

PRIVATEERING AND THE PRIVATE PRODUCTION OF NAVAL POWER

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The early history shows that, contrary to the belief of many economists, a lighthouse service can be provided by private enterprise. . . . The lighthouses were built, operated, financed, and owned by private individuals. . . . We may conclude that economists should not use the lighthouse as an example of a service which could only be provided by the government.

—Ronald Coase (1974)

Introduction

Privatization and the “contracting-out” of services traditionally provided by means of governmental monopoly continue to attract increasing interest from both politicians and scholars. Many studies have found that private provision of certain goods and services tends to be more efficient than comparable arrangements provided directly by the government.

One of the very few areas relatively untouched by the recent attempts at privatization, or contracting-out, of governmental services is the military. Although some economists have argued that the privatization of major elements of the provision of national defense would be both feasible and efficient, in modern times military forces are essentially a pure governmental monopoly. Not only are private military forces illegal, but the military force maintained by the government is invariably wholly owned and operated by the government. National defense, like lighthouses, frequently serves as a stylized illustration of the need for governmental provision of “public goods” in economics textbooks.

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However, just as in the case of lighthouses, the “monopolization” of military force production by the government is a fairly recent historical trend. During wartime, nations have long depended on hired private contractors for a portion of their military might.¹ At sea, until the 19th century, a significant portion of the naval power of many countries was provided by privateers.

Privateers were privately owned and operated vessels that were granted licenses to seize the shipping assets belonging to the citizens of enemy states and to sell the “prizes” at auction. Privateers preyed on the seaborne communications of enemy nations. The granting of licenses to privateers to legally attack and seize enemy ships during wartime appears to have constituted an effective means of waging war and had many advantages from the standpoint of the licensing government. Privateering played a significant role in the history of naval warfare for many centuries. During some wars, licensed privateers provided the bulk of the naval power employed by one or all of the belligerent powers.

Our intention in the present paper is to examine interesting examples of the private production of military power and the complex system of international law that emerged to regulate the practice. We will then proceed to consider possible explanations for the eventual demise of a seemingly efficient military institution.

Military Importance of Private Contractors for Waging War at Sea between 1600 and 1815

Privateers were privately owned vessels awarded a license by the government, and legally permitted—subject to certain restrictions—to sell seized ships and cargo to the highest bidder and keep any resulting profit. Privateering arose when Western European nations found themselves unable to maintain standing navies beyond a negligible size, or even any at all. When nations fought wars at sea, they found that the cheapest option available was to “hire” private ship owners for that purpose, by offering those owners all or part of the

¹Corvisier (1979, p. 42) explains that recourse to professional war contractors was a “very convenient solution” to the problem of raising military forces and “was to be found everywhere in the fourteenth century.” Later the private contractors were replaced by governments that “rented” their soldiers to other governments during times of war. For example, during the most important 18th century wars, a large proportion of Britain’s armed force on land was actually composed of foreign troops placed under temporary British control, usually in exchange for a cash subsidy paid to their nation’s ruler (see Brewer 1989, chap. 2). As late as the Crimean War (1854–56), Britain employed about 15,000 foreign mercenaries as contract combat soldiers (Bayley 1977, p. 115).

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value of any enemy ships and cargo they were able to capture (Pares 1938, p. 1). As navies grew stronger, nations continued to find employing privateers desirable. A primary objective of war at sea was and is the disruption and destruction of the enemies' maritime commerce. Historically that has been accomplished by blockading enemy ports and destroying enemy commerce on the high seas. Even as late as the wars of the French Revolution and the Napoleonic Wars, the British Navy—the strongest navy in the world—could not have maintained the blockade of France and her colonies without the help of privateers.²

Privateers provided a major portion of the ability of national navies to project power during wartime. Privateering was the most cost-effective means available to a belligerent government to wage war; obviously, the prizes that provided the necessary financial incentives for privateering were provided by foreign nationals. Also, the commissioning government might receive substantial net revenue from the activities of the privateers it licensed—assuming prizes were subject to tax, as was normally the case.

In several important wars during the period in question, privateering vessels far outnumbered the official “navies” of warring countries, and they probably contributed much more than warships to the actual harm done the enemy. During the Spanish War at the end of the 16th century, English privateers “far outnumbered the Queen’s ships” (Andrews 1964, p. 21). Almost two centuries later, during the American Revolution, there were 800 vessels in commission in the “reserve naval force” (i.e., privateers) but only 198 vessels in commission in the Continental Navy (Stivers 1975, p. 29). Admittedly, those two cases were extreme. More typical of the overall record is the proportion of privateers to public navy efforts reflected in the manning of the vessels, as reported by the House of Commons for Britain during the Seven Years War (1756–63). In 1761, at the height of the struggle, 80,675 men were listed as “borne” by the Royal Navy; in the same year, 75,618 other men were crewing ships bearing letters of marque, that is, privateers (Neal 1977, p. 22).³ Privateers were a large proportion of the total military force at sea during the 17th and 18th centuries.

Privateers were widely employed by warring governments because they were generally extremely effective in their appointed

²With the Act of Union in 1707, England and Scotland became united as “Great Britain.” We will use the terms “English” and “British” to refer to the pre- and post-1707 eras, respectively.

³That number for letters of marque does not include the large numbers of similar letters issued, not by the British Admiralty, but by colonial authorities in America.

task: damaging the ocean-going trade, including the military supply operations, of enemy nations. The damage inflicted on enemy merchantmen by privateers was sometimes huge. Between 1688 and 1697 England lost about 4,000 merchant ships to enemy (French) action, and most of those were seized by privateers. In the War of the Spanish Succession (1701–13), England lost 3,250 merchant ships, again mostly to privateers (Brewer 1989, p. 197).⁴ However, English privateers were about equally successful through the 18th century as a whole.

