

The Supreme Court Argument that Saved the Union Richard Henry Dana, Jr., and the Prize Cases

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On January 1, 1863, Abraham Lincoln signed the Emancipation Proclamation claiming constitutional authority to do so “as a fit and necessary war measure.” The epic struggle between North and South had been raging for nearly two years. There were over a million soldiers under arms. At Antietam there had been more than 20,000 casualties in the bloodiest single day of battle in American history.¹ But was it, in point of law, a war?

This astounding question---conceivable under such circumstances only in the American constitutional system---was answered by the United States Supreme Court in the *Prize Cases*.² It was very nearly answered in the negative. That it was not was due to the extraordinary argument of a lawyer who fortunately for the history of the United States, went to sea as a young man.

Richard Henry Dana, Jr. is today remembered as the author of *Two Years Before the Mast*, his classic account of a voyage around Cape Horn to the California coast. Published in 1840, the year the twenty-five year old Dana opened his law office, the book has never been out of print. Scholars of American literature have expressed regret that Dana “dissipated” his enormous literary talent in the practice of the law.³ But Dana always saw himself, first and foremost, as a lawyer. He had written *Two Years Before the Mast*, in part, to express his outrage at the unjust and unlawful treatment of seamen.⁴

Dana’s book brought the young lawyer a succession of clients who seldom had access to legal representation. He quickly built a reputation as a zealous advocate for the common sailor. His office “[i]n those days, and indeed long afterwards, . . . was apt to be crowded with unkempt, roughly dressed seamen, and it smelled on such occasions much like a forecabin.”⁵ Dana’s experience at sea shaped and informed his development as a lawyer. By the outbreak of the Civil War, no lawyer in America was more well-versed in maritime law nor more experienced in the intricacies of “prize law”---the arcane avenue of jurisprudence that, in 1863, threatened to unravel Abraham Lincoln’s attempt to preserve the Union.

The *Prize Cases* arose from the capture of four vessels (the brig *Amy Warwick*, the barque *Hiawatha*, and the schooners *Brillante* and *Crenshaw*) in the early months of the Civil War. Each had been seized pursuant to a blockade of southern ports proclaimed by President Lincoln in April, 1861.⁶ The right to interdict, seize, and dispose of vessels and cargo belonging to those residing in “enemy’s territory” upon the implementation of a lawful blockade was a recognized principle of international law. But the right was predicated on a war between sovereign nations. Lincoln did not accept the claim of the Confederacy that it was a sovereign government. He had an equal interest in ensuring that no other nation did either.⁷

President Lincoln's first blockade proclamation characterized the Southern secessionists as a "combination of persons" engaged in "an insurrection against the government of the United States."⁸ The difficulty posed by this description was that a government engaged in the suppression of an insurrection could "close" its domestic ports, but could not according to accepted tenets of international law "blockade" them.⁹ Why, then, had Lincoln not chosen to close Southern ports---a decision clearly within his executive authority and consistent with international law?

The question had divided Lincoln's "team of rivals."¹⁰ Secretary of the Navy, Gideon Welles, supported by Attorney General Edward Bates, argued strenuously against the blockade because its legal validity presupposed a conflict between two distinct nations. The issue of whether to close or blockade was revisited in the summer of 1861 when Congress, on July 13th, specifically authorized the President to declare ports closed where the authority of federal customs collections was challenged. Lincoln requested his Navy Secretary to advise him whether the blockade should be continued. Welles responded in a lengthy memorandum asserting that a port closure would be "legally . . . impregnable" but a blockade was unlikely to be sustained by a federal court. Welles warned the President that the Union would face huge damage claims for selling vessels and cargoes as prizes if the blockade was declared illegal.¹¹

Abraham Lincoln was a good enough lawyer to recognize the validity of the legal arguments espoused by his Secretary of Navy and Attorney General, but he was President of the United States during a war. Secretary of State William Seward conveyed the view of the cabinet member who mattered most: the British foreign secretary, Lord Russell. Her majesty's government made clear it would not accept American "closure" of Southern ports that would expose British shippers to arrest as common smugglers. A "blockade," on the other hand, would enable England to exercise the rights of a neutral nation. The British message was coupled with the implicit threat that port closure could lead to direct recognition of the Confederacy and the intervention of the British fleet to preserve the shipping rights of British subjects.¹² Secretary Welles acknowledged Lincoln's convincing rationale for choosing a legally problematic blockade over a legally sound closure: "The President said we could not afford to have two wars on our hands at once."¹³

History has proved the soundness of Lincoln's judgment. But it has made remote the enormous stakes at risk in the *Prize Cases*. "Contemplate, my dear Sir, the possibility of a Supreme Court deciding this blockade is illegal," Dana wrote to Charles Francis Adams, the American ambassador to England. Dana thought "it would end the war."¹⁴ At the very least, an adverse decision would subject the Union to immense damages when it least had the capacity to pay them. Depending on its scope, an opinion concluding the President had acted illegally in declaring a blockade could raise constitutional challenges to decisions already made by Lincoln pursuant to his interpretation of the war power. If there was no constitutional basis for Lincoln's blockade of Southern ports, where was the authority for the decision he had made to suspend habeas corpus nearly two years earlier? Or to emancipate slaves from states in rebellion against the government taken less than two months earlier?

Abraham Lincoln had already expressed his view that the judiciary did not comprehend the reality confronted by a President in a civil war. The judiciary, he stated, "seemed as if it had

been designed not to sustain the government but to embarrass and betray it.”¹⁵ By the time the *Prize Cases* were ripe for Supreme Court review, Lincoln had no reason to be more optimistic. Counsel for the ship owners in the *Prize Cases* were eager for a hearing before the Court despite their lack of success in the courts below. Their well-founded optimism was based on the Court’s composition.

