

PUNISHING OUR OWN RASCALS: GREAT BRITAIN, THE UNITED STATES,  
AND THE RIGHT TO SEARCH DURING THE ERA OF SLAVE TRADE SUPPRESSION

by

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A thesis

submitted in partial fulfillment

of the requirements for the degree of

Master of Arts in History

Boise State University

December 2013

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BOISE STATE UNIVERSITY GRADUATE COLLEGE

**DEFENSE COMMITTEE AND FINAL READING APPROVALS**

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Thesis Title: Punishing Our Own Rascals: Great Britain, the United States, and the Right to Search During the Era of Slave Trade Suppression

Date of Final Oral Examination: 26 June 2013

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## ACKNOWLEDGEMENTS

First of all, I want to thank God for giving me an inquisitive mind and a passion for writing.

I want to thank my wife, Cheryl, who encouraged me to pursue my Master's degree. She, along with my three children, Calvin, Caleb, and Molly, have encouraged me and managed themselves and their immune deficiencies well in the absence of their father during the past three years. I also want to thank to my supervisors at Emmett High School for allowing me grace during my afternoon hours.

My experience with the history department at Boise State University has been fantastic. I appreciate their accepting me into the program after a twenty year absence from higher education; my first trip to the library was quite a shock as the card catalogues were removed. I particularly want to thank my classroom instructors: Dr. Jill Gill, Dr. Joanne Klein, Dr. Lynn Lubamersky, Dr. John Bieter, Dr. Nick Miller, and Dr. Michael Zirinsky. Thanks also to Dr. Klein and Dr. Peter Buhler for accepting positions on my advisory committee. Special thanks go to Dr. David Walker for the time that he committed to my thesis, his enthusiasm for the topic, his encouragement as well as his constructive criticism; he has taught me how to truly be a professional historian.

Mark T. Haggard

June 3, 2013

## ABSTRACT

This thesis examines the relationship between the United States and Great Britain during the era of slave trade suppression in the nineteenth century. Two ideals of international relations came into conflict when Great Britain's humanitarian drive to rid the world of the international slave trade ran headlong into the United States' claims to sovereignty under the Law of Nations. Under international maritime law a ship is the sovereign territory of the nation under whose flag it sails; the forcible boarding of a ship is tantamount to an invasion of the country itself. Britain sought to circumvent this rule in the pursuit of their humanitarian cause by negotiating bilateral treaties with all maritime powers, allowing the reciprocal right to search the vessels of every signatory, therefore nullifying that tenant of international maritime law. The United States remained a "persistent objector," refusing to go along with the plan, despite its humanitarian purpose. British government sources and those of many historians charge that American intransigence was mainly driven by American slave interests, but records drawn from Congressional sources, the United States Department of State, and the United States Navy show that the U.S. was more interested in protecting the sovereignty of ships that flew the American flag from the aggressive actions of the British Navy. The British finally gave up trying to force the Americans to adopt the right to visit and search in 1858. Four years later, the United States negotiated a right to search agreement with Great Britain. When the Civil War ended, the African slave trade, for the most part, came to end. American sovereignty was never compromised, but the price of that

sovereignty was the hundreds of thousands of slaves who crossed the Atlantic, under the Stars and Stripes, to a life of forced labor.

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CHAPTER ONE: INTRODUCTION – AMERICAN AND BRITISH EFFORTS TO  
END THE TRANSATLANTIC SLAVE TRADE

In 1808 the United States and Great Britain declared war on the international slave trade by enacted legislation abolishing the trade in human chattel. Each approached suppression of the slave trade in different ways though. The British committed a large fleet to the effort, sacrificing its international reputation as well as vast sums of money and men. The United States had a naval presence off of the coast of Africa from time to time, and a permanent squadron between 1842 and 1860, but they were never as robust as the British in their efforts though, in fact, the United States was often less than cooperative with the British efforts on the high seas. Why was the United States such a thorn in the side of the British if both nations had abolished the trade? Over and over again the historical record shows American leaders crying “Sovereignty!” whenever the British stopped an American-flagged ship suspected of slaving. The issue of sovereignty, as it was defended by the United States, frustrated the suppression effort on all sides.

