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## The Error of the Paquete Habana: U.S. Naval Forces in the Safe Harbor of Commander-in-Chief Discretion and the Law of War

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## ARTICLE

# THE ERROR OF THE *PAQUETE HABANA*: U.S. NAVAL FORCES IN THE SAFE HARBOR OF COMMANDER-IN-CHIEF DISCRETION AND THE LAW OF WAR

T. NELSON COLLIER\*

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## I. INTRODUCTION

When a U.S. warship shot down an enemy fighter plane in a naval operation in 1988,<sup>1</sup> the fighter plane turned out to be a commercial airliner transporting 290 civilians, all of whom died.<sup>2</sup> The civilians' next of kin sued the U.S. government on the grounds of negligence.<sup>3</sup> The United States maintained the matter constituted a political question.<sup>4</sup> However, in *Koobi v. United States*,<sup>5</sup> the appeals court disagreed and without restraint, said, "the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians. The controlling case is *The Paquete Habana*."<sup>6</sup> The *Koobi* proposition<sup>7</sup> oversimplifies the law.

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1. Samuel J. Cox, *H-018-1: No Higher Honor—The Road to Operation Praying Mantis, 18 April 1988*, NAVAL HIST. & HERITAGE COMMAND (May 8, 2019, 10:41 AM), <https://www.history.navy.mil/about-us/leadership/director/directors-corner/h-grams/h-gram-018/h-018-1.html> [https://perma.cc/3528-2QV6].

2. *Id.*

3. *Koobi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992). Plaintiffs also alleged design defects in the warship's weapon system. *Id.* The ultimate issue in *Koobi* was domestic sovereign immunity. While both the Federal Tort Claims Act and the Public Vessels Act waive the federal government's sovereign immunity, only the Tort Claims Act includes exceptions for combatant activities and discretionary functions. Still, the Ninth Circuit in *Koobi* applied the combatant activities exception to the Public Vessels Act, finding that, "Under those circumstances, a 'time of war' exists, at least for purposes of domestic tort law." *Id.* at 1335. Its rationale: "The [Federal Tort Claims Act's] combatant activities exception specifically covers activities of naval and Coast Guard vessels. Unless a similar exception is read into the [Public Vessels Act], this specification will be rendered nearly meaningless." *Id.* at 1336.

4. *Id.* at 1331.

5. *Id.* at 1328.

6. *Id.* at 1331 (citing *The Paquete Habana*, 175 U.S. 677 (1900)). The only other case the Ninth Circuit referred to was *Scheuer v. Rhodes*, a case concerning the employment of the national guard during "the incident at Kent State," a police action on American soil. *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974)). According to the Ninth Circuit in *Koobi*: "These cases make clear that the claim of military necessity will not, without more, shield governmental operations from judicial review." *Id.*

7. *Id.*

Federal courts typically apply the political question doctrine to matters of Commander-in-Chief discretion. Yet, the *Koobi* proposition persists.<sup>8</sup> Worse, it relies on an error.

The error of the *Paquete Habana*<sup>9</sup> is the Supreme Court's failure to consider whether the case concerned a matter of wartime military discretion.<sup>10</sup> Due to this error, the Court failed to consider the political question doctrine.

If the *Koobi* proposition indicates the import of the *Paquete Habana*, the error threatens to have a chilling effect on military operations.<sup>11</sup> This is the

8. See, e.g., *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325, 337 (S.D.N.Y. 2013) (“While *Habana* and *Koobi* add a wrinkle to the analysis in this case, they do not change the result.”).

9. Although decided in 1900, the U.S. Supreme Court case of the *Paquete Habana* has remained a staple of the jurisprudence of U.S. foreign relations law well beyond the terrorist attacks of September 11th, 2001. See, e.g., RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §§ 406 n.3, 421 n.7 (AM. LAW INST. 2017). Courts have relied on it most for its proposition that “international law is part of our law” and the passages that follow. *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (“It has long been established that customary international law is part of the law of the United States to [a] limited extent.”). So, in the interplay of international law and U.S. law, the *Paquete Habana* stands out as a landmark case. In addition, preeminent national security lawyer and scholar Jamie Baker has added the *Paquete Habana* to a short list of national security cases which represents the body of case law with which every national security generalist should be familiar. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 348 n.1 (2007). It also appears in several places in the Department of Defense Law of War Manual published in 2015, the go-to source for the DoD Office of General Counsel's interpretation of the law of war. OFF. OF GEN. COUNS., DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 81 n.178 (June 2015), [https://ogc.osd.mil/Portals/99/departement\\_of\\_defense\\_law\\_of\\_war\\_manual%20%281%29.pdf](https://ogc.osd.mil/Portals/99/departement_of_defense_law_of_war_manual%20%281%29.pdf) [<https://perma.cc/2W38-6XXE>] [hereinafter DEP'T OF DEFENSE, LAW OF WAR MANUAL].

10. “Wartime military discretion” refers to actions undertaken in the conduct of hostilities—in the parlance of the law of armed conflict, measures implicating the *jus in bello* of the law of war—in declared or authorized war. DEP'T OF DEF., LAW OF WAR MANUAL, *supra* note 9, at 43. This is in contrast to Commander-in-Chief discretion, which refers to measures implicating *jus in bello* in undeclared war, or war without congressional authorization.

11. Brief of the Veterans of Foreign Wars of the United States as Amicus Curiae in Support of Defendants and Dismissal at 2, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), (No. 1:10-cv-01469-JDB), 2010 WL 4974321 (“The VFW [Veterans of Foreign Wars] agrees with the Government's arguments regarding why this suit is barred, including by the political question doctrine. Rather than repeating those arguments, this *amicus* brief seeks to add perspective to the reasons why suits like the present action would threaten national security by interfering with ongoing military operations. Allowing this case to proceed would contravene the core military principle of ‘unity of command,’ and undermine the military's chain of command, creating uncertainty for subordinate leaders and soldiers. Such litigation also would adversely affect unit cohesion, the glue which binds small units together in the heat of battle, and enables them to survive and accomplish their missions. Further, litigation of cases such as this would undermine battlefield decisionmaking by subjecting tactical, operational and strategic decisions to second-guessing by courts far removed from the battlefield. And, to the extent this case will involve the activities of special operations forces, the VFW urges the Court to tread with

*Koobi* problem. Therefore, the principal aim of this Article is to test the *Koobi* proposition. And because the *Paquete Habana* error is the basis of the *Koobi* proposition, addressing the *Koobi* problem requires examining this foundational error.

First, this Article examines the *Paquete Habana* error, offering an outline of the opinion and an overview of points the opinion either overlooked or minimized in its rationale—points that should have shaped the Court's decision.

The Article goes on to explain the error in Section III, including an overview of judicial review and the political question doctrine. This overview demonstrates how the *Paquete Habana*, while right in its result, was wrong in its rationale.

In the fourth section, the Article considers judicial review<sup>12</sup> on matters of Commander-in-Chief discretion, noting the Supreme Court cases of *Youngstown*<sup>13</sup> and *Baker v. Carr*.<sup>14</sup> These cases urge federal courts to defer on matters of Commander-in-Chief discretion by operation of the political question doctrine.

In Section V, the Article considers more recent cases—*Tarros S.p.A. v. United States*<sup>15</sup> and *Wu Tien Li-Shou v. United States*<sup>16</sup>—to show how the *Paquete Habana* error still obscures the application of judicial review in matters of Commander-in-Chief discretion and emphasizes the importance of the *Paquete Habana* error. But these cases also show that the federal

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particular caution, because of the need to protect the extremely sensitive sources and methods utilized by our nation's elite forces.”). See generally Jack Goldsmith, *Phillip Carter on VFW Brief Supporting Government in Al-Aulaqi*, LAWFARE (Oct. 6, 2010, 11:14 AM), <https://www.lawfareblog.com/phillip-carter-vfw-brief-supporting-government-al-aulaqi> [<https://perma.cc/K6JN-QQ2R>] (“Briefly stated, the VFW’s brief agrees with the Government’s motion to dismiss on, *inter alia*, political question grounds, but seeks to supplement the Court’s understanding of *why* the political question doctrine matters so much in the sphere of military operations, particularly with respect to special operations such as those at issue.”) (emphasis in original).

12. Throughout, “judicial review” refers to the power of the federal civilian courts of the United States. War crimes tribunals and courts-martial are beyond the scope of this Article. If the actions of a naval officer or other military officer in the conduct of hostilities should be subject to judicial review, it should be the judicial review of courts-martial. “Safe harbor” does not mean *allowed to act with absolute impunity*, but in accordance with the *lex specialis* of the law of war. See DEP’T OF DEF., LAW OF WAR MANUAL, *supra* note 9, at 9 (“[T]he law of war is the *lex specialis* governing armed conflict.”).

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

14. *Baker v. Carr*, 369 U.S. 186 (1962).

15. *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325 (S.D.N.Y. 2013).

16. *Wu Tien Li-Shou v. United States*, 777 F.3d 175 (4th Cir. 2015).

judiciary can manage its duty of judicial review and maintain the proper separation of powers by undertaking the appropriate discriminating analysis.

## II. EXAMINING THE ERROR

On 15 February 1898, the U.S. warship *USS Maine* exploded in Havana Harbor.<sup>17</sup> More than 250 U.S. Sailors and Marines died.<sup>18</sup> Suspicion spread that a seaborne mine had caused the explosion.<sup>19</sup> The press blamed Spain, and the people called for war.<sup>20</sup> On 20 April, Congress passed a joint resolution authorizing military force,<sup>21</sup> enabling President William McKinley to order a blockade along the northern coast of Cuba on 22 April.<sup>22</sup> On 25 April, Congress passed the formal declaration of war,

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17. *The Sinking of Maine*, NAVAL HIST. & HERITAGE COMMAND (Aug. 17, 2020, 1:06 PM), <https://www.history.navy.mil/browse-by-topic/disasters-and-phenomena/destruction-of-uss-maine.html> [https://perma.cc/SMH3-U69Z].

