issue because all the Justices agreed that, unless there existed a state of public war as recognized by the law of nations, that law prohibited any country from enforcing a blockade against neutral nations' shipping.<sup>196</sup> Therefore, the legal status of the conflict against the rebels was a key point—was it “war” or domestic crime control? The second, related inquiry sounded in constitutional separation-of-powers law: before Congress came into session and ratified the President's earlier war measures, did the President have the authority to treat the conflict as a public war and institute a blockade recognized by the law of nations? The dissent would have answered both questions in the negative, holding that, because of all the serious consequences of a state of war under international law,<sup>197</sup> the law of nations itself mandated that the “the sovereign power” only could change peace to war,<sup>198</sup> and

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195 Justices Grier, Miller, Davis, Swayne, and Wayne composed the majority; dissenting were Chief Justice Taney and Justices Nelson, Clifford, and Catron.

196 See *Prize Cases*, 67 U.S. (2 Black) at 666.

197 As Justice Nelson explained:

The people of the two countries become immediately the enemies of each other—all intercourse commercial or otherwise between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land . . . all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures *jure belli*.

*Id.* at 687 (Nelson, J., dissenting).

198 See *id.* at 688 (stating that the law of nations, “the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State. This power in all civilized nations is regulated by the fundamental laws or

under the U.S. Constitution, the sovereign power charged with initiating or recognizing war was the Congress.<sup>199</sup> The distance between the dissent and majority was, in fact, relatively narrow; after Congress authorized the President to act against the insurrection in July 1861, the dissent was fully satisfied that public war existed and the U.S. government could exercise belligerent rights against the entire CSA.<sup>200</sup> All sides agreed that the law of nations allowed the same belligerent rights to be applied in civil wars as in foreign wars.<sup>201</sup>

The majority noted that only Congress was empowered to “initiate or declare a war” in the formal sense.<sup>202</sup> But a formal *de jure* state of war was not required to justify resort to belligerent rights, including the right to blockade. War might merely “exist *de facto*,” and the fact of war could occur without any initiative taken by the U.S. government.<sup>203</sup> A state of war could be created by enemy attack.<sup>204</sup> And a civil war, said the majority, “is never publicly proclaimed, *eo nomine*, against insurgents.”<sup>205</sup> No branch of the U.S. government initiates it, so the constitutional separation-of-powers concern of the dissent never arose. For purposes of the law of nations, a civil war comes into existence as a factual matter when an insurrection has become large enough in terms of “the number, power, and organization of the persons who originate and carry it on”<sup>206</sup> and has forced the closure of the civil justice system of the recognized government.<sup>207</sup> This had occurred by April 1861. It followed that the President had acted constitutionally when he instituted on his own authority the blockade. The President was “bound” to respond to the crisis “in the shape it presented itself;”<sup>208</sup> he had constitutional duties, as Commander-in-

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municipal constitution of the country.”); *see also id.* at 645–47 (argument of Mr. Carlisle for the claimants) (questioning whether the rebellion was a war).

199 *See id.* at 688–89 (Nelson, J., dissenting) (stating that only Congress, “the war-making power of the Government,” has constitutional authority to “change the legal status of the Government or the relations of its citizens from that of peace to a state of war”).

200 Before that time, the dissent allowed that the U.S. government could wage “personal war” against the individuals actually in rebellion; Congress’s action had been necessary to make it “a territorial civil war.” *Id.* 694–95.

201 *See id.* at 667 (majority opinion).

202 *Id.* at 668.

203 *See id.* at 666.

204 *Id.*

205 *Id.*

206 *Id.* at 666.

207 *Id.* at 667. When “[t]his greatest of civil wars . . . sprung forth suddenly from the parent brain, a Minerva in the full panoply of war,” it existed as a matter of “fact,” even though Congress had not yet “baptize[d] it with a name.” *Id.* at 668–69.

208 *Id.* at 669.

Chief, to defend against violent attacks on the country and government.<sup>209</sup>

Modern commentators overlook that the Court considered the separation-of-powers issue from two perspectives: that of the foreign neutral nations, and that of residents of seceded states of the Union. Because Great Britain and other nations had, soon after the fall of Fort Sumter, proclaimed that a state of war existed between the United States and “certain States styling themselves the Confederate States of America,”<sup>210</sup> the Court held that foreigners were “estopped to deny” in a U.S. court “the existence of a war with all its consequences as regards neutrals.”<sup>211</sup> In addressing the claims of the for-

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209 Professor Vladeck has argued that the *Prize Cases* located the President’s power to blockade not in the Constitution but in two congressional statutes, dating from 1795 and 1807, which authorized the President to use militia or the armed forces to put down “insurrection,” “obstruction of the laws,” and other domestic disturbances that were too powerful for the criminal justice system. See Stephen I. Vladeck, *Re-Rethinking the Prize Cases: Some Remarks in Response to Professor Lee*, 53 ST. LOUIS U. L.J. 85, 86–88 (2008) [hereinafter Vladeck, *Re-Rethinking*]; Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 178–80 (2004) (citing Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 and Act of Feb. 28, 1795, ch. 36, 1 Stat. 424). Notwithstanding the compelling case he makes, I remain unconvinced. The Court’s extensive discussion of how the peacetime constitutional rights of U.S. citizens are displaced during a public war contains no mention of congressional authorization. When U.S. citizens are protesting that a president has unconstitutionally assumed the power to start a war *and* has violated their individual constitutional rights, “Congress authorized it” would be just the type of persuasive response that a court might highlight. Another objection to Professor Vladeck’s thesis is that the *Prize Cases* was about “war”—Did it exist? Had the President started it or responded to it? Who decides? Did the powers or duties of the President differ in “civil war” as opposed to “foreign war”? As discussed in Part II above, “civil war” was at the extreme end of a continuum of domestic conflict; starting at the other end of the continuum, there was simple crime, then crime too severe to be handled by law enforcement, then insurrection, then rebellion, and then finally civil war. The statutes cited by Professor Vladeck appear to give the President certain authorities in cases on that continuum which are less severe than civil war. The statutes do not purport to boost the President’s powers into the “war” zone—i.e., to give him the authority to use all belligerent rights authorized by the customary laws of war against both combatants and civilians of the revolting part of the Union and against foreign neutrals, if necessary. Cf. 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, 63–64 (2008) (noting that seizure of the shipping of foreign neutral nations is authorized only in a state of public war and that nothing in the statutes cited by Professor Vladeck appears to give the President that kind of authority).

210 This is the phrasing of the Queen of England’s proclamation. See *Prize Cases*, 67 U.S. (2 Black) at 669 (emphasis omitted) (quoting Queen Victoria).

211 *Id.* This was certainly true of the British. The Mexican claimants in the *Prize Cases* were also estopped to deny the existence of a public war, though Mexico’s politi-

eign neutrals, the Court did not discuss the merits of any questions under U.S. municipal law, but simply scolded the foreign claimants for “ask[ing the] Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race.”<sup>212</sup> The Court then turned to what it characterized as a separate inquiry: in wartime, what type of property is considered “enemies’ property” under the laws of war and hence was subject to seizure.<sup>213</sup> Under this heading, the Court confronted most directly the individual constitutional rights claim of the allegedly loyal Virginians. Here it was clear that the Court did not

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cal status and its relationship to the United States were complicated. During much of the war, the Mexican port Matamoros, on the Rio Grande across from Brownsville, Texas, was “the *entrepôt* for [neutral] trade with the South exchanging cotton for contraband.” JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 387 (1988). Although the United States was favorably disposed to Mexico’s liberal government—the winning side in the Guerra de Reforma, Mexico’s “ferocious civil war” from 1858–61, see ENRIQUE KRAUZE, *MEXICO: BIOGRAPHY OF POWER* 169, 173–74 (Hank Heifetz trans., 1997)—the Matamoros trade was an irritant. Mexico, like the European powers, had declared itself a neutral in the armed conflict between the United States and the CSA. See H. EXEC. DOC. NO. 371, at 751–52 (1862). In early 1862, England, France, and Spain intervened militarily in Mexico—ostensibly to collect outstanding debts. See KRAUZE, *supra*, at 169, 173–74. Spain and England withdrew, leaving France to attempt to conquer the country and install a new conservative government. See *id.* at 174. As the Supreme Court was hearing argument in the *Prize Cases*, French forces were winning decisive victories; a year later, France would install Maximilian, a Hapsburg archduke, as Emperor of Mexico. See *id.* at 175–76.

212 *Prize Cases*, 67 U.S. (2 Black) at 669. The Court’s not entirely explicit on this point, but it appears that the majority only adjudicated the claims of foreigners under the law of nations, not the U.S. Constitution. If true, that would be consistent with the protection-allegiance framework under which nonresident foreigners acted against by the U.S. government on the high seas would not be under the protection of the Constitution. The foreign claimants did, though, have a right to the protection of any applicable principles of the law of nations, because by constituting prize courts and requiring that high seas captures by U.S. forces be adjudicated there, Congress had implicitly mandated application of the law of prize, which, unless changed by Congress, allowed neutral claimants to contest the legality of the seizure of their vessels or cargoes.

The dissenting Justices and counsel for the Mexican claimants argued that, because the law of nations required a declaration or other action by “the sovereign power” to change peace to war and invoke international belligerent rights, it was necessary to examine the municipal constitution of a nation to discern whether war was properly initiated. See *id.* at 645 (argument of Mr. Carlisle for the claimants); see also *id.* at 688 (Nelson, J., dissenting). Hence the law of nations required, here, inquiry into the constitutional separation-of-powers question. Whether because it agreed with this argument *sub silentio*, or more likely because the U.S. citizen claimants had a right to have their constitutional claim adjudicated, the Court considered it in detail.

213 *Id.* at 671 (majority opinion).

consider whether the Mexican and British claimants had individual constitutional rights.<sup>214</sup>

The Court asked whether “the property of all persons residing within the territory of the States now in rebellion [could lawfully] be treated as ‘enemies’ property,’ whether the owner be in arms against the Government or not?”<sup>215</sup> The Virginians invoked the antebellum traditional framework of treason law:

The appellants contend that the term “enemy” is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say “that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies.”<sup>216</sup>

This argument might have had some force a few years earlier, but by 1863, elite political and legal circles in the North had, as described above in Part III, accepted that residents of the CSA had forfeited their right to be protected by the Constitution or other municipal laws. As the Court put it in reply to the Virginians: “All persons residing within [the seceded States] are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.”<sup>217</sup>

The Virginian claimants also contended that the violent rebellion and the secession of their state from the Union could not be attributed to them:

[T]he acts of the usurping government [of Virginia] cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the [U.S.] government for their persons and property, and to be treated as loyal citizens till legally con-

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214 Their vessels and cargo were not seized because they were property of the CSA (enemy property), but because theirs was neutral property caught violating a lawful blockade by trading with the CSA. Furthermore, as discussed shortly, the Court analyzed whether residents of the CSA were still under “protection” of the Constitution and other “municipal” laws, and whether the actions of state governments in seceding could lawfully be attributed to residents who retained their “allegiance.” These concepts are entirely inapplicable to foreigners not resident in the United States, who owed no allegiance and could claim no protection from the United States, its Constitution, and laws.

