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The Global Scope of Competitive Legalities in the Early 19th-Century South China Sea: The Topaz *Incident*

Jedidiah J. Kroncke[*] and Haimo Li[**]

Abstract

This article examines the 1807 capture of the American merchant vessel Topaz *by the British cutter HMS* Diana *in waters outside of Macau. By unearthing the full transnational context of this event, the article establishes the under-appreciated global scope of post-colonial American foreign policy as well as the early 19th-century Anglo-American rivalry that culminated in the War of 1812. Moreover, explicating the transnational dynamics of the* Topaz *incident demonstrates the similarly under-appreciated centrality of the China trade to this growing geopolitical rivalry. This trade was materially critical to the resolution of British ambitions in Europe during the Napoleonic Wars, and such importance drove aggressive British reactions to the rapid success of the USA as a re-exporter of Chinese goods. Similarly, Sino-American trade relations were a symbolically charged arena for American ambitions to establish a distinct post-colonial identity as a true adherent to the law of nations. Herein, recovering the full diplomatic and legal aftermath of the* Topaz *incident also reveals the importance of prize law as a global forum for this era of Anglo-American rivalry as well as how prize law's particular form of quasi-privatized legality played into often opportunistic American invocations of 'commercial empire'. The article's mapping of the local and transnational reactions to the* Topaz *incident also challenges extant scholarship's focus on Opium War-era treaty negotiations as the primary driver of Qing understandings of Western legalities by highlighting the neglected importance of pre-Opium War legal interactions, especially commercial interactions and conflicts.*

[*] Associate Professor of Law, University of Hong Kong, Hong Kong Special Administrative Region.
[**] Assistant Professor, School of International Relations and Public Affairs, Fudan University, Shanghai, China. Email: li_haimo@fudan.edu.cn.
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1 Introduction

On 8 August 1807, the crew of the American merchant vessel *Topaz* would see their lives take a dramatic turn. After departing Baltimore nearly 18 months earlier, their journey would end when the *Topaz* was attacked and subdued by the British cutter HMS *Diana*. At the time, America and Britain were not formally at war. However, the British capture of American vessels in the Atlantic Ocean had become a point of growing public concern in the USA ever since the end of the Revolutionary War in 1783. Yet the *Topaz*'s capture occurred not in the Atlantic Ocean but on the other side of the world – in the waters surrounding the Portuguese-administered territory of Macau in the South China Sea. The *Topaz* had travelled to Macau following a long trading mission through South America, and the *Diana* arrived in Macau from Bombay with the formal mission of combating piracy afflicting trading vessels in the region. After the *Topaz*'s capture, the American consul at Canton, Edward Carrington, engaged not only officials in both the British and American governments but also Portuguese officials stationed in Macau and those in the local bureaucracy of the Qing Dynasty. Concurrently, the taking of the *Topaz* under British maritime law would be contested by its financiers through years of transnational litigation starting in the Vice-Admiralty Court in Bombay – one of many such courts established by the British around the world to process 'prize' claims regarding captured ships.[1]

Beyond the fate of its cargo and crew, the *Topaz* incident implicated much broader geopolitical stakes. For Britain, the China trade had become a near existential priority as the financial lifeline keeping its imperial ambitions afloat during the naval blockades of the Napoleonic Wars. The USA saw pursuit of the China trade as a marker of its own international post-colonial standing and had taken rapid advantage of its newly independent trade status to bypass British trade blockades and resell Chinese goods across Europe. The incident quickly became a key part of escalating American outrage over British maritime aggression that would culminate once again in open warfare between the two nations during the War of 1812.

An in-depth examination of the diplomatic and legal aspects of the *Topaz* incident enables three specific interventions. First, it demonstrates the under-appreciated global scope of early 19th-century conflicts[2] and provides a fully transnationalized view of the origins of the War of 1812 amid the early formation of American commercial and foreign policy.[3] Moreover, the *Topaz* incident demonstrates the similarly under-appreciated centrality of the China trade to this growing geopolitical rivalry. This trade was materially critical to the resolution of British ambitions in Europe during the Napoleonic Wars, and such importance drove aggressive British reactions

[1] This study was facilitated by the recent digitalization of the *Topaz*'s prize court records. 'Prize Papers', available at www.prizepapers.de.

[2] D. Allison and L. Ferreiro (eds), *The American Revolution: A World War* (2018).

[3] Recent revisionist work on early Sino-American relations tends to focus on the post-Opium War era or is less aware of the *Topaz* and other incidents when discussing the origins of the War of 1812. See, e.g., D. Copeland, *A World Safe for Commerce: American Foreign Policy from the Revolution to the Rise of China* (2024), at 98–103.

to the rapid success of the USA as a re-exporter of Chinese goods.[4] Similarly, Sino-American trade relations had become a symbolically charged arena for American ambitions to establish a distinct post-colonial identity among the world's leading nations.

Second, recovering the full diplomatic and legal aftermath of the *Topaz* incident reveals the global importance of prize law during this era of Anglo-American rivalry. The incident serves as a reinforcing example of extant studies of prize law as a form of imperial legality[5] but at the very extremes of its logistical and rationalizing reach where the actions of ship captains – examples of imperial actors 'on the spot' – played out on the thinnest of lines between imperial legality and violence even as the British continually invested in reforming prize law and its global administration. For the USA, prize law's particular form of quasi-privatized legality played into its frequently opportunistic invocations of 'commercial empire', and critique of British prize administration became an active site for America's competitive self-representation as a nation committed to legality and the 'law of nations'.

Third, the article contributes to a nascent reorientation of China as a critical site in the transnationalization of international legal history central to the development of global legal history, if not global history more broadly.[6] The incident establishes the necessity of disaggregating the still-popular use of the 'West' as a totalizing framework for analysing Chinese engagement with foreign nations during this period.[7] More specifically, fully contextualizing the *Topaz* incident challenges dominant framings that the Qing Dynasty initially 'learned' about Western law primarily through treaty negotiations following the Opium Wars of 1839 and 1856.[8] Instead, witnessing strife over

[4] Macabe Keliher has resituated the competitive and often hostile 'cooperation' between the USA and Britain in China over the 19th century, which has long been framed as either cooperative or reflective of a lack of any distinct US–China policy. Keliher, 'Anglo-American Rivalry and the Origins of U.S. China Policy', 31 *Diplomatic History* (2007) 227.

[5] The flexibly patchwork administrative quality and function of prize litigation as a rationalizing technology of empire led prize courts to take on the status of what Lauren Benton and Lisa Ford have described as the 'middle power' in colonial administration. L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2016), at 93.

[6] The most systemic revision of China's reception of Western international law and its role in the development of modern international legal institutions is R. Mitchell, *Recentering the World: China and the Transformation of International Law* (2022). Ryan Mitchell's post-Opium War intervention integrates this Chinese engagement with Euro-American international law in much the same way as Arnulf Becker Lorca's seminal work has for Latin America. A. Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015). Key recent monographs in Chinese legal historiography critically re-examining American engagement with Chinese law include T. Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (2013); J. Kroncke, *The Futility of Law and Development: China and the Dangers of Exporting American Law* (2016); L. Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (2016).

[7] As with any foreign engagement, Sino-Western incidents were interpreted domestically primarily through parochial lenses. D'Aspremont and Zhang, 'China and International Law: Two Tales of an Encounter', 34 *Leiden Journal of International Law* (*LJIL*) (2021) 899; Yin, 'Heavenly Principles? The Translation of International Law in 19th-century China and the Constitution of Universality', 27 *European Journal of International Law* (2016) 1005. Recent work has helped recapture more granular accounts of such engagements. See, e.g., Nuzzo, 'The Birth of an Imperial Location: Comparative Perspectives on Western Colonialism in China', 31 *LJIL* (2018) 569.

[8] See, e.g., M. Carrai, 'Historiographies of International Law from a Chinese Perspective', 18 *Histoire du droit international* (2020) 1.

prize taking was one of the neglected means by which commercial interactions and conflicts informed Qing understandings about how aspects of 'Western' international law operated in practice, especially in the largely neglected pre-Opium Wars era.[9]

2 Rising Anglo-American Tensions in the South China Sea

A The Capture of the *Topaz* in a Legal and Diplomatic Context

Maritime law has historically grappled with the fact that its subject often occurs beyond the bounds of national borders and the immediate ambit of formal law enforcement. Even today, the reality of sea vessels as near-literal societies unto themselves means that national authorities have to accept captains' broad discretion over exigent questions of life and death. For the diplomats representing nations whose naval presence began to rapidly spread across the world during the 18th and 19th centuries,[10] the large gap between formal law and its enforcement on the seas presented numerous challenges as well as opportunities. When Edward Carrington arrived in Canton during the summer of 1802, he did not initially predict that this particular issue would come to dominate the next decade of his life. Like most who sought their fortunes in China after the American Revolution, Carrington's motives were primarily commercial. Enmeshed in the social world of powerful East Coast trading families, he looked to profit from the China trade that had gripped the imagination of his hometown of Providence, Rhode Island. Shortly after his arrival, Carrington set about establishing himself as the informal leader of the local American mercantile community then most distant from their home shores.[11]

One of Carrington's chief preoccupations was corresponding with federal officials in the USA to communicate the local community's many concerns. The most consistently thorny subject that he addressed was the growing trend of British predation upon American trading vessels. Carrington also repeatedly corresponded with British naval leaders whose captains had been claiming the right to inspect all ships in the region for British deserters.[12] Writing to Secretary of State James Madison in November 1805, he further complained that Qing officials had been unwilling to intervene in the capture of American vessels beyond Chinese waters.[13] Carrington's escalating frustrations led to a stream of letters to Madison in the coming years, warning that 'if these outrages to be continued, I am extremely apprehensive they will be attended by serious

[9] Li Chen's monograph is the only work to date that provides an extended analysis of Sino-British legal relations in the pre-Opium War era. Chen, *supra* note 6. While still focused on treaty negotiations, another notable recent exception to this post-Opium War exclusivity is Ham, 'The Gentle Civilizer of the Far East: A Re-Examination of the Encounter between "China" and "International Law"', 26 *Journal of the History of International Law* (2024) 1.

[10] G. Paquette, *The European Seaborne Empires: From the Thirty Years' War to the Age of Revolutions* (2019).

[11] Y. Wang, *Daguo Waijiao yu Wanqing Xingshuai* [*The Encounter between China and the United States*] (2021), at 115–116.

[12] T. Dennett, *Americans in Eastern Asia* (1922), at 81.

[13] 'To James Madison from Edward Carrington, 25 November 1805', in M. Hackett *et al.*, *Secretary of State Series*, vol. 10 (2014), at 584–586.

consequences'.[14] Carrington himself was not initially deterred by this challenge. He successfully petitioned to be appointed as American consul in 1807 – the sole formal representative of the USA in China as the young nation was only beginning to establish its diplomatic operations overseas. Yet the tensions that Carrington warned of most nearly came to a head in the summer of 1807 when the HMS *Diana* captured the American schooner *Topaz*.[15]

The *Topaz* had taken a long, indirect route to Canton, leaving Baltimore in March 1806 captained by William Nicoll and carrying an array of trade goods. Its early trade mission was to pass through Haiti on the way to several South American stops, notably Chile and Peru, and then on to Ecuador and Mexico. The ship's course was notably violent, involving several raids, kidnappings and other conflicts as it attempted to convert its cargo into silver for the eventual purchase of Chinese goods in Canton. Nicoll's ultimate aim was then to later resell these goods in both the USA and Europe. By the time the *Topaz* reached Macau, it had successfully converted its original stock as intended.[16]

First deployed from Bombay in 1807, the *Diana* was one of the increasingly formidable British cutters whose armaments and speed were indicia of Britain's growing projection of naval power across Asia. It was captained by William Kempthorne, by then a 12-year veteran of the British Royal Navy but on his first command. Kempthorne's formal mission was to aid the Qing government in suppressing the piracy that had plagued the South China Sea in the preceding decade.[17] As records from the East India Company relate, when Kempthorne learned of the *Topaz*'s arrival in the area he abandoned his piracy patrol from inspecting it for suspected smuggling.[18] Though a departure from Kempthorne's original instructions, the capture of the *Topaz* was made on well-recognized British legal grounds. While Britain and the USA were not formally at war after 1783, British courts tasked with assessing the legalities of takings at sea – deemed 'prizes' and, thus, such courts were 'prize courts' – recurrently applied the 'continuous voyage doctrine'. This doctrine asserted that neutral ships at sea could be

[14] K. Latourette, *The History of Early Relations between the United States and China, 1784–1844* (1917), at 50–51.

