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A new breed of hijackers has evolved as a product of international political strife of recent years. In attempts to escape an actua or self-styled oppressive environment, these political hijackers cause irreparable injury and serious danger to travelers, and complicate the operation of many transportation companies. After sketching the problems involved in providing adequate reparations to the injured passengers and corporations, and in implementing adequate punishment of the offenders, Mr. Reeves examines the question of whether a hijacked ship or plane might be retained by the arrival country rather than returned to its foreign owner. The author concludes that such an act is both diplomatically and legally unwise, and would constitute a provocation little short of an act of war.

I. INTRODUCTION

"Hijacking" is a word which has acquired various meanings. It has referred to the activities of any robber, particularly one whose unlawful acts were practiced upon goods in transit on land. The word has also been used to describe the seizure of a ship as an act of piracy, such as practiced notoriously by lawless persons along the eastern coast of China as recently as a quarter of a century ago. These hijackers would board a vessel as peaceful deck passengers at some convenient port, such as Singapore, and thereafter would temporarily seize control of the ship, rob the passengers and, if possible, unload valuable cargo into waiting junks which took the loot and the hijackers to Bias Bay, their base on the mainland of China.[1]

In contrast, hijacking most recently has been used to describe the dramatic effort of some person or persons to find a way to leave one country—without hindrance or obtaining permission—to enter another country whose laws, political theories, and economic rules are more agreeable to him or them. In this sense, hijacking is not the act of a pirate or a robber, but means the forceful seizure of a ship or

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1. The New York Times recorded an unusual instance of hijacking an airplane for the sole purpose of robbing passengers. N.Y. Times, Nov. 7, 1968, at 3, col. 1.

airplane, causing it to interrupt its scheduled voyage and, usually, by leaving its prescribed course, to enter the territory of another country for purposes other than monetary gain. The most frequent acts of political hijacking in recent years have been by persons desiring to return to Cuba and, though with lesser opportunities, by those desiring to leave Cuba.[2] Similar motivation for hijacking, however, has been found in other parts of the world troubled by ideological, political, and economic differences within a country or with neighboring sovereigns.

The modern hijacker, merely desiring transportation from one country to another, is not concerned that valuable property is thus transferred from one national jurisdiction to another as an incident of his use of armed force. This transfer, however, gives rise to a number of international legal questions in every country where political hijacking has occurred. In considering such questions of political hijacking as a unique manifestation of international political ideological differences, it must be remembered that political hijacking always involves two countries, and, although the country where the successful hijacker finally arrives presumably has done nothing to encourage the hijacking or to condone it after it has occurred, the destination country is not the nation whose interests have been wronged and which has the immediate urge to prosecute the hijacker.

.It should also be recognized that hijacking is a crime against both persons, the passengers and crew whose lives are risked, and property, the plane, ship or cargo wrongfully used and diverted.[3] From the standpoint of the corporate owner of a hijacked vessel, of the passengers, and of the owner of any cargo on board, a great wrong has been committed. In characterizing the act, we may safely say that the transportation company has suffered a costly nuisance. It has been deprived of its property and forced to expend funds. The passengers have been subjected to a justifiable fear for their lives, and have been carried to a foreign country to which they did not wish to go. The cargo owner, if any, has been subjected to delay. How reparations for these losses may be obtained is a troublesome issue, which shall not be discussed at length here. A few lawsuits have been initiated against the airline companies by passengers aboard hijacked

2. Eleven persons came to the United States from Cuba by hijacking a Cuban ship. *See* notes 9 & 10 *infra*. Others have come by hijacking airplanes. *See* N.Y. Times, Feb. 16, 1969, at 4E.

3. For the practical difficulties of measures to prevent hijacking and the danger to airplane passengers opposing a hijacker, see Wall Street Journal, Dec. 9, 1968, at 1, col. 4; TIME, Jan. 31, 1969, at 19.

planes, alleging liability for failure to prevent this dangerous occurrence, although so far the great losses suffered and dangers endured have been *damnum absque injuria.* It might be possible that the United States government itself should share in these losses for its inability to offer effective police measures, somewhat on the same reasoning that under certain circumstances the investment of United States nationals abroad is insured against confiscation.[4]

II. PUNISHMENT OF THE OFFENDERS

High feelings have been engendered in the United States concerning hijacking, and public sentiment has clamored for some method to detect, capture, and punish those who commit acts of hijacking. Since most hijackers could not respond in damages, assuming they could be sued, it is probably especially important to establish a punishment sufficient to deter others from attempting a hijacking. The Constitution of the United States provides:

> The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations; . . . and make Rules concerning Captures on Land and Water.[5]

The question arises, therefore, as to the nature of the crime committed by a political hijacker who returns or is returned to the jurisdiction of the United States, or who has been caught in an unsuccessful attempt, or by persons who conspire with a hijacker and thereafter are found within the United States.

