Regulating Private War: U.S. Federal Courts in the War of 1812

Kevin Arlyck
Ph.D. Candidate in History, New York University

When one thinks of the maritime conflict of the War of 1812 from an American perspective, one often imagines the dramatic single-ship naval engagements that captured the public’s imagination. Or one might think of the fleet actions fought to establish control over the lakes on the United States-Canadian border.\footnote{Donald R. Hickey, \textit{The War of 1812: A Forgotten Conflict} (Urbana, IL: University of Illinois Press, 1989); Alfred Thayer Mahan, \textit{Sea Power in its Relations to the War of 1812} (Boston, MA: Little, Brown, and Company, 1905).} While these events were no doubt important to the course of the war, their notoriety serves to obscure the fact the conflict fought by the United States on the seas was primarily a commercial one, a war waged against British maritime trade by what one historian has termed “the republic’s private navy.” During the war hundreds of private armed vessels—known as “privateers”—sailed from U.S. ports with commissions from the President authorizing them to seize British vessels and cargo and bring them back to the U.S., to be sold for the profit of the privateers’ owners, officers, and crew.\footnote{Jerome R. Garitee, \textit{The Republic’s Private Navy: The American Privateering Business as Practiced by Baltimore During the War of 1812} (Middletown, CT: Wesleyan University Press, 1977), 238; Faye M. Kert, \textit{Prize and Prejudice: Privateering and Naval Prize in Atlantic Canada in the War of 1812} (St. John’s, NL: International Maritime Economic History Association, 1997), 78, 89.} Though their precise impact is necessarily difficult to measure, scholars estimate that privateers captured, sank, or burned over a thousand British merchant vessels, and perhaps as many as 2,500—a considerable number even given the immense size of the British merchant fleet. The damage wrought by privateering was significant enough that, by the end of the war, Lloyd’s of London was charging exorbitant rates for underwriting maritime insurance policies.\footnote{One Baltimore newspaper of the time estimated that at least 1,750 British ships had been captured, whereas more recent research has put the estimate at something between 1,300 and 2,500. A recent study corroborates the higher figure, Donald R. Hickey, \textit{The War of 1812: A Forgotten Conflict} (Urbana, IL: University of Illinois Press, 1989).}
Privateering had been an established feature of international war for centuries, but the need for American privateers was all the greater in 1812 due to the nation’s limited naval capacity, which had only sixteen ships at the war’s outset, no match for the collective might of the Royal Navy. Thomas Jefferson articulated the importance of privateers quite well when, in 1812, he declared that “[i]n the United States, every possible encouragement should be given to privateering in time of war with a commercial nation. . . . Our national ships are too few in number . . . to retaliate the acts of the enemy. But by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe.” Accordingly, at the war’s outset Congress authorized President Madison to issue privateering commissions to American ship owners. The financial arrangements between governments and privateers had historically varied over time, but during the War of 1812 privateers were allowed to keep the bulk of the proceeds derived from their captures, paying only customs duties on the captured cargo they sold in the United States. Those proceeds would then be divided between the owners and the officers and crew. In short, commissioning privateers allowed the federal government to quickly establish a “private navy” without dipping into the public till, a feature of no small importance given public (and Congressional) ambivalence regarding military expenditures during the war.  

Reliance on privateers to prosecute a maritime war against British commerce, however, presented a fundamental difficulty: Given the federal government’s limited size and scope—and in particular the lack of a significant naval infrastructure—how best to ensure that privateering was

---

conducted properly? Under the laws of war, a privateer was only empowered to capture an enemy vessel and cargo—known as a “prize”—under the authority of a valid commission issued by a sovereign, and was required to have the legality of the capture verified by a tribunal of that authorizing sovereign before the property could be sold and the captors dispose of the proceeds. In practice, privateering was rife with abuses: forged commissions, falsified ship’s papers, sales without proper judicial proceedings, and outright theft. In general, however, each nation was responsible for policing its own privateers, and the owners of illegally-captured property had to contest the validity of the seizure before the tribunals of the capturing nation.

Unsurprisingly, privateering had long produced tensions, recriminations, and retaliation among the maritime powers of the Atlantic world, and recent experiences in the United States were no more salutary. Nearly two decades before the war, John Quincy Adams, one of the leading U.S. critics of privateering, argued that privateers, “stimulated by the prospect of a valuable spoil . . . are not apt to be nice in their distinctions of morality,” a belief he would continue to espouse throughout his political career. Adams was not alone—in many quarters privateering was thought of as little more than

---

5 Though recent scholarship has demonstrated that the federal government had a larger presence in the U.S. economy and society prior to the Civil War than has previously been appreciated, in terms of personnel and budget its size in the early nineteenth century was relatively small. See generally Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge, MA: Cambridge University, 2009); Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA: Harvard University, 1995); Gautham Rao, “The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution” (Ph.D. dissertation, University of Chicago, 2008).

