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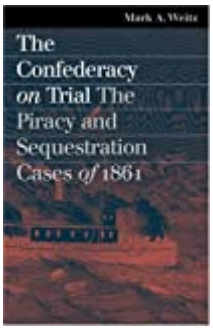

Mark A. Weitz. *The Confederacy on Trial: The Piracy and Sequestration Cases of 1861.* Lawrence: University Press of Kansas, 2005. xi + 219 pp. $35.00 (cloth), ISBN 978-0-7006-1385-4; $15.95 (paper), ISBN 978-0-7006-1386-1.

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Mission Impossible: Define the Confederacy

By any measure, the Civil War was a constitutional mess. It raised the prickly problem of the ultimate location of sovereignty and it tested the proposition that states had the inherent right to withdraw from the federal union. These were riddles for which there had been no definitive solution in antebellum America, but the secession crisis of 1860-61 forced contemporaries to confront them. No problem was more immediate than how to treat the newly formed Confederacy of southern states. Was the government a legitimate entity? For northerners determined to keep the Union together, a negative answer was essential to the future of democracy. For southerners, doggedly striving to protect slavery, the international recognition of the Confederacy was imperative in its bid for survival.

In *The Confederacy on Trial*, Mark A. Weitz suggests that we look for these answers in the more immediate aftermath of secession. Focusing on several hitherto neglected piracy and sequestration cases in 1861, he reconstructs how contemporaries defined the Confederacy in the courtroom. He makes the case for the importance of these trials: "Unlike the post-Civil War cases that passed judgment on the Confederacy as a failed rebellion, the piracy and the sequestration cases addressed the Confederacy as a viable entity" (p. 13). It is in those first early struggles, argues Weitz, that we can truly tease out a definition of the Confederacy.

The first conflicts that led to these trials came about because Jefferson Davis was forced to rely on civilians to combat northern naval supremacy. The Confederacy issued letters of marque to merchant ships, giving them the authority to arm themselves and capture Union vessels. Weitz gives a good background discussion of the origin of privateering, including the United States's decision not to join in the 1856 Declaration of Paris, an international agreement to ban the practice. Southerners rallied to the call, and several Confederate ships received letters of marque and began harassing Union shipping in 1861.

The CSS *Savannah* was the first such Confederate ship to set sail. It captured one prize and was then itself caught, its crew taken prisoner and thrown in the Tombs of New York City. The second ship captured by the Union navy was the *Enchantress*, itself a prize of the

CSS *Jeff Davis*. Among the fatal mistakes made by the captain of the *Jeff Davis* was the decision to take, as a prize, the free black cook on board the *Enchantress* in order to put him on the auction block in Charleston. The cook jumped overboard when in range of a Union vessel and alerted it to the Confederate crew piloting the *Enchantress*. The prize was reclaimed and the crew jailed in Philadelphia.

How important were these events? Weitz argues that licensing privateers represented more than just the necessity to float a navy, but was also "the first tangible manifestation of Confederate nationalism in a structural sense" (p. 34). He means, I believe, that the action itself had a symbolic value that affirmed the real existence of the Confederacy. Weitz's evidence indicates as well why this makeshift private fleet was no match in the long run for a professional navy. Thanks to the 1856 Declaration of Paris outlawing privateering as well as the reluctance of European nations to recognize the Confederacy as a sovereign nation, European ports were closed to Confederate prizes. Even the return to southern ports proved risky, as the short-lived journey of the *Enchantress* demonstrated. The profit motive also worked against the Confederacy, as privateers left many potential prizes unmolested because they were not worth the powder and shot. These factors stultified their obvious successes, many of which have been mythologized. Perhaps the fate of the *Jeff Davis* serves as a fitting metaphor for Confederate privateers. It captured many prizes and was the pride of the South. But in the end it ran aground trying to enter the port at St. Augustine, Florida and had to be abandoned on the shoals.

In 1861, the Confederacy girded the homefront for war. On August 8, the Confederate Congress passed the Alien Enemies Act allowing for the jailing and removal of any southerner still claiming U.S. citizenship. On August 30, the Confederacy passed the Sequestration Act in retaliation for the Confiscation Act passed by the U.S. Congress. It was a sweeping measure targeting personal and real property of alien enemies. The law commanded southerners to report any alien property and, if they were in possession of it, to turn it over to Confederate authorities. This duty also fell upon attorneys, who in section 3 of the statute were admonished to give a full accounting of alien enemy property and deliver it to the government. Refusal carried stiff civil and criminal penalties.

Weitz gives a valuable and detailed account of the Confederacy's administrative machinery. We may dismiss as an overstatement Wetiz's claim that "no one escaped Confederate efforts to purge the land of alien enemies" (p. 38) without discarding the excellent evidence he provides of extensive enforcement both of the Alien Enemies Act and the Sequestration Act. Rich and poor alike were swept up in seizures, although the Southwest Telegraph Company's ability to fend off authorities indicated that the Confederacy's powers could be crimped. The seizures, nonetheless, were capricious. Caught up in the drive to sequester alien property were debts in the form of promissory notes, often used as a form of currency in antebellum America. Promissory notes recorded a debt between two people, but often the creditor would assign the debt to a third party to pay for goods or services. This could be reassigned again and again. The Sequestration Act, however, looked no further than the immediate creditor (who was often a northerner) even if a southerner or a non-enemy alien legitimately held the debt. No matter. The debts were seized and liquidated.