"Piracy" is the word most frequently used to describe the acts of political hijacking, and certainly such hijackings have some resemblance to acts of piracy. Curiously, however, the United States has limited its own definition of piracy to "the crime of piracy, as defined by the law of nations."[6] In the United States, this phrase has long been interpreted to include various elements: robbery, depredations on ships and persons on the high seas, and lack of allegiance to any government. Generally, a pirate is considered an outlaw—*pirata est hostis humani generis*—over whom every country has jurisdiction to punish for the crime of piracy. The political hijacker, however, does not seek to profit from the hijacking other than for transportation to a place of refuge. Thus, he is not a robber,

4. Economic Cooperation Act of 1948, 22 U.S.C. § 2181(b) (1964).

5. U.S. CONST. art. 1, § 8 (the last sentence appears to relate to war powers).

6. "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States shall be imprisoned for life." 18 U.S.C. § 1651 (1964).

and therefore not a pirate by definition, nor is his act always committed on the "high seas."

In 1961, Congress created a new federal crime called "aircraft piracy" and defined it, without reference to the law of nations, as follows:

> (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—
> (A) by death if the verdict of the jury shall so recommend, or in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or
> (B) by imprisonment for not less than twenty years, if the death penalty is not imposed.
> (2) As used in this subsection, the term 'aircraft piracy' means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.[7]

Other sections of this law provide that any crime committed on an aircraft within the special maritime and territorial jurisdiction of the United States is punishable with the same penalty as defined in the various sections of the United States Code relating to federal crimes. Presumably, these other sections would apply whenever a crime was committed aboard an airplane not involving the actual assumption of control of the aircraft in flight.

Efforts at punishment of a successful hijacker (who always arrives in the *other* country), however, is a complex question thrust into intricacies of international relations. Except for wholly fortuitous circumstances, there are only two practical ways in which jurisdiction over him may be obtained for the purpose of prosecution: (1) extradition, from the country to which he fled to the country whose nationals owned the facilities he had diverted,[8] and (2) application of the traditional feature of the law of piracy to political hijackers, declaring them universal criminals punishable by right and duty in any country wherein he may be found.

Several searching questions are here raised. Is the United States willing to hand over to some other country—Cuba is the obvious example—a refugee who, by hijacking a ship or plane, has sought the asylum of the United States? We are apt to welcome such a hijacker who comes our way, while condemning anyone who leaves the United States in such a manner, particularly for a communist nation. To be

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7. Act of Sept. 5, 1961, Pub. L. No. 87-197, § i, 75 Stat. 466, *amending* 72 Stat. 784 (codified in 49 U.S.C. § 1472 (1964)).

8. Extradition of a person accused of a crime by a country where he is not physically present is by treaty between two countries.

workable, international relations must be reciprocal; while we fear to return a political hijacker to face death before a firing squad or long imprisonment, we should remember that our own laws provide the death penalty for one convicted of aircraft piracy. Should the United States adopt the position that, however welcome a refugee may be, hijacking a foreign ship or plane is not the way to accomplish an exit from his own country and entrance into ours? Can a lawful purpose, under our jurisprudence, be accomplished by unpunished criminal acts? Can the United States remain obligated to punish a hijacker for an act not committed against the United States, but against a plane or ship of the country from which he fled? Can we be assured that all nations would really carry out any agreement to punish the political hijacker?

These questions are matters for the Congress, for the State Department, as the treaty-making agency, and for our courts. We should re-examine our laws to determine whether our penalties for political hijacking are effective deterrents which are fair to other countries of the world. Above all, the cooperation of all nations is required in order that the costly and dangerous practice of hijacking for political purposes may be abated.