18. *Id.*

19. *Id.*

20. The swell of public furor grew under the clamor of “Remember the *Maine!* To hell with Spain!” Samuel J. Cox, *H-015-3: “Remember the Maine! To Hell with Spain!”*, NAVAL HIST. & HERITAGE COMMAND (May 3, 2019, 10:47 AM), <https://www.history.navy.mil/content/history/nhnc/about-us/leadership/director/directors-corner/h-grams/h-gram-015/h-015-3.html> [https://perma.cc/ZR3D-AU2X]. Although it galvanized public opinion in favor of war, the sinking of the *Maine* was not the war’s principal cause. *See, e.g.*, JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 2 (2014) (“The circumstances of President McKinley’s request for a declaration of war against Spain in 1898 stand in singular contrast to all the others. McKinley’s request for a declaration of war on April 25, 1898, was approved by a voice vote of both Houses of Congress on that date. His request was made after Spain had rejected a U.S. ultimatum that Spain relinquish its sovereignty over Cuba and permit Cuba to become an independent state. This ultimatum was supported by a joint resolution of Congress, signed into law on April 20, 1898, that among other things, declared Cuba to be independent, demanded that Spain withdraw its military forces from the island, and directed and authorized the President to use the U.S. Army, Navy and militia of the various states to achieve these ends. The war with Spain in 1898, in short, was not principally based on attacks on the United States but on a U.S. effort to end the Cuban insurrection against Spain, bring about Cuban independence, and restore a stable government and order on the island—outcomes that were believed by the United States to advance its interests.”).

21. Act of Apr. 20, 1898, Pub. L. No. 55-24, 30 Stat. 738 (“Joint Resolution For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.”).

22. According to Naval History and Heritage Command, “The blockade of Northern Cuba became the early lynchpin of the American strategy.” *Blockade of Northern Cuba*, NAVAL HIST. & HERITAGE COMMAND, <https://www.history.navy.mil/research/publications/documentary-histories/united-states-navy-s/blockade-of-northern.html> [https://perma.cc/3BLS-Y2WF]; *see* FRENCH

and the declaration recognized that a state of war had existed since the 21 April.<sup>23</sup> The error of the *Paquete Habana* is that the Court failed to recognize the issue as implicating wartime military discretion.

John Long, the Secretary of the Navy, issued the blockade order, ordering the interdicting of Spanish ships and certain neutral ships.<sup>24</sup> The Secretary communicated this order to the U.S. Navy's North Atlantic Squadron commander, Admiral William T. Sampson, who instituted the blockade.<sup>25</sup> The next day, the President announced that the blockade had been ordered and would be maintained "in pursuance of the laws of the United States, and the laws of [n]ations applicable to such cases."<sup>26</sup>

There had been preparations earlier than 20 April. On 6 April, Secretary Long telegraphed to then-Commodore Sampson with the following directives: (1) "In the event of hostilities with Spain, the Department wishes you to do all in your power to capture or destroy the Spanish war vessels in West Indian waters, including the small gunboats which are stationed along the coast of Cuba;" (2) "[I]n case of war, you will maintain a strict blockade of Cuba, particularly at the ports of Havana,

ENSOR CHADWICK, *THE RELATIONS OF THE UNITED STATES AND SPAIN: THE SPANISH-AMERICAN WAR* 55 (1911) ("A blockade of the Cuban coast and military assistance of the insurgents ashore by supplying arms and munitions of war, or by sending armed forces, were thus the first steps to be considered. The Spanish troops efficiently blockaded both by sea and land, and under the ravaged conditions of the island, would succumb finally by mere starvation should not aid come by sea."); *see also The Question of Blockade*, N.Y. TIMES, Apr. 6, 1898, <https://www.nytimes.com/1898/04/06/archives/the-question-of-blockade.html> [<https://perma.cc/HA2Q-NPSH>] ("[A]n early step on the part of the United States would be closing the ports of Havana and Matanzas, if no others. This would essentially be a prelude to their capture, but, independent of capture, the shutting out of food and other supplies from the districts now occupied by the only available Spanish military force, and the prevention of its reinforcement, would require a blockade. . . . [A] blockade of Havana and Matanzas would not only be of the highest advantage, but would be decisive.").

23. Act of Apr. 25, 1898, ch. 189, 30 Stat. 364.

24. *The Paquete Habana*, 175 U.S. 677, 712–15 (1900); *see* Proclamation of Blockade by President William McKinley, transmitted by John D. Long, Sec'y of Navy, to James M. Forsyth, Commandant, Key West Naval Base (Apr. 22 1898), <https://www.history.navy.mil/content/history/nhlc/research/publications/documentary-histories/united-states-navy-s/blockade-of-northern/secretary-of-the-nav-2.html> [<https://perma.cc/Q8Z5-DSQN>] [hereinafter President McKinley's Proclamation of Blockade to Forsyth] (proclaiming neutral vessels approaching Cuban ports would be subject to blockade measures).

25. It was only on 21 April, in preparation for war, that the President made Sampson an admiral and gave him command of the North Atlantic Squadron. CHADWICK, *supra* note 22, at 129–30 ("The reception of this telegram was equivalent to information that war was declared, inasmuch as under the law the president could only make such an assignment in war.").

26. President McKinley's Proclamation of Blockade to Forsyth, *supra* note 24 (footnote omitted).

Matanzas;” and (3) “All prizes should be sent to Key West or other available United States ports for adjudication.”<sup>27</sup>

Standing out against this background is the case of the *Paquete Habana*.

#### A. *A Case of War*

After setting up the blockade, the squadron seized two boats off Havana Harbor sailing under the Spanish flag and seized them.<sup>28</sup> The sailors searched the ships and found the crewmen to be Cuban fishermen, the ships laden with live fish.<sup>29</sup> Yet, as Admiral Sampson observed, these Cuban fishermen were also reservists of the Spanish navy.<sup>30</sup> The Admiral ordered the squadron to detain the men as prisoners of war and take the ships to the army garrison at Key West.<sup>31</sup>

On behalf of the United States, a U.S. attorney filed a petition calling upon the prize court to decide the propriety of the captures under prize law.<sup>32</sup> The district court condemned the ships as a lawful prize and had them auctioned.<sup>33</sup> The captives’ appointed lawyer appealed on their behalf, based on a rule of international law that exempted coastal fishing vessels

27. Letter from John D. Long, Sec’y of the Navy, to William T. Sampson, Rear Admiral, U.S. Navy, Commander of the N. Atl. Squadron (Apr. 6, 1898), <https://www.history.navy.mil/content/history/nhhc/research/publications/documentary-histories/united-states-navy-s/naval-operations-in/secretary-of-the-nav-10.html> [<https://perma.cc/GS8V-C468>].

28. *The Paquete Habana*, 175 U.S. at 678.

29. *Id.* at 679.

30. *Id.* at 713. Also important, the men “had a fishing license from the Spanish government.” *Id.* at 679. They were fishing to feed the Spanish forces off Havana. See CHADWICK, *supra* note 22, at 147 (detailing the movements and purposes of different foreign vessels). For more on the Admiral’s observation about the crewmen as reservists of the Spanish navy, see *infra* note 56.

31. *The Paquete Habana*, 175 U.S. at 713.

32. *Id.* at 679. Some background remarks are appropriate on prize law. Captures at sea during wartime are considered under prize law and adjudicated in prize courts. FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS* 383 (1863) (“In the United States and Great Britain, the exclusive jurisdiction of maritime captures is vested in courts of admiralty, which in the exercise of this power are usually denominated prize courts.”). Prize courts have jurisdiction to determine whether the property captured is or is not lawful prize under the law of nations. *Id.* at 388 (“The prize jurisdiction of a court of admiralty, is that which authorizes it to take cognizance of captures made on the sea, *jure belli*, of captures in foreign ports and harbors . . . for the purpose of determining whether the property captured or surrendered, is or is not lawful prize of war . . .”). To call for such adjudication, a libel and claim are filed in the prize court setting out the facts comprising the circumstances of the capture, and a hearing is held. *Id.* at 406 (“In all cases, the hearing in the first instance, is upon the libel and claim, the ship’s papers and documents found on board, and the examination of the master and officers and crew of the captured vessel.”).

33. *The Paquete Habana*, 175 U.S. at 679.



from capture as prizes.<sup>34</sup> Based on an 1891 statute conferring jurisdiction, the appeal went “direct to the Supreme Court.”<sup>35</sup>

### 1. The Rule and the Exception

The Supreme Court took up the case on “the question [of] whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.”<sup>36</sup> The Court considered the rule under the law of nations that exempted coastal fishing vessels from condemnation as prizes. As the Court explained: “By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”<sup>37</sup> The rule was far from absolute and had an exception for military necessity—an exception the Court failed to apply.<sup>38</sup>

As the Court acknowledged, the rule “does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.”<sup>39</sup> As evidence of the general rule, the Court noted relevant passages from “the works of jurists and commentators,”<sup>40</sup> no fewer than five of which included language implying the military necessity exception.<sup>41</sup> According to the Court: “No international jurist of the present day ha[d] a wider or more deserved reputation than [Argentine scholar Carlos] Calvo,” and even Calvo emphasized the military necessity exception to the general rule.<sup>42</sup>

Nevertheless, the Court overlooked a critical fact when applying the rule. The taking of the ships was attendant to the apprehension of the fishermen

34. *Id.* at 679, 686; *see* Act of July 17, 1862, ch. CCIV, § 12, 12 Stat. 608 (“[T]he Secretary of the Navy is hereby authorized to appoint an agent or to employ counsel when the captors do not employ counsel themselves, in any case in which he may consider it necessary to assist the district attorneys and protect the interests of the captors . . .”).

35. Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826. The 1891 statute also allowed direct appeal to the U.S. Supreme Court in any case concerning the constitutionality of laws. *Id.*

36. *The Paquete Habana*, 175 U.S. at 686. The “smacks” were the *Paquete Habana* and the *Lola*.

37. *Id.* at 686.

38. *Id.* at 706 (“[N]o jurist would seriously argue that their immunity must be respected if they were used for warlike purposes . . .”).

39. *Id.* at 708.

40. *Id.* at 700.

41. *Id.* at 702–04.