[15] Scholarly mention of the *Topaz* incident is not without precedent. See, e.g., Latourette, *supra* note 14, at 50–51. However, Kenneth Latourette primarily relies on the 1838 second-hand account of famed American explorer Edmund Fanning. As the *Topaz*'s prize court records reveal, Fanning misunderstood the incident as wholly concerned with an attempt to impress the *Topaz*'s crew. See E. Fanning, *Voyages to the South Seas* (1838), at 92–93. These and later citations are generally descriptive and do not explore the larger geopolitical or imperial issues at stake. As such, most extant studies of American engagement with prize courts or considerations of early American maritime identity largely lack mention of events beyond the Atlantic Ocean. See, e.g., C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960). Also indicative of this larger trend, the incident itself is often omitted even from extended studies of the individuals involved. See, e.g., H. Noel-Smith and L. Campbell, *Hornblower's Historical Shipmates: The Young Gentlemen of Pellew's 'Indefatigable'* (2016), at 103–106.

[16] 'Prize Appeal Case for the Ship "Topaz", William Nicoll (Master), at the Vice-Admiralty Court of Bombay, 1811', HCA 45/62/20, at 1–3, Prize Papers Archive. Subsequent citations to the Prize Papers Archive will be listed as 'PAC, Topaz' and followed by the page number from the digitized document.

[17] PAC, Topaz, at 26.

[18] H.B. Morse, *The Chronicles of the East India Company Trading to China, 1635–1835*, vol. 3 (1926), at 65.

seized if they were found to be carrying cargo bound for an adversary's port.[19] Perhaps more critically, under British law, captains and their crew were eligible for sizable commissions if they successfully took foreign vessels as prizes.[20]

When the *Diana* first approached the *Topaz*, Kempthorne demanded that Nicoll provide a detailed record of the ship's travels after leaving Baltimore.[21] Nicoll obliged, and Kempthorne initially accepted these records. However, shortly thereafter, the *Diana* returned on another commonly asserted ground for searching American vessels – retrieving deserted British sailors. Again, Nicoll provided documentation establishing the nationalities of his crew, and Kempthorne withdrew. Here, things turned in Kempthorne's favour as four of the *Topaz*'s crew had grown discontented with their prospects given the depletion of the crew during the *Topaz*'s violent course after leaving Baltimore. Hoping to gain employment with the Royal Navy, once these sailors were on the *Diana* they told Kempthorne of the *Topaz*'s many colourful stops in South America. In the interim, the *Topaz* had anchored in Macau.

Kempthorne waited until the *Topaz* left its moorings in Macau to once again intercept it. This time, he initially used another claim under British maritime law to initiate contact – that he was recovering back wages for the four new members of his crew. Once on board, he then cited the disaffected crew's statements as grounds to search the *Topaz*'s cargo under suspicion of piracy in South America.[22] It was at this point that the crew of the *Topaz* resisted Kempthorne's latest search and attempted to return to the ship's original mooring in Macau. The immediate consequence of this resistance was an unsuccessful attempt by the *Topaz* to flee. A pitched battle ensued that ultimately required local British reinforcement. Nicoll was killed, and Kempthorne was badly wounded.[23] In total, nine members of the *Topaz*'s crew were killed, and seven from the *Diana* were wounded. Kempthorne subsequently wrote to his superiors detailing the legal grounds of his searches and the 'trouble' that the *Topaz* had caused. He asserted that he 'must abandon the purpose for which I remained here' to ensure such a valuable prize made its way to the Vice-Admiralty Court in Bombay.[24]

After several years of growing resentment, the local American merchant community reacted to the capture of the *Topaz* in a manner as heated as Carrington had feared.[25] Eleven American vessels joined together to form an informal fleet set to make reprisals against the British. For three months, a standoff persisted as recriminations were traded at the local and diplomatic levels. From the outset, Carrington attempted to engage Portuguese and Qing officials to no avail.[26] The reactions of the Portuguese

19 Golove, 'Leaving Customary International Law Where It Is', 34 *Georgia Journal of International and Comparative Law* (2006) 333, at 354.

20 The *Topaz*'s cargo was worth an estimated US $150,000, which today would be nearly US $4,000,000. *Indian Antiquary*, vol. 56 (1927), at 193.

21 There was little dispute as to the basic facts of the initial searches and final violent boarding in the appellant's and respondent's prize litigation submissions. PAC, Topaz, at 1 (for the appellant's submission) and PAC, Topaz, at 9 (for the respondent's submission).

22 PAC, Topaz, at 15.

23 PAC, Topaz, at 3.

24 Morse, *supra* note 18, at 64–65.

25 Fanning, *supra* note 15, at 99–102.

26 'To James Madison from Edward Carrington', 14 November 1807, Founders Online, National Archives, available at founders.archives.gov/documents/Madison/99-01-02-2329.

and Qing authorities to the capture of the *Topaz* and subsequent American entreaties continued to be marked by the very refusals that Carrington had already complained about to Madison in previous years. In this instance, Kempthorne's tactic of waiting for the *Topaz* to leave Macau's waters for his final search allowed both powers to extricate themselves from the matter even though it directly implicated their trade interests in the region.

Instead, Carrington spent most of his efforts attempting to persuade British Rear Admiral Edward Pellew – then commander-in-chief of the Royal Navy's forces in the East Indies – to instruct Kempthorne to return the vessel.[27] Carrington and Pellew had already corresponded on another case a month earlier when Kempthorne had captured the American vessel *Caravan* and impressed one of its British crew but left its cargo unmolested.[28] After the *Topaz* was taken, Carrington sent several messages to Pellew that included supportive testimony from the *Topaz*'s crew. Pellew ultimately responded that he knew Kempthorne well and that his faith in Kempthorne's character left him unpersuaded of any wrongdoing.[29] The standoff was resolved only after a formal pronouncement was made that a full British naval intervention would occur if the makeshift American fleet took any violent action.[30]

After the standoff was resolved, physical possession of the *Topaz*, its cargo and its crew was thereafter under Kempthorne's full discretion. They were soon taken to Bombay, with plans to auction the *Topaz*'s cargo there while the surviving members of the *Topaz*'s crew would ultimately disperse to points around the world.[31]

B *Four Years of Contested Prize Litigation*

After Carrington's unsuccessful initial diplomatic efforts, the American financiers of the *Topaz*'s mission located and retained local counsel in Bombay to challenge the taking in the British Vice-Admiralty Court at Bombay.[32] The *Topaz*'s first hearing was

[27] Edward Pellew's promotion to this post was seen as a significant career advancement in large part because of the prize money receivable from overseeing captures in the region. E. Wilson, *A Social History of British Naval Officers, 1775–1815* (2017), at 105.

[28] Here, the legal controversy was quite specific, as William Kempthorne's ability to impress a British subject on a neutral vessel was clearly supported by British law. Caputo, 'Alien Seman in the British Navy, British Law, and the British State, 1793–1815', 62 *The Historical Journal (THJ)* (2019) 685. The captain of the *Caravan* made the counterclaim that his sailor was immune based on a previous impressment, but Kempthorne was not persuaded, and Edward Carrington's pleas again went unheeded. Steel, 'Diana versus Caravan and Topaz', 43 *The Mariner's Mirror* (2013) 46, at 48.

[29] Pellew served as Kempthorne's personal sponsor after an early career controversy and took the success of Kempthorne's career as a personal commitment. Noel-Smith and Campbell, *supra* note 15, at 103–106.

[30] Latourette, *supra* note 14, at 51.

[31] Beyond the four deserters who joined the Royal Navy, the *Topaz*'s crew was first taken to England before they could return home, though many also ultimately joined the Royal Navy. PAC, Topaz, at 16.

[32] The Bombay legal representatives are identified as local practitioners, but how exactly they were retained by the plaintiffs remains unclear. PAC, Topaz, at 1. The *Topaz*'s voyage was covered by the increasingly transnationalized insurance industry, which was likely involved in arranging representation in such far-flung prize cases. Kert, 'Commercial Warfare and Maritime Risk in the War of 1812', 3 *The Northern Mariner* (1998) 1, at 2; H. Farber, *Underwriters of the United States: How Insurance Shaped the American Founding* (2021), at 164.

held in March 1808 – a full seven months after its capture. The parties were given a month to collect evidence after the initial hearing. The initial decision at the Bombay court favoured Kempthorne. The records of the Vice-Admiralty Court's proceedings, along with later appellate records, reveal the construction of a highly detailed evidentiary record, if a more summary set of legal judgments. The legal claims underpinning the plaintiff's submissions were not complex.[33] They asserted that the provenance of the ship's cargo had been established, that their trading activity had been legal and, therefore, that there was no justification for Kempthorne's final, violent search of the ship.[34] Moreover, they claimed that the *Topaz* had been in Macau's waters when taken, which would make Kempthorne's actions a violation of well-recognized principles of neutrality.[35]

The contents of the original *Topaz* evidentiary submissions, and their later supplementation on appeal, detail the *Topaz*'s original cargo, noting its origin and the various transactions up through the ship's arrival in Canton. The parties' interest in the goods is described by the ship's manifest and the testimony of individual *Topaz* crew members, noting that the crew had no financial interest beyond the captain and the interpreter's high-value personal items.[36] There was no dispute as to the *Topaz*'s adherence to its initial itinerary, which included stopping in Port-au-Prince before heading to Chile, Peru and Mexico to trade for silver before heading to Canton.[37] Next, the bulk of the depositions secured from the sailors and other members of the *Topaz*'s crew focused on the issue of piracy and their characterizations of the *Topaz*'s specific actions in South America. Even after many months, key witnesses for both sides appeared in Bombay in person to give their testimony.[38] The statements of both members of the *Topaz*'s remaining crew and the disgruntled sailors who had joined Kempthorne confirmed repeated conflicts with Spanish colonial officials. Where they diverged were who initiated these conflicts and which nation's colours were flown at the time.

Depositions from Kempthorne's crew and the disgruntled sailors favouring Kempthorne's position detailed what the departing crew had told Kempthorne,

[33] While the Prize Papers Archive regarding the *Topaz* details the initial claims made by the respective parties, the refined claims presented at appeal have recently been made available through the digitalization project of the Canadian Naval Marine Archive (CNMA). See 'Cases Determined at the High Court of Appeal', available at navalmarinearchive.com/research/pdf/topaz_highcourt_finding.pdf. Subsequent references will be listed as CNMA, Topaz, and the relevant page number in the archive.

[34] PAC, Topaz, at 7.

[35] These arguments concerning whether the taking occurred in neutral waters were the focus of the appellate litigation. CNMA, Topaz, at 2–3.

