

2008

## Contemporary Lessons From the Age-Old Prize Cases: A Comment on The Civil War in U.S. Foreign Relations Law

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### Recommended Citation

Deborah Pearlstein, *Contemporary Lessons From the Age-Old Prize Cases: A Comment on The Civil War in U.S. Foreign Relations Law*, 53 St. Louis U. L.J. (2008).

Available at: <https://scholarship.law.slu.edu/lj/vol53/iss1/8>

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**CONTEMPORARY LESSONS FROM THE AGE-OLD *PRIZE CASES*:  
A COMMENT ON *THE CIVIL WAR IN U.S. FOREIGN RELATIONS  
LAW***

DEBORAH PEARLSTEIN\*

INTRODUCTION

Professor Lee's work on the history of the Supreme Court's Civil War-era *Prize Cases* raises a question that could not be timelier for modern constitutional and international law scholars: What significance do these iconic cases have for contemporary foreign affairs law in the United States?<sup>1</sup> On first blush, one might be forgiven for imagining the answer is: not much. After all, the past four years alone have seen the Supreme Court produce at least four landmark cases elaborating on the scope of executive power under constitutional and international law.<sup>2</sup> The *Prize Cases* were cited by the majority in only one of the four, and there solely for the purpose of rejecting the dissent's suggestion that the *Prize Cases* were at all germane.<sup>3</sup>

Yet since 2001, the *Prize Cases* had appeared repeatedly in claims by the U.S. Department of Justice of broad executive power over matters of national security and foreign affairs. The cases appeared in memos to support the President's inherent authority to engage in coercive interrogation of terrorist

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1. Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53 (2008) (citing *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)).

2. See *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). These are only the most well known foreign and international law opinions the Court has issued. Others may prove at least as significant over time in defining executive power and the role of international law in U.S. courts. See, e.g., *Munaf v. Geren*, 553 U.S. \_\_\_, 128 S. Ct. 2207 (2008); *Medellin v. Texas*, 552 U.S. \_\_\_, 128 S. Ct. 1346 (2008).

3. *Hamdan*, 548 U.S. at 599 n.31 (addressing the *Prize Cases*' narrow holding regarding the Executive's power to recognize the existence of war) ("Because we do not question the Government's position that the war commenced with the events of September 11, 2001, the *Prize Cases* are not germane to the analysis." (citations omitted)).

suspects.<sup>4</sup> They were invoked to defend the President's authority to conduct warrantless surveillance beyond the powers described in the Foreign Intelligence Surveillance Act, the law that had provided the "exclusive means" by which the Executive could engage in intelligence surveillance in the United States.<sup>5</sup> And they were deployed to support the claim that the President has inherent authority to detain as an "enemy combatant" a U.S. citizen arrested in Chicago and suspected of terrorist activity.<sup>6</sup> In each instance, the *Prize Cases* were invoked to support the argument that all of these prerogatives were within the President's powers under Article II of the U.S. Constitution. Do the cases withstand such reliance?

Professor Lee would seem to agree that the *Prize Cases* are indeed significant, but not for the reasons these executive claims would suggest. Among other features of their precedential impact, he suggests, the *Prize Cases* offer support not necessarily for an expansive reading of Article II, but for the proposition that "*international law* provides a basis for the President's exercise of military force in a manner neither specifically enumerated in the Constitution nor preauthorized by congressional enactments."<sup>7</sup> In this respect, they might do little to support recent claims of inherent executive power under the Constitution. But they might have much to say about, for example, whether a U.N. Security Council resolution could empower an executive to take counterterrorism measures not otherwise authorized by Article II alone.<sup>8</sup>

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4. See, e.g., Memorandum from Jay S. Bybee to Alberto R. Gonzales (Aug. 1, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 206 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (citing *Prize Cases* in support of the President's "complete discretion in exercising the Commander-in-Chief power"); Memorandum from John C. Yoo, Deputy Assistant U.S. Att'y Gen., to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., at 5 & n.7, 6 (Mar. 14, 2003), available at [http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf) ("If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary.").

5. Office of Legal Counsel, U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, at 7-9 (Jan. 19, 2006) (citing Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1812, 1821-1829, 1841-1846, 1861-1862, 1871, 1881, 1885 (2000)), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

6. Brief for the Petitioner at 35, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) ("[I]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist by force. He . . . is bound to accept the challenge without waiting for any special legislative authority." (quoting *Prize Cases*, 67 U.S. at 668)).