III. A Case of Hijacking: Who Gets the Ship?

Another troublesome issue is the treatment accorded to the ship or airplane used by a political hijacker to transport himself to the country of refuge. The commonplace diplomatic procedure has been to return the property to the foreign company owning the ship or plane, whose agent, captain, or pilot unwillingly diverted the vessel from its ordered course and thus furnished the desired transportation to the hijacker. Ownership of the ship or plane or its cargo has usually not been a matter of controversy. The arrival country might seek, however, to retain jurisdiction over the ship or plane to satisfy its claims, or claims of its own nationals, against the foreign, probably unfriendly, sovereign from whose country the ship or plane was hijacked. The wisdom, both diplomatically and under international law, of such a procedure requires serious evaluation. The remaining portion of this article is addressed to this issue, using as a basis for discussion the case of the *Bahia de Nipe*.[9]

The Bahia de Nipe and its cargo of sugar became the subject of

9. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

international claims and protest that drew wide attention and occasioned judicial and executive action in the United States. The vessel had been owned by a Cuban-incorporated company and was confiscated in Cuba by the Government of Cuba under the nationalization program of the Castro regime. It was loaded with a cargo of sugar confiscated from the United Fruit Sugar Company, a United States national, and was sailing under orders from the Cuban Government to deliver that cargo to a Soviet port. While on the high seas north of Cuba, the ship was seized by the captain and ten members of the crew, and brought into Hampton Roads, Virginia, where the vessel was surrendered to the United States Coast Guard. The hijackers requested, and received, political asylum.

The sugar company soon obtained a libel with clause of foreign attachment, and demanded that a federal court adjudicate the cargo of sugar to belong to United Fruit Sugar Company. In addition, libels were issued on behalf of several other claimants who demanded satisfaction of their various claims against the ship.[10] After asserting its right to acquire in rem jurisdiction, over objections of the executive branch,[11] the court heard argument as to what disposition it should make of the ship. The attorney for the Republic of Cuba entered the case, claimed title to the ship and its cargo, and demanded release of both. The State Department of the United States asked the release of the ship to Cuba without adjudication of any of the claims adverse to Cuba against the ship or cargo. A communication to the court from the State Department said:

> [T]his is to inform you that the release of this vessel would avoid further disturbance to our international relations in the premises.[12]

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10. The other libelants were (1) two longshoremen, James Rich and Walter Precho, who had recovered judgments against Naviera Vacuba, S.A., and the Republic of Cuba in actions instituted in the United States District Court for the Eastern District of Pennsylvania; (2) The Mayan Lines, S.A., seeking a recovery of a judgment rendered against the Republic of Cuba by a state court in Louisiana; (3) a third libelant asked for a judgment for fuel and necessaries furnished vessels owned by Naviera Vacuba, S.A.; (4) the master and ten defecting crew members claimed wages alleged to be due and unpaid. Also appearing, Naviera Vacuba, S.A., and Republic of Cuba defending against the action claimed as owners of the ship (apparently not adversely).

11. When the United States marshal attempted to effect service of process on the ship, the Coast Guard officer in charge, acting under the authority of the executive branch of the United States, refused to permit him to serve the libel the process through which the court could exercise dispositive dominion over the ship, the res. The court properly refused to countenance this effort at enlargement of the executive authority at the expense of diminution or elimination of its own: "There is no statute expressly authorizing the Executive to effectively destroy the judicial process for, without the ability to serve the court process, the doors of the court may be forever closed." Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 718 (E.D. Va. 1961).

12. *Id.* at 714.

This seemed an insufficient reason for the court to decline to continue its jurisdiction, and the State Department, through the Secretary of State, supplemented its request by a further statement:

> I understand that the Cuban vessel Bahia de Nipe now at Norfolk is owned by the Government of Cuba and is employed in the carriage for the Government of Cuba of a cargo of sugar which is the property of the Government of Cuba.[13]

The court, finally convinced that it had before it a "suggestion of immunity" from the State Department, ordered the ship to be returned to the authority of the Republic of Cuba. This decision was confirmed by the United States Court of Appeals for the Fifth Circuit,[14] and the ship, with a new captain supplied from Cuba, resumed its interrupted voyage.

Thus the case ended, with the issue of ownership of the ship and cargo unsettled. The attorney for the sugar company made the following comment upon his company's claim to the sugar and the action of the United States in granting a suggestion of immunity that permitted removal of the ship and cargo from the jurisdiction of the court:

> My company was involved in one of these cases which received little publicity. The efforts of a brave captain and eleven members of his crew to return stolen property to its owners in the United States was defeated by the intervention of our Department of Justice—even though Castro had not requested the United States Government to act as his champion in the matter.[15]

The district court judge most certainly believed that the cargo belonged to the sugar company. He stated:

> Under our system of laws, the Court would, if permitted to do so, find that the title to the cargo of sugar remains in The United Fruit Sugar Company.[16]

Except for the holding of the district court in *Banco National de Cuba v. Sabbatino*,[17] there was no authority at that time for the proposition that title transfers by a foreign act of state in its own country would be considered invalid in the United States, if confiscatory and contrary to international law. The Supreme Court confirmed the general rule that the United States had always adhered to the act of state doctrine

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13. *Id.*

14. Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (5th Cir. 1961).