42. *Id.* at 703.

as prisoners of war. This nuance implicated the military necessity exception to the exemption.<sup>43</sup> On its own volition, the Court appropriately

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43. This was beyond the scope of prize jurisdiction because prize jurisdiction was only concerned with the issue of prize and incidental torts. UPTON, *supra* note 32, at 388–89. “The federal courts, in exercising prize jurisdiction, exercise a considerable control over the navy in time of war. They not only return captured vessels and cargoes not liable to condemnation under international law, but decree damages against naval officers for illegal captures.” Quincy Wright, *The Control of the Foreign Relations of the United States: The Relative Rights, Duties, and Responsibilities of the President, of the Senate and the House, and of the Judiciary, in Theory and in Practice*, 60 PROC. OF THE AM. PHIL. SOC’Y 99, 259 (1921) (citing *Little v. Barreme*, 6 U.S. 170 (1804), for the point on damages against naval officers). Awarding damages for illegal captures was within the jurisdiction of prize courts. UPTON, *supra* note 32, at 388–89. However, judging the propriety of the taking of prisoners of war was not within that jurisdiction. It is worth noting that the counsel for the United States, Henry M. Hoyt, Assistant Attorney General (and soon-to-be Solicitor General), did not argue the military necessity point in the case of *The Paquete Habana*. U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 26–27 (Nov. 30, 1900) (“The argument on behalf of the Government undertook to show that, while by express allowance of the sovereign or executive in the past, small fishing boats of the enemy near their own coasts were exempted on humane grounds and sometimes because they supplied subsistence to the belligerent’s own vessels on blockade duty, larger vessels of the types here involved ought not to be exempted, and were not in fact exempted under any well-established rule of international law, unless by express executive ordinance.”).

As for why the Assistant Attorney General did not argue the military necessity exception, it is worth noting that the law of war was still very much underdeveloped. Law of war as it is known today—which is a body of multilateral treaties establishing law-based norms for the conduct of warfare—had begun to come into existence by 1898, but only barely. The “Lieber Code” of 1863 only concerned land warfare and was only a General Order applicable to the Union Army, not a source of international law. DEP’T OF DEF., LAW OF WAR MANUAL, *supra* note 9, at iii. It is remarkable that only months after the captures of the *Paquete Habana* and the *Lola*, Secretary Long issued a General Order similar to the Lieber Code, *The Laws and Usages of War at Sea*. *Id.*; John D. Long, Secretary of the Navy, *General Order No. 551, The Laws and Usages of War at Sea*, Jun. 27, 1900, reprinted as *Appendix I* in U.S. Naval War College, *International Law Discussions, 1903: The United States Naval War Code of 1900*, at 101 (1904). Of particular relevance are Articles 3 and 11. Article 3 says: “Military necessity permits measures that are indispensable for securing the ends of the war and that are in accordance with modern laws and usages of war.” *Id.* at 103. Article 11 states: “The personnel of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses, or as prisoners of war when by training or enrollment they are immediately available for the naval service of the enemy.” *Id.* at 105. Still, this General Order came into force only after the captures.

As for international law, after the 1856 Paris Declaration Respecting Maritime Law, law of war at sea did not again become the subject of multilateral treaty law until the First Hague Peace Conference of 1899, which resulted in, among other things, the Hague Convention on Maritime Warfare. *Treaties, States Parties and Commentaries*, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByDate.xsp> [<https://perma.cc/Z6XR-B8J4>]. Thus, the case of the *Paquete Habana* fell within a law-of-war gap, so to say. There seems to have also been an ever-present consideration of humanity, starting from the press reports (many of them accurate, some wildly overblown) on the atrocities of the Spanish toward the Cubans. *See, e.g.*, MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 103 (5th ed. 2015) (explaining that the American military intervention was a response to Spanish brutality, among

ascertained the military necessity exception, yet failed to apply the exception.<sup>44</sup> Rather than explain its rationale, the Court only mentioned in passing that there was no evidence supporting the application of the exception.<sup>45</sup> On this premise, the Court inferred that the Admiral had violated higher orders.<sup>46</sup> The Court's rationale reveals the error.

## 2. The Rationale and the Error

The Court erroneously inferred that the Admiral violated the orders of the Secretary of the Navy.<sup>47</sup> On 25 April 1898—the day Congress declared war with Spain, five days after the authorization for the use of force and three days after the blockade order—the North Atlantic Squadron captured the first ship, the *Paquete Habana*, sailing under the Spanish flag on course to Havana, Cuba.<sup>48</sup> Two days later, 27 April, the squadron captured the second ship, the *Lola*, also sailing towards Havana under the Spanish flag.<sup>49</sup>

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other reasons). In addition to Mr. Hoyt's note that the customary exemption was on humane grounds, a contemporary also made the same observation (and in the same volume of the same journal). Charles Noble Gregory, *The Law of Blockade*, 12 YALE L.J. 339, 346 (1903) ("An interesting and humane exception has been recently allowed by our own highest court in the case of fishing boats.").

44. This is another factor that makes *Little v. Barreme* inapposite. *Little v. Barreme*, 6 U.S. 170 (1804). In *Little*, a prize case, the Supreme Court said, "the [President's] instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* at 179. In contrast, in the *Paquete Habana*, the President's instructions were in compliance with the law of nations, and the Court said so itself. *The Paquete Habana*, 175 U.S. at 712 ("The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels."). There are other facts that are important. For example, *Little* concerned the "undeclared, Quasi War" with France. See, e.g., J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 468 (2005) (concerning "the right of a sovereign nation to make decisions regarding" the waging of war). The Spanish-American War was a declared war, a factor that makes the campaign more a matter of political discretion. Also, in *Little*, it was not disputed that the vessel captured was in fact a neutral vessel. *Little*, 6 U.S. at 178–79.

45. *The Paquete Habana*, 175 U.S. at 713–14.

46. As law scholar Michael Glennon has noted: "A close reading of *The Paquete Habana* reveals that the Court invalidated acts of lower-level executive officials, not those of the President, because the acts violated the President's orders." MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 244 (1990).

47. Admiral Chadwick has also made the point: "In accord with the navy department's instructions, which would seem sufficiently explicit, a number of these vessels were sent into Key West." CHADWICK, *supra* note 22, at 146 n.1.

48. *The Paquete Habana*, 175 U.S. at 713. A packet is "a passenger boat usually carrying mail and cargo." *Packet*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/packet> [<https://perma.cc/TZX6-PHFV>].

49. *The Paquete Habana*, 175 U.S. at 714.

The next day, 28 April, Admiral Sampson telegraphed Secretary Long:

I find that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging to the maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserves, have a semi-military character, and would be most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend that they should be detained prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West.<sup>50</sup>

On 30 April Secretary Long responded: “Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid [the] enemy may be detained.”<sup>51</sup>

In interpreting these correspondences, here is what the Court had to say:

The Admiral’s despatch assumed that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling; and the necessary implication and evident intent of the response of the Navy Department were that Spanish coast fishing vessels and their crews should not be interfered with, so long as they neither attempted to violate the blockade, nor were considered likely to aid the enemy.<sup>52</sup>

This passage reveals the Court’s error. Contrary to the Court’s assertions, the Admiral knew that the fishermen who might be of use to the Spanish navy were not ordinary fishermen to whom the rule of exemption applied in the absolute, and the Secretary authorized the captures if the Admiral deemed the men likely to aid the enemy.<sup>53</sup>

This point is supported by the history that followed. In *The Relations of the United States and Spain: The Spanish American War*, published in 1911, retired Rear Admiral French Ensor Chadwick (who was also a veteran of the War and had served with Admiral Sampson) said: “Several fishing-schooners were released after their cargoes were thrown overboard, but the admiral, in doubt as to the propriety of such release, telegraphed to the navy

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50. *Id.* at 712–13.

51. *Id.* at 713.

52. *Id.*

53. *Id.* at 712–13.

department . . . . His suggestions were approved by a telegram from the navy department, dated April 30, but not received until May 2.”<sup>54</sup>

However, as the Court continued:

[The *Paquete Habana*] had no arms or ammunition on board; she had no knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; she made no attempt to run the blockade, and no resistance at the time of the capture; nor was there any evidence whatever of likelihood that she or her crew would aid the enemy.<sup>55</sup>

This passage reveals the Court misconstrued Admiral Sampson's telegram and the Secretary's response.<sup>56</sup>

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54. See CHADWICK, *supra* note 22, at 146 (detailing the prevention of further supplies from reaching forces is necessary to the scheme of blockade).

55. *The Paquete Habana*, 175 U.S. at 713–14.

56. Admiral Chadwick expressed astonishment with the result: “The final outcome of this action,” referring to the Supreme Court's decision, “was of an extraordinary character.” CHADWICK, *supra* note 22, at 146 n.1. He continued:

While the present writer has the utmost respect for the ability and learning of this eminent judge, he cannot think his treatment of this case wholly logical. . . . The Havana vessels were furnishing food to a beleaguered army; beleaguered by sea by the fleet, practically by land by the insurgents, to the extent at least that food was not obtainable from the surrounding country. Their only ports were those so blockaded. The cutting off of the food supply of an enemy so situated has always been recognized as a military duty and as an important element in the reduction of a fortress. This of itself demanded at least their detention. The fact that their crews were reservists of the Spanish navy, trained men who undoubtedly would have been utilized in the Havana defence, was an additional reason of equal or perhaps greater weight. . . . [A]s the case stood, the fishing-vessels seized and condemned were intending to violate a blockade and carry food to a besieged enemy.

*Id.* at 147 n.1. One scholar (who now happens to be the Chief Judge of the Court of Appeals for the Armed Forces) has noted Admiral Chadwick's observations as “dubious.” Scott W. Stucky, *The Paquete Habana: A Case History in the Development of International Law*, 15 UNIV. BALT. L. REV. 1, 20 (1985). Chief Judge Stucky was gracious enough to engage with the author on this point in a series of emails between 12 August and 15 September 2020]. After all, the ships did not have a Spanish commission, and none of the crewman knew anything about the war or the blockade. Scott W. Stucky, *The Paquete Habana: A Case History in the Development of International Law*, 15 UNIV. BALT. L. REV. 1, 14–15 (1985). However, some news reports from 1898 lend credibility to Admiral Chadwick's observations, at least with respect to the crewmen being reservists in the Spanish navy. For example, after publishing the report on the administration's views concerning the President's rules of engagement on 26 April, the *New York Times* also published reports on several of the other captured fishing boats. According to the report of the capture of the *Engracia*: “Only one blank shot was necessary to bring her to. She had on board a crew of seven men and a cargo of fish. The men on board the prize had been in the Spanish Navy, and served as a sort of naval reserve.” *The Newport Takes*

It was not the Court's province to weigh the propriety of the Admiral's determination that the crewmen were likely to aid the enemy. The justiciable issue, properly framed, was whether the district court was wrong to have condemned the captured ships as lawful prizes.<sup>57</sup> The district court's condemnation of the ships under prize law was subject to judicial review. However, the ships' capture was attendant to the crewmen's capture as suspected reservists of the Spanish navy, and so was not subject to judicial review.<sup>58</sup> The heart of the error was the Court's inference that Admiral Sampson's capture of the ships was contrary to higher orders and violated the customary norm.<sup>59</sup>