215 *Prize Cases*, 67 U.S. (2 Black) at 671.

216 *Id.* at 672.

217 *Id.* at 674.

victed of having renounced their allegiance and made war against the [U.S.] Government by treasonably resisting its laws.<sup>218</sup>

Phrased in more modern terms, the Virginians claimed that their individual constitutional rights could not be waived or forfeited by anyone's actions except their own. They also made the related argument that secession was illegal and void, and the U.S. government still had power under "municipal law" to punish crimes of U.S. citizens in rebellion, and therefore that the "the law of the land" and the concomitant "protection" of the "Constitution and Laws of the United States" should still govern seizure of their property, not the international law of prize.<sup>219</sup> The Court rejected these arguments for constitutional protection with impatience and a bit of hostility. Note the triple exclamation points and ironic quotation marks:

This argument . . . assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "*unconstitutional!!!*" Now it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights. Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity.<sup>220</sup>

In condensed form, the Court here refers to two years' worth of public argument about whether the rebellion was crime, war, both, or neither; whether "coercion" of seceded states was constitutional; whether the United States could concede belligerent rights to the CSA military in order to avoid bloody retaliation yet still maintain that secession was illegal and the Union unbroken; and whether the U.S. government could concurrently exercise both sovereign and belligerent rights. The Court's dismissive attitude was not due to carelessness or a failure to appreciate the weightiness of these legal questions. This debate had already occurred and the legal views of the Copperheads and other opponents of the U.S. government's war-powers

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218 *Id.* at 672.

219 *Id.*

220 *Id.* at 672–73 (citation omitted).

claims had been rejected. The Union's theories had prevailed in the war of ideas, and it was time that the losers accepted that and moved on.<sup>221</sup>

The Court did not display the same impatience with having to answer the Virginian's contention that they were loyal and therefore it was unfair to displace their constitutional rights by the laws of war. The Court did reject the argument, however. Just as all citizens or subjects of a nation are treated as enemies of the other in a foreign war—because it would be impractical and dangerous to assume otherwise and because their bodies can be enlisted in the armed forces and their property used to wage war, even if they oppose it—so too would all residents of the CSA be treated as public enemies of the United States.<sup>222</sup> No one would deny that this rule causes suffering for the innocent in every war, and perhaps even more so in civil wars. But it must be the rule.<sup>223</sup>

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221 One recent commentator contends that the Court in the *Prize Cases* and other Civil War decisions did not “abandon[ ] the traditional distinction under treason law between ‘enemies’ and ‘traitors,’” and that U.S. citizens and all others present in the United States could not lawfully be treated as military enemies because of the allegiance/protection framework. See Larson, *supra* note 36, at 918–20; see also *id.* at 863 (“[T]he Treason Clause prohibits the exercise of military authority over individuals who are subject to the law of treason, a category that includes not only United States citizens, but almost all persons merely present within the United States.”). This is not correct. As shown above in Part III, a wide swath of elite opinion in the North had already concluded, by 1863, that all residents of the CSA had forfeited their right to protection by attempting to cast off their allegiance through armed rebellion. The Supreme Court stated its agreement with this view in the *Prize Cases*, and would reiterate that agreement frequently in later decisions concerning the war.

222 See *Prize Cases*, 67 U.S. (2 Black) at 673.

223 The majority opinion in the *Prize Cases* ended with a striking image:

[This] is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

*Id.* at 673–74. Though this may sound like a mere rhetorical flourish, the Court was likely sending an important legal message to the U.S. government and, perhaps, to the residents of the CSA as well. To the Lincoln Administration and Congress: the war zone in which U.S. citizens may be treated as enemies without constitutional rights will not be allowed to extend throughout the entire United States, but only to those places on the other side of the rebels' bayonets. The Court was obviously not articulating a precise rule, but was indicating that there were limits to the government's power over individual liberties that corresponded roughly to the battle lines. And to the South: put down your bayonets and you will no longer be subject to harsh treatment as military enemies outside the protection of the laws.

After the *Prize Cases*, the Supreme Court accepted as beyond dispute that residents of the CSA were enemies and could be subjected by the U.S. government to military force and other military coercion under the laws of war as if they were foreigners in a foreign war. When the United States acted against them in a military capacity, they lacked any enforceable constitutional rights. After the *Prize Cases*, the Court also accepted the related proposition that the U.S. government could, in its discretion, choose to act as either a sovereign applying municipal law to punish and deter persons who remained protected by any applicable individual rights under the Constitution (or statutes or treaties), or a belligerent, subject to the laws of war (and any statutes or treaties applicable to wartime). In sum, the Court accepted the dual-status doctrine in full.<sup>224</sup>

### B. *Wartime Decisions After the Prize Cases*

#### 1. Additional Decisions Concerning Maritime Prizes

The Court decided relatively few additional war cases before the surrender of the Confederate armies in spring and summer 1865. In *United States v. Hallock*,<sup>225</sup> the Court reaffirmed the *Prize Cases* and condemned as enemy property that owned by a U.S. citizen resident in New Orleans and seized on the high seas as prize of war.<sup>226</sup> Property owned by citizens of Connecticut and New York was held *not* to be enemy property—a rule that was obviously implicit in the *Prize Cases*—but their property was condemned anyway for “illicit trading with the enemy,” that is, trading with residents of Louisiana.<sup>227</sup> In *The Andromeda*,<sup>228</sup> the Court condemned a vessel and cargo owned by residents of Texas and Louisiana—both individuals were “rebel enemies” whose property could be seized under the laws of war as “enemy property.”<sup>229</sup> *The Baigorry*<sup>230</sup> upheld the condemnation of a vessel and cargo owned by British and French merchants living in New Orleans; their property was “enemies’ property, because of the employment of

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224 See RANDALL, *supra* note 44, at 71 (“This ‘double status’ principle was not only the basis of Union policy; it was fully affirmed by the Supreme Court . . . in the *Prize Cases*.”); cf. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 231 (1957) (“[T]he Court held in the Prize cases in 1863 that the President was entitled to treat the blockaded states as enemy territory and their inhabitants as ‘enemies’ of the United States, and thereby put them out of their constitutional rights.”).

225 154 U.S. 537 (1864).

226 *Id.* at 537.

227 *Id.*

228 69 U.S. (2 Wall.) 481 (1864).

229 *Id.* at 488–89.

230 69 U.S. (2 Wall.) 474 (1864).

the vessel in the enemies' trade" between Havana, Cuba and Louisiana.<sup>231</sup>

In *The Circassian*,<sup>232</sup> a British steamer was libeled as a prize of war for attempting to run the blockade to reach New Orleans in May 1862.<sup>233</sup> The claimants argued that the capture of New Orleans by a joint U.S. Army-Navy operation a few days before the seizure of their vessel off the coast meant that the blockade was no longer legal under "the law of nations," because blockades operate only against territory of "the enemy," and New Orleans was no longer that.<sup>234</sup> According to the claimants, the people of New Orleans "were, at all times, American citizens," whose "rights" as citizens were reinstated by the overthrow of rebel rule and the restoration of U.S. supremacy.<sup>235</sup> The Court disagreed. The Union forces' very brief possession of the actual city of New Orleans did not terminate the blockade, it said, because the entire coastal and riverine area around New Orleans, still in rebel control, was being blockaded by the force which captured the *Circassian*.<sup>236</sup> A rule of the *Prize Cases*—agreed to by the dissenting Justices also, the Court noted—still applied here, that the rebellion had "assumed the character and proportions of civil war," in which the U.S. government properly invoked belligerent rights.<sup>237</sup>

*The Venice*<sup>238</sup> concerned a vessel owned by a long-term resident of New Orleans who had retained his British nationality; his vessel was seized on Lake Ponchartrain, Louisiana, in May 1862, just after U.S. forces had occupied New Orleans and Confederate defenders fled into the interior of the state.<sup>239</sup> The Court reiterated what it described as the law of the Prize Cases "concurring in by the dissenting Justices": "The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the

231 *Id.* at 481.

232 69 U.S. (2 Wall.) 135 (1864).

233 *Id.* at 135.

234 *Id.* at 143.

235 *Id.* at 144.

236 *See id.* at 149–50.

237 *Id.* at 148. In dissent, Justice Nelson stated that New Orleans was "our own territory" containing "our own people," and when the U.S. forces recaptured it, "the Constitution of the United States, which extends over every portion of the Union, and is the supreme law of the land," brought about "restoration" of the U.S. government's "ancient possession, authority, and laws." *Id.* at 158 (Nelson, J., dissenting); *see also id.* at 159 ("[T]he moment the capture took place, and the authority of the United States was established, the municipal laws of that government took the place of the international law upon which the blockade rested.").

238 69 U.S. (2 Wall.) 258 (1864).

239 *Id.* at 260.

citizens or subjects of the other, applies equally to civil and to international wars.”<sup>240</sup> Residents of the CSA could be treated by the U.S. government as enemies even if “not actually engaged in active hostilities against the Union.”<sup>241</sup> The U.S. government argued that the British claimant’s long residence in New Orleans made Louisiana his domicile and him “an enemy;”<sup>242</sup> the Court agreed.<sup>243</sup> Counsel for the United States further contended that only the President could decide when the power of the enemy in a particular locale had been broken and “the people and property once subject to hostile control may be *released from the laws of war, and restored to their rights under the Government.*”<sup>244</sup> The Court held that the policy announced by Congress, by the President in a proclamation, and by the commanding Union general in New Orleans was that recaptured CSA territory would be held under martial law as necessary, but that the inhabitants would, in many other respects, no longer be subject to “treatment as enemies.”<sup>245</sup> In particular, private property would no longer be seized as prize under the customary laws of war. The “general purpose” under which the President and Congress waged the war was “the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations.”<sup>246</sup>

*The Venice* is significant for several reasons. It nicely illustrates that the judiciary’s application of the customary laws of war to residents of the CSA occurred at the behest and under the direction of Congress and the President; the judiciary was not *ex proprio vigore* importing customary international law into the U.S. legal system. Second, the case also shows how the Court’s legal analysis was affected by the fact that the conflict occurred within the United States and the military enemies being attacked by the U.S. government were U.S. citi-

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240 *Id.* at 274 & n.16.

241 *Id.* at 275.

242 *Id.* at 266 (argument of counsel).

243 *Id.* at 279 (majority opinion).

