1980

Trading with the enemy: Legal theory and the Civil War

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TRADING WITH THE ENEMY:
LEGAL THEORY AND THE CIVIL WAR

A Thesis

Presented to

The Faculty of the Department of History

The College of William and Mary in Virginia

In Partial Fulfillment

Of the Requirements for the Degree of

Master of Arts

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by

Carole Johnson Breitenbach

1980

APPROVAL SHEET

This thesis is submitted in partial fulfillment of

the requirements for the degree of

Master of Arts

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Approved, May 1980

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ACKNOWLEDGMENTS

The author wishes to acknowledge the advice and patience of Ludwell Johnson, Jim Curtis, and Bill Breitenbach.

ABSTRACT

The purpose of this study is first to introduce the concept of trading with the enemy, as defined and governed by international law. The thesis then applies this definition, and the stipulations it embodies, to the statutory laws passed and the Supreme Court decisions rendered concerning interbelligerent trade during the Civil War. The study traces the efforts of Union lawmakers to control trade between the North and the South, and the extent to which those efforts reflected international legal theory. Discussion then turns to the Supreme Court cases dealing with the wartime trade, and the degree to which the Court's decisions upheld the tenets of international law. Finally, the study briefly examines the application of international law to twentieth-century warfare.

TRADING WITH THE ENEMY:

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CHAPTER I

CIVIL WAR TRADE WITH THE ENEMY: THEORY AND PRACTICE

A nation at war demands sacrifices of soldier and civilian alike. The soldier's potential sacrifice can be severe--he may suffer wounds or death in furthering the cause of his country. While perhaps less exacting, civilian sacrifices are no less important. Merchants and traders are among those civilians who feel the demands of war most directly, as lucrative avenues of commerce are often closed during hostilities.

The temptation to ignore such closures and to conduct illegal commercial transactions can be great. Economic regulations may be as important as military strategy in winning a war, but merchants are often able to convince themselves that ignoring them is only a slight offense. Evasions can yield great profits while seemingly causing little personal harm. Such evasions can sap the strength and morale of a nation, however, especially if they provide economic aid to the enemy. Civilians as much as soldiers must obey the rules if their nation is to win at war.

Political and legal thinkers have developed a body of law that contains rules of warfare applicable to all nations. International law matured in the nineteenth century as an attempt to govern the war and peacetime relationships of modern nations. Though interpreted and enforced by each state in its own way, the rules and principles of

international law continue to direct the conduct of nations.

Works of international law discuss at length the topic of trading with the enemy. Few nations would deny the evil of interbelligerent trade. Nevertheless, the gap between acceptance in theory and enforcement in practice has never been easily closed. The complexity of the problem has led legal theorists to develop a set of principles and regulations with which to enforce the interdiction of trade with the enemy. According to the nineteenth-century legal commentator James Kent, the principle of trade interdiction became the accepted doctrine of English courts. Following the English example, American law adopted the principle as well. Congress upheld trade prohibition during the Revolutionary War, and the United States Supreme Court supported trade interdiction in rulings arising from the War of 1812.[1]

Henry Halleck, a widely-recognized authority on international law and soon to be general in chief of Union armies, cited Kent in 1861 to emphasize the importance of trade interdiction: "The idea that any commercial intercourse can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the duties growing out of a state of war."[2]

The doctrine of trade interdiction rendered null and void all contracts with the enemy during the war. The doctrine also made it illegal for citizens to insure enemy property, purchase bills on the enemy's country, remit or deposit funds there, or remit money or bills to enemy subjects. All endeavors at trade with the enemy through the intervention of third parties or through partnerships were also forbidden. No artifice could legalize any trade, communication, or contact whatsoever with the

enemy, without the government's express permission. Enemy aliens as well as citizens were obliged to obey the rules of war. The subjects of the various belligerent powers could not begin or carry on any correspondence or business together, and all commercial partnerships existing before the war were dissolved by "the mere force and act of the war itself."[3] However harsh their disapproval of interbelligerent trade, states usually regarded it as less than treasonable. The American Civil War provided no exception to this general rule; treason charges were not pressed against either disloyal Northerners or adherents to the Confederacy who engaged in illicit trade.

Still, if not considered treasonable, interbelligerent trade was clearly and forcefully proscribed by international law. Joseph Chitty, an English legal theorist, was an acknowledged expert on the legal restrictions governing enemy trade. In The Law of Nations (1812) he stated that there was "no such thing as a war for arms and a peace for commerce." Commercial intercourse aided the enemy, so a state of war naturally required that it cease. "It is criminal in a subject to aid and assist the enemy," he declared. "Trading affords that aid in the most effectual manner by enabling the merchants of the enemy's country to support their government."[5]

Nor could trade be allowed by engaging a neutral agent. Chitty observed that aid was "equally given to the enemy, whether goods be furnished immediately by the enemy, or through the medium of a neutral merchant."[6] Accordingly, neutrals who traded between enemies lost their neutral rights:

> A class of people may not be enemies in the strict sense of the word yet must be deemed alien enemies to certain intents and purposes of a commercial nature, so that their

> property may, for the most part, be taken as prize, according to the laws of war between adverse belligerents. Therefore, when we speak of an hostile character, it is to be understood to imply, not hostility to all intents and purposes, but only that degree of hostility which attaches to particular property.[7]

Thus, cargo traded illegally was confiscable even if the trader were a citizen of a neutral country. The trader was only considered as hostile, however, in that particular instance of enemy trade. The rules of condemnation hence applied to the citizens of a belligerent nation and to traders of neutral countries alike. Moreover, belligerent property assigned to neutrals for shipping was likewise subject to confiscation. Condemned cargo was labelled as prize during a period of war between two nations. According to A. D. M. McNair and A. D. Watts, special bodies called prize courts enforced the prohibition against trading with the enemy by condemning not only the cargo involved but also the ships carrying it.[8] It was the final destination of the cargo that was the key to its protection or condemnation.

Legal theorists allowed one exception to that rule, however. Goods purchased under an order given prior to hostilities were exempt from confiscation. Yet this exception was very rigidly applied. Ignorance of the commencement of hostilities did not excuse interbelligerent trade. In the words of one expert on international law, "The entire absence of any intention to violate the law, no matter how perfect the innocence of the intent may have been, nor whether the act resulted from mistake or ignorance, cannot avert the penalty of confiscation."[9] Again, the ultimate destination of the goods, rather than the intent of the shipper, determined the legal character of the trade.

Nor did it matter how circuitous the route by which the goods

reached their destination. A vessel engaged in unlawful trade with the enemy was liable to capture and condemnation at any time during the voyage in which the offense was committed. Liability ceased only with the completion of the voyage. Finally, the failure to effect an actual transfer of goods did not exonerate a ship or cargo from confiscation. Engaging in a voyage with that design was sufficient to incur liability.[10]

All inhabitants of a country, whether native or stranger, were required to recognize and adhere to these stipulations: "Every person in a country . . . whether a native or stranger, owes obedience to its laws, and the rule of international jurisprudence, which forbids all intercourse and trade with the public enemy, is just as obligatory upon him as the municipal laws of revenue or regulations of police."[11]

This obedience did, however, allow some room for variation. One exception to complete prohibition has already been illustrated, and there were two other possibilities of escaping total interdiction. These exceptions came under two headings--exercizing the rights of humanity in a situation of extreme economic hardship, and sanctioning trade by license or authority of the government:

> The first would permit trade to a limited and rare extent; the second, results from the fact, that on certain occasions it is highly expedient for the state to permit an intercourse with the enemy, by commerce or otherwise; but the state alone, and not individuals, must determine when it shall be permitted, and under what regulations.[12]

The Dutch jurist Cornelius van Bynkershoek, an authority often cited by English and American judges from the Napoleonic era on, observed "that the interests of trade, and the necessity of obtaining certain commodities have sometimes so far overpowered this [prohibition], that different species of traffic have been permitted. . . . But it is in all cases

the act and permission of the sovereign."[13]

Three landmark cases revealed the application of these principles of international law in the period prior to the Civil War. The case of The Hoop (1799), a turning point in the development of English prize law, involved goods purchased in French-occupied Holland on the account of British merchants and shipped in a neutral vessel to a British port. These goods were captured and confiscated as prize of war. According to Sir William Scott's decision, "There exists . . . a general rule in the maritime jurisprudence of this country, by which all subjects[']trading with the public enemy, unless with the permission of the sovereign, is interdicted." Scott based his decision in part on an opinion delivered by Bynkershoek. Even in the absence of specific prohibition, war, "as the phrasing of the formal declaration proves," rendered trade illegal.[14]

Old World legal precedents would be followed in the New World. As John Marshall wrote, "The United States having, at one time, formed a component part of the British empire, their prize law was our prize law."[15] This was certainly true in the case of The Rapid (1814), one of the first American court decisions to reflect the influence of international law regarding enemy trade.

That case involved an American who purchased goods in England before the War of 1812 and deposited them on British-owned Indian Island in Nova Scotia. After the war began he hired the Rapid to bring his goods from the island to the United States. On that voyage the ship was captured by an American privateer on the high seas and brought into Salem, Massachusetts. The goods were libelled as prize and condemned to the captors on the ground that they had acquired the character of enemy's property.

The owner appealed to the Supreme Court, but Justice William Johnson cited the opinions of Bynkershoek and The Hoop to uphold condemnation. Johnson's decision was an important one, as the justice himself realized: "'This is the first case, since its organization, in which this Court has been called upon to assert the rights of war against the property of a citizen.'"[16] Basing his decision on common law rather than statutory law, Johnson stated that the nature and consequences of a state of war directed his conclusion. In the state of war citizens of belligerent states met only in combat; war stripped man of his social nature. Though Johnson acknowledged that rules of modern warfare have lessened some of the barbarities of war,

> on the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. . . . The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent, and of the property found engaged in anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.[17]

A second Supreme Court decision also reflected English precedents in its consideration of wartime trade. The case of Jecker v. Montgomery (1855) involved the seizure of an American vessel during the Mexican-American War. The Admittance was taken by an American war vessel in California upon suspicion of trading with the enemy. The chaplain of one of the American warships--a man authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture--condemned the Admittance as lawful prize.

The condemnation was appealed and upheld in the United States Circuit Court for Washington, D. C. The owners of the Admittance then appealed to the Supreme Court. In delivering the opinion which upheld the circuit court's decision, Justice Peter Daniel cited theorists Henry Wheaton and Cornelius van Bynkershoek as well as The Rapid for legal support. Finding evidence of premeditated trade, the Court accordingly supported the act of confiscation. "In the present case," Justice Daniel observed, "the evidence shows that the owners of the ship and cargo knew that the destination of the voyage was to an enemy's port. Even if the owner of the vessel was ignorant of it, the fate of the vessel must be decided by the acts of those persons who had her in charge."[19]

This case marked the last Supreme Court decision concerning trading with the enemy before the Civil War. By the 1860s then, the dictates of international law were clearly recognized. American courts admitted only two exceptions to complete prohibition of trade between enemies. The "rights of humanity" permitted the supply of life-sustaining goods to the victims of war. And, the sovereign could license exceptions to prohibition. During the Civil War, Americans recognized the difficulty of applying these exceptions, especially the second.

The Union, for example, had the difficulty of determining where sovereignty lay. Since Congress alone had the power to declare war, it alone could partially suspend war by issuing licenses to trade with the enemy. This theoretical understanding did not withstand the test of Civil War. Congress delegated the licensing authority to the executive branch, and many criticized this delegation as overly generous. Lincoln

used his war powers with zeal, and often at the expense of congressional intentions. Many in Congress wanted a complete interdiction of trade with the Confederacy, but Lincoln's licensing powers removed all possibilities of comprehensive prohibition.

These divergent attitudes led to a policy toward trade with the Confederacy that met with criticism both from contemporaries and historians. In a dissertation on the wartime trade, Robert Frank Futrell outlined a report issued in Spring of 1865 by the joint Congressional Committee on Commerce. Denouncing federal trade policies, the committee charged that the Confederate goods received harmed rather than benefitted the Union cause. The report warned that trade prolonged the war, costing the country thousands of lives and "millions upon millions of treasure."[20]

Yet Lincoln had strong grounds for his relatively lenient policy. Futrell suggested some of the factors influencing that policy:

> To the Lincoln administration, with its necessary sensitivity to the importunities of an electorate which was divided in its sympathies toward the war, the problem of trade was much more complicated than it appeared to the Federal field commanders and to the politicians and historians who reflected their opinions. . . . The problem of Federal trade became that of securing Southern cotton needed to keep Northern spindles turning, to clothe a Union army, to assuage European powers which were impatient with the Federal coastal blockade, and to sustain the gold reserves of the Federal Treasury, which, even with heavy grain exports, were relentlessly drained by an unfavorable balance of trade.[21]

Northern and European industrialists applied heavy pressure upon Lincoln to keep the cotton routes open. Lincoln also recognized the difficult position of Southerners living in areas occupied by Union troops who would be destitute unless they could sell their supplies of cotton.

Lincoln was therefore reluctant to proclaim total trade interdiction.

The Confederacy existed four months before the enactment of trade regulations. After Fort Sumter, however, northern states clamored for federal action to control commercial intercourse between the sections. Although some civilians demanded continued trade with the Confederate states, many Union military officers wanted to ban all traffic as giving aid and comfort to the enemy.[22]

Believing that some steps were necessary, Lincoln first issued a blockade limited to the coasts of states controlled by the Confederacy. In April of 1861, these states included South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. Lincoln's proclamation stated that any vessel attempting to leave or enter a blockaded port would be captured and sent to the nearest convenient port, where proceedings would be initiated against her and her cargo as prize.[23] On April 27 a second proclamation extended the blockade to the ports of Virginia and North Carolina.

Lincoln issued the blockade cautiously, for he feared provoking the border states, and Kentucky in particular, into secession. This blockade was not immediately implemented by a stoppage of trade. But as northern resentment against the South increased, the War Department took steps to enforce the internal blockade. According to Futrell, the War and Treasury departments authorized a tight blockade of the insurrectionary states, but at the same time cautioned against "vexacious or unnecessary" interruption of regular commerce. The attempt to prohibit trade with insurgents while allowing trade with loyal citizens within insurrectionary states proved impracticable. Neither the War nor the Treasury department dealt with the border states. Kentucky was an important avenue into the cotton belt, and the Union was reluctant to take steps that would

induce it to abandon its neutrality for Confederate loyalties.

Some contemporaries thought that Lincoln had already taken too much initiative in his wartime measures. Because the Civil War began during a congressional recess, for nearly three months all necessary measures of resistance were executive acts performed without legislative authorization. The question of the legality of Lincoln's early acts was only settled in 1863 by the Supreme Court in Prize Cases. This case concerned ships captured for violating the president's blockade proclamations of April 19 and 27, 1861. The plaintiffs argued that war must begin with a declaration, and that Congress alone had the power to declare war. The president's power of suppressing an insurrection did not equal the war power, and the right to promulgate a blockade order became valid only after war was a legal fact through congressional declaration. The plaintiffs further argued that war did not exist when the early captures were made; hence there was no valid blockade and no prize jurisdiction in the federal courts.[24]

The Supreme Court disagreed, upholding the legality of war from the time of Lincoln's blockade orders. While a president was powerless to initiate wars, he did have the authority to resist force by force. The Court did not consider that the president had exceeded his power, although four of the nine justices dissented. The four dissenting justices refused to equate the president's legitimate power to suppress an insurrection with the power to initiate a legal state of war. In their view, the Civil War did not begin by executive proclamation.[25]

It would be a mistake to over-emphasize the strength of the dissent, however, as the Court divided only upon the presidential actions that occurred between April and July of 1861. The entire Court agreed that

from July 13, 1861, when Congress acted, a legal state of war existed, which invested Lincoln with belligerent powers appropriate to an executive.[26]

When convened in 1861, most Congressmen did not see Lincoln's actions as usurping their authority. In a report issued July 4, 1861, Secretary of the Treasury Salmon P. Chase asked Congress and the president to provide stricter guidelines for controlling intercourse between the sections. Chase recommended passage of an enactment giving the president the power to label the insurrection as civil war, and thereby the power to prohibit commerce with the South except under presidential license.[27] A definition of the hostility was important in determining the status of the belligerents.[28]

Recognizing the necessity of such an act, Congress passed legislation on July 12 authorizing a presidential proclamation of war. Speaking in support of Chase's request, Senator Jacob Collamer (Vt.) reported on the importance of obtaining a formal declaration of war. Such a declaration alone would give the war a locality:

> When an insurrection exists, it may be of such a character and kind . . . that the Executive could never use against it those powers which are incident to a condition of war, unless you give it locality. . . . [I]t is utterly impracticable ever to put down a local insurrection by any sort of withholding intercourse incident to war, unless you withhold all intercourse from that section of country. You cannot carry supplies to a people and not carry supplies to the insurgents whom they maintain.[29]

Senator Willard Saulsbury (Del.) worried, however, that the rights of loyal citizens would be abridged under complete prohibition. Collamer answered that it was impossible to distinguish between loyal and disloyal men in the same state. Still, he admitted that there might be loyal parts of a state wherein trade should be continued. For this reason, the

July act allowed the president to exercise his discretion in issuing a trading license to persons and parts of the country. The bill, which passed the Senate by a 36-6 vote, established Lincoln's power to declare the inhabitants of a state in insurrection against the United States. Such a declaration would authorize the cessation of trade between the United States and those states. Reflecting the dictates of international law, the act stated that "all goods and chattels coming from such a state, together with the vessel carrying them are to be forfeited to the United States."[30]

The act also recognized the president's power to issue licenses, though it stipulated that "such intercourse shall be conducted only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."[31] Chase requested trade licenses only for those areas of the Confederacy occupied by Union forces. The act allowed the president to use his discretion to "license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he . . . may think most conducive to the public interest."[32]

This law did not immediately affect the status of intersectional trade. It was not until August that Lincoln issued the proclamation formally prohibiting commerce with the rebel states. He carefully excluded the border states and areas remaining loyal to the Union from trade interdiction. Neither this exclusion nor the licensing of trade with areas of the Confederacy occupied by Union forces proved of tremendous significance in opening avenues of trade during the first year of the war. Southerners preferred to burn their cotton rather than

relinquish it to the North, and the Union had little economic or military power to prevent the destruction. Early in the war, federal policies restricting commercial intercourse varied sharply from department to department. Secretary of War Edwin M. Stanton echoed the legal theorists in his efforts to ban all trade, but Secretary of State William H. Seward believed commercial intercourse with the South was essential to the Union cause both domestically and abroad. Apart from the August 1861 regulations, the administration made no serious effort to state a comprehensive policy. According to Futrell, "The system of theoretical non-intercourse whereby commerce depended on supposedly exceptional executive licenses had never been strictly enforced."[33]

By 1862, however, the question of trade assumed more importance. Spring of that year marked the fall of New Orleans and Memphis--victories that brought Union armies into contact with the southern cotton belt. On May 12 Lincoln opened the blockaded ports of Beaufort, North Carolina, Port Royal, South Carolina, and New Orleans. In opening commercial intercourse with these ports, the president only prohibited trading in contraband of war. By November, Norfolk had also been opened to restricted trade. The North needed cotton, and by late 1862 and 1863 many Southerners were willing to sell their crop to the first buyer.[34]

Determined to regulate the growing trade, Congress passed acts in May of 1862 and March of 1863. The 1862 "Act to Provide for the Collection of Duties on Imports, and for other Purposes" added to the regulatory powers granted the Secretary of the Treasury in 1861. This supplement authorized treasury agents to refuse clearance to any vessel laden with goods destined for a foreign or domestic port whenever there was

reason to believe that any of those goods might be transported to places under the insurgents' control. Any vessel refused a permit which attempted to depart for any port was subject, along with its cargo, to forfeiture to the United States.[35] The act stated further that following the issuance of a permit granting a vessel passage to either a domestic or foreign port, the collector was required to obtain bond from the vessel's owner in an amount equal to the value of the cargo. Such a bond was to be given as insurance that the cargo would be delivered to its stated destination and not be used to aid the insurrectionists. The Treasury secretary was authorized also to prohibit and prevent transportation in any vessel of any goods. In essence, the May 1862 act empowered the secretary to require reasonable security that goods, wares, or merchandise would not fall into the hands of the insurgents.