Of course, privateering was usually profitable to the individual contractors and their crews, too. After all, it was a profit-maximizing business. Successful privateering cruises often netted the crews (and the ship's owners) handsome profits.⁵ Even given the limitations of available profit rate data for much of the period of privateering, modern historians mostly agree that privateering in general was profitable during the Elizabethan period (Andrews 1964, pp. 128, 134, and 147). Moreover, privateering continued to be a profitable activity for many centuries (Stivers 1975, p. 66). The highly competitive nature of privateering, and not high costs associated with prize taking, constrained profitability.

In addition to providing the national government with the ability to hamper enemy commerce during wartime, privateering was a source of government revenue. The prize share claimed by the licensing government varied in different countries at different times from about 40 percent of the value of the prize to nothing—not counting the charges paid to the prize courts for adjudication, which were normally relatively small (totaling no more than 10 percent and usually substantially less).⁶ Although the revenue from “prize taxes”

⁴Although better data are available for a longer period showing *British* losses, British privateers were also busy throughout that era causing comparable losses on the shipping fleets of other nations. During the War of the Austrian Succession (1739–48), Britain lost 3,238 merchant ships and France lost 3,434 merchantmen to the British (Bayley 1977, p. 198). Later in the Seven Years War, English privateers were relatively more successful than their French counterparts, taking 641 prizes; another 524 prizes were taken by His Majesty's ships (Neal 1977, p. 28). Swanson (1985, p. 377) shows that during King George's War (1739–48), British colonial privateers captured 829 prizes worth at least £7,561,000; during that war, approximately 36,000 Americans served aboard privateers at one time or another (Swanson 1985, p. 381).

⁵For example, during the Spanish War (1585–1603), the value of prize goods was equivalent to 10 to 15 percent of England's total imports; the average profit on fixed capital for 271 privateer voyages for the period 1589–91 was about 60 percent, although average economic profit is difficult to determine precisely and was probably somewhat lower (Andrews 1964).

⁶The “tax” ranged from two-fifths in the United States during the Revolutionary War to one-fifth in England before 1708, to one-tenth in Spain in 1718, to none in Britain after 1708 (see Stivers 1975, p. 117; Rogers [1712] 1928, especially p. ix; Shelvocke

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was never especially significant to the taxing governments relative to other sources of cash, it was almost pure net revenue given the very low cost to the government of providing the license. The government simply issued the license and allowed private enterprise to do the rest. The cost of the adjudication process was borne by the litigants (i.e., the privateers and sometimes the seized vessel's owner).

Owners of privateers (who typically did not sail with their vessels) employed a share agreement both in their contractual relationship with the captain and crew and in their relationship with the licensing government. The captains and crews of privateers were paid shares of the value of the captured prizes. That contractual arrangement was similar to the one used on whaling and fishing voyages; merchant sailors received a fixed monthly or lump-sum wage. As in whaling and fishing, shares were used on privateers because monitoring an individual's contribution to output was costly.⁷ Activities that were relatively costly to monitor included standing lookout for potential prizes, fighting when confrontation with prizes turned hostile, and sailing prizes back to port as part of a prize crew. Typically, all crew members signed the privateer's Articles of Agreement, which precisely allocated shares in prize money to individuals holding various crew positions and a certain percentage to the owners (see Garitee 1977 and Stivers 1975 for representative examples).

Just as the owners of privateering vessels faced monitoring problems with captains and crews, the licensing government also faced monitoring problems with the privateers because commerce raiding was costly to monitor. If the costs of monitoring performance of privateers had been zero, the government could have simply paid privateer crews wages and appropriated privateering profits itself. However, the licensing government could not directly observe the behavior of the crews at sea (the inputs), and monitoring by the direct observation of output (number of enemy prizes seized) was impractical given the long time lags involved. The average English privateer brought in between two and three prizes per year (see Davis 1962, p. 333). Thus, it would have taken several years, by monitoring output, to determine if a privateer was shirking in its

[1726] 1971, p. xviii). The British Parliament enacted the Prize Act in 1708 that allowed privateers to keep the entire value of the condemned prize, although one-tenth was still allocated to the Admiralty Court (see Bourguignon 1977, p. 14). That "tax reduction" was aimed toward improving the incentives facing privateers and increasing the destructiveness of such private activity during wartime; evidently it did just that.

⁷See Alchian and Demsetz (1972) for a general discussion of the use of sharing contracts when contributions to output are costly to monitor.

raiding duties or merely experiencing normal variations about the mean in capture rates.

High costs of monitoring inputs and outputs imply that a sharing arrangement would often be efficient. Share-owning employees act to maximize the value of their shares, thus “monitoring” themselves. That was precisely the contractual form used between owners of privateers and the state. Privateers were residual claimants to prize seizures, and the licensing government extracted some proportion of the residual in the form of tax. In fact, governments sometimes allowed privateers to keep the entire residual, minus a small percentage taken to defray the expenses of necessary adjudication (which will be addressed below).

Though the sharing contracts used in privateering solved one of the government’s agency problems, they tended to exacerbate another—the problem of neutral rights. Granting privateer crews residual claimancy status provided them with an incentive to seize prizes even when ships were engaging in legal commerce. National governments generally appear to have judged that the problem was handled adequately by the prize-court process, which is described below.

To the extent that privateering operated as a militarily efficient means of projecting national power (i.e., damaging an enemy nation), it reduced the demand for a standing national navy, for which it was a substitute. That was in spite of the fact that privateers were usually careful to avoid actual combat if at all possible.⁸ Their goal was to seize the richest cargo at the lowest cost.

