

GEORGE

I teach admiralty now just as a one week course in the January term. And I do it not out of any felt necessity, but because I like it. The cases are somewhat exotic, concerned with issues like treasure salvage and piracy. They also go deep into the history of the United States when maritime commerce was one of the first areas in which we had developing federal law, not to mention judicial decisions, which I'll talk about in a moment.

RUTHERGLEN:

I also think that in admiralty we have these statutes with the best titles. My favorite is the Death on the High Seas Act, which itself has developed a logic of its own extending quite surprisingly from deaths on the high seas themselves to aviation accidents that occur outside the boundaries of the United States.

Now, admiralty law had a significant revival in the middle of the 20th century, first by decisions of the Supreme Court, and then second by the efforts of a couple of Yale Law professors, Charlie Black and Grant Gilmore, to offer a systematic treatment of the subject in their treatise. Since then it has diminished in popularity, partly because much of admiralty is now handled through arbitration. The great wave of reliance upon arbitration, particularly in international transactions, really got its start in an admiralty case, *Vimar Seguros against the Motor Vessel Sky Reefer*, which concerned arbitration of a claim over damage to a cargo of fruit.

But just to illustrate why I find the subject fascinating is where else are you going to find a case named the *Sky Reefer*? But we have many more examples along those lines. As admiralty has become itself something of an esoteric specialty, its relevance as a source of comparative law looking at how other land-based sources of law compare to the distinctive doctrines developed in admiralty sheds light on both. So that it is a little bit like studying foreign law and comparing it to otherwise applicable American law.

It is probably true that most scholars in admiralty suffer over the anxiety of influence or, more precisely, the anxiety of lack of influence in a subject that no longer attracts people as vigorously as it did in the past. They want to discuss admiralty as a case study in looking at a different system of laws, a different system of jurisdiction. I don't share that anxiety over influence. I think the subject is fascinating in its own right. But I am not leading any charge to have the course made one of the requirements for a JD degree here at the University of Virginia.

So I got the idea for this talk as I taught my course in international civil litigation this semester. And I kept coming upon admiralty cases, some which we discussed in class, but others which were prominently cited in the opinions. So I'll give you an example of several of these cases, which are leading decisions of the Supreme Court.

One is *The Republic of Argentina against Amerada Hess*, which concerns the scope of the Foreign Sovereign Immunities Act. Amerada Hess sued the Republic of Argentina. Why? Because the Argentine Air Force bombed one of their tankers during the Falklands Malvinas War, notwithstanding the fact that the tanker was hundreds of miles away from the zone of conflict.

And somewhat ironically, the tanker had notified the Argentinian Air Force. Here we are. We're far away from the Falkland Malvinas Islands.

Please leave us alone. Evidently, that was too much for the Argentine Air Force. I've already mentioned the *Sky Reefer*, a leading case on the act-of-state doctrine, as it took on its present form in American law.

Banco Nacional de Sabbatino concerned an expropriation of a shipment of sugar that was going from Cuba, which had recently gone through a revolution under Fidel Castro. And the question was whether the American owners of the sugar could get just compensation for its taking by the government of Cuba. The immediate holding in *Sabbatino* was that they could not.

The expropriation was a sovereign act of the Cuban Republic undertaken within its own boundaries. That elicited a chain reaction of legislation and subsequent judicial decisions, which effectively reversed *Sabbatino* on its own facts. But it started out as an admiralty case. Sugar was just sitting in a vessel waiting to be shipped over to Africa. And the key fact in the case, as the Supreme Court decided it was, the expropriation took place while the vessel was in Cuban waters, not when it was out on the high seas.

Another case which sometimes appears in courses in civil procedure is the *Bremen against Zapata Off-Shore*, which concerns the force and effect of forum selection clauses in commercial contracts. That case involved towing an oil rig from the vicinity of Texas to the Adriatic Sea. The oil rig was damaged in a storm in the Gulf of Mexico.

And then claims were brought, claims by the towage company to get their money back, claims

by the owner of the oil rig to recover for damage to the rig. And the question was whether that litigation could go forward in Florida, where the little flotilla took refuge, or whether it had to go forward in London. The *Bremen* now stands for the proposition that foreign selection clauses are routinely enforced in commercial contracts.

Now, these are just a handful of cases. But what is still more surprising to me is the basic principles of international law that appear in early admiralty cases mainly decided by the Marshall Court, which shows how far back admiralty law goes. And here, again, you just have to admire the case names.