6 The one significant exception to this rule was when the captor’s commission was invalid. In such cases the privateer had no legal authority to make captures in the first place, and could be tried for piracy under international law, a crime of universal jurisdiction over which any nation could assume responsibility. Alfred P. Rubin, *The Law of Piracy*, 2nd ed. (Irving-on-Hudson, NY: Transnational Publishers, 1998), 150–58.

7 In the early 1790s, the government’s inability to prevent American merchants and seamen from preying upon British commerce off the North American coast under commissions from revolutionary France put a significant strain on U.S.-British relations, and only a few years later the excesses of French privateers were one of the factors leading to the Quasi-War between France and the United States. William R. Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* (Columbia: University of South Carolina Press, 2006); Alexander De Conde, *The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797-1801* (New York, NY: Scribner’s, 1966).

8 Adams writing as Marcellus in the *Columbian Centinel*, Apr. 24, 1793, reprinted in Worthington Chauncey Ford, ed.,
legalized piracy, and by the beginning of the nineteenth century there was a growing international belief that it should be abolished outright. Critics of privateering did not object on ethical grounds only; in fact, their primary concern was that abuses threatened to exacerbate tensions during wartime and even drag the country into conflict with neutral nations whose citizens were often the victims of privateer misconduct. As Adams noted, “[i]n time of war, the subjects of all belligerent powers are frequently disposed to violate the rights of neutral nations.” Recognizing this problem, Justice Joseph Story of the Supreme Court, the nation’s leading expert on maritime law, noted in 1814 that “[i]t has been the great object of every maritime nation to restrain and regulate the conduct of its privateers: They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies.” Accordingly, shortly after Congress declared war against Britain, it passed a law regulating the capture of enemy property at sea, and specifically investing the federal district courts—that is, the trial courts of the national judicial system—with exclusive jurisdiction to adjudicate the validity of prizes brought into ports in the United States.

This paper proposes that, as a result, the federal courts were the governmental institution charged with primary responsibility for supervising the conduct of what was essentially a private war.

---

9 For a leading contemporary critique of privateering, see John Gallison, “Privateering,” North American Review 11 (1820): 166, 190. Though this movement did not reach fruition until 1856, when the major European powers signed a declaration abolishing privateering, the War of 1812 (and the broader Napoleonic conflict of which it was a part) was one of the last major conflicts in which privateering played a significant role. Henry J. Bourguignon, Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828 (Cambridge: Cambridge University Press, 1987), 173; Nicholas Parrillo, “The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century,” Yale Journal of Law & Humanities 19:1 (Winter 2007), 50-57. However, despite strong criticism of privateering in the U.S. in the period after the War of 1812, the U.S. did not sign on to the 1856 declaration, and privateering was a feature of the Civil War of the 1860s. See Parrillo, “De-Privatization,” 3-4.

10 The Thomas Gibbons, 12 U.S. 421, 429 (1814).
against British maritime commerce. The explanation for the courts’ leading role was in large part pragmatic: Simply put, the infrastructure of the early federal government was too limited to meaningfully supervise the hundreds of privateer ships that sailed from American ports during the war. But because a prize had to be judged as valid by a tribunal of the capturing nation before a privateer could reap the benefits of selling the captured vessel or cargo, the courts were well-positioned to exert public authority over privateer behavior. During the war the executive branch played a gatekeeping role in issuing commissions to privateers, but otherwise the Madison administration did little more than promulgate basic instructions governing privateer conduct. In addition, privateers were nominally subject to naval discipline, but the navy’s tiny size and the extent of the maritime theater of war meant that power was rarely exercised.

In short, once a privateer vessel had received its commission and sailed from port, responsibility for ensuring that its captures were made in conformity with international legal norms fell primarily to the courts.

As will be detailed below, however, the court’s regulatory role was not limited to simply adjudicating whether the property in question in a particular case was captured in accordance with established rules. To begin with, because Congress and the President established few guidelines regulating captures, the courts were in fact responsible for elaborating many of the specific rules to be applied to the particular conditions of the war. Though the courts’ extensive experience in maritime

11 Henry Wheaton, Reports of Cases Argued and Adjudged in the Supreme Court of the United States, vol. 2, (New York: Robert Donaldson, 1817), App. 9-11. (Justice Story wrote a two-part treatise on prize law, published as appendices to the first and second volumes of Wheaton’s reports of Supreme Court cases. See Parrillo, “De-Privatization,” 45.) Of course, the history of privateering is rife with examples of privateers selling captured cargo on the black market, without it first being deemed valid by a competent tribunal (perhaps because the capture itself was legally questionable or simply because the captor wanted to avoid the hassle of the adjudicatory process). It does not appear, however, that this was a common occurrence during the War of 1812, most likely because the British commercial empire was sufficiently robust and well-organized that it would be difficult for an American privateer to find a port (in the U.S. or elsewhere) in which to sell goods that had not been properly adjudicated.

commercial matters was useful in defining what exactly constituted “enemy property” subject to capture, the particular legal and political conditions of the war presented new questions the courts were obliged to address. Other responsibilities proved even more challenging. The courts’ expansive jurisdiction over maritime captures subsumed many ancillary issues beyond whether a capture was valid or not, leaving the courts with much of the responsibility for ensuring that privateers (and their victims) observed the procedural requirements of prize law. Moreover, during the war the court assumed significant responsibility regarding the proper division of proceeds stemming from maritime captures, performing tasks we might call administrative rather than adjudicatory.