[36] The *Topaz*'s financiers are detailed in the March 1806 register of the ship, but only one – Lemuel Taylor – is otherwise identified in public or in correspondence with the federal government. It is repeated several times that most of the crew knew little about the ownership structure of the enterprise and relied on Captain Nicoll for all information about the voyage, its cargo and its intended course of action up through arriving in Canton. PAC, Topaz, at 2.

[37] Two years earlier, it had already become settled law in British prize courts that the intended re-export of goods through America did not immunize ships from capture, even if their goods had been otherwise acquired lawfully. W. Oosterveld, *The Law of Nations in Early American Foreign Policy* (2016), at 255–256. However, there could be no direct evidence of this intention by the *Topaz*'s financiers even if such re-export was part of a clear pattern of American trade at the time.

[38] PAC, Topaz, at 19–20.

relating a specific chronology of various conflicts including kidnapping, organized incursions and the fact that a large number of the crew had been killed during one episode.[39] The disgruntled sailors also gave testimony that the ship's surgeon was forced to fabricate letters to Spanish authorities and that most records were thrown overboard before the ship's eventual capture, though this was contested by the ship's surgeon himself.[40] It is also in these statements where far greater detail appears regarding the significant armaments purchased for the *Topaz* in Baltimore.[41] The most direct disagreement in the competing depositions regarded what instructions Captain Nicoll gave to the crew if they were to be boarded. The disaffected crew stated that they were told to resist to the death any and all attempts to board the ship while destroying all of its records. They recounted how Captain Nicoll told them they would eventually have to find their own passage home and that he planned to forfeit his life before the ship was to be captured.[42] Sailors from the *Diana* repeated elements of this narrative as related to them by the deserters.[43] Depositions from the rest of the *Topaz*'s crew stated that they were told either nothing or only to resist if fired upon first.[44] They also portrayed all of the *Topaz*'s actions in South America as provoked by local authorities,[45] some of which were acknowledged by several of the sailors who ultimately joined the *Diana*'s crew.[46] This testimony was supplemented by the *Topaz*'s log books, all of which construct a similar narrative of responses to aggression while noting the need to discipline the disorderly sailors who would eventually join Kempthorne.[47]

Given that Kempthorne's initial justification for his right to search the *Topaz* rested on its presence outside of Macau, the submissions become most detailed when concerning arguments about its position at capture.[48] Initially, no eyewitness was able to say exactly where the conflict happened, but every sailor was asked about various geographical reference points in the area. The plaintiff's appellate submission later provided specific information regarding the depths of waters, reports of other ships in the area as well as actual surveys conducted in the area revealing the intense cartographic attention that British interest had invested in the area surrounding Macau.[49]

The judge presiding over the *Topaz* case was soon-to-be-famed Scottish jurist James Mackintosh, who gave a laconic judgment in favour of Kempthorne's taking. The

[39] Compare PAC, Topaz, at 20, 28. It was not contested that the flags of multiple nations were found during the final search of the *Topaz*.
[40] PAC, Topaz, at 2–3.
[41] PAC, Topaz, at 13.
[42] PAC, Topaz, at 23.
[43] PAC, Topaz, at 14.
[44] PAC, Topaz, at 14.
[45] PAC, Topaz, at 27, 30–31.
[46] PAC, Topaz, at 24.
[47] PAC, Topaz, at 38.
[48] Compare PAC, Topaz, at 31, 44–46.
[49] It is in this evidence that the vast array of descriptive statistics compiled by the *Topaz* during its trip can be seen. *Ibid.* At appeal, the King's Advocate introduced evidence from British maritime surveys in the region. He also drew on advances made to track weather, tide and other nautical concerns to transform the issue of the *Topaz*'s location into one of scientific expertise beyond personal testimony. CNMA, Topaz, at 2–3.

financiers of the *Topaz* initiated a delayed appeal that was heard at the High Court of Admiralty in London in February 1811.[50] Here, the King's Advocate emphasized the Vice-Admiralty Court's relative proximity to the facts of the case.[51] They also noted Kempthorne's claims that the Portuguese themselves did not intervene in the capture and cited the necessity of prize taking to regulate piracy.[52] The only new legal authority cited by the King's Advocate was a prize precedent from 1809 in order to characterize the resistance by the *Topaz*'s crew as grounds itself for their capture.[53]

In the appellate submission, the respondents again argued that the nature of the *Topaz*'s cargo when it arrived in Canton made it clear that it had carried out the silver trade it intended and that there was no evidence of pirated loot. They also specifically attacked the sufficiency of Kempthorne's reliance on disgruntled deserters to justify his search and emphasized the *Topaz*'s uncontested cooperation with earlier searches.[54] They also noted the silence of Spanish officials to register any complaint related to such claimed piracy. They admitted that Kempthorne could have sought back wages for the deserters but that there was no legal basis to use violence to enforce their payment. They also cited testimony that asserted that the *Topaz* initially fled but was first shot upon before being boarded, which they sought to distinguish from the facts of the 1809 precedent.[55]

The High Court announced its verdict a month after receiving the appeal, summarily affirming the Vice-Admiralty Court in a two-sentence judgment in May 1811.[56]

C *An Unstable Line between Legality and Violence*

While the litigation over the *Topaz* incident stretched on over four years, at no point did Kempthorne or other British captains subsequently pause their prize taking in the South China Sea. Shortly after the ad hoc American 'fleet' had disbanded, British ships were only emboldened to capture American ships and impress their crews around Macau and Canton.[57] As a result, while 31 American ships sailed to China in 1807,[58] just a year later the traffic had fallen to six ships.[59] There are no other records that this prize taking was ever contested at the Vice-Admiralty Courts in Bombay or elsewhere, and, soon, British prize taking began to target ships of any nationality in the region.[60] By the end of 1808, British confidence had grown to the point that Kempthorne and the crew of the *Diana* were called on to lead a short-lived blockade of Canton. While

50 CNMA, Topaz, at 1.
51 CNMA, Topaz, at 2.
52 PAC, Topaz, at 15, 24.
53 CNMA, Topaz, at 8.
54 CNMA, Topaz, at 3.
55 CNMA, Topaz, at 9.
56 CNMA, Topaz, at 9.
57 J.B. Eames, *The English in China* (1909), at 134.
58 H. Qiu, *Zaoqi Zhongmei Guanxi Yanjiu, 1784–1844* [*Research on Early Sino-American Relations, 1784–1844*] (2005), at 112.
59 C.S. Gilbert, *An Historical Survey of the County of Cornwall*, vol. 2 (1820), at 175; W.H. Long, *Medals of the British Navy and How They Were Won* (1895), at 166.
60 H. Lecky, *The King's Ships*, vol. 2 (1913), at 232–234.

the *Topaz* incident had seemed to temporarily establish the baseline that British captures would only happen in neutral waters, such legal restraint would be short lived. Again, prompting strenuous American and Qing protests throughout 1814, the British would take American and other ships in what were clearly Chinese waters.[61]

The entire affair became a high point in Kempthorne's career, and his time in Chinese waters was a boon to his career until the *Diana* sank two years later. He was awarded several medals for his aggressive tactics in the region, and the taking of the *Topaz* was considered a sterling merit in his royal biography, which recounts his leadership of the *Diana*'s 'stout fellows' as they overcame the resistance of the *Topaz*'s 'gang' to claim a 'lawful prize' for the empire.[62]

3 The Global Centrality of China in the Early 19th-Century Anglo-American Rivalry

A *Transnational Piracy as British Imperial Aperture*

In the century after they first arrived in 1513, the Portuguese often exclusively dominated European relations with China. It was not until the early 17th century that the British first attempted to establish a trading relationship with the Ming Dynasty. An often tense relationship developed with the new Qing Dynasty as the 17th century turned into the 18th century when demand for Chinese goods, especially tea, skyrocketed in Britain. At the time, China had minimal demand for foreign goods and felt little need to depart from the largely tributary framework through which it engaged other countries in Asia.[63] In 1757, the Qing formalized a restrictive trade regime with all European nations, limiting foreign presences to Macau and Canton.[64] The resulting 'Canton system' revolved around the preferential status of the Portuguese and their administration of foreign trade through Macau.[65] Moreover, the Qing had granted Portugal an exception to the ban on silver trading, which cemented its intermediary role in the region. The Hong merchant guilds that represented private Chinese trading interests were equally critical to this trade and were also important intermediaries with the Qing government, even for the Portuguese.[66]

[61] Wang, 'Between Tribute and Unequal Treaties: How China Saw the Sea World in the Early Nineteenth Century', 103 *History: The Journal of Historical Association* (2018) 262, at 281–282. The American ship *Hunter* would be the last British capture in April of 1814, which was subsequently followed by yet another illegal British blockade of Canton. F. Brinkley, *China: Its History, Arts and Literature*, vol. 10 (1902), at 210.

[62] 'Kempthorne, William', in John Marshall (ed.), *Royal Naval Biography* (2010).

[63] D. Kang, *East Asia before the West: Five Centuries of Trade and Tribute* (2010).

[64] P. Van Dyke, *Whampoa and the Canton: Trade Life and Death in a Chinese Port, 1700–1842* (2020), at 154; see also J. Downs, *The Golden Ghetto: The American Commercial Community at Canton and the Shaping of American China Policy, 1784–1844* (2015).

[65] T. Larkin, *The China Firm: American Elites and the Making of British Colonial Society* (2024), at 24–28. Though this article focuses on the largest foreign presences in the South China Sea, there were numerous other European countries involved. See generally P. Van Dyke and S. Schopp (eds), *The Private Side of the Canton Trade, 1700–1840* (2018).

[66] W. Cheong, *Hong Merchants of Canton: Chinese Merchants in Sino-Western Trade, 1684–1798* (1997).

For most of the 18th century, the projection of British naval force into Chinese waters remained highly circumscribed. The relative local military power of the Qing had prompted the British to take a generally conciliatory attitude towards Chinese authority in order to maintain its burgeoning, if largely one-sided, trade.[67] In early legal incidents between British and Chinese subjects this conciliatory attitude was on display, as Li Chen has detailed in his studies of Sino-British relations during the era.[68] However, the issue of jurisdiction over conflicts between Chinese and European subjects, or even between European subjects in Chinese territory, would become a focal point of ongoing Sino-Western negotiation.[69]

Traditional accounts of this era emphasize conflicts over the British importation of opium from India starting in 1781. Even though the Qing had banned opium smoking as early as 1729, this trade quickly transformed Britain's trade deficit with China and turned Macau into the central point for opium smuggling. Moreover, this shift coincided with an exponential increase in the importance of the China trade as a source of British revenue, which approached nearly two-thirds of all sales income by the early 1800s.[70] Dwarfing revenue from India, some have estimated that 16 percent of British national income in this era was derived from its trade with China.[71] The eventual success of Britain in its conflict with France is widely credited to its naval blockades against Napoleon and his allies, largely funded by this particular trade surplus.[72] The impact of the European blockades reached its zenith in the years preceding the *Topaz* incident, drawing in nearly all of Europe and their colonies.[73] The importance of this trade led to the resolution of any acute moments of Qing-British conflict because of unilateral Qing threats to end trade relations.[74]

67 S. Zhang, *Yige Teshu Shíqi de Ying Ren Ping Hua* [*British Views on China at a Special Time*] (2014).

68 Chen, 'Law, Empire, and Historiography of Modern Sino-Western Relations', 27 *Law and History Review* (2009) 1.

69 Chen, 'The State as Victim Ethical Politics of Injury Claims and Revenge in International Relations', in A. Bloom, D. Engel and M. McCann (eds), *Injury and Injustice: The Cultural Politics of Harm and Redress* (2018), at 300–302.