There had been one vacancy on the nine-member Supreme Court when Lincoln was elected President. In March, 1861, Justice John McLean died shortly after Lincoln took office. One month later, Justice John Campbell followed his home state of Alabama out of the Union by tendering his resignation to the President. The six remaining members of the Court included four Justices (Wayne, Grier, Catron, and Nelson) who had joined Chief Justice Roger Taney in the *Dred Scott* decision of 1857.¹⁶ The sixth member of the Court, Justice Nathan Clifford of Maine, had not been on the Court at the time the *Dred Scott* case was decided, but as a Buchanan appointee, he had made clear his agreement with the decision.¹⁷

In early 1862, attorneys for the claimants in the *Prize Cases* pressed Attorney General Bates to advance the cases on the Supreme Court calendar.¹⁸ Bates wavered despite the certainty that a hearing before the Court as then composed would have led to an opinion adverse to the government. Asserting that he was being “urged in several quarters to ask for a special term,” Bates asked William Evarts for advice. Evarts, who had represented the United States in the *Hiawatha* and the *Crenshaw* claims before federal courts in New York, advised the Attorney General that the government had little to gain by accelerating the case, especially when President Lincoln had yet to fill a vacancy on the Court.¹⁹

The posture of the *Prize Cases* presented Attorney General Bates with greater challenges than an unsympathetic Court. That obstacle he could partly surmount by refusing to grant the claimants’ request for an expedited hearing before a truncated Court. But Bates was no closer to a compelling legal theory with which to defend the blockade decision than he had been nearly two years earlier when he joined Secretary of Navy Welles in expressing doubts about its legality. In the words of Chief Justice Taney’s biographer:

The Supreme Court was in position to greatly embarrass the government in either of two ways. It might hold that the conflict was not a war . . . and that the prizes had been illegally taken...Such a decision would make the government liable for huge sums in damages, and its psychological effect would be such as seriously to cripple the conduct of the war. On the other hand the court might hold that the Confederacy was an independent sovereign power and although holding the blockade to be legal, it might do it in such a way as to encourage the recognition of the Confederacy by foreign governments.²⁰

Edward Bates had been a rival of Abraham Lincoln’s for the Republican presidential nomination in 1860, and his appointment as Attorney General owed more to his political value than his legal acumen. Bates’s opinion justifying Lincoln’s decision to suspend the writ of habeas corpus was not persuasive.²¹ But he at least had some self-knowledge of his shortcomings as an oral advocate.²² With the *Prize Cases* scheduled for the Court’s December 1862 term, Attorney General Bates began assembling the legal team to argue the most

momentous case heard by the United States Supreme Court during the Civil War. His first choice almost cost the government its case. His last choice saved it.

As principal advocate for the government in the *Prize Cases*, the Attorney General chose Charles Eames, a prominent Washington lawyer. Eames, a former newspaper editor and United States minister to Venezuela was often used by Secretary Welles to represent the Navy Department.²³ Given the Secretary's long-standing reservations about the legality of the blockade, and his high regard for Eames, Welles undoubtedly influenced Bates's choice. Although the Secretary's characterization of Eames as "the most correct admiralty lawyer in the country" is often cited as evidence of the reasonableness of the Attorney General's selection, it is revealing to note a further description from Welles's diary. Eames, wrote the Secretary "did not love the practice of the law, but necessity impelled him Not endowed with a strong constitution, he broke down upon the pressure of certain great cases entrusted to him."²⁴ The Supreme Court was soon to make it clear that Charles Eames was a disastrous choice for the *Prize Cases*.

The Court scheduled twelve days of oral argument commencing on February 10, 1863 and ending on February 25.²⁵ Allowing each side six days to present its case would be inconceivable today, but even in a legal culture where lengthy argument was the norm, the grant of two weeks to oral advocacy emphasized the significance the Court attached to the *Prize Cases*. The cause "attracted a display of legal and forensic talent rarely equaled in the history of the Court."²⁶

Attorneys for the claimant ship owners divided their time among four accomplished appellate lawyers: James M. Carlisle of Washington, a friend of Chief Justice Taney's, represented the Mexican owner of the *Brillante*, seized on June 23, 1861 for attempting to run the blockade of New Orleans, and condemned as a lawful prize by the U.S. District Court in Key West. Claimants in the seizures of the *Hiawatha* and the *Crenshaw* were represented by the prominent New York firm of Lord, Edwards, and Donohue. Daniel Lord was an experienced appellate attorney and he and his partner, Charles Edwards, often represented British interests. The British-owned *Hiawatha* and the Virginia-owned *Crenshaw* had each been captured in Hampton Roads in May 1861, and condemned as lawful prizes by the U.S. District Court in New York City. Counsel for the Virginia claimants in the *Amy Warwick* was Edward Bangs of Boston who had represented the ship's owners in the U.S. District Court in Boston, after its capture off the Virginia coast on July 10, 1861.²⁷

Attorney General Bates apparently intended to have Charles Eames argue three of the four consolidated cases (*Brillante*, *Crenshaw*, and the *Amy Warwick*) though Eames---unlike opposing counsel---had argued the cases in neither the district nor circuit courts. In the case of the *Hiawatha*, the Attorney General assigned the argument to William M. Evarts and Charles B. Sedgwick. Bates had already relied on Evarts's sensible advice not to expedite the *Prize Cases*. Sedgwick was a New York Congressman and Chair of the House Committee on Naval Affairs. Astonishingly, Attorney General Bates did not, in the first instance, consider Richard Henry Dana as counsel for the government.²⁸