7. Lee, *supra* note 1, at 55 (emphasis added).

8. For a detailed account of the global growth of just such an effect on the power of domestic executives, see Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 347 (Sujit Choudhry ed., 2006).

A conclusion that the *Prize Cases* could support such a notion would be dramatic indeed, making it possible for any administration to supplement the limited powers the Framers intended to provide the President under the Constitution with affirmative powers in a source of law external to the nation's constitutive charter. But as I shall argue below, it would seem surprising at the least if the *Prize Cases* Court worked such a profound change in constitutional law without saying so directly. Indeed, I believe such a proposition cannot fairly be found in the Court's opinion.

What does remain of great significance in the *Prize Cases*, however, is the insight they offer into the Court's relative interest in deferring to the Executive on the interpretation of law, even in times of armed conflict. On that topic, and contrary to Professor Lee's suggestion, I believe the *Prize Cases* are better recognized for their identification of the *limits* of judicial deference in wartime—limits that make the Court's most recent cases in the field only the latest in a lengthening line of precedents embracing judicial competence in key matters of national security.

#### I. INTERNATIONAL LAW SOURCES OF EXECUTIVE POWER

Professor Lee's contention that international law may support the President's use of military force not expressly authorized by the U.S. Constitution or laws is based on his reading of the *Prize Cases* and the circumstances surrounding the Court's decision. Among the questions presented in those cases was whether President Lincoln acted within his authority in erecting a naval blockade of seceded southern states shortly after Confederate forces fired on the federal military installation at Fort Sumter, South Carolina.<sup>9</sup> According to Professor Lee, international law of the day was clear in permitting such blockades (pursuant to certain limitations), provided there existed a state of war between belligerents.<sup>10</sup> At the same time, Professor Lee posits, the President's authority to erect the blockade was far less apparent under domestic law. Unlike the President's presumptive constitutional power to engage in *defensive* force without prior authorization, a blockade of this nature could only be understood as an *offensive* act (inasmuch as it infringed the rights of neutral trading partners and citizens who were not a part of the Confederacy).<sup>11</sup> Offensive acts of war could only be authorized by Congress. Yet Congress had not authorized any such action; indeed, it was in recess at the time the blockade proclamations issued.<sup>12</sup> Thus, Professor Lee reasons,

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9. *See Prize Cases*, 67 U.S. at 665.

10. Lee, *supra* note 1, at 59.

11. *Id.* at 63–64.

12. *Id.* at 57.

President Lincoln's power to pursue the blockade must have come, if anywhere, from international law itself.<sup>13</sup>

One might well challenge more than one step in this chain of reasoning (the claim, for instance, that no existing federal statute would have authorized Lincoln's action).<sup>14</sup> But its greatest import is in the assertion that Lincoln's power under the circumstances should be understood as flowing from a source other than the Constitution and laws of the United States. After all, it is most typically considered black letter law that ours is a government of limited powers, a principle found (among other places) in the Constitution's Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>15</sup> Indeed, in the years since the *Prize Cases*, and without much pausing on their account, the Supreme Court has affirmed more than once that the power of the President "must stem either from an act of Congress or from the Constitution itself."<sup>16</sup>

Perhaps conscious of this concern, Professor Lee's opening claim that "international law *provides a basis* for the President's exercise of military force" in erecting the blockade is later restated more equivocally as the proposition that international law in the *Prize Cases* "*defined and enhanced* the scope of presidential war power."<sup>17</sup> But there seems quite some distance between the position that international law creates the power, and the rather narrower claim that international law helps define powers otherwise granted. The latter claim, which I have taken Professor Wuerth, among others, to embrace, flows without much difficulty from common problems of constitutional interpretation. Thus, for example, where textual and originalist

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13. *Id.* at 59–64. The text of the blockade proclamation invoked both domestic and international law, ordering "a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and of the law of nations in such case provided." Proclamation No. 4, 12 Stat. app. 1258, 1259 (Apr. 19, 1861).

14. See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004); see also *infra* pp. 77–79.

15. U.S. CONST. amend. X; see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1247–48 (1995).

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); see also *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S. Ct. 2229, 2259 (2008) ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885))); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("I take it to be correct . . . that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."); *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.").