These two actions by the Confederacy–the licensing of privateers and the sequestration of alien enemies' property–prompted three separate but near-simultaneous trials. While each engaged its own legal questions, they all had to struggle with a fundamental question: what was the Confederacy? Was it an illegal and treasonous rebellion? Was it a nation-state of its own or at least an entity with belligerent rights? To answer these questions, Weitz weaves together narratives of these three trials. While this makes for a sometimes disjointed presentation, it has the benefit of highlighting some of the particulars of procedure, whether the law of evidence, the process of demurrer, or the importance of jury instructions in criminal cases. Weitz's attention to the mechanics of law elucidates the context that produced some of the first coherent statements about the existence and nature of the Confederacy.

The civil challenge to the Sequestration Act came from leading members of the South Carolina bar. The case turned on a demurrer when lead attorney James Louis Petigru challenged the writs of garnishment issued by Confederate district courts. It violated the Constitution's prohibition on general writs, he argued, and since this was not a power delegated by the Confederate Constitution, the government could not claim it. By logical extension, if the writs of garnishment were unconstitutional, then the law lacked any legitimate means of enforcement and was thus null and void.

The presiding judge, Andrew Gordon Magrath, set a full trial for the demurrer, and every attorney in the trial argued before the bench. Weitz reconstructs the argu-

ments precisely and clearly, although he hints that the challenge to the law was doomed at the start. Magrath had been a federal judge before secession, but on the day after Lincoln's election "dramatically tore off his judicial robes and closed his court 'before its altar has been desecrated with sacrifices to tyranny' " (p. 65). Public opinion (sharply opposed to the Sequestration Act) and the strength of the defendants' argument notwithstanding, Magrath issued the opinion everyone expected him to–he declared that the Sequestration Act was in line with the constitutional powers (and responsibilities) of the Confederacy and that it was not the job of the courts to inquire into matters of policy.

Meanwhile, the Confederate privateers awaited trial in Philadelphia and New York. Of course, much more was at stake than in the Charleston trial. Failure likely meant a trip to the gallows. To combat this, defense lawyers argued that their clients had been soldiers-at-war rather than pirates. Both courts proved reluctant to allow into evidence the documents necessary to establish such a claim. To authenticate it, Algernon Sullivan, one of the defense lawyers for the crew of the *Savannah*, requested documents from the state of Virginia proving the fact of secession. This landed him in prison by special order of the secretary of state, William Seward. He would be released several days before the trial only after swearing an oath of loyalty to the United States and promising not to engage in treasonous correspondence.

Weitz does not pursue this fascinating digression any further, perhaps because it proved inconsequential to the outcome. In both trials, evidence was ultimately admitted that placed the actions of the defendants into context. What really mattered, Weitz argues, were the judge's instructions. In the Philadelphia trial of the *Enchantress*, the judge instructed the jury that "no rebellion designed to overthrow the government can be recognized as a legitimate government regardless of its size or power" (p. 161). This left the case "a jury trial in name only" (p. 162) and earned a guilty verdict. In contrast, Judge Samuel Nelson's jury instructions in the New York trial of the *Savannah's* crew left open possibilities. Judge Nelson allowed the jury to choose whether to interpret the federal government's naval blockade, the military treatment of prisoners, and Lincoln's July 4, 1861 address to Congress as conferring a *de facto* belligerent status on the Confederacy. The jury deadlocked, and never agreed on a verdict.

The piracy trials yielded mixed results, but the realities of Civil War forced a different conclusion. Jefferson Davis threatened to hang Union prisoners if Confederate privateers went to the gallows, effectively enticing Lincoln to transfer the privateers to military custody. Two years later in the *Prize Cases*, the Supreme Court recognized that a Civil War in fact existed, and while it refused to grant nation status to the Confederacy, it granted the Confederacy rights as a belligerent.

So what was the significance of these three trials? It is doubtful that Weitz fulfills his central promise to find a more compelling definition of the Confederacy in these events than in later judicial assessments (especially in the *Prize Cases*). Weitz's primary accomplishment lies in the recovery of evidence not often considered in the ongoing debate over the constitutional meaning of the Civil War. The litigation over the Sequestration Act which Weitz brings to light perhaps provides a finishing nail in the coffin of southern "lost cause" apologist arguments–what few remain.[1] The Sequestration Act, with its creation of a Confederate police power, obliteration of property rights, and extensive reach into the most privileged and private relationships, violated both letter and spirit of states' rights. It earned the violent indignation of liberty-loving southerners, but their resistance to the centralizing needs of a government-at-war proved futile.[2]

The piracy cases demonstrated, if nothing else, the inherent difficulty in grafting the logical needs of the law onto chaotic reality. To deny that a real war existed in 1861 was absurd. It was also the only way to get a conviction in the piracy cases before a northern jury. Occurrences such as these suggest something about the historical role of law during wartime that requires fleshing out.

As part of the University Press of Kansas's Landmark Law Cases and American Society series, this book is geared toward undergraduates. It would be appropriate for any Civil War era course that seeks to examine how difficult it was in practice for contemporaries to grasp what the Confederacy really was. It has the added benefit of spelling out technical aspects of legal procedure in a remarkably readable way. Its bibliographic essay is useful and up-to-date, offering students an appropriate starting point for further research.

Notes

[1]. E.g., Thomas DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (New York: Three Rivers Press, 2003). For an impressive critique of the argument that Confederates genuflected at the shrine of strict constitutional construction, see Mark E. Neely, *Southern Rights: Political Prison-*

ers and the Myth of Confederate Constitutionalism (Charlottesville: University of Virginia Press, 1999).

[2]. There is a historiographic movement afoot to reinterpret the motives and the meanings of participants in the Civil War through the lens of property law. See Daniel W. Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (Chicago: University of Chicago Press, 2006); and Silvana R. Siddali, *From Property to Person: Slavery and the Confiscation Acts, 1861-1862* (Baton Rouge: Louisiana State University Press, 2005).