Like Supreme Court justices that decide a case the same way, but for different constitutional reasons, Great Britain and the United States attempted to suppress the trade *concurrently* rather than *jointly*. The British cast their net as wide as possible, gaining the legal right to search as many ships from as many nations as they could. They negotiated bilateral treaties with numerous nations with the “reciprocal right to search,” under which the signatories had the right to stop and search suspected slavers, have them tried in

Courts of Mixed Commission (with judges from both signatories), and, if found guilty, have their ships condemned and their cargoes released. In practice the British had the only navy large enough to commit a fleet solely to suppression duties. The United States only searched ships under the Stars and Stripes. The American plan was to only target American nationals, to equate slaving with piracy, to deliver suspected slavers to American courts, and to allow juries to determine their guilt or innocence. The penalty for piracy was death and the possibility of a conviction was believed to be enough to dissuade Americans from trading in slaves. There was no attempt to work with other nations in the international realm.

Legal issues plagued the suppression effort on both sides. The idea of the “Rule of Law” was ingrained in the English mind from the time of *Magna Carta* in 1215. The English lived by known rules of law established by Parliament, and when the English established colonies in America the concept of the rule of law was established along with them. By the 1770s each of the thirteen British colonies that became the United States had a written constitution with a foundation in the rule of law. The Constitution that the United States developed in 1789, like the state constitutions before it, was based on the rule of law. It was fitting that these two nations became locked in legal battles as they determined to reach the same goal by different means.

Throughout the nineteenth century the British sought to induce the United States into a “Right to Search” agreement, but the latter refused. Even as more and more of the slave trade fell under the Stars and Stripes, the United States remained a persistent objector, arguing that the searching of American ships was an illegal violation American sovereignty: the forceful intrusion onto an American-flagged ship was tantamount to an

invasion of the United States itself. The boarding of American ships by the French brought about a “Quasi-War” in 1798. The boarding of American ships by the British and the impressment of American sailors sparked an actual war in 1812. These violations of sovereignty were fresh in the minds of American politicians and naval captains as suppression ramped-up in the 1830s and 1840s. The United States refused to sign on to any agreement that allowed any violation of their sovereign rights, no matter how hard the British pressed or how humanitarian the cause. As Britain coerced more states into their right to search conventions it gained momentum for codifying the right to search into international maritime law, but the United States continually acted as the “persistent objector” in this drive.

The United States had good cause to question British intentions in intercepting ships flying the American flag. The relationship between the two was still adversarial, having fought in a war of independence, a war in 1812, and nearly going to war again in 1844 over the Oregon Country. Frustration with British searches of American ships goes back to the days leading up to the Revolutionary War. The British authorities in the American colonies used “Writs of Assistance” to search Americans’ homes for contraband smuggled into the colonies. The Fourth Amendment of the Constitution was a reaction to the government’s use of Writs of Assistance, specifically outlawing the search and seizure of private property by the government without a warrant based upon probable cause; the warrant itself must state specifically the contraband for which the party is searching. Now, the British were proposing a plan to stop American ships, and search for slaves and possibly for British subjects, and possibly for American seamen that could help in another British cause. British searches of American ships on the high seas

seemed more like enforcing Writs of Assistance than helping in a humanitarian cause. To the average American, “If my own government is barred from searching and seizing my property without probable cause, why should my own government let a foreign entity search my property?”

Consider the situation where a man was robbing a house and a neighbor goes into the house to stop him. Under normal circumstances the homeowner might appreciate his neighbor’s effort. But what if the homeowner did not trust his neighbor, had a long history of bad run-ins with him, and believed that he had ulterior motives. In the case of the British searching American ships, it was like a “Hatsfield” entering a “McCoy” house to stop a robbery. The “McCoy” does not want a “Hatsfield” in his home under any circumstances. The “Hatsfield” may stop the robber, apprehend him, and then take the “McCoy’s” TV. One would rather have a legitimate police force involved in the investigation and apprehension of the perp than have someone that he does not trust. The Americans did not to trust the British.

Differences in legal systems also plagued the two sides. The United States Supreme Court’s interpretation of the Fifth Amendment assumes that the accused, even an accused slaver, is “innocent until proven guilty.” “Better that ninety-nine criminals go free than an innocent man be condemned.” Allowing the British to board “suspected” slavers to search or to visit turns that legal concept on its head, allowing the British to detain a merchant and search, assuming guilt until the captain could prove the ship’s innocence.

Considering the combination of American intransigence and the increase in the number of slavers were flying the American flag without the proper authority, the British

demanded the right to *visit* in order only to check paperwork. The Americans remained intransigent, arguing that a visit was the same thing as a search, a violation of American sovereignty. In the robbery metaphor the neighbor might not enter the house while the robbery is in progress, but may now peer through the windows. What if there was no crime occurring but the neighbor peered through to get a good look at the master's wife? For the United States this situation was entirely unacceptable. A few Americans demanded that ships flying the Stars and Stripes were not to be visited, no matter how suspicious they seemed. The legal and semantic battle between the United States and Great Britain continued for fifty years until 1858 when the British finally relented in their efforts to force American compliance and gave up the demand for the right to search. Four years later, during the Civil War, the United States agreed to allow their ships to be searched. The Union victory in the war ended slavery in the United States and searches of slavers, for the most part, became a moot point.