15. Folsom, *The Outlook for the Alliance for Progress—1964*, in 8 ABA INTERNATIONAL AND COMPARATIVE LAW SECTION No. 2 at 23 (1964) (an address before the Houston World Trade Association). Ten crew members joined the captain, making eleven in all who defected and seized the ship. As customary, the Department of Justice presented the communication from the Department of State.

16. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 724 (E.D. Va. 1961).

17. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).

when it reversed the district court in *Sabbatino*.[18] Of course, with the passage of the "Sabbatino" or "Hickenlooper" Amendment,[19] United States courts may today find confiscatory acts contrary to international law do not transfer valid title. The purpose of the Amendment is as follows:

> Congress determined that the national interests in the areas of foreign investment and international trade and commerce require the elimination of the act of state doctrine except where the President determines otherwise.[20]

Any Cuban company, such as had originally owned the Bahia de Nipe, will not be protected by the Hickenlooper Amendment, however, and as to such a Cuban-owned Cuban company, Cuban laws must still be recognized as valid even if confiscatory.[21]

On the other hand, the State Department had stated that both the ship and cargo were the property of Cuba, either as a mere assertion without proof, or as a recognition of the validity of Cuba's confiscatory acts to transfer title. In addition, the Fifth Circuit made the following statement:

> The certification and suggestion of immunity, however, which has been made by the State Department in this matter affecting our foreign relations, withdraws it from the sphere of litigation. Especially is this so when the *presence of the ship within the territorial jurisdiction of the court is made possible only by the barratry of the shipmaster.*[22]

The Court of Appeals, in thus characterizing the action of the captain as "barratry," recognized that the captain had acted in bad faith and had committed a crime against the owner of the ship, and indirectly recognized that Cuba was the owner and entitled to possession of the ship.

If "title" was not the basis in the *Bahia De Nipe* case for the judicial release requested, even demanded, by the Executive, are any other reasons to be found why, either on its own motion or at the "suggestion" of the State Department, the court should have released this ship? If the facts are analyzed from a maritime point of view, the issue becomes clear. There has been a forceful seizure on the high seas of a ship and its cargo which can be characterized, using the statement as

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18. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

19. 22 U.S.C. § 2370(e)(2) (1964), *as amended*, (Supp. III, 1965-1967) (originally enacted as Act of Oct. 7, 1964, 78 Stat. 1013).

20. Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 972 (S.D.N.Y. 1965) (district court opinion in *Sabbatino* case after the passage of the "Hickenlooper" Amendment).

21. *See* F. Palicio y Compania, S.A. v. Brush, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd mem.*, 375 F.2d 1011 (2d Cir. 1967).

22. Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (5th Cir. 1961) (emphasis added).

to ownership made by the sugar company's attorney, as a "capture" or "recapture" of goods stolen from a United States national and wrongfully in the possession of another. In the alternative, the act may be characterized as a "reprisal,"[23] the bringing into the United States by force property belonging to Cuba, the actual act of force being committed, however, by a private person who had no actual authority from any government to commit the act. Nevertheless, if the courts had taken advantage of this act on the high seas by continuing to hold jurisdiction and by determining disposition of this vessel on the basis of the claims, such judicial act would have been to condone and thereby ratify the act in hijacking the ship and would have been tantamount to an authorization by the United States Government for the captain and some crew members to have so acted. In this connection, it must be emphasized that the ship and its cargo were in possession of and under the control of a sovereign government, the Republic of Cuba, at the time of the captain's "hijacking."

The question is posed: Has the United States ever permitted or authorized a private person to seize on the high seas property in possession of a foreign sovereign, either as recapture of stolen goods or for payment of, or as reprisal for, an obligation owing to United States nationals? If so, what were the conditions under which such authority was granted, and what disposition was made of the ship?