Privateers played no important role in strategically significant battles at sea. Admittedly, there were important operational and practical differences between the private and the public “navies.” By the 17th century the national navies performed certain specialized tasks that privateers could not or would not perform. For example, privateers could not blockade an enemy port without the support of the navy if the enemy maintained naval warships in the port or vicinity, for even the weakest warship outgunned a privateer, and privateers would engage those ships only if they had no other alternative. If, however, a privateer did capture an enemy warship, it could claim the warship as a prize, usually selling the captured ship to its own or some other nation’s navy. Privateers were less useful in convoying merchant ships because escorts of merchantmen very rarely captured

⁸At one extreme, American privateers carefully avoided tangling with men-of-war, and many actually were “armed” with dummy, wooden “guns”—their aim was to overawe potential prizes, not actually to fight (Stivers 1975, p. 97). Although many privateers were quite heavily armed with real guns (see Rogers [1712] 1928, p. x), the intention was usually to frighten their victims, not to engage in combat.

prizes and because escorts had to be prepared to fight, which in general privateers were not. For similar reasons, privately owned and operated vessels rarely served as cruisers, which protected merchant shipping by hunting down enemy commerce raiders.⁹

In overall strategic effect, the operations of privateers were analogous to 20th century submarine campaigns against the sea lanes of communication to enemy countries, which proved highly effective in both world wars (see Powley 1972, p. 192, for a similar argument). Naturally, the technology and detailed operational techniques were radically different, but the strategic result was similar. On some occasions the operations of privateers effectively crippled the sea-borne trade of major powers and led to severe impacts on those countries' domestic economies—and indirectly led to victories for the governments who provided the privateering “franchises.” Privateering was also less wasteful of resources than submarine campaigns, for the simple reason that the former aimed at seizing and reselling the target ships and cargo, while the latter just sank them. Ships, cargo, and crew at the bottom of the sea were lost to the world economy.

Law without Legislation: The International Law of Prize

While both privateers and pirates shared similar goals—stopping and seizing merchantmen on the high seas—there were critical differences between the two groups. Pirates were criminals, and piracy was a capital offense. In contrast, privateers had a commission from some recognized legal authority, either a monarch, a congress, or a parliament. That license gave the privateer the legal right to stop, board, search, and under some circumstances seize foreign vessels and their cargo. Privateers were obligated to then promptly present those “prizes” to a specialized court, which normally sat in the privateer's home port, for adjudication. The precise requirements for a legal seizure were highly detailed and rigidly enforced. Assuming

⁹However, “[i]f the privateers could not be expected to fight uncalled-for battles against the enemy's ships of force, at least it was hoped they would support the trade of their country by recapturing a certain number of merchant ships from the enemy” (Pares 1938, p. 29). To encourage that endeavor, the English paid privateers “salvage” for recaptured merchant vessels. An act of the English Parliament in 1693, for example, set the salvage rate at one-eighth the value of the vessel and cargo if the vessel was recaptured within 24 hours of its capture, rising to one-half the value if the vessel had been in the hands of the enemy for more than 96 hours. French law at the time specified that a privateer was entitled to claim the entire vessel as a prize if it had been in enemy hands for at least 24 hours (Pares 1938, p. 30).

that the prize was found in court to be indeed lawful, proceeds from its sale (and the sale of its cargo) at auction were distributed to the privateer—and sometimes a significant portion was extracted by the government. While those arrangements differed in some details over time and across countries, there gradually arose a body of international law based on a common set of basic precedents that was employed by prize courts in different countries. Moreover, the commissioning governments usually imposed additional strict rules on privateering. Those rules were designed to prevent criminal actions (including violations of the rights of neutral parties) by private “contractors.”

From the standpoint of the responsible governments, there were a number of potentially serious problems that might arise from the licensing of privateers. Privateers might despoil friendly vessels, endangering the lives and property of fellow citizens; delay, seize, or otherwise damage the vessels belonging to the citizens of neutral nations; or violate the rules of war in other ways, such as throwing overboard the crews of captured vessels. The most complex and difficult problems arose in relation to the rights of neutral states to engage in trade during war.

Throughout history, states have often found that it is in their interest to respect the rights of neutrals who traded with their enemies. For one thing, the warring state was often itself trading with that particular neutral. Even when that was not the case, a currently warring government could normally expect to be a neutral state in some future conflict, in which it might well benefit from claiming neutral rights. Preserving the legal precedent for respect of neutral rights by belligerents was, therefore, protecting a valuable resource.

Another constraint on the behavior of belligerent powers was the risk that a neutral state would go to war to protect the rights of its citizens or the interests of its rulers, or both. Numerous examples exist of cases where even the hostility of a relatively weak country has presented a significant problem to a strong country already at war. Great Britain, for example, treated the complaints by the government of the neutral Dutch Republic during the Seven Years War quite carefully and made a serious effort to keep the Dutch from entering the war on the side of France. Efforts by the British government to protect the rights of neutral Spain were even more concerted, and Britain “made the most of every excuse by which they could consistently acquit Spanish neutrals in the Seven Years War.” That was because Britain “was more afraid of Spain than of the Dutch Republic, and had gone farther to buy her neutrality by concession”

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(Pares 1938, pp. 202–3). Though the laws of war were a constraining influence at the margin, it was still true that “might made right.”

In the context of the delicate balance of power in 16th- to 18th-century Europe, in which patterns of alliance frequently shifted, there were particularly strong reasons to respect neutral rights. Today’s neutral nation could (and often does) become tomorrow’s enemy, or ally, and the neutral nation’s choice might be significantly influenced by the treatment its commerce has received at the hands of the opposing belligerents. Shifts in coalitions were highly unpredictable. Between 1672 and 1674, England and Holland were at war with each other during the Third Anglo-Dutch War. But by 1688, England and Holland were allied together against France in the War of the League of Augsburg (1688–97). Again, in 1701, England and Holland were allies at war with France and Spain in the War of the Spanish Succession (1701–13). But in 1718, England and France were allied in war *against* Spain in the War of the Quadruple Alliance, in which British navy vessels actually transported French soldiers on several occasions. That war occurred during a 15-year period of alliance between England and France—countries that spent much of the rest of the 18th century almost continuously at war with one another. When at war, standard strategy dictated that neutrals be nudged toward becoming active allies and allies of the enemy be convinced of the advantages to be gleaned from becoming more neutral.¹⁰

A system of adjudication of prize cases and of the claims of neutral status was required to efficiently resolve the many disputes that were likely to arise. In fact, such a system of international adjudication developed to the point where, by the mid-18th century, it represented a complex and generally effective legal order.