Earlier studies of slave trade suppression downplay the issue of sovereignty. There were other elements in the minutiae that dominated the slave trade suppression. Foreign policy is developed by governments but it is carried out by individual people with ideas, feelings, motivations and hostilities. Certainly pro-slavery officials were not likely to press for the strict enforcement of American anti-slave trade law, and as long as slavery was legal in the United States, suppressing the trade in slaves seemed hypocritical. The first comprehensive study of the American suppression effort was by W.E.B. DuBois in 1896. In *The Suppression of the African Slave Trade* DuBois suggests that the United States effort was minimal because they were still the greatest slave power in the world and cooperation with London was a slap to the South. "The reason why

Americans were opposed to allowing Britain the right to search American ships,” said DuBois, “was that nine-out-of-ten times the search turned up slaves.”<sup>1</sup> It was not until the Southern states seceded and their Senators were recalled that the Americans redoubled their efforts.

British studies, like Christopher Lloyd’s *The Navy and the Slave Trade* and W.E.F. Ward’s *The Royal Navy and the Slavers*, suggest that the reason for lack of cooperation with the British was that the United States was a new country, driven by youthful exuberance to throw off the chains of imperial Britain. After fifteen years of American citizens being forced to serve on British warships and the two years of war brought about by impressment, most Americans of the early nineteenth century harbored intense hostility toward the British. Two of the most hostile men, important to the American part of the suppression enterprise, were Lewis Cass, the United States’ ambassador to France, and Nicholas Trist, United States’ Consul in Cuba. Cass was instrumental in turning French public opinion against a slave trade suppression treaty with Great Britain.<sup>2</sup> Trist continually gave American assent to the sale of American ships to known Spanish slavers allowing them to use the American flag and to enjoy the protection of American maritime law.<sup>3</sup> Both men used their positions to befuddle

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<sup>1</sup> W.E.B. DuBois, *The Suppression of the African Slave Trade* (Williamstown, MA: Corner House Publishers, 1970; First Edition 1896): 165.

<sup>2</sup> Nicholas Trist’s position concerning slavery and the British are detailed in “Chapter 6: Nicholas Trist: General-Counsel in Havana.”

<sup>3</sup> Lewis Cass’s position concerning slavery and the British are detailed in “Chapter 7: Lewis Cass and the Quintuple Treaty.”

Britain's suppression efforts and they did this, not because they were necessarily in favor of slavery, but because of their own hostility to the British.

Although slavery existed in all parts of the world, the scope of this study will be limited to the trans-Atlantic slave trade between West Africa and the Americas, where American and British interests crossed each other. The British Suppression Acts demanded the worldwide suppression of slavery and a British suppression fleet operated in the Indian Ocean as well as the Atlantic, but state-sponsored "coolieism" from Asia and the "apprenticeships" of Africans in the Caribbean was allowed under the act. The timeframe studied will be between 1808, when both nations passed their suppression laws, and 1862, when the United States, hampered by the Civil War, acceded to a treaty with Britain which granted the Royal Navy the right to search American-flagged vessels.

France was a player in slave trade suppression as well. Their policies vacillated, from outright hostility to the British, to cooperation with right to search treaties in 1831 and 1833, to intransigence when they backed out of the Quintuple Treaty for the Suppression of the Slave Trade in 1842. Despite their diplomatic agreements with the British, and language that referred to the slave trade as "evil, immoral and illegal,"<sup>4</sup> the successive governments of Nineteenth Century France never forbid its citizens from dealing with slave traders; they preferred to allow their nationals to be involved indirectly in the slave trade rather than interfere directly with commercial freedom.<sup>5</sup> For the

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<sup>4</sup> Lawrence C. Jennings, "French Policy Toward Trading with African and Brazilian Slave Merchants, 1840-1853." *The Journal of African History* 17, No. 4 (1976): 515.

<sup>5</sup> Jennings 522.

purpose of this thesis, French suppression is only studied in the context of British and American suppression efforts, where the interests of the French crossed with that of the Americans or the British.