70 Recent studies have explored how the China trade impacted broader British imaginations of its imperial rule. L. Lowe, *The Intimacies of Four Continents* (2015), at 102. Expansion into China during the 19th century also impacted the British Royal Navy's role in new visions of British imperialism. Leggett, 'Navy, Nation and Identity in the Long Nineteenth Century', 13 *Journal for Maritime Research* (2010) 151.

71 A. Mikaberidze, *The Napoleonic Wars: A Global History* (2020), at 487.

72 J. Black, *Trade, Empire and British Foreign Policy, 1689–1815* (2007), at 185–186. As British imperial ambitions only grew after this victory, this now crucial trade doubled in the first 15 years of the 19th century. Davey, 'The War at Sea: Trafalgar and Beyond', in B. Colson and A. Mikaberidze (eds), *The Cambridge History of the Napoleonic Wars* (2023) 563, at 577.

73 Napoleon had, at the peak of his confidences, contemplated a wide-ranging assault against British colonies throughout Asia with Russian assistance. J. Black, *Debating Foreign Policy in Eighteenth-Century Britain* (2013), at 208.

74 Six months before the *Topaz* incident, sailors of the British vessel, the *Neptune*, were tried for violence against several Chinese subjects – the last time British subjects would have to face a Qing court before formal extraterritorial British rights were imposed in the aftermath of the Opium Wars. The conflict stopped the entire trade for two months during negotiations over their trial's procedures and outcome. Eames, *supra* note 57, at 136, 138.

Yet far less appreciated is how piracy had become central to Qing foreign relations in this era,[75] if not maritime policy more generally.[76] By the end of the 18th century, piracy in East and Southeast Asia had emerged as a transnational operation that claimed ships and armaments on a scale rivalling the naval resources of individual countries.[77] Pirate societies formed with their own governing structures and inter-society coordination.[78] The power of these societies was enough to repeatedly resist Qing suppression across what the Qing saw as its territorial waters.[79] It was this challenge that ultimately transformed relations in the region and led to the conditions that emboldened British prize taking.

As noted earlier, before its turn to active prize taking, the *Diana* had embarked from Bombay with the official purpose of combating piracy. However secondary this mission became, it was not wholly pretextual. By this time, the Qing had grown increasingly desperate to contain piracy following a longer-term trend of weakened commercial and military strength in the region.[80] Two years before the *Topaz* incident, the Qing's then-losing contest with the Red Flag pirates in the South China Sea had resulted in increased pirate activity around Macau and a rise in the targeting of Western traders that would last until the end of the decade.[81] The Qing authorities in Guangdong had been pressed as early as 1803 to rely on Portuguese aid and leased armaments to fight piracy in the region, which the Portuguese used to repeatedly bargain for greater rights in the administration of Macau.[82] Yet the severity of the issue and the relatively limited Portuguese military resources eventually forced the local Qing officials to formally ask for Royal Navy assistance, even allowing them access to Chinese waters that had previously been closed to foreign ships. Four months before the *Topaz* incident, the Portuguese protested to the Qing that they had emboldened the British to the point of abuse and requested that they specifically ban British patrols in the region.[83]

[75] Nathan Kwan has captured the broad challenge of piracy within Qing international relations of the era. N. Kwan, '"Designs against a Common Foe": The Anglo-Qing Suppression of Piracy in South China' (2020) (PhD dissertation on file at the University of London), available at hub.hku.hk/handle/10722/290448. Most other accounts focus on post-Opium War piracy regulation. See, e.g., Chappell, 'Maritime Raiding, International Law and the Suppression of Piracy on the South China Coast, 1842–1869', 40 *International History Review* (2018) 473; R. Antony, *Piracy, Empire, and Sovereignty in Late Imperial China* (2021).

[76] Ronald Po has recently recaptured the broad importance of maritime relations in Qing governance during this era. R. Po, *The Blue Frontier: Maritime Visions and Power in the Qing Empire* (2018).

[77] Y.L. Yuan, *History of the Pirates Who Infested the China Sea from 1807 to 1810*, 1831, translated by K. Neumann (2011).

[78] Antony, *supra* note 75, at 189.

[79] *Ibid.*, at 188.

[80] Po, *supra* note 76, at 146.

[81] G. Wang and C.K. Ng (eds), *Maritime China in Transition 1750–1850* (2004), at 57–58; Y. Chen, *Hai Fen Yang Bo: Qingdai Huandongya Haiyu shang de Haidao* [*The Rough Sea: Pirates in the Seas around East Asia in Qing Dynasty*] (2018), at 346–347; Y. Zhang: *Qingdai Jiaqing Nianjian de Haidao yu Shuishi* [*The Pirates and the Navy of the Jiaqing Period in the Qing Dynasty*] (2015), at 68, 233.

[82] Y. Toyooka and E. Murakami, 'The Suppression of Pirates in the China Seas by the Naval Forces of China, Macao, and Britain (1780–1860)', in A. Ota (ed.), *In the Name of the Battle against Piracy* (2018), at 212–214.

[83] B. Nan *et al.* (eds), *Qingshi Jishi Benmo* [*Chronicles of Qing History*], vol. 6 (2006), at 1991–1992.

The *Topaz* incident thus occurred directly amid this ongoing process of compromise over piracy suppression, even as the Qing still tried to limit British aggression itself around Macau and Canton.[84] This state of affairs prompted national Qing officials to retreat from policing incidents among European countries and preferentially defer to Portuguese intermediation.[85] Though the *Topaz* case was clearly documented by local Qing officials,[86] their lack of involvement compared to earlier cases is thus readily intelligible. They initially accepted British differentiation between actions taken inside and those taken outside of Macau's water to recast the incident as simply an internecine conflict between foreign parties.[87] For the Portuguese, their weakened position in the region, as well as Portugal's then dual occupation by Britain and Spain, had also created a strategic reluctance to challenge Kempthorne's claim of taking the *Topaz* in open waters.[88]

Yet Carrington's protests and the need to remain independent of Britain in Qing eyes did have an, albeit short-lived, impact on Portuguese reactions to British prize taking. Just three months after the capture of the *Topaz*, another British cruiser captured an American ship under much the same legal pretext as had the *Diana* when taking the *Topaz*. However, the Portuguese authorities immediately asserted jurisdiction as the American ship was clearly anchored in Macau's waters. The British vessel was captured, its crew arrested and shelter was provided to the American vessel, without any national Portuguese rebuke.[89] However, Britain was already emboldened and would increasingly use piracy as grounds for active intervention in the South Sea for the rest of the 19th century.[90] The critical flow of income from the China trade would become a national strategic priority that the British saw as demanding aggressive policing of any other foreign competitor in the region.

[84] W. Johnson, *America's Foreign Relations*, vol. 1 (1916), at 457–458.

[85] Local officials were often charged with incompetence after bouts of British aggression, and these charges could lead to their removal from office. Q. Wei, *Aomen Shi Lungao* [*Macau History Essay*] (2005), at 163–165.

[86] K. Tang, *Tianchao Yihua Zhijiao: Shiji Xiyang Wenming zai Aomen* [*The Corner of Alienation in the Celestial Empire: Western Civilization in Macau from the 16th to the 19th Century*], vol. 1 (2016), at 179; X. Guo, *Dakai 'Ziyou' Tongshang Zhi Lu: 19 Shiji 30 Niandai Zai Hua Xi Ren Dui Zhongguo Shehui Jingji de Tanyan* [*Opening the Road to 'Free' Trade: Exploration of China's Social Economy by Westerners in the 1830s*] (1999), at 323.

[87] G. Chen, *Zhongguo Jindaishi* [*Modern Chinese History*], vol. 1 (2017), at 31.

[88] In both 1802 and 1808, Royal Naval forces attempted to occupy Macau during heightened moments of British conflict with France. The Portuguese were ultimately reliant on aggressive Qing condemnation of these occupations to secure British retreat. X. Zhou and A. Li, *Haojing ying Xihu* (2013), at 69; Wei, *supra* note 85, at 163–165.

[89] Van Dyke, 'Smuggling Networks of the Pearl River Delta before 1842', 50 *Journal of the Royal Asiatic Society* (2010) 67.

[90] Many commentators on British imperial maritime history have noted the broad use of piracy as a pretext for projecting the Royal Navy's force into new waters. See, e.g., Benton, 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction', 23 *International Journal of Maritime History* (*IJMH*) (2011) 229.

B The *Topaz* and China in the Post-Revolutionary American Imagination

The importance of China in early American history has received renewed attention in recent decades.[91] Especially as the USA first began its post-colonial struggle to separate itself from Britain,[92] China was forefront in the minds of Revolutionary-era Americans on a wide range of issues. Some 'Founding Fathers' initially saw China's foreign policy as an exemplar and specifically cited it as an example of the peaceful 'commercial empire' that it sought to achieve.[93] More concretely, the promise of direct trade with China had been a rallying call of the Revolution,[94] and American exuberance to establish this trade played a formative role in the country's earliest international financial infrastructure.[95]

Establishing its post-independence trade with China reflected many of the challenges the young nation faced abroad. Most critically, American merchants no longer enjoyed the protection of the Royal Navy.[96] In turn, what came to distinguish the American presence in China was its largely private nature. In contrast to the East India Company, American traders abroad were only indirectly supported by their fledgling national government. As a result, early American diplomatic presence in China was minimal and funded through levies on traders collected by episodic individual consuls.[97] While US naval forces had slowly begun to enforce Atlantic trade interests, comparable interventions in China were far beyond their capabilities.[98]

Like the British and most of Europe, Americans had struggled to find the trade goods that the Chinese markets consistently demanded,[99] and they would eventually be drawn into the opium trade.[100] However, American merchants were comparatively successful in supplying silver to China – as the *Topaz*'s journey evidences – by taking advantage of their positive balance of trade with the Spanish colonies in the Americas.[101] By the end of the 18th century, the USA had already established itself as the second largest foreign presence at Canton, and even its presence in India was only

[91] D. Wang, *China and the Founding of the United States: The Influence of Traditional Chinese Civilization* (2021).

[92] S. Haynes, *Unfinished Revolution: The Early American Republic in a British World* (2010).

[93] 'From Thomas Jefferson to G. K. van Hogendorp, 13 October 1785', in J. Boyd (ed.), *The Papers of Thomas Jefferson*, vol. 8 (1953), at 631–634.

[94] D. Norwood, *Trading Freedom: How Trade with China Defined Early America* (2022).

[95] Sioli, 'Opening American Commerce with Canton: From the Empress of China to the Columbia Rediviva', 77 *Force du Commerce* (2020) 1.

[96] K. Yokota, *Unbecoming British How Revolutionary America Became a Postcolonial Nation* (2014), at 117–119. The bind being that, while it was a colony, America could not directly trade with China or any other nation without British intermediation.

[97] See Parrillo, 'The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century', 19 *Yale Journal of Law and the Humanities* (2007) 1.

[98] Histories of early US naval development now recurrently link it to the formation of American post-colonial identity. See, e.g., F. Lambert, *The Barbary Wars: American Independence in the Atlantic World* (2007).

[99] L. Schakenbach, *Manufacturing Advantage: War, the State, and the Origins of American Industry* (2019), at 137–138.

[100] W. Tao, *A History of China-U.S. Relations (1911–1949)* (2022), at vii.