17. Lee, *supra* note 1, at 55, 61 (emphasis added).

interpretative methods fail to resolve a question of constitutional foreign affairs power, the conduct of the other branches of government may help inform judicial construction of constitutional provisions.<sup>18</sup> A treaty or executive agreement may shed light on one or both of the political branches' presumptive views of their own power, and courts may be aided by taking those views into account.<sup>19</sup>

In contrast, the suggestion that international law may serve, *ex proprio vigore*, as a font of federal power is precisely the outcome the Court self-consciously worked to avoid in the landmark *Missouri v. Holland*, upholding the federal Migratory Bird Treaty Act restricting the hunting of certain migratory birds.<sup>20</sup> There, the Court was called to consider whether the United States had the authority to enter into, and enforce against the states, a treaty that regulated a topic the Court had already held was beyond Congress's Commerce Clause power to regulate.<sup>21</sup> Often framed as presenting the question whether a treaty could empower Congress to take action that the Constitution otherwise did not,<sup>22</sup> *Holland* skirted the invitation to hold the Migratory Bird Treaty itself an independent font of power and instead located affirmative authority for congressional regulation of migratory birds in the Necessary and Proper Clause of Article I:

If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. . . .

. . . .

. . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.<sup>23</sup>

Finding no basis for Missouri's claim that the power to regulate migratory birds was reserved exclusively to the states, the Court concluded that the federal law enforcing the treaty commitment was within Congress's Article I power—as it may be inferred Congress itself had concluded in its own exercise in constitutional interpretation undertaken before enacting the legislation.<sup>24</sup>

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18. See Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 64–65 (2007) (describing international law as a useful “second-order interpretive norm”).

19. See *id.* at 63–65 & nn.10–17.

20. 252 U.S. 416, 435 (1920).

21. *Id.* at 431–32.

22. See, e.g., Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

23. *Holland*, 252 U.S. at 432–34.

24. *Id.* at 432.

The Treaty did not create Congress's power to pass laws "carrying into Execution" the treaties of the United States, but its ratification gave substantive content to that power's scope.<sup>25</sup>

Under the circumstances, had it been the intention of the *Prize Cases* Court to recognize that international law may provide an independent font of structural federal authority, one might at a minimum expect to find some detailed defense of that view in the Court's decision. But on the contrary, the opinion itself, while hardly a model of clarity, more readily suggests just the opposite conclusion. Namely, that the President's proclaimed blockade was an exercise in national self-defense, and given that, Article II of the Constitution, not international law, provided ample authority for the President to institute the blockade.

Here, it is critical to disentangle the question of the President's authority to act under the Constitution from the legality of his action challenged by the claimants under international law. On the former question, the Court was clear:

The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is 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. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But . . . [i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war . . . .

. . . .

. . . Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.<sup>26</sup>

Professor Lee makes an interesting argument that Lincoln's blockade in some respects was more properly viewed as offensive as a matter of international law.<sup>27</sup> But that is not how the Court saw it as a matter of constitutional law.

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25. See U.S. CONST. art. I, § 8, cl. 18; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 179 (2004).

26. The *Prize Cases*, 67 U.S. (2 Black) 635, 668–70 (1863); see also LOUIS FISHER, *PRESIDENTIAL WAR POWER* 6–8 (1995) (recounting acceptance at the constitutional convention of the Executive's power "to repel sudden attacks").

27. Lee, *supra* note 1, at 62–64.

In contrast, the international law of war, and the laws of prize and capture, were relevant inasmuch as they answered the separate questions presented by the claimants—whether a state of war existed sufficient to justify the imposition of a blockade, and whether the ships seized were appropriately deemed “enemy” ships, subject to capture.<sup>28</sup> In this regard, perhaps the most noteworthy aspect of the Court’s holding is its decision that even the *Amy Warwick* (a vessel owned by Virginians who asserted U.S. citizenship) was properly deemed enemy property.<sup>29</sup> But the significance here is almost certainly far greater as a political matter than a legal one. By the time the *Amy Warwick* was captured, Virginia had seceded from the Union;<sup>30</sup> seven states had ratified the Constitution of Confederate States, providing for the formation of a “permanent federal government” and establishing that each state enjoyed “sovereign and independent character”;<sup>31</sup> and Confederate forces had attacked the federal Fort Sumter.<sup>32</sup> It was a dramatic moment in U.S. history for the Supreme Court to recognize, in effect, that “[e]ach party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war.”<sup>33</sup> But concluding that an attacking foreign sovereign state was an “enemy” likely required little stretch under international law.