The Attorney General's failure to immediately draw upon Dana's unequalled expertise, immense talent, and legendary diligence, is particularly difficult to understand given the origin of the *Amy Warwick* case. Unlike the other three ships, the *Amy Warwick* had not been seized for attempting to run a blockade after notice. It had been captured on the "high seas" by the U.S.S. *Quaker City*, much to the surprise of its master who was bringing coffee from Rio de Janeiro to Richmond. In response to the standard interrogatories taken in the *Prize Cases*, the master had explained:

At the time of the first pursuit and capture, the ship was steering directly for Cape Henry . . . Saw a man-of-war . . . some two or three hours before she weighed anchor and bore down on us; did not alter course but hoisted American flag when she hoisted hers . . . The ship brought us to by firing a gun, on which I hove to and waited for orders, and was much surprised to hear that there was a blockade on the port, and Virginia had seceded.²⁹

The captured vessel was taken to Boston where Richard Henry Dana served as United States Attorney. United States District Courts had jurisdiction in prize cases. Although prize courts in Philadelphia and New York were ordinarily nearer to blockade stations than Boston, captains preferred to bring their prizes to Boston where Dana's knowledge of prize law enabled him to devise the most "honest, rapid and inexpensive" Prize Court proceedings in the country. Dana's integrity and sympathy for ships' crews who shared in the proceeds derived from the sale of a captured vessel and its cargo, made the United States District Court of Boston one of the busiest prize courts in the country.³⁰

It also made Judge Peleg Sprague one of the most respected maritime jurists in the nation. Judge Sprague knew full well, as did Dana, that the issues of "enemy's property" and "enemy's territory" raised by the circumstances of the *Amy Warwick*'s seizure on the open sea, went to the heart of the prize case controversy. "[I]t is contended" wrote Judge Sprague in deciding the *Amy Warwick* case, "that although this property might be liable to confiscation if the contest were a foreign war, yet it is otherwise in a rebellion or civil war. This requires attention." Judge Sprague, relying extensively on Dana's brief and argument, foreshadowed the legal theory which was ultimately to persuade a majority of the Supreme Court that the United States could invoke both belligerent and sovereign power against the Confederacy without a Congressional declaration of war.³¹

Unaccountably inattentive, Attorney General Bates did not see fit to consult with Dana despite the evidence that Dana's work had persuaded one of the nation's most knowledgeable prize case judges of a novel legal theory that could preserve Lincoln's presidential authority. It has been suggested that Dana's lack of experience in the Supreme Court (he had appeared only once) was the reason Bates looked elsewhere.³² If so, the Attorney General had very little familiarity with Dana's reputation for oral advocacy. Judge Sprague who served for a quarter century, said upon his retirement that Richard Henry Dana "made the best arguments that I ever heard from anybody, except perhaps, some of [Daniel] Webster's." Dana's former law partner, who passed along this accolade to Dana noted, "this is, as Dr. Johnson would say, a compliment enhanced by an

exception, if indeed, it be an exception, for Judge Sprague evidently doubted whether he could make it.”³³

Dana viewed the Attorney General’s preparations for the *Prize Cases* with increasing apprehension. As events were soon to prove, Dana had reason to question whether Charles Eames had the mastery of the law and subtlety of argument the cause required. Charles Sedgwick’s perfunctory brief was evidence that his selection owed more to the Attorney General’s view of Sedgwick’s congressional significance than legal standing. Dana had great respect for William Evarts, whom he had known since their days as Harvard students. Though Evarts had successfully represented the government before the United States District Court and Second Circuit in the *Hiawatha* and *Crenshaw* cases, Dana correctly judged Evarts’ argument to be an incomplete exposition on the law of prize.³⁴

The man and the moment were at hand. Two of the most striking aspects of Richard Henry Dana’s character---his fearless devotion to a just cause and his complete immersion in the work needed to further it---had been shaped and strengthened by his years “before the mast.” In 1841, Dana had written *The Seaman’s Friend*, a comprehensive handbook on seamanship, sailors’ rights, and masters’ duties. Of the latter Dana had written, “[h]e may ask advice, but he must act upon his own account, and is equally answerable for what he does himself and what he permits to be done.”³⁵

Dana’s legal career was a testament to that standard. No lawyer of equivalent standing had done as much on behalf of fugitive slaves nor paid a higher price. Richard Henry Dana had been socially ostracized, economically boycotted, and physically assaulted for his defense of fugitive slaves and their “rescuers.” Dana had taken the cases without fee when Boston’s other prominent attorneys, Rufus Choate and Charles Sumner among them, had refused. Dana’s unwavering commitment to “the unpopular side . . . kept the rich clients from his office. He was the counsel of the sailor and the slave---persistent, courageous, hard-fighting, skillful but still the advocate of the poor and unpopular. In the mind of wealthy and respectable Boston almost anyone was to be preferred to him”³⁶

“Every man rates himself when he ships,” Dana had written in *The Seaman’s Friend*. He knew well that “by training at the bar and before the mast, no less than by the natural turn of his thought and habit of mind [he] was better qualified to present the case on the side of the government as, in view of all the circumstances, it ought to be presented than any other lawyer in America.”³⁷ On November 16, 1862 Richard Henry Dana wrote to Attorney General Edward Bates offering to participate in the *Prize Cases* without fee. One week later, an Assistant Attorney General replied that he could do so.³⁸

Richard Henry Dana prepared for the *Prize Cases* in characteristic fashion. “Dana . . . was always absolutely absorbed in the one thing he was doing,” an associate in his office has written, “and this question of---was there a war? Could there be prize?---took absolute possession of him.”³⁹ Dana’s power of advocacy owed much to the literary gift so apparent in *Two Years Before the Mast*. It was this “same faculty of seeing and

describing” that enabled Dana to “[see] things clearly himself, and then [make] others see them as he saw them.”⁴⁰