Law is the body of enforced rules of conduct. Legislation is the deliberate construction of a set of rules of conduct by an identifiable governmental agency. The international law of prize, which evolved in Europe and North America after about 1500 was the result of voluntary acceptance of legal precedent and principles of arbitration,

¹⁰One device that proved helpful in providing an incentive for private men-of-war to avoid diplomatic problems with neutral states was the requirement to post a bond before sailing. Misbehavior could then be readily penalized by the licensing government. As early as the reign of Edward VI, in 1547, English private men-of-war were required to give security for “good behavior” before they left port (Marsden 1909, p. 685). That practice became general. The bond could be, and frequently was, claimed by the government when the privateer was found to have violated stated conditions of his license. However, an orderly process for adjudication was still necessary for efficiently determining the actual fines imposed. The Admiralty Court determined the size of the fine.

although influenced at the margin by the terms of treaties occasionally made between governments. In short, the international law of prize had major elements of what F. A. Hayek calls “spontaneous order” (see Hayek 1973, pp. 72ff).

The laws of war governing conflicts in Europe and the Americas during the period in question arose from custom and precedent, by treaties between nations, and from time to time a unilateral declaration of policy by a militarily strong belligerent nation (Roberts and Guelff 1982, p. 2). The principal aim of those laws was to specify the rights and obligations of belligerents and the rights of neutrals. The laws recognized the right of a state to remain neutral during war. Further, neutrals had rights to continue maritime trade during times of war, including the right to trade with the belligerents subject to certain restrictions. It was in relation to neutral shipping that privateers generated the most diplomatic conflict.

Like all other legal rules, the laws of war by no means performed their function perfectly. Individual nations sometimes chafed under the international rules. A particularly vexatious problem involved the legal right of neutrals to engage in trade with an enemy country. Various treaties between the maritime powers of Europe in the 17th and early 18th centuries had introduced the doctrine of “free ships, free goods.” That meant that neutral ships could trade with a belligerent as long as trade did not include goods on the contraband list and was not conducted through blockaded ports. This international rule implied that all cargo on neutral vessels was presumed neutral. The rule itself was simple, but the exact *interpretation* was frequently disputed. One especially significant reinterpretation was initiated by the British government during the Seven Years War (1756–63). As a result of the success of the British Navy and privateers against French merchant shipping, the colonial trade of France was soon contracted out to Dutch (i.e., neutral flag) ships. Although the legal issues involved were complex, in essence the British government decided that Dutch trade conferred too great an advantage on the French (and incidentally the Dutch as well) and unilaterally declared that trade subject to seizure.¹¹ Still, despite occasional unilateral

¹¹Further, ambiguities in the British government’s policy and the exuberance of the privateers resulted in illegal prizes even by the standards of the reinterpreted rule. Some of the Dutch grievance was the result of the change in policy on the part of the British government rather than a result of illegal acts (under the new rules) on the part of privateers. When British privateers began capturing Dutch ships engaged in this trade with the French, the Dutch government protested. Many Dutch claimants secured release of those vessels when they were taken illegally, although even in these cases many owners were not awarded compensation for their costs in time and money, which were sometimes substantial. If, however, the captor was deemed sufficiently irresponsible, the court awarded the claimant damages in addition to ordering the

policy shifts of that sort, the basic outlines of the international law of prize remained stable for a long period.

If the laws of war had no power to constrain the behavior of belligerents and their agents, then clearly privateers could easily become no better than pirates. In fact, the laws of war did have a moderating influence on belligerents' behavior. As with all laws, changes in external circumstances (as occurred during the Seven Years War) led to changes in the form of the optimal structure of rules. The international law of war at sea was continually modified as treaties were enacted and as the body of legal precedent developed.¹²

Until this century, there existed no international organizations with the coercive power to enforce obedience to any set of international rules, nor any international agency or tribunal that legislated the rules themselves. Yet a system of international law based on the self-interests of the various, competing national governments evolved anyway. As one source (Roberts and Guelff 1982, p. 15) observes:

Critics may argue that states involved in conflicts will always put their vital interests first, and the law will be violated if it clashes with those interests. But in fact the position is not nearly so simple. The law has been created by states with their general interests [in mind]. Thus it is not an abstract and external imposition on the international system, but rather a direct outgrowth of it.

Privateering, therefore, was a "legitimate" business that operated within a carefully defined, actively enforced framework of law.

Prize Courts and Prize Law as Controls on Malfeasance

By the early 18th century, a body of international legal principles and precedents had emerged that carefully delimited the rights associated with prize taking during wartime, as well as the rights of neutral vessels. That body of law was enforced by a system of prize

return of the ship and cargo (see Pares 1938).

¹²During the heyday of prize taking, new bilateral treaties were extremely frequent in Europe; one recent source lists 227 different treaties between England (Great Britain) and other countries made between 1688 and 1761 (Cook and Stevenson 1988, pp. 132–44). Hence, the accepted ground rules for prize taking were almost constantly being renegotiated between governments. Pares (1938) offers a detailed analysis of the significant changes in the international rules for conduct at sea during the Seven Years War (1756–63). The changes adopted by the English in the Seven Years War were part of a long line of such amendments made in response to changes in circumstances, including advances in technology. Those responses to change continued down through and including the world wars of this century.

(or admiralty) courts established in each seafaring nation. Although the different court systems varied in terms of procedures and organization, the application of the international law of prize was quite uniform. One pair of authorities (Jessup and Deak 1976, p. 247) has succinctly summarized the significance of the often-neglected situation:

One of the most usual criticisms of international law is that it lacks judicial machinery for its application and enforcement. Here is an ancient body of law constantly applied by courts. The courts were indeed national in origin and organization, but they lived up fairly well to the tradition that they applied international law.

Privateers were legally obligated by their commissioning governments to follow established prize court procedure. They were required to bring all seized goods before an established prize court in their home port and prohibited from alienating (i.e., appropriating) any goods on a captured vessel before those goods had been condemned by the court. Condemnation meant the court had decided that the seized vessel, or goods, or both were legitimate prize. Only after that could the privateer legally sell the prize, usually at auction. In the event that the prize court found for the defendant (i.e., the owner of the seized goods), the captor was liable for restitution and damages to the owner (Jessup and Deak 1976, p. 207). The privateer had a strong incentive to follow the rules and bring the prize before the court to be legally condemned. That gave the privateer legal title, without which the prize would have been salable only at a discount,¹³ and the privateer legally defined as a pirate—a crime punishable by death.