The following discussion examines these three aspects of the courts’ role: establishing rules, regulating conduct, and administering the war. The picture of the courts that emerges is of a governmental institution that assumed a range of responsibilities related to the regulation of the nation’s “private navy” during the war, ones that extended well beyond the basic function of assessing the validity of maritime captures. As we shall see, however, striking the proper balance between government supervision of privateering and leaving certain questions to private agreement was not always simple.¹³

Before proceeding to the discussion a brief sketch of privateering’s mechanics during the war will be useful.¹⁴ A privateer was generally a small, fast-sailing merchant vessel armed with cannons and manned by a larger-than-usual crew. Because privateering was a capital-intensive operation, most

¹³ A note on methodology and the scope of the project: This paper is based primarily on initial research in the War of 1812 case files of the federal district court for New York, which includes papers relating to 118 proceedings involving vessels and cargo brought into that port by American privateers. New York was one of the two leading privateering cities in the U.S. during the war (Baltimore being the other), and the records reveal a great deal about how the court performed its crucial wartime function. To develop a more comprehensive view of how the “private” side of the maritime war was regulated, further research will be conducted in additional court records, the records of several executive departments, and certain collections of private papers.

¹⁴ For a more detailed outline of prize procedure in federal district courts at the time, see the appendix in volume 1 of Wheaton’s Reports.
ships were fitted out by consortium of investors, each of whom was entitled by agreement to a certain portion of the proceeds derived from any captures made. In order to legally capture enemy vessels and cargo, a privateer needed an authorizing commission from the federal government, which was usually acquired through application to local customs officials, and had to pay a bond ensuring that the privateer would operate in accordance with the laws regulating captures.

Once a privateer captured a prize at sea, the captain generally put a small crew onto the captured vessel to sail it back to a port in the United States (the vessel’s original crew often remained on board, though occasionally the captain and others were taken onto the privateer). When the prize vessel arrived in port the prize crew informed the court as well as the investors or their “prize agent.” Two commissioners appointed by the court were charged with collecting all the captured ship’s papers—which would be used to determine if it was a valid prize—and take depositions from members of the captured vessel’s crew regarding the circumstances of the seizure. A lawyer representing the privateer investors would then file a claim to the vessel and cargo in court—termed a “libel”—laying out the basic facts supporting the capture; the court would then usually issue an order putting the property under the control of the marshal of the court. The owners of the capture vessel and cargo could contest the legality of the seizure by filing a “claim and answer” indicating the grounds for their opposition.

The court’s decision on the validity of the capture was based primarily on the ship’s papers and the depositions, though sometimes time would be granted to allow the parties to obtain additional evidence. Because the adjudicatory process could take long, the cargo was often sold in the interim by the order of the court (especially if it was susceptible to spoiling), and the proceeds held by the court until the case’s conclusion. Before distribution, however, the court would deduct various expenses associated with the maintenance and sale of the property, as well as various fees owed to the court’s officers and any customs duties owed. The remainder was disbursed to the prevailing parties, marking the formal conclusion of the district court proceedings. If any party believed that the court had erred in
its ruling, he could appeal the decision to the circuit court, and then to the Supreme Court for final
decision. As a result, during this period the Court decided dozens of cases arising from the war,
resulting in numerous new rules establishing the boundaries of maritime conflict.

Establishing Rules

The primary question the district court faced, in every case, was whether the vessel and cargo
were valid prize—that is, whether they were enemy property. Though many of the case files from the
New York district court do not include a final decree disposing of the property, it appears that prizes
were condemned and proceeds awarded to the captors in the majority of cases, generally without much
opposition. 15 Sometimes these cases were quite straightforward. For example, in 1812 the privateer
Marengo captured the British vessel Concord, whose cargo included wine shipped by a merchant from
a neutral nation. Though the vessel itself was deemed good prize, the wine was not, as it was neutral
property (even when carried in a British bottom). Occasionally the outcome was so clear that
proceedings ended prematurely, as when a privateer lawyer released a captured vessel back to its
owners without even waiting for a decision from the court, presumably because the vessel was
American and therefore clearly not a good prize. 16

On many occasions, however, the governing law was not so clear, and the courts had to first
determine the applicable rules before applying them to the particular case. This should not be

15 See, for example, White v. Rio Nova (Nuovo), clerk’s report (June 3, 1813), National Archives and Records
Administration, Prize and Related Records for the War of 1812 of the U.S. District Court for the Southern District of
New York 1812-1816, microfilm M928 [hereinafter SDNY War of 1812 Prize Cases], roll 3; Graves v. Annabella,
marshal’s report (Mar. 1, 1813), SDNY War of 1812 Prize Cases, roll 1; Bailey v. Rum from Wreck of Friends, SDNY
War of 1812 Prize Cases, roll 3.