So if you've taken international law, perhaps you are familiar with the canon of construction of federal statutes derived from the case called *The Charming Betsey*. *The Charming Betsey*, was a vessel which formerly had been a French warship and had been seized and was held by an admiralty court. The holding in the case is that, as a matter of international law, this seizure of a foreign warship violated the relations between nations. And therefore, we should interpret American law, so that the vessel can be freed.

The canon of construction that comes from *The Charming Betsey*, perhaps you've heard it. An act of Congress ought never to be construed to violate the law of nations if any other permissible construction remains. I am particularly fond of this principle, but it's often contrasted with other principles which are also derived from admiralty cases.

So *The Paquete Habana* was a case that arose from seizure of fishing vessels in Cuban territorial waters during the Spanish-American Civil War. The question was whether those vessels could be seized pursuant to the blockade imposed by the American Navy on Cuba. The answer was no.

And the principle in *The Paquete Habana* which is often widely quoted in human rights litigation is that international law is our law. I think this is taken often out of context, because just as in *The Charming Betsey*, the Supreme Court in *Paquete Habana* followed international law in order to restrain the assertion of American power, to restrict the force of an American blockade. And then the foundation of the law of sovereign immunity preventing suits against foreign sovereigns and their instrumentalities comes from another early admiralty case called *The Schooner Exchange*.

Now, the influence of admiralty law does not really stop there. A look at the Constitution, which always reminds one of exactly how complicated a document it is, reveals three or four clauses

that are particularly concerned with admiralty. First, there's the power of Congress to confer admiralty and maritime jurisdiction. It's found in Article III, Section 2 of the Constitution.

Then somewhat anachronistically, there's the power of Congress to grant letters of marque and reprisal. You might well ask what those are. They convert a pirate into a lawful agent of the United States government.

I actually have a copy of a letter of marque and reprisal signed by President Madison and then Secretary of State Monroe during the War of 1812. And that's found in Article I Section 8, the general provision in the Constitution granting broad legislative powers to Congress. Another provision in the same section, which also illustrates what I would call the poetry of admiralty law, is the power of Congress to define and punish piracies and felonies committed on the high seas.

Now, these judicial decisions, these constitutional provisions, reflect the fact that maritime commerce was really the first area in which federal law exercised a dominant influence. Legislation under the Commerce Clause, which we are now familiar with from massive programs enacted during the 20th century, came quite a bit later. In the early days of the republic, the commerce that was subject to federal regulation was commerce by water.

By the 1850s, the Supreme Court had extended federal regulation of commerce by water to the inland waterways, so that the principle regulation of interstate commerce was not by enacted federal legislation. It was by federal judges applying nationally and internationally uniform maritime law. Now, this point about the historical origins of admiralty law in a burgeoning area of commerce is I think one that is of general significance.

Not to assume a completely Marxist approach to the genesis of law, but is an illustration of how law concerned with material goods, commerce by water, can involve simply because of the value of this commerce. People invest in interstate and international commerce, because it creates great gains from trade, because it triggers important issues of sovereignty concerning control over trading routes. And therefore, the law has to adjust to it.

Now, this lesson I think, you know, carries over to the law today. Uniform maritime law began in classical times with the law of the Island of Rhodes, the Rhodian law which governs commerce by water. And then it extended in the Middle Ages to various laws that were widely adopted among seafaring nations, such as the French laws of Oléron.

These, for instance, created the maritime law of general average, which allows the loss of cargo sacrificed in order to save a vessel to be apportioned among everyone participating in the maritime venture, other cargo interests, the owner of the vessel. And then with the growth of maritime commerce in the modern era starting in the 15th century, these laws became very widely accepted, and decisions of courts in different nations came to be increasingly uniform. So for instance, the High Court of Admiralty in England was not a common law court, did not follow the indigenous English common law, instead drew principles of civil law which were widely accepted on the continent of Europe.

And this fostered a degree of uniformity in the European law of maritime commerce that carried over to this country in the colonial era through colonial courts of vice admiralty. Here, again, you just have to admire the literal and symbolic importance of maritime law. So the power of the English Court of Admiralty was symbolized by a silver ore that was put on the bench, which showed that the court was acting with the power of the Office of Admiralty behind it.

And that carried over to the United States. In fact, there is a silver ore in New York, which was lost for many years after the War of 1812 when the British invaded New York City. It was discovered in the 1960s among the heirs of the clerk of court.