The history of the effort to suppress the slave trade is well-documented in Britain; a plethora of new British studies emerged recently corresponding to the bicentennial of the Act to Abolish the Slave Trade in 1808. Yet the effort is almost unheard of in the United States. Few college textbooks discuss the effort. In his three volume *Oxford History of the American People* American historian Samuel Eliot Morison devotes one line to the effort. High school teachers have yet to see textbooks that discuss the effort to suppress the trade and may not even know that such an effort occurred. American students are taught that slavery ended with the Thirteenth Amendment and give tacit ignorance to any effort before the 1860s. Despite the failure of the American historical community address the effort, the story of slave trade suppression, and the legal battles that accompanied it, is a story that demands attention.

## CHAPTER TWO: 1808 – THE BRITISH AND AMERICAN SLAVE TRADE SUPPRESSION ACTS

In the late eighteenth century the move to end the slave trade gained momentum. The new Enlightenment thinking of Europe had little room for social systems that set one person above another. At the same time a wave of religious fervor swept across England and many middle class English, disenchanted with the Anglican Church, moved to the Protestant “Dissenter” churches: the Quakers, Baptists, Methodists, Congregationalists and Unitarians. These growing Evangelical denominations emphasized a more egalitarian interpretation of the Bible. These groups also believed in an activist God, rewarding and punishing people according to their merit. Nations were rewarded and punished as well, and they saw nineteenth century English society as corrupted by a number of interconnected evils, the greatest being slavery.<sup>6</sup> God was punishing Great Britain by stripping her of her North American colonies and bringing repeated wars upon her. Members of these groups were mocked as “Saints,” but soon their influence would end slavery in Britain and ultimately crush the slave trade around the world.

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<sup>6</sup> Chaim D. Kaufmann and Robert A. Pape, “Explaining Costly International Moral Action: Britain’s Sixty-Year War Against the Atlantic Slave Trade.” *International Organization* 53, No. 4 (Autumn, 1999): 634.

### **The British Abolition Act of 1808**

In fifteen years the “Saints” went from being a fringe element to the mainstream. William Wilberforce submitted his first bill to abolish the slave trade to Parliament in 1791, declaring the trade to be contrary to “justice, humanity and sound policy.” That bill was defeated, but Wilberforce opened each session of Parliament each year by submitting a slave trade abolition bill. Despite opposition from those arguing that the slave trade was an economic boon to the country, by 1807 opinion had turned and Parliament voted to end the slave trade effective January 1 of the following year.<sup>7</sup> British vessels were prohibited from carrying slaves anywhere in the world; violations of the prohibition carried a penalty of £100 (\$7000) per slave captured, and the law offered generous bounties to officers making the capture. Furthermore, slave imports into Britain’s West Indian colonies were banned, and foreign slave ships were barred from using British ports.<sup>8</sup>

The slave trade was abolished in the spirit of the law, but the letter of the law did not provide enough punishment to stop all slavers. As a misdemeanor, the fine for slaving was an amount of money that a slaver could easily make up on the next voyage though. In March of 1811 Parliament upped the ante against the slavers, passing the Slave Trade Felony Bill, making a convicted slaver subject to seven years transportation

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<sup>7</sup> The House of Lords voted 100-36, the House of Commons decided “without division.”

<sup>8</sup> HC Deb, 16 March, 1807. *Hansards*, vol. 9: 139-140.

in Australia.<sup>9</sup> The addition of the felony bill gave the British a strong enough deterrent to force the slavers out from under the Union Jack.

### **The American Abolition Act of 1808**

The American drive to end the slave trade reflected the efforts across the Atlantic. The Enlightenment thinking that brought about the ideals of the Declaration of Independence now demanded the abolition of slavery, to “rid the land of the free of the paradox of slavery.”<sup>10</sup> But emancipation would not be easy. Thomas Jefferson wrote that “As it is we have the wolf by the ear, and we can neither hold him, nor safely let him go. Justice is in one scale and self-preservation in the other.”<sup>11</sup>

The American debate over the slave trade originated at the Constitutional Convention. A proposal to end slave importation was introduced with the support of New England and the Middle states.<sup>12</sup> Delegates from Georgia and South Carolina were intransigent, warning that they could not accept a plan that prohibited the slave trade. Their complaints and threats of secession induced a compromise which allowed slave imports until 1808.

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<sup>9</sup> HC Deb, 5 March, 1811. *Hansards*, vol. 19: 240.

<sup>10</sup> DuBois, 197.

<sup>11</sup> Letter, Thomas Jefferson to John Holmes, April 22, 1820.

<sup>12</sup> George Mason of Virginia called the trade “infernal” and warned that the crime of slavery would bring the judgment of God upon the nation. Luther Martin of Maryland said that the slave trade was “inconsistent with the principles of the revolution, and dishonourable to the American character.” John Dickinson of Delaware declared that “Every principle of honor and safety demands the exclusion of slaves.” DuBois, 53.