The Captured and Abandoned Property Act of the following year sought to control an area of illicit trade that had flourished despite the earlier regulations. The legislation passed on March 12, 1863, was instituted to deal with captured property. It authorized the Secretary of the Treasury to appoint agents to collect captured and abandoned property in parts of the Confederacy occupied by Union forces. Such property did not include any goods used, or intended to be used, for waging war against the United States, such as arms, ordnance, ships, steamboats, and "the furniture, forage, military supplies, or munitions of war." In actuality, the act pointed at the illegal trading in captured stores of privately-owned cotton. All goods collected would be sold at auction for the benefit of the United States. Agents were instructed to keep thorough accounts of all property collected, and any agent found allowing insurrectionists' property into the United States

was to be charged with a misdemeanor.[36]

The Senate passed this bill knowing that cotton had come into the Union from the Confederacy, often brought in by those directly in charge of defending the Union cause. Senator Lyman Trumbull (Ill.) called for governmental confiscation of cotton as the army advanced through Confederate territory because it had been "a source of great demoralization and injury to the army that officers and privates and citizens have been permitted to go down as our Army advances and speculate in cotton, as has been charged. . . . [W]e all know that the country is full of accusations against men, otherwise of high character and standing in the country, in consequence of their alleged speculations in cotton; and charges are made that our soldiers have been used to advance the purposes of these speculators."[37]

On paper the regulations of 1862 and 1863 seemed quite extensive, but in practice they did little to prevent illicit trade and further speculation. Lincoln revealed his awareness of this situation in a proclamation issued in April of 1863. This order reversed an earlier proclamation exempting inhabitants of West Virginia and other loyal areas within rebel states from trade prohibition: "Experience has shown that the exceptions made . . . embarrass the due enforcement of said Act of July 13, 1861, and the proper regulation of the commercial intercourse authorized by said Act with the loyal citizens of said States." Thus, the border states were included in the area under trade prohibition, except, of course, in an instance of "license and permission of the President."[38]

Chase's report to Congress on the state of the finances for the year ending June 30, 1863, reflected the confusing state of affairs. He first

referred to his duty to regulate commercial intercourse in conformity with the acts of July 13, 1861, May 1862, and March 1863: "This duty has been found exeedingly arduous and perplexing. The subject is too vast and complicated, the appetite for trade is too eager and exacting, and the impatience of all restraint, however salutory or necessary, is too great, to allow any hope of avoiding many and sometimes just complaints."[39]

Chase declared his observance of the duties outlined in the March 1863 act. They included the prevention of supplies being carried into districts controlled by rebels; the duty of allowing necessities to reach inhabitants of areas in which the rebellion had been suppressed; and the policy of supporting the efforts of loyal citizens to obtain from within Union lines cotton, sugar, tobacco, tar, resin, and such other rebel products for the benefit of loyal commerce. To these ends Chase had selected supervising agents to exercise the necessary powers over commercial intercourse and had imposed licensing fees on permitted trade to defray the costs of supervision.

In a subsequent report to Congress made at the end of 1863, Chase indicated that an attempt had been made to simplify his agent system. It was not the system, however, but the integrity of his agents that needed bolstering. Many agents could not resist the bribes offered by speculators or the opportunities to engage in illegal trade themselves.[40] By 1864, the illicit cotton trade flourished despite efforts of more scrupulous treasury agents and military officers. In addition to this, the volume of licensed trade was so great that the fees from the permits made the regulatory system self-supporting. According to A. Sellew Roberts, "By Spring of 1864 enough cotton went north to provide for

manufacture of all the goods that could be sold at the prevailing prices and it was thought that a surplus would be left for exportation." A similar laxness was evident in tradestores which had been established in occupied districts for the purpose of supplying residents of a district with the necessities of life. Despite regulations as to who could manage the stores and the kinds and amounts of goods to be handled, the plan was abused.[41]

Union military officers became more impatient as abuses continued. Generals Grant and Sherman were particularly angered when the Secretary of War approved the payment of gold for southern goods. Treasury regulations forbade payment for cotton in specie rather than Union notes. Not only did payment in gold hurt the Union balance of payments, it also facilitated Confederate transactions of foreign soil. The North wanted cotton, however, and Lincoln seemed willing to ignore the means taken to obtain it. When specie payments continued, Grant pushed for total government control of the cotton trade. He urged Lincoln to convince Congress to adopt a policy by which the government would buy cotton at a fixed price and drive traders out of the war zone.[42]

The military leaders had some support in Congress, which was also tiring of the advantages being taken of the licensing system. As Ludwell Johnson noted, "Congress had been investigating contraband trade and had reached some painful conclusions. 'Under the permission to trade,' said one member, 'supplies have not only gone in, but bullets and powder.'"[43] According to James Ford Rhodes, licensed exceptions had become the rule.[44] Lincoln began to formulate a new plan, but Congress acted first in July 1864, putting into effect measures that had been under debate since passage of the Captured and Abandoned Property Act of 1863. The 1864

act repealed Lincoln's right to license commerce with the South, but qualified that repeal with some accompanying exceptions. Loyal persons residing within insurrectionary states would be supplied when within the lines of actual United States occupation. When necessary, persons residing within those lines would be licensed to bring or send to market in loyal states any products produced by their own or their employees' labors. Officers of the Treasury Department determined where and when goods could be taken. Finally, the act prohibited officers and soldiers of the Union from dealing in any way with the property mentioned in the act for profit or benefit to themselves, and it authorized the Secretary of the Treasury to detect and prevent frauds and abuses in trade.[45]

The act empowered the Secretary of the Treasury to place agents at designated locations to purchase for the United States any products of insurrectionary states. Payment for goods was not to exceed the market value at the place of delivery. Agents were not to pay for these products out of any fund other than that arising from property sold as captured or abandoned, or purchased and sold under the provisions of this act. Property so purchased was to be sold at places designated by the Treasury Department, and all money left after expenses had been paid was to go into the Treasury.

This section of the bill occasioned much debate, as senators disagreed over the degree to which cotton and other southern goods were essential to the Union cause. Senator Lazarus Powell (Ky.) was especially reluctant "to turn this Government into a speculator and trader in sugar, rice, cotton, and tobacco, or any other commodities." Such speculation, if it had to exist, should be left to private citizens:

> I know that if the Government wishes to buy these things for its own use it has a right to go into the market and do so, but that is not the object of this bill. It makes these agents buyers of the goods with a view to selling them again, trafficking in them. What does this Government want with raw cotton? . . . The object is to have it for resale, to make money; to have the Government turn speculator. Pass this bill, and my word for it these agents will become pilferers and plunderers of the public Treasury.[46]

Senator John Henderson (Mo.) likewise disapproved of the purchasing agent section, and criticized it in terms of the nonintercourse policy which he though implicit in war:

> The end to be accomplished by the adoption of a section of this character can certainly be best accomplished by withdrawing entirely the blockade from the southern ports, and then letting those people trade where they desire to trade. That would be less objectionable than this proposition; because besides allowing trade with States in rebellion, under this section we have the Government embarking as a great trader.

Describing the illicit trade already taking place along the Mississippi, Henderson stated that this bill would only worsen the situation. He closed with an eloquent plea to prohibit intersectional trade: "Those men who think that this rebellion can be crushed otherwise than by force, by military power, are laboring under a most egregious error. There is but one way in which it can be put down, and that is by force. . . . Blockade the ports; blockade the Mississippi river; give them none of the aid and encouragement that would be given by this bill."[47]

Senator Preston King of New York thought that commercial traffic through military lines was of doubtful propriety, but he upheld the Administration's right to regulate that trade as it saw fit:

> [T]he Administration has found that this trade and intercourse exists, and, supposing it cannot be prevented, has come to the conclusion that it is desirable to have it regulated by law. . . . If the trade is to be continued, it is very proper that it should be

> under the direction and control of the Government and of law, and I shall not interpose objections.

While the permits issued by Lincoln and the Treasury Department had caused havoc, King had faith in the government's ultimate control: ". . . great demoralization has resulted; very serious charges and imputation of speculation and money-making have grown out of it; and this bill is an attempt on the part of the Government to remedy these evils without discontinuing the traffic."[48]

Senator Collamer also feared a complete repeal of Lincoln's licensing power, and he was instrumental in providing the exceptions that the bill included. Collamer agreed with the sentiment that holding commercial intercourse with one's wartime enemy was a paradox, but he referred to the 1861 act and the intentions with which the licensing privilege had been passed:

> As our Army went on . . . in the occupation of the enemy's country. . . it was apprehended that intercourse might be needed to feed the towns and cities in the rear of our armies; and the question immediately arose whether that could be done consistently with the law of nations, as we now had the United States in a state of war with the insurrectionary States . . . . [I]t was ascertained distinctly that by the law of nations the power to declare war, in modern times, within the last two hundred years at least, has been considered among nations as a power to modify that war; it may license intercourse with particular parts and sections under peculiar circumstances.[49]

In the course of debate Senator Henderson slightly modified his earlier position by agreeing with Collamer that some licensing of trade was necessary. He realized that total repeal had been urged "in consequence of the numerous frauds committed by Treasury agents in the southern States." However, if trade were cut off entirely, both Confederate and Union-occupied areas of the South would starve: "Are we to do a very great wrong because some men are dishonest?"[50]

Senator John Ten Eyck (N.J.) agreed with Senator Lot Morrill (Me.), the bill's sponsor, that the wrongs perpetrated by a continuation of licensing would be worse than a total cessation of trade:

> While we are looking to the protection and comfort of the Union men and women who have suffered in consequence of their fidelity to the ancient flag, we must not overlook the fact that we have prolonged their sufferings, prolonged the rebellion, strengthened the arm of traitors by allowing this very trade, in consequence of which not only Union men and women but rebels of the deepest dye have been fed and have had their pockets crowded with greenbacks, by means of which they could carry on the rebellion.

He supported the need for repeal with a claim that would be voiced long after the occasion for wartime trade had ceased: "I am greatly afraid that in some quarters the movements of our armies have been directed more with a view to carry on trade and procure the productions of the southern country than to strike down the rebels and put rebels under their feet."[51]

Morrill and his committee ultimately amended the licensing repeal, but many senators continued to agree with Senator James Grimes of Iowa: "My own impression is that either there should be an absolute, unqualified, and unconditional exclusion of trade, or else every man should be permitted to trade who chooses to do so."[52] The unforeseen result of this legislation was just such permission.

As Merton Coulter noted, the intention of Congress was to stop completely the commerce between the United States and the Confederacy. The private trader was to be eliminated and all commerce that was necessary in the occupied districts was to be under government agents. As Congress soon discovered, however, these intentions were not realized. The first hint came with Treasury Secretary Fessenden's promulgation on September 24, of a set of rules approved by Lincoln on that same day. These rules

allowed any person who owned products in the Confederate lines (the presumption being that they would be Confederates) to bring them in to a government agency and receive three-fourths of the market value of those goods in New York, payable in greenbacks. This procedure completely nullified the law as Congress had intended it. The amazement of the Senate was without bounds when, on examining more closely it found that Section 8 of the measure clearly warranted the new rules. That section did indeed state that the Secretary of the Treasury could, with the president's approval, authorize agents to purchase for the United States any products of the insurrectionary states. Section 8 further outlined the secretary's responsibility to declare the places of purchase, and to set prices exceeding neither the products' market value at their place of delivery, nor three-fourths of their market value in New York City.[53] Many senators believed that the section had been inserted fraudulently. This was not the case, however; the Secretary of the Treasury was responsible for the wording, which Congress enacted without fully comprehending its meaning. The Senate was dumbfounded further when it discovered that its bill also authorized a presidential order permitting a seller to purchase merchandise up to one-third of the price received and to transport that merchandise under Treasury Department protection to any location inside or outside the Confederacy.[54]

Ludwell Johnson claims that Lincoln made use of a law intended to stop private trading in enemy territory in order to throw open such trade to an unprecedented extent. Treasury regulations then in effect absolutely prohibited commercial intercourse across Union lines and forbade the issuance of Treasury permits for any areas under Confederate control. But Treasury agents could not prevent products from being brought into

Union lines from Confederate territory. All they could do was to refuse to issue permits to take goods out of those lines. The export of property to the Confederacy was taken care of by executive order.[55]

Johnson, Coulter, and Futrell agree on the outcome of the combined "regulations:" trade between the North and South was thrown wide open. The title of Futrell's chapter describing the resulting trade is appropriate--"Lincoln Opens the Flood-Gates, 1864-1865." By March of 1865 Lincoln signed approximately forty orders authorizing private cotton sales to the government. These acts were followed by a steady opening of blockades as the Union controlled more and more of the South.

Congress took steps to repeal Section 8, but by the time of its January 1865 debate on the subject, such efforts were of little consequence. Senator Collamer echoed the surprise of many Congressmen in hearing that Congress "had actually passed a law for trading by the Government with the people of that country for their produce."[56] He demanded a repeal of the offending section on the grounds that its enactment had provided almost uninhibited intersectional trade:

> I ask, why did we declare the blockade? It was to keep the southern people from selling their great quantity of cotton and getting money for it from foreign nations, and having thereby the sinews of war. Would it not be strange if we should ourselves say in the face of the world, "All that was a mere pretense; we will buy their produce; we will pay them money for it, we will give them the sinews of war?" It would be the strangest anomaly under the heavens.[57]

Collamer then cited a letter written to him by General Canby, who was an officer in charge of the Mississippi Department, stationed in New Orleans:

> Cotton speculators in the Mississippi Valley have a prospective and hope to have an actual interest in every bale of cotton within the rebel lines; they know that expeditions within the enemy's country are

> followed by the capture of cotton, or its destruction by the rebels to prevent its falling into our hands; hence it is to their interest to give information to the rebels of every contemplated movement. . . . I have now several speculators, who were captured in the enemy's country, awaiting trial . . . for giving information to the enemy. But the punishment of these men is no compensation for the evil they have occasioned, and will not secure us from future disasters from the same cause.[58]

Though by then of little practical importance, the fundamental disagreement that had plagued the Union's attitude toward intersectional trade reasserted itself in one of the last debates of the war. Senator Henry Wilson (Mass.) agreed that corrupt trading practices had to be abolished, but he also continued to defend the need to obtain cotton: "It is . . . of vital importance to the finances of the country, to the industry of the people, to obtain cotton if we can do so without giving aid to the rebel authorities."[59] Senator Grimes responded by stating that it was impossible to obtain cotton without helping the Confederates: "The Senator from Massachusetts says the cotton must be got out of the rebel lines. . . . [T]he only way in which it can be safely got out of that country . . . is by fighting it out, never by trading it out. . . . Either let us carry on this war as war, or else let us disband the Army and let the Treasury undertake to trade us through the war."[60]

The two factions continued to the end. Charles Sumner (Mass.) supported Wilson's desire to obtain cotton, finding it necessary "not merely to the business of the country, but to its foreign exchanges, its finances, its national credit."[61] Senator Benjamin Wade of Ohio, on the other hand, thought that any hopes of trading with Southerners without at the same time providing aid for the Confederate cause were delusory.