Three justices dissented, and, on the issue of discretion, the dissenters had it right. Chief Justice Melville Fuller—together with Associate Justices John Harlan and Joseph McKenna—conceded, “I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.”<sup>60</sup>

Regarding when the Admiral dispatched the Secretary, the dissenters continued on this point: “Of course they would be liable to be if involved in the guilt of blockade running, and the Secretary agreed that they might be [if likely to aid the enemy] in the Admiral's discretion. All this was in accordance with the rules and usages of international law.”<sup>61</sup>

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*a Sloop*, N.Y. TIMES, Apr. 30, 1898, <https://timesmachine.nytimes.com/timesmachine/1898/05/01/102071761.html> [<https://perma.cc/A2NT-Q626>]. There was also the issue of impressment, which is “the state authority to require the service of a subject for the defence of the country.” THE OXFORD COMPANION TO SHIPS AND THE SEA 415 (Peter Kemp ed., 1988) (1976) (“Impressment was a general and recognized method of recruitment in most countries of the world, and applied equally to service ashore and afloat.”). With the blockade cutting off Spain's ability to send men to reinforce its army and navy, it had little choice but to impress seafaring Cuban merchantmen into military and naval service. This fact had shaped the state of affairs for Admiral Sampson and the North Atlantic Squadron. For example, as reported in the New York Times on 1 May 1898: “The captain of the *Lola* hove to when a blank shot was put across his bows, declaring that he would rather be captured by the Americans than enter [General] Blanco's service, which he would be compelled to do if he went into Havana.” *Fishing Smack Lola Taken*, N.Y. TIMES, May 1, 1898, <https://timesmachine.nytimes.com/timesmachine/1898/05/01/102071761.html> [<https://perma.cc/DBC2-69YD>]. It was after the capture of the *Lola* that Admiral Sampson telegraphed Secretary Long.

57. *The Paquete Habana*, 175 U.S. at 678.

58. *Id.*

59. *Id.* at 715 (Fuller, J., dissenting).

60. *Id.*

61. *Id.* at 717.

All this follows from the opinion's details. However, there are facts not recited that are also important. These facts also show that the Admiral followed the President's orders.

B. *The President's Rules of Engagement*

According to the joint resolution authorizing military force, a state of war had existed since 21 April.<sup>62</sup> On 26 April, President McKinley, through the Secretary of State and Secretary Long, communicated this authorization to Admiral Sampson.<sup>63</sup> The President's letter also established certain rules of engagement, which reproduced the provisions of the 1856 Paris Declaration Respecting Maritime Law, a law of war treaty.<sup>64</sup> The President also directed that the war was to be "conducted upon principles in harmony with the present views of nations & sanctioned by their recent practice."<sup>65</sup>

The rules of engagement also said that, notwithstanding the blockade, under certain conditions, Spanish merchant vessels should be allowed to pass until 21 May,

provided that nothing here in contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy or any coal except such as may be necessary for their voyage; or any other articles prohibited of contraband of war or any dispatch of or to the Spanish [Government].<sup>66</sup>

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62. *Id.* at 712.

63. *Id.*

64. See DEP'T OF DEF., LAW OF WAR MANUAL, *supra* note 9, at 1157 ("The United States [was] not a Party to the 1856 Paris Declaration."). For a brief overview of the state of the law of war in 1898, see *supra* note 43.

65. Telegraph from John D. Long, Sec'y of the Navy, to William T. Sampson, Rear Admiral, U.S. Navy, Commander of the N. Atl. Squadron (Apr. 26, 1898), <https://www.history.navy.mil/research/publications/documentary-histories/united-states-navy-s/blockade-of-northern/secretary-of-the-nav.html> [<https://perma.cc/A43V-KG5W>].

66. *Id.*; see William T. Sampson, Instructions to Blockading Vessels and Cruisers (May 5, 1898) (unpublished military instructions), <http://hrnm.navy.mil/research/publications/documentary-histories/united-states-navy-s/naval-operations-in/instructions-to-bloc.html> [<https://perma.cc/8A JF-7EDM>] [hereinafter Sampson, *Instructions to Blockading*] (incorporating Admiral Sampson's instructions by reference).

More than that, Navy regulations passed in 1862 had made the violation or disobedience of orders, or the carrying out of orders with negligence or carelessness, punishable by court-martial.<sup>67</sup> These regulations, *The Articles for the Government of the Navy*, set out several constraints on prize captures and remained in force throughout the war.<sup>68</sup>

Between 22 and 26 April, and notwithstanding the 30-day grace period, the North Atlantic Squadron captured and sent for adjudication four Spanish ships, documented as “unarmed steamers.”<sup>69</sup> Some were merchant ships,<sup>70</sup> and the President was “[n]ot [p]leased with the [c]apture of [m]erchantmen,” such captures appearing to be against the orders of 26 April.<sup>71</sup> The next day, the *New York Times* published a report to that effect.<sup>72</sup>

Still, those rules of engagement did not cover captures made before the President’s order. The Administration expressed its view that the propriety of such seizures should be left to prize courts:

[C]aptures made before the proclamation must be judged according to the general principles of international law, *which do not preclude such captures*. Each

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67. Act of Jul. 17, 1862, ch. CCIV, § 1, art. 1, 12 Stat. 608 (1862); *see also* Wright, *supra* note 43, at 259 (“Military and naval regulations and instructions are enforced by courts martial whose jurisdiction, however, is largely confined to the statutory articles of war, and by military commissions.”).

68. Act of Jul. 17, 1862, ch. CCIV, § 1, art. 1, 12 Stat. 608.

69. *Spanish Ships and Commanders*, NAVAL HIST. & HERITAGE COMMAND, <https://www.history.navy.mil/research/publications/documentary-histories/united-states-navy-s/list-ships-commanders/spanish-ships-and-commanders.html> [<https://perma.cc/89WW-TK31>].

70. The ships were the *Argonauta*, *Buena Ventura*, *Catalina*, and the *Miguel Jover*. The *Argonauta* was a mail steamer laden with “general merchandise, with a large quantity of arms and ammunition intended for the Spanish troops in Cuba.” *The Argonauta at Key West*, N.Y. TIMES, May 4, 1898, <https://www.nytimes.com/1898/05/04/archives/the-argonauta-at-key-west-col-de-cortijo-weylers-brotherinlaw-on.html>. The *Buena Ventura*, laden with lumber, was determined to be a good prize, but the Supreme Court reversed the decision. *The Buena Ventura*, 175 U.S. 384, 391, (1899). The *Miguel Jover* and the *Catalina*, both laden with cotton, were released. CHADWICK, *supra* note 22, at 132–34.

71. *President and the Prizes*, N.Y. TIMES, Apr. 27, 1898, <https://www.nytimes.com/1898/04/27/archives/president-and-the-prizes-his-proclamation-not-retroactive-mr.html>.

72. *Id.* (“The proclamation does not make any specific reference to ships taken prior to its promulgation [on April 26]. In some quarters it has been assumed that it was intended to be operative from the day the war began, which is officially set down as April 21. Under this interpretation the vessels taken in Cuban waters up to date would be exempt from capture, and would have to be returned to their owners, with consequent loss of prize money to their captors. This, however, is not the view taken by the Administration.”).



case will go before the prize court . . . and be adjudicated upon its merits according to the well[-]defined rules and regulations of the laws of nations.<sup>73</sup>

Now, remember the squadron had captured the *Paquete Habana* on the 25th and the *Lola* on the 27th.<sup>74</sup> The Secretary's dispatch on the 26th communicated the Administration's intent to allow the passage of merchant ships as exempt from prize capture, with the exception that those likely to aid the enemy were to be detained.<sup>75</sup> Admiral Sampson's telegram on the 28th described the special character of the crewmen—being such as to put them in the exception to the President's directive—expecting more ships with men of similar character and requested authorization to take them as prisoners.<sup>76</sup> The Secretary's response on 30 April left to the Admiral's judgment whether the men were likely to aid the enemy.<sup>77</sup> In exercising that judgment, the Admiral's actions complied with the President's orders and the rules of engagement.<sup>78</sup>

After the Secretary's dispatch of 30 April stating “any such vessel or crew [considered] likely to aid the enemy may be detained,” which Admiral Sampson received on 2 May, the Admiral issued rules of engagement of his own.<sup>79</sup>

### C. *The Admiral's Rules of Engagement*

On 5 May the Admiral published an order to his men: “The vessels of this Squadron while engaged in blockading and cruising service, will be governed by the rules of International law and the decisions of Prize

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73. *Id.* (emphasis added) (“The information comes from thoroughly trustworthy sources that the President and his Cabinet have viewed the prize-taking performances of the fleet off Havana with anything but enthusiasm. The President is understood to be inclined to view these as unworthy [of] the dignity of American war ships, and to regret them as tending to put this country in a bad light before the world. The suggestion has been made that, regarding the seizure of these ships in the light of misfortunes as he does, the President might take upon himself to order their release. He has the power to do this before the cases are adjudicated in the prize court, and there is no doubt that he would exercise it were it not that such action might be taken by the officers of the fleet as a rebuke to their zeal, the good intentions of which are not doubted.”).

74. *The Paquete Habana*, 175 U.S. 677, 713–14 (1900).

75. *President and the Prizes*, *supra* note 71.

76. *The Paquete Habana*, 175 U.S. at 712–13.

77. *Id.* at 713.

78. As were the prize captures. Consider what the Supreme Court said only a few years later, that, in the case of the *Paquete Habana*, the *Lola*, and the other similar vessels, “The libels alleged a capture pursuant to instructions from the President.” *United States v. Paquete Habana (The Paquete Habana II)*, 189 U.S. 453, 465 (1903).