[101] Von Glahn, 'Cycles of Silver in Chinese Monetary History', in B. So (ed.), *The Economy of Lower Yangzi Delta in Late Imperial China Connecting Money, Markets, and Institutions* (2013) 54.

exceeded by that of Britain. Most critically, it was in its ability to move Chinese goods to embargoed European partners where American comparative advantage was at its greatest.[102] Americans soon began shipping goods like Chinese tea in greater quantities to Europe than were the British.[103] By the time of the *Topaz* incident, half of all American exports were re-exports to Europe.[104]

This American success surprised other Western nations who exclusively used state-chartered monopolies to carry out their long-distance China trades.[105] The Qing also found this less-militarized American presence less concerning.[106] Simultaneously, the comparative lack of state capitalization and military capacity made Americans much more sensitive to any short-term losses that Qing disfavour could bring.[107] Yet it was this very early success that drew special British enmity.[108] Beyond smouldering resentment after the Revolution, American attempts to supply Europeans with otherwise embargoed Chinese goods did not go unnoticed.[109] The capture of the *Topaz* was thus not only part of a larger British practice of suppressing America's post-colonial trade but also reflective of its new global trading patterns.

More broadly, what the British saw as the Americans' insistence on their 'hostile and profitable neutrality' was at the heart of the tensions that led to renewed hostilities in the War of 1812. The impressment of American sailors had generated great resentment even before the Revolution, and British prize taking had escalated during the Revolution itself.[110] A renewed wave of impressment followed America's post-Revolutionary trading success and the ongoing demands of the Napoleonic Wars.[111] It was this British policy that became a focus of American media attention at the outset of the 19th century.[112] In turn, an ongoing and central political debate in American politics became how to respond, either economically or militarily, to this aggression.[113] Early in 1807, President Thomas Jefferson rejected the Monroe-Pinkney Treaty, which would have recognized British domination over the two countries' trade relationship.

[102] C. Whiting, *Commercial Tariffs and Regulations, Resources, and Trade, of the Several States of Europe and America*, vol. 2 (1846), at 1027–1028.

[103] C. Frank and P. Johnston (eds), *Global Trade and Visual Arts in Federal New England* (2014), at 5.

[104] James Fichter has argued that America's initial post-colonial China trade missions were an under-appreciated aspect of early American economic development. J. Fichter, *So Great a Profit: How the East Indies Trade Transformed Anglo-American Capitalism* (2010), ch. 8.

[105] *The Weekly Review of the Far East*, vol. 20 (1922), at 85–86.

[106] S. Zhang, *Bizhiwen Yu Zaoqi Zhong-Mei Wenhua Jiaoliu* [*E.C. Bridgman and Early Sino-American Cultural Exchange*] (2010), at 3–9.

[107] J. Gibson, *Otter Skins, Boston Ships and China Goods* (1999), at 104–107.

[108] The short 'Quasi-Qar' of 1797 with France resulted from much the same concerns. Yellott, 'Not-Quite Justice after Never-Was War: A French Spoliation Case from the Quasi-War', 113 *Sea History* (2005) 16.

[109] W. Dudley and M. Crawford (eds), *The Naval War of 1812: A Documentary History*, vol. 1 (1985).

[110] C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960); C. Magra, *Poseidon's Curse: British Naval Impressment and the Atlantic Origins of the American Revolution* (2016).

[111] Dudley and Crawford, *supra* note 109, at 16–17; Brunsman, 'Subjects vs. Citizens: Impressment and Identity in the Anglo American Atlantic', 30 *Journal of the Early Republic* (2010) 557.

[112] Wolf, 'British Impressment, American Discontent, and the Making of the Chesapeake-Leopard Affair, 1803–1807', 29 *War and Society* (2010) 1; Steel, 'Merry and the Anglo-American Dispute about Impressment, 1803–6', 9 *Cambridge Historical Journal* (1949) 331.

[113] G. Brown, *Empire of Liberty: A History of the Early Republic, 1789–1815* (2009), at 650–652.

This year would turn out to be a decisive one in Anglo-American relations as Jefferson enacted a trade embargo against Britain in December 1807. A great deal of scholarly energy has been expended unearthing the motivations and consequences that surrounded this embargo.[114]

In traditional accounts, the British capture of the USS *Chesapeake* off Virginia in June 1807 is cited as the exemplar of American concern with British impressment.[115] Yet the capture of American vessels in China was also consistently part of American reporting and became the dominant issue raised in formal American diplomacy with the Qing.[116] The China trade had remained a symbol of national independence in the events leading to the War of 1812,[117] and the *Topaz* was frequently cited as an example of this threat following its capture.[118] In April 1807, Carrington related to Madison that all American vessels had been warned about the approach of foreign vessels in Chinese waters.[119] In June 1807, Madison received a report that nearly every American vessel engaged in the China trade had some of their crew subject to impressment – with such losses nearly impossible to replace at such a distance – and that the British treated all private American traders as collectively responsible for their compatriots' behaviour.[120]

Thus, when the *Topaz* was taken by the *Diana* in 1807, its fate was instantly relayed to both Madison and the general American media. Carrington provided a stylized version of his exchange with Pellew along with details of the case to the State Department.[121] Even while noting the Qing's general reluctance to intervene on their behalf,[122] Carrington used the *Topaz* case to symbolize his powerlessness given the lack of any formal US military presence in the region.[123] However ineffective they were for achieving material restitution, Carrington's protests did help keep British aggression in China a frequent citation in both congressional and public discourse.[124] The financiers of the *Topaz* directly petitioned Jefferson to support the ongoing legal proceedings related to the case, even asking for an American vessel to be sent to Bombay to retrieve it.[125] In his own final

[114] D. Fraser, *The Growth and Collapse of One American Nation, The Early Republic, 1790–1861* (2020), at 130–131; J. Wheelan, *Jefferson's War: America's First War on Terror 1801–1805* (2004), at 335–336; B. Spivak, 'Jefferson, England, and the Embargo' (1975) (PhD dissertation on file at the University of Virginia), available at libraetd.lib.virginia.edu/public_view/dz010q12m.

[115] C. Edel, *Nation Builder: John Quincy Adams and the Grand Strategy of the Republic* (2014), at 92–93.

[116] Ruskola, *supra* note 6, at 121–122.

[117] R. Watson, *America's First Crisis* (2014), at 352–353.

[118] J. Shulim, *The Old Dominion and Napoleon Bonaparte* (1952), at 186.

[119] 'To James Madison from Edward Carrington', 19 April 1807, Founders Online, National Archives, available at founders.archives.gov/documents/Madison/99-01-02-1617.

[120] 'To James Madison from Com. Isaac Chauncey', 9 June 1807, Founders Online, National Archives, available at founders.archives.gov/documents/Madison/99-01-02-1765.

[121] Steel, *supra* note 28, at 56.

[122] 'To Madison from Carrington', *supra* note 26.

[123] 'Canton, E.C. Carrington, Dec. 6', in General Services Administration, *Despatches from United States Consuls in Canton, 1790–1906*, vol. 1 (1965), at 65.

[124] 'Notes for Confidential Message to Congress', 7 December 1807, Founders Online, National Archives, available at founders.archives.gov/documents/Jefferson/99-01-02-6926.

[125] Even after Jefferson enacted the 1808 embargo, the *Topaz*'s financiers persisted and pressed the matter as one of domestic subordination to British aggression. By contrast, in 1809, Carrington had already resigned as consul and returned to the USA.

campaign to secure support for the embargo, Jefferson noted that aggressive action in response to takings and impressment was needed as the '[British] have repeatedly done the same in foreign ports and countries, particularly in Canton'.[126]

In debates over the embargo, it was also true that multiple communications between Secretary of State Madison and other American dignitaries contained concern with the impact that the new embargo would have on the China trade.[127] It is notable that, while the embargo did damage the China trade,[128] Jefferson gave a specific exception to John Astor – by many accounts, America's leading merchant at that time – to continue trade missions to China. Jefferson continued to see the China trade as an important symbol of US independence and thought this action would help show the Qing the superior national character of Americans in contrast to that of the British.[129] In the coming year, British aggression against the Americans in China would recurrently be the subject of communications between federal government officials. John Adams cited the situation as an acute example of the inability of the American government to protect the interests of its citizens abroad.[130] Madison lamented the lack of a state-supported interpreter to help negotiate better support from the Qing, which specifically inhibited the ability to contradict British claims about specific incidents such as the *Topaz*'s capture.[131]

Ultimately, the failure of the embargo to arrest British aggression led to the War of 1812, but it also helped solidify the idea that American national identity was critically reflected in its ideals of commercial empire.[132] The success of America's still largely private naval forces in China[133] led some to continue to absorb the risk of the China trade even during this period of open hostility.[134]

C *Placing China at the Heart of 19th-Century Geopolitical Competition*

For all the competing imperial interests at play in the South China Sea during 1807, the *Topaz* incident reflected shifting tides of opportunity and vulnerability. Even before the British obtained clear military dominance over the area, the destabilizing force of piracy pushed the declining Qing to concede to their assistance. In doing so, the

[126] 'Notes for Confidential Message to Congress', 7 December 1807, Founders Online, National Archives, available at founders.archives.gov/documents/Jefferson/99-01-02-6926.

[127] 'To James Madison from Samuel Smith', 18 April 1807, Founders Online, National Archives, available at founders.archives.gov/documents/Madison/99-01-02-1612.

[128] R. Rudolph and S. Cammann, *China and the West: Culture and Commerce* (1977), at 50.

[129] D. Wang, *China and the Founding of the United States: The Influence of Traditional Chinese Civilization* (2021), at 125–127.

[130] 'From John Adams to James Sullivan', March 1808, Founders Online, National Archives, available at founders.archives.gov/documents/Adams/99-02-02-5235.

[131] 'To James Madison from James Fenner', 16 June 1808, Founders Online, National Archives, available at founders.archives.gov/documents/Madison/99-01-02-3202.

[132] Hattendorf, 'The Naval War of 1812 in International Perspective', 99 *The Mariner's Mirror* (2013) 5.

[133] F. Kert, *Privateering: Patriots and Profits in the War of 1812* (2015), at 20.

[134] E. Dolin, *When America First Met China: An Exotic History of Tea, Drugs, and Money in the Age of Sail* (2012), at 143–144.

British were provided a powerful new rationale for regional interventions, ultimately leading to the capture of the *Topaz*. The specific legalized framing of the encounter enabled both the Qing and the weakening Portuguese an opportunity – if fleeting – to reserve their energies for other conflicts when they were forced to more directly confront rising British aggression. As such, the incident demonstrates the global importance of Chinese affairs during the era in often existential terms for the British.

For the USA, the episode reflected the global scope of its own early post-colonial foreign policy history and China's centrality therein. The *Topaz* incident was a recurrent part of the heated discourse in private and public American forums over British aggression and the lead-up to Jefferson's pivotal 1807 embargo. Moreover, the episode broadens the setting for the Anglo-American rivalry leading up to and through the War of 1812 and, more generally, the tensions that would eventually initiate the Opium Wars.

4 Prize Law and Competitive Imperial Self-Conceptions

A *Prize Litigation as Imperial Legality*

For the captains of the *Topaz* and *Diana*, their encounter would come after voyages in which they both crossed what many would consider murky lines of legality. The *Topaz*'s path through South America was checkered by violent encounters that occurred under various legal pretenses – to which its possession of several national flags was clear evidence. The *Diana* broke her own orders to pursue increasingly aggressive searches of the *Topaz* on modulating legal grounds, nearly leading to open Anglo-American violence in the region – all while both countries engaged in a systemic flouting of the Qing ban on the opium trade. The regulation of prize taking was marked by many of the qualities that still make maritime law such a distinct area of expertise. Involving some admixture of public aegis and private self-interest, the line between publicly sanctioned privateering and publicly suppressed piracy rested on often artful distinctions in theory and muddy overlaps in practice. As such, prize law has been used by historians as a key illustration of the expansion of British naval power as imposing a form of 'legalized despotism' in its wake.[135]

Yet such legality was far from a purely rhetorical device in imperial contexts, as the vast literatures on law and colonialism or law and empire attest to.[136] The Admiralty Court system that the *Topaz*'s case travelled through had been institutionalized at significant cost by the British in every maritime arena where it had come to exert power. Here, the early history of prize law did reflect some facet of the legalization of international affairs of the Grotian era.[137] Thus, even as larger geopolitical conflicts raged, the ultimate fate of the *Topaz* still rested on years of transnational litigation in which its participants invested a great deal of resources.