Adjudicating cases involving enemy vessels carrying enemy goods was fairly simple—an enemy ship was almost always condemned by the court as a “good prize” (Jessup and Deak 1976, pp. 124, 217). Enemy vessels carrying cargoes owned by neutrals and not destined for an enemy port were a more difficult problem; generally, if the neutrality of the cargo could be proven (and assuming that it was not composed of contraband), it would be returned to its rightful owner.

¹³By the 17th century, it was generally conceded that a prize judgment followed by a prize court sale “gave good title against the world” (Jessup and Deak 1976, p. 209). Furthermore, it was in the interest of belligerent governments to listen to complaints from neutral claimants about purported irregularities. The refusal of the courts of one nation to recognize the title conveyed by a prize court of another nation would hinder the sale of future prizes condemned by the former nation’s court (Jessup and Deak 1976, p. 209). Failure to strictly observe the legal formalities in the proceedings was often the basis for a condemnation’s reversal and a compensation award to the original owners of the seized vessel.

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Neutral vessels constituted the most serious practical problem; enemy ships could only rarely prove that they carried neutral cargo. In the case of a neutral ship its cargo could be subject to condemnation if the cargo was destined for a belligerent port when a blockade was in force and included contraband of war (Jessup and Deak 1976, pp. 124, 217).

A seized enemy vessel carrying cargo for neutral owners, or a neutral vessel carrying contraband, was potentially a "good prize" only if its destination was proven to be a blockaded port. That meant the port in question was actively patrolled by the naval forces of the hostile power who actively attempted to board and inspect outgoing vessels and stop incoming vessels from arriving (just declaring a port to be blockaded was not legally sufficient). Contraband of war was at first defined to include a small array of goods that were clearly of direct usefulness to the enemy war effort (e.g., gunpowder, cannon, and naval stores), but over time the list tended to become more inclusive. Lists of contraband items were often included in treaties with neutral countries, and the definition of what was and what was not contraband was normally understood by all relevant parties before hostilities began (Jessup and Deak 1976, p. 62). Those same scholars note (1976, p. 103) that violation of the law of contraband "resulted frequently in compensatory awards by the violator." Technically, a neutral vessel could carry noncontraband cargo to a blockaded port, or carry contraband cargo to a nonblockaded port, and its owner's property would be protected by the prize court.

If the owners and officers of a seized neutral vessel could demonstrate that its papers were in order and could provide satisfactory answers to the standard interrogatories required by the prize court, the ship would routinely be released by the court.¹⁴ In such cases, the captor was often required to pay the costs of the trial and to compensate the owner for damage resulting from the illegal seizure. Seizing a prize without being able to demonstrate "probable cause" could impose significant costs on the privateer (Jessup and Deak 1976, p. 224). Prize courts also routinely released vessels seized in

¹⁴Those papers included such documents as registers, invoices, bills of lading, and proof of identity and ownership. It was standard prize court doctrine that the prize's fate was to be determined "out of her own mouth" (on the basis of the papers found aboard). A standard presumption was that the absence, concealment, or destruction of the ship's papers, or the presence of fraudulent papers, was sufficient grounds for condemnation of the prize, which was reasonable given the strong incentives for misrepresentation on the part of neutral merchantmen during wartime (see Jessup and Deak 1976, pp. 230-38).

violation of international treaties, even if the vessel in question would otherwise be a “good” prize (Jessup and Deak 1976, p. 79).

Despite the obvious potential for abuse (e.g., English prize courts adjudicating disputes involving the prizes seized by English privateers), the basic principles of prize law were accepted internationally, and prize court decisions were generally respected. There were various appeals available in cases where a neutral owner challenged a prize court decision. There were numerous examples of prizes being returned to their rightful owners as the result of successful legal defense.¹⁵

The laws of war and in particular the prize laws and courts of the various states did a reasonably good job of protecting neutral rights. Many of the grievances of neutrals were the result of changes in policy by belligerent states rather than violations by the privateers themselves. The policy changes, responses to changes in external circumstances, resulted in temporary problems as affected parties adjusted to the new rules; once that occurred, the system once again worked well at protecting neutral rights under the new regime.

It should also be pointed out that the alternative to using privateers, employing commissioned naval vessels with commissioned naval officers as commerce raiders, would have generated the same kind of problems. Use of commissioned ships would not have reduced the complaints of neutrals that resulted from policy changes on the part of belligerent governments.¹⁶

Costs and Benefits of Legalized Theft on the High Seas

Privateers were private contractors, privateering was a highly competitive industry, and complex international legal institutions for adjudicating prizes served to minimize many potential problems. However, privateering was fundamentally different from other kinds of “service” industries; privateering represented a form of legalized theft of private property.

¹⁵While privateering has been abolished by all world governments, as has the award of prize money to naval personnel, it is interesting to note that basic elements of the international law of prize and contraband remain essentially unchanged. See De Lupis (1987, pp. 305–12) for a summary of the modern status of captured prizes in international law.

¹⁶For example, the North used only commissioned naval vessels to take prizes during the Civil War. Yet many complaints arose alleging the illegal taking of prizes; in fact, that issue could easily have brought Britain into the war on the side of the South. See Bernath (1970) for a detailed discussion of the Civil War prize cases.

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During the late 19th century, many opponents of privateering argued that the fundamental violation of the inviolability of private property on the high seas was an intolerable abuse of human rights.¹⁷ Regardless of the sincerity of those protests, it is indisputable that the efficiency of the global economy, other things held equal, would have been increased if private property rights at sea had been protected from theft.