79. CHADWICK, *supra* note 22, at 146.

courts.”<sup>80</sup> Far from leaving the men to educate themselves on the rules, the Admiral set out in writing the most salient provisions—twenty-eight in total, of almost 2,000 words.<sup>81</sup> Most important among them was this: “A neutral vessel carrying troops or military personages of the enemy is liable to seizure.”<sup>82</sup>

Notice the reference to neutral vessels.<sup>83</sup> If neutral vessels “carrying troops or military personages of the enemy” were liable to capture, also liable to capture were enemy vessels, and the *Paquete Habana*, the *Lola*, and the other similar vessels were all flying the Spanish flag.<sup>84</sup>

Admiral Sampson stopped and searched the two vessels to enforce the order of blockade, following the authorization for the use of military force, presidential directive, rules of engagement, and international law.<sup>85</sup> When the Admiral discovered that the men were likely reservists of the Spanish Navy, he took them prisoner, as they were men of the character that the President specifically noted as those who were to be captured. Still, the Admiral sought guidance for good measure.<sup>86</sup>

After the Admiral’s squadron interdicted the ships and the Admiral sent the detained crewmen to the army base at Key West, the matter was out of his hands, and the condemnation of the ships as prizes was completely separate.<sup>87</sup> The instructions he published to his men suggest the Admiral had not acted contrary to his interpretation of Secretary Long’s dispatch but following it—it being consistent with the applicable law of nations and with the intent of the Commander-in-Chief.<sup>88</sup>

All this is not to mention the North Atlantic Squadron ships, between the 2nd and the 9th of May, captured at least eight other fishing boats, three after Admiral Sampson’s receipt of the President’s rules of engagement, and

80. *Instructions to Blockading*, *supra* note 66. The Admiral also reproduced the President’s rules of engagement, its provisions to be incorporated by reference. According to Admiral Chadwick’s first volume, Admiral Sampson’s rules of engagement, *Instructions to Blockading Vessels and Cruisers*, were “but slightly modified” by the State Department. CHADWICK, *supra* note 22, at 145.

81. *Instructions to Blockading*, *supra* note 66.

82. *Id.*

83. *Id.*

84. “The flag or pass under which a ship is sailed is deemed conclusive evidence of its national character, though in general, the national character of a vessel depends on the domicile of the owner.” UPTON, *supra* note 32, at 410.

85. *Instructions to Blockading*, *supra* note 66.

86. *Id.*

87. *The Prize Cases*, 67 U.S. (2 Black) 635, 651 (1863).

88. *Jurisdiction: Admiralty and Maritime*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-admiralty-and-maritime> [<https://perma.cc/Z6SP-L2DY>].

five after the Admiral's own rules of engagement.<sup>89</sup> No telegram came to admonish the squadron or prevent any further captures.<sup>90</sup>

So while a close reading of the *Paquete Habana* reveals that the Court invalidated acts of lower-level executive branch officials, not those of the President, the facts and circumstances attendant to the seizures that the Court overlooked (and a natural reading of the *Paquete Habana II*) reveal that this invalidation was in error.<sup>91</sup>

The Court decided the case in 1900, yet the *Paquete Habana* error had its origins in 1803, in the origins of the doctrine of political questions.

### III. EXPLAINING THE ERROR

"[W]here there is no treaty, and no controlling [e]xecutive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations,"<sup>92</sup> so went the Court's reasoning, "and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."<sup>93</sup> Yet the federal courts' authority to say what the law is came from a source that also put profound constraints on that authority, constraints the Court ignored.<sup>94</sup> The Supreme

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89. *Paco* (captured by Newport on 2 May); *Oriente* and *Suarez* (captured by Helena and Montgomery respectively on 5 May); *Espana* and *Padre de Dios* (both captured by Newport on 7 May); *Santiago Apostol* (captured by Mayflower on 8 May); *Fernandito* and *Severito* (captured by Vicksburg and Dolphin respectively on 9 May). *Spanish Vessels Captured up to Evening of May 19*, N.Y. TRIBUNE, May 21, 1898, at 3, <https://www.newspapers.com/image/468657509/>. The Supreme Court in 1903 listed these ships as "fishing smacks, which were libeled as prize of war," and, "[t]he proceedings in all the cases are similar and the evidence, to a large extent, the same" as the *Paquete Habana* and the *Lola*. *United States v. Paquete Habana (The Paquete Habana II)*, 189 U.S. 453, 463–64 (1903). The *Dolphin*, *Newport*, *Helena*, *Montgomery*, *Mayflower*, and *Vicksburg* were ships of the North Atlantic Squadron under the command of Admiral Sampson. CHADWICK, *supra* note 22, at 399–400.

90. *The Paquete Habana*, 175 U.S. 677, 712–13 (1900).

91. *See generally* *The Paquete Habana*, 175 U.S. 677; *The Paquete Habana II*, 189 U.S. 453.

92. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 240 (2d ed. 1996).

93. *The Paquete Habana*, 175 U.S. at 700. *See generally* HENKIN, *supra* note 92, at 241 ("[I]t is not clear that the Court's incidental qualification was addressing the significance of a public act that was inconsistent with the international principle. In context, the Court was telling the courts how they should determine whether a particular rule has become a principle of international law. The Court said that one has to explore the practice of states and distill a principle from that practice, unless a public act by some branch of the U.S. government has already determined and codified the principle on behalf of the United States. By this reading, the Court's statement did not address at all whether the Executive (or Congress) is free to act contrary to international law.")

94. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (giving the courts authority to interpret the law) (explaining the federal courts have the authority to interpret appropriate laws).

Court had applied the political question doctrine to political discretion matters since the inception of judicial review.<sup>95</sup>

The Constitution of the United States divides foreign relations powers between Congress and the President, and this division is most profound for war powers. Article I gives Congress the power “To declare War,” “To raise and support Armies,” “To provide and maintain a Navy,” and “To make Rules for the Government and Regulation of the land and naval Forces.”<sup>96</sup> There are also, of course, the Necessary and Proper Clause<sup>97</sup> and the Appropriations Clause.<sup>98</sup> Article II makes the President the Chief Executive<sup>99</sup> and “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.”<sup>100</sup> The framework is also important.<sup>101</sup>

War powers include—as two realms of international law—treaties and the “law of nations.”<sup>102</sup> What was once the law of nations in the parlance

95. *Id.* at 170 (explaining the courts decide the rights of individuals, not “how the executive, or executive officers, perform duties in which they have a discretion”).

96. U.S. CONST. art. I, § 8, cl. 11–14.

97. *Id.* cl. 18. Congress relied on the Necessary & Proper Clause when it passed the War Powers Resolution of 1973. *See* 50 U.S.C. § 1541(b) (“Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.”).

98. U.S. CONST. art. I, § 8, cl. 12; *Id.* § 9, cl. 7.

99. *Id.* art. II, § 1, cl. 1.

100. *Id.* § 2, cl. 1.

101. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 68 (1990).

102. In addition to the Declare War Clause, Article I, Section 8, of the Constitution of the United States says in pertinent part: “The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. Article II, Section 2, says the President “shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.” *Id.* art. II, § 2, cl. 2. As for the judicial power, Article III says: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime jurisdiction; [and] to Controversies to which the United States shall be a Party.” *Id.* art. III, § 2. On treaties and the law of nations, *see* John Jay, *Federalist Papers: Primary Documents in American History; The Federalist No. 3*, LIBR. OF CONG., <https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493266> [<https://perma.cc/5G3F-85BB>] (“The [just] causes of war, for the most part, arise either from violation of treaties or from direct violence. America has already formed treaties with no less than six foreign nations . . . . It is of high importance to the peace of America that she observe the laws of nations towards all these powers.”). In 1793, Jay had more to say on treaties and the law of nations: “Treaties between independent nations, are contracts or bargains which derive all their force and obligation from mutual

of the Revolution is now customary international law.<sup>103</sup> International law comprises maritime law, which in turn includes prize law, decided in courts of admiralty.<sup>104</sup> Under Article III of the Constitution, which gives the United States' judicial power to the federal courts, the Judiciary Act of 1789 gave jurisdiction on all admiralty and maritime cases to the district courts.<sup>105</sup> The law of 1891, building on this framework, also gave the Supreme Court appellate jurisdiction over prize cases, direct from the districts.<sup>106</sup>

With this background in mind, it is hard to overstate that the Supreme Court in the *Paquete Habana* was sitting as a prize court, not a court of general jurisdiction.<sup>107</sup> It had cognizance only over matters of prize.<sup>108</sup> What follows is that the *Paquete Habana* holding is limited to prize cases, and though the case might persuade, it should not serve as precedent for non-prize cases. The holding of the *Paquete Habana* was that the ships

consent and agreement . . . As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war.” Grand Jury Charge of 1793, reproduced in *Henfield's Case*, 11 F. Cas. 1099, 1100 (Cir. C. Pa. 1793) (No. 6360).

103. Customary international law is “a type of unwritten law grounded in the ‘practice of states.’” JAMES R. HOLMES, A BRIEF GUIDE TO MARITIME STRATEGY 7 (2019) (“Customary international law exists alongside treaty law, much as common law coexists with written laws in many domestic legal systems. In other words, what states do—their observable behavior—indicates what they believe international law and norms to be.”). James R. Holmes is a naval strategist and current J. C. Wylie Chair of Maritime Strategy at the Naval War College. *James R. Holmes, Ph.D.*, U.S. NAVAL WAR COLL., <https://usnwc.edu/Faculty-and-Departments/Directory/James-R-Holmes> [<https://perma.cc/GGR5-GWUZ>].

104. *Jurisdiction: Admiralty and Maritime*, *supra* note 88.

105. In 1789, Congress passed the Judiciary Act. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The Act established, specifically, the federal districts: “Each district was generally coextensive with a state; each had a federal district court and a district judge. The districts, in turn, were grouped into three circuits. In each circuit, a circuit court, made up of two Supreme Court Justices and one district judge, sat twice a year.” LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94 (Oxford Univ. Press 4d ed. 2019) (1973). Thus, as legal scholar Joseph Sweeney has explained: “In 1789, the federal courts, sitting as prize courts, were vested with exclusive jurisdiction, as against the state courts, to decide the legality of a capture as prize and any issue incidental to the capture, such as a claim for reparation of a tort committed by the captors.” Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 447 (1995).

106. *Jurisdiction: Appellate*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-appellate> [<https://perma.cc/WCB2-WRJ2>].

107. *See* Sweeney, *supra* note 105, at 483 (“The Supreme Court of the United States was sitting in the case as a court of prize. In so doing, it remained, of course, a court of the United States, but it was not sitting as such. In the famous words of Lord Stowell, it was sitting as ‘a Court of the Law of Nations.’”).

108. “The prize jurisdiction of a court of admiralty, is that which authorizes it to take cognizance of captures made on the sea . . . for the purpose of determining whether the property captured or surrendered, is or is not lawful prize of war.” UPTON, *supra* note 32, at 388.

and their cargos were not lawful prizes, a very narrow holding.<sup>109</sup> Therefore, it is an error to think of it as an abrogation of the political question doctrine as applied to matters of wartime military discretion or Commander-in-Chief discretion.