The Constitution of the United States gives to Congress the power to authorize just such acts by private persons. These persons, when so authorized, are not under the control of any military or civil authority whatsoever, and vessels which they may use for the purpose of recapture of property belonging to United States citizens, or capture of foreign ships as a reprisal, are their own, and their action is entirely on their own responsibility under the authority granted to them. The Constitution states:

> The Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .[24]

The power to issue and grant Letters of Marque and Reprisal has never been exercised except in time of a declared war and by a statute enacted under constitutional authority, specifically granted by Congress to the Executive Department. Such Letters of Marque and Reprisal were issued to numerous private persons during the War of

23. Under United States law, Cuba owed to all United States nationals the value of any property confiscated by the government.

24. U.S. CONST. art. I, § 8, ¶ 11.

1812.[25] What the holder of a Letter of Marque might do, and still be free internationally from the accusation and the penalties of piracy if he should be apprehended by a foreign power, is spelled out with meticulous care in each Letter of Marque. The operative part of a typical Letter of Marque reads as follows:

> to subdue, seize and take any armed or unarmed British vessel, public or private, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, or within the waters of British dominions, and such captured vessel, with her apparel, guns and appurtenances and the goods or effects which shall be found on board the same together with all the British persons and others who shall be found acting on board, to bring within some port of the United States; *and also to retake any vessel, goods and effects of the people of the United States, which may have been captured by any British armed vessel,* in order that proceedings may be had concerning such capture and recapture in due form of law, and as to right and justice shall appertain. The said [John Doe] is further authorized to detain, seize and take all vessels and effects to whomsoever belonging which shall be liable thereto according to the law of nations, and the rights of the United States as a power at war.[26]

During the War of 1812, the individuals applied for and accepted Letters of Marque for various reasons. For some it was pure patriotism—to assist the inconsiderable Navy of the United States at that time. Others, whose livelihood in overseas commerce had been curtailed by the various circumstances growing out of the Napoleonic wars and the United States' efforts—by embargo and non-intercourse acts—to avoid international embroilment, by accepting Letters of Marque, could after war had been declared, seek recoupment of their losses by seizure of British property on the high seas—a sort of rough and ready self-help method of collecting personal indemnity or reparations. Holders of Letters of Marque, subject to certain conditions, were also permitted to keep for themselves the value of enemy ships which they captured, whether or not they had ever suffered losses even remotely attributed to the British. Finally, some who received Letters of Marque were probably mere gentlemen adventurers who sought a profit by acts which, unless authorized by the Government of the United States, would have been considered piracy.

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25. Although various states had issued Letters of Marque and Reprisal during the American Revolution, the issuance of Letters of Marque and Reprisal is forbidden to the states by article III, section 10 of the Constitution. Only the Congress can authorize issuance of Letters of Marque and Reprisal.

26. Letter of Marque and Reprisal from James Madison, President, and James Monroe, Secretary of State, for use in the War of 1812 (emphasis added). It appears that in more ancient times and on the continent of Europe and in time of peace, permission had sometimes been given to a private individual, who claimed he had been damaged by hostile citizens of a neighboring sovereign, to cross the national boundary, or marque, and attempt to seize back

Whenever a ship had been captured by a "privateer," it did not immediately become the property of the captor. As soon as capture had occurred a grim race began by the captor and the captured ship, or perhaps by the captured ship alone in charge of a prize crew, to reach a friendly port. There the captor would submit the captured ship and the evidence of its capture to a friendly court, which would thereupon "condemn" the ship and change its nationality and title.[27] Up until the point of such condemnation, the ship, although captured, remained in point of law a ship of its nationality before capture, and the title remained the same. In fact, some mariners believed that it was proper for a captured ship to fly its own colors until it arrived at the port of condemnation, even if it were in the hands of a prize crew.[28] This custom may not have been so much a courtesy to the country from which the ship had been captured as it was a protection against possible recapture.

In every case, however, condemnation of a ship or cargo by a court of competent jurisdiction over that ship was universally recognized as an act of state which transferred title to that ship and cargo. In fact, it was Justice Marshall, at this early age of our national existence, who began the restrictive definitions of an act of state which exist in the phrase, "executed act of state," continuing until this day. He insisted that unless the condemnation of the ship and cargo was by a fully executed act of state, which could be done only by a court which had actual jurisdiction of the ship and dispositive dominion over it, that the title had not been transferred and the validity of the act need not be recognized. He said:

> The great question to be decided is—was this sentence pronounced by a court of competent jurisdiction?
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> At the threshold of this interesting inquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this:
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> Can this court examine the jurisdiction of a foreign tribunal?[29]

The law of prize as developed in this earlier phase of the history

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goods alleged to have been taken from him, or to seize an equal amount as reprisal or indemnity. Such an action may be characterized as authorized self-help by force of arms.