Actual events have demonstrated that other things were *not* equal. As the history of the past century has demonstrated, during wartime the real alternative to the seizure of merchantmen destined for belligerent ports was not the protection of private property rights during war but the *destruction* of enemy commerce. Prize taking stopped, but only to be replaced by the wholesale sinking of merchant vessels.

The net effect of privateering on the economic costs of war is more difficult to assess. Arguably, privateering was cheaper from the perspective of the commissioning government's budgetary requirements. Privateers were "financed" by the enemy. By lowering the cost of projecting naval power, privateering may have encouraged governments to engage in war more often than they otherwise would have.¹⁸ On the other hand, to the extent that privateering was an effective means for damaging the enemy economy and war effort, it may have tended to bring wars to a quicker, and less destructive, end.¹⁹

Further and perhaps more important, since privateers were volunteers, the resources they used were not being drawn from higher-valued nonmilitary uses. In contrast, contemporary navies all

¹⁷The Pierce administration's Secretary of State, W. L. Marcy, repeatedly reiterated that the failure of the Declaration of Paris to explicitly protect *all* private property rights at sea, regardless of the identity of the potential captor, was his major objection to the declaration (see Stark 1967, p. 149). That position incidentally implied that Secretary Marcy opposed the traditional presumption that seizure of enemy-owned goods was in principle legal and proper.

¹⁸According to Baugh (1965, p. 22) there is some evidence that privateers actively lobbied the British Parliament for war with Spain in the late 1730s in order to increase profit opportunities on the high seas. At various times, potential privateers may have lobbied for war in pursuit of profit, but not even historians who are most biased against privateering argue that such lobbying was politically significant.

¹⁹There is another reason why the availability of privateering may have reduced the incidence of war. The potential availability of private men-of-war to smaller nations, and those with relatively weak standing navies, represented a deterrent against aggression by larger, better-armed powers. Privateering allowed smaller nations, with weaker navies, a better chance to seriously damage larger nations with bigger navies. Thus, the availability of privateering helped to protect smaller states from the imperialistic designs of the larger and more powerful nations, reduced the potential "profits" from aggressive war, and possibly limited the frequency of conflict.

resorted to the use of impressment of seamen during wartime, sometimes on a wide scale (Rodger 1986).

Although it would presumably have been feasible for governments to grant their own national navies monopoly rights in prize-taking activities, no major nation did so until after 1856. However, that appears paradoxical, at least on the surface. If the national navy had been granted monopoly rights, the government could have claimed a share of the resulting prize money. In fact, the government often *did* claim a portion of the value of prizes seized by naval vessels (as is explained below). Why did revenue-maximizing governments *not* simply nationalize prize taking?

The relatively greater efficiency of privateers as prize-taking “firms” helps to explain why public navies were not granted monopoly rights in prize taking. Privateers were a lower-cost method of attacking enemy commerce, and they also produced more net revenue for the licensing government than a grant of monopoly prize-taking rights to the public navy would have provided.

The generally superior efficiency of private production compared to public production of public goods has often been noted. But privateers also had another advantage over national navies as suppliers of “commerce-raiding services” during wartime. The transactions costs associated with such activities were lower for privateers. Since commerce raiding had value to the belligerent government only in time of war, in peacetime the official navy would have to bear the cost of storing or selling the vessels used for commerce raiding, as well as the cost of supporting commissioned officers (in England, often at half pay). Owners of privateers would simply use the vessels as merchant ships in peacetime and convert them for privateering in time of war. In peacetime most navy vessels were a drain on government resources because of the high cost of maintaining them; in peacetime, most of the fleet was laid up in reserve (“in ordinary,” to use Royal Navy parlance). For example, in September 1739 only 89 of the total 170 British warships were actually in service; the rest were in various states of storage (Baugh 1965, p. 246).²⁰

Building and maintaining naval vessels was expensive, and governments intentionally allocated scarce financial resources to providing themselves with these kinds of ships that had no private-sector equivalents (e.g., large ships of the line, which were powerful but too slow and unwieldy to serve as merchantmen) and relied on the

²⁰Moreover, the smaller vessels, which were equivalent to privateers in size, speed, and number of cannon, were mostly sold off between wars, as they were expensive to store but had a ready market as potential merchant vessels (Baugh 1965, p. 254).

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private sector for other ships.²¹ Even nations with strong navies hired merchant ships in large numbers during time of war over and above the numbers of licensed privateers.²² Over time, increased specialization of both merchant and large naval vessels ruled out the use of hired vessels as ships of the line, but there was still a role for hired merchant ships as cruisers (which hunted down enemy commerce raiders) and for convoy escorts.²³

However, technological and other changes since the American Civil War have tended to reduce or eliminate some of the differential costs between privateers and navy ships. As warships have become more specialized (e.g., the submarine), they essentially have no peacetime use, thus eliminating the transactions cost advantage enjoyed by the private sector. Radio, undersea cable, and telegraph increased the ability of navies to communicate with their ships at sea and in port, thus reducing the costs of monitoring their activities and weakening the contractual advantage of the private sector.²⁴ By greatly increasing the cost of seizing prizes at sea, technological change reduced the viability of sharing contracts between governments and private providers of defense.

But before those technological developments occurred, contemporary governments experimented with granting their national navies the right to seize commerce in wartime. One of the lesser-known features of naval warfare between the turn of the 16th and the end of the 19th centuries was that public navy vessels and their crews

²¹The Royal Navy even had to build the larger warships in its own dockyards, as the private shipbuilders lacked the specialized facilities and skills the big ships required. However, the British Navy routinely contracted with private shipyards for the construction of medium-to-small vessels armed with 50 or fewer guns (see Baugh 1965, p. 255).

²²Such was the case in Great Britain, where "during the wars of the seventeenth century, the line of battle fleet was heavily supplemented by larger [armed] merchant vessels" (Davis 1962, p. 330).

²³The government also hired large numbers of "victuallers, water carriers, fire ships and hospital ships; [as well as] fleets . . . for the transport of troops overseas" (Davis 1962, p. 330). Since those ships had little or (more usually) no chance of capturing prizes, the government paid their owners a monthly rate based on size (i.e., measured tons). Owners of ships hired as warships not only received higher rates than owners of those ships used in noncombatant roles, they also received compensation for war damage or loss. Those whose ships were used in noncombatant roles as victuallers, transports, and in various other support tasks, did not receive such compensation, but they "ran few risks, being usually employed under heavy escort" (Davis 1962, p. 331).