16 Charretton v. Concord, SDNY War of 1812 Prize Cases, roll 4; The Concord, 13 U. S. (9 Cranch) 387 (1815); Johnson
v. Mary and Susan, ship release (Dec. 19, 1812), SDNY War of 1812 Prize Cases, roll 5. The Marengo’s other prizes
appear to have been condemned without incident. See Charretton v. Eliza, SDNY War of 1812 Prize Cases, roll 3;
Charretton v. Lady Prevost; Marengo v. Lady Sherbrooke; Charretton v. Hardware and cutlery and other cargo from
Maria, SDNY War of 1812 Prize Cases, roll 4.
surprising—the federal courts had only a limited experience in sitting as prize courts (in the Quasi-War with France), and there was not a substantial body of American prize law upon which they could base their judgments. Thus the courts were often obliged to fashion the rules governing privateer captures on the fly, reasoning from the principles established by treatises on the law of nations and the precedents from British and other European courts, subject to review and final determination by the Supreme Court. For example, in the case just mentioned in which the lawyer released a captured American vessel back to its owners, a portion of the cargo owned by an American merchant domiciled in Britain was deemed good prize; the merchant’s decision to reside and do business in enemy territory meant that his property was subject to capture. But in order to establish this principle the Supreme Court was obliged to parse the writings of Vattel and Grotius as well as numerous British precedents, and even then the answer was by no means certain, as two of the Justices were of the opposite view.  

Certain cases presented even greater challenges, illustrating the legal and procedural complexity the court had to confront in its capacity as the arbiter of international military-commercial disputes. In light of the varieties of commercial arrangements into which transatlantic merchants could enter, the question of who “owned” a particular item found in the hold of a ship could be especially vexing. Take one example: The ship *Mary and Susan* was bound from Liverpool to the United States when it was captured by the privateer *Tickler*. Part of the cargo consisted of hardware which had been purchased in Birmingham by the mercantile firm of Daniel Cross & Co. at the request of G. & H. Van Wagenen, merchants at New York. However, to make the purchase Cross had borrowed money from an English bank, Spooner, Attwood & Co., to whom Cross subsequently assigned its rights to payment for the 

---

17 *The Mary and Susan*, 14 U. S. (1 Wheat.) 46, 54-55 (1816); *The Venus*, 2 U. S. (8 Cranch) 253, 273-317 (1814). In the war’s early stages the New York court was presented with numerous cases in which privateers sought condemnation of American vessels and cargos captured coming from Britain, on the theory that they were guilty of trading with the enemy. Such cases often turned on whether the ship had sailed prior to knowledge of Congress’s declaration of war had been received in Britain. See, for example, *Breed v. Lady Gallatin*, libel (Nov. 20, 1812), SDNY War of 1812 Prize Cases, roll 4; *Miller v. Georgia*, claim of Jacob Mark (Dec. 24, 1812), SDNY War of 1812 Prize Cases, roll 3.
shipment. Thus the question was whether, at the moment of capture on the high seas, did the cargo belong to the American firm that requested the order, the English firm that bought and shipped it, or the English bank that held a lien against it? (If the first, the cargo, being American property, was not a valid prize.) In order to answer the question, the Court had to precisely determine what rights each party enjoyed with respect to the property under this arrangement—for example, whether Van Wagenen had a right to refuse receipt of the hardware upon arrival in New York, or whether Spooner could have stopped the shipment and taken possession of the goods for its own use, in lieu of payment.18

For present purposes, whether the Court answered these intricate questions correctly is not important, though it is worth noting that the district court in this case came to a different conclusion, indicating the proper outcome was not self-evident. What is noteworthy is the extent to which the substantive outcomes of the war hinged on the meaning and import the courts gave to ordinary commercial terms. Freight, account, lien, factor, agent, supercargo, consignee—the courts’ orders and opinions in this period are littered with the mercantile vocabulary of early nineteenth-century, as the federal courts struggled to map the complex relationships of maritime commerce onto the substantive rules that would govern the nation’s private war against Britain’s economic empire.

**Regulating Conduct**

In addition to establishing many of the operative rules, the courts also had a role to play in ensuring that privateers played by them. Interestingly enough, research into the records of the New York district court suggests that American privateers rarely violated the rules of prize in their captures, and even those instances involved relatively minor infractions that were insufficient to warrant the

18 *The Mary and Susan*, 14 U. S. (1 Wheat.) 25 (1816).
court’s intervention. For example, an affidavit filed in one case alleged that the *Emulation*, prize to the Baltimore privateer *Syren*, had been plundered in the Outer Hebrides of “the whole of her cargo” by the prize master acting on concert with several inhabitants of the islands. But these allegations apparently did not render the capture of the vessel itself invalid, as the *Emulation* was sold (without its cargo) at auction by the marshal of the court, for the benefit of the *Syren*’s owners.\(^{19}\) Similarly, an admission that another privateer crew had taken some liquor out of a captured vessel for their “personal use” did not trigger any apparent response from the court, nor did a confession that a third crew had made off with part of a shipment of hats. In fact, as a general matter allegations of outright misconduct at sea were rare, and not just in the New York court.\(^{20}\)

This is not to say that the courts had no role to play in ensuring that American privateers conducted themselves appropriately. In September 1815 the owners of the Haitian merchant vessel *Amiable Nancy* filed suit in the New York district court, alleging that an American privateer, the *Scourge*, had plundered her cargo, taken her papers, and mistreated her crew. Lacking proper documentation as a neutral vessel after her papers were taken, the *Amiable Nancy* was seized by the British and sold in Antigua, and the owners sought compensation from the *Scourge*’s investors for the loss of the vessel and cargo. In response, the investors did not deny that it was wrong for the privateer...