244 *Id.* at 267 (argument of counsel) (emphasis added). The argument of claimant’s counsel was not published, but it seems likely that he claimed entitlement, upon the federal government’s recapture of the city, to some municipal rights including constitutional rights.

245 *Id.* at 277 (majority opinion).

246 *Id.* at 278. The Court ended with two important qualifications: first, that its ruling said nothing about the continuing liability of persons and property to *statutory* criminal penalties or confiscations; and, second, that the federal government could continue to treat residents of areas recaptured as enemies in all respects if they, unlike the claimant in this case, were “guilty of any actual hostility against the national Government,” that is, if they acted as military enemies before or after the federal repossession of the area. *Id.* at 279.

zens (or resident aliens owing temporary allegiance and hence under protection of the laws). In this civil war, individual constitutional rights were always hovering about, ready to emerge and be enforced just as soon as the state of war ended in particular places or as to particular people. As the U.S. lawyers put it, for all enemies there would come a time when they would be “released from the laws of war, and restored to their rights under the Government” of the United States.<sup>247</sup> The default legal status of the enemy in the Civil War was under the protection of the Constitution. Therefore the judiciary needed to closely examine U.S. wartime actions and policies so it could discern when the war’s displacement of constitutional rights would end. This aspect of the legal analysis of the conflict makes it wholly unlike international wars against foreigners and foreign nations whose default legal position was out of protection of the Constitution.

## 2. Courts Closed to Rebel Enemies During the War

In the 1864 case *Mrs. Alexander’s Cotton*,<sup>248</sup> the Court held that the laws of war made a plantation owner an “enemy” and her cotton “enemy property” because they were located within Confederate lines in Louisiana.<sup>249</sup> The Court rejected the assertion that temporary Union military control of the area had allowed loyal residents to “resume their political and civil rights” and “rights of property, such as [they] enjoyed before” the war.<sup>250</sup> The Court was “governed by the principle of public law”—that is, customary international law—“so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.”<sup>251</sup>

The Court further held that enemies of the United States had no standing to invoke the aid of courts in the United States while the war lasted: “Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United

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247 *Id.* at 267.

248 69 U.S. (2 Wall.) 404 (1864).

249 *Id.* at 418.

250 *Id.* at 411–12, 418–21 (emphasis omitted).

251 *Id.* at 419. The Court held that U.S. naval forces had no authority to seize property on land as “maritime prize,” and that proceeds from the sale of Mrs. Alexander’s cotton should therefore be turned over to the U.S. Treasury under the Abandoned and Captured Property Act, the statute applicable to enemy property seized on land. *Id.* at 420–23.

States so long as that relation shall exist.”<sup>252</sup> While this rule is fundamental to understanding the full scope of the displacement of constitutional and other municipal rights of U.S. citizens by the laws of war, it is not often noted in scholarship or judicial discussions of Civil War cases.

The Supreme Court, lower federal courts, and state courts repeatedly held or stated that, as in prior wars,<sup>253</sup> U.S. courts were closed to enemies during the Civil War.<sup>254</sup> This rule is rarely understood or noted by contemporary scholars or courts.<sup>255</sup> It is impossible to com-

252 *Id.* at 421.

253 *See supra* notes 79–81 and accompanying text.

254 *See, e.g.*, *Lamar v. Micou*, 112 U.S. 452, 464 (1884) (“A state of war . . . suspends until the return of peace the right of any one residing in the enemy’s country to sue in our courts.” (citations omitted)); *Conrad v. Waples*, 96 U.S. 279, 289–90 (1877) (“During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended.”); *Masterson v. Howard*, 85 U.S. (18 Wall.) 99, 105 (1873) (“The existence of war does, indeed, close the courts of each belligerent to the citizens of the other . . . .”); *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 184 (1872) (applying to residents of Virginia and Kansas “[t]he principle of public law which closes the courts of a country to a public enemy during war”); *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 236 (1871) (noting the rule that enemies are “totally incapable of sustaining any action in the tribunals of the other belligerent” and that there is an “[a]bsolute suspension of the right to sue and prohibition to exercise it during war, by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts”); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 536 (1867) (describing “the inability of an alien enemy to sue or sustain, in the language of the civilians, *a persona standi in judicio*”); *Elgee’s Adm’r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4344) (“[A] man residing in the Confederacy, and subject to its control, is, in law, a public enemy . . . [and] he cannot, in our courts, maintain any suit against citizens residing in loyal states.”); *Stiles v. Easley*, 51 Ill. 275, 276 (1869) (“While hostilities continued, Easley, as the citizen of a hostile State [Virginia], was disabled from suing in our courts; but this disability ended with the war.”); *Kershaw v. Kelsey*, 100 Mass. 561, 563 (1868) (“The rule is certainly well settled that during any war, foreign or civil, an action cannot be prosecuted by an enemy, residing in the enemy’s territory, but must be stayed until the return of peace.”).

The Supreme Court ruled that enemies could not themselves invoke the aid of the courts, but that they could defend themselves in court if the United States brought suit against them or their property, for example under the First or Second Confiscation Acts. *See Windsor v. McVeigh*, 93 U.S. 274, 277 (1876); *Univ. v. Finch*, 85 U.S. (18 Wall.) 106, 111 (1873); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 267 (1870).

255 The misunderstanding might stem from the fact that many postbellum decisions of the Court about the war involved civil claims brought by residents of the former CSA, and even by former officers and soldiers of the Confederate military. But both Presidents Lincoln and Johnson liberally issued individual and group pardons to rebels which removed their disability to invoke the power of the courts and restored their other constitutional and civil rights. *See, e.g.*, *Erwin v. United States*, 97 U.S. 392, 395 (1878) (“[N]or is any point raised against [Erwin’s] status in court from

prehend the true legal status of military enemies of the United States during the Civil War—and later, as the Civil War jurisprudence remained black letter law for decades afterwards—without realizing that they could not seek aid from courts in the United States during the conflict. The Supreme Court’s blithe assumption in the twentieth century that even Nazi saboteurs have a right to habeas review in Article III courts in the middle of World War II, and the twenty-first century Court’s view that the Constitution positively requires habeas review for noncitizens detained outside the United States as military enemies in a congressionally authorized armed conflict, no matter what Congress and the President say,<sup>256</sup> were radical departures from prior U.S. law and practice.

### 3. Vallandigham’s Case

The Court decided one other war powers case during the war, *Ex parte Vallandigham*<sup>257</sup>—and it was a significant one, regarding military jurisdiction over civilians in the North. Clement Vallandigham was a nationally known political figure—a leading Copperhead and Peace Democrat, who represented a southern Ohio district in Congress from 1857 to 1862. He was arrested at home in Ohio in May 1863 on the orders of the local commanding Union general and was quickly convicted by a military commission for uttering disloyal statements at Democratic party rallies intended to undermine the Union war effort

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his former connection with the rebellion as an officer in the Confederate army, the disability thus created having been removed by the President’s proclamation of pardon and amnesty.”). The most far-reaching was a Christmas pardon by President Johnson. See Proclamation No. 15, 15 Stat. 711, 711–12 (Dec. 25, 1868). For the other group pardons, see Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867); Proclamation No. 37, 14 Stat. 758–66 (May 29, 1865); Pres. Proclamation No. 14, 13 Stat. 741 (Mar. 26, 1864); Proclamation No. 11, 13 Stat. 737 (Dec. 8, 1863). A large part of the Court’s work product about war issues concerned the effect of the various pardons restoring civil and property rights. See, e.g., *Lamar v. McCulloch*, 115 U.S. 163, 164–65 (1885); *Knote v. United States*, 95 U.S. 149 153–54 (1877); *Osborn v. United States*, 91 U.S. 474, 475 (1875); *Haycraft v. United States*, 89 U.S. (22 Wall.) 81, 92 (1874); *Sprott v. United States*, 87 U.S. (20 Wall.) 459, 467 (1874); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 151 (1872); *Pargoud v. United States*, 80 U.S. (13 Wall.) 156, 157–58 (1871); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 155–56 (1871); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136 (1871); *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542 (1869); *In re Armstrong’s Foundry*, 73 U.S. (6 Wall.) 766, 769 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

<sup>256</sup> See *supra* notes 4, 17.

<sup>257</sup> 68 U.S. (1 Wall.) 243 (1864).

and spur resistance to military orders.<sup>258</sup> The U.S. circuit court in Cincinnati denied Vallandigham's habeas corpus petition.<sup>259</sup> Vallandigham had alleged that military detention was unconstitutional because he was a civilian in a loyal state where martial law had not been imposed. The U.S. government was ably represented by Aaron F. Perry, an Ohio politician and private lawyer who in 1861 had declined President Lincoln's offer to appoint him to the Supreme Court.<sup>260</sup> According to Perry, the Constitution contemplates times of peace where civil jurisdiction under constitutional protections prevails, but the Constitution also contemplates and allows the government to "meet war with war."<sup>261</sup> "[T]he laws of war are a necessary incident of a state of war," he argued, and are as constitutional in wartime as "the laws of civil procedure are in times of peace."<sup>262</sup> Furthermore, no man can "throw off his allegiance, defy the government, make war upon it, and, at the same time, claim its protection. When he lifts his arm against the constitution, the arm may be cut off, without giving him a right to complain of cruel and unusual punishment."<sup>263</sup> The circuit court upheld military jurisdiction to detain based on a prior unreported decision by Justice Swayne sitting in the

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258 See GUELZO, *supra* note 110, at 230–32; WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 64–66 (1998); see also *Vallandigham*, 68 U.S. (1 Wall.) at 244–45 (detailing the specific charges).

259 See *Ex parte Vallandigham*, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816).

260 See Biographical Directory of the United States Congress, Aaron Fyfe Perry, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000241> (last visited May 3, 2010).

261 *Vallandigham*, 28 F. Cas. at 901.

262 *Id.* at 910.

263 *Id.* at 902. The local U.S. Attorney, Flamen Ball, who also addressed the court, claimed more than he needed to, invoking "the law of self-preservation" of the nation, which is "higher than any written law, or written constitution." *Id.* at 917. His fiery rhetoric likely hurt rather than helped the United States's case. Before civil counsel for the United States appeared, the general who ordered the arrest, Ambrose Burnside, responded to the court that in this "state of civil war," where the several loyal states within his military department were threatened with invasion, "all the rules of modern warfare" would allow him to hang "a man from the enemy's country" who did what Vallandigham did, and it was illogical that "our own public men" should be given total immunity from military arrest for similarly damaging conduct. *The Case of Mr. Vallandigham*, N.Y. TIMES, May 17, 1863, at 2. Whether the general intended it or not, his response seems to have been a clever way to turn Vallandigham's fame against him, by implying that ruling for the United States was the strictly legal course and that freeing the detainee would represent genuflection to his public status.

same circuit.<sup>264</sup> The validity of the military commission trial was not passed upon.<sup>265</sup>

Vallandigham's case became a *cause célèbre* for critics who contended that many of the administration's policies violated civil liberties. The lower court's decision was sustained in the U.S. Senate by the influential John Sherman of Ohio, who would later serve as Secretary of the Treasury and Secretary of State. Vallandigham was justly treated as a "public enemy," argued Sherman, because he went to a part of Ohio where "open insubordination existed, and aided the public enemy by acts calculated to fan the flames of insurrection."<sup>266</sup> Before the Supreme Court became involved, in May 1863 President Lincoln ordered Vallandigham released from prison and sent "beyond [the] military lines" of the United States into the CSA.<sup>267</sup> Then in June 1863 President Lincoln defended military jurisdiction over Vallandigham and other civilians in an open letter to New York Democrats that was reprinted in the *New York Tribune* and many other newspapers and in a run of some 50,000 pamphlets.<sup>268</sup> The New York Democrats addressed by Lincoln contended that military detention and trial of civilians residing in northern, loyal states, and outside of

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264 See SWISHER, *supra* note 107, at 927.