²⁴Further, the existence of ship-to-shore radio, air support, fast surface ships, modern gunnery, the submarine, and, in World War II, radar significantly increased the cost of sending prizes to a friendly port where they could be sold. Since the Civil War, commerce raiding has been devoted almost exclusively to the sinking of enemy merchant vessels.

were permitted to seize prizes and claim the proceeds.²⁵ According to one historian who has studied the internal workings of the Royal Navy in the 18th century, prize money during wartime was the “chief attraction of Naval service” (Baugh 1964, p. 112).²⁶ Furthermore, the prize revenues could be enormous.²⁷ Other navies of the time also permitted, and in fact encouraged, prize taking.²⁸

Governments discovered that, as a rule, naval warships were less efficient than privateers as raiders of enemy commerce. One problem was that many warships were simply too slow and difficult to maneuver to chase merchantmen with any realistic hope of success. Technical constraints applied to pre-steam naval construction; a heavily armed ship needed to be big and heavy if it were to be a stable gun platform, but with greater size came a loss in speed and agility. A large, “first-rate” man-of-war might carry over 100 cannon but could

²⁵Permission to claim prize money was first granted to the English Navy by Cromwell in 1649 (see Dupuy 1977, p. 555).

²⁶Shares in returns from the sale of seized prizes were standardized. For instance, in Britain in 1740 one-eighth was allocated to the flag (i.e., the Commodore or Admiral commanding the fleet in which the captor was included), one-fourth to the ship’s captain, three-eighths to the other officers, and one-quarter to the crew (Baugh 1965, pp. 112–13, n. 72). Similar distribution schedules were operated by the navies of other nations.

²⁷One battle (Cape Ortegal, against a French fleet) brought two British admirals in command of a victorious fleet £62,991 and £31,496, respectively; that single battle brought a total of £755,896 to the various participants (Gwyn 1973, pp. xlii–xliii). The period of war between 1739 and 1748 earned British Admiral Warren over £127,000 in total prize money (Gwyn 1973, p. xlv). Of course, the average crewman received a much smaller average share, although at least one authority (Rodger 1986, p. 129) argues that the average prize share a British Navy sailor serving on board a small, fast ship could expect to receive was similar to what the average crewman on board a privateer could expect. Unfortunately for the Navy, the expected prize share for sailors serving on board the extremely manpower-intensive, large warships was likely to be zero, because such vessels had almost no chance of capturing valuable prizes. The Royal Navy relied on impressment to man the large ships during war.

²⁸Interestingly, John Paul Jones—famous as the founder of the U.S. Navy, Revolutionary War hero, and celebrated for his various naval exploits—is less frequently remembered for his remarkably successful record of prize taking. Between 1778 and 1781 most of Jones’ prizes were sent to ports in France, Holland, and Denmark to be adjudicated and sold. Complete accounts do not seem to have survived, but, after 1783, the French government settled a dispute with Jones by giving him 181,000 livres representing the value of his prizes sold by French courts (Buell 1900, vol. 2, p. 103). Consequently he was able to retire from the U.S. Navy as a wealthy man. Jones, incidentally, repeatedly expressed contempt for greedy private prize seekers, whom he described as “maggots” infected with a “mercenary spirit,” and insisted that he himself was above such avarice (Russell 1930, pp. 69–70, 121). That was the same Jones who vigorously, and successfully, lobbied the Continental Congress to lower the tax rate on prizes seized by the navy to encourage public prize takers in competition with the allegedly “parasitic” privateers (Lorenz 1943, pp. 87–88).

sustain a speed of only around two knots (about 2.5 miles per hour). Privateers were normally smaller ships that could sustain speeds in excess of 12 knots under ideal conditions.

But that was not the only reason for the relatively poor performance of navy vessels as commerce raiders. After all, before 1750, about two-thirds of the British fleet was composed of ships in the fourth-rate class and smaller (Brewer 1989, p. 34). Privateers were in the same approximate size range.

Unlike privateers navy vessels were not optimized for commerce raiding; they had numerous other duties. Most important, navy warships were designed to battle enemy warships and thus required much heavier armament. Warships were much more effective than privateer ships against enemy warships—that is unsurprising considering that such encounters were intentionally avoided by privateers. For example, during the Seven Years War, the Royal Navy took or destroyed 328 French naval vessels while British privateers accounted for only 48—and those probably occurred because occasionally actual battle was unavoidable (Neal 1977, p. 29).

In other words, even though public warships were encouraged to take prizes, for a variety of reasons they were less efficient in that particular endeavor than private, licensed contractors. Moreover, permitting private ships to legally compete with naval vessels for the same potential prizes reduced the size of the prize shares available to navy vessels.

Political Economy of the Demise of Privateering

We have argued that privateering provided a major portion of the naval power employed by national governments for several centuries, that it appears to have been a highly potent device for harming an enemy, and that a complex set of international legal institutions evolved that served to minimize the worst abuses and protect the rights of neutral vessels. In short, privateering seems to have been a fairly efficient system for providing war-fighting services to governments at low cost. Nevertheless, privateering was virtually universally abandoned by national governments after the mid-19th century. That surprising rejection deserves more attention than it has hitherto received.

Did improvements in the technology of naval warfare render privateering obsolete? After the American Civil War, naval warfare underwent a technological revolution in which wooden sailing vessels armed with inaccurate, short-range, muzzle-loaded cannon were replaced by faster, heavily armored warships equipped with more

accurate, longer-range, and much more lethal breech-loading rifles. Also came the advent of the submarine, at least in a militarily efficient form, with the capability to annihilate merchantmen with virtually no warning—and with no capacity for prisoners or room to carry prize crews. Modern gunnery allowed merchant vessels to cheaply and effectively protect themselves and place potential prize takers at serious jeopardy.