That faculty and more were critical to success in the *Prize Cases*. As the first day of oral argument approached, there was very little evidence that a majority of the United States Supreme Court would see things as clearly as the government claimed to see them. The three new appointees of President Lincoln (Justices Swayne, Miller, and Davis) could be reasonably counted on to be receptive to the Lincoln Administration’s case. Chief Justice Taney could not. Of the five remaining Justices, four of whom had sided with the Chief Justice in *Dred Scott*, only Justice Robert Grier provided a basis for hope. Justice Grier, sitting as a circuit judge, upheld the blockade in an appeal from the U.S. District Court in Philadelphia.⁴¹ Attorney General Bates, however, had little regard for Grier whom he considered a “natural-born vulgarian.” In a later case before the Court in which Bates appeared for the government, the Attorney General had been appalled when Justice Grier said to Bates from the bench: “If you speak, give that damned Yankee hell.”⁴²

Two other Justices had also affirmed the blockade while sitting as circuit judges. Neither was likely to accept the government’s argument. Justice Samuel Nelson had affirmed the *Hiawatha* and *Crenshaw* condemnations with “a view to facilitate a hearing before the Supreme Court.”⁴³ Justice Nathan Clifford had upheld Judge Sprague’s blockade decision in the *Amy Warwick* case but asserted that should the issue come before the Supreme Court, “[m]y mind is open to conviction on this great question.”⁴⁴ Justice Clifford had the unusual distinction of being a southern sympathizer from Maine, so his “openness” did not bode well for the government. That left, as “swing votes,” the two Southern Justices who had refused to resign their seats during the war: Justice James Wayne of Georgia and Justice John Catron of Tennessee. Attorney General Bates could expect them to approach the *Prize Cases* with as much objectivity as their sympathies would allow, but it was clear that, absent a coherent and compelling legal theory to support the government’s case, the cause would be lost.

The legal quandary confronted by the government’s attorneys was more easily stated than resolved. Could the United States government seize the ship and cargo of its citizens without any proof of treasonable acts, on the sole ground that their residence was in a part of the United States controlled by persons in rebellion against the government? Prize was permitted only in war. Congress had never declared war. The necessary predicate for the legality of blockade and the taking of prizes was a state of war between sovereign nations. But if the United States conceded that such a state of war existed between it and the Confederate States of America, foreign powers had a much greater incentive---some would argue an obligation---to recognize the Confederacy as a *de jure* nation.⁴⁵

There was an added complication that only Richard Henry Dana appeared to grasp. Under prize law doctrine, the vessel and cargo seized pursuant to a lawful blockade must be “enemy’s property,” and the owners of the captured prize must reside in “enemy’s territory.” Both terms were fraught with potential extra-judicial

consequences. The first would appear to condemn the property of United States citizens without proof of their disloyalty---or even as the owners of the *Amy Warwick* insisted---in the face of loyalty to the Union. The second implicitly recognized the status of the Confederacy, for it was difficult to see how the United States could argue that the ship's owners were residents of "enemy's territory" without acknowledging that it was passage of secessionist ordinances that had created the territory.⁴⁶

The government's dilemma was not lost on the attorneys for the ship owners. Nearly a century and a half later, it is still possible to feel the force of James M. Carlisle's argument when on February 10, 1863 he appeared before the United States Supreme Court on behalf of the Mexican owners of the captured schooner *Brillante*.⁴⁷ Carlisle argued, as did counsel for the captured vessels *Hiawatha* and *Crenshaw*, that there had been no intent to violate the blockade. But that was a question of fact, and as Carlisle well knew, subsumed by the largest question of all:

To justify this condemnation, there must have been *war* at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight between two, or between thousands . . . but war as known to international law---war carrying with it the mutual recognition of the opponents as *belligerents*; giving rise to the right of blockade of the *enemy's* ports, and affecting all other nations with the character of neutrals War, in this, the only sense important to this question, is matter of law, and not merely matter of fact."⁴⁸ (Emphasis in original.)

Carlisle made effective use of Lincoln and Seward's evasion of the war issue. The seizure of the *Brillante*, Carlisle asserted, took place "when the President, casting about among doubtful expedients," used the Navy under the Act of 1807 to suppress insurrection. Lincoln and Seward, Carlisle emphasized, denied to all the world that a war with its attendant rights and obligations existed between the United States and the Confederacy. Therefore, Carlisle maintained, blockade and prize jurisdiction could not have existed.⁴⁹

The "most extraordinary part of the argument for the United States," claimed Carlisle, is that "[t]he principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator. . . . It comes to the plea of necessity. The Constitution knows no such word."⁵⁰ The impact of Carlisle's argument is testified to by those to whom it was directed. Immediately after the hearing, Justice Catron wrote a congratulatory note to Carlisle expressing his hope that the argument would be reprinted in the Court's reports. Justice Catron added that Justice Nelson and Clifford joined in the request.⁵¹

Charles Eames opened for the government.⁵² The record of his argument has not been preserved but the Court's reaction to it is well-documented. Justice Swayne, whom the government counted as a certain vote for its position, told Attorney General Bates that Eames had made "no argument at all." Swayne complained that Eames had made a

“speech” that had turned the hearing “into a farce.”⁵³ The thrust of Eames’ argument may be glimpsed in the remarks of Carlisle who addressed himself to “counsel for the United States . . . [who] testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done.”⁵⁴