\(^{19}\) *Cazeaux v. Emulation*, affidavit of Samuel Neaves (Dec. 27, 1815), marshal’s report (Feb. 7, 1815), SDNY War of 1812 Prize Cases, roll 3; Garitee, *Republic’s Private Navy*, 35, 105.

\(^{20}\) *Riker v. Ocean*, affidavit of Samuel Whitlock (Sep. 17, 1812), SDNY War of 1812 Prize Cases, roll 6; *Brown v. Merchandise from Dundee*, affidavit of Guy R. Champlin (Apr. 22, 1815), SDNY War of 1812 Prize Cases, roll 2. A thorough study of privateering from Baltimore found evidence of only three violations by privateers from that port, and the most egregious of them—an attack on an island in the Bahamas—was resolved diplomatically, not through the courts. Garitee, *Republic’s Private Navy*, 92-93. The explanation for this good behavior is uncertain; after the war’s end many of the men involved in privateering (especially those from Baltimore) accepted commissions from the revolutionary governments of South America, to raid Spanish and Portuguese commerce, and their exploits were rife with misconduct. The scholar who first noted this anomaly offers a possible explanation: American privateers during the War of 1812 were dissuaded from engaging in misconduct because such behavior could potentially result in the loss of the bond all privateer owners had to provide as a guarantee of good conduct when receiving a commission from the government. See Parrillo, *De-Privatization*, 48-49. In Baltimore apparently no sureties were revoked during the war, suggesting that the requirement had its desired deterrent effect. Garitee, *Republic’s Private Navy*, 92-93.
crew to engage in such conduct (let alone against a neutral vessel). Instead, they argued that the improper acts of the crew could not be imputed to them, and, moreover, the malfeasants had already been punished for their acts by a naval court martial. In short, whatever the crew’s misdeeds, they were redressable only through direct disciplinary action by the government against the offenders.

These arguments did not sway the court. Though four members of the crew had been found guilty of misconduct by a court-martial at Boston several months earlier, aside from a short term of imprisonment for the lieutenant under whose command the infractions occurred, the only penalty imposed on the offenders was the loss of their shares from the prizes made by the *Scourge*. The *Amiable Nancy*’s owners were likely more satisfied with the district court’s decision awarding them damages of over $10,000. On appeal the Supreme Court reduced the award, finding that certain amounts (such as future profit lost by the owners of the cargo) were too speculative to be allowed. Nevertheless, the Court implicitly upheld the district court’s determination that the *Scourge*’s investors were financially liable for injuries committed by the privateer crew, and even turned aside quite legitimate objections that the New York court should not have heard the case in the first place, as the lawsuit did not assert a claim to the vessel or cargo themselves.

Though speculating as to the courts’ reasons for allowing the damages claim against the privateer investors is an uncertain venture at best, it is entirely possible that the courts believed that, whatever deterrent effect court-martial proceedings might have on individual seamen, privateer investors needed a greater incentive to properly police their officers and crews. By ensuring that

---

21 *Mirault v. Schenck*, libel (Sep. 19, 1815), claim and answer (Jan. 16, 1816), SDNY War of 1812 Prize Cases, roll 1.
22 *Mirault v. Schenck*, court-martial proceedings (Feb. 7, 1815), SDNY War of 1812 Prize Cases, roll 1; *Boston Daily Advertiser*, Feb. 27, 1815, p. 2; *Evening Post* (New York), Feb. 25, 1815, p.3.
23 *The Amiable Nancy*, 16 U. S. (3 Wheat.) 546 (1818). As noted earlier, prize proceedings were structured as a lawsuit by the captors against the property itself, whereas in this case the *Amiable Nancy*’s owners sued the *Scourge*’s investors personally.
penalties for gross violations of neutral rights would be felt in the investors’ bank accounts, the courts effectively rebalanced the allocation of supervisory responsibility between the government and the private parties sponsoring privateering. Given the limited reach of naval discipline, enlisting investors in the effort to prevent privateers from offending neutral nations was a means of leveraging the federal government’s limited institutional resources to greater regulatory effect.