265 See *Vallandigham*, 28 F. Cas. at 923 ("Whether the military commission for the trial of the charges against Mr. Vallandigham was legally constituted, and had jurisdiction of the case, is not a question before this court. There is clearly no authority in this court, on the pending motion, to revise or reverse the proceedings of the military commission, if they were before the court. The sole question is whether the arrest was legal . . ."); *id.* at 919 ("The petitioner does not state what the judgment of the military commission is . . .").

266 See *Proceedings of Congress*, N.Y. TIMES, June 28, 1864, at 8 ("Mr. Sherman said . . . [that a] riot sprung up in the County of Holmes, and the rioters were arrested and imprisoned, and under indictment upon charges of treason. Vallandigham went into the adjoining county, and in the presence of a large concourse of excited persons, some of them insurgents themselves, indulged in language evidently intended to excite them to the commission of further crime, subjecting him properly to arrest by military law, for openly aiding and abetting rebellion. . . . He was not merely talking opposition to the Government, but aiding the public enemy. It is a distinction which should not be ignored. . . . Mr. Sherman wished it distinctly understood that Mr. Vallandigham's case was not put on the ground of the suspension of the habeas corpus. He was treated just as Jeff. Davis would have been—as a public enemy stimulating and abetting open acts of rebellion against the Government of the United States.").

267 *Vallandigham*, 28 F. Cas. at 925 (reprinting President's military order of May 19, 1863).

268 See GUELZO, *supra* note 110, at 230, 232. The letter was addressed to Erastus Corning "and others." Corning, of Albany, New York, was a wealthy railroad man, head of the state's Democratic Party and recently a member of Congress. See *id.* at 232–33.

any zone of military activity, violated various individual rights provisions of the Constitution, such as Article III's rules about treason prosecutions and the jury and grand jury rules in Article III and the Bill of Rights.<sup>269</sup> This was a category error, Lincoln explained. Those guarantees were meant to operate in "quiet times" of "peace;" they applied to arrests and prosecutions of individuals or small groups for "ordinary" crimes already committed.<sup>270</sup> The Constitution itself, in the Habeas Suspension Clause,<sup>271</sup> wrote Lincoln, recognized that different rules applied in times of "rebellion or invasion" because civil courts and their processes are often "inadequate" to control the violent actions by large, organized groups.<sup>272</sup> Lincoln showed that Vallandigham had not committed ordinary crime but had endangered the "public safety" by "warring upon the military" and "damaging the army."<sup>273</sup> This "gave the military constitutional jurisdiction to lay hands upon him."<sup>274</sup> "Must I shoot the simple-minded soldier boy who deserts," asked Lincoln rhetorically, "while I must not touch a hair of a wiley agitator who induces him to desert?"<sup>275</sup> According to Lincoln, his choice to pursue Vallandigham rather than simple-minded boys influenced by him was "not only constitutional, but, withal, a great mercy."<sup>276</sup> Lincoln's letter to Corning was well received

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269 See Letter from Lincoln to Corning, *supra* note 39, at 347–48. Lincoln's letter to Corning came about because Corning's Democratic Party committee had announced a series of resolutions at a public meeting condemning the military actions against Vallandigham. Although Lincoln and his cabinet were not pleased with Burnside's aggressiveness, Lincoln deemed it prudent to defend the general's course publicly. See GUELZO, *supra* note 110, at 232; REHNQUIST, *supra* note 258, at 72–73. The government also successfully fended off Vallandigham's habeas challenges. Lincoln's letter to Corning was preapproved by the cabinet. See *id.* at 73. For additional analysis of this episode, see MCGINTY, *supra* note 107, at 182–90; SWISHER, *supra* note 107, at 925–30.

270 Letter from Lincoln to Corning, *supra* note 39, at 347.

271 U.S. CONST. art. I, § 9, cl. 2.

272 Letter from Lincoln to Corning, *supra* note 39, at 349. The functional reasons for the Constitution's distinction is that civil courts are slow-moving and at the mercy of ill-disposed jurors; and moreover, their constitutional rules ban "preventive" detention and conviction except for "defined crimes [already] committed," proved by substantial evidence. *Id.* at 348.

273 *Id.* at 349. "Public safety" is, of course, a reference to the Habeas Suspension Clause.

274 *Id.* Lincoln also defended the constitutionality of his Emancipation Proclamation by invoking concepts underlying the dual-status doctrine. See Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in 2 ABRAHAM LINCOLN: COLLECTED WORKS, *supra* note 39, at 396, 397 ("[T]he constitution invests its commander-in-chief, with the law of war, in the time of war.").

275 Letter from Lincoln to Corning, *supra* note 39, at 349.

276 *Id.*

and helped quiet some of the legitimate public concern about civil liberties in the North during the war.<sup>277</sup>

Vallandigham wanted the Supreme Court to review the constitutionality of his conviction by military commission. But the lower court had not ruled on that issue, and a new habeas corpus petition in federal court could not then be instituted to challenge the trial because Vallandigham had been sent out of federal custody to the CSA. Vallandigham's counsel therefore petitioned the Supreme Court to issue a writ of certiorari to the Judge Advocate General of the Army in order to bring up to the Court the record of the military commission trial and judgment. The Supreme Court refused to issue the writ, holding that it lacked appellate jurisdiction to issue a writ of certiorari because the case was "not in law or equity" within Article III, nor was "a military commission a court within the meaning of the 14th Section of the Judiciary Act of 1789."<sup>278</sup>

The Court seemed to go out of its way to suggest its view of the merits and implied quite distinctly that the military detention and trial were lawful. It treated the Lieber Code as authoritative; stated that the general who arrested Vallandigham had acted "in conformity" with the Code; and stated that, as recognized by the Lieber Code, military commission jurisdiction was "applicable, not only to war with foreign nations, but to a rebellion" also.<sup>279</sup> It is not surprising, and in fact was likely intended by at least some of the Justices, that *Vallandigham* was read as holding that the arrest, detention, and trial "[were] not illegal."<sup>280</sup>

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277 According to Randall, the Corning letter "is generally regarded as one of [Lincoln's] ablest papers." RANDALL, *supra* note 44, at 184 n.20.

278 *Vallandigham*, 68 U.S. (1 Wall.) at 251.

279 *Id.* at 249.

280 *Vallandigham in the Supreme Court*, N.Y. TIMES, Feb. 16, 1864 at 4; *see also Mr. Vallandigham's Case*, DAILY AGE (Phila.), Mar. 18, 1864, at 2 ("The question of law, a very narrow one, might have been disposed of . . . in a few lines. . . . Not content with this, however, Judge Wayne gives a long recital of facts [and] all the details of Burnside's infamous outrage . . . as if they were the most natural occurrences in the world, without one word to show that what was done or suffered is matter of censure or regret."); *Vallandigham and the Supreme Court*, MACON (Ga.) DAILY TELEGRAPH, Feb. 25, 1864, at 2 (noting with dismay that the decision had been read as a "most important" precedent that would "do much towards suppressing exhibitions of treason"). Other media sources correctly described the limited nature of the Court's holding and did not comment on the Court's expansive dicta. *See, e.g., The Vallandigham Case*, N.Y. TRIB., Feb. 16, 1864, at 1.

## V. POSTBELLUM SUPREME COURT DECISIONS ON WAR ISSUES

The Court continued to hear and decide cases arising from the war until the end of the century—well over 300 in all. In other words, it was thirty-five years after Lincoln’s assassination and the war’s end when the Court’s docket was free of the Civil War. During that period, the Court had three Chief and twenty-five Associate Justices. In scores of cases covering a vast range of issues, the Court repeatedly reaffirmed core tenets of the dual-status doctrine. It did of course hold some Union war measures unconstitutional, but the number and scope of those decisions were tiny compared to the victories for the U.S. government.<sup>281</sup> This Part traces the course of the Court’s war decisions in a number of areas.

### A. *Secession Was Treason Because Allegiance Was Unimpaired*

In *Texas v. White*<sup>282</sup> and several other decisions, the Court considered the validity of wartime acts of the CSA and seceded states and, hence, the legality of secession itself. Secession—the attempt to cast off allegiance to the United States<sup>283</sup> and establish an independent nation—was a legal nullity, the Court held; “the State did not cease to be a State, nor her citizens to be citizens of the Union.”<sup>284</sup> The attempt to throw off allegiance to the United States failed; all residents of the CSA were still bound by the obligations of citizen-

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281 One of the most significant acts of Congress held unconstitutional was the wartime legislation making paper money “legal tender” for all debts public and private. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869). One year later, the Court reversed itself and upheld the legislation. See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870). Because it does not concern individual rights against military actions, the issue is not addressed in this Article.

282 74 U.S. (7 Wall.) 700 (1868).

283 See *Vallandigham*, 68 U.S. (1 Wall.) at 249 (describing the “rebellion” as “when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own”).

284 *Texas v. White*, 74 U.S. (7 Wall.) at 726.

ship.<sup>285</sup> Their rebellion constituted treason. All acts of the CSA were void and its officers who invaded individual rights were trespassers.<sup>286</sup>

*B. The Laws of War Displace Constitutional Rights of U.S. Citizen Enemies*

In reviewing basic principles concerning legal rights of seceded states and their inhabitants, the Court in *Texas v. White* noted the rule that, during this condition of civil war, the rights of the State [of Texas] as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.<sup>287</sup>

The leading consequences were the loss of constitutional rights during the rebellion and, of course, susceptibility to attack by the military forces of the Union. In these few words, the Court encapsulated the core propositions of the Union's war powers theorists. Rebellion against the United States and its Constitution caused U.S. citizens to forfeit their right to protection by the Constitution. The corporate actions of the people of the states through their governments, embracing and pursuing rebellion, were attributed to and bound all members of the state, even those whose individual dispositions or actions did not show support for rebellion. The Court then made

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285 See *Williams v. Bruffy*, 96 U.S. 176, 188 (1877) ("The United States, during the whole contest, never for one moment renounced their claim to supreme jurisdiction over the whole country, and to the allegiance of every citizen of the republic."); *White v. Hart*, 80 U.S. (13 Wall.) 646, 651 (1871) ("At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. His political rights may be put in abeyance or forfeited. . . . If he loses his rights he escapes none of his disabilities and liabilities which before subsisted.").