[LAUGHTER]

And it was returned to the federal court for the Southern District of New York in a procession in which all the admiralty lawyers there willingly participated. So actually, my own interest in admiralty started when I was taking a course in federal courts and the professor referred to putting the silver ore on the bench. And being an enterprising law student, I said, what is that? And he explained it to me. And here I am now talking about it.

[LAUGHTER]

Well, this historical emphasis on creating a uniform law of commerce primarily through judicial decisions that draw upon uniform law accepted in other countries I think is a very valuable lesson for the development of international law today. So the first lesson is that we start with a law regulating commerce. And then we move on to the law regulating human rights.

And this development was apparent in the very early 19th century where because of English reformers seeking to abolish the slave trade, the Royal Navy engaged in a campaign to shut

down the slave trade from Africa to the New World. And this gradually gained acceptance from all the nations in the Atlantic world at that time. In our country, by another provision in the Constitution, Congress was forbidden from regulating the import of slaves to the United States before 1808.

But on January 1, 1808, President Jefferson of all people signed a law that specifically prohibited the importation of slaves into this country. What is less often noticed is that even before 1808 Congress passed many statutes prohibiting the slave trade between other destinations, between foreign countries, defining the slave trade as an act of piracy, which could then trigger not just seizure by the American Navy, but also claims in admiralty in this country. Now, there was some controversy about those statutes, but it shows how a system of law designed to protect shipping, the law of piracy, could be used to protect human rights to prohibit slave trade.

And it was, really courtesy of the Royal Navy, very effective. Of course, that didn't solve the grievous problems that our country encountered with slavery. But it started the international movement towards abolition that culminated in this country and the ratification of the 13th Amendment just after the end of the Civil War.

Now, in a recent opinion, Justice Breyer has examined the law of human rights. And he has argued for a gradual, but significant, extension of human rights claims in federal law by analogy to piracy. Or as he says, who are the pirates of today?

So just as maritime law tried to address human rights violations in the early 19th century right at the dawn of the American republic, so, too, the analogy to piracy is regularly invoked at the beginning of the 21st century as an example of a successful attempt through international law, through judge made mechanisms for enforcement, to expand the scope of human rights. Regrettably, just as piracy has assumed a presence as an analogy, it's also reasserted its presence as a real threat to maritime shipping in various locations in the world-- in the Arabian Sea, in the Indonesian archipelago, off the west coast of Africa. So we have not yet seen the end of piracy.

Now, what can we learn from this success, such as it has been of admiralty law in bringing remedies to bear upon wrongs that occur outside the boundaries of this country? Well, first, it takes a long time. So maritime law stretches back over centuries, if not over millennia, to classical times.

And it's only with the gradual appreciation of the self-interest of all seafaring nations in having uniform laws and similar remedies that maritime law has grown to be as vigorous as it is. Second, it hasn't evolved by simply taking a moral stand. The example of piracy, I think, is very instructive. Instead, the lives developed in certain well-defined categorical areas where it's possible to identify the wrong with some precision and to develop feasible remedies, such as in the case of piracy-- seizing the ships, freeing the slaves.

And another lesson is that federal judges have taken an active role in developing admiralty law. And this has been largely successful. So it is an example of where innovation in the judicial branch can move the law forward.

Now, judges don't do it by themselves. Congress had to grant admiralty jurisdiction to the federal courts. And Congress has, from time to time, passed legislation which in the 20th century, became increasingly comprehensive. But that still left judges with an important role in statutory interpretation.

Likewise, the executive branch has participated in the negotiation of a variety of treaties such as the convention on salvage and saving lives at sea. That might appear to be minor. But at least in my lifetime, it has been an important feature in trying to rescue refugees who try to flee their home country by water. And we see this playing out, even as I speak, in the Mediterranean Sea.

But also there's comprehensive legislation like the Law of the Sea Treaty, UNCLOS. The United States has not ratified the Law of Sea Treaty, but the United States does recognize the treaty in large part as defining current issues of customary international law-- for instance, with respect to maritime boundaries, the right to exploit maritime resources. And as you know, there are all kinds of disputes around the world about where maritime boundaries are to be marked out, most notably in the South China Sea.

But not to be entirely accusatory, we also have disputes with that aggressive and belligerent nation to our north, Canada, which has staked claims to the Northwest Passage, which with global warming increasingly has become an avenue of commerce. All those issues are addressed in the Law of the Sea Treaty and by established principles of maritime law. And it shows that with the cooperation of Congress and the executive branch, courts can impose a degree of progress and uniformity on activities that otherwise would go wholly unregulated.