[135] C. Bayly, *Imperial Meridian: The British Empire and the World, 1780–1830* (1989).

[136] Two of the most influential classics are L. Benton, *Law and Colonial Cultures Legal Regimes in World History, 1400–1900* (2001); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2012).

[137] Clapham, 'Booty, Bounty, Blockade, and Prize', 97 *International Law Studies* (2021) 1200.

Many existing studies of prize law have emphasized the function of prize courts as a quasi-legalized forum of diplomacy and imperial administration.[138] Given the strong incentives for captains to take prizes, it has long been recognized that overzealous captains could use flexible legal pretexts to capture even the vessels of their home nation's allies.[139] British imperial historians have noted how the personal priorities of 'men on the spot' in imperial frontiers could undermine larger national strategic objectives.[140] Thus, returning ships captured through prize litigation was seen as a cost of disciplining the exercise of naval power, and Admiralty Courts' conformity to formal legal procedure as a necessity exactly to avoid the appearance of pure legal pretext.[141]

Still, the Vice-Admiralty Courts charged with initially adjudicating prize cases did come to develop a general reputation for providing a type of retroactive legal veneer to imperial violence.[142] The great difficulty for plaintiffs to produce compelling evidence to overcome the presumption for captors meant that vice-admiralty judges had wide discretion to determine which cases would bend to extra-legal concerns.[143] As the *Topaz* litigation shows, for appellate litigation, these issues were compounded by the distances involved and meant that it could take years for final judgments to be reached. More materially, the Vice-Admiralty Courts had always been marked by irregular institutionalization and high levels of staff turnover,[144] and their embeddedness in local jurisdictions has been described as 'corrupt, by design'.[145] Even when the High Courts of Admiralty were reformed in the early 19th century, it was admitted that proper procedural reform of the lower Vice-Admiralty Courts might disrupt their genuine role in serving imperial interests.[146] The taking of the *Topaz* itself occurred in the midst of the most intense periods of prize law revision in Britain as the Royal Navy pressed its power across the globe.[147]

As British prize taking skyrocketed around the Napoleonic Wars, the financial stakes of prize litigation increased.[148] Thus, for the Royal Navy, what legal restraints existed

[138] Prize courts decisively evidence broader conclusions on maritime law: 'Law on the seas at times suggested a model of international order and at times smacked of imperial ambition. It colored global order as a clumsy hybrid creation: regional and global, municipal and international, simultaneously beholden to and exempt from imperial sway.' Benton and Ford, *supra* note 5, at 147.

[139] Though prize law became a highly specialized area of practice, naval officials were generally aware of its basic principles. Baty, 'Neglected Fundamentals of Prize Law', 30 *Yale Law Journal* (1920) 34, at 34.

[140] Galbraith, 'The "Turbulent Frontier" as a Factor in British Expansion', 2 *Comparative Studies in Society and History* (1960) 150, at 168.

[141] Steigelman, 'The Promise and Perils of Prize Law', 19 *World History Connected* (2022) 1, at 6.

[142] R. Cheriau, *Imperial Powers and Humanitarian Interventions: The Zanzibar Sultanate, Britain, and France in the Indian Ocean, 1862–1905* (2021), at 103.

[143] Even under the best of circumstances, this informality made the presumption in favour of captors all the more difficult to rebut. Captains were also not expected to travel to defend their takings. Baty, *supra* note 139, at 41.

[144] Marten, 'Constitutional Irregularities in the British Imperial, Courts of Vice Admiralty during the Mid-Nineteenth Century', 37 *Journal of Legal History* (2016), at 215.

[145] P. Scanlan, *Freedom's Debtors: British Antislavery in Sierra Leone in the Age of Revolution* (2017), at 101.

[146] *Ibid.*, at 102–103.

[147] G. Aldous, 'The Law Relating to the Distribution of Prize Money in the Royal Navy and its Relationship to the Use of Naval Power in War, 1793–1815' (2020) (PhD dissertation on file at King's College London), available at kclpure.kcl.ac.uk/ws/portalfiles/portal/136790810.

[148] Marten, *supra* note 144, at 215.

on prize taking could be more easily overwhelmed by the incentives that were created the further its ships travelled away from home.[149] For captains like Kempthorne, the admixture of self-interest and inflamed passions could render the restraints of imperial legality unable to prevent the type of potential geopolitical crisis such as that which the *Topaz*'s capture quickly stoked. The Vice-Admiralty Court in Bombay was no exception to these general trends. It was itself originally staffed by one jurist and two merchant representatives initially appointed by the East India Company. As mentioned earlier, the judge in the *Topaz*'s initial hearing was Scottish jurist James Mackintosh, whose station in Bombay was the first of his public career. His role in the *Topaz* case itself was unexceptional, but Mackintosh's tenure in Bombay from 1803 to 1811 is notable in one revealing regard.

At the very outset of his tenure in 1803, Mackintosh decided the sole prize case on record from the Bombay court whereby an American ship was returned to its owners. Mackintosh derived the grounds for his ruling not from prize law but, rather, from the law of nations.[150] This action generated immediate and fierce criticism from Charles Grant, then director of the East India Company.[151] Unsurprisingly, Mackintosh's decision later found favourable citation by American jurist Henry Wheaton.[152] Mackintosh's commitment to proper legality continued to ruffle many in the local Bombay elite,[153] and he later did not speak enthusiastically about his time on the Court.[154] However, by the time Mackintosh heard the *Topaz* case, he had already resigned himself to not invoking any higher legal principle for guiding prize adjudication.

In this larger context, the *Topaz* litigation presents a reinforcing example of extant studies of prize litigation as a form of imperial legality but in a context where its veneers were stretched thinnest by 'men on the spot' at the frontiers of imperial expansion. In a context like that of the South China Sea in the early 1800s, the disciplinary function of prize law was acutely limited for cases like that of the *Topaz*, where the eventual fate of captured vessels was more powerfully impacted by strategic diplomatic calculations rather than by legal principle. Still, even here, the formal legality of prize law did not fully break. The *Topaz* litigation was taken seriously by all of its participants even near the brink of war, and the litigation records reveal that its appeal was allowed even though the normal time limit had passed.[155]

However attenuated its practices were at these far reaches, the bending but not breaking character of prize law in the *Topaz* incident reflected the force of its ideological function. While the true inner mind of any individual captain such as Kempthorne is often impossible to retrospectively pierce, imperialisms of many forms have long

[149] As Padraic Scanlan relates, 'public support, loose regulations, huge incentives, and little chance of reprisal made [them] accustomed to impunity in search and seizure'. Scanlan, *supra* note 145, at 101.

[150] E. Macleod, *British Visions of America, 1775–1820* (2015), at 120–121.

[151] J. Rendall, 'The Political Ideas and Activities of Sir James Mackintosh' (1972) (PhD dissertation on file at the University of London), at 186–187, available at discovery.ucl.ac.uk/id/eprint/1317900.

[152] H. Wheaton, *A Digest of the Law of Maritime Captures and Prizes*, vol. 1 (1815), at 52.

[153] Rendall, *supra* note 151, at 153–154.

[154] P. Handler, 'James Mackintosh and Early Nineteenth-Century Criminal Law', 58 *THJ* (2015) 757, at 766.

[155] PAC, Topaz, at 11.

been marked by the genuine need for comforting rationalizations by those carrying out their violence.[156] However hypocritical they may have appeared to others, British Royal Naval officials routinely made public proclamations throughout this era that they would respect Qing sovereignty as part of their demonstrated commitment to legal discipline.[157] And even an aggressive captain like Kempthorne – geographically and logistically far removed from the British courts – maintained a proactive commitment to present the justifications for his violence in the precise language of law, a practice for which he was richly rewarded.

B *Prize Law as the Battleground of American Post-Colonial Identity*

The dual legal and diplomatic character of prize litigation was acutely on display during and after the *Topaz*'s capture. However, Carrington's appeals found little diplomatic resonance given the growing enmity of Anglo-American relations – a far cry from the diplomatic leverage that a European ally could apply to the capture of their own ships in the Atlantic. What is perhaps more surprising, then, is that the financiers of the *Topaz* pursued the case in a Vice-Admiralty Court that had only ever once – a decade earlier – returned an American ship to its owners. Moreover, very little in prize law, or in the evidentiary record, had changed since the initial judgment. A contemporaneous French account of the case claimed it was well understood that the original holding in the case defied basic legal reasoning and that the taking was a clear case of 'mais il fallat un pretexte'.[158]

While a full account of the *Topaz*'s financiers' motivations in pursuing such expensive international litigation remains elusive, it is notable that they continued their own aforementioned diplomatic efforts at home even after Carrington's resignation as consul in 1809.[159] It is also true that the scale of the Atlantic Vice-Admiralty decisions had produced enough case reporting that something akin to an actual body of binding precedent could be referred to, as was seen in the *Topaz* appeal.[160] Given the very large sums required to finance trade missions to China, this general atmosphere of at least potential prize litigation success provided the financiers of the *Topaz* calculations with some assurance that their dual efforts could secure a favourable outcome when Carrington's diplomacy could not.

Such hopes would have been buoyed by the fact that the symbolic importance of the China trade to the post-colony remained high throughout the life of the *Topaz* litigation. Concurrently, the incident was not just an under-appreciated part of the era's

[156] Ikechi Mgbeoji, 'The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security', 27 *Third World Quarterly* (2006) 855.

[157] Morse, *supra* note 18, at 219; Barrow, 'Free Trade to China', 100 *The Quarterly Review* (1834) 440.

[158] C. Renouard de Sainte-Croix, 'Voyage commercial et politique aux Indes Orientales, aux Iles Philippines, a la Chine' ['Commercial and Political Trips to the East Indies, the Philippine Islands, and China'] (1810), at 132.

[159] Though admittedly speculative, it is possible that the very intensity of Anglo-American tensions in 1811 convinced the *Topaz*'s financiers that their appeal could benefit from British attempts to pacify American elites at the time.

[160] J. Smith, *John Marshall Definer of a Nation* (2014), at 113–116.

Anglo-American trade tensions but also part of an aggressive, contrastive strategy of using such cases to demonstrate American allegiance to legality and the 'law of nations'. For many Americans, their relative vulnerability and victimization at the hands of the British after the Revolution fuelled a distinctive vision of commercial empire secured by the cooperation of public and private naval power abroad.[161] This vision of a formally non-imperial foreign policy led several founders to directly cite China as an exemplar nation that treated all foreign nations equally and refrained from violent territorial acquisitions.