286 See *Hickman v. Jones*, 76 U.S. (9 Wall.) 197, 200–01 (1869) ("The rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress, and downfall. The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted."); *United States v. Keebler*, 76 U.S. (9 Wall.) 83, 86 (1869) ("The whole Confederate power must be regarded by us as a usurpation of unlawful authority, incapable of passing any valid laws . . .").

287 *Texas v. White*, 74 U.S. (7 Wall.) at 727.

clear that it did not follow Thaddeus Stevens and other radicals<sup>288</sup> to the view that the states and people had committed political suicide: the Court emphasized that the forfeiture of rights was a temporary phenomenon of war—a mere suspension—because secession could neither break the Union nor destroy the obligations of U.S. citizenship. And so when war ended, Congress and the President would indicate the proper time for constitutional rights to be resumed.

*United States v. Miller*<sup>289</sup> was a leading case of comparable importance to the *Prize Cases*. Miller's stock in railroad companies was seized and condemned in a U.S. district court in Michigan under both the First and Second Confiscation Acts.<sup>290</sup> His property was confiscable because he lived in Virginia, a rebel state, and served in the Confederate military. Miller did not appear in the lower court and these allegations were considered admitted by default. By writ of error, Miller later asked the Supreme Court to vacate the judgment because the Confiscation Acts punished him for the municipal crime of treason by taking his property, but did so without a grand jury indictment or common law jury trial, as required by the Fifth and Sixth Amendments.<sup>291</sup> According to the Court, "[w]ar existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held."<sup>292</sup> Since the sections of the Confiscation Acts used to take Miller's property "were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, [but] on the contrary, [were] an exercise of the war powers of the government," the Court found it "clear they are not affected by the restrictions imposed by the fifth and sixth amendments."<sup>293</sup> Even Justice Stephen Field—a dogged defender of the alleged rights of rebels<sup>294</sup>—had to concede in dissent in *Miller* that

288 According to Stevens, secession made the rebel states "foreign nations" and their inhabitants "enemies." CONG. GLOBE, 38th Cong., 1st Sess. 316–17 (1864).

289 78 U.S. (11 Wall.) 268 (1870).

290 See *supra* note 105.

291 *Miller*, 78 U.S. (11 Wall.) at 306.

292 *Id.* at 304–05.

293 *Id.*

294 Field wrote a number of majority opinions—which often provoked dissents—finding that rebels' property rights survived wartime confiscation measures. See, e.g., *Conrad v. Waples*, 96 U.S. 279 (1877); *Windsor v. McVeigh*, 93 U.S. 274 (1876). Field issued written dissents from decisions upholding Union war actions in numerous cases. See, e.g., *Sinking-Fund Cases*, 99 U.S. 700, 731–44 (1878) (Field, J., dissenting); *Lamar v. Browne*, 92 U.S. 187, 200–02 (1876) (Field, J., dissenting); *Mechs.' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 298–308 (1875) (Field, J., dissenting); *Sprott v. United Sates*, 87 U.S. (20 Wall.) 459, 465–74 (1874) (Field, J.,

legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those applicable to legislation founded upon the municipal power of the government and directed against criminals. Legislation in the former case is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. Legislation in the latter case is subject to all the limitations prescribed by the Constitution for the protection of the citizen.<sup>295</sup>

*Miller's* holding that the Second Confiscation Act was valid when applied to property in loyal states of U.S. citizens who received no actual notice was reaffirmed several times.<sup>296</sup>

It is suggested that *Miller* shows that the U.S. government's war powers are limited by the customary laws of war.<sup>297</sup> The Court in fact

dissenting); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 634–81 (1870) (Field, J., dissenting); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 350–56 (1870) (Field, J., dissenting); *Miller*, 78 U.S. (11 Wall.) at 314 (Field, J., dissenting). Field voted against the government but did not write separately in other important war cases. See, e.g., *Young v. United States*, 97 U.S. 39 (1877); *New Orleans v. S.S. Co.*, 87 U.S. (20 Wall.) 387 (1874); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

295 *Miller*, 78 U.S. (11 Wall.) at 315 (Field, J., dissenting); see also KELLY ET AL., *supra* note 44, at 415–16 (discussing the Court's understanding in *Miller*, shared by the dissent, that a statute implementing the government's "sovereign right" under "internal or municipal law" can only be implemented through proceedings consistent with the individual rights in the Constitution and Bill of Rights, but that constitutional protections are not applicable when an individual is proceeded against according to a statute enacted under the "war power" and based on the government's "belligerent right"). Even *Miller's* counsel conceded that the Fifth and Sixth Amendments were inapplicable to exercises of the rights of war; counsel contended, though, that their client was not properly subject to the laws of war at all. See *Miller*, 78 U.S. (11 Wall.) at 284–85. Also in 1870, the year *Miller* was decided, Justice Field conceded in another case "the right of Congress" to proceed against the disloyal as "enemies" under "the limitations, which the law of nations has imposed on the conduct of war," or as criminals "amenable to the municipal law," under which Congress may "legislate for the punishment of crimes," and "subject to limitations, which secure to the accused a trial by a jury of his peers, and the right to be confronted with the witnesses against him." *Tyler*, 78 U.S. (11 Wall.) at 354–55 (Field, J., dissenting).

296 See *Wallach v. Van Riswick*, 92 U.S. 202, 207 (1875) (concerning real estate in Washington, D.C.); *Brown v. Kennedy*, 82 U.S. (15 Wall.) 591, 599 (1872) (concerning a real estate mortgage in Kansas); *Tyler*, 78 U.S. (11 Wall.) at 345–47 (concerning real estate in Washington, D.C.); see also *Alexandria v. Fairfax*, 95 U.S. 774, 777 (1877) (concerning securities of the city of Alexandria, Virginia, a place under federal control since spring 1861).

297 David Golove, *Military Tribunals, International Law, and the Constitution: A Frankian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 387–88 (2003) (seeming to imply that the Court understood the laws of war as restraints on Congress); cf. Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 21 (2006) ("[A]ll

declined to decide that question.<sup>298</sup> In any event, to place *Miller* in a proper context, one must remember that during the Civil War, all relevant parties were U.S. citizens within the United States whose default legal status was to be in allegiance and under the protection of the laws. If Mr. Miller, for instance, was not an enemy under the law of nations, then he was a regular U.S. citizen whose property was being condemned in a federal court in Michigan—and in that case everyone would agree that he would be protected by constitutional rights. So Miller’s argument that the law of nations did not make him an enemy was, in a sense, just another way of phrasing his claim that he enjoyed the rights of a U.S. citizen. And so the law of nations can be seen, in this boundary-policing sense only, as a constitutional limit on the U.S. government. But that would not be true in cases involving foreign enemies, whether inside or outside the United States, and friendly noncitizens outside the United States, all of whom would by default be outside the protection of the Constitution.

In *The Gray Jacket*,<sup>299</sup> a resident of Alabama argued that his vessel and cargo were not properly condemned as enemy’s property because the rights of “the rebels,” being U.S. citizens, could only “be adjudged by the municipal laws of their country,” not by the harsh law of prize which applied only to foreigners.<sup>300</sup> The Alabaman asserted that he had personally remained loyal and had only been trying to remove his property from “the insurrectionary district” to the Union when he was

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Justices on the Court in both *Brown* and the *Prize Cases* agreed that the scope of the President’s constitutional warmaking authority was defined by the law of nations.”). In *Miller*, the President, through subordinates, simply applied Congress’s confiscation statutes; there was no exercise of his independent constitutional powers. The allegedly unconstitutional action was the application of the statute to Miller. It was the powers of Congress that were challenged. *See Miller*, 78 U.S. (11 Wall.) at 304 (considering “the objection . . . that the acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the Constitution”).

298 The claimant Miller argued, and Justice Field in dissent agreed, that under the law of nations Miller was not properly considered an enemy, and since Congress was constitutionally required to conform its statutes to the law of nations, they were unconstitutional as applied to him. Miller and Justice Field conceded that, if the confiscation laws were exercises of Congress’s belligerent rights and applied to an enemy, there could be no individual constitutional rights claim. The majority’s rejoinder was that it did not need to decide whether Congress was constitutionally bound by the law of nations because Miller was in fact a military enemy as defined by the law of nations. The Court did not, then, suggest that Congress’s constitutional war powers were limited by the law of nations. Instead it avoided the need to decide that question by showing that the law of nations was not violated.

299 72 U.S. (5 Wall.) 342 (1866).

300 *Id.* at 359 (argument of counsel for claimant).

captured.<sup>301</sup> He had been, “at worst, only an enemy by construction” due his domicile in a seceded state, but he had shed that “quasi-enemy . . . status” as soon as he sailed out of rebel territory intending to “return[ ] to his allegiance” and reside in a loyal state.<sup>302</sup> In short, argued his counsel, he should not be treated as “an alien enemy” and subjected to the law of nations,<sup>303</sup> but was a loyal U.S. citizen whose property was protected under municipal law. Though not mentioning the Constitution expressly, the claimant in effect asserted rights under it. And the Court dismissively rejected his arguments. By the law of nations, specifically the law of prize, property of a “hostile country” is still enemy’s property notwithstanding the feelings or status of the individual owner.<sup>304</sup> Belligerent rights of the government under international law trumped an individual’s former municipal rights.

In *The William Bagaley*,<sup>305</sup> the Court also upheld the condemnation as enemy property under the laws of war of the partial interest that a concededly loyal citizen of the loyal state of Indiana had in a vessel and cargo owned by an Alabama firm.<sup>306</sup> The Court cited precedents from international wars holding that contracting with an “alien enemy” was barred by the law of nations and that lingering in an enemy nation after a war begins makes a person an enemy and hence his property confiscable.<sup>307</sup> In multiple other decisions, the Court upheld the application of harsh rules of the laws of war to U.S. citizens domiciled in loyal states.<sup>308</sup>

301 *Id.* at 361.

302 *Id.* at 364.

303 *Id.* at 364–65.

304 *Id.* at 369–70. The Court held this on many other occasions. *See, e.g.,* *United States v. Farragut*, 89 U.S. (22 Wall.) 406, 423 (1874) (“If the owners [of seized vessels] resided on that side of the line of bayonets spoken of in the *Prize Cases* which adhered to the Union, then they were not liable to condemnation as prize . . . . But if their owners resided on the other side of that line, were themselves citizens of and domiciled in States declared by the President’s proclamation to be in insurrection, then their property captured in naval warfare was lawful prize, and subject to condemnation. The loyalty of the owners made no difference in this regard.” (footnote omitted)).