So I think it's a pervasive, prominent, and also a promising analogy for the development of international law. I'm happy to take your questions. I'm glad you left some food for me. Yes.

INTERVIEWER 1: So I know virtually nothing about admiralty law. But in its application to commerce broadly defined that isn't within borders, is admiralty law being used in space?

GEORGE RUTHERGLEN: I see someone has a NASA shirt. People have made that proposal. And there is a treaty, which actually tries to regulate claims to territory on extraterrestrial objects-- moons, asteroids, planets. And I believe, although I'm not certain of this, there is a treaty that also tries to regulate the accumulation of objects that are in Earth orbit.

So you can make the analogy. I think the analogy is promising, because admiralty law grew up out of the need to regulate actions on the high seas, which are defined as seas outside the borders of any nation. And same problem can arise with respect to outer space. Yes.

INTERVIEWER 2: Kind of similar to that, I know absolutely nothing about admiralty law. But when I hear the term piracy and privateering, it kind of makes me think of, like, cyber operations and when you have non-state actors hacking state actors, et cetera. It's not really clear who it is or where it's taking place. Is the admiralty a good analogy or possible use case for cybercrime and cyber interactions?

GEORGE RUTHERGLEN: Well, I think piracy in that sense, you know, developed in the law of copyright as, you know, it became technologically much simpler to copy movies. So I mean, it's possible to think of that as some form of piracy that occurs on the high seas. I don't think the example is actually going to work all that well, because everything that happens on the internet has some kind of land based connection.

So the servers and the users can be physically identified. But it's possible. If you think the issues through, I mean, you might say, well, there's an analogy to piracy, because-- in a phrase that's used in the law of piracy-- they are enemies of all mankind. So you could say that people who engage in cyber sabotage and copying are enemies of all mankind. Therefore, we can have universal jurisdiction in the courts of any nation to bring it to a stop.

INTERVIEWER 2: And I think-- follow up to the really quick, sorry. Like, when you're talking about the marque of reprisal kind of turning a pirate into a privateer and saying now you can attack this other nation for whatever--

GEORGE Yes.

RUTHERGLEN:

INTERVIEWER 2: --with the blessing of the Royal Navy, theoretically if a nation was saying, this group of hackers or whatever, actually now you're helping country A. So you're like a privateer now. And you're attacking these things. Would that analogy kind of spread to that as well?

GEORGE Let's hope it doesn't.

RUTHERGLEN:

[LAUGHTER]

Let's hope it doesn't. I don't think privateering was a great success as a sort of policy initiative. All you have to do is talk to the Spanish about Sir Francis Drake. Their view is that he was not a privateer, and he was a pirate. Yes.

INTERVIEWER 3: Why hasn't the US ratified the treaty of the Law of the Sea? And I mean, does that come down to its application to a territorial dispute with Canada or [INAUDIBLE] a signatory?

GEORGE No. We are signatory. Well, first, in order to get full ratification in the United States, you need
RUTHERGLEN: the president to sign it and 2/3 of the Senate to go along. So it's very hard to push through approval by two to one majorities in the Senate.

But the proximate dispute, which has prevented ratification of the Law of the Sea treaty had to do with the possibilities for undersea mining on the high seas. And United States commercial interests held out for freedom to engage in undersea mining. I don't think it's come to fruition. But it was thought in 1978 to be an important area of possible investment and innovation. So that was the principal objection.

By and large, the United States follows the Law of the Sea treaty. For instance, it allowed nations to assert territorial boundaries that go out 12 nautical miles from shore. President Reagan, who did not at all push for ratification of the Law of the Sea treaty, did issue a declaration on our national boundaries now go out 12 nautical miles in conformity with the Law of the Sea treaty. And as I said, it's pretty widely accepted among American commentators that it is a kind of restatement of international law concerned with maritime matters apart from undersea mining on the high seas.

INTERVIEWER 3: So is that really the only provision that we don't accept as customary international law at this point?

GEORGE

I believe so. But my colleague John Norton Moore helped negotiate the treaty. So he knows

RUTHERGLEN:

everything about it. But I think that was the principal objection.

Certainly, that's the way it was presented at the time. Well, thank you for coming to this event.

I hope to see you in admiralty.

[APPLAUSE]