Given that the USA retained much of its common law legal heritage after the Revolution, contrasting British imperial policy with American attitudes in the international arena was an attractive forum for legal differentiation.[162] Several recent studies have resituated the transnational context of American law during this era as well as American commitment to the 'law of nations'.[163] Prototypically derived from Emerich de Vattel's highly influential two-volume 1758 *The Law of Nations*, this ideal was generally advanced as placing international relations under the discipline of general legal principles, especially those of comity and neutrality.[164] This contrastive strategy was central in the discourse over Anglo-American relations in the run-up to the War of 1812. Herein, prize law was one of the American's recurrent foci that crystallized the connection between their visions of a putatively non-violent commercial empire and a commitment to the law of nations. Immediately before famed American jurist John Marshall began his tenure on the US Supreme Court, he singled out Vice-Admiralty Courts as evidence of how far British judges had fallen in service of imperial interests.[165] Such claims were also recurrent in the US state courts that commonly heard maritime cases.[166] Thus, the direct invocation of the *Topaz* incident and the larger situation in Canton described earlier eventually joined this discourse.[167]

[161] Arlyck's forthcoming monograph comprehensively explores the role of Atlantic prize courts in the formation of American internationalism, generally, and American federal courts, specifically. Kevin Arlyck, *The Nation at Sea: The Federal Courts and American Sovereignty, 1789–1820* (forthcoming).

[162] Oosterveld, *supra* note 37, at 255–256. Notably, James Mackintosh was an early sympathizer of the American Revolution and was drawn to its open embrace of the law of nations. A. Gust, 'Empire, Exile, Identity: Locating Sir James Mackintosh's Histories of England' (2011) (PhD dissertation on file at the University College London), at 104, available at discovery.ucl.ac.uk/id/eprint/1306715/1/1306715.pdf.

[163] E. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (2012); Golove and Hulsebosch, 'Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition', 85 *New York University Law Review* (2010) 933.

[164] For the longer history of American invocation of the law of nations, see M. Weston Janis, *America and the Law of Nations 1776–1939* (2010).

[165] John Marshall called on Britain to 'infuse a spirit of justice and respect for law into the Courts of Vice Admiralty … their excessive and irritating vexations … by converting themselves from judges into mere instruments of plunder'. A. Beveridge, *The Life of John Marshall Politician, Diplomatist Statesman 1789–1801* (2000), at 512–514.

[166] 'Though no war existed in form, no declaration of hostilities had been made, yet British cruisers were sweeping every American vessel from the ocean; and the vice-admiralty courts were condemning them, with or without cause, as fast as they were brought within their jurisdiction'. C. Little and J. Brown (eds), *Reports of Cases Argued and Determined in the Supreme Judicial Court of the Commonwealth of Massachusetts*, vol. 3 (1851), at 445–446.

[167] In 1808, John Adams claimed that, unless the British refrained from similar actions, 'we shall have a continual Warfare at Sea, like that lately at Canton'. 'From John Adams to James Sullivan',

In this vein, it is no coincidence that Carrington focused much of his diplomatic attention on Madison, for Madison had made the critique of British admiralty law a centrepiece of his own writings during this era.[168] The year before the *Topaz* incident, Madison had penned a treatise on the subject[169] and repeatedly criticized British rationales for interfering with the trade vessels of neutral nations.[170] Madison had also used British Vice-Admiralty Courts as examples of British legal hypocrisy throughout the months leading up to the *Topaz* incident.[171] However, American critique of British maritime policy, and prize litigation specifically, was not simply a defensive strategy. The USA's reliance on private naval forces in its early history meant that privateering was a large source of revenue for its ships, and the nation quickly established its own prize court system after the Revolution.[172] As the *Topaz*'s voyage around South America clearly displays, claims of commercial empire carried out by a non-violent state were often complemented by the systemic private violence that propelled privateering. Similarly, American prize courts often served the same quasi-diplomatic function by returning captured ships that might otherwise have provoked tensions with its European trade partners.[173]

Such potential definitional sleights of hand notwithstanding, the specific integrity of American prize litigation was quickly held up as a direct comparator to the British practices from which its own doctrines had emerged.[174] The relative merits of prize cases like that of the *Topaz* were then folded into the annals of Anglo-American rivalry along predictable lines. In British accounts until the mid-20th century, the *Topaz* would remain a 'piratical schooner' lawfully and meritoriously captured.[175] Similarly, in subsequent American accounts, the case would be one of 'totally unfounded suspicion' and tyrannical 'oppression'.[176]

March 1808, Founders Online, National Archives, available at founders.archives.gov/ documents/ Adams/99-02-02-5235.

168 R. Rutland, *James Madison, the Founding Father* (1997), at 185–189, 270–281.

169 J. Madison, *An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace* (1806).

170 'From James Madison to Thomas Jefferson', 14 September 1805, and 'From James Madison to James Monroe', 24 September 1805, both from Founders Online, National Archives, available at founders.archives.gov/documents/ Madison/02-08-02-0556 and 02-10-02-0329.

171 'From James Madison to David Montague Erskine', 25 March 1808; 'From James Madison to David Montague Erskine', 29 March 1807; 'From James Madison to James Monroe', 20 May 1807; and 'From James Madison to Anonymous', 30 July 1807, all from Founders Online, National Archives, available at founders.archives.gov/documents/Madison/99-01-02-2129; 99-01-02-2129; 99-01-02-1371; 99-01-02-1846.

172 Foy, 'Eighteenth Century "Prize Negroes": From Britain to America', 31 *Slavery and Abolition* (2010) 379, at 386.

173 Arlyck, 'Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822', 30 *Law and History Review* (2012) 245. Whether such privatized violence fully vitiates any claim that American foreign policy ever embraced a truly non-imperial 'commercial' form of empire is debatable to say the least and ongoing fodder for debates in American legal history. See, e.g., B. Coastes, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (2016).

174 A. Lambert, *The Challenge: Britain against America in the Naval War of 1812* (2012).

175 J. Fraser, *Fraser's Magazine for Town and Country*, vol. 25 (1842), at 456–457; G. Lanning and S. Couling, *The History of* Shanghai, vol. 1 (1921), at 226–227; Alfred Weightman, *Heraldry in the Royal Navy: Crests and Badges of H.M. Ships* (1957), at 175.

176 J.E. Cabot, *Extracts from Letterbooks of James and Thomas Handasyd Perkins* (1964), at 174.

5 Prize Law as a Forum for Learning 'Western Law' before the Opium Wars

A *Commercial Engagement and Growing Qing Cynicism over British Legality*

In recent decades, major revisions have reworked previous understandings of the Qing Dynasty's relationship with non-Han populations.[177] This scholarship has informed parallel work upgrading perspectives on Qing engagement with Western international legal practices, generally beginning with the treaty-making processes following the Opium Wars.[178] These new advancements have worked to centre technical and conceptual gaps in legal knowledge and moved explanatory frameworks away from culturalist explanations that emphasized the effect of either an innate Chinese aversion to legality or simply an arrogantly dismissive Qing sense of superiority.[179] Yet these interventions largely do not consider the pre-Opium Wars history of Qing experience with foreign legal practices that unavoidably arose from growing commercial engagement.[180] However, in the two centuries preceding the Opium Wars, legal practices were already a common topic of cross-cultural differentiation and primarily drew on the many private interactions that composed China's overland and overseas trades.

The *Topaz* incident is one example of this more privately orientated interaction beyond national treaties where Qing commentary reveals a pre-existing discourse on the legal practices of individual foreign nations, especially those of the British. The growing British practice of prize taking at the end of the 18th century fuelled deepening Qing cynicism about Western claims to principled legality that required little precise knowledge of prize law to critically evaluate. For Qing officials, the longer relationship with Portugal had already shaped their perceptions of European affairs, but knowledge of Britain – or its global imperial expansion – was still quite limited in the early 19th century.[181] What knowledge did exist was largely dependent on the writings of individual Chinese travellers, whose accounts were not always readily accessible to national Qing officials.[182] Such a disconnect meant that strategic planning

[177] W. Rowe, *China's Last Empire: The Great Qing* (2012); Phillips, 'Contesting the Confucian Peace: Civilization, Barbarism and International Hierarchy in East Asia', 24 *European Journal of International Relations* (2018) 740.

[178] M. Carrai, *Sovereignty in China: A Genealogy of a Concept Since 1840* (2019); see also Mitchell, *supra* note 6.

[179] Ruskola, *supra* note 6; see also J.H. Day, *Qing Travelers to the Far West Diplomacy and the Information Order in Late Imperial China* (2018).

[180] The primary exception here again is Chen's study that examined actual Sino-British cases from this era and, to some extent, Jedidiah Kroncke's overview of early Sino-Western legal engagement. Chen, *supra* note 6, ch. 4; Kroncke, *supra* note 6, at 47–49.

[181] D. Li, *Yapian Zhanzheng Qianhou Yingmeifa Zhishi zai Zhongguo de Shuru he Yingxiang* [*The Import and Influence of Anglo-American Law on China Before and After the Opium War*] (2013), at 63.

[182] Z. Li, 'Qingdai Jiaqing Qinian Yingchuan Ruao Wenshu Chutan' ['A Preliminary Study on the Documents of British Ships Entering Macau in the Seventh Year of Jiaqing Period in the Qing Dynasty'], 10 *Xibu Xuekan* [*Journal of Western Studies*] (2013) 1; Li, *supra* note 181, at 65–66.

could be slowed by challenges in keeping abreast of affairs such as the Napoleonic conflict or the appearance of post-colonial nations such as the USA.[183]

It also meant that local Qing officials, especially those working in Macau and Canton, were the most directly informed on different Western legal practices and often foresaw problems much earlier than did the central officials.[184] Some issues, such as the formal separation but informal coordination between the Royal Navy and the East India Company, remained difficult for central Qing officials to fully assess.[185] However, it became very clear to Qing officials that British imperial legal practices were characterized by the thin line between legality and violence at the heart of prize law. Qing frustrations with the British refusal to respect its 1796 ban on opium trading were already recurrent during this era. By the time the *Topaz* incident had occurred, growing concern had already mounted among local Qing officials about the new legal pretexts that the British had begun to articulate for violent actions in the South China Sea.[186] Provincial Qing officials repeatedly submitted damning characterizations to the central government of Britain's use of legal formalities to justify these encroachments.[187]

As a result, consistent Qing responses to new British legal claims were hamstrung by the complexities of local–centre relations that had already caused larger problems in Qing maritime governance.[188] There were also symbolic pressures on the central administration to hew to the Sino-dominant presumptions of the tributary system.[189] As such, central authorities publicly resisted acknowledging the British as a legitimate threat, though they received a steady stream of direct accounts of the imperial violence that followed new British legal arguments.[190] Many local officials gave stark warnings about the misleading character of British claims to principled legality and argued that a firmer response in cases like the *Topaz* was necessary to ward off future encroachments.[191]

Specific accounts of the practice of taking American vessels like the *Topaz* also generated resentment that the British were using legal pretexts to enact revenge following the Revolutionary War.[192] This criticism only intensified as the British grew more

[183] T. Liang, *Haiguo Sishuo* [*Four Treatises on Maritime Countries*] (1997).
[184] S. Platt, *Imperial Twilight: The Opium War and the End of China's Last Golden Age* (2018), at 239–242.
[185] Eames, *supra* note 57, at 144.
[186] Po, *supra* note 76, at 81–82.
[187] In 1802, one such report recounted that 'the country UK/Britain, has long held an infamous reputation in the west as very good/professional at schemes, intrigues, conspiracies and plots, in the recent several decades it has an ambition and desire to gradually, piece by piece encroach on China and East Asia's territory'. Zhou and Li, *supra* note 88, at 69–70.
[188] The Qing did carry out public maritime research surveys, but most cartographic knowledge was produced and shared through localized private commercial and literary networks. This decentralized production could lead to large gaps in the empirical starting points of local and central officials when considering maritime issues. W. Wang, *White Lotus Rebels and South China Pirates: Crisis and Reform in the Qing Empire* (2014).
[189] For example, local officials were initially reluctant to report the 1802 British attempt to occupy Macau for fear they would be punished by their superiors. Wakeman, 'Drury's Occupation of Macau and China's Response to Early Modern Imperialism', 28 *East Asian History* (2004) 27, at 28.
[190] H. Gao, *Creating the Opium War British Imperial Attitudes towards China, 1792–1840* (2019).
[191] B. Wei, *Ruan Yuan, The Life and Work of a Major Scholar-Official in Nineteenth Century China before the Opium War* (2006), at 138–139.
[192] J. Waley-Cohen, *The Sextants of Beijing: Global Currents in Chinese History* (2000), at 129–130.

brazen in their actions in Chinese waters, which again only increased after the *Topaz* incident.[193] In this light, the Qing's permissive reaction to the taking of the *Topaz* did not reflect a measured validation of British legal arguments, even as Kempthorne used their inaction as positive evidence in the *Topaz* litigation itself.[194] Instead, Qing deference to British claims that the *Topaz* was taken in neutral waters was clearly legible as a strategic decision informed by its own compromised position in the region, which it hoped would only be temporary. The realism with which the Qing treated British invocations of legal authority thus prefigured their own debates over the content of British legality decades before they had to directly engage in treaty making that was theoretically governed by the law of nations.