The Union's attempt to trade was "an endeavor to do that which was never attempted in any other country, or at any other time; and that is to carry out the idea that you may fight an enemy and trade with him at the same time. It is a paradox, a solecism, a thing that never entered the brains of any other people, in the world." The consequences of such a policy would undoubtedly be grim:

> No investigation has yet fathomed that sink of iniquity, that sewer of corruption, that has been laid open here by the Government. . . . It is corrupting everybody that has come within the circle of its influence. . . . Senators talk about having cotton, say we must have it, and that it will sink the price of gold in the market. It may have that effect; but it sinks your honor faster than it sinks the premium on gold.[62]

Wade closed debate on Section 8 (its repeal was defeated) with a statement showing the lesson that some, at least, had learned from the Union practice of licensing intersectional trade:

> The evil that you cannot guard against is that these traders go on to the line, or as near as may be to the line between the two enemies, and induce the enemy to come in and trade, and they bring their cotton, and the trader takes contraband articles of war to them, and thus enables them to keep up the war. Thousands of our men have fallen victims to this trade, as is proven by all the military officers with whom I have conversed along the line. You cannot guard against this abuse. . . . It is idle, nugatory, and vain to talk about regulating a trade of this kind. It cannot be done, and that is the evil. You must stop this trade with the enemy, or you must submit to this abuse.[63]

By the time that Wade made his March 1865 plea, the damage had been done. Although Lincoln's proclamation did not go into effect immediately, restrictions aimed against intersectional trade relaxed steadily in the last months of conflict. This development did not please Grant, who protested against the sale of food to the Confederates under cover of Treasury permits. Lincoln authorized him to disregard all trading permits

but trade between the sections continued.[64] Some Union spokesmen rather welcomed than resisted the growth of intersectional commerce. In a letter written to Lincoln on May 5, 1865, Attorney General James Speed explained that he had no objections to the infamous Section 8.

Speed first referred to the enlargement of the presidential licensing power that the 1864 act had provided--Lincoln's new ability to license trade between persons residing or living within insurrectionary districts. Section 8 gave the president the power to review the Treasury Secretary's equally new authority to purchase products of insurrectionary states. It was now within the discretion of the president "to withhold his approval of such purchases, thus keeping in the hands of the President complete control over the subject of trade between the loyal and disloyal, and of the disloyal amongst themselves." Speed believed that the allowances made for presidential discretion should be large, "so as to bring trade to as near the point of untrammeled freedom as is consistent with public safety."[65]

Speed's emphasis throughout his letter on the importance of presidential discretion made it apparent that he regretted the need to regulate trade at all: "The trade can be left as free, or made as limited, as the President may deem expedient for the public good and safety. . . . As it is greatly desired that the intercourse should be as free as possible, there need be but few rules, and they as simple as possible." Speed's reference in the next passage to the 1864 legislation is especially revealing of the attitude that may have tended to excuse encroachments upon trade restrictions:

> This statute, unfortunately, seems to have been framed in reference to a state of actual and active hostility. But it is the law, and we must conform to its provisions

> until it is repealed, or it shall be proclaimed that the rebellion has been suppressed. The necessities of the southern people, and an exhibition of returning loyalty, should make us construe it as much for their advantage as we possibly can.[66]

Lincoln did not resist formulating a liberal interpretation of the statute, and seemingly he had few qualms about exercising his powers of discretion. The final wartime orders of Lincoln and Andrew Johnson opened blockaded ports. On August 29 Johnson issued an order that removed all trade restrictions between the North and the South.

Confederate policies toward interbelligerent trade were no less confused than their federal counterparts. Ludwell Johnson described Confederate policy as haphazard: "Rather than evolve a policy, the Confederacy groped its way uncertainly through a thicket of unforeseen difficulties and disappointed expectations, grasping at one expedient after another. There was a wide gap between law and practice, and poor coordination between, and even within, the executive departments."[67]

Southerners were aware of the demoralization of soldiers and citizens caused by trading with the North. They also realized that a curtailment of trade would hurt the enemy. The deprivation resulting from prohibition might harm the South more than the Union, however, as the Confederate states depended on the northern states for foodstuffs and other necessities of life. Thus, a prohibition of trade might dampen rather than boost Confederate morale.

These and other factors contributed in the South, as they had in the North, to the development of a confusing set of statutory laws and equally confusing interpretations of those laws. With an act passed on May 21, 1861, the Confederate Congress prohibited the exportation of cotton except through the seaports of the Confederate states. Southerners

burned a great deal of their cotton during the early phases of the war to prevent its capture by Union forces and to increase its value. Cotton was by far the most valuable commodity the South had with which to obtain necessary war supplies. The Confederacy wanted to confine commerce to England and France, but the amount of cotton that could be shipped to these countries through the blockade did not provide the many manufactured goods needed by the Confederacy. Moreover, many of the good cotton regions were closer to federal lines and river points of shipment than to the European shipping ports. These avenues of commerce all pointed to the North, and despite the statutory prohibition, trade between the sections began.

This commerce with the enemy brought complaints to the War Department at Richmond, although the department had earlier authorized certain citizens in Mobile to trade cotton for supplies at Union-controlled New Orleans. Secretary of State Judah P. Benjamin had given cotton permits to Confederate citizens to trade with Yankees on the Atlantic and Gulf coasts after the commissary-general reported that northern supplies were essential to keep the army from starving.

Secretary of War George W. Randolph, agreeing that some interbelligerent trade was necessary, reported his findings to President Jefferson Davis. Randolph was of the opinion that the statutes did not forbid the government's trading with the enemy. No principle of public law prohibited such trade, which was a common occurrence in European wars. Commerce with the enemy was an evil, but a lesser one than starvation of the armies. He advised, therefore, that contracts be made with northern citizens for bacon, salt, blankets, and shoes, payable in cotton.[68] Both sections needed interbelligerent trade, but the South's needs were more

urgent.

Davis refused to voice wholesale approval or disapproval of trade with the North, but he did authorize the trading of cotton for salt with a French commercial house. Davis stipulated that none of the cotton should go to any port of the enemy, but since the seat of the French trade was New Orleans, such trafficking could not continue without General Butler's permission. (Butler was then in command of the city, and was active in encouraging interbelligerent commerce.) Thus, although Davis did not give his formal consent to making trading arrangements with the enemy, he "suffered them to be made."[69]

James Seddon, who became Secretary of War on November 21, 1862, followed the policy of his predecessor by entering into contracts with parties inside federal lines in order to get necessary supplies. Many contracts were made in the departments of Mississippi and East Louisiana, where John C. Pemberton was the general in command. Opposed to such trade, Pemberton received authorization from Davis to stop all commerce except the forwarding of cotton to pay for articles already received. The contracts were annulled, but the illicit trade continued. Rhodes writes that commercial intercourse went forward under a quasi-authority which winked at illegalities for the sake of the general good, or which countenanced trade because the officers in charge were secretly interested in it. The southern story bears a striking resemblance to the northern account of interbelligerent commerce. As Rhodes put it, "The history of the traffic from Southern is like that from Northern sources, a tale of demoralization and corruption as well as vacillation, but the South being the invaded country the taint there infected people as well as soldiers and officers."[70] A member of the House of Representatives from Mississippi

expatiated on the sorry consequences of illicit commercial traffic:

> The classes engaged in this nefarious traffic, to hid its enormity, would say that it was for the good of our people; that they were buying articles of necessity; that they were supplying the people with shoes, salt, etc. It was not so. If these men, who are trading with the enemy had been true to their specious professions every man and child in the Confederacy would have a half-dozen pairs of shoes and the country would be knee-deep with salt. The evil has produced great dissatisfaction among the people.[71]

General Leonidas Polk wrote to Davis from Alabama that planters and citizens resorted to many measures to sell their cotton to the enemy--even to bribing the guards to let them pass through the lines. Polk was opposed to all trade, and thought that the only way to prohibit it was to authorize governmental possession of all cotton by purchase or impressment. This policy was not adopted by the Confederate government. As was the case in the North, opinions and practices regarding trade continued to vary within the Confederacy. Very harsh measures might have stopped the illicit trade, but Davis did not choose to authorize such repression.[72]

Indeed, Jefferson Davis found it hard either to prevent or permit interbelligerent trade. In August 1864, Davis vested the Treasury Department with responsibility for the cotton trade. The new policy never received a fair test, however, as Union advances were making every branch of Confederate administration increasingly difficult. Davis was clearly reluctant to exercise the executive discretion that Lincoln practiced so freely. The Confederate president telegraphed a general in Mississippi that he had no power to authorize a certain trade desired with the enemy. Secretary of War Seddon exercised less caution: "'The law prohibits such permits. Where the necessity is apparent and urgent I see no alternative but toleration of the trade to the extent of such

a necessity.'"[73]

Rhodes concludes that interbelligerent trade was of greater advantage to the Confederacy than to the Union. The real advantage, if any, was to a few enterprising individuals rather than to either section as a whole. Interbelligerent trade helped fuel a war that inflicted great losses upon both sides; in itself the trade spurred neither a Union victory nor a Confederate defeat. The story of Louis A. Welton depicts with accuracy the true impact of illicit trade during the Civil War. Welton was born a Northerner, but he was captured in Confederate guise when he attempted to import northern goods into the South:

> Welton was merely one of a multitude of Americans who found themselves in the midst of a war which they had never wanted but which nevertheless made preemptory demands on their allegiance. Feeling no strong loyalty to either section, they threaded their way through their personal interests, sometimes hindered by the War, often helped by it, but never really involved in the emotions of the great struggle that enveloped them.[74]

The picture of Civil War trade--both from a northern and a southern perspective--is a difficult one to paint. Both sides passed laws first to prohibit and then to regulate interbelligerent trade. But neither side possessed the strength of conviction needed to control interbelligerent commerce. One can argue that pressing needs made one side's trading practices more excusable than the other's, but though illicit trade was practiced by both sides, it served neither cause well.

If any overview of the northern position can be drawn, it appears that the Union attitude toward commercial intercourse with the South went through four phases. The first two years of war marked an attempt to follow legal precedents, with the administration and Congress prohibiting all commerce except humanitarian relief and trade authorized by presidential

license. In 1863, a new dimension was added through the authorization of Treasury agents to trade northern money and supplies for the needed cotton. In 1864, specific purchasing locations replaced the agent system. It was not until 1865, when victory was assured and the demand for cotton stabilized, that the administration permitted the military to follow the restrictions it had wanted throughout the war. By that time, however, Union victory was certain and trade prohibition seemed something of a joke.

Several Union military and congressional leaders thus emerge as rather ineffective proponents of rigid trade interdiction. At no time during the war was there complete prohibition of trade. Some on the Union side judged Lincoln harshly for his policies; others agreed with him that a supply of cotton was essential for the Union cause. It can be argued that the president employed his discretionary power within proper jurisdiction, though some accused the executive of encroaching dangerously upon legislative powers. The purpose here has not been to judge but merely to present federal statutes concerning the status of interbelligerent trade during the Civil War. The presidential orders and congressional enactments focused on the two exceptions to prohibition cited by Wheaton and the other theorists mentioned earlier. Some Congressmen balked at any degree of intersectional commerce, but their voices were drowned out by those who succeeded in elevating the licensing privilege into a legal principle in its own right. It remains to be seen whether the highest court in the land would acknowledge the legality of these exceptions, or revert to a more conservative interpretation of the practice of trading with the enemy.

Chapter One Notes

1. H. W. Halleck, International Law; or Rules regulating the Intercourse of States in Peace and War (New York, 1861), 357-358.

2. Ibid., 357.

3. Ibid., 358.

4. Bradley Chapin, The American Law of Treason (Seattle, Wa., 1964), 73; and J. G. Randall, Constitutional Problems under Lincoln (Gloucester, Mass., 1963), 77.

5. Joseph Chitty, A Practical Treatise on the Law of Nations (Boston, 1812), 2-3.

6. Ibid., 6.

7. Ibid., 32.

8. A. D. M. McNair and A. D. Watts, The Legal Effects of War (Cambridge, 1966), 355.

9. Halleck, International Law, 504.

10. Ibid., 506.

11. Ibid., 508.

12. Ibid., 498.

13. Quoted in Henry Wheaton, Elements of International Law (Oxford, 1936 [orig. publ. 1866]), 209.

14. Quoted in Ludwell Johnson, "The Business of War: Trading with the Enemy and Early American Law," Proceedings of the American Philosophical Society, CXVIII (October 1974), 463.

15. Ibid., 464.

16. James Brown Scott, ed., Prize Cases Decided in the United States Supreme Court, 1789-1918, I (Oxford, 1923), 478.

17. Ibid., 479.

18. The case of Jecker v. Montgomery first came to the Supreme Court in 1851, but was remanded to district court. Chief Justice Roger B. Taney spoke for the Court in that decision. When the case appeared before the Supreme Court again in 1855, Justice Peter V. Daniel delivered the decision.

19. Scott, Prize Cases, II, 1397.

20. Robert Frank Futrell, "Federal Trade with the Confederate States, 1861-1865: A Study of Governmental Policy" (Ph.D. diss., Vanderbilt University, 1950), 455.

21. Ibid., 457-458.

22. Ibid., 1.

23. Roy P. Basler, ed., The Collected Works of Abraham Lincoln, IV (New Brunswick, N. J., 1953), 338-339.

24. Randall, Constitutional Problems under Lincoln, 53.

25. Ibid., 53-54.

26. J. G. Randall and David Donald, The Civil War and Reconstruction (Boston, 1961), 296.

27. Congressional Globe, 37th Congress, First Session, Appendix, 7.

28. Randall wrote that according to the Washington view secession was a nullity and the whole southern movement illegal. Those who took part in it were insurgents warring against their government, but they were also enemies in the sense in which the word "enemy" is used in a public war. The district declared by the constituted authorities to be in insurrection was "enemies' territory" and all persons residing in it were liable to be treated by the United States as "enemies." For legitimate acts of war, therefore, Confederate officers and soldiers were relieved from individual civil responsibility. From one angle the Confederates were regarded as insurgents and traitors, while from another angle they were considered belligerents and public enemies. The conflict thus was conceived of as being both a war and a rebellion; the Southerners were "rebels," yet also "belligerents." They therefore were subjected to the trade restrictions automatically applied to belligerents by the rules of international law. See Randall, Constitutional Problems under Lincoln, 59-73.

29. Congressional Globe, 37th Congress, First Session, 83.

30. George P. Sanger, ed., The Statutes at Large, Treaties, and Proclamations of the United States of America, XII (Boston, 1861-1866), 258.

31. Ibid., 260.

32. Futrell, "Federal Trade with the Confederate States," 28.

33. Ibid., 225.

34. Thomas H. O'Connor, "Lincoln and the Cotton Trade," Civil War History, VII (March 1961), 28.

35. Sanger, Statutes at Large, XII, 404-405.

36. Ibid., 820-821.

37. Congressional Globe, 37th Congress, Third Session, 1332.

38. Basler, Collected Works of Lincoln, VI, 159-160.

39. House Executive Documents, Number 3, 38th Congress, First Session, 23.

40. A. Sellew Roberts, "The Federal Government and Confederate Cotton," American Historical Review, XXXII (January 1927), 271.

41. Ibid.

42. Ibid., 270.

43. Ludwell Johnson, "Contraband Trade During the Last Year of the Civil War," Mississippi Valley Historical Review, XLIX (March 1963), 637.

44. James Ford Rhodes, History of the United States from the Compromise of 1850, V (New York, 1893-1906), 295.

45. Sanger, Statutes at Large, XIII, 375-378.

46. Congressional Globe, 37th Congress, Third Session, 1333.

47. Ibid., 1432.

48. Ibid., 1333.

49. Ibid., 2822.

50. Congressional Globe, 38th Congress, First Session, 2823.

51. Ibid.

52. Ibid., 3325.

53. Sanger, Statutes at Large, XIII, 377.

54. E. Merton Coulter, "Commercial Intercourse with the Confederacy in the Mississippi Valley," Mississippi Valley Historical Review, V (March 1919), 388-389.

55. Johnson, "Contraband Trade," 637-638.

56. Congressional Globe, 38th Congress, Second Session, 271.

57. Ibid., 272.

58. Ibid., 273.

59. Ibid., 1352.

60. Ibid.

61. Ibid., 1353.

62. Ibid.

63. Ibid., 1355-1356.

64. O'Connor, "Lincoln and the Cotton Trade," 30.

65. J. Hubley Ashton, ed., Official Opinions of the Attorneys General of the United States. . ., XI (Washington, D. C., 1869), 222.

66. Ibid.

67. Ludwell Johnson, "Trading with the Union: The Evolution of Confederate Policy," Virginia Magazine of History and Biography, LXXVIII (July 1970), 310.

68. Rhodes, History of the United States, V, 412.

69. Ibid., 412-413.

70. Ibid., 413-414.

71. Johnson, "Trading with the Union," 309.

72. Rhodes, History of the United States, V, 417.

73. Ibid., 419-420.

74. Ludwell Johnson, "The Louis A. Welton Affair: A Confederate Attempt to Buy Supplies in the North," Civil War History, XV (March 1969), 37-38.

CHAPTER II

THE SUPREME COURT AND THE WARTIME TRADE

In examining the Supreme Court cases involving instances of inter-belligerent Civil War trade, it is important to consider three factors that have influenced all decisions. The Supreme Court has never operated in a vacuum. The justices bring to the bench their personal backgrounds and attitudes, and while in office are never wholly removed from the political pressures of the day. While most justices are highly trained in the law, they are nevertheless confronted with cases that compel them to draw upon the more subjective resources of individual judgment and interpretation.

The two courts that decided the Civil War trade cases must be considered in light of these influences. The Taney Court, the first to issue a wartime decision, was led by a chief justice largely out of step with the prevailing political attitudes. Roger B. Taney's dissent in the Prize Cases decision revealed his narrow view of the proper realm of executive wartime action. The infamous Dred Scott decision, also rendered by his Court, affirmed Taney's narrow interpretation of the law. The opinion also increased his unpopularity with liberals such as Lincoln.