Let us examine the doctrine.

#### A. *Judicial Review and Political Questions*

Article III of the Constitution says the United States' judicial power shall extend to cases arising under the Constitution and laws of the United States and controversies to which the United States is a party.<sup>110</sup> However, the Constitution does not say the judicial power includes the authority "to say what the law is."<sup>111</sup> The federal courts' authority "to say what the law is" comes from *Marbury v. Madison*,<sup>112</sup> which also established the doctrine of political questions.<sup>113</sup> The political question doctrine established that matters of political discretion are not subject to judicial review.<sup>114</sup>

In *Marbury*, Chief Justice John Marshall famously announced: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."<sup>115</sup> However, as Chief Justice Marshall also emphasized,

By the [C]onstitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects

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109. *See generally* *The Paquete Habana*, 175 U.S. 677 (1900).

110. U.S. CONST. art. III, § 2, cl. 1.

111. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

112. *Id.*

113. *Id.* at 170 (describing how the courts decide the rights of individuals, not how the executive and his officers perform their duties in which they have discretion).

114. *Id.*

115. *Id.* at 177.

are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.<sup>116</sup>

As Chief Justice Marshall continued,

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the [C]onstitution and laws, submitted to the executive, can never be made in this court.<sup>117</sup>

That is, there are questions that may be presented to a court of law but that a court of law may not decide—which is to say they are nonjusticiable—because they are political in nature, or are, by the Constitution and laws, “submitted” to the executive.<sup>118</sup> This principle constitutes the first formulation of the political question doctrine.<sup>119</sup>

Now, it is true that “Nothing in this general formulation implied that presidential initiatives over the war power fell outside the scope of judicial review.”<sup>120</sup> However, it is also true that nothing in the general formulation of judicial review over the war power had implied that judicial review should operate to call into question matters of wartime military discretion or Commander-in-Chief discretion.<sup>121</sup> In fact, Supreme Court cases had expressly applied the political question doctrine to bar such matters from judicial review.<sup>122</sup>

#### B. *Wartime Actions and Political Discretion*

By the time of the *Paquete Habana*, the Supreme Court had explained war measures were not subject to judicial review.<sup>123</sup> Consider what the Supreme Court had to say in the *Prize Cases*:<sup>124</sup>

116. *Id.* at 165–66.

117. *Id.* at 170.

118. *Id.*

119. *Id.* at 165–66.

120. Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466, 468 (2005) (discussing how at the time of Marbury, the decision to wage war was with the legislative branch, not the president).

121. *Id.*

122. *Id.*

123. *The Prize Cases*, 67 U.S. (2 Black) 635, 651 (1863).

124. *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

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. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.<sup>125</sup>

To be sure, the facts of the *Prize Cases* make the opinion inapposite to the *Paquete Habana*.<sup>126</sup> Notwithstanding, the dicta expressed in the *Prize Cases* and others had begun to shape the political questions doctrine by the time of the Spanish American War.<sup>127</sup>

By the joint resolution of 20 April 1898, Congress authorized military force to liberate Cuba.<sup>128</sup> On 21 April, President McKinley ordered Admiral Sampson to blockade Cuba along its northern coast and interdict Spanish ships.<sup>129</sup> When Congress declared war on 25 April, it expressly recognized that a state of war had existed since the 21st.<sup>130</sup>

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125. *See id.* at 670 (finding the political branches are enabled to “prosecute war with vigor and efficiency”) (emphasis omitted).

126. *See* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 191 (2004).

127. On the point of matters of Commander-in-Chief discretion as not subject to judicial review, also consider the case of *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186) (“The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown [in Nicaragua] . . . was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the secretary of the navy.”). *Id.* at 112. *Durand*, a case from the Circuit Court of the Southern District of New York, is not a part of the Supreme Court’s jurisprudence. Still, it was an early case that shaped the application of the doctrine in matters of Commander-in-Chief discretion. Of note, the author of the opinion in *Durand*, Samuel Nelson, was an Associate Justice of the Supreme Court serving on the circuit court, as was then customary. *See* SCHLESINGER JR., *supra* note 126, at 191 (discussing Samuel Nelson’s service on the Supreme Court). Since, like the *Paquete Habana*, *Durand* has remained a staple of the law concerning war powers, especially within the executive branch. *See* JACK L. GOLDSMITH III, *DEPLOYMENT OF UNITED STATES ARMED FORCES TO HAITI: MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT 2* (Mar. 17, 2004), <https://fas.org/irp/agency/doj/olc/haiti.pdf> [<https://perma.cc/ZZ9Q-YCDD>] (citing *Durand* for support).

128. Act of Apr. 20, 1898, Pub. L. No. 55-24, 30 Stat. 738 (recognizing the independence of the people of Cuba by joint resolution).

129. *The Sinking of Maine*, *supra* note 17.

130. *Id.*



As for the rule, when the Court said, “where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations,” it said nothing offensive.<sup>131</sup> But it misapplied its own rule.<sup>132</sup> There was a controlling executive act that ordered the blockade and directed the capture of all Spanish ships and even neutral ships with men likely to aid the enemy. There were controlling legislative acts that authorized the use of military force and declared war, a declaration that Congress made retroactive to the blockade’s date and, therefore, ratified the President’s measures undertaken to effectuate the blockade.<sup>133</sup> And there were judicial decisions, not least *Marbury* but also the *Prize Cases*, establishing political discretion decisions to be barred from judicial review.<sup>134</sup>

Admiral Sampson’s captures of the two fishing boats were actions extending from the Commander-in-Chief’s wartime military discretion and were therefore not subject to judicial review.<sup>135</sup>

#### IV. JUDICIAL REVIEW AND WAR POWERS

*In time of war, the law is silent.*<sup>136</sup> This maxim, attributed to Cicero, could just as well be imputed to Clausewitz or others on war. It, too, oversimplifies. Law does apply to conduct in wartime.<sup>137</sup> But more difficult is the answer to the question of which law applies. Perhaps the better principle is, *in time of war, the law defers.*<sup>138</sup> In matters of warfare, the political question doctrine is a doctrine not of silence but deference, deference to Commander-in-Chief discretion, and the law of war.<sup>139</sup>

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131. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

132. *President McKinley’s Proclamation of Blockade to Forsyth*, *supra* note 24.

133. *The Sinking of Maine*, *supra* note 17.

134. *Marbury v. Madison*, 5 U.S. 137, 170 (1803); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

135. *President McKinley’s Proclamation of Blockade to Forsyth*, *supra* note 24.

136. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 15 (2015).

137. *Id.* at 19.

138. *See id.* (“[I]n certain instances, the Constitution gives not to the courts but to other branches of government the power to decide whether an action violates the Constitution. In this way, the laws, including the Constitution, do not necessarily fall ‘silent.’ They still apply to the government action in question. But it is for Congress or the President, not the courts, to determine what the law requires given the national security threat.”).

139. The political question doctrine is “more specific and better developed than Cicero’s maxim as crisis jurisprudence,” though in some cases, “as applied to questions of national security, it is nonetheless in the same spirit.” *See id.* (“[B]y walling off many of the President’s wartime and foreign affairs decisions from review, it is but one step removed from Cicero.”).

Events in the first half of the twentieth century further complicated judicial review. In the famous words of scholar Edward Corwin, the Constitution had proved to be “an invitation to struggle for the privilege of directing American foreign policy”<sup>140</sup> with the Supreme Court as the final arbiter of the law of foreign relations. What has emerged is that Commander-in-Chief discretion is not absolute, as the Supreme Court intimated in *Curtiss-Wright*.<sup>141</sup> Although the Court in *Curtiss-Wright* did not use the phrase political question, the rationale reveals application of the doctrine.<sup>142</sup> The same is true for the cases concerning the United States’ internment of Japanese-Americans and *Youngstown*.<sup>143</sup>

The Japanese-American internment cases are important because they exemplify the struggle for control expressed in Corwin’s aphorism, and precisely in the area of Commander-in-Chief wartime military discretion. *Youngstown* is important because it stands out as an example of the federal judiciary asserting itself against executive overreach, and again in a matter of Commander-in-Chief wartime military discretion.<sup>144</sup>

To be sure, much went wrong in the Japanese Internment cases.<sup>145</sup> Still, Associate Justice Robert Jackson’s statement in dissent in *Korematsu*<sup>146</sup> is unassailable: “In the very nature of things[,] military decisions are not

140. EDWARD S. CORWIN, *THE PRESIDENT: OFFICES AND POWERS 1787–1957*, at 171 (N.Y. Univ. Press 4th ed. 1957) (1940).

141. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .”). This extraneous treatment came to stand for a “vision of unrestrained executive discretion.” KOH, *supra* note 101, at 112.

142. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 329.

143. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 634 (1952) (discussing the “infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote,” in the context of Presidential powers); see BREYER, *supra* note 136, at 79 (“As to the ‘political question’ doctrine, as expressed in *Curtiss-Wright* and *Korematsu*, the Guantanamo cases did not overrule these decisions directly, but it is as if they (and also *Steel Seizure* [*Youngstown*]) drained those earlier cases of their persuasive force . . .”).

144. *Youngstown*, 343 U.S. at 585.

145. Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 *YALE L.J.F.* 641, 641–42 (2019) (“[T]he Court’s decision in *Korematsu* has joined the ranks of this country’s most notorious antiprecedents—textbook cases of judicial decision-making gone wrong that jurists of all stripes vow never to repeat.”); Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T. OF JUSTICE (May 20, 2011), <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [<https://perma.cc/TN9W-38BH>].

146. *Korematsu v. United States*, 323 U.S. 214 (1944).

susceptible of intelligent judicial appraisal . . . . Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.”<sup>147</sup> Another of Justice Jackson’s opinions, his concurring opinion in *Youngstown*, is of paramount importance on judicial review of war powers.<sup>148</sup>

#### A. *Commander-in-Chief Discretion and the Twilight Zone*

*Youngstown* came up during the Korean War.<sup>149</sup> Steelworkers threatened to strike after talks failed on new collective bargaining agreements.<sup>150</sup> Fearing the impending strike would jeopardize the steel production needed for the war, President Truman ordered the Secretary of Commerce to take possession of the steel mills and oversee their operation.<sup>151</sup> The workers brought suit, arguing that the order was beyond the President’s power.<sup>152</sup> The President invoked his authority as Chief Executive and Commander-in-Chief, characterizing the Korean campaign as a grave emergency that necessitated the order.<sup>153</sup>

In the end, the Court held against the seizure.<sup>154</sup> Justice Hugo Black wrote the Court’s opinion.<sup>155</sup> Four of the five justices who concurred with Justice Black issued separate opinions, each important in its own right, but none more important than Justice Jackson’s concurring opinion.<sup>156</sup>

In his concurring opinion, Justice Jackson outlined a three-part framework of presidential power:

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147. *Id.* at 245.