B *The Relative Success of American Claims to Legal Fidelity*

Just as in other areas of its international relations, the American desire to contrast their post-colonial legal identity with British practices was not solely directed across the Atlantic but was a transnational affair in which China has remained an underappreciated facet. The active invocation of the *Topaz* incident in domestic American affairs had been predated for decades by American officials asserting that their comparatively amenable attitude to Qing authorities was reflective of their special valuation of comity and the law of nations.[195] From the outset of direct Sino-American engagement, Americans were quick to privately and publicly disparage general British devotion to legality – among many other qualities – when seeking Qing favour.[196] Again, for many American leaders, this tactic was not disingenuous and reflected what they saw as part of their distinctive national project. The symbolic importance of the China trade made it an attractive point of American differentiation from Britain both as an aggressor and also as a nation respectful of international law.[197] Though Carrington ultimately left his post as consul in frustration, he knew that this language of contrastive allegiance to the law of nations had become a foundation to American understandings of the importance of China as a symbol of its post-colonial identity.

Moreover, many US Founders continued to reciprocally invoke China favourably as an example of a commercial empire and make active inquiries into acquiring information on Chinese legal practices.[198] Shortly after Jefferson's embargo was announced, Adams cited Chinese law as one of the great national legal traditions that similarly respected the principles of international law.[199] It is also true that America's then relative weakness in the South China Sea made such positive framing a practical necessity aimed at inspiring the goodwill of the Qing administration in order to counterbalance

[193] Y. Guo, *Qingdai Jingjishi Jianbian, 1644–1840* [*A Brief Economic History of the Qing Dynasty, 1644–1840*] (1984), at 155–156; S. Hu, *Hu Siyong Xueshu Wenji* [*Hu Siyong's Collected Academic Works*] (2013), at 11.
[194] PAC, Topaz, at 44.
[195] Chen, *supra* note 6, at 188.
[196] Morse, *supra* note 18, at 64–65.
[197] *Ibid.*, at 107.
[198] Kroncke, *supra* note 6, ch. 1.
[199] 'From John Adams to Joseph Bradley Varnum', 9 January 1809, Founders Online, National Archives, available at founders.archives.gov/documents/Adams/99-02-02-5289.

British power.[200] In this regard, the greater deference of American traders to Qing authority did succeed in focusing most Macau and Canton officials' criticism on the British.

In practice, many Americans were not so consistent in adhering to their own self-representation as a nation bound by the law of nations.[201] American ships in the Atlantic began their own aggressive prize taking following the onset of the War of 1812.[202] In tandem, American ships became just as likely to take prizes in the Chinese waters of the South China Sea as their British competitors.[203] This new practice even led to reciprocal British protests to authorities in Macau seeking the return of their vessels from American captors.[204] Local officials never acknowledged that active hostility between foreign nations justified aggression in their waters, and the Americans did lose their ability to sell prizes in Canton by the end of 1814.[205]

Such inconsistency marked much of American activity regarding China in the coming century – most notably, when America took advantage of British aggression during the Opium Wars to achieve its own extraterritorial treaties with the Qing.[206] Over time, some Qing officials began to see how American criticisms of the British opium trade were contradicted in practice by their own traders.[207] It was also during the War of 1812 that American views of Chinese law grew increasingly inconsistent and that US leaders first expressed less willingness to subject American citizens to Chinese law.[208] Still, at least in public forums, Americans were consistent in differentiating their legal practices from the British, including quite detailed arguments regarding the process, content and motivations of its post-Opium War extraterritorial treaties with the Qing.[209]

Chinese views of the USA, and, in turn, American law, remained quite diverse up to and including the early 20th century. Even after the Opium War, leading Chinese intellectuals would cite positive evaluations of the Americans' peaceable commercialism, at the very least when contrasted with the British.[210] While Qing investment in formal

[200] American missionaries had also long been consistent in publicly condemning the British violation of the Qing's opium ban. See generally J. Reed, *The Missionary Mind and American East Asian Policy* (1983).

[201] The scurrilous behaviour of American expatriates in China was a recurrent problem for American officials attempting to maintain this image. E. Scully: *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844–1942* (2001).

[202] It is also notable that this period saw the first presence of formal American warships in the Pacific Ocean as several began to target British vessels there after 1812. M. Green, *By More Than Providence* (2017), at 17–18.

[203] Kert, *supra* note 133, at 11.

[204] M. Kuebel, 'Merchants and Mandarins: The Genesis of American Relations with China' (1974) (PhD dissertation on file at the University of Virginia), at 32, available at libraetd.lib.virginia.edu/public_view/h415p965q.

[205] Dennett, *supra* note 12, at 82–83.

[206] Donahue, 'The Caleb Cushing Mission', 16 *Modern Asian Studies* (1982) 193, at 209.

[207] Kroncke, *supra* note 6, ch. 2.

[208] Chen, *supra* note 6, at 188.

[209] C. Fuess, *The Life of Caleb Cushing* (1923), at 414, 438.

[210] Wei Yuan's influential assessment of foreign nations is one representative example of this positive evaluation of American dispositions. Y. Wei, *Haiguo Tuzhi* [*Illustrated Treatise on the Maritime Kingdoms*] (1842). For a discussion of Wei's relatively positive views of Americans, see Alex Haskings, 'Innovating Empire:

expertise regarding Western international law only occurred after the Opium Wars, this early era of maritime legal interactions set the stage for ongoing debates in China about the utility of learning about Western law – as well as which country's law to specifically study – as part of China's attempts to fight off foreign encroachment.[211]

6 Conclusion

The hull of the *Topaz* and its cargo were finally auctioned and deposited in the Registry of the High Court of Admiralty in 1813, two years after the final appellate verdict.[212] Shortly thereafter, Philip Ammidon raised the issue of his appointment with Madison as the new American consul for Canton.[213] He had plans to rebuild the American merchant presence there and later found great success operating under cooperative terms with British traders. His ambitions were prescient of the decades following the end of the War of 1812, which saw systemic growth in both the British and American trade with China.[214] Rather than signalling any particular rapprochement on the legality of their respective takings in the South China Sea, this new Anglo-American cooperation was facilitated by the general British pacification of France in 1815, which ended the need for the Royal Navy to impress Americans.[215] While there were some bumps along the proverbial road as British and American captains revised their old habits,[216] the issue of open violence was limited to British interdiction of American slave ships, itself eventually resolved by the Webster-Ashburton Treaty in 1842.

Prize law continued to be a part of the larger global history of maritime law and the regulation of modern warfare.[217] While the reputation of prize courts remained ever low, their attraction as a form of imperial legality persisted for any nation that had the capacity to systematically exert naval power abroad. By 1819, US military ships would become a regular presence alongside British vessels in Chinese waters.[218] The Qing's strategic engagements with British aggression during episodes such as the *Topaz*'s capture were bellwethers of the shifting balance of naval power in the region.[219] The Qing

Domination and Resistance in Nineteenth Century China and Japan' (2020) (PhD dissertation on file at the University of Chicago), at 127.

211 Most Qing officials at the central and regional levels saw the acquisition of better military technology, rather than legal expertise, as the key to reversing the outcomes of the Opium Wars. Carrai, *supra* note 178, at 58–69. At the same time, the leading figures of the American Revolution and interpretations of their ideas remained popular among many of China's leading intellectuals up to the mid-20th century, including many leaders of the Chinese Communist Party.

212 T. Neuman, *The London Gazette*, vol. 1 (1813), at 1128.

213 'To James Madison from Philip Ammidon, 16 September 1813', in A. Kreider *et al.* (eds), *The Papers of James Madison, Presidential Series*, vol. 6 (2008), at 633–634.

214 L. Fang, *The History of Chinese Ceramics* (2023), at 1044–1045.

215 R. Buel and J. Lennox, *Historical Dictionary of the Early American Republic* (2nd edn, 2017), at 182.

216 Dennett, *supra* note 12, at 82–83.

217 Clapham, *supra* note 143; Scott, 'The International Court of Prize', 5 *American Journal of International Law* (1911) 302.

218 Y. Hao, *19 Shiji Zhongye Meiguo zai Aomen de Huodong* [*American Activities in Macau in the Mid-19th Century*] (2016), at 59–60.

219 Kwan, 'Piracy and Occasional Interstate Power in South China during the Mid-Nineteenth Century', 32 *IJMH* (2020), 697.

would face numerous domestic challenges in the 19th century that would leave them ill-equipped to contest these trends. British control over Hong Kong in the 1840s led to further Portuguese decline as Macau was diminished as a trade hub, and Portugal became even more dependent on British military support to ward off European and, soon, Japanese interest in the island.

The violent mid-19th-century reconfiguration of foreign trade in favour of Western interests was codified in a series of treaties that would haunt Sino-Western relations up to the contemporary era.[220] Concurrently, Sino-American relations would retain a central place in American articulations of its self-styled visions of a non-colonial commercial empire well into the mid-20th century.[221] Yet American inconsistency in this regard eventually led to incidents like the *Topaz*'s capture, which was to be cited by American leaders not as indictments of British aggression but, rather, as examples of the need for American parity with Britain in its China relations.[222] In 1841, Adams signalled the first public shift in this regard when he referred to recognizing Chinese legal authority over foreign subjects as an 'enormous outrage upon the rights of human nature, and upon the first principles of the rights of nations'.[223]

While the post-Opium War era remains a fertile ground for revisionist explorations of Sino-Western history, examining the *Topaz* incident shifts the importance of China as a stage for global history half a century earlier – in a manner that clearly disaggregates the varied 'Western' interests at play in the region. In tandem, the significant geopolitical stakes that drove the material and symbolic outcomes of the *Topaz*'s capture are instructive for the continued transnationalization of post-revolutionary American legal history. Such a recalibrated perspective also productively resituates how the tension between the formalities of prize law and the Anglo-American competition over fidelity to the 'law of nations' provided an early stimulus to Qing understandings of Western legal traditions, even if often far from salutary. Herein, a single violent encounter becomes a window not only into issues that preconfigured the coming transformation in Sino-Western relations but also into larger issues of imperial legality that would encircle the international legal orders shaped by British and American global expansion over the coming two centuries in which China would remain a critical participant.

[220] D. Wang, *China's Unequal Treaties: Narrating National History* (2005).
[221] Kroncke, *supra* note 6, at 77.
[222] Chen, *supra* note 6, at 189.
[223] T. Dennett, *Americans in Eastern Asia* (1922), at 107.