In his lengthy work on the Taney Court, Carl Swisher stated that it fell upon evil times not because of Taney's Jacksonianism or his lack of ability, but because his Court was caught in the pressures of sectional conflict. ". . . in the time of civil war the strident and clamorous voice of Mars too often drowned out the voice of the law, with its stress upon reason and rightness rather than upon ruthless power, and little deference

was accorded to judicial spokesmen. To a considerable degree the executive won dominance in matters which in other times would have been left to the courts."[1]

Taney's successor, Salmon P. Chase, and the Chase Court proved more amenable to the popular mood, thanks largely to Lincoln's appointive powers. Five of the nine Supreme Court justices who served throughout most of the Civil War and all of Reconstruction were Lincoln appointees. Noah Swayne, Samuel Miller, David Davis, and Stephen Field were Lincoln choices, and the president selected Secretary of the Treasury Salmon P. Chase to succeed Taney as chief justice. The new members of the Supreme Court were young, and after 1867 none of the justices was southern. All of Lincoln's appointees played significant roles in antislavery politics and loyally supported the war. Support of the war indicated support of Lincoln as well. In the words of Charles Haines, "It was a court composed of a Republican majority that gave its support and sanction to the extraordinary military powers assumed by President Lincoln."[2] Such sanction, however, did not preclude dissent and varying interpretations from arising among the nine justices. What the Court pronounced "in contemplation of the law" was affected by the outlook of the individuals who sat on the Bench and did this contemplating.[3] Even at the war's end, the Supreme Court revealed discord, as Justice Miller wrote to his brother-in-law in 1868:

> The political climate looks to me more gloomy than it has ever looked. I never thought a separation by success of the rebellion the worst misfortune that could occur. But in the threatened collision between the Legislative branch of the government and the Executive and Judicial branches I see consequences from which the cause of free government may never recover in my day. The worst feature I now see is the passion which governs the hour in all parties and all persons who have controlling influence. In this the Supreme Court is as fully involved as the President or the House of Representatives.4

A potential source of the Supreme Court's division could have been

its need to interpret Civil War statutes and executive proclamations. The Chase Court possessed the power of statutory interpretation--the authority to interpret federal statutes and executive orders. In judging the laws passed to govern interbelligerent trade, however, this interpretory power seemingly led to little of the dissension and passion noted by Miller. None of the trade decisions considered the constitutionality of the congressional or presidential measures taken to regulate commercial intercourse with the South. The judges, almost as one, upheld these measures as legitimate applications of international law.

This chapter will discuss only those cases involving an exchange of goods across the military lines of the North and the South. The conclusion based upon the entire collection of cases is that the Supreme Court was well aware of the strict intentions that lay beneath the often laxly-enforced congressional acts. Almost every opinion began with a reference to the principle of international law that forbade commercial intercourse between enemies during war. Was this reliance on international law a shield with which to avoid considering the legitimate extent of congressional and legislative power? A partisan Supreme Court may have been reluctant to raise such questions. Its view of the picture of Civil War trade and the controlling measures taken may also have been affected by the timing of the decisions. The Supreme Court, seeing Reconstruction as a time to heal wounds rather than cause new factions, may have sought in its support of legislative and executive powers a return to a unified central government. Whatever its motives, the Supreme Court used international law to defend both congressional prohibition and executive licensing of northern trade with the South during the Civil War.

Several instances of intersectional trade that came to the Court's attention resulted from illegal transportation of merchandise by water.

The Reform (1865), The Sea Lion v. The United States (1868), and The United States v. Lane (1868), arose from voyages in which a loyal vessel attempted to secure a cargo in Confederate territory and transport these goods back to Union territory. In each instance Union officials confiscated the cargo, and in each case the defendant's appeal of the confiscation to the Supreme Court proved futile.

The significance of The Reform rests upon a congressional act passed on February 13, 1862, that appropriated various moneys for the purchase of cotton and tobacco seed. This money was to be distributed to buyers by the Treasury Department with the stipulation that they purchase cotton as far north as possible, and only in areas where cotton was grown. This appropriation made no mention of weakening the earlier prohibition of trade.

On March 7, 1862, William Hodges of Washington received a license to carry cotton seed from any point on the waters of Virginia emptying into the Chesapeake Bay to the port of Baltimore. The Treasury Department license required that Hodges execute a bond of $200,000 as assurance that he would not transfer any cargo to or from Baltimore or Virginia besides that needed by the crew for one trip. Unwilling to pay such a bond, Hodges never used the license. The day after its issuance, however, he received a letter from the Secretary of Interior authorizing him to procure a cargo of seed in Virginia and to bring it to Baltimore without posting bond. Accompanying the letter was an endorsement of Navy Secretary Gideon Welles promising protection to Hodges' cargo in waters under United States military control.

To obtain the seed Hodges hired a man named Penniman, who loaded The Reform with miscellaneous cargo "well-suited to a blockaded region" in order to execute the purchase.[5] The Reform cleared from Baltimore for Alexandria, a legal and unblockaded destination, but then she set sail

for Urbanna, on the Rappahannock River approximately 100 miles south of Alexandria--a district then in insurrection against the United States. Shortly thereafter United States revenue officers seized the vessel and libelled it for forfeiture in the Federal District Court of Maryland.

Penniman admitted to undertaking the voyage, but defended his action on the grounds that it was authorized by the interior secretary's letter and the Navy Department's endorsement. He stated that General John A. Dix (the region's military commander) knew of his Urbanna destination and understood that the delicate nature of his voyage necessitated the pretense of clearing for Alexandria. At the time of the congressional act of 1862, Union troops occupied no part of the cotton-growing territory. The act specified only that purchases be made as far north as possible. Penniman further defended his voyage on the ground that Urbanna was the only place that satisfied that specification.

The district court dismissed the libel, and when the federal circuit court upheld the decision the United States appealed to the Supreme Court. An interesting aspect of the case is that Chief Justice Taney was in the circuit court that dismissed the libel. Taney remained consistent in his position until his death, and viewed the enlargement of executive and congressional authority embodied in the trading acts of July 1861, May 1862, and August 1862 with an unfriendly eye. "A civil war, or any other, does not enlarge the powers of the Federal Government over the States or the people, beyond what the compact has given to it in time of war."[6]

Taney interpreted the July 13, 1861, statute to mean that liability of goods and of vessel "adheres to them while they remain. . . in transitu between the forbidden places and no longer." Charles Fairman reasoned that Taney here was analogizing with the rule in prize law that holds that the neutral ship breaching blockade is purged if it completes the voyage

without being caught. The spy may not be penalized if he has returned into his own lines. Those are the rules, but a sovereign declaring law for persons who owe it obedience is not playing games. One charged with transporting stolen goods does not escape punishment by showing that he has deposited his load before the arrest was made.[7] The chief justice consistently took, "with deep sincerity," the very narrowest view of the power to fight the war for the Union.[8] A new viewpoint reigned when the case finally reached the Supreme Court. Taney's narrow construction of the nonintercourse law was rejected unanimously by the Supreme Court in The Reform.

The details of that rejection will be revealed with those of Sea Lion and US. v. Lane, as the three decisions contain similar arguments. First, however, the facts of those cases. The Sea Lion v. The United States resulted from a permit issued on February 16, 1863, by Treasury agent G. S. Denison (and approved by Major-General N. P. Banks) to a New Orleans commercial firm allowing that company to bring cotton to New Orleans from Confederate-occupied areas. Rear Admiral David G. Farragut was in command of the blockading force on that coast. He endorsed the Banks permit but instructed his commander of the Mobile blockade to investigate any ship coming out of Mobile to make sure it conformed to trade regulations. Farragut's instructions were as follows:

> Should any vessel come out of Mobile and deliver itself up as the property of a Union man desiring to go to New Orleans, take possession and send it into New Orleans for an investigation of the facts and if it be shown to be as represented, the vessel will be considered a legal trader, under the general order permitting all cotton and other produce to come to New Orleans. 9

Agents of the New Orleans firm went to Mobile in late March 1863, bought The Sea Lion, and loaded it with a cargo of cotton and turpentine. The vessel left Mobile on May 8, 1863, under the Confederate flag. The

Sea Lion was cleared for the destination of Havana rather than New Orleans by the Confederate officers--a ruse that enabled the ship to leave Confederate waters with cargo intact. This ruse did not prevent Union blockade officers from obeying the instructions issued by Farragut. They boarded The Sea Lion shortly after she set sail for Mobile. Upon investigation the ship was found to be an illegal trader, and she and her cargo were taken to Key West and libelled in the District Court for Southern Florida as prize.

The claimants appealed the condemnation in the Supreme Court, and defended their voyage on the basis of the Banks permit. They stated that their destination was indeed New Orleans, and offered their voluntary surrender to the blockaded fleet as proof of that fact.

The United States v. Lane likewise involved a license issued to authorize a voyage within insurrectionary areas. During the war George Lane contracted with treasury agent Hanson A. Risley at Norfolk, Virginia, for the purchase of cotton stored on the Chowan River in North Carolina, an area controlled by the Confederacy. In addition to the Risley contract, the commander of the military district gave Lane an assurance of safe conduct given by the military commander. Risley appointed a sub-agent to sail with the vessel and to be in charge of its cargo. He instructed this agent not to deliver those goods to Lane until the latter had delivered cotton worth three times the cargo's value to the vessel.

The ship travelled to the Chowan River without hindrance, and Lane delivered the cotton to the sub-agent as agreed. On the return trip to Norfolk, however, Union officials seized both vessel and cargo in the inland waters of North Carolina. They were released but seized again before reaching Norfolk, and Union officials sent the vessel to Washington, D.C. The property was libelled in the Supreme Court of the District of

Columbia, but no proceedings were taken against the cotton and it eventually was restored to Lane. Upon repossession he sold it in New York. Rapidly falling prices meant that this sale of the cotton yielded far less than if the voyage had not been interrupted. Lane called upon the United States to make good the loss caused by the conduct of its officers. The court of claims ruled in Lane's favor, and the United States appealed the decision.

The Supreme Court ruled against the traders in all three cases, finding that each voyage involved trade illegalities. The Court refuted all of the points raised by Penniman in The Reform v. The United States. The July 1861 nonintercourse act was valid throughout the war. Thus, the interbelligerent trade occurring during the war was still illegal when the case was heard in 1865. The Court further denied that the interior secretary's letter was sufficient authorization for Penniman's voyage. Since trade within insurrectionary states was strictly prohibited, commerce conducted in rebel districts under United States control was only to be permitted by a license issued by the president in accordance with Treasury Department regulations. The Court found that the 1862 appropriation for cotton seed was not a relaxation of these earlier restrictions. Penniman's voyage into an insurrectionary district was clearly illegal, as was his attempt to justify such action with a license not issued by the president.

Hodges was authorized only to procure cotton seed, and not to transport cargo to the place of destination or to bring back a cargo other than seed. The license not used by Hodges specified that the only permissible cargo would be that which the ship's crew would use for one trip. Although Hodges did not use the license granted him, he knew through its stipulations that the variety of goods carried by The Reform constituted

an illegal, and therefore condemnable cargo. Reversing the circuit court decree, the Supreme Court issued an order of forfeiture against the cargo and vessel.

The Court used many of the same grounds to uphold the condemnation of The Sea Lion's cargo. Drawing upon the principles established in Jecker v. Montgomery, Justice Swayne found in 1868, as had Justice Daniel in 1855, a premeditated violation of trade restrictions. The Sea Lion was fitted and loaded at Mobile during a time when that city was in enemy territory and under blockade. Clearance was signed for Havana, and Justice Swayne found it hard to resist the conclusion that the vessel's crew left Mobile with two alternatives in mind. One possibility was to evade the blockading fleet and head for Havana. In case of seizure, the plan was to produce the Banks license and set up the pretext of a trip to New Orleans. Neither was a legal alternative. As shown in The Reform v. The United States, the July 1861 act prohibited trade within enemy-held territory, which outlawed trade in Alabama. Even if such a voyage were permissible, Major-General Banks was not authorized to license any exception to trade prohibition. That power was solely an executive privilege.

George Lane fared no better in 1868 than had the owners of The Reform and The Sea Lion. Justice Davis wrote the opinion for the Lane case, and in it reflected the legal viewpoint that served to govern the former decisions as well.

> At the time the Lane contract purports to have been made, this country was engaged in war with a formidable enemy, and by a universally recognized principle of public law, commercial intercourse between states at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents

> should cease. If commercial intercourse were allowable, it would oftentimes be used as a door for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen. But the rigidity of this rule can be relaxed by the sovereign, and the laws of war so far suspended as to permit trade with the enemy. . . . It being the rule, therefore, that business intercourse with the enemy is unlawful unless directly sanctioned, the inquiry arises, whether there was any law of Congress in force at the time that sanctioned this transaction.[10]

In this paragraph lies a perfect example of the extent to which Chase's Court used international law to avoid challenging the concept of Lincoln as sovereign, and to avoid questioning Congress' delegation of power to the executive branch during the war. The use of statutory interpretation came next, as Davis examined the statutes thoroughly and found no sanction for Lane's activities. Lane maintained that his license to journey the Chowan River was authorized by the July 2, 1864, act and its alleged relaxation of trade. His contention that the law conferred upon treasury agents a power to license trading within the military lines of the enemy was not supported by either the act itself or treasury regulations of July 29, 1864, which affirmed a prohibition of commercial intercourse beyond United States military lines. The system that authorized treasury agents to purchase products of insurrectionary states at certain locations did not carry with it the right to establish such a place within enemy lines. The Court also found nothing in the September 1864 regulations issued by Treasury Secretary Fessenden and approved by Lincoln inconsistent with continued prohibition. The eighth section stated that an agent should record an individual's application to sell property, and request safe conduct for such party and his necessary transportation to and from the location specified to the purchasing agent. Nothing in this rule allowed trading, that is, an

exchange of goods or money, with the insurrectionary areas. The justices viewed the sections limiting the presidential issuance of licenses and requiring a strict recording of all transactions as further evidence of Congress's determination to enforce trade prohibition.

Davis, explaining the Court's intentions, wrote that private trade had hurt the war effort by 1864. By this time, it was also known that the government and many private traders wanted certain southern products brought within United States military lines. Neither group, however, wanted to jeopardize the Union's military operations. Congress realized that a new system was needed to achieve both ends. Accordingly, Congress denied citizens all privileges of trading with the enemy, and instead allowed the secretary of the treasury, with presidential approval, to purchase products of the insurrectionary states through agents located at trading posts within Union-occupied areas.

The secretary could not use the army to attract trade, and needed inducements in order to get the insurgents to bring their products to the agents. The inducements offered were strong. The treasury regulations promised Confederates that if they brought their cotton within Union lines it would be purchased instead of seized. Confederates were also allowed to entrust someone to take their produce to the purchasing agent and sell it for them. Davis described the presidential order of September 1864 as adding further enticement by promising Confederates the ability to purchase any merchandise needed--except contraband of war--up to one third of the value of the products sold by them. In addition, both party and property were promised safe conduct. Davis made no mention of the result of this promise--namely, that trade between the sections was thrown wide open. He interpreted the law as written, not as practiced. The Court understood that if private citizens of loyal

states engaged in a venture like Lane's, they would need, in order to make the voyage remunerative, to exchange a cargo for southern products. There was no authority to do this. The president's September proclamation only permitted the taking of return cargo, bought with part of the proceeds resulting from a sale of products to a purchasing agent. In this act of statutory interpretation, Davis sought to close the door on trade that was theoretically permissible under the wording of the controversial Section 8.

Risley was clearly acting beyond his authority when he made the contract with Lane. The voyage itself was illegal, as was Risley's issuance of a trading permit. Upon receiving a written application made by an individual wishing to sell southern products, the agent's power was limited to issuing a stipulation to purchase, to providing a certificate of the application made, and to requesting safe conduct for the party and his property. The purchasing agent had no right to negotiate with anyone in regard to products. Therefore, the Supreme Court reversed the court of claims decision, and sent the case back to that court with an order to dismiss Lane's petition.

The Supreme Court's determination to uphold the intention of the original 1861 nonintercourse act here becomes evident. Subsequent congressional efforts to limit trade were to be rigidly enforced by the justices, even where other Union officials did not sympathize with complete prohibition. In all three cases, military officers granted illegal licenses. The Court adhered to the 1861 act even in the face of the new 1864 system--a system interpreted by many to allow greater degrees of interbelligerent trade. However, The United States v. Lane shows that the Court interpreted these new regulations as consistent with the principle of prohibition. In this and many other decisions the heritage of

international law removed from Court opinion any doubts caused by a confused Union attitude toward trade with the Confederacy. Thus, the issue of the use of international law as a screen with which to avoid controversial topics is again of relevance. Any mention of Lincoln's use of executive powers to actually thwart wartime trade controls is studiously avoided. The Court proved itself again loyal to the Union cause, and to the cause of reconstructing a strong national government.

The cases of Gay's Gold (1871) and The United States v. Mora (1879) also involve instances of illegal water traffic, but these decisions embodied a few new considerations as well. An appeal from the Louisiana Federal Circuit Court brought Gay's Gold to the Supreme Court's attention. The appeal resulted from the seizure of a package of gold in March 1864. Special treasury agent George S. Denison found and seized the gold on a steamer lying at New Orleans and about to go upriver. The gold was libelled in federal district court on the grounds that its transport to an area under rebel control violated the nonintercourse acts of 1861 and the resulting treasury regulations. A claim for the gold was entered by Edwards in the name of Gay, a merchant and planter living within Louisiana's federal lines. Gay's northern indentity and technical loyalty to the United States were not in dispute. The district court found no proof that he had intended to violate the law. The circuit court reversed and condemned this decree, however, and Gay brought his case to the Supreme Court.

Edwards claimed that the United States had no proof that the gold was intended for any place under insurgent control. Even if the money was so intended, the case was not within the dictates of the 1861 nonintercourse act, as "acts visiting persons with forfeiture are to be construed strictly. . . . money is neither goods, wares, merchandise,

or chattels."[11] Moreover, even if Gay had been guilty of some wrongdoing, his offense should have been obliterated at the time of the trial by President Andrew Johnson's December 1868 pardon. This pardon restored to those who had participated in the war all rights, privileges, and immunities as stated by the Constitution.

Justice Miller's opinion voiced little doubt that the gold had been destined to be used for buying cotton in an insurrectionary district. The fact that Gay, although a loyal citizen, did not come himself to New Orleans and make an oath to his claim for the gold added further weight to suspicions that the gold was going within rebel lines. Justice Miller also wrote that gold was well within the restrictions of the nonintercourse act.