When a court has scheduled twelve days for oral argument, counsel does not open from a position of strength by questioning the Court’s decision to take the case. Justice Swayne provided further evidence of Eames’s woeful performance by passing along to Bates a remark of the Chief Justice. Eames had unsuccessfully represented Union General Fitz-John Porter, court-martialed for misconduct at the Second Battle of Bull Run. After hearing Eames argue, Taney had said of the General: “he deserved to be convicted for trusting his case to such counsel.”⁵⁵

When Richard Henry Dana rose to argue the *Prize Cases*, “the supreme crisis, in jurisprudence as well as in war” was at hand.⁵⁶ Here in the midst of his country’s most terrible storm was a peril equal to that Dana confronted when his ship nearly foundered in a fearsome gale off Cape Horn. Dana had the characteristic qualities of an accomplished appellate lawyer: quickness of mind, command of the law, and verbal dexterity. But that could be said of each of the eminent attorneys in the case excepting the unfortunate Eames. Dana, however, possessed an extraordinary trait—first exhibited when he went to sea—and well-described by his biographer and former law associate:

[H]e displayed in a high degree that great quality of physical and mental nerve . . . which has always been a noticeable characteristic of great commanders. Never flustered even when taken unawares, Dana invariably rose to an equality with the occasion. As new difficulties presented themselves and danger increased he seemed to grow cooler and more formidable; what excited others only toned him up to the proper key, and thus it was in the moment of greatest peril that he appeared in most control of all his faculties.⁵⁷

There can be no doubt of the profound impact Dana’s legal reasoning had upon the Court’s decision in the *Prize Cases*. That may be readily seen by comparing Dana’s brief and the Reporter’s notes of his argument with the Court’s majority opinion.⁵⁸ Dana’s method of preparing for argument was unorthodox. He looked to precedent last. Always a master of the facts, Dana first sought to identify fundamental principles and work out the reasoning that would apply the principles to the issue at hand. Only then would Dana examine precedent in light of the legal theory he had evolved.⁵⁹

There is no greater evidence of the effectiveness of this method than Dana’s argument in the *Prize Cases*. He first brilliantly framed the issue:

The case of the *Amy Warwick* presents a single question which may be stated thus: At the time of the capture, was it competent for the President to treat as prize of war property found on the high seas, for the sole reason that it belonged to persons residing and doing business in Richmond, Virginia?⁶⁰

Upon this question, Dana proceeded to construct a logic that could compel only one answer.

Dana began with the law of prize applicable to cases of war with a recognized foreign power: property on the high seas owned and controlled by persons who themselves reside in “enemy’s territory” is liable to capture as prize of war. His comprehensive knowledge of the law of prize and even greater capacity to educate the Court, provided a path through the political minefield of the terms “enemy’s property” and “enemy’s territory.” Each phrase, Dana emphasized, was a technical term peculiar to Prize Courts. The owners of the *Amy Warwick* asserted that they were American citizens residing within an insurrectionary district but neither implicated in the rebellion nor disloyal to the United States. They contended that seizure of their property was an unlawful confiscation and unjust penalty. But Dana artfully contrasted forfeitures and confiscation which depended upon a nation’s “internal codes”—and applicable if Lincoln had “closed” the ports—with the law of prize derived from the rights and powers of war.⁶¹

The right of the sovereign power to capture property on the high seas did not depend on any actual or presumed disloyalty of the property’s owners. To the contrary, asserted Dana, prize law made immaterial whether an owner was loyal, neutral, or disloyal. Nor was it material whether the seized cargo would directly benefit the enemy nor whether the commerce was with neutral nations.⁶²

The test, Dana maintained, was the “predicament” of the property. If found on the high seas and owned by persons residing in “enemy’s territory,” the property was subject to capture *jure belli*, a prize of war. Characteristically, Dana emphasized the reason for the right: “The reason why you may capture it is that it is a justifiable mode of coercing the power with which you are at war. The fact which makes it a justifiable mode of coercing that power, is that the owner is residing under his jurisdiction and control.”⁶³

The rule was clear enough when the war was between established sovereign powers, but why was it applicable to an “internal war” where the sovereign claiming the right of blockade denied the war was against another government? Here, again, Dana argued from first principles. In internal wars the sovereign can exercise belligerent powers. The object of the sovereign is to coerce the power which is organized against it and making war upon it. Insurrectionists can compel inhabitants of the territory controlled by the insurgency. Therefore, Dana maintained, the parent state has the same interest and right to capture property on the high seas for the purpose of coercing the rebel power, as it would if the insurrectionists were a *de jure* rather than *de facto* state.⁶⁴

Dana brought an equal clarity of argument to the issue of “enemy’s territory.” The test, he argued, was whether the residence of the property’s owner is within the *de facto* jurisdiction and control of the enemy. Again, Dana coupled reason to rule and rule to example. The reason for the rule, Dana explained, was because captured property “must be condemned or restored to the claimant.” If the *Amy Warwick* had been permitted to go to Richmond, Dana argued, duties would have been paid to the rebel government. Vessel and cargo could have been taken by the insurrectionists for military purposes with or without compensation. Indeed, Dana observed, if

the owners of the *Amy Warwick* were as loyal to the Union as they claimed, it increased the likelihood that the Confederacy would confiscate the vessel.⁶⁵

It was unnecessary, Dana asserted, to “draw a fine line” as to what constituted “enemy’s territory.” The occupation of Richmond by rebel forces was more than sufficient for the purposes of deciding the *Prize Cases*. Thus, Dana neatly avoided drawing the Court into the political thicket of whether articles of secession established a territorial sovereignty that might provide a basis for recognition of the Confederate states as a *de jure* power.⁶⁶