That said, theft, mistreatment, and other types of blatant misconduct at sea were not the court’s primary challenge in regulating behavior; rather, the court was more often confronted with questionable practices engaged in once the captured and vessels and cargo made it into port, as privateers and the property’s original owners vied to wrest the prizes away from each other. One relatively minor incident related to the capture the ship *Henrietta* by the privateer *General Armstrong*. In their libel the captors described the *Henrietta* as a “British sloop,” and therefore a lawful prize, conveniently omitting the fact that the *Henrietta* was actually an American ship owned by merchants in New York, and had been captured at sea by a British warship before being recaptured by the *General Armstrong* a short while later. The apparent reason for the admission was a law passed by Congress, under which privateers who recaptured American ships from the British were entitled to a reward of only 1/6 of the value of the vessel and cargo, rather than the entire value they would get if it were judged a good prize.24

It was not only the malfeasance of the privateers that the court had to watch out for. An attorney representing the captors of the *Lady Gallatin*, a vessel seized in 1812 on her way from Liverpool to New York, alleged that several local merchants to whom the cargo had been consigned had in fact “removed” portions of it “out of the reach of the marshall” before he could attach it, items

24 *Jenkins v. Henrietta*, libel (Aug. 2, 1814), claim and answer (Sep. 9, 1814), SDNY War of 1812 Prize Cases, roll 3; An Act for Providing for Salvage in Cases of Recapture, § 1, 2 Stat. 16 (1800). The recaptors’ failure to mention the *Henrietta*’s true ownership was not the result of ignorance or oversight, as the vessel’s owners had offered to pay the privateers 1/6 value even before the court proceedings commenced. Instead, they apparently hoped to pass the vessel off as British and reap the full benefits.
which they subsequently advertised for sale in the local paper. Fearing similar conduct, the attorney for another privateer warned the clerk of the court that the consignees of cargo in a recently-arrived prize might attempt to break bulk and spirit the cargo away once they learned of the libel filed by the privateers.25

Nor was not only cargo that might be spirited out of the court’s control. Several cases included allegations regarding missing ship’s papers, which from the privateers’ perspective were “indispensably necessary . . . to enable them to recover [the] Merchandize as prize.” In certain cases the papers’ disappearance appeared to simply be the result of mistake, as in the case of an attorney who apologized to the court for having temporarily misplaced papers owing to poor health. At other times, however, such behavior was intentional. The captain of one captured vessel simply refused to hand over the ship’s papers upon arrival in New York. In another case, the court had to go so far as issue legal process ordering the return to the clerk’s office of certain papers that the privateer owners alleged had been “purloined” from the office of the clerk of court by an agent for one of the parties involved.26

In short, though instances of blatant misconduct were rare, the court had to be ever-vigilant in ensuring that neither privateers nor the owners of captured property bent the rules of prize to their advantage.

**Administering the War**

What becomes clear from the New York court records, however, is that beyond establishing and enforcing rules regarding privateer conduct, the courts also had a significant administrative role to play in maintaining public authority over the private arrangements upon which privateering was based. For

25 *The Columbian* (New York), June 6, 1812, p.3; *Public Advertiser* (New York), Nov. 12, 1812, p.3; *Miller v. Georgia*, W.H. Thompson to deputy clerk (Oct. 7, 1812), SDNY War of 1812 Prize Cases, roll 3.

26 *Breed v. Lady Gallatin*, affidavit of Samuel Harris, Aug. 5, 1814, SDNY War of 1812 Prize Cases, roll 4; *Miller v. Georgia*, libel (Oct. 7, 1812), SDNY War of 1812 Prize Cases, roll 3; *Johnson v. Mary and Susan*, affidavit of Joshua Secor, Dec. 12, 1812, SDNY War of 1812 Prize Cases, roll 5.
even when captures were legitimately made and properly adjudicated, the convergence of private interests that characterized privateering posed further challenges—namely, how to ensure that prize proceeds were properly distributed among the various interested parties.

In order to do so, the New York court performed functions normally left to the litigating parties under typical judicial proceedings. For example, under usual admiralty procedure a court did not assume jurisdiction over a case until a libel was filed in the court. In wartime practice, however, the New York court assumed responsibility for ensuring the proper disposal of the captured vessel and cargo as soon as it entered the port. Under the rules established by the court, personnel from the captured ship were examined by court-appointed commissioners, who asked each deponent a standardized series of questions and forwarded their responses to the court, usually before the libel was filed. 27 As a result, under this procedure the court effectively assumed the responsibility for developing the facts necessary to decide whether the capture was valid, a function that was typically the responsibility of the contesting parties. The importance of this evidence-gathering function cannot be underestimated; in-person testimony was rare, and cases were generally decided on the basis of the captured vessel’s papers and the answers to the interrogatories. 28 In fact, considering the records as a whole, one is struck by the extent to which the court acted independently of the parties to ensure that cases were correctly decided. A number of cases include multiple reports from the clerk exhaustively detailing the facts of the capture, and even when a libel went uncontested by the owners of the captured property the court acted to satisfy itself that the prize was valid, despite the Supreme Court’s

27 See, for example, Graves v. Annabella, deposition of Richard Clark (Feb. 13, 1813), deposition of William Coleman (Feb. 15, 1813), libel (Feb. 23, 1813), SDNY War of 1812 Prize Cases, roll 1. For the New York district court’s rules and standing interrogatories, see Francis H. Upton, The Law of Nations Affecting Commerce During War (New York: John Voorhies Law Bookseller and Publisher, 1863), 474-484.