> It is a well-known fact that in 1864 gold coin was an article of merchandise, and bought and sold at fluctuating prices, and was the object of a large and active traffic. It would be folly to say that the court could not take notice of what all the world besides knew very well; and we must, therefore, hold that gold coin in package, carried from one person to another; and not used for paying travelling expenses, when intended for an insurrectionary district, was within the prohibition of both statutes cited.12

The Court also held that Gay was not entitled to the gold under Johnson's pardon, as the terms of the proclamation were limited to persons who participated in the war, and offenses pardoned were "treason against the United States, or adhering to their enemies during the late civil war."[13] There was no pretense that Gay was such a person or guilty of any such offense. The circuit court decree was affirmed and Gay's appeal denied.

In The United States v. Mora the act of interbelligerent commerce involved did not bring the case to the Supreme Court's attention. The case instead centered around a suit brought by the United States on a

bond dated and executed March 4, 1863. The bond was executed by the collector at the port of New York as a condition precedent to a granting of clearance to Sarah Marsh, a vessel laden with merchandise bound for Matamoras, Mexico. The New York collector of customs had acted under regulations issued on May 23, 1862, by the secretary of the treasury, that referred to the presidential proclamation modifying the blockade of Beaufort, Port Royal, and New Orleans. In accordance with that proclamation the collector was to refuse clearance to vessels bound for these ports only if their cargoes contained contraband of war. The collector was also authorized to refuse clearance to ships intended for Confederate ports, or if the vessel's goods were in danger of falling into rebel hands. Where the collector feared that wares shipped from New York might be used to aid the insurgents, instructions required him to demand security as a guarantee that the wares would not be transported anywhere under insurrectionary control. The collector of customs was also authorized to require bonds securing an adherence to the regulations concerning liquor, scrap metal, and hardware if the goods were destined for ports where they might be reshipped to aid the insurrectionists.

Such bond was taken by the collector from Sarah Marsh, and with good cause. After paying the bond, the ship's captain sold part of Sarah Marsh's goods to Confederate military officials in Brownsville, Texas, in April 1863.

Such a sale, however, was not the issue in The United States v. Mora. The claimant in this case was Mora, owner of the Sarah Marsh. He objected to the harsh conditions demanded by the bond, and sought reimbursement of the money it exacted. The federal circuit court sustained his objection, and the United States appealed to the Supreme Court. The United States held that the bond was a reasonable amount, and stated

that its payment was a voluntary undertaking by the defendant. Mora, however, objected to a bond double the amount of the value of Sarah Marsh's goods, and complained that its payment had not been voluntary.

Justice Bradley's opinion reversed the ruling of the lower court. The security required was proper, given the May 20, 1862, act of Congress and May 23 treasury circular issued under it. The secretary of the treasury did not exceed his authority either in instructing the New York collector to refuse clearance to suspect vessels, or in ordering the collector to require substantial security that the goods would not be transported anywhere under insurrectionary control.

The Court ruled that a security of double the value of goods was reasonable as were all the conditions of the bond. The bond given in this case required only what the law sought to secure. If the shipper chose to give bond in order to clear the goods, it was a voluntary act and he had no grounds for complaint. The defendant never tried to prove that the collector had no basis for suspicion. Had the government's offer to prove that the goods did not reach Matamoras been accepted, the resulting facts would have revealed their Brownsville destination, and ample grounds to suspect Mora's motives.

This case, like Gay's Gold, showed the Supreme Court to be adamant in its strict interpretation of the nonintercourse policy. If any part of a trade restriction was in line with statutory principles and those of the law of nations governing wartime trade, such a restriction was viewed as well within legal boundaries. The Court was therefore using its power of statutory interpretation to uphold trade control, and not to see in the wording of the statutes the opportunities to trade viewed by others.

The next group of cases to be considered originated from illegal

attempts to purchase cotton during the war years. The Ouachita Cotton (1867) involved three appeals coming from the Illinois Circuit Court regarding 395 bales of cotton seized during the war by a Union flotilla. The cotton in question had been sold to the Confederate government in 1862, and paid for in Confederate bonds. Three American parties residing in New Orleans purchased a quantity of this cotton from the Confederate government during the rebellion, and after their city of residence was restored to federal jurisdiction. All three left the cotton stored on the Ouachita, Louisiana, plantation where it was grown.

Business partners Withenbury and Doyle received some of the crop in August 1863 as payment for the Confederacy's use of their two steamboats during the war. These men, Ohio citizens normally engaged in legal commerce between New Orleans and Upper Georgia, maintained that the Confederacy compelled them to provide the use of their boats.

Leon Queyrous was a second recipient of some Ouachita cotton. Queyrous was a United States citizen and a New Orleans resident. In March of 1864 he bought a load of the Ouachita cotton from a Confederate agent. Queyrous ultimately sold his cotton to the French firm of Le More & Company, but his title to the cotton was questioned in this case.

The third party involved in the Ouachita case was the Louisiana State Bank. The bank found itself with a large amount of Confederate currency made worthless in New Orleans after the city's capture by the Union. Two agents were authorized to take large amounts of that currency within the rebel lines to buy cotton in 1863 with the result that the bank became owner of some of the Ouachita crop.

Thus, all three purchases were made after New Orleans was restored to the Union on May 6, 1862. In April 1864 a United States gunboat flotilla sailed up the Ouachita River and found the cotton stored in a part

of Louisiana under Confederate control. The flotilla seized the Confederate cotton and took it to Cairo where it was libelled in district court as prize of war. Such a seizure was authorized by the July 1861 act and by international law, which held that an enemy's property may "be taken as prize, according to the laws of war between adverse belligerents." They then brought their case to the attention of the Supreme Court.

Appeal was pursued against the Unites States on several grounds. One was that the nonintercourse act of July 13, 1861, only ordered the forfeiture of goods "coming from said state or sections into the other parts of the United States, and all proceedings to such state."[14] Property could only be confiscated when involved in an act of transfer from one section to another. The appeal also stated that as long as rebels held United States territory to the exclusion of U.S. laws and officers, the citizens could sell or buy rebel property whether under individual or government transaction, provided that transactions were not undertaken with the intention and purpose of aiding that government in its unlawful usurpations.

The Supreme Court ordered that the congressional prohibition of trade overruled these lines of defense. The July 1861 act stated that commercial intercourse between the sections was illegal. All three parties had violated this ruling by purchasing Confederate property while claiming Union citizenship. The Court also cited Lincoln's August 1861 and April 1863 proclamations. The President excepted New Orleans from total interbelligerent trade interdiction, a relaxation which applied only to trade practiced by presidential license.

These proclamations were made prior to either of the purchases of cotton from rebel agents to which the bank and Queyrous traced their

titles. The Court stated that the subjugation of New Orleans had been completed on May 6, 1862, and from which date its citizens lay under the same trade restrictions as those of loyal states. Both the bank and Queyrous claimed that they had been granted licenses to trade by military authorities, but the Court declared all licenses other than those granted by Lincoln to be null and void. The Court also forbade the Confederate payment of cotton to United States citizens was likewise forbidden. The claim of Withenbury and Doyle was also overruled. The Court found all three cotton purchases to be null and void, and upheld the Ouachita seizure.

The Supreme Court was beset with many claims for cotton seized under the aegis of the Abandoned and Captured Property Act shortly after the war's end. The right to assert a claim to property two years after the war ended first brought relevant cases to the court of claims. Charles Fairman reported that after it was established that claimant and government alike could plead their case before the Supreme Court, the construction of the Abandoned and Captured Property Act became in the early 1870s a significant branch of the Court's work.[15]

Like the Ouachita case, those of Montgomery v. The United States (1874) and The United States v. Lapène (1873) involved situations in which New Orleans residents arranged to buy cotton within Confederate territory from Confederate citizens. In these cases the agreements to purchase were made after the United States captured New Orleans. Both Montgomery and the Lapène firm transacted their business through agents, but agents did not legitimate these transactions in the Supreme Court's eyes. In both cases the U.S. military seizure of the cotton was upheld, and the claimant's title to the cotton denied. The agencies created by both Montgomery and Lapène originated at a time when they were legal, or

when New Orleans was under Confederate control, but the purchases occurred in each instance after the parties involved became residents of hostile portions of the same states. Both cotton purchases thus became transactions made with an alien enemy.

The Court mentioned the rules of international law in both cases. Justice Strong wrote that the Montgomery firm's right was "founded upon an attempted purchase, during the war, from an enemy, of enemy's property, in direct violation of the acts of Congress." Strong cited Theodore Dwight Woolsey's text on international law to support his finding that an intermediary agent made the act of trade no less criminal an action.

> 'Nothing is clearer. . . than that all commercial transactions of whatever kind. . . with the subjects or in the territory of an enemy, whether direct or indirect, as through an agent or partner who is neutral, are illegal and void. . . .' The present case exhibits a transaction not wholly within enemy's territory, but a sale from an enemy to a friend. If that can be made through an agent, then the rule which prohibits commercial intercourse is a mere regulation of the mode of trade. It may be evaded by simply maintaining an agency in the enemy's territory. In this way every pound of cotton or of sugar might have been purchased by northern traders from those engaged in the rebellion. . . . The contract in this case contemplated the delivery of the sugar, molasses, and rum at New Orleans, then within the Federal lines. There, on its being weighed and measured, payment was to be made to [the Montgomery] agents. If this be allowed, the enemy is benefitted and his property is protected from seizure or confiscation.16

The Court again cited Woolsey in ruling against the plaintiff in the Lapène case. The purchase of cotton in the case "gave effectual aid to the enemy by furnishing to them the sinews of war. It was forbidden by the soundest principles of public law. The purchaser obtained no title to the cotton, and has no claim against the [federal] government for its capture."[17] Thus, while other Union spokesmen may have been hedging on the question of trade with the Confederacy, the Supreme Court remained

rigid in its adherence to the interdiction inherent in the law of nations. Here again, the Court may have used international law to stop the development of other inquiries. The Court was determined to uphold the wartime measures of Lincoln and Congress, and in an effort to avoid question or controversy may have tried to neutralize them in the foundation of the law of nations.

Mitchell v. The United States (1874) and Desmare v. The United States (1876) bring more elaborate considerations of domicile into similar instances of illegal trade. Mitchell was a Louisville resident who spent a considerable portion of the war conducting various business transactions within the Confederacy. He stored a large amount of cotton purchased during this period in Savannah, and protested its seizure when the city was captured by Union forces. The Desmare case concerned a New Orleans resident who protested the seizure of cotton he had stored in Louisiana. The purchase of that cotton was made after New Orleans was captured by the Union in 1862. The Court ruled in both cases that the claimants were domiciled within Union-controlled territory when they undertook their business transactions in the Confederacy. Justice Swayne cited the two previous cases as well as international law in writing the Mitchell opinion. These tenets of law also governed the Desmare case, so Swayne's Mitchell opinion applies to it.

> At the time when Mitchell passed within the rebel lines the war between the loyal and the disloyal states was flagrant. It speedily assumed the largest proportions. Important belligerent rights were conceded by the United States to the insurgents. Their soldiers when captured were treated as prisoners of war, and were exchanged and not held for treason. Their vessels when captured were dealt with by our prize courts. Their ports were blockaded and the blockades proclaimed to neutral nations. Property taken at sea, belonging to persons domiciled in the insurgent states, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one

> with a foreign nation. The laws of war were applied in like manner to intercourse on land between the inhabitants of the loyal and the disloyal states. It was adjudged that all contracts of the inhabitants of the former with the inhabitants of the latter were illegal and void. It was held that they conferred no rights which could be recognized. Such is the law of nations. . . as administered by courts of justice.18

Herein lies a rather subjective view of the trade controls enacted during the Civil War. Swayne rather blithely states that "the laws of war were applied in like manner to intercourse on land," thus leading one to assume that trade interdiction was the natural condition. The real picture was not so neat. Swayne would also lead one to believe that a "court of justice" has a formula for applying the law of nations to wartime crimes. This may indeed have been the impression that Chase's Court was trying to convey.

In the Court's eyes, the Civil War had a dual character. Duality carried with it the assumption that the Confederate sympathizers were accorded belligerent rights, and were answerable to both international and municipal law. Both sets forbade interbelligerent commercial intercourse. In all five of the cases, contracts were made on invalid grounds, and the trading practiced of a trespassing nature.

In at least one case, however, the question of just what constituted an area under United States military control was not so clearcut. In the case of Butler v. Maples (1869) the Court ruled on the matter of how an area should be judged to be within the lines of federal occupation so that a treasury agent could issue a permit to trade. In this case, the Court concluded that the grant of permit was in fact based upon the realities of occupation. In Butler v. Maples there was uncontradicted evidence that before the grant of a permit, Desha County, Arkansas, had been evacuated by Confederate forces in their retreat toward the Red

River and on into Texas. No such forces existed within 150 to 200 miles from Red Fork, in Desha County, so the military occupation of Union forces extended over the region. The Court also held that the citizens generally had taken the oath of allegiance, or had obtained protection papers. In addition, an authorized treasury agent had granted a permit to a Memphis firm--Memphis was then under federal control--to buy cotton there. Hence, the Supreme Court affirmed the lower court's decision that the license had been legal.

The Court acknowledged that the grant of the permit may have involved technical improprieties, but it held that it

> . . . was an exercise of the treasury agent's judgment, and a deduction from the facts known by him, that the region over which the permit extended was within the military lines. It is to be presumed that he acted rightly, and as he could not lawfully grant the permit in the absence of such military occupation, his grant of it raised a presumption that the occupation existed. It established at least a prima facie case.

Referring to a similar case, The United States v. Weed, the Court added,

> 'The fact that the proper officers issued these permits for certain parishes, must be taken as evidence that they were properly issued until the contrary is established.' But a prima facie case, with nothing to rebut it, is a case made out. If, then, what amounts to military occupation. . . is necessarily a question of law. . . and if there was nothing to rebut the presumption of fact arising from the grant of the permit, and no contradiction or impeachment of the direct testimony the court was justified in declaring, as matter of law, that Desha County was within the lines of military occupation from the north, and that the contract was not illegal.19

The Supreme Court therefore upheld the decision of the federal circuit court in permitting the trade grant. The Butler v. Maples decision illustrated the power of judicial review, but a power that supported executive and legislative policies as well as legal precedent. The decision also suggested some of the opportunities available to treasury

agents to abuse their privileges.

The next set of cases involved the use and misuse of legitimate trade licenses. These cases were The United States v. Weed (1866), Walker's Executors v. The United States (1862), and McKee v. The United States (1868).

In April of 1864, U.S. military authorities seized the steamer A.G. Brown on two separate voyages--once while en route to Brashear City, Louisiana, and once while in port at the same city on a return from another expedition. Both times the ship carried a cargo of sugar and molasses. The two captures were combined into a single case, and litigation was pursued in the District Court for the Eastern District of Louisiana.

C. A. Weed filed a claim in the district court for the sugar and molasses involved in the first capture. He claimed himself to be a loyal U.S. citizen from New Orleans. Weed had purchased the property in the Parish of St. Mary, Louisiana, under the authority of a treasury agent's license, and was transmitting it to New Orleans when the goods were seized. F. Blydenburgh filed a claim for the sugar of the second capture, saying that he bought it under license from the Louisiana parish of St. Martin's. The district court dismissed the libel and ordered restitution of the property, and the United States brought its appeal to the Supreme Court.

The claimants defended their action on the grounds that neither voyage extended beyond the region of the country which was under United States military control at that time. The United States' major argument was that no license had been immediately found with the goods on board each ship, thus evading the order printed on each license that "this permit will accompany the shipment, and be surrendered at the custom-house."

The Supreme Court affirmed the district court's decision. Justice Miller wrote that neither party attempted to break the blockade, nor did their cargoes contain enemy property. The place where the goods were purchased was under U.S. military control, and their purchase was authorized by license. Although those permits were not found with the goods, they were probably on board, and lack of their immediate appearance was not adequate ground for forfeiture.

The United States v. Weed is one of few cases found in which the Supreme Court's strict adherence to legal and administrative principle thwarted the government's efforts to seize Confederate property. Neither claimant in this case transgressed his trade stipulations, and the obedience to wartime regulation was honored by the Supreme Court.

The other two cases involve the abuse of licenses granted in exception to trade prohibition. Walker's Executors v. The United States (1862), the only case in this collection decided by the Taney Court, originated from a presidential license granted to Samuel P. Walker on March 6, 1865. The license verified and described Walker's ownership of insurrectionary products in Mississippi and Alabama and his arrangements with parties in the same areas to buy other products. Walker proposed to sell and deliver these goods to federal treasury agents under the stipulations of the July 2, 1864 act and supporting treasury regulations. The order provided Walker and his goods protection and safe passage through military lines while going for or returning with the products.

April 12, 1865, marked both the capture of Mobile by Union forces and Walker's purchase of 3,405 bales of cotton from Mobile resident O'Grady. O'Grady had bought the cotton from a Confederate treasury agent, and much of it was still on plantations within Confederate land.

On May 5 the counties in which this cotton was held passed under the control of Union General E.R.S. Canby. Canby issued an order stating that the Confederate cotton in East Louisiana, Mississippi, Alabama, and West Florida was to be surrendered to the United States government, and any sale of this property except through federal treasury agents would be treated as the embezzlement of public property. Between June 30 and December 1, 1865, almost two thousand bales of cotton from Mississippi counties, including the cotton owned by Walker, were seized by U.S. treasury agents and sent to New York.

These agents found the Walker cotton stored in territory embracing Mississippi counties occupied by the Confederacy on and before Walker's April 12 purchase. The Union occupied Mobile and Memphis from that date until the end of the war. Walker protested the seizure, but the court of claims found him guilty of violating the nonintercourse statutues and upheld the confiscation. Before turning to the Supreme Court's treatment of the case, that of McKee v. The United States will be shown to add a new dimension to a similar situation of Civil War trade.