Richard Henry Dana’s careful explication of the law of prize resurrected a government case that had almost certainly been sunk by Charles Eames’s argument. There remained, in Dana’s words, “another branch of the question”: whether the President could exercise the war power without a preceding act of Congress declaring war. In light of the relevance of the *Prize Cases* to current debate about presidential authority in undeclared wars, it is of interest to note how Dana framed the issue.⁶⁷

Dana conceded that the right to initiate a war as a voluntary act of sovereignty was vested solely in Congress. Dana asserted “[t]he question is not what would be the result of a conflict between the Executive and Legislature, during an actual invasion by foreign enemy, the Legislature refusing to declare war . . . it is as to the power of the President before Congress shall have acted, in case of war actually existing.”⁶⁸

Dana argued that actions of Congress subsequent to Lincoln’s April, 1861 blockade proclamation had ratified the President’s decision. The essence of his argument, however, was “the overwhelming reasons of necessity” derided by James Carlisle in his opening argument for the ship owners. “War is *a state of things*, and not an act of legislative will,” Dana asserted. The President’s authority to use the Army and Navy “within the rules of civilized warfare and subject to established laws of Congress, must be subject to his discretion as a necessary incident to the use, in the absence of any act of Congress controlling him.”⁶⁹

The influence of Dana’s carefully constructed logic on the Court’s opinion is clear. What cannot be precisely recaptured is the brilliance of Dana’s oral presentation. Oral argument was not only longer in the nineteenth century, it was of far greater significance to the outcome of the case. Richard Henry Dana’s argument before the United States Supreme Court “with all its power of illustration, force of logic, clear statement, philosophy and eloquence, except as a tradition, has died with the death of those who heard it.”⁷⁰ We do, however, have a remarkable account of Dana’s performance:

There are but few now living who heard that argument . . . but those who are left can easily recall the glow of admiration and delight with which they listened to that luminous and exquisite presentation which armed the Executive with power to use the methods and processes of war to suppress the great rebellion . . . the . . . right of capture of private property at sea was for the first time in the hearing of most of the judges . . . applied to the pending situation with a power of reasoning

and a wealth of illustration and a grace and felicity of style that swept all before them.⁷¹

Oral argument concluded in the *Prize Cases* on February 25, 1863. Justice Swayne's confidential visit to Attorney General Bates occurred the very next day. The Attorney General confided to his diary: "Mr. Eames who was entrusted by me, with the chief management of the *Prize Cases* . . . seems . . . in the conduct of the cases, [to have] made himself very obnoxious to the Court I am afraid that the feeling may endanger the *Prize Cases*."⁷²

Bates now had some inkling of his grievous error in selecting Eames, but had yet to realize the significance of the fortuitous appearance of a sailor turned lawyer. The Attorney General was apparently not privy to the "impulsive compliments" Richard Henry Dana's argument had prompted from the Justice who was to write the majority opinion in the *Prize Cases*. In the words of one who was present:

After Mr. Dana had closed his argument, I happened to encounter Judge Grier who had retired for a moment to the corridor in the rear of the bench . . . and, in a burst of unjudicial enthusiasm he said to me, "Well, your little 'Two Years Before the Mast' has settled that question; there is nothing more to say about it!"⁷³

There remained the not inconsequential step of transforming Dana's argument into the majority opinion of the United States Supreme Court.

On March 10, 1863, the Court was crowded in anticipation of a decision. The *New York World* reported that lawyers and spectators were attracted from throughout the land. It was widely recognized that the nation was at the crossroad awaiting a momentous ruling.⁷⁴ Justice Grier delivered the opinion of the Court. His very first sentence revealed the profound effect Richard Henry Dana's reasoning had upon the majority. Justice Grier began by observing: "[t]here are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each."⁷⁵

Joined by the three Lincoln appointees (Justices Swayne, Miller, and Davis) and by Justice James Wayne of Georgia, Grier's decision adopted every significant argument Dana had advanced in support of the blockade. The "right of prize and capture has its origin *jus belli* and is governed and adjudged under the law of nations"; "it is not necessary to constitute war that both parties should be acknowledged as independent nations"; "The President was bound to meet [war] in the shape it presented itself, without waiting for Congress to baptize it with a name"; enemies' territory "has a boundary marked by lines of bayonets"; "whether property be liable as enemies' property does not in any manner depend on the personal allegiance of the owner."⁷⁶

Richard Henry Dana may not "have swept all" but his argument was unquestionably the key to the government's victory. Justice Catron of Tennessee, Justice Clifford of Maine, and Chief Justice Taney joined the dissent authored by Justice Samuel Nelson. Nelson's language provides a stark reminder of what was at stake in the *Prize Cases*:

So the war carried on by the President against the insurrectionary districts in the Southern states, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion . . . with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war . . . but in the case of the President no such power existed. . . .