148. With experience as Solicitor General, Attorney General, and Chief United States Prosecutor on the Nuremburg Trials, it is not surprising that Justice Jackson had much to say on judicial review of war powers. See *About the Robert H. Jackson Center*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/about/> [<https://perma.cc/2AY8-UWDS>] (detailing the positions Justice Jackson held throughout his career).

149. *Youngstown*, 343 U.S. at 583.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 582.

154. *Id.* at 589.

155. *Id.* at 582.

156. See BREYER, *supra* note 136, at 56 (“Justice Robert Jackson added what history has shown to be the most important concurring opinion, in which he set forth an important, now well-known analysis dividing presidential action into three categories.”).

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.<sup>157</sup>

In explaining the scope and limits of presidential power, Justice Jackson sought to make clear the import of *Curtiss-Wright*, so as to refute any residual ideas of its endorsement of “unrestrained executive discretion.” Justice Jackson emphasized:

[*Curtiss-Wright*] recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.<sup>158</sup>

Thus, it is important to keep in mind that the Japanese-American internment cases and *Youngstown* concerned matters implicating the exercise of war powers in internal affairs. Furthermore, even a cursory review of *Curtiss-Wright* and *Korematsu* reveals that both cases concerned executive function together with congressional approval, either beforehand or after the fact.<sup>159</sup> Yet when such authority is exercised abroad in wartime under the Commander-in-Chief power, judicial review may be had, but only under narrow circumstances, and for narrow purposes. Considering these difficulties, what is necessary is a “discriminating analysis.”<sup>160</sup>

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157. *Youngstown*, 343 U.S. at 635–37.

158. *Id.* at 636 n.2.

159. *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944); *United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304, 311 (1936).

160. *Baker v. Carr*, 369 U.S. 186, 211–12 (1962).

B. *Foreign Relations and the Discriminating Analysis*

The case of *Baker v. Carr*<sup>161</sup> is the most important case in shaping the political question doctrine, not least because it set out factors the Court determined to be relevant in judging whether and to what extent to apply it.<sup>162</sup> After *Baker*, in foreign relations and national security cases, courts must undertake the appropriate discriminating analysis of the particular question posed.

Associate Justice William Brennan established the *Baker* framework, such that:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>163</sup>

*Baker* factors 1 and 2 have remained intact.<sup>164</sup> These two criteria are still very much a part of the analysis.<sup>165</sup> Factors 3,<sup>166</sup> 4, 5, and 6 concern the

161. *Baker v. Carr*, 369 U.S. 186 (1962).

162. *Id.* at 211.

163. *Id.* at 217.

164. *But see* *Goldwater v. Carter*, 444 U.S. 996, 1002–06 (1979) (laying out rationale on the non-justiciability of political questions without any mention whatsoever of the *Baker* factors). In *Goldwater*, none of the Justices was able to marshal enough support for his views to bring about a majority opinion. Justices Stewart & Stevens joined Justice Rehnquist's opinion, which then constituted the plurality view. *Id.* at 1002.

165. *See* *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”) (emphasis in original); *see also* *Nixon v. United States*, 506 U.S. 224, 236 (1993) (“In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability.”).

166. Factor 3, the test of the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, seems to suggest that the true nature of the test is whether the

prudential features of the doctrine. Consider Justice Powell's concurring opinion in *Goldwater v. Carter*,<sup>167</sup> which subsumed *Baker's* last four factors into the issue of whether "prudential considerations counsel against judicial intervention."<sup>168</sup>

As for foreign relations, *Baker* emphasized that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>169</sup> The Court went on to say:

Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms [1] of the history of its management by the political branches, [2] of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and [3] of the possible consequences of judicial action.<sup>170</sup>

These are the *Baker* principles.

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issue is yet ripe for review. That is, if the issue is impossible to decide without an initial policy determination of a kind clearly for nonjudicial discretion, then, in order for it to be possible for the Court to decide the issue, there must first be some policy determination by one or the other of the political branches. This sounds in the principle of ripeness. See *Goldwater*, 444 U.S. at 997 (Powell, J., concurring) ("This Court has recognized that an issue should not be decided if it is not ripe for judicial review. Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."). Consider also this statement from Justice Sonia Sotomayor's concurrence in *Zivotofsky*: "[I]t may be appropriate for courts to stay their hand in cases implicating delicate questions concerning the distribution of political authority between coordinate branches until a dispute is ripe, intractable, and incapable of resolution by the political process." *Zivotofsky v. Clinton*, 566 U.S. 189, 206 (2012) (Sotomayor, J., concurring).

167. *Goldwater v. Carter*, 444 U.S. 996 (1979).

168. *Id.* at 998.

169. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

170. *Id.* at 211–12. A close reading of this wording interprets it as applying to foreign relations cases. But these three factors seem to be just restatements of the two jurisdictional categories plus the catch-all prudential category. And as to the broader political question doctrine, the Court also said:

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for *discriminating inquiry* into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

*Id.* at 217 (emphasis added). So, whether it is a "discriminating analysis" or "discriminating inquiry," it is always on a case-by-case basis.

Now notice that *Baker* principles 1 and 2 are reformulations of *Baker* factors 1 and 2, and that principle 3 is an amalgam of *Baker* factors 3 through 6. But the *Baker* principles are more than only reformulations of the *Baker* factors. They free courts' rationale from the strictures of the more "semantic cataloguing" of the *Baker* factors in favor of a set of principles more faithful to the framework of the Constitution—particularly to the separation of powers—and the courts' role of judicial review in foreign relations and national security cases.<sup>171</sup>

The first *Baker* principle is compatible with the *Youngstown* framework. That is, considering the history of the management of the war powers by the political branches, it is appropriate to determine if the president's power (as Chief Executive and Commander-in-Chief) is at its maximum, in the twilight zone of concurrent authority, or at its lowest ebb.<sup>172</sup> Next, under the second *Baker* principle, it is appropriate to consider whether and to what extent the precise legal question is susceptible "to judicial handling in the light of its nature and posture in the specific case."<sup>173</sup> Finally, consideration is appropriate on the possible consequences of judicial action.

The changing character of war and warfare make the discriminating analysis imperative.

#### V. THE DISCRIMINATING ANALYSIS IMPERATIVE

When historian David Crist wrote his history on the "twilight war" between the United States and Iran, he used the twilight metaphor to describe the space between war and peace.<sup>174</sup> Still, the phrase could just as well have alluded to Justice Jackson's three-part framework.<sup>175</sup> As with the naval operation implicated in *Koobi*,<sup>176</sup> most military operations occur in

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171. *Id.* at 217.

172. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

173. *Baker*, 369 U.S. at 211.

174. DAVID CRIST, *THE TWILIGHT WAR: THE SECRET HISTORY OF AMERICA'S THIRTY-YEAR CONFLICT WITH IRAN* 4–5 (2012) ("Twilight is an accurate metaphor for the current state of affairs between the United States and Iran. . . . For three decades, the two nations have been suspended between war and peace.").

175. *Youngstown*, 343 U.S. at 635–38.

176. Punctuating the twilight wars was the naval operation at issue in *Koobi*, operation Earnest Will. Cox, *supra* note 1. President Ronald Reagan did not seek congressional authorization for the operation. CASPAR W. WEINBERGER, *A REPORT TO THE CONGRESS ON SECURITY ARRANGEMENTS IN THE PERSIAN GULF* 21 (1987) ("[T]here is no basis at the present time for concluding that the [War Powers] Resolution will apply . . ."). Weinberger was Secretary of Defense under President Reagan.

these two zones of twilight.<sup>177</sup> Therefore, resolving the *Koobi* problem calls for an application of *Baker's* discriminating analysis of the particular question. Two cases demonstrate the point.

#### A. *Tarros S.p.A. v. United States*

In 2011, to quell civil unrest in his country, Muammar Qadhafi, dictator of Libya, authorized (ordered) the country's military forces to silence protestors.<sup>178</sup> Civilians, men and women alike, were to be silenced, even if that meant maimed or killed.<sup>179</sup> The U.N. Security Council (UNSC) unanimously resolved to intervene.<sup>180</sup> With Resolutions 1970 and 1973, the UNSC instituted, among other measures, an arms embargo on the Libyan government.<sup>181</sup> The Resolution instructed U.N. member states to enforce the embargo and take all necessary measures to protect civilians and civilian-populated areas.<sup>182</sup>

Under orders of United States President Barack Obama, in March 2011, the U.S. initiated Operation Odyssey Dawn to enforce Resolution 1973.<sup>183</sup> On 22 March, U.S. naval warship the *USS Stout* interdicted, questioned, and turned away the *Vento*—a commercial cargo ship flying the flag of Cyprus—as it made its way toward the Libyan coast, bound for Tripoli.<sup>184</sup> At some point, the ship sustained damage.<sup>185</sup> The company that contracted for the *Vento* alleged damages due to negligence of the U.S. naval forces.<sup>186</sup> The plaintiff claimed the U.S. naval forces' actions were contrary to the Resolutions, a North Atlantic Treaty Organization (NATO) Warning, and international maritime law, specifically the United Nations Convention on the Law of the Sea (UNCLOS).<sup>187</sup>

The district court took up the matter on the question of “whether the *Stout*—and by implication, the military—had a duty under international law to conduct operations in a specified manner, and acted negligently in the

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177. BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2020, at 2 (2020).

178. *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325, 327 (S.D.N.Y. 2013).

179. *Id.*

180. *Id.* at 328.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 329.

185. *Id.* at 327.

186. *Id.* at 330.