That case focussed upon a sale of cotton owned by A. W. McKee. From 1862 until the autumn of 1864 McKee was the general agent of the Confederate Treasury Department to purchase and dispose of cotton in Texas and all of Louisiana lying west of the Mississippi River. These regions were then within the military lines of the Confederacy. McKee was a resident of the rebel section of Louisiana when he sold cotton stored on the banks of the Red River to John McKee. Purchaser McKee (no relation to A. W.) bought this cotton on March 4, 1864, as a loyal citizen of the United States. He lived in New Orleans, a city then under U.S. military control. Before his purchase, McKee was granted permission by federal military

forces to pass through their lines into a rebellious region and to bring away any property he might have purchased there. The evidence also showed that these authorities granted him a license to trade. McKee had not yet claimed his stored cotton when a U.S. flotilla seized it, and carried it to Cairo where it was condemned.

The high court upheld the confiscation in Walker's Executors and McKee v. The United States, as both involved an abuse of the trading licenses issued. Under the stipulations presented in the July 2, 1864, and previous nonintercourse acts, the Court found Walker's April 12, 1865 purchase from O'Grady to be illegal. At that time persons in Union-occupied Memphis were forbidden without proper authorization to have commercial intercourse with persons residing in federally-occupied Mobile, because both cities were within insurrectionary states, and neither were within the territorial exceptions made by Lincoln in 1863--those exceptions being West Virginia and the ports of New Orleans, Key West, Port Royal, and Beaufort.

Justice Harlan viewed Lincoln's order of March 6, 1865, as authorizing Walker to proceed from Memphis to Mobile only after that city had surrendered to the United States, and there to contract with O'Grady for the purchase of the cotton in question--cotton only recently Confederate property and within a district occupied by insurrectionary forces. The order proceeded solely on the ground that Walker then (as of March 6) owned the insurrectionary products, and that he then had arrangements with parties in the vicinity of those places for other places of the insurrectionary states. It was in reference to such products that President Lincoln ordered them free from seizure.

Walker did not own any part of the cotton in question on March 6, 1865. The cotton was then owned by planters who held it for the

Confederate government. If it was ever the property of O'Grady, as against the U.S., it did not become so until April 5, 1865. There is no evidence to support the fact that Walker entered into any contract with O'Grady until after the capture of Mobile. The Court concluded that the case seemed to be one in which the claimants sought to bring under the operation of the March 6 order a transaction in cotton not covered nor intended to be covered by it. The contract that was made between O'Grady and Walker was in clear violation of the federal laws forbidding commercial intercourse between persons residing in places occupied by the national forces, and those persons residing in districts declared to be in insurrection. Justice Harlan wrote that the Walker agreement contradicted U.S. statutory policy.

> The contract, upon the finding of facts, must be regarded as one made between Walker and O'Grady, in palpable violation of the laws of the United States forbidding commercial intercourse between persons respectively residing in places occupied by the national forces, with districts the inhabitants whereof were declared to be in insurrection. It is therefore, according to the settled doctrines of this court, a contract from which could arise, in favor of Walker, no right to the cotton, as against the United States, which could be enforced in the courts of the Union.20

Walker was found to have no right to the cotton in question, and the decision of the circuit court was affirmed. Thus, the Taney Court and its reputation for strict interpretation did not preclude deciding a case in favor of the trade controls.

McKee was likewise found to have violated the 1864 and preceding trade regulations, and the law of nations as well. "It is a familiar principle of public law, that unlicensed business intercourse with an enemy during a time of war is not permitted."[21] Indeed, all laws forbade trade with areas beyond the lines of U.S. military occupation.

McKee's license only allowed him passage through federal lines to bring back property rightfully acquired--that is, goods purchased prior to the state of hostilities. Even if he had been granted a license to trade, such permission was null and void. McKee bought goods from Confederate lands as a resident of Union-occupied territory. The Ouachita Cotton case comes to mind here, as the Supreme Court applied the same principles in ruling against the claim of John McKee.

The Court's decision is also reminiscent of Justice Johnson's argument in The Rapid. That case involved an American citizen who acquired goods prior to hostilities and attempted to bring them through enemy territory after the war began. Those goods were seized as prize by an American privateer in much the same way that McKee's goods were seized by an American flotilla. Johnson's words fit McKee's predicament:

> 'The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent, and of the property found engaged in anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.22

The effect of the acts subsequent to the 1861 restrictions, as seen by military officers as well as civilians, may well have been a relaxation of the nonintercourse stipulations, but the Supreme Court interpreted them to be as limiting as any of the previous nonintercourse acts.

Two further cases involve instances wherein confiscated goods were claimed under the rules of the Captured and Abandoned Property Act. This act, passed by Congress in March of 1863, had many subsequent amendments, but its major purpose remained the same--to collect captured and abandoned property in parts of the Confederacy occupied by Union forces. As stated earlier, persons proving their loyalty before the court of

claims could reclaim their property within two years after the cessation of hostilities. The cases in question involved complaints that stemmed from acts of intersectional trade. One involved a violation of the limitations on that trade, but in the other no transgression was found and the owner's claim was upheld.

The United States v. Grossmayer (1869) centered around one Elias Einstein of Macon, Georgia, a man indebted at the beginning of the war to Grossmayer of New York. Einstein's debt gave rise to a correspondence maintained by a third party who conveyed messages between Macon and New York throughout the Civil War period. This exchange culminated in Grossmayer's request that Einstein remit the amount due him in cash or by investing the sum in cotton.

Since money could not be transmitted through the military lines, Einstein chose the cotton alternative and shipped his purchase to Savannah through Abraham Einstein for safe-keeping until the end of the war. The cotton was stored there under the latter's name to prevent rebel seizure by the U.S., and sold in New York. Grossmayer filed in the New York Court of Claims for the residue of the proceeds from that sale, asserting that he was within the protection of the Captured and Abandoned Property Act. The court ruled that Einstein's purchase for Grossmayer was not a violation of the war intercourse acts, whereupon the United States appealed the decision.

Supreme Court Justice Davis wrote that it was hard to see how Grossmayer was protected under the Captured and Abandoned Property Act, as his action was forbidden by the nonintercourse act of July 1861. Davis referred to the law of nations in refuting the legality of Grossmayer's action.

> It has been found necessary, as soon as war is commenced,

> that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without any express declaration of the sovereign on the subject.23

From his postwar perspective, Davis found it easy to overlook the actuality of Civil War trade, as he did any questioning of the 1861 statute, in deference to the precedents of international law and their "obvious" prohibition of interbelligerent trade.

A declaration was made following the 1861 act that dispelled any remaining doubts concerning the legality of intersectional trade. Lincoln's proclamation directed the prohibition of intercourse to extend to debtors and creditors on either side of the Union lines. Davis did not deny that a resident in the territory of one of the belligerents might have an agent in the other territory to whom his debtor could pay his debt in money or property. Such an agency must have been created before the war began, however. The act of appointing Einstein as Grossmayer's agent to buy cotton was completely illegal, as it was undertaken during the war. Personal communication between Grossmayer and Einstein was not needed to make the act unlawful. As in the decision of Ouachita Cotton, the physical transport of goods across sectional lines was not necessary to make their purchase illegal, nor did the presence of an agent make the purchase any more acceptable than it had been in The United States v. Lapène.

The Court remained consistent in its rulings, stating that whether the relation of debtor and creditor continued or changed to that of principal and agent, Grossmayer could not recover the proceeds of his cotton. As he was prohibited during the war from having any dealings with Einstein, nothing both or either did could have granted him title of the cotton.

Briggs v. The United States (1892) involved a similar claim, but in this case the Court did not find a violation of the nonintercourse statutes.

At the outbreak of the Civil War, Kentucky citizen Charles S. Morehead owned two plantations near Egg's Point in Mississippi. He left his son and an overseer in charge of the plantations and returned to Kentucky in 1861. On April 18 he sold all the cotton presently on his plantation as well as the 1862 crop to C. M. Briggs, also a loyal citizen and resident of Kentucky.

In late 1862, the agents of Morehead's plantations took part of the cotton to Wilson's Burn--a location used for storing cotton belonging to or to be sold to the Confederacy. The cotton was marked C.S.A. to save it from destruction by Confederate soldiers, but it was not so marked by Morehead's direction. In March 1863, the United States confiscated the cotton and shipped it to Memphis where it was mingled with other cotton and sold.

Briggs sought to claim the proceeds received from the sale of his cotton, but the court of claims dismissed his petition. The Supreme Court reversed the lower court, finding that even though war was occurring at the time of the sale, no law ruled against the Morehead-Briggs transaction. Both parties were residents and citizens of Kentucky, and no agreement was made for the transportation and delivery of the cotton across the lines separating Confederate from Union territory. In this case, the loyalty of Briggs to the Union and his title to the cotton were established to the Court's satisfaction, and the case was sent back to the court of claims to determine the proceeds due the petitioner. Since the act of purchase was not conducted across enemy lines, Briggs did not violate the nonintercourse statutes and so his claim was upheld.

Justice Field's opinion in the Briggs case made several references to international law, and provided an interesting interpretation of the

Captured and Abandoned Property Act as well. He first referred to the legality of a sale of property between two Confederate citizens.

> The character of the parties as rebels or enemies did not deprive them of the right to contract with and to sell to each other. . . . It was commercial intercourse and correspondence between citizens of one belligerent and those of the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of nonintercourse. . . . But commercial intercourse and correspondence of the citizens of the enemy's country among themselves were neither forbidden nor interfered with, so long as they did not impair or intend to impair the supremacy of the national authority or the rights of loyal citizens. No people could long exist without exchanging commodities, and of course, without buying, selling, and contracting. And no belligerent has ever been so imperious and arbitrary as to attempt to forbid the transaction of ordinary business by its enemies among themselves. No principle of public law and no consideration of public policy could be subserved by any edict to that effect; and its enforcement, if made, would be impossible.24

The most important question was whether the United States acquired title to the property by its capture and could disregard the petitioner's claim of ownership. The Captured and Abandoned Property Act served to settle this question.

> The circumstances in which the late war originated, and the fact that within the Confederate lines there were multitudes of people who were sincerely attached to the government of the Union and desired its success, gave ample reason to the Federal government for a modification of the harsh rules of war in regard to the capture of property on land, so as not to bring within the same calamity friend and foe. It was a desire to ameliorate as much as possible the exercise of the necessary belligerent right of capture of property within the rebel lines, in its application to the property of persons thus friendly to the Union, so far as cotton was concerned, which led to the passage of the Captured and Abandoned Property Act. . . .

Davis was here perhaps trying to smooth ruffled southern feathers during the Reconstruction era. His is a rather sentimental statement; considerably less harsh that other pronouncements that viewed the Confederacy as enemy. The importance of returning to the status quo in the Court's mind

is perhaps here illustrated.

In explaining why such legislation was enacted, Davis continued this tone, attributing more altruistic motives to the Union than others have perceived. Under the Captured and Abandoned Property Act,

> . . . immense amounts of property belonging to citizens of the United States, who sincerely mourned the origin of the Confederacy, and longed for the re-establishment of the national government, and who kept faith in their hearts through the whole of the long struggle, were accounted for and the proceeds restored to the rightful owners; and certainly it must be regarded as a most beneficent act on the part of the general government.25

Regardless of its evaluation of Union statutes, the Court proved a strict judge in determining what did and what did not constitute illicit trade across sectional divisions. It did not let allegiance to the Union sway its decision. The Court thus interpreted statutory policy more faithfully than some federal aupporters might have liked.

Matthews v. McStea (1875) is the last case in this discussion because it reveals a novel variation of that faith. The decision contradicted an earlier one, but maintained the Chase Court's support of Congress' and Lincoln's war powers. Matthews v. McStea concerned the legality of a bill of exchange issued by the New Orleans firm of Brander, Chambliss & Company on April 23, 1861. The bill was made payable in one year to the order of McStea and accepted on the day of its date by the firm in which Matthews was a member. Matthews resided in New York and the other members of his firm lived in Louisiana. He disputed the bill's legality, stating that since he and the other members were residents of enemy territories, their copartnership was dissolved by the rules of war before the bill was accepted on April 23, 1861. Matthews interpreted the blockade of April 19, 1861, as a prohibition of all commercial intercourse between the sections. Supreme Court Justice Strong viewed the

blockade regulations differently, however, and in this instance upheld the legality of wartime commerce.

Strong stated that Lincoln's proclamation of the April blockade was indeed a recognition of a war waged. He further conceded that one consequence of war, even if not formally stated, was always an interdiction of trade between enemies:

> Still further, it is undeniable that civil war brings with it all the consequences in this regard which attend upon and follow a state of war. Certainly this is so when a civil war is sectional. Equally with foreign war, it renders commercial intercourse unlawful between the contending parties and it dissolves commercial partnerships.[26]

Thus he reflected a viewpoint found in many of the other cases cited.

Exceptions to prohibition could enter, however, when licenses to trade were authorized:

> Trading with a public enemy may be authorized by the sovereign, and even, to a limited extent, by a military commander. Such permissions or licenses are partial suspensions of the laws of war, but not of the war itself. In modern times, they are very common.[27]

Strong here cited Bynkershoek and Halleck for support. Their findings of a need to modify total trade interdiction were described previously, yet Strong was the first to cite these authorities in order to overrule total interdiction of interbelligerent trade. Attorney General Speed was earlier quoted as saying that the president should have "complete control over the subject of trade between the loyal and disloyal." Justice Strong supported this theory of executive discretion. No formal declaration of war had been made, yet Lincoln recognized the existence of a war by the April 19 blockade. It then became his duty as well as his right to say how the war should be carried on: "In the exercise of this right, he was at liberty to allow or license intercourse;

and his proclamations, if they did not license it expressly, did, in our opinion, license it by very cogent implications."[28] Strong here supported the extension of executive authority already approved in the Prize Cases decision. This was one of very few instances in which Lincoln's use of executive discretion was directly addressed by the Court during the Reconstruction period.

The early blockade proclamations carried the conviction that no interdiction of commerce was intended except through the ports of designated states. On April 19, 1861, war was only inferentially realized, and the measures proposed were avowed to be "with a view to . . . the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled."[29] This attitude was inconsistent with one that regarded the citizens of insurrectionary states as public enemies and that consequently debarred them from intercourse with the inhabitants of loyal states. The only interference in trade was to be that which the blockade might cause.

Strong here supported the Court's earlier finding that a civil war involved special considerations. The Court granted the president extraordinary powers, but with good reason. Subsequent congressional action concerning the interdiction of trade confirmed Strong's view that

> . . . in a civil war more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse; for, in a civil war, only the government can know whether the insurrection has assumed the character of war.[30]

This conclusion directly contradicted that of Justice Davis in U. S. v. Lane. In referring to the interdiction of trade necessitated by war,

Davis found that "it needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease."

Strong disputed any natural assumption of trade interdiction, and his decision seems to refute most legal precedent. The July 13, 1861, act stated that a presidential proclamation of a state of insurrection would have to precede a cessation of trade between the North and the South. In accordance with this act, Lincoln's August proclamation declared some states to be engaged in insurrectionary activity against the United States, and thus prohibited commerce between such states and the Union. Strong wrote that both the act and proclamation exhibited a clear implication that before the first was enacted and the second issued, commercial intercourse between the sections was not unlawful. He reasoned in this manner:

> What need of [commercial intercourse] should cease, if it had ceased, or had been unlawful before? The enactment that it should not be permitted after a day then in the future must be considered an implied affirmation that up to that day it was not unlawful; and certainly Congress had the power to relax any of the ordinary rules of war.[31]

The court of appeals decision to uphold the partnership was supported, and Matthew's appeal dismissed.

Matthews v. McStea thus provides an interesting conclusion for this discussion of the Supreme Court cases dealing with interbelligerent trade. Whether using the tenets of international law as a screen or not, the Court largely upheld the statutes of Congress and the proclamations of Lincoln as they were ideally intended. As noted in the first chapter, however, the proclamations and statutes often had dual intentions. The Supreme Court chose not to see the practical effect of the executive

power to license trade--the virtual unleashing of interbelligerent trade--and held that power as totally acceptable under the regulations of international law.

Strong strayed from the established pattern in Matthews v. McStea, but still upheld both the congressional and executive uses of wartime power. His decision helps illustrate the fact that the Chase Court used judgment, rather than formula, to arrive at its decisions. The justices' conclusions may seem to have meshed, but the role of individual interpretation and discretion must be remembered. A recent article in The New Republic pointed out a popular misconception of the Court's manner of operation: "Is the Supreme Court a court or a superlegislature? Many think of it as an automatic vending machine; put in a quarter, press the button, and out tumbles a decision, like a bottle of Coke. The machinery was invented, according to this theory, by the Founding Fathers 200 years ago. It shocks some people to think of the court as a place of uncertainty."[32]

As it does today, the Supreme Court during the Civil War and Reconstruction periods experienced its share of uncertainty. The Court sought to rise above the political pressures of the day without ignoring the need to reaffirm the justice of Union victory and the worth of a strong central government, and vested its decisions on trade in a legal foundation above reproach. These decisions were important, but they must be considered in their Reconstruction context. As Charles Fairman writes, "The Court was performing its share in the labor of restoring the national house to order. This was a useful contribution, necessary at that period, yet of transitory importance. Some incidental rulings on matters of practice have had significance. But the major problems

were mainly, such as the nation would not meet again. . . . In this chapter of its annals the Court performed well."[33]

Thus, the possible overextension of the rules of international law at the expense of other issues should not be exaggerated. It is interesting to note, however, the way in which international law was used so extensively to legitimize wartime measures. Such considerations may have been transitory, but they would reemerge as American history progressed. Modern warfare involved old rules, but new ones were developing as well. The judicial evaluation of interbelligerent trade was not static in the nineteenth century, nor did it remain so during the twentieth century. The concluding chapter will examine how the modern international attitude toward such trade developed. The Civil War was not to be the last American war; future hostilities brought with them judicial and statutory decisions that further modified the traditional stance toward trading with the enemy.

Chapter Two Notes

1. Carl B. Swisher, "The Taney Period, 1836-1864," The Oliver Wendell Holmes Devise, or History of the Supreme Court of the United States, V (New York, 1974), 974-975.