28 Upton, Law of Nations, 406; Wheaton, Reports, vol. 2, 23-24. In the court’s first wartime case the captor’s libel was mistakenly filed before the depositions had been taken, so the court held proceedings in abeyance until they arrived. Charretton v. Lady Prevost, libel (Sep. 3, 1812), deposition (Sep. 29, 1812), monition (Sep. 30, 1812), SDNY War of 1812 Prize Cases, roll 4
recognition that “[t]he usual controversy in prize causes is between the captors and captured.”29

Moreover, the court’s extensive responsibility for ensuring that the spoils of war were properly disposed of continued once the case had been decided and it was time to divide up the proceeds. In addition to the investors who owned shares in the venture, privateers were manned by a several officers and over a hundred seamen, each of whom had shares as well (though of course much smaller than the investors). On the other side, the vessel and cargo of a captured ship generally had multiple owners scattered across the Atlantic world, who often sought to recover their property from the captors on the ground of it being an invalid prize. And given that the parties were rarely present when their claims were being decided, all of them routinely engaged local agents and attorneys to manage affairs on their behalf.

What the records suggest is that, at the war’s outset, the district courts were meant to exert significant control over the way that proceeds were distributed; in other words, not only would a court adjudicate the legal and factual questions as to whether the captured property was a valid prize, but would also bear the administrative responsibility of ensuring that every interested party would be properly compensated. For example, as a general matter the division of prize proceeds was determined by private agreements among the owners, officers, and crew. Congress recognized this reality in the 1812 statute authorizing the President to issue privateering commissions, which stipulated that captured property would be “distributed according to . . . written agreement.” When there was no written agreement to govern, the proceeds were to be distributed by the terms of a statute passed during the period of the Quasi-War minutely regulating distributions to the officers and crew of naval ships.30

29 Brown v. Dundee, clerk’s reports (May 2, 1815; May 15, 1815; May 28, 1816, May 29, 1816), SDNY War of 1812 Prize Cases, roll 2; Brown v. Nicholson, clerk’s reports (May 2, 1815; May 9, 1815; undated 1815), SDNY War of 1812 Prize Cases, roll 6; Schenck v. Henry, marshal’s report, SDNY War of 1812 Prize Cases, roll 3; The George, 14 U. S. (1 Wheat.) 408, 409 (1816).

What the statute did not specify, however, was who was responsible for ensuring that the distribution was properly made.

The New York district court took this responsibility upon itself. In one of the earliest cases, the judge issued a rule specifying that, prior to paying over the proceeds of the sale of the captured vessel and cargo, the clerk of the court was to present a report to the court indicating how the monies were to be distributed. First, the clerk was to indicate all the court fees and charges that were to be deducted from the proceeds prior to distribution to the prevailing party. However, in cases where the privateer was to receive the net remainder, that amount was not simply given over to the privateer agent in a lump sum to be distributed by the terms of the agreement among the owners, officers, and crew. Instead, the clerk was to report to the court “the proportions and amounts of the several sums of prize money due the owners & each of the officers seamen & mariners & crew” as well as any advances made by the owners to the officers and crew and the final balance due to each.\(^{31}\)

In other words, the clerk of the court was charged with keeping accounts and distributing the proceeds derived from maritime captures. Accordingly, the files of the a number of cases include highly detailed reports from the clerk indicating every single individual with a share in the prize proceeds, lists which could include over a hundred names. Not only did the clerk have to determine the individual amount due each interested party, but had to keep track of the (often numerous) advances made by the owners to the officers and crew as well as delete the names of those who had deserted or been discharged from the privateer.\(^{32}\)

The demands that the court ensure proper compensation came from all quarters. The captain of

\(^{31}\) *Adams v. Venus*, rule of court (Nov. 16, 1812), rule of court (undated), SDNY War of 1812 Prize Cases, roll 8.

\(^{32}\) *Adams v. Venus*, affidavit of Robert Finn (Jan. 4, 1816), SDNY War of 1812 Prize Cases, roll 8; *Engersoll v. Industry*, clerk’s report (Mar. 10, 1813), SDNY War of 1812 Prize Cases, roll 3; *Jenkins v. Union*, clerk’s report, SDNY War of 1812 Prize Cases, roll 8; *Adams v. Jenny*, clerk’s report, SDNY War of 1812 Prize Cases, roll 3; *Campan v. Young Adella*, clerk’s report, SDNY War of 1812 Prize Cases, roll 8.
one ship argued for additional compensation because his officers and crew already owed him more than their shares of the proceeds were worth. Noting that “it belongs and appertains to this Honorable Court, to enforce and collect the payment of the fees and charges of its officers,” an attorney in another case asked the court to order that the privateer investors pay him the $500 he was owed for libeling a captured ship in 1813. Agents petitioned the court for a greater share of the proceeds of prizes sold, citing the significant expenses and hardships associated with managing the suits for the benefit of the privateer investors.\textsuperscript{33} The court was therefore called upon to not only disburse the proceeds of maritime war among the participants, but was also obliged to make carefully calibrated judgments about the worth of services rendered by the merchants and lawyers hired by privateers to manage the business side of their military adventures.