187. The United States and is not a party to UNCLOS.



performance of that duty by blockading and diverting the Vento.”<sup>188</sup> The district court was careful. It announced: “It is well established, however, that the political question doctrine generally precludes judicial review of discretionary military decisions related to military operations.”<sup>189</sup> The court said “such cases typically implicate *Baker*’s first two factors.”<sup>190</sup> And, in applying the first factor, it found that not only does the Constitution commit military decisions to the political branches, but “[m]ilitary judgments such as these are *paradigmatic* of discretionary decisions constitutionally committed to the Executive Branch.”<sup>191</sup>

Citing a Fourth Circuit case from 1991,<sup>192</sup> the district court stated “adjudication would require the Court to wade into the heart of military operations, interjecting tort law into the realm of national security and second-guessing judgments . . . that are properly left to the other constituent branches of government.”<sup>193</sup> The district court also found that there were no judicially manageable standards (*Baker* factor two) on which to judge “what would be ‘reasonable’ under the circumstances.”<sup>194</sup>

And it is here that the district court confronted the error of the *Paquete Habana* and the *Koobi* problem: “In the face of ample case law indicating that this dispute is not justiciable, Plaintiff cites two cases—the *Paquete Habana* and *Koobi v. United States*—that allowed tort actions for damages challenging military discretion related to military operations.”<sup>195</sup> The district court explained in the plainest language why the error of the *Paquete Habana* is of little legal consequence:

While *Habana* and *Koobi* add a wrinkle to the analysis in this case, they do not change the result. *Habana* is inapposite for at least three reasons. First, whereas Congress has expressly granted jurisdiction to federal courts over prize causes, . . . no statute or treaty authorizes courts to determine whether military actions taken to enforce international obligations such as Resolutions 1970 and 1973 were justified, and the Court will not read into general statutes such as the [Public Vessels Act] and the [Suits in Admiralty Act] jurisdiction

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188. *Tarros*, 982 F. Supp. 2d at 333.

189. *Id.*

190. *Id.* at 334.

191. *Id.* (emphasis added).

192. *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991).

193. *Tarros*, 982 F. Supp. 2d at 334 (quoting *Tiffany v. United States*, 931 F.2d 271, 275 (4th Cir. 1991)) (internal quotations omitted).

194. *Id.* at 336.

195. *Id.* at 337 (citations omitted).

to make such determinations . . . . Second, in *Habana*, the Executive petitioned the judiciary to review the prize for condemnation. In contrast, in this case the Government is the defendant and contends that the Court lacks jurisdiction. Third, *Habana* predates *Erie*, which established that there is no federal general common law. *Habana*'s reliance upon customary international law as a matter of federal general common law to restrain the Executive's military discretion is therefore no longer warranted.<sup>196</sup>

The district court did not mention that the Supreme Court in the *Paquete Habana* was sitting as a prize court and so its holding was a narrow one, applicable only to prize cases.<sup>197</sup> For all these reasons, the *Paquete Habana* should not be of much legal consequence. Still, the case shows that the *Paquete Habana*, its error notwithstanding, remains of practical consequence.

In addressing the question presented, the district court in *Tarros* went on to weigh the "Effect of International Law on Military Discretion."<sup>198</sup> Finding that Resolutions 1970 and 1973 and the NATO Warning were not self-executing such as to create domestically enforceable legal rights, the district court then turned to the application of UNCLOS.<sup>199</sup>

The United States had not (and has not) ratified UNCLOS, so, as the court explained: "To the extent that Plaintiff invokes UNCLOS, the Court understands it to argue—and assumes *arguendo*—that the Convention's provisions are reflective of customary international law and, therefore, would inform the standard of care by which the military is bound."<sup>200</sup> With restraint, the district court said: "In light of the Court's conclusion that this case presents a political question, UNCLOS is irrelevant."<sup>201</sup> This point is worth repeating. Customary international law is irrelevant to whether a matter presents a nonjusticiable political question.

If a case or controversy should bring the Supreme Court to overturn the *Paquete Habana*, the Court would do well to take a page—or all of them—from *Tarros*. But *Tarros* is a district court case. Without appellate endorsement, *Tarros* is far from having settled the issue of the nonjusticiability of matters of Commander-in-Chief discretion in federal courts.

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196. *Tarros*, 982 F. Supp. 2d at 337–38 (citations omitted). The court's third listed reason is significant but beyond the scope of this Article.

197. Sweeney, *supra* note 105, at 483.

198. *Tarros*, 982 F. Supp. 2d at 339.

199. *Id.* at 344.

200. *Id.*

201. *Id.*

The issue came up again in 2015 in the Fourth Circuit case of *Wu Tien Li-Shou v. United States*.<sup>202</sup>

#### B. *Wu Tien Li-Shou v. United States*

In 2010, Somali pirates raided and commandeered a Taiwanese fishing vessel—the *Jin Chun Tsai 68* (JCT 68)—and held it and its men hostage, including Wu Lai-Yu, the owner and master, and two Chinese crewmen.<sup>203</sup> In 2011, a NATO task force came under orders to “shadow and then disrupt the pirate mothership JCT 68.”<sup>204</sup> On 10 May 2011, the warship *USS Groves* confronted the JCT 68 and ordered the pirates to surrender on the order of the task force commander. The pirates refused to comply, and an hour-long firefight ensued.<sup>205</sup> When the men boarded the vessel, they found Master Wu shot dead.<sup>206</sup>

Years later, Master Wu’s widow, Wu Tien Li-Shou, sued for wrongful death and negligent destruction of property under several federal statutes.<sup>207</sup> The district court and the Fourth Circuit dismissed for lack of subject-matter jurisdiction, having determined that the matter presented a nonjusticiable political question.<sup>208</sup>

The district court based its holding on the determination that the alleged negligence that caused the death of Master Wu and the destruction of the ship arose from an operation by a U.S. naval vessel in “an act of belligerency,” and the “[t]he Navy sank the JCT 68 under direct orders from the allied commander of the NATO-led operation.”<sup>209</sup> The district court emphasized the following facts:

It is alleged in the complaint, and for purposes of the pending motion it is assumed to be true, that (1) when the *USS Groves* fired the shots that killed Master [Wu Lai-]Yu,<sup>210</sup> it positioned itself beyond the firing range of the

202. *Wu Tien Li-Shou v. United States*, 777 F.3d 175 (4th Cir. 2015).

203. *Id.* at 179.

204. *Id.* In 2009, NATO initiated Operation Ocean Shield to combat piracy in the Gulf of Aden and around the Horn of Africa. *Id.*

205. *Id.* at 179.

206. *Id.*

207. The Public Vessels Act, the Suits in Admiralty Act, and the Death on the High Seas Act.

208. *Wu Tien Li-Shou*, 777 F.3d at 178.

209. *Wu Tien Li-Shou v. United States*, 997 F. Supp. 2d 307, 309–10 (D. Md. 2014).

210. The District Court referred to the decedent as “Yu,” which is in fact his first (given) name, and only part of it. It is a custom of Chinese and Taiwanese culture to put the family name (surname) first. So, Tien Li-Shou carries her married name Wu, and the deceased is properly referred to by his family name Wu.

pirates' weapons, (2) the shots that were fired hit the JCT 68 on the starboard [right-hand] side of the ship, well aft [back] of the bow [front], and (3) the USS Groves used exploding ordnance [artillery] rather than inert ordnance as would have been appropriate.<sup>211</sup>

After determining that the matter presented a nonjusticiable political question, the Fourth Circuit addressed domestic sovereign immunity. The following passage deserves highlight:

Wu also challenges the district court's holding that the United States retains its sovereign immunity from suit because it was engaged in the exercise of a discretionary function. While this is framed as an alternative ground for decision, it decidedly is not because the political question doctrine and the discretionary function exception to waivers of sovereign immunity overlap here in important respects.<sup>212</sup>

But while “Wu insist[ed] that the USS Groves acted in contravention of law and thus that the government [could not] claim the discretionary function exception as a safe harbor, . . . Wu [still did] not identify a law that would permissibly have circumscribed the USS Groves's course of action.”<sup>213</sup> In the end, the Fourth Circuit emphasized: “The [Suits in Admiralty Act] and the [Public Vessels Act] both waive sovereign immunity for *in personam* admiralty suits,” but that, “[n]either statute contains an explicit exception to the scope of its waiver.”<sup>214</sup> The Fourth Circuit nevertheless applied the discretionary function exception to the Acts.<sup>215</sup> The Supreme Court declined review in October 2015.<sup>216</sup>

The current realities of warfare call for some revisions to the law of justiciability and domestic sovereign immunity. Specifically, the appellate jurisdiction of the U.S. Supreme Court and the original and appellate jurisdiction of the federal courts should be expressly limited to exclude matters of wartime military discretion and Commander-in-Chief discretion. Also, the combatant immunities and discretionary function exceptions in the Federal Tort Claims Act should be expressed across all legislative

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211. *Wu Tien Li-Shou*, 997 F. Supp. 2d at 309.

212. *Wu Tien Li-Shou*, 777 F.3d at 183.

213. *Id.* at 185 (citation omitted).

214. *Id.* at 183–84.

215. *Id.* at 184.

216. *Li-Shou v. United States*, 136 S. Ct. 139 (2015).

enactments that waive the sovereign immunity of the U.S. Government and its agents acting under lawful orders.

## VI. CONCLUSION

The error of the *Paquete Habana* is that the Supreme Court failed to recognize that the case concerned a matter of wartime military discretion.<sup>217</sup> On the Admiral's orders, the fishing boats' captured crewmen were to be detained as prisoners of war, the ships to be taken to the army garrison at Key West.<sup>218</sup> This implicated the military necessity exception to the rule that exempted coastal fishing boats from capture as prize.<sup>219</sup> Yet, the Court applied the rule without applying the exception.<sup>220</sup> As a result, the Court's inference that the Admiral violated higher orders was wrong. According to the joint resolution authorizing the use of military force and the Declaration of War, a state of war had existed since the 21st of April.<sup>221</sup> In addition, the President's and the Admiral's rules of engagement expressed that the war was to be conducted in harmony with international law and applicable customary norms. Thus, the Admiral's judgment that the crewmen were likely to aid the enemy was an extension of the Commander-in-Chief's wartime military discretion.

The *Koobi* proposition carried forward the *Paquete Habana* error by asserting matters of Commander-in-Chief discretion are subject to judicial review. This proposition threatens to have a chilling effect on military operations. Resolving the *Koobi* problem requires a discriminating analysis of the particular question posed. In matters of warfare, the political question doctrine calls for the courts to defer to Commander-in-Chief discretion and the law of war.

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217. *Koobi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

218. *The Paquete Habana*, 175 U.S. 677, 713 (1900).

219. *Id.* at 718.

220. *See generally id.*

221. *Id.* at 712.