2. Charles Grove Haines, The American Doctrine of Judicial Supremacy (New York, 1973), 395.

3. Charles Fairman, "Reconstruction and Reunion, 1864-1888," The Oliver Wendell Holmes Devise, VI, Part One (New York, 1971), 1478.

4. Charles Fairman, Mr. Justice Miller and the Supreme Court (New York, 1939), 140.

5. The source from which all of the cases in this chapter have been taken is United States Reports, or Cases Argued and Adjudged in The Supreme Court of the United States, 438 vols. (1903-). The quotations extracted from the cases are cited separately below. The first number of the entry indicates the volume in which the case is described, the second number is the page on which the description begins, and the third is the page from which the direct quotation has been taken. 70 US 617, 621.

6. Fairman, "Reconstruction and Reunion," 785.

7. Ibid., 785-786.

8. Ibid., 142.

9. 70 US 617, 631.

10. 75 US 185, 195.

11. 80 US 358, 361.

12. 80 US 358, 362.

13. 80 US 358, 363.

14. 73 US 521, 526.

15. Fairman, "Reconstruction and Reunion," 787.

16. 82 US 395, 399-400.

17. 84 US 601, 604.

18. 88 US 350, 351-352.

19. 76 US 766, 777-778.

20. 106 US 413, 422.

21. 75 US 163, 166.

22. See Chapter One, p. 8, note 17.

23. 76 US 72, 74.

24. 143 US 346, 352-353.

25. 143 US 346, 357-358.

26. 91 US 7, 9.

27. 91 US 7, 10.

28. 91 US 7, 11.

29. 91 US 7, 12.

30. 91 US 7, 12.

31. 91 US 7, 13.

32. "TRB," "The Supreme Legislature," The New Republic, CLXXXII (March 15, 1980), 2.

33. Fairman, "Reconstruction and Reunion," 873-874.

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The United States v. Mora (1879)	97 US 413
Briggs v. The United States (1892)	143 US 346

CHAPTER III

INTERBELLIGERENT TRADE AND THE TWENTIETH CENTURY

International law may have matured in the nineteenth century, but its application to periods of warfare did not cease with the Civil War's end. The twentieth century provided ample opportunity for enforcing the principles of enemy trade prohibition. The administration of those tenets improved, and the gap between theory and practice so evident during the Civil War narrowed in subsequent hostilities. A.D.M. McNair and A. D. Watts revealed the following: "Up to and including the early years of the nineteenth century the orthodox view upon trading with the enemy was not nearly so severe as it is now, and it was customary frequently to relax the general principle by granting to persons in this country, and in the enemy country 'licenses to trade'. . . "[1]

International war brought with it new possibilities of interbelligerent trade, and political leaders perhaps recognized the need to uphold its prohibition in both principle and practice. In its support of statutory laws regarding wartime trade, the Supreme Court likewise adhered to the rules of international law.

The Spanish-American War was the first major conflict which tested this increasing severity. Two cases that came to the Supreme Court's attention concerned the status of enemy merchant ships during that war. Before the 1850s, the international practice was to seize ships in port even if warning of war had not been given. Breaking precedent in 1853,

Turkey gave a warning to Russian merchant vessels in her ports. Other European nations adopted this practice, as did America when she went to war with Spain in 1898. A presidential proclamation issued on April 25, 1898, stated that the United States would allow Spanish merchant vessels anywhere within the country until May 21, 1898, to load their cargoes and depart. Such vessels, if met at sea by any American ship, would be permitted to continue if their papers showed that their cargoes were taken on board before the expiration of the April 25-May 21 term. Although this proclamation was not a license to trade, it permitted some flexibility within the sphere of increasingly stringent statutory policies and executive decrees regarding interbelligerent trade.

This generosity did not extend to ships carrying officers in military service of the enemy, or to ships containing any coal (except that necessary for the voyage), any article prohibited as contraband of war, or any dispatch of the Spanish government.[2] The case of Buena Ventura (1899) concerned a Spanish merchant ship captured on the morning of April 22, 1898, eight or nine miles off the Florida coast. At the time of capture, the vessel was on a voyage from Ship Island, Mississippi, to Rotterdam, by way of Norfolk, Virginia. The ship was carrying a cargo of lumber.

Arriving at Ship Island on March 31, 1898, the Buena Ventura sailed for Rotterdam on April 19 with a fully authorized permit to call at Norfolk for a supply of bunker coal. When captured on April 22 she made no resistance, had on board no military or naval officer, and carried no arms.

Authorities questioned whether the Buena Ventura could be included under the confiscation exemption accorded "Spanish merchant ships, in any

ports or places within the United States." The Supreme Court held that the provision should include not only those Spanish ships in port on April 21 (the day that war was declared), but also any that had sailed on or before May 21, whether before or after the commencement of the war or the issuing of the proclamation. While the proclamation did not specifically include vessels that sailed from the United States before the commencement of war, such vessels were within its intention. Restitution was, therefore, awarded to the owners of the Buena Ventura.

The Pedro also set sail during the Spanish-American War under a Spanish flag. Officered and manned by Spaniards, she loaded in Antwerp for Cuba. On March 18, 1898, an American firm chartered the vessel to proceed to Pensacola, Florida, or Ship Island, Mississippi, for a cargo of lumber destined for Rotterdam or Antwerp.

Shortly thereafter, Pedro sailed from Antwerp with a cargo of merchandise for Havana and Cienfuegos. The ship arrived at Havana on April 17, and after discharging her cargo, sailed five days later for Santiago, Cuba, with a small quantity of general merchandise taken at Havana. Pedro was captured while sailing to Santiago by an American blockading fleet on April 22, when she was a few miles from Havana.

The Supreme Court decided in 1899 that Pedro did not fall within the exemption offered by the April proclamation. The vessel lay at Havana from April 17 to 22, and cleared from Havana on April 22, the day after the war began. She had then no cargo for any United States port, only merchandise for enemy ports (Santiago and Cienfuegos). It was assumed that she either knew of the hostilities or knew that they were imminent. The Court decided that Pedro was neither bringing a cargo to the United States for the increase of its resources nor for the convenience of its

citizens. Instead, she was an enemy vessel trading with an enemy port. The Supreme Court held that a contract to proceed ultimately to an American port did not bring the vessel within the exemptions contained in the executive proclamation.[3]

This decision reaffirmed a familiar tenet of international law. As Henry Halleck stated a generation earlier, "The entire absence of any intention to violate the law, no matter how perfect the innocence of the intent may have been, nor whether the act resulted from mistake or ignorance, cannot avert the penalty of confiscation."[4] The ultimate destination of the goods rather than the intent of the shipper determined the character of the trade. It did not matter how circuitous the route by which the goods reached their destination.[5] An executive proclamation issued during the Spanish-American War relaxed the restrictions of prize law somewhat, but the Supreme Corut carefully guarded against taking illegal advantage of that relaxation.

When World War I erupted, the belligerents by statute and executive decree reinforced their acceptance of the tenets of international law restricting wartime trade. In September 1914, Great Britain passed the Trading with the Enemy Act, which forbade (except under license) all transactions during the war prohibited by common law, statute, or proclamation. These transactions included all arrangements that would improve the financial or commercial position of a person trading or residing in an enemy country. It also prohibited trade with a belligerent's allies. The property of persons engaged in such illicit intercourse was confiscable.

By the Decree of September 17, 1914, France likewise prohibited all trading by French citizens with the enemy. The French enactment included as enemies not only the subjects of Germany and Austria-Hungary but also

persons resident in hostile territory who were not nationals of the enemy powers.[6] These French and English regulations were not surprising, given the history of international law and wartime trade restrictions. World war did, however, lead to a new area of concern. To what degree could a corporation assume an enemy character?

Daimler Company Limited v. Continental Tyre and Rubber Company (Great Britain) Limited (1916) focussed on a company formed in 1905, with an office in London, for selling German motor tires in the United Kingdom. The company was formed by one incorporated in Germany under German law. The German company held more than 90 percent of its shares. One share was held by the secretary of the company. Born in Germany but a United Kingdom resident, the secretary became a naturalised British subject in 1910. Three of the company's four directors resided in Germany when war began, and the fourth left England for Germany when war broke out. During the war, the company secretary directed the respondent company to pay for goods shipped to the German parent company before the war began. Balking at the summons to pay, the British company stated that such payment would contravene the Trading with the Enemy Act of 1914. The Court of Appeals upheld the secretary's right to institute such action, but the House of Lords reversed its decision.

Lord Parker of Waddington explained that the British company's control by the German corporation afflicted it with an enemy character. In his decision, Lord Parker illustrated how the rules of enemy character applied to an artificial person, incorporated by forms of law. He thereby established a set of rules to govern future cases dealing with enemy corporations.

He wrote that a company incorporated in the United Kingdom was a

legal entity. Not a natural person with mind or conscience, it could be neither friend nor enemy. Such a company could only act through agents properly authorized. While carrying on business in England through such agents, and residing there or in a friendly country, it was to be regulated as friend.

The company would assume an enemy character if its agents or persons in de facto control of its affairs resided in enemy country, adhered to the enemy, or took instructions from or acted under the control of the enemy. The character of individual shareholders did not of itself affect the character of a corporation in either peace or war. The enemy character of individual shareholders and their conduct could, however, help determine whether the company's agents were acting under the control of enemies. The power of determination would vary with the number of shareholders who were enemies and the value of their holdings.

In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident in Britain or in a neutral country, was to be regarded as friend. Such a firm could, through its agents or persons in de facto control of its affairs, assume an enemy character. Lord Parker closed his decision with this admonition: "'It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. . . . The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes.'"[7] Parker here reinforced a tenet of international law--only trade conducted during the period of hostilities was liable to condemnation.

The concept of the corporation or its agents as enemy assumed greater importance as World War I continued. Enemy trade was becoming less an illegal exchange made between two individuals, and more a transaction involving branches of the same international corporation.

Related to the First World War's measures to control trade were Statutory or "Black" Lists instituted in 1915 by both Great Britain and France. All commercial intercourse by British and French citizens with the listed persons or firms was forbidden on account of their enemy character or associations. By a subsection of the English Trading with the Enemy (Extension of Powers) Act of 1915, corrections and additions of further persons or firms to the Statutory Lists could be made by an Order in Council.[8]

John Colombos writes that in Great Britain's case, the adoption of such lists marked a departure from the ordinary criteria governing enemy character. Individuals or corporations on the lists most often were residents of or transacted business in neutral countries. In these lists, Great Britain applied the test of nationality to enemy character, and not the traditional criterion of domicile. "It is noteworthy that the United States, which at first had energetically protested against the establishment of the 'Black Lists,' and had even, on September 8, 1916, passed a 'Revenue' Act threatening retaliatory measures against the Allies, adhered to the Anglo-French system soon after their entry into the war, by issuing similar lists in 1917 and 1918."[9]

The United States followed Anglo-French precedents in other instances after joining the Allies in 1917. The American Trading with the Enemy Act of 1917 was modelled after the British Act. This legislation was instituted to prevent aid and comfort to the enemies; to make available for the financing and successful prosecution of the war such funds and

property in this country as belong to the enemies or their allies; and to protect interests in the property rights of private citizens.[10] In the American act, as in its British counterpart, the increasing severity of policy noted by McNair and Watts is apparent.

The American act defined the enemy to be . . .

> any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.11

This definition is considerably less complicated than was that of the enemy during the Civil War.

The act also defined an enemy ally and the concept of trade, and explained the need of an executive license to practice such trade. It was illegal to transport an enemy subject anywhere, and only someone in government service or authorized by the president could bring into or send out of this country any tangible form or writing except in the regular mails. The act forbade any attempt to send, take, or transmit out of the United States any letter or other writing, book, any plan, or any form of communication intended for an enemy or his ally. Such a transmission was legal only if the communication was submitted to the president or an officer directed by the president, and if a license was then issued. The act of 1917 also authorized the president to censor communication by mail, cable, radio, or any other means passing between the United States and a foreign country. Warfare had clearly come a long way--if it can be seen as embodying progress--since the Civil War. The possible means of interbelligerent trade had expanded considerably since the days of Louis A.

Welton.

An important office instituted by the act was that of the Alien Property Custodian. T. S. Woolsey wrote an editorial during the war explaining the need for this office. When World War I began, many Germans living in the United States were not enemies. Their property thus was not enemy property nor was it confiscable. Owing to the "intricacies and complexities of modern commerce," however, enemy property in great variety rested within the United States in the form of goods on sale, branches of banks, stocks and bonds in American corporations, and insurance companies taking risks in America.

No government could permit its enemy to draw upon such resources for the prosecution of war. In order to do justice to enemy property rights, yet prevent their use against the nation, the United States impounded that property and placed it in the charge of a public official accountable for all property taken over at the war's end. This official was the Alien Property Custodian, an individual "vested with all of the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act."[12] Claims made by this office resulted in many lawsuits filed during and following the war. Such litigation, however, does not deal with an actual exchange of goods, so will not be examined in detail in this chapter.

Another aspect of the Trading with the Enemy Act of 1917 did not touch directly upon instances of interbelligerent trade. The act refused to authorize the prosecution of a suit in a United States court by an enemy before the end of the war. An enemy licensed to trade under the act could prosecute, however, if the action arose out of business

transacted in the United States under license and as long as the license remained effective. Alien enemies could also defend themselves when sued.

In summarizing statutory policy, executive decree, and the judicial posture taken regarding interbelligerent trade during World War I, it appears that all three sought to reinforce existing restrictions and to introduce some new elements of discipline regarding illicit wartime commerce. The institution of the "black lists" and the office of Alien Property Custodian are significant examples of the trend noted earlier by McNair and Watts. The Allied powers agreed concerning these measures. Both England and America instituted stricter guidelines than were authorized previously, intending to clarify ambiguous areas of law and to allow only specific incidents of interbelligerent trade.

In a period of warfare subsequent to World War I, the United States was not in such agreement with the friendly European nations. She broke from the mainstream with a carefully worded explanation issued during the Spanish Civil War. The Department of State made public a telegram sent to the American embassies in Paris, London, Berlin, Rome, Moscow, and Valencia. The Department had, "with great reluctance," issued a license for the exportation of a shipment of airplanes and engines to the port of Bilbao in Spain--the principal port of entry held by the forces of the Spanish government. As the telegram explained,

> . . . the joint resolution of Congress now in effect providing for an embargo against the shipment of arms, ammunition, and implements of war to 'belligerent countries' does not apply to the present civil strife in Spain as it is applicable to wars between nations. The present authority for the issuing of licenses contains the following provision: 'Licenses shall be issued to persons who have registered as provided for except in cases of export or import licenses where exportation of arms, ammunition or implements of war

> would be in violation of this Act or any other law of the United States or a treaty to which the United States is a party, in which cases licenses shall not be issued.' As none of these exceptions exist in the case of the Spanish situation the right to a license could not be denied.13

The history of the trade embargo on war goods mentioned in the State Department's telegram goes back to the Spanish-American War. In both World Wars, the president was empowered to control all exports to all destinations. Otherwise, with rare exceptions, controls upon exports before 1945 were limited to war materials or to articles exported to countries with which America was at war. Export controls also applied to countries at war with others or to those in which a state of civil strife existed.[14] Though part of Trading with the Enemy legislation, such embargoes did not control "trading with the enemy" as such. The embargo would play an increasing role in foreign policy maneuvers as the twentieth century advanced.

The Second World War brought with it an expansion of many executive powers, and the policies toward interbelligerent trade issued by the Allies reflected that expansion. Britain again led the way with the Trading with the Enemy Act of 1939. This act had two objectives. One was to create and define the criminal offense of trading with the enemy by statute, that offense being "any commercial, financial or other intercourse or dealings with, or for the benefit of an enemy." The second objective was to prevent the payment of monies to the enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace. To this end, a Custodian of Enemy Property was created, the British counterpart to the American Alien Property Custodian.[15]

In another attempt to define "the enemy," the act tested such character by residence rather than by allegiance. The statute also created

another statutory list of enemies and gave power to the Board of Trade to apply the provisions of the act to any area, whether occupied or not.

The case of Vandyke v. Adams (1942) provided an interesting test of statutory policy regarding enemy character. The plaintiff in the case claimed to be entitled to the release of a sum of money deposited in the joint names of himself and the defendant. The defendant was an officer in the army captured in 1940 and detained as a prisoner of war in Germany or German-occupied territory. In January 1942 the plaintiff asked for an Order dispensing with the service of a writ upon the defendant. This request was based on the Rule of Court that authorized a court or judge to dispense with the service of a writ of summons, or a notice of such a writ, on any defendant who was an enemy under the 1939 act. The question was whether the defendant was an enemy under the Trading with the Enemy Act of 1939 or whether he was an individual resident in enemy territory.

The House of Lords held that a soldier in His Majesty's Army who had the misfortune to have been taken prisoner during the war and who was detained as a prisoner in Germany was not an enemy in any sense of the word. Refusing to make an Order to dispense with service of the writ, the Court based its decision on the doctrine that detention by the enemy as prisoner precludes the notion that he can be said to be resident in Germany, as his confinement there is entirely against his will.[16]

As the question of enemy character was resurrected during World War II, so was that of the enemy corporation. Lubrafol Motor Vessel (owners) v. Pamia (owners) (1943) concerned a plaintiff company incorporated in Belgium that had taken proceedings in a collision action for damages made to a ship. The defendant moved the Court to stay all further

proceedings on the ground that the plaintiffs relied on an Order in Council of the Belgian government made in Belgium on February 2, 1940, that enabled Belgian commercial companies, without losing their Belgian nationality, to transfer their head offices to a neutral country.