## II. JUDICIAL DEFERENCE

If the *Prize Cases* are of less-than-blockbuster import on the question of presidential power under international law, what of their significance for the role of the judiciary on questions of law in wartime? Professor Lee argues that the Court’s posture in the *Prize Cases* is one of substantial deference to the Executive, on questions of both law and fact.<sup>34</sup> Citing the end of the passage excerpted above on the scope of executive power under the Constitution, Professor Lee suggests that the Court accepted at face value the President’s

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28. As the Court explains near the outset:

The right of prize and capture has its origin in the ‘*jus belli*,’ and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion . . . .

*Prize Cases*, 67 U.S. at 666.

29. *See id.* at 637, 674–75.

30. *See* JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 280 (1988) (explaining that Virginia officially seceded on May 23, 1861, before the July 10, 1861 capture of the *Amy Warwick*).

31. CONFED. CONST. pmb., *reprinted in* THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 11 (James M. Matthews ed., Richmond, R.M. Smith Printer to Congress 1864).

32. *See Prize Cases*, 67 U.S. at 637, 669.

33. *Id.* at 669 (quoting *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 337 (1822)).

34. Lee, *supra* note 1, at 68–70.



judgment that the conflict with the South amounted to war.<sup>35</sup> Likewise, the Court could have—but did not—review *de novo* the facts of the individual ships' capture in applying international law to each of the consolidated cases before the Court.<sup>36</sup> The Court's behavior in both respects, Professor Lee's characterization suggests, makes it unsurprising that the *Prize Cases* continue to be invoked by Executives seeking to assert broad discretion over security affairs.

Yet while one might find "language of" deference lurking in passing dicta, the *Prize Cases* Court devotes the vast bulk of its opinion to conducting a remarkably detailed, *de novo* review on questions of law and fact. Consider first the legal significance of the Court's statement, quoted in separate part above:

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.'<sup>37</sup>

While there may be some debate about precisely what "question" the Court means is governed by the Executive's "decisions and acts," the paragraphs both preceding and following this passage make it difficult to conclude that the Court was referring to the operative legal question in the case of whether or not a state of war exists. Indeed, the opinion had just finished explaining that as a matter of international law, "a civil war is never publicly proclaimed," but rather, "its actual existence is a fact in our domestic history which the Court is bound to notice and to know."<sup>38</sup> It had also just explained how, as a matter of constitutional law, "no name given" to the war then raging between the states by either the President or Congress "could change the fact" that from the Court's point of view and that of "all the world," war plainly exists.<sup>39</sup>

If anything, the subject of judicial deference in the passage reproduced above was not the President's determination of the legal status of war, but

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35. *Id.* at 68–69 (citing *Prize Cases*, 67 U.S. at 670 ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.")).

36. *See id.* at 69–70.

37. *Prize Cases*, 67 U.S. at 670; *see also* FISHER, *supra* note 26, at 6–8 (recounting acceptance at the constitutional convention of the Executive's power "to repel sudden attacks").

38. *Prize Cases*, 67 U.S. at 667.

39. *Id.* at 669.

rather, given the existence of war, the nature and quantum of force appropriate in response (as noted in the passage's concluding sentence, "He must determine what degree of force the crisis demands."). No doubt, there is some significance in the questionable suggestion, if this were the Court's intent, that the President is entitled to complete discretion on the matter of what degree of force is appropriate in self-defense. But in light of the many paragraphs beyond this one the Court devotes to establishing that war exists no matter what the parties themselves say, it is difficult at best to read this passage as having much if any bearing on the merits of the legal question presented in the cases.