While altered technological constraints were surely significant, it is simply a fact that technological advances played absolutely no immediate, direct role in the demise of privateering. We can assert that with confidence because privateering essentially ended before the American Civil War (although the Confederacy issued letters of marque for a brief period).²⁹ The major changes in naval technology all occurred later.

Rhetoric concerning the purported evils of privateering was partly a result of diplomatic problems caused by privateers over the rights of neutrals and partly the public face of opposition from national navy bureaucracies, who correctly perceived privateers as close competitors as the suppliers of naval force to governments. Public navy officers and other officials fought a running battle against the commissioning of privateers for centuries, sometimes with temporary success.³⁰ When the national standing navies could not prevent the commissioning of privateers, the navies went to great lengths to harass their private competitors and to generally restrict their ability to compete.³¹

Consequently, the national navies had a twofold incentive to oppose the licensing of privateers: the potential loss of wartime prize

²⁹The Confederate States of America issued a small number of letters of marque until April 18, 1863, when the Confederate government eliminated all privateers within its jurisdiction and replaced them with navy vessels (Robinson 1928, pp. 327–29).

³⁰For example, during the War of the Grand Alliance against France (1688–97), the English Admiralty granted only a few privateering commissions and actually ceased issuing commissions altogether in 1695 (Ritchie 1986, pp. 42–43). The stated reason for the cessation was to ease the manpower shortage facing the Royal fleet (Clark 1971, p. 50). However, it is clear that the Royal Navy was also concerned about the loss of potential prize money to letters of marque, which was the subject of frequent complaint by naval officers (Clark 1971, p. 59). Only political pressure exerted by the powerful East India Company along with other merchants caused the Admiralty to issue new commissions (Ritchie 1986, p. 43).

³¹Privateer vessels were often literally robbed of their crew via impressment by the navy while they were at sea. Naval commanders preferred sailors with experience as private “warriors” over those with more pacific resumes. During the War of the Grand Alliance and on many other occasions, the Royal Navy did what it could to reduce, if not completely stop, the issuance of privateering commissions (Ritchie 1986, pp. 42–43), in part, to eliminate competition for skilled sailors.

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money and the loss of budgetary resources from the government. On a number of occasions, politicians took explicit note of the relative efficiency of privateers, to the potential detriment of career naval officers. A particularly notable example occurred after the American Revolution, when many in Congress opposed the maintenance of a regular navy because private enterprise had shown that it could do a better job, at low cost to the government (Stivers 1975, p. 55).

The bureaucratic "turf battle" finally ended after privateers were prohibited by international treaty. In 1856, most of the maritime powers signed or acceded to the Declaration of Paris, which formally abolished the taking of prizes at sea by privately owned vessels (Israel 1967, p. 957).³² The United States refused to ratify the declaration, stating that as written it did not go far enough to protect private property rights at sea and that the United States might have need of privateers in future wars, as it had in the past.³³ Despite those stated objections to the declaration, the United States has not, in fact, commissioned any private men-of-war since that time. In 1899, during the Spanish-American War, the United States formally abolished privateering and further abolished the award of prize proceeds to the navy (Robinson 1928, p. 344). One authority on privateering summarizes those developments by commenting that "after 1815 [the navy] would properly see to it that never again would a reserve naval force [i.e., privateers] be as predominant as the privateersmen had been" (Stivers 1975, p. 134).

³²The Declaration of Paris immediately followed the Crimean War. That conflict led the strong naval powers of France and England to conclude that privateering was an effective weapon of weak naval powers and, thus, that the abolition of privateering was in their interest. Even a small, neutral state that could not afford a standing navy might license privateers in time of war, and in the case of a state engaged in little overseas trade, the relative advantage in privateering would often be with small weak neutrals. In the words of one authority, by "taking a stand against privateering, they hoped to serve their own cause—and quite incidentally that of the neutrals—by abolishing it" (Jessup, writing in Turlington 1976, p. v). According to that view, privateering was eliminated not because it was inefficient but because it was believed to be an effective tool in the hands of weak maritime powers. That line of explanation is consistent with the argument above concerning the role of the naval bureaucracies—which were naturally the largest and the most powerful in countries with relatively strong navies.

³³The declaration implicitly allowed for the continued taking of prizes at sea by naval vessels and, therefore, failed to really provide protection for private property rights at sea (see Stark 1967, pp. 143–48 for details). The U.S. Secretary of State made it clear that his country "could never acquiesce in any change of international law which might render it necessary to maintain a powerful navy or large standing army in time of peace" (Savage 1969, p. 78). As written, the Declaration of Paris merely granted government navies the monopoly right to take prizes at sea. The United States also made pointed reference to the "coincidence" that the country with the strongest interest in abolishing privateering, Great Britain, just happened to have the strongest standing navy by far.

Conclusion

Privateering appears to have been profitable, and it represented a means of projecting national force during wartime that was cheap to the sponsoring governments—indeed, it sometimes generated net revenue to the licensing governments. It was also less wasteful than other forms of naval “combat” because it did not destroy, but merely reassigned ownership rights to, property. Privateers sought to damage their prizes as little as possible so as to protect their resale value. Yet for all those seeming advantages, privateering gradually ceased to exist.

The extinction of privateering was at least partly the result of rent seeking by established government bureaucracies. National naval bureaucracies recognized privateers as competitors who threatened their mission and budgets, and the bureaucrats often vented their hostility. That was a rational, albeit self-interested, response on the part of the professional navies. But the result was the legal abolition of privateering. Privateering was not a market that can be shown to have “failed”; rather it was one that was eliminated through political means.

The record of the private provision of naval power belongs alongside Coase’s lighthouses as an example of the successful provision of a public good—in this case, national defense—by private enterprise. The private provision of naval power was proven feasible by its long history of use. It was apparently efficient from the perspective of licensing governments. The question of the efficiency of privateering from the standpoint of the global economy is more difficult to answer. However, the government monopoly naval force that replaced privateering almost surely has had a still more detrimental impact on the world economy.

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