I am compelled to the conclusion that no civil war existed between this government and the states in insurrection til recognized by the Act of Congress, 13th of July 1861; that the President does not possess the power of the Constitution to declare war or recognize its existence . . . and, consequently that the President had no power to set on foot a blockade under the law of nations . . . and in all cases before us in which the capture occurred before the 13th of July 1861 for breach of blockade or as enemies' property are illegal and void.⁷⁷

The single vote majority in the *Prize Cases* preserved Lincoln's capacity to carry on the war. We cannot know if, in the words of one historian, "a defeat at the hands of the Court at this time would have shattered the morale of the union."⁷⁸ But Supreme Court historian Charles Warren was certainly correct in describing the *Prize Cases* as "far more momentous" than any other case arising out of the war.⁷⁹ And Richard Henry Dana expressed the view of the Lincoln Administration when he wrote that the consequences of an adverse decision were "fearful to contemplate."⁸⁰ By securing a majority in the *Prize Cases*, Dana may well have deterred constitutional challenges to other actions essential to the Union's success, including the Legal Tender Act of 1862, the Emancipation Proclamation, and the Conscription Act of 1863.⁸¹

The significance of the *Prize Cases* decision was amply illustrated by attempts (in modern parlance) to "spin" the result. Those sympathizing with the South, including many in the North and in Europe, seized upon the phrase "enemy's territory" to argue that the Supreme Court had acknowledged the right of secession and the independence of the Confederate States.⁸² To counter misleading use of the Court's decision, Dana published a pamphlet entitled "Enemy's Territory and Alien Enemies: What the Supreme Court Decided in the Prize Causes."⁸³ The pamphlet was widely circulated and Dana's clarity impressed another fair stylist: Abraham Lincoln.

Dana visited Lincoln at the White House in May, 1864. Superficially, there could scarcely be a greater contrast between two men. By the time of Lincoln's birth in a Kentucky log cabin, three generations of Danas had graduated from Harvard. Yet for all their dissimilarities each had, to borrow Churchill's phrase, "the root of the matter" in him. Dana had written of Lincoln that "[h]is life seems a series of wise, sound conclusions, slowly reached, oddly worked out, on great questions."⁸⁴ That is an equally apt description of Dana's argument in the *Prize Cases*.

Dana wrote to his wife of his visit with the President: "When I return, I will tell you of a high compliment he paid me, in a sincere, awkward manner." Lincoln had told Dana that he had read his *Prize Cases* pamphlet and that "it reasoned out . . . what he had all along felt in his

bones must be the truth of the matter and was not able to find anywhere in the books, or to reason out satisfactorily to himself.”⁸⁵

It was, indeed, the highest of compliments. Richard Henry Dana had confronted in the *Prize Cases*, the critical challenge to a constitutional democracy in the time of war: “to keep the discrepancy between what had to be done and what could be done constitutionally, as narrow as possible.”⁸⁶ The sailor-lawyer’s extraordinary argument enabled the great work of the prairie-lawyer to continue because each felt in their bones that the Constitution mattered.

¹ James M. McPherson, **Crossroads of Freedom: Antietam, The Battle That Changed the Course of the Civil War** (Oxford University Press, 2002), 3.

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

³ Robert F. Lucid, ed., **The Journal of Richard Henry Dana, Jr.** (Cambridge, The Belknap Press of Harvard University Press, 1968) vol. I, xxxiii.

⁴ Richard Henry Dana, Jr., **Two Years Before the Mast**, (New York, The Modern Library, 2001) 115. After seeing two of his shipmates brutally flogged Dana wrote: “I...vowed that if God should ever give me the means, I would do something to redress the grievances and relieve the sufferings of that poor class of beings, of whom I then was one.”

⁵ Charles Francis Adams, **Richard Henry Dana**, (Cambridge, The Riverside Press, 1890) 2 vols. vol. I, 27. Adams did not use “Jr.” though both he and Dana were named after fathers well-known in the 19th century. The senior Richard Henry Dana was a noted poet and essayist. The senior Charles Francis Adams was American ambassador to England during the Civil War. There was a long and intimate connection between the two families.

⁶ The *Prize Cases*, 67 U.S. at 637-38.

⁷ Brian McGinty, **Lincoln and the Court**, (Cambridge: Harvard University Press, 2008) 122.

⁸ “Proclamation of Blockade in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas (April 19, 1861).

⁹ Stuart L. Bernath, **Squall Across the Atlantic**, (Berkeley and Los Angeles: University of California Press, 1970) 19.

¹⁰ Doris Kearns Goodwin, **Team of Rivals**, (New York: Simon and Schuster, 2005) 351.

¹¹ David M. Silver, **Lincoln’s Supreme Court**, (Urbana and Chicago: University of Illinois Press, 1998, reissue, original publication, 1957) 105.

¹² McGinty, 123.

¹³ Gideon Welles, **Lincoln and Seward: Remarks upon the Memorial Address of Chas. Francis Adams, on the Late Wm. H. Seward**, (New York: Sheldon and Company, 1874) 124.

¹⁴ Adams, vol. II, 267.

¹⁵ Quoted in William H. Rehnquist, **All the Laws But One**, (New York: Vintage Books, 2000) 59.