27. The seizure of a ship was authorized by the Letter of Marque carried. The "condemnation" was the completion of an "act of state." Sequence of an executed act of state of captured enemy ship: (1) National policy announced by declaration of war; (2) authorized execution by the "privateer," holder of the Letter of Marque and Reprisal; (3) judicial confirmation of executive action (a) that seizure was in accordance with national policy and (b) that execution was proper and related to a ship subject to authorized seizure.

28. Mangrove Prize Money Cases, 188 U.S. 720, 721-22 (1903).

29. Rose v. Himley, 8 U.S. (4 Cranch) 241, 268 (1808).

of the United States is still, but with some modification, the law of the United States as a sovereign at war, although no Letters of Marque and Reprisal have been issued by the United States since the War of 1812. Letters of Marque were issued by the Confederate States at the beginning of the Civil War and Southern privateers were moderately successful for a brief period of time. The attitude of other countries in refusing to open their ports to prize vessels, together with the blockade of Southern ports, rendered privateering unprofitable, and as an institution it had ceased to exist long before the end of the war. The North countered the action of the Southern States in issuing such Letters by a Presidential Declaration that any Southern privateer "will be held amenable to the laws of the United States for the prevention and punishment of piracy."[30] Some Southern privateers apparently were captured, tried, and convicted. But the penalties were never carried out.[31]

The law of prize may now be found in the United States Code under the general heading, "Armed Forces," and under the more particular sub-heading of "Navy and Marine Corps." Two brief excerpts will be illustrative of the law of prize and particularly of the two main actions of recapture of goods owned by United States nationals and the seizure of property of citizens of another country.

> This chapter applies to all captures of vessels as prize *during war by authority of the United States or adopted and ratified by the President.* However, this chapter does not affect the right of the Army of the Air Force, while engaged in hostilities, to capture [enemy ships] wherever found and without prize procedure . . . .
>
> (a) If a vessel or other property that has been captured by a force hostile to the United States is recaptured, and the court believes that the property had not been condemned as prize by competent authority before its recapture, the court shall award an appropriate sum as salvage.
>
> (c) If the recaptured property belonged to any person residing within or under the protection of the United States, the court shall restore the property to its owner upon his claim and on payment of such sum as the court may award as salvage, costs, and expenses.[32]

To analogize the seizure at sea of the Bahia de Nipe with the tacit approval of the United States (a conclusion to be drawn if the court had held the ship for adjudication or if the United States had not appeared in court and argued for the release of the ship from

30. J. Soley, *The Blockade and the Cruisers*, in 1 THE NAVY IN THE CIVIL WAR 170 (1898).

31. *Id.*

32. 10 U.S.C. §§ 7651 & 7672 (emphasis added).

jurisdiction) to the capture of a prize and subsequent condemnation may seem unusual, if not fanciful. But the result of the capture of a prize which had on board some cargo previously captured from a United States national and the hoped-for result of the actions in respect to the Bahia de Nipe and its cargo would have been the same. In spite of some differences in nomenclature, both the physical and legal proceedings by which that hoped-for result was to have been obtained would have been surprisingly similar.

In both cases a ship of a foreign owner sailing under the protection of a foreign sovereign whose flag the vessel flies is forcefully seized on the high seas and diverted from its intended course. In the law of prize this is called "capture." The result is the same as "hijacking." This is the first step. The second step in each case is to bring the ship into a friendly jurisdiction and submit the title of ship and cargo to a court for determination. The Bahia de Nipe had on board goods "stolen" from a United States national. The federal court of the United States said that if jurisdiction had been continued it would have restored these goods to their owner. That cargo had not been seized at sea by a hostile "capture" but had been seized on land by a "confiscation" contrary to international law. The effect of "capture" with subsequent "condemnation" and the effect of "confiscation" by a fully executed act of state have the same result; the original owner in each case has been deprived of his goods and the title in them in accordance with the law of the country of the captor or the confiscator.