The plaintiffs contended that they had taken appropriate steps at Pittsburgh to transfer the company's domicile from Antwerp to America. Since the Belgian company transferred its commercial domicile to the United States, the Court held that it was not an enemy, and dismissed the motion to stay proceedings.[17]

Another case decided by the English court upheld the enemy character of a corporation, but also recognized that corporation's right to file suit when acting under an authorized license to trade. In Schering A. G. v. Pharmedica Property Limited (1950), the plaintiff was refused the right to make an injunction to restrain infringement of a trademark by the defendant, as the plaintiff was incorporated in Germany and the defendant in Australia. After amending its claim to reveal that it was operating in Australia under an authorized license, the Court defended the plaintiff's right to maintain action. Plaintiff claimed that it acted under a proclamation issued by the Governor-General on June 1, 1949, under Section 15 of the 1939 Trading with the Enemy Act, exempting from the provisions of the act "trade. . . with or for the benefit of any. . . body of persons carrying on business in Germany, in pursuance of an agreement or contract made or entered into after the date of this license," and by further alleging that it had traded in New South Wales following agreements made since June 1, 1949. Maintaining the plaintiff's right to such action, the Court stated, "It is, of course, clear that where an enemy alien is present in this country by license he is

entitled to sue without having the necessity of obtaining an express license permitting him to sue. . . . The license to trade must, I think, carry with it the right to sue for the purpose of protecting the trade which is licensed."[18] This right was mentioned earlier in a discussion of American statutory policy during World War I.

The potential enemy status of the corporation and the rights provided or denied to that entity also concerned America during World War II. On December 8, 1941, Congress closed a considerable gap in the powers of the president over enemy-controlled corporations through adoption of the First War Powers Act. This legislation amended several sections of the 1917 Trading with the Enemy Act.[19]

The War Powers Act stated that unless authorized by a license expressly referring to this general ruling, no person shall, "directly or indirectly, enter into, carry on, complete, perform, effect, or otherwise engage in, any trade or communication with an enemy national, or any act or transaction which involves, directly or indirectly, any trade or communication with an enemy national."[20] These prohibitions also applied to an enemy national seeking to conduct any acts or transactions with the United States.

The act defined "enemy national" as the government of any country against which the United States had declared war and any agent representing that government or the government of any "blocked" country having its seat within enemy territory. Also included in the definition was any individual in enemy territory except one acting with the armed forces or employed and acting for the government of any United Nations, any person whose name appeared on "The Proclaimed List of Blocked Nationals," or any person acting directly or indirectly for an enemy

national (other than a United States prisoner of war) if such enemy national was within any country against which the United States had declared war.[21]

The list of blocked nationals mentioned in the definition resulted from action taken by Franklin D. Roosevelt. President Roosevelt authorized the Secretary of State on July 17, 1941, to prepare a list of persons acting for or collaborating with Germany or Italy, persons to whom the direct exportation of any article from the United States was deemed detrimental to the interest of national defense. Additions and deletions were made to this list until it was withdrawn in 1946. Upon withdrawal, the accompanying statement warned that some trade restrictions still existed.

> In certain cases, accounts will continue to be blocked by reason of nationality. Similarly, the withdrawal of the Proclaimed List does not imply that all former Proclaimed List nationals are regarded as satisfactory agents for American business. . . . However, the withdrawal of the Proclaimed List does represent an important step in the United States policy of freeing trade from wartime controls as soon as such action becomes possible.22

The practice of blocking or "freezing" foreign accounts began after the invasions of Denmark and Norway. On October 10, 1940, the president by executive order froze the assets in the United States of those countries and their inhabitants. By June 14, 1941, the "freezing" included most of continental Europe, and another executive order provided for the automatic extension of the freeze to such new countries controlled or occupied by any of the existing blocked countries. The freezing orders required reports concerning all European-owned property in the United States to be filed with authorities. Prohibited, except under license, were nearly all types of dispositions of such property. These freezing

orders are again not directly tied to interbelligerent commerce, but are mentioned because they rested on the foundation of the 1917 Trading with the Enemy Act. The act gave the president the power to "investigate, regulate, or prohibit transactions in foreign exchange as well as the export or earmarking of corn, bullion or currency, transfers of credit (except those transactions to be executed wholly within the United States) and transfers of evidences of indebtedness or ownership of property either between the United States and a foreign country, or between residents of foreign countries by any person within the United States."[23]

These freezing orders, the list of blocked nationals, and the term "enemy national" were aimed primarily at nonresident "enemies" who had property in the United States, not at enemy nationals in the narrow sense of the term residing in the United States. These latter nationals could be controlled to some extent, the former could not.[24] The 1941 act also illustrated the importance of corporate trade in World War II and how statutory policy sought to control it. As Marjorie Whiteman stated, "The enemy character of corporations is naturally of importance because of the value of the property they hold. Under Article 2 of the Trading with the Enemy Act, this enemy character was determined by incorporation in the enemy state, and by incorporation outside of the United States, but by doing business in an enemy state. An important third criterion was lacking--that of enemy control, whether through the management or the stockholders."[25]

Two cases reveal how the First War Powers Act closed this gap. Uebersee Finanz-Korporation v. McGrath, Attorney General (1952) again denied a corporation its seized or "vested" property. Uebersee was affected with an "enemy taint," and under the control and domination of

an enemy national. The recovery of its vested property therefore was forbidden.[25] Kaufman v. Societe Internationale (1952) also involved a corporation, this time Swedish, that had its American assets vested on the ground of its control by Germans. The petitioners, American citizens who owned stock in the corporation, moved to protect their claims on the corporation's assets which they alleged would not be pressed by the dominant enemy group. The Supreme Court viewed this claim in a different light. The Court held that under the 1941 Amendment to the Trading with the Enemy Act, the nonenemy character of a foreign corporation, because it was organized in a friendly or neutral nation, no longer conclusively determined that all interests in the corporation must be treated as friendly or neutral. Justice Hugo Black's opinion in Kaufman maintained the following:

> Enemy taint can be found if there are enemy stockholders; even the presence of some nonenemy stockholders does not prevent seizure of all the corporate assets. . . . Our holding is that when the Government seizes the assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. . . . The innocent stockholder may not have a title to corporate assets, but does have an interest which Congress has indicated (Section 2 of Trading with the Enemy) should not be confiscated merely because some others who have like interests are enemies.27

Although strict, the new definition of the enemy corporation did not cause undue hardship to friendly or neutral parties with interests in such a corporation. Two cases that reached the Supreme Court after the war illustrated other considerations that tested the new definitions of enemy character and other facets of the 1941 act.

In Guessefeldt v. McGrath (1952), the plaintiff was a German national who lived in Hawaii from 1896 to 1938. He took his family to Germany for a vacation but was unable to return to America in 1939 because of the

outbreak of war. Guessefeldt was involuntarily detained by German authorities after the United States entered the war, and then detained by the Russians after 1945. After returning to the United States in 1949, he brought action to recover property vested by the Alien Property Custodian.

The Supreme Court held that the plaintiff was not a resident within Germany, so was not an enemy. "Residence within" implied "something more than mere physical presence and something less than domicile. Nor was the plaintiff prevented from recovery by Section 39 of the Trading with the Enemy Act stating that 'no property or interest therein of Germany, Japan, or any national of either such country vested. . . shall be returned.'"[28]

The Court found Section 39 to be of peripheral concern to the case at hand, and stated that the plaintiff fell under the class of friendly aliens protected under the Fifth Amendment requirement of just compensation. Thus, Guessefeldt was seen not to be afflicted with an enemy character, and his property was returned. This decision is reminiscent of the English Vandyke v. Adams, and proved the Court not unreasonably harsh in interpreting enemy residence and character.

The Court proved equally openminded in considering the principle denying the enemy the right to bring action in an American court. On August 17, 1951, the Japanese government brought action in the United States District Court for the Southern District of New York against the Commercial Casualty Insurance Company and the Frederick Mahogany Company. This action resulted from the breach of a contract entered into in April 1949--a contract approved by the Supreme Commander of the Allied Powers. The action was filed after the cessation of hostilities between the United States and Japan but before the peace treaty was signed.

Holding that the Government of Japan could maintain the action on grounds of a treaty of peace, the District Court found the Japanese government recognition to be a political and not a judicial question.

> The basic reason, at common law, for denying access to our courts as plaintiffs to nonresident, alien enemies was that not to do so might give aid and comfort to the enemy. The contract in suit did not give such aid or comfort, it was approved pursuant to the policy of the U.S. government which encouraged its making. It cannot be said that this contract is void as against public policy. This suit could have been maintained at common law; we now consider whether it is prohibited by statute. We conclude that it is not.29

Thus ends the discussion of judicial and statutory attitudes raised during World War II towards trading with the enemy. The Trading with the Enemy and War Powers acts carried restrictions touching upon fields other than actual interbelligerent trade, but fields considered as properly within the scope of trading with the enemy. Now a wholly international affair, warfare carried considerations far more complex than those involved during the Civil War. Statutory and judicial policies paralleled this complexity in seeking to ensure victory and justice during those twentieth-century hostilities.

An examination of developments in enemy trade policies since World War II showed that such considerations did not end in 1945. The onset of the Cold War necessitated interbelligerent trade regulations, as did a violent offshoot of that hostility--the Vietnam War.

In February 1967 a group sponsored by the Quaker Action Group sailed in the Phoenix to deliver medical supplies to the victims of American bombing in North Vietnam. The Department of State refused to validate their passports, stating that it was unlawful to engage in unlicensed transactions with North Vietnam and that the Quaker mission would include furnishing goods or services to that country. Also illegal was sailing

any American documented ship or taking a cargo aboard such a ship if destined for North Vietnam.

Other Americans then applied for a license to send funds to the Canadians Friends Service Committee for their Vietnam aid program. The United States Treasury Department issued this statement on February 27, 1967:

> The Treasury announced today that it is denying all pending requests for licenses to send funds to relief agencies abroad to purchase medical supplies for shipment to North Vietnam. The decision to deny the licenses was made at the recommendation of the Department of State after it ascertained that North Vietnam refuses to permit impartial observers from any relief agency to witness the distribution of the supplies. . . . Under these conditions, there is no assurance that the supplies will in fact be devoted to the nonmilitary purposes intended by the donors, and the United States government does not, therefore, believe it proper to issue further licenses under such circumstances.[31]

United States military involvement in Vietnam has ended, but the trade restrictions continue. In at least one area, the Cold War trade restrictions are creating difficulties. An article in a 1973 issue of San Diego Law Review discusses the growth of multinational corporations and their conflicts with individual nations' trade restrictions. As author Jack Hodges reported, "A subsidiary formed under the laws of a host nation but owned and controlled by a United States corporation can trigger problems of conflicting allegiance."[32]

The United States limits trade with Communist countries by regulations passed under the 1917 Trading with the Enemy Act. Amended in 1933, the act now applies also to any other presidentially declared emergency. The current period of emergency began in 1950 and continues today. Trade embargoes are now administered by the Office of Foreign Assets Control. When Hodges' article was written, the Peoples Republic of China, North Korea, and North Vietnam were all under a complete trade embargo. Four

sets of Foreign Assets Control Regulations have been issued by the Office, and a subparagraph of one set allows the United States to assume jurisdiction over foreign subsidiaries of American multinational corporations irrespective of nationality. Penalties imposed for willful violations of the act are criminal in nature and as defined in the Trading with the Enemy Act constitute up to ten years imprisonment, a $10,000 fine, or both. A second set of regulations limits the trading of strategic commodities to all Communist countries except Cuba and Yugoslavia. In 1970, restrictions were loosened to all countries but the Peoples Republic of China, North Korea, and Tibet. Since 1975, there has been further relaxation of trade restrictions toward the Peoples Republic of China. The 1970 legislation permitted trading to the allowed Communist nations if the shipment were made via certain western countries.

Many European countries have protested the American control over the multinational corporations. One instance of this conflict concerns branches of the Ford Motor Company. The American Ford Motor Company was forbidden in 1973 by United States law to trade with the Peoples Republic of China. The company owned Ford Limited of Canada, a Canadian subsidiary. Under American law, the Detroit-based parent was liable if the Canadian subsidiary traded with Red China. Canada, on the other hand, authorized and encouraged such commerce. As Hodges concluded:

> America must decide if the risk of alienating such allies as Canada, France, and Great Britain is worth depriving such small countries as North Korea, North Vietnam, and Cuba of our trade. If future attempts at control produce greater opposition, if American influence continues to dwindle, if multinational corporations are caught in a bind between conflicting regulations because of American foreign policy, the United States may see not only a loss of allies, but

> a loss of economically vital multinational corporations as well.[33]

Hodges' "small countries" have suddenly loomed large, as America's and the world's eyes are fixed on Iran and Afghanistan. Trade embargoes have resumed their importance as part of the economic sanctions that now play a major role in foreign policy. The purpose here is not to offer a commentary on modern foreign affairs, but to show how concerns over enemy trade have continued to the present day. Trade has always been seen as an area of vital importance during any type of warfare--be it civil, worldwide, or cold war--and the resulting statutory restrictions and judicial condemnations have met with varying degrees of success in stemming illicit trade.

This thesis has examined statutory and judicial rulings concerning interbelligerent trade and briefly mentioned the practical circumstances surrounding such commerce. These circumstances have not been offered as excuses for illicit trade, but to provide a wider context for the discussion of legal theory, statutory laws, and court decisions. Civil War Supreme Court decisions adhered more closely to the tenets of international law than did the provisions when put into practice. But practical circumstances affecting the Court may have occasioned this adherence as much as any respect for international law.

Whatever the reasons, statutory restrictions in later periods of warfare followed the judgments of international law as well, but more successfully prohibited illicit trade in both theory and practice. Perhaps the later trade was easier to regulate than that described as taking place during the Civil War. The Civil War differed from the conflicts described in this chapter because of its nineteenth-century

setting and because of the special nature of civil war.

The enemy status of the Confederacy remained confused throughout the war, and many in the North who did acknowledge the South as enemy were uncertain about the extent of warfare needed. Specifically, many northern politicians--including the Union's president--remained unconvinced that a total interdiction of trade between the sections was necessary. Total prohibition meant great harm to both sections' economies. Few would challenge the idea that most Northerners sought a reunited nation. Destruction of both the southern and northern economies--not to mention international trade relationships--would hardly promote the speedy resurrection of a strong and united America.

This is not to say that all sought some degree of trade merely for the good of the economy. The Civil War was fought on home ground, and individuals outside and within government circles faced both great material deprivation and its converse--frequent opportunities for substantial and sudden wealth. Practicing illicit trade was just one avenue for advancement, but it was a lucrative one indeed.

With the advent of twentieth-century foreign and world war, many considerations important to Civil War leaders became irrelevant. Trade prohibition could be proclaimed with fewer fears of self-deprivation. Economic warfare assumed the status of military warfare, and hostilities included efforts to crush the enemy economy. A war fought on enemy soil brought fewer immediate temptations to transgress trade regulations, and the patriotism engendered by foreign war quite possibly lessened the extent of illicit trade.

The growth of multinational corporations also facilitated the ability of American leaders to control wartime trade. Trade was no

longer exclusively an exchange of goods between two individuals or small businesses. Corporate transactions could be halted by freezing the assets of a nation. The federal government took (and is taking) more action of this type as the twentieth century progressed.

The powers of all three branches of the federal government, and especially those of the executive branch, have expanded considerably since Lincoln's day. Lincoln did not seek rigidly to control interbelligerent commerce, but subsequent wartime presidents did so endeavor. Their attempts to control trade succeeded because these leaders assumed, and were granted, greater discretionary powers. This is an effort to excuse neither Lincoln nor the ineffective congressional controls of wartime trade in the Civil War. Rather, it is an explanation of the considerations that must accompany study of Civil War efforts to deal with interbelligerent trade. The statutory laws and executive decrees issued by both North and South were neither rigidly enforced nor obeyed. No matter how much one reads of the legal principles surrounding the concept of trading with the enemy and the application of those principles, one cannot consider them without some knowledge of the practicalities inherent in a specific conflict and in any period of warfare. Theory and practice are quite often two different things, and this thesis has served to illustrate the importance and the verity of that finding.

Chapter Three Notes

1. A. D. M. McNair and A. D. Watts, The Legal Effects of War (Cambridge, 1966), 357.

2. James Brown Scott, "Status of Enemy Merchant Ships," American Journal of International Law, II (1908), 263-264.

3. Ibid., 268.

4. H. W. Halleck, International Law; or Rules regulating the Intercourse of States in Peace and War (New York, 1861), 504.

5. Ibid., 506.

6. John Colombos, A Treatise on the Law of Prize (London, 1926), 224.

7. L. C. Green, International Law Through the Cases (London, 1970), 558.

8. Colombos, Treatise, 224.

9. Ibid., 225.

10. Samuel Anatole Lourie, "The Trading with the Enemy Act," Michigan Law Review, XLII (October 1943), 205.

11. Marjorie M. Whiteman, ed., Digest of International Law, X (Washington, D.C., 1973), 98-99.

12. T. S. Woolsey, "Editorial Comment: The Custodian Under the Trading with the Enemy Act," American Journal of International Law, XII (January 1918), 148.

13. George A. Finch, "Editorial Comment: The United States and Spanish Civil War," American Journal of International Law, XXXI (January 1937), 74.

14. Whiteman, Digest, XIV, 844.

15. "Decisions of the English Courts Relating to Trading with the Enemy in the Years 1939-1943," The British Yearbook of International Law, XXI (1944), 222-223.

16. Ibid., 229.

17. Ibid., 231.

18. Whiteman, Digest, X, 124-125.

19. Ibid., 104.

20. Ibid., 106.

21. Ibid., 107.

22. Ibid., 114-115.

23. "Foreign Funds Control Through Presidential Freezing Orders," Columbia Law Review, XLI (June 1941), 1050.

24. Whiteman, Digest, X, 108.

25. Ibid.

26. Ibid., 109.

27. The Kaufman decision is quoted in William J. Bishop, Jr., "Judicial Decisions," American Journal of International Law, XLVI (July 1952), 555. The case was decided on April 7, 1952, and its legal citation is 343 US 156.

28. Ibid., 553.

29. Whiteman, Digest, II, 676.

30. Ibid., X, 127-128.

31. Ibid., 128-129.

32. Jack W. Hodges, "The Trading with the Enemy Act of 1917 and Foreign-Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining," San Diego Law Review, XI (November 1973), 207.

33. Ibid., 226.

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