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- ¹⁶ *Dred Scott v. Sandford*, 60 U. S. 393 (1857).
- ¹⁷ McGinty, following 143, Justice Nathan Clifford.
- ¹⁸ Howard K. Beale, ed., **The Diary of Edward Bates, 1859-1866**, (Washington, D.C.: Government Printing Office, 1933) 231. The Attorney General's entry of February 14, 1862 notes that he met with attorneys "anxious to bring on the prize cases."
- ¹⁹ Silver, 107.
- ²⁰ Carl B. Swisher, **Roger B. Taney**, (New York: Macmillan, 1935) 563-64.
- ²¹ Rehnquist, 44.
- ²² *Id.* at 121.
- ²³ McGinty, 134.
- ²⁴ Gideon Welles, **Diary of Gideon Welles**, (Cambridge: The Riverside Press, 1911) vol. III, 67-68.
- ²⁵ McGinty, 134.
- ²⁶ Clinton Rossiter, **The Supreme Court and the Commander-in-Chief**, (Ithaca: Cornell University Press, 1951) 69.
- ²⁷ McGinty, 134.
- ²⁸ Dana's offer to assist in the argument before the Supreme Court was not initially welcomed by Attorney General Bates and precipitated correspondence with an Assistant Attorney General that must have seemed demeaning to Dana. "I beg you to inform the Attorney General that I did not know, when I wrote him, that he retained counsel in such a manner as to include *The Amy Warwick*. I supposed that Mr. Evarts' retainer included only the case he had argued before Judge Betts and Judge Nelson, and I did not know that Mr. Eames had been retained at all." Richard Henry Dana to Assistant Attorney General T. J. Coffey, November 24, 1862. National Archives, NARA-CP RG 60, letters received Massachusetts, 1813-1864. Entry 9, Box 1. See also, Shapiro, 121.
- ²⁹ Testimony of Charles Brown, Interrogatory No. 29, *United States of America v. The Brig Amy Warwick & Cargo*, In Admiralty, Circuit Court of United States, Ma. Dist., printed case, p.27, Dana Family Papers 1862-1868, Mass. Historical Society.
- ³⁰ Samuel Shapiro, **Richard Henry Dana, Jr.**, (East Lansing: Michigan State University Press, 1961) 117-18.
- ³¹ *The Amy Warwick*, 2 Spr. 123, 1 Fed. Cas. 799 (1862).
- ³² Shapiro, 120.
- ³³ Adams, vol. II. 277.
- ³⁴ *The Hiawatha, The Crenshaw*, Blatchf. Prize Cas. 1, 12 F.Cas. 95 (1861).
- ³⁵ Richard Henry Dana, Jr., **The Seaman's Friend**, (Mineola, New York: Dover Publications, 1997) 193.
- ³⁶ Adams, vol. I, 129.
- ³⁷ Adams, vol. II, 268-69.
- ³⁸ Richard Henry Dana, Jr. to Attorney General Edward Bates, November 16, 1862 and to Assistant Attorney General T. J. Coffey, November 24, 1862. Coffey to Dana, November 28, 1862. National Archives, *supra*, 28.
- ³⁹ Thorton K. Lothrop to Charles Francis Adams, Jr., August 25, 1890, quoted in Adams, vol. II, 418.
- ⁴⁰ Adams, vol. II. 138.
- ⁴¹ *United States v. The Cargo of Prize Barque Meaco*, unreported case, cited by Carl B. Swisher, **History of the Supreme Court of the United States, The Taney Period, 1836-64**, (New York: Macmillan, 1974) vol. V, 882.
- ⁴² Beale, 340.
- ⁴³ *The Hiawatha, The Crenshaw*, 12 F. Cas. 94 (1861).
- ⁴⁴ McGinty, 133.
- ⁴⁵ Bernath, 18-19.
- ⁴⁶ Richard Henry Dana, III, **Speeches in Stirring Times and Letters to a Son**, (Cambridge: The Riverside Press, 1910) 276.
- ⁴⁷ *The Prize Cases*, 67 U.S. at 639-50.
- ⁴⁸ *Id.* at 648-49.
- ⁴⁹ *Id.* at 643.
- ⁵⁰ *Id.* at 648.
- ⁵¹ McGinty, 135
- ⁵² *Id.*
- ⁵³ Beale, 281.
- ⁵⁴ *The Prize Cases*, 67 U.S. at 645.

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- ⁵⁵ Beale, 281.
- ⁵⁶ Silver, 118 (quoting Hampton L. Carson, **The History of the Supreme Court of the United States with Biographies of all the Chief and Associate Justices** (Philadelphia, 1902), vol. II, 382).
- ⁵⁷ Adams, vol. II, 143.
- ⁵⁸ Richard Henry Dana brief, reprinted in Van Vechten Veeder, ed., **Legal Masterpieces** (Callaghan and Co. 1912), vol. II, 907-28.
- ⁵⁹ R. H. Dana III, 3.
- ⁶⁰ *The Prize Cases*, 67 U.S. at 650.
- ⁶¹ *Id.* at 650-57.
- ⁶² *Id.* at 651.
- ⁶³ *Id.* at 651,653.
- ⁶⁴ *Id.* at 654-55.
- ⁶⁵ *Id.* at 658.
- ⁶⁶ *Id.* at 659.
- ⁶⁷ See, e.g., Deborah Pearlstein, “Contemporary Lessons from the Age-Old *Prize Cases*: A Comment on the Civil War in U.S. Foreign Relations Law,” 53 *St. Louis U. L.J.* 73 (Fall, 2008).
- ⁶⁸ *The Prize Cases*, 67 U.S. at 660.
- ⁶⁹ *Id.* at 659-61.
- ⁷⁰ R. H. Dana III, 275.
- ⁷¹ Adams, Vol. II, 269.
- ⁷² Beale, 281.
- ⁷³ Adams, vol. II, 269.
- ⁷⁴ *The New York World*, March 11, 1863, Silver, 113-14.
- ⁷⁵ *The Prize Cases*, 67 U.S. at 665.
- ⁷⁶ *Id.* at 666-74.
- ⁷⁷ *Id.* at 694-95, 698-99.
- ⁷⁸ Silver, 116
- ⁷⁹ Charles Warren, **The Supreme Court in United States History**, (Boston: Little, Brown, & Company, 1922) vol. III, 103.
- ⁸⁰ Adams, vol. II, 267.
- ⁸¹ Rossiter, 75.
- ⁸² R.H. Dana III, 276-77.
- ⁸³ Richard Henry Dana, Jr., **Enemy’s Territory and Alien Enemies—What the Supreme Court Decided in the Prize Causes**, (Boston: Little, Brown, & Company, 1864).
- ⁸⁴ Adams, vol. II, 274.
- ⁸⁵ *Id.* at 273-74.
- ⁸⁶ Harold Melvin Hyman, **A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution** (Knopf 1973) 101.