If the goods on board had not been "condemned" as prize, they remained the property of the original owner. The Hickenlooper Amendment (not in effect at the time of the *Bahia de Nipe* case) directs the courts to recognize that no change of title is effected by a confiscation contrary to international law. The Hickenlooper Amendment, therefore, if applied to the law of prize, merely changed the results of a "capture" and "condemnation" as a "reprisal" (compensation for losses suffered) to a "recapture" of "stolen goods," since the title remained the same regardless of the "confiscation." On arrival of the Bahia de Nipe within United States territory, the ship was libeled, and the libelants wanted a judgment which would only be paid by the sale of the ship (transfer of title) and the division of the proceeds. Thus the result of a capture of a prize which had on board property of a United States national and the hijacking of the Bahia de Nipe (if the court had retained jurisdiction and had found the claims against it and the cargo valid) would have

been the same; the owner in both cases would be deprived of his ship under the judgment of an alien court and the "stolen" goods on board would have been returned to their owner.

The Executive Department of our Government, however, urged the Court not to let this happen, but to decline jurisdiction and return the ship to the Republic of Cuba. Reciprocity is a cardinal principle in international relations. Whatever Cuba may have done in the past—actions universally and heartily condemned within the United States—all airplanes hijacked and flown to Cuba have been returned. Furthermore, there is ample authority that the act of violence, or stealth in lieu of violence, by the captain and ten crew members on the high seas, if authorized or ratified by the United States, would be considered an international delinquency.

First, the United States Government has never permitted a private citizen, in time of peace, to seize by force on the high seas property, even if wrongfully in possession of another, in order that this property might rightfully be returned to the owner. Such capture has been authorized only in time of war.[33]

Second, such action would probably violate the maxim not "to vex the peace of nations." A large portion of the exportable property in Cuba's possession following the confiscation decrees had been owned by nationals of the United States. An official condonation of the hijacking of the Bahia de Nipe would encourage others to seek methods of taking from the possession of Cuba other property, which under United States law is considered to still be owned by United States nationals, and to attempt to return it to the United States. Furthermore, the effect of transfer of title by confiscation is recognized as valid under both United States and Cuban law as to property of Cuban corporations owned by Cuban nationals, none of whom can invoke international law as to acts of their own government. A ratification of the seizure procedure would become an international wrongful act. Also, since Cuban law recognized the validity of the confiscation of the cargo any efforts by private citizens to reach such property on a vessel owned by the sovereign state of Cuba, would undoubtedly have caused Cuba to use counter force or to institute "reprisal," and thus certainly "vex the peace of nations." Finally, it must be noted that

33. "In the consideration of that question we assume that 'capture' and 'prize' are not convertible . . . .

. . . .

Ordinarily the property must be brought in for adjudication as the question is one of title which does not vest until condemnation . . . ." The Manila Prize Cases, 188 U.S. 254, 259-60 (1903).

Cuba is still a "friendly" country in the sense that its government is recognized by the United States as the de jure Government of Cuba.[34] Clearly, therefore, even indirect authorization by the United States to hijack Cuban ships and bring their cargo to the United States would encourage a foreigner to act against his own government and its laws.

Third, it is unclear that the United States could authorize a foreigner, in time of peace or war, to serve as an agent in the seizure of a foreign ship. An incident during World War II is illustrative of the problem. A Dutch ship was transporting a cargo of coal to Japan when the wireless reported that the Netherlands had declared war on Japan. The Dutch master then returned the ship to a United States port, where the Chinese crew sought a declaration that the ship's cargo was prize and that they could be paid out of the proceeds of the sale of the coal. A United States Court rejected this plea, stating:

> There is no proof in this case that any government, either Dutch, Chinese or American, has authorized or ratified any capture of this cargo as a prize of war. In the absence of statute I see no legal basis for American authorization or ratification of such capture by Chinese or non-American captors.[35]

Fourth, ratification of such seizures might be unwise in light of the dictum of the Court of Aden concerning the status of hijacking in the famous case of *The Rose Mary (Anglo-Iranian Oil Co. v. Jaffrate)*.[36] The Rose Mary, loaded with oil purchased from the Iranian Government which had confiscated the oil properties of the Anglo-Iranian Oil Company, was on a voyage to Bari, Italy. During the voyage, the ship's Master received conflicting orders from the charterer and owner—one to continue his voyage and another to put in at the port of Aden, then a protectorate of Great Britain. Off the coast of Aden, the ship was met by a tug with a representative of the ship's owner aboard who demanded that the captain disobey his orders to continue to Italy and, contrary to the interest of the purchaser of the oil, to enter the port of Aden. An airplane of the Government of Aden circled the ship, and the captain put into Aden where the oil was immediately claimed by the Anglo-Iranian Oil Company. The captain of the ship protested the jurisdiction of the court in which the claim by the Anglo-Iranian Oil Company had been made. The captain stated that the court had no

34. Jan. 7, 1959, recognition by the United States. 40 DEP'T STATE BULL. 128 (1959). This recognition has not been withdrawn although our diplomatic representatives have been called home. Diplomatic contact is carried on for the United States by a foreign government still maintaining an embassy in Cuba.