Unsurprisingly, taking on the responsibility for properly distributing prize money to all the interested parties created administrative headaches for the court. Because it was “impossible” (in the deputy clerk’s estimation) to determine from the privateer’s papers exactly which members of the crew were entitled to shares in a given prize, the clerk had to rely on additional information from the privateer owners in determining how to pay out the proceeds. But complete accuracy was hard to come by; in one case, the clerk’s initial report omitted several individuals entitled to shares, so the court ordered that a second list be drawn up. Unfortunately, the clerk had already overpaid several officers based on the first list, and attempts to recoup the excess dragged on for years, requiring the court to issue an order demanding repayment and prompting the clerk of the court to personally sue the agent who had received the payment.\textsuperscript{34}

\textsuperscript{33} Kane v. Caroline, affidavit of Kane (Apr. 5, 1813), SDNY War of 1812 Prize Cases, roll 1; Jones v. Tooker, libel (Jan. 22, 1816), SDNY War of 1812 Prize Cases, roll 7; Constitution v. Susannah, affidavit of John McCauley (June 19, 1815), SDNY War of 1812 Prize Cases, roll 7; Cazeaux v. Adeline, claim of John Carrere (Aug. 6, 1814), decree (Nov. 4, 1814), SDNY War of 1812 Prize Cases, roll 1.

\textsuperscript{34} Adams v. Venus, rule of court (Nov. 16, 1812), rule of court (undated), affidavit of Robert Finn (Jan. 4, 1816), order to
Congress appears to have recognized the significant burden that these procedures placed on the courts. A statute passed in early 1813 specified that upon condemnation and sale of the captured property the marshal would pay over to the privateer owners and to the officers and crew the respective total amounts to which they were entitled under their prior agreement, but with no responsibility for ensuring that each individual received his proper share; in other words, final distribution of the proceeds was left to the individuals involved. The sponsors of the legislation actually wanted to go further in relieving the courts of distributive responsibility; the bill as initially drafted would have given the captured property to the privateer owners as soon as the court deemed it a valid prize, to be “sold or disposed of at [the captors’] discretion, and the proceeds thereof distributed by them.” Though the final version of the law left the courts responsible for ensuring that the officers and crew collectively received their fair share, it nonetheless relieved them of the administrative burden of determining each individual amount.

This rollback of the court’s supervisory responsibility highlights the fundamental tension underlying privateering operations during the war—tension between a need to exert government regulatory control over privateering and the benefits to be gained from leaving the details of such operations to be governed by private arrangement. Though covered with a patina of government approval—in the form of a commission from the executive branch—privateering was based on, and

---


36 This change in practice is illustrated by the post-1813 presence of numerous clerk’s reports regarding the facts of the capture in question, but no detailed lists of how proceeds were to be distributed. See, for example, Ward v. Mary, clerk’s report (Dec. 9, 1814), SDNY War of 1812 Prize Cases, roll 4; Taylor v. Star, clerk’s report (Mar. 20, 1815), SDNY War of 1812 Prize Cases, roll 7; Schenck v. Helena, clerk’s report (Sep. 8, 1815), SDNY War of 1812 Prize Cases, roll 3; Dennet v. Jane, clerk’s report (June 15, 1815), SDNY War of 1812 Prize Cases, roll 3; Schenck v. Harmony, clerk’s report (May 23, 1816), SDNY War of 1812 Prize Cases, roll 3. Following Congress’s direction, it appears that other courts also paid the proceeds over to the agents for their distribution to the owners and officer and crew. Garitee, Republic’s Private Navy, 192.
driven by, financial agreements among owners, investors, suppliers, officers and crew. When it came to dividing up the proceeds of a successful capture, once the customs duties and court costs had been paid there was little reason for the government to concern itself with the particular finances of the interested parties. As mentioned earlier, one of the significant advantages of privateering was that it conserved government funds by shifting the costs of naval warfare onto private parties; by putting into privateers’ hands the responsibility of distributing the proceeds among themselves, Congress similarly shifted to them some of the administrative burdens associated with privateering. Individuals who felt they had not receive what they were due could petition for redress, but the court would no longer act as paymaster for the nation’s “private navy.”

* * *

On the whole, however, while Congress may have relieved the courts of certain responsibilities with respect to regulating privateering, they remained the institution that exerted the greatest authority over privateer conduct, both during the war and after. Though in hindsight the War of 1812 was the nation’s last significant engagement with privateering, that fact was by no means evident at the war’s end. For example, in 1817 Justice Story published an extensive two-part treatise on prize law in the United States and on the role of the federal district courts in particular, with the intent of correcting the “irregularities” that had occurred in some courts’ handling of recent prize cases. And in the decade immediately after the war’s end, Spanish and Portuguese consular officials filed numerous lawsuits in federal courts against Americans who had signed up as privateers on behalf of the revolutionary governments of South America, ensuring that the courts would continue to play a significant role in regulating American conduct on the high seas.37