305 72 U.S. (5 Wall.) 377 (1866).

306 *Id.* at 403; *see also id.* at 397 (argument of claimant’s counsel) (arguing that the claimant’s loyalty and residence in Indiana should preclude application of the laws of war).

307 *Id.* at 407–08.

308 *See, e.g.,* *Jenkins v. Collard*, 145 U.S. 546, 552 (1892) (concerning the confiscation of property of resident of Cincinnati, Ohio, who joined rebel army); *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 351–52 (1874) (holding that the laws of war voided the contracts of resident of Louisville, Kentucky with residents of CSA); *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 183 (1872) (holding that the laws of war tolled stat-

C. *Discretion to Choose Sovereign or Belligerent Methods*

The *Miller* Court found that certain provisions of the Second Confiscation Act were exercises of the war power while others were enacted under the United States's authority as a "sovereign" to punish the crimes of its citizens.<sup>309</sup> It did not affect the constitutionality of the Act that both "belligerent" and "sovereign" purposes were contained in a single statute and therefore that different regimes of procedural rights would apply to proceedings under different subsections. Contrary to the suggestion of some scholarship, there was no constitutional difficulty with the U.S. government deciding to "toggle back and forth" between the exercise of belligerent and sovereign rights "according to what best served its military interests."<sup>310</sup>

In *Lamar v. Browne*,<sup>311</sup> the Court reiterated that "during the late war" the United States "could act both as belligerent and sovereign." The United States's belligerent acts were regulated by the laws of war. At the same time, "as a sovereign [the United States] might recall their revolted subjects to allegiance by pardon, and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose. It was a matter entirely within their sovereign discretion."<sup>312</sup> Similarly, in *The Hampton*,<sup>313</sup> the Court held that the

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ute of limitations for the benefit of resident of Virginia in suit against residents of Kansas); *see also* *Mauran v. Ins. Co.*, 73 U.S. (6 Wall.) 1, 13–14 (1867) (holding that the rules of laws of war applied to detriment of Massachusetts insurance firm in controversy arising from seizure of insured vessel by CSA forces).

309 *See supra* notes 289–96 and accompanying text.

310 *Lee, supra* note 209, at 69. The government's constitutional power to "toggle" was understood by some contemporary observers to have been recognized in the *Prize Cases* itself. *See, e.g.*, SPEECH OF HENRY CHAMPION DEMING OF CONNECTICUT ON THE PRESIDENT'S PLAN FOR STATE RENOVATION 10 (Washington, D.C., Gibson Bros. 1864) (stating in a speech before the House of Representatives his understanding that the *Prize Cases* allow the President to "elect to pursue them [rebels] either as enemies or traitors, by the Constitution or the laws of war. If he elects to pursue them as traitors, he must pursue them in accordance with the constitutional definition of treason and by the mode and with the limitation it clearly indicates in the section [of the Constitution] devoted to that crime. If he elects to pursue them as enemies, there is no limit and restraint upon his discretion but the laws of war."). Deming further argued that the *Prize Cases* had settled the debate that had occurred since the beginning of the conflict, by rejecting the view "that rebels who adjure the Constitution and wage war for its destruction are entitled to all the rights which it guaranties, and can only be pursued by constitutional penalties," and accepting the view of Deming and others that "the inhabitants of the insurgent States have forfeited all their rights under the Constitution, and are public enemies in a state of war, with no rights but such as the law of nations accords to belligerents." *Id.* at 11–12.

311 92 U.S. 187 (1875).

312 *Id.* at 195.

Executive had the discretion to confiscate a Virginia vessel under either the international laws of war as enemy property or under an applicable congressional statute which created a “municipal forfeiture.”<sup>314</sup> There was no limit on the government’s choice to proceed as a belligerent or sovereign against one of its citizens, even when, as here it was not contested that he was “loyal.” In *The Circassian*, the Court noted that in wartime, international law allows “military force” to be employed to blockade the enemy’s ports, and “when the enemies are rebels, [the government may use] military force *and municipal law*.”<sup>315</sup> Chief Justice Chase, in an opinion delivered on circuit, stated that the concession of belligerent rights to the rebel army “in the exercise of political discretion and in the interest of humanity, to mitigate vindictive passions inflamed by civil conflicts, and prevent the frightful evils of mutual reprisals and retaliations,” “established no rights except during the war,” and rebels were liable for the civil crime of treason.<sup>316</sup> The Lieber Code also announced the shifting between belligerent and sovereign rights was perfectly appropriate, stating that “[t]reating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly.”<sup>317</sup>

#### D. Immunity/Indemnity

An entirely different set of Supreme Court cases, concerning the liability of U.S. executive officers to civil or criminal penalties for wartime conduct,<sup>318</sup> shows the breadth of the displacement of U.S. citizens’ individual constitutional and common law rights by the laws of war. In two very significant decisions, the Supreme Court held that the courts of the “enemy”—all the courts in the seceded states—had no jurisdiction to entertain any civil or criminal charges against federal soldiers, even apparently when the soldier’s actions were allegedly in violation of the laws of war or otherwise illegal.<sup>319</sup>

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313 72 U.S. (5 Wall.) 372 (1866).

314 *Id.* at 375–76.

315 *The Circassian*, 69 U.S. (2 Wall.) 135, 151 (1864) (emphasis added).

316 *Shortridge v. Macon*, 22 F. Cas. 20, 22 (C.C.D.N.C. 1867) (No. 12,812).

317 Lieber Code, *supra* note 14, art. 154.

318 Recall that no enemy could sue in U.S. courts during the war, so any suits against U.S. soldiers or officials for wartime conduct would have had to await the end of hostilities.

319 See *Dow v. Johnson*, 100 U.S. 158, 164–65 (1879) (“[The late] war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war. . . . The people of the

Though they avoided what would have been an avalanche of suits against them in Confederate courts, thousands of Union soldiers and federal officials were still harassed in the courts of loyal states, which did have jurisdiction over them. The practice at the time was to sue officials in common law tort to attempt to vindicate alleged infringements of individual rights by the government.<sup>320</sup> In the years after the Civil War, the Court held that soldiers and other government officials had no civil liability in tort or otherwise for any wartime acts “done in accordance with the usages of civilized warfare under and by military authority.”<sup>321</sup> Just as described above regarding the *Miller* decision,

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loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other . . . . When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy’s country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. . . . [I]t is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. . . . Much more must this exemption prevail where a hostile army invades an enemy’s country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings.”); *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878) (“When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government and making war against it, in other words, when the armies of the United States were in the enemy’s country, the military tribunals [of the United States] had, under the laws of war, and the authority conferred by [statute], exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.”).

320 The common law of tort was used to bring claims even when it was expressly recognized that individual rights of constitutional dimension were being pursued. See, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 126–27, 134, 136 (1851); *Milligan v. Hovey*, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9605). The practice of suing state or local government officials directly under the Constitution would have to await an 1871 act to enforce the Fourteenth Amendment, see Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13, and such suits against federal officials were not recognized by the Supreme Court until *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), implying a federal cause of action for the violation of certain constitutional rights.

321 *Freeland v. Williams*, 131 U.S. 405, 416 (1889). Because the United States “conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation,” that the Confederate forces had “such belligerent rights as belonged under the law of nations to the armies of independent governments engaged in war against each other,” the same defense to civil liability was available to Confederate

this rule polices the boundary between the constitutional rights of citizens and the U.S. government's power to displace them by invoking war powers under the laws of war.

To provide additional protection to U.S. soldiers and officials, Congress enacted in 1863 the Indemnity Act,<sup>322</sup> amended and broadened in 1866 and 1867,<sup>323</sup> which granted sweeping immunity to federal soldiers and civilian officials from any civil or criminal liability in state or federal court for wartime actions relating to trials by military commission or any "search, seizure, arrest, or imprisonment."<sup>324</sup> The 1867 statute also removed federal and state court jurisdiction over

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soldiers and officials. *Ford v. Surget*, 97 U.S. 594, 605 (1878). In *Ford*, the Court held that an "act of war" which was "consistent[ ] with the laws and usages of war," and done under Confederate military orders, could give rise to no "civil responsibility," at least where the plaintiff was also a resident of the CSA and hence an enemy entitled to no protection under "the provisions of the Federal Constitution." *Id.* at 605–06, 607.

322 See Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 ("[A]ny order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress . . .").

323 See Act of Mar. 2, 1867, ch. 155, 14 Stat. 432, 432 ("[A]ll acts, proclamations, and orders of the President . . . or acts done by his authority or approval [between July 4, 1861 and July 1, 1866] respecting martial law, military trials by courts-martial or military commissions, or the arrest, imprisonment and trial of persons charged with participation in the late rebellion . . . or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels. . . and all proceedings and acts done or had by courts-martial or military commissions, or arrests and imprisonments made in the premises . . . are hereby approved in all respects, legalized and made valid . . ."); Act of May 11, 1866, ch. 80, § 1, 14 Stat. 46, 46 ("[A]ny search, seizure, arrest, or imprisonment made, or any acts done or omitted to be done during the said rebellion, by any officer or person, under and by virtue or any order, written or verbal, general or special, issued by the President or Secretary of War, or by any military officer of the United States holding the command of the department, district, or place within which such seizure, search, arrest, or imprisonment was made, done, or committed, or any acts were so done, or omitted to be done, either by the person or officer to whom the order was addressed, or for whom it was intended, or by any other person aiding or assisting him therein, shall be held, and are hereby declared, to come within the purview [of the immunity provision of the Act of March 3, 1863].").

324 Act of Mar. 3, 1865, ch. 81, § 4, 12 Stat. 755, 756. These acts were necessitated by the thousands of suits filed against federal soldiers and officials and the lawless conduct of some state judges and legislators in persecuting federal defendants. See RANDALL, *supra* note 44, at 186–214. For a discussion of how these statutes and associated congressional debates illuminate important questions about the suspension of the writ of habeas corpus, see Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 639–55 (2008).

cases challenging such actions by military or civilian officials.<sup>325</sup> These protective statutes were drafted so comprehensively as to cover even grossly excessive actions, including actions that violated the laws of war. The Supreme Court upheld the statutory immunity and related removal jurisdiction from constitutional challenges.<sup>326</sup> The importance of the Court's holding in these cases should not be underestimated; they blocked almost all ability to judicially vindicate alleged common law, constitutional, or laws-of-war violations by federal officials during the war.