35. Ling v. 1,689 Tons of Coal, 78 F. Supp. 57, 62 (W.D. Wash. 1942).

36. Sup. Ct., Aden, Jan. 9, 1953, [1953] 1 W.L.R. 246, [1953] INT'L L. REP. 316.

power to take possession of the ship and cargo on the ground that he had been *forced* to enter Aden. He considered himself "hijacked" and feared he would be bombed if he did not comply with the demand to enter Aden. But the Aden judge rejected his plea and assumed jurisdiction over the Rose Mary and its cargo:

> As to his fear of the aeroplane, it seems to me very unlikely that this really existed. No reasonable man could think it likely that Her Majesty's Government in the year 1952 would try to resolve a commercial dispute by what would be little short of an act of war.[37]

The judge also held that the title to the oil had not been transferred by the confiscatory acts of Iran, since those acts were contrary to international law. No answer was ever given to the obvious questions of who wanted the ship to enter Aden, and why.[38]

Fifth, international self-help was disapproved by the United States Supreme Court in *Sabbatino*. For example, there were elements of self-help which the Court condemned in that case:

> Although that rule [against an enforcement of foreign penal and revenue laws] presumes invalidity in the forum whereas the act of state principle presumes the contrary, the doctrines have a common rationale, a rationale that negates the wisdom of discarding the act of state rule when the plaintiff is a state which is not seeking enforcement of a public act.
> Certainly the distinction proposed would sanction self-help remedies, something hardly conducive to a peaceful international order.[39]

Indeed, hijacking a foreign ship on the high seas seems a very great manifestation of international self-help, more than suggested by the factual situation in the *Sabbatino* case.

Our conclusion must be, therefore, that the "suggestion" of the executive branch of our government that the court relinquish its jurisdiction over the Bahia de Nipe and the court's acquiescence prevented the United States from committing a provocative act little short of an act of war against Cuba.

Beyond all of these technical considerations of jurisdiction, it should be remembered that judicial abstention, too, is a judicial

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37. [1953] INT'L L. REP. 316, 319-20.

38. In a later English case, the judges indicated that the Aden judge misinterpreted the cases on which he relied. *In Re* Helbert Wagg & Co., (1956) Ch. 323, [1956] 1 W.L.R. 183. The Anglo-Iranian Oil Company challenged other oil shipments which reached Italy and Japan, but in these cases its efforts to secure a judgment that it had title to the oil were unsuccessful. See Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., Civ. Ct. Rome, Sept. 13, 1954, [1955] 11 Foro Italiano 1. 256, [1955] INT'L L. REP. 23 (It.); Anglo-Iranian Oil Co. v. Indemitsu Kosan Kabuski Kaisha, Dist. Ct., Tokyo, [1953] INT'L L. REP. 305, *aff'd*, High Ct., Tokyo, [1953] INT'L L. REP. 312 (Japan).

39. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 437-38 (1964).

function. Cogent reasons may exist why a court should not attempt to decide the legal rights of the parties before it, or the disposition of a res, although legally entitled to do so. A hundred and fifty years ago, a United States Government attorney argued successfully before the Supreme Court of the United States that the Court should decline jurisdiction and not adjudicate the private claims made against a ship claimed by a foreign sovereign:

> It is beautiful in theory, to exclaim "*fiat justitia, ruat coelum*," [let justice be done, though the heavens fall] but justice is to be administered with a due regard for the law of nations, and to the rights of other sovereigns.[40]

If we consider national jurisdiction as broad as national power, it is clear that the courts of the United States had jurisdiction over the Bahia de Nipe and its cargo. But the question of the propriety of exercising jurisdiction cannot be disposed of simply by reference to geographical position of a res. If history teaches us anything, it is that nations may not use unlimited power over persons and things within their national jurisdiction and remain at peace with their neighbors. In these tempestuous times, no wise nation would exercise power without recognition of the self-imposed limitations on such use by the nation's position in the world and by presently existing international relations.

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40. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 123 (1812).