What, then, of the Court's treatment of the facts—in particular the application of international law of prize and capture to the varied circumstances of each individual claimant's case—in which Professor Lee finds evidence of "exceeding" deference to the President?<sup>40</sup> His principle complaint, however, is the Court's treatment of the question of *law* underlying those claims, namely, the Court's holding that because residents of seceded states had "cast off their allegiance and made war on their Government," they and their property may be properly treated as "enemy," subject to confiscation under the law of war.<sup>41</sup> One might disagree with the merits of the Court's conclusion on this point, but as I suggested above, there is little evidence to suggest the Court reached it solely (or at all) as a result of a sense of deference due the *President's* interpretation. As Justice Grier, writing for the majority, puts it perhaps most directly: "[Claimants] cannot ask a 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>42</sup>

Professor Lee also finds evidence of deference in what he views as the Court's insufficiently careful attention to each of the claimants' factual arguments about the legality of their particular capture<sup>43</sup> (for example, whether a crew had fair notice of the blockade). But again here, while there may be some disagreement about the merits of the Court's judgment in each instance, it is hard to read the nearly ten pages the Court devotes to discussing such features of the record as deposition testimony regarding a vessel's particular route through Lake Ponchartrain as indicating any degree of deference to (unmentioned) factual findings of the Executive.<sup>44</sup> In all events, the factual judgments the Court reviews in this regard are those not of the Executive, but rather of proceedings conducted by the lower courts. But for the unusual

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40. Lee, *supra* note 1, at 69.

41. *Prize Cases*, 67 U.S. at 674.

42. *Id.* at 669.

43. See Lee, *supra* note 1, at 69–70.

44. *Prize Cases*, 67 U.S. at 674–83.

nature of the Supreme Court's role in these cases as prize court of last resort, the level of attention the Court pays to the factual record here would seem extraordinary indeed.

Consider finally the *Prize Cases* Court's ready rejection of the Executive's vigorous arguments in favor of judicial abstention. As Professor Lee points out, the Court's review of the cases came over substantial objections by the President's counsel that the Court abstain under the circumstances.<sup>45</sup> Yet the Court devotes not even a portion of its opinion to discussing questions of justiciability or the like. Quite the contrary, Justice Grier concludes by emphasizing: "We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean."<sup>46</sup> Even in the midst of the "greatest civil war known in the history of the human race," this was a Court entirely comfortable with the notion that certain disputes would be settled by law.

#### CONCLUSION

When held up against the most recent judicial forays into the field of foreign affairs, the lesson of the *Prize Cases* seems quite consistent with the Court's modern sensibility: "[A] case that may be of extraordinary importance is resolved by ordinary rules."<sup>47</sup> As in the *Prize Cases*, the Executive advanced similarly vigorous arguments against Court review in *Boumediene*, *Hamdan*, *Hamdi*, and *Rasul*,<sup>48</sup> and was likewise met with responses ranging from indifference to categorical rejection. Disposing of the Government's argument in *Hamdan* that the Court should abstain from deciding the legality of military commission trials until after their conclusion, the Court held that neither the existence of the commission process itself nor any "other 'important countervailing interest'" enabled "federal courts to depart from their general 'duty to exercise the jurisdiction that is conferred upon them by Congress.'"<sup>49</sup> In *Boumediene*, where the Court recognized a constitutional

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45. Lee, *supra* note 1, at 68 (citing *Prize Cases*, 67 U.S. at 645-46) ("And this attention came despite strong arguments by the President's counsel for judicial abstention (including, apparently, the suggestion that deciding the merits would make the Court an 'ally of the enemy').").

46. *Prize Cases*, 67 U.S. at 673.

47. *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part).

48. Brief for the Respondents at 66-67, *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196); Brief for Respondents at 24-25, *Hamdan*, 548 U.S. 557 (No. 05-184); Brief for the Respondents at 25-27, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); Brief for the Respondents at 35-36, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

49. *Hamdan*, 548 U.S. at 589 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

right of certain military detainees to habeas corpus, the Court's interest in ongoing engagement with such questions in the future was even more direct: "Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."<sup>50</sup>

None of this is to say that the Supreme Court never has—or never should—decline to address questions of executive foreign affairs power during times of conflict. But together with the contemporaneous Civil War examples of active court engagement in matters of military detention in *Ex parte Milligan*<sup>51</sup> and *Ex parte Merryman*,<sup>52</sup> and the findings of Professor Sloss elsewhere in this volume suggesting judicial review was more the norm than the exception in early America,<sup>53</sup> it seems increasingly difficult to maintain, as Professor Lee puts it, that "the Court has historically seemed a timid institution" in wartime.<sup>54</sup>

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50. *Boumediene*, 128 S. Ct. at 2277.

51. 71 U.S. (4 Wall.) 2 (1866).

52. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). *Merryman* was decided by Chief Justice Taney while sitting with the Circuit Court of the District of Maryland. *Id.* at 147.

53. See David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

54. Lee, *supra* note 1, at 71.