*E. The Displacement of Constitutional Protection by the Laws of War Was Not a Theory of Extra-Constitutional Power*

The Supreme Court repeatedly confirmed that wartime was not some strange zone in which the Constitution was somehow simply "off," to use Professor Currie's unfortunate phrase.<sup>327</sup> The Court quite frequently required the executive branch to comply with congressional statutes,<sup>328</sup> showing that traditional constitutional relations between the branches of the federal government were "on" during the war. Lower executive officials were frequently bound by the Court to compliance with the international law of prize<sup>329</sup>—the law which the President and Congress had directed the courts to apply to adjudicate the legality of wartime high-seas seizures. The Court voided a congressional statute because it interfered with the President's constitu-

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325 Act of Mar. 2, 1867, 14 Stat. at 433.

326 See *Mitchell v. Clark*, 110 U.S. 633, 641 (1884); *Beard v. Burts*, 95 U.S. 434, 437 (1877); *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 352–54 (1867); see also *Crosby v. Cadwalader*, 6 F. Cas. 876, 876 (Strong, Circuit Justice, C.C.E.D. Pa. 1870) (No. 3419) (applying Act of March 3, 1863, to bar tort suit); RANDALL, *supra* note 44, at 211 (stating that "the essential provisions of the Indemnity Act were sustained by the high tribunal" but noting that one minor provision was held to violate the Seventh Amendment). Justices Field and Clifford stated in a dissenting opinion in 1878 that the Indemnity Acts were unconstitutional; the majority had declined to reach the issue because it found other infirmities in the civil judgment against U.S. army officers and because the issue was not properly presented in the bill of exceptions. See *Beckwith v. Bean*, 98 U.S. 266, 284 (1878); *id.* at 292 (Field, J., dissenting).

327 See *supra* note 163.

328 See, e.g., *The Cotton Plant*, 77 U.S. (10 Wall.) 577, 580–81 (1870) (requiring compliance with statute barring the U.S. Navy from seizing rebel property as prize of war on any inland waters); *The Ouachita Cotton*, 73 U.S. (6 Wall.) 521, 531 (1867) (enforcing statute which allowed the "President" to make exceptions to prohibition on commercial intercourse between North and South to void licenses given by U.S. military).

329 See, e.g., *The Watchful*, 73 U.S. (6 Wall.) 91, 93 (1867); *The Peterhoff*, 72 U.S. (5 Wall.) 28, 50–51 (1866).

tional power to pardon (as exercised on behalf of former rebels).<sup>330</sup> Lower court decisions condemning rebel property seized on land through *in rem* proceedings were reversed if a claimant's right to demand a jury trial had been violated.<sup>331</sup> All of this is inconsistent with the notion of a general absence of constitutional restraint during war.

#### F. *Enforcing the Constitutional Rights of Citizens During the War*

It might be suggested that all of these precedents from the Civil War, holding that the constitutional rights of U.S. citizens are displaced by the laws of war when they become military enemies of the United States, merely show that the courts were less protective back then of individual rights in general. That theory is wrong, as shown by two types of Supreme Court decisions, those enforcing or discussing (1) the individual constitutional rights of loyal U.S. citizens in loyal states against U.S. government actions, and (2) the individual constitutional rights of citizens in both rebel and loyal states against unconstitutional actions by rebel state governments.

In two important cases, the Court suggested that noncombatant, loyal citizens in loyal states had enforceable constitutional rights against certain U.S. military actions during the war. The cases involved the army's use or destruction of private property for military reasons and considered when wartime necessity displaced otherwise applicable protections of the Fifth Amendment's Takings Clause. In *United States v. Russell*,<sup>332</sup> the Court held that "immediate, imminent, and impending" "public danger" during war allowed U.S. military officials to "impress[ ] into public service, or . . . appropriate[ ] to the public use, or . . . destroy[ ] without the consent of the owner" the private property of loyal citizens in loyal states, but that compensation was required.<sup>333</sup> In *United States v. Pacific Railroad*,<sup>334</sup> compensation

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330 *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). For a full discussion of the case, see Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *FEDERAL COURTS STORIES* 87–113 (Vicki C. Jackson & Judith Resnick eds., 2010).

331 See, e.g., *Armstrong's Foundry*, 73 U.S. (6 Wall.) 766, 769 (1867); *Union Ins. Co. v. United States*, 73 U.S. (6 Wall.) 759, 764, 766 (1867).

332 80 U.S. (13 Wall.) 623 (1871).

333 See *id.* at 627–28. Here a steamboat was temporarily impressed into service to ferry military supplies. The Takings Clause required compensation, but the remedy was not against the individual officer. The emergency justified what would otherwise be a trespass by him. Instead, the Court of Claims had jurisdiction to assess and pay damages to the owner. *Id.* at 627–29.

334 120 U.S. 227 (1887).

was not required because the unavoidable necessity of destroying the loyal property overrode potentially applicable constitutional rights.<sup>335</sup>

In the second type of case, the Court held that the rebel states never actually left the Union and thus, their conduct was still subject to U.S. constitutional restrictions, such as the Contracts Clause and the Privileges and Immunities Clause of Article IV.<sup>336</sup> Sometimes the Court simply voided statutes under the rule that “all acts done in aid of the rebellion were illegal and of no validity,” but without specifying the source of law.<sup>337</sup> Typical of state statutes struck down were those taking the property or otherwise discrimination against residents of loyal states on the ground that they were “alien enemies” to the CSA and the states in rebellion. When holding illegal the acts of rebel state governments, the Court was quite clear that it was recognizing and enforcing “the just rights of citizens under the Constitution.”<sup>338</sup>

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335 See *id.* at 228–29. Missouri had been invaded by a large Confederate army, and to impede its advance on St. Louis, the retreating U.S. Army destroyed several privately owned railroad bridges. The Court held that the United States was not required to compensate the owners for “injuries to or destruction of private property in necessary military operations during the civil war.” *Id.* at 239. “The safety of the state in such case overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex.*” *Id.* at 234. The Court distinguished “claims where property of loyal citizens is taken for the service of our armies, such as vessels . . . for the transport of troops and munitions of war.” *Id.* at 239. Citing *Russell*, the Court confirmed that the U.S. government compensates the loyal owners in those cases, but indicated that this practice may “rest upon the general principle of justice” rather than “the terms of the constitutional clause.” *Id.* Despite suggestion to the contrary, see Vladeck, *Re-Rethinking*, *supra* note 209, at 88–89, *Pacific Railroad* is not a case about “enemy property” at all. The case concerned whether the U.S. government was required to compensate loyal U.S. citizens in the loyal state of Missouri when their property was unavoidably destroyed during military operations. There is no basis in *Pacific Railroad* or any other decision for the notion that, but for some special doctrine about enemy property, the United States could be sued in federal court and required by the Constitution to compensate German owners if the U.S. military “bombed a German Messerschmitt plant during World War II.” *Id.* at 88. The Takings Clause is inapplicable to enemy aliens’ property even when within the United States. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 n.9 (1952). *A fortiori*, lawful military targets in the enemy’s country during war would obviously not be protected by the Constitution from attack by U.S. forces.

336 See *Stevens v. Griffith*, 111 U.S. 48, 50–51 (1884); *Keith v. Clark*, 97 U.S. 454, 462–63 (1878); *Williams v. Bruffy*, 96 U.S. 176, 184–85 (1878).

337 *Dewing v. Perdicaries*, 96 U.S. 193, 195 (1878).

338 *Keith*, 97 U.S. at 464; see also *Stevens*, 111 U.S. at 50–51 (enforcing rights of “citizens of a loyal state” violated by Virginia statute which was “contrary to the clause of the constitution declaring that ‘the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states’”).

A third type of case involved tort suits by loyal citizens for personal injuries caused by persons acting under CSA civil authority. The United States had, for reason of humanity, conceded belligerent rights to the Confederate military forces, and so lawful acts of the rebel military forces were protected by the combatant's privilege recognized by the laws of war.<sup>339</sup> But the concession of sovereign, belligerent rights to the Confederate military "did not extend to the pretended government of the Confederacy."<sup>340</sup> In *Hickman v. Jones*,<sup>341</sup> the Court held that because all acts of the civil government of the CSA were void, a man prosecuted for treason in a CSA court pursuant to the CSA statute could sue in trespass those civil officers responsible for prosecuting him.<sup>342</sup>

In a fourth type of case, lower federal courts, including Chief Justice Chase sitting on circuit, held that courts of seceded states had no jurisdiction over any residents of loyal states during the war because by the laws of war and congressional statute no intercourse could be had between the two warring sections of the country.<sup>343</sup>

#### G. *Military Occupation of Enemy Territory*

One final set of cases, which concern the occupation of captured CSA territory by the U.S. Army, should be noted. In these cases, the Court reaffirmed the rule that the war powers of the government can be directed against enemies, even those who are U.S. citizens, unrestricted by any alleged constitutional rights.

In *New Orleans v. The Steamship Co.*,<sup>344</sup> a case concerning actions of the U.S. military occupation government of New Orleans, the Court declared that "[t]here is no limit to the powers that may be exerted" when the United States occupies and governs enemy territory, "save those which are found in the laws and usages of war."<sup>345</sup> According to

339 See *supra* note 78 and accompanying text.

340 See *Hickman v. Jones*, 76 U.S. (9 Wall.) 197, 200 (1869).

341 76 U.S. (9 Wall.) 197.

342 *Id.* at 201. The plaintiff was not disabled from suing in U.S. courts by reason of his residence in the CSA because the war had ended. No policy interest would exclude him either, since he was a loyal citizen seeking redress from CSA officials for harassing him on account of his loyalty.

343 See, e.g., *Livingston v. Jordan*, 15 F. Cas. 675, 677 (Chase, Circuit Justice, C.C.D.S.C. 1869) (No. 8415).

344 87 U.S. (20 Wall.) 387 (1874).

345 *Id.* at 393-94; see also HALLECK, *supra* note 119, at 776 ("[During a military occupation of enemy territory,] one do[es] not look to the [C]onstitution, or the political institutions of the conqueror, for authority to establish a government . . . nor for the rules by which the powers of such government are regulated and limited. Such authority, and such rules, are derived directly from the laws of war, as estab-

the Court, “the laws of war take the place of the Constitution and laws of the United States as applied in time of peace.”<sup>346</sup> With a nod to the era’s categorical rule that the Constitution did not protect foreign enemies in or outside the United States, the Court noted that this power to govern civilians in Confederate territory without protecting individual rights guaranteed by the Constitution existed “as if the territory had belonged to a foreign country and had been subjugated in a foreign war.”<sup>347</sup> This followed directly from the Court’s holding in the *Prize Cases* and other decisions that the Civil War was regulated by the same rules of international law as applied to wars between independent nations.

After the war, the Supreme Court repeatedly affirmed the constitutional authority of the President, or his military subordinates, to create military courts in conquered territory to hear all manner of civil or criminal cases during wartime.<sup>348</sup> The lawful life of these military courts created under the President’s war powers extended even beyond the close of hostilities, lasting until Congress could make “proper provision for the business before it, as well as that which had been disposed of.”<sup>349</sup> This authority could be exercised in foreign territory or in U.S. territory recaptured from an enemy during civil war. And neither Article III nor individual-rights provisions of the Consti-

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lished by the usage of the world . . . .”); 2 WINTHROP, *supra* note 14, at 1, 21–22 (reciting the doctrine of *The Steamship Co.* and stating that “the law of war may, in its exercise, substantially supersede for the time the Constitution and laws of the land”).

346 *S.S. Co.*, 87 U.S. (20 Wall.) at 394.

347 *Id.* at 393–94.

348 *See, e.g.*, *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466, 469 (1874) (“The validity of the Provisional Court [of Louisiana] is not an open one. We have held it valid on more than one occasion.” (citing *The Grapeshot*, 76 U.S. (9 Wall.) 129, 129 (1870)); *Mechs.’ & Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 297–98 (1887) (holding that, in occupied territory during wartime, the President or one of his generals has authority under the laws of war to create civil and criminal courts, the judgments of which will be valid and binding upon the return of peace); *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519, 524 (1874) (holding that the President has constitutional authority during war to create and staff a military court to hear civil and criminal cases in occupied enemy territory); *Pennywit v. Eaton*, 82 U.S. (15 Wall.) 382, 384 (1873) (holding that the military governor of occupied enemy territory, appointed by the President, had authority to establish and staff courts to hear civil cases); *Handlin v. Wickliffe*, 79 U.S. (12 Wall.) 173, 174–75 (1871) (same); *The Grapeshot*, 76 U.S. (9 Wall.) at 133 (holding that the provisional court of Louisiana was authorized to hear all cases arising under U.S. and Louisiana law and “was properly established by the President in the exercise of his constitutional authority during war” to govern occupied enemy territory).

349 *Burke*, 86 U.S. (19 Wall.) at 525. The Court also upheld the authority of Congress to transfer cases from military courts to peacetime courts of the United States. *See The Grapeshot*, 76 U.S. (9 Wall.) at 133.

tution give any person a right to exempt his judicial case from the jurisdiction of these military courts.

For example, during the Civil War, Confederate civilians in occupied New Orleans had “no constitutional immunity against subjection to the judgment”<sup>350</sup> of military provost courts, created by the general commanding the occupied enemy district, “for the hearing and determination of all causes arising under the laws of the State [of Louisiana] or of the United States.”<sup>351</sup> In this case, *Mechanics’ and Traders’ Bank v. Union Bank*,<sup>352</sup> the Court held that “the Constitution of the United States” did not “prevent the creation” and use of the courts that specifically that the clause of Article III which vests the judicial power of the United States “has no application to the abnormal condition of conquered territory in the occupancy of the conquering army.”<sup>353</sup> In *Planters’ Bank v. Union Bank*,<sup>354</sup> the Court stated, in reference to the limits on the power over civilians of a Union general occupying rebel territory during the war, that “it must be conceded that he had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or by the effect of Congressional legislation.”<sup>355</sup>

#### H. Milligan in Context

It is glaringly obvious—based on the Court’s decisions in the *Prize Cases* and the dozens of other decisions discussed above—that the Court’s sweeping rhetoric about the universality of constitutional rights in *Milligan*<sup>356</sup> cannot be taken at face value.<sup>357</sup> Even in *Milligan* itself one sees suggestions that there might be large categories of people and places that the Constitution does not protect. The majority’s repeated emphasis that Milligan was not a “resident” of any “of the rebellious states” hints at the rule that residents of the CSA were enemies with no constitutional rights to protect them against U.S. military force. Similarly, the Court suggested that military courts could try

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350 *Mechs.’ & Traders’ Bank*, 89 U.S. (22 Wall.) at 296.

351 *Id.* at 295.

352 89 U.S. (22 Wall.) 276.

353 *Id.* at 294–95 (1874).

354 83 U.S. (16 Wall.) 483 (1872).

355 *Planters’ Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 495 (1873).

356 See *supra* note 13 and accompanying text.

357 See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 36 (expanded ed. 1976) (“[H]owever eloquent and quotable his [Justice Davis, the author of *Milligan*] words on the untouchability of the Constitution in time of actual crisis, they do not now, and did not then, express the realities of American constitutional law.”).

persons in certain categories: “prisoners of war,” persons residing in enemy territory, and persons located in U.S. territory where war had obstructed ordinary civil processes.<sup>358</sup> Chief Justice Chase’s concurring opinion suggests that the Constitution does not follow the Army when it marches into enemy territory.<sup>359</sup>

Why then did the Court only hint at these rules in *Milligan* when it boldly pronounced them in so many other decisions? In his writing about the Civil War and the Court’s decisions about individual rights, John Norton Pomeroy suggested that “there is something exquisitely absurd in the supposition that a civil, any more than a public, war can be waged under the protection of the Bill of Rights.”<sup>360</sup> Why did the Court in *Milligan* write its decision in a way that made it seem that the Court had crossed the line to the absurd?<sup>361</sup> The most likely explanation is that a majority of the Court wished to signal to the Radicals in Congress that it disapproved of military Reconstruction and the continued displacement of civil by military courts in the defeated

358 See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118, 123, 131 (1866).

359 *Id.* at 141 (Chase, C.J., concurring) (“[T]here is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.”).

360 JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 379 (Edmund H. Bennett ed., New York, Houghton, Mifflin & Co. 10th rev. ed. 1888).

361 The majority opinion in *Milligan* could have been written in very different ways than it was. As Chief Justice Chase in concurrence and numerous later commentators have pointed out, the Court could have resolved the case on the narrow ground that Congress in the 1863 habeas corpus statute had prohibited the military trial of persons situated as Milligan was. Even an opinion reaching out to decide that Congress lacked power to subject Milligan to military trial could have been written in a much narrower manner, for instance:

As we held in the *Prize Cases*, *The Circassian*, *Mrs. Alexander’s Cotton*, and *The Venice*, because the insurrection assumed the character and proportions of civil war, “all who live[d] in the enemy’s territory [we]re public enemies, without regard to their personal sentiments or conduct; [but] the converse of the proposition is equally true,—that all who reside[d] inside of our own territory [we]re to be treated as under the protection of the law. If they help[ed] the enemy they are criminals, but they cannot be punished without legal conviction.” In loyal states where the courts are open and unobstructed, the laws of war cannot strip constitutional liberties from civilians who have not taken up arms, even if, like Milligan, they may plot to do so in the future.

The language in quotation marks is part of the argument that Milligan’s counsel, former Attorney General Jeremiah Black, delivered in the Supreme Court. See *Milligan*, 71 U.S. (4 Wall.) at 80–81 (argument of counsel).

South.<sup>362</sup> That the U.S. military was essentially the only institution with the capacity and will to defend freed slaves and white Unionists from the horrific violence meted out by decommissioned rebel soldiers should, one might think, cause contemporary civil libertarians to temper their uncritical deification of the *Milligan* Court. But that would require an understanding that the vigorous exercise of government power is a necessary precondition for the existence of individual liberty, not, as many today seem to imagine, simply and only a threat to liberty.<sup>363</sup>

### CONCLUSION

This Article has attempted to recover important but forgotten legal rules and theories about the relationship between the Constitution and the laws of war. The Supreme Court today, while claiming fidelity to the doctrines of the Civil War era, holds that military enemies of the United States—and noncitizens outside the United States, at that—have judicially enforceable rights under the Constitution, the laws of Congress and the international laws of war. That repudiates core legal doctrines of the Civil War, for instance that by waging war against the United States, the rebels of the CSA—even though they were U.S. citizens in the United States—put themselves outside the protection of the Constitution and laws of the United States and had the courts closed to their claims; that the U.S. government could attack them with all the rights and powers allowed against foreign ene-

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362 In July 1866, a few months before the opinions in *Milligan* were released, Congress overrode President's Johnson veto to extend and expand the Freedmen's Bureau. See Second Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866). Johnson had (in)famously argued in his veto message that the bill's extension of "military jurisdiction" over civilians, and particularly its "arbitrary tribunals" akin to "court[s]-martial," violated the Fifth and Sixth amendments, CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866)—the constitutional provisions at issue in *Milligan*. Justice Davis, author of *Milligan*, conceded privately that his opinion was motivated by a concern that "Congress claims omnipotent power," 6 CHARLES FAIRMAN, RECONSTRUCTION AND REACTION 1864–88 PART ONE 233 (1971). Davis was clearly not referring to Congress's actions regarding wartime issues, because all the Justices had agreed in *Milligan* that an 1863 statute *prohibited* the trial of the conspirators, see *Milligan*, 71 U.S. (4 Wall.) at 115–17; *id.* at 134–35 (Chase, C.J., concurring in the judgment); Davis could only have been talking about postwar Reconstruction—an issue that had not come before the Court and which Davis therefore had no business adverting to and prejudicing with comments about Congress's lack of power to allow military trials, see *id.* at 121–22 (majority opinion).

363 As the Declaration of Independence reminds us, it is to "secure . . . rights"—"among these are life, liberty and the pursuit of happiness"—that "governments are instituted among men." Philip Bobbitt has written eloquently about this. See PHILIP BOBBITT, TERROR AND CONSENT 241–46 (2008).

mies during international wars; and that, in its discretion, the U.S. government could also or instead choose to prosecute them for municipal crimes, and only then would constitutional protections be available. The modern Court repeatedly, by rote almost, acknowledges that some deference and leeway must be accorded to the President and Congress's wartime decisions about how to subdue the enemy, but always goes on to assert that American constitutional traditions and precedents, including from the Civil War, positively compel the Court to intervene on behalf of military enemies. Once one understands the true constitutional doctrines of the Civil War, the modern Court's reluctant pose is seen to rest on historical fiction. This is not to say that every legal rule of the Civil War era should be applied today. I happen to think that the legal framework of the Civil War has a lot to recommend it, especially as compared to the serious problems that seems likely to flow from the current Court's grant of robust rights to enemies.<sup>364</sup> But that normative question is not the task of this Article. I have simply tried to recover and accurately describe the law of the Civil War as it was understood by contemporaries. It turns out that those doctrines are vastly different than what the Court and many contemporary academic commentators have led us to believe.

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<sup>364</sup> See, e.g., Jess Bravin, *Gitmo Detainee Ordered Released*, WALL ST. J., Mar. 23, 2010, at A6 ("A suspected al Qaeda organizer once called 'the highest value detainee' at Guantanamo Bay was ordered released by a federal judge Monday. Mohamedou Ould Slahi was accused in the 9/11 Commission report of helping recruit Mohammed Atta and other members of the al Qaeda cell in Hamburg, Germany, that took part in the Sept. 11, 2001, terrorist attacks in the U.S.").