In 1800, eight years before the Constitutionally-mandated date, Congress passed an act prohibiting Americans from engaging in the slave trade,<sup>13</sup> and in a matter of three months the United States Navy seized three slavers.<sup>14</sup> But these efforts became less effective after 1800. The end of the Quasi-War against France caused an uptick in trans-Atlantic trade, including slaves. At the same time, the Democratic-Republican President Thomas Jefferson made severe cuts in the size of the navy and increased cotton production in the South, driven by the introduction of the cotton gin and the purchase of Louisiana, also created higher demand for slaves. The United States Navy was impotent to stop a tidal wave of slave imports. By the middle of the first decade of the nineteenth century collectors in Southern ports complained of numerous “irregularities and mocking of the laws” in the courts,<sup>15</sup> and getting no assistance from citizens. Mr. Chew at New Orleans recommended that, “to put a stop to that traffic a naval force suitable to those waters is indispensable.”<sup>16</sup> Another collector begged for just “one small cutter” to patrol the Gulf Coast. The 1800 law simply had no teeth.

Congress went to work on another slave trade prohibition bill as the Constitutionally-mandated year of 1808 approached. They quickly settled on penalties for those involved in the slave trade: forfeiture of the vessel and cargo, a penalty of

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<sup>13</sup> *Annals of Congress*, 6 Congress I Session, 686-700

<sup>14</sup> Donald L. Cannay, *Africa Squadron: The U.S. Navy and the Slave Trade, 1842-1861*. (Dulles, VA: Potomac Books, 2006): 3-4

<sup>15</sup> DuBois, 114

<sup>16</sup> *House Doc.*, 16 Cong. 1 sess. III No.42, p.7, as cited in DuBois, 115

\$1000 to \$10,000, and five to ten years imprisonment.<sup>17</sup> The more pressing concern was what to do with Africans liberated from captured American ships. It was believed that free blacks could not mix in white dominated American society. The federal government had no interest in the well-being of the Africans liberated off of the slave ships and, left to their own devices, most believed that Africans given freedom in America were likely to die or to become vagabonds.<sup>18</sup> President Jefferson made deep cuts in the federal budget, shifting more responsibility to the states. As for making the states responsible for liberated Africans the fear was that those Africans released in the South were likely to be arrested as vagabonds and sold into slavery anyway.<sup>19</sup> Nevertheless, Congress did make the individual states responsible for disposing of liberated Africans. On March 2, 1807 Congress passed “An Act to prohibit the importation of Slaves into any port or place within the jurisdiction of the United States.” On January 1, 1808, slave imports into the United States were banned. The trade in slaves was also banned.<sup>20</sup>

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<sup>17</sup> *Statutes at Large*, II, 427

<sup>18</sup> Nathaniel Macon of Georgia stated, “If you give them their freedom and turn them loose, they must perish.” *Annals of Congress*, 9 Congress II Session, 173.

<sup>19</sup> Josiah Quincy III of Massachusetts queried, “What was to prevent the legislature of Georgia, after Congress have declared these people shall be free, considering them as vagabonds, and selling them for a term of years, or for life, to the highest bidder.” He concluded, “If imported into the South, they will be slaves; if into the North, vagabonds.” *Annals of Congress*, 9 Congress II Session, 176, 183.

<sup>20</sup> *Statutes at Large*, II, 427-428. The prohibition was on slave imports into the United States; there was no prohibition on the interstate slave trade, including that within American territorial waters.

In 1819 Congress passed another Act for the Suppression of the Slave Trade. This act directed the President to use armed cruisers to interdict slavers on the coast of Africa and the United States. The bill was compromised, though, when Thomas Butler of Louisiana added the proviso that captured slavers be returned to the port from which they had cleared. The proviso essentially allowed slavers clearing from the Southern ports to get trials in front of sympathetic juries. As ships in Southern jurisdictions awaited trial many Africans simply “disappeared.”<sup>21</sup> Attorney General Wirt found it necessary in 1819 to remind collectors that “it is against public policy to dispense with prosecutions for violation of the law to prohibit the Slave trade.”<sup>22</sup> One district attorney replied “It appears to be almost impossible to enforce the laws of the United States against offenders after the negroes have been landed in the state.”<sup>23</sup> Another stated, “[W]hen vessels engaged in the slave trade have been detained by the American cruisers, and sent into the slave-holding states, there appears at once a difficulty in securing the freedom to these captives which the laws of the United States have decreed for them.”<sup>24</sup> Representative Quincy’s assertion, that freed Africans landed in the South would become slaves anyway, was proving correct.

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<sup>21</sup> *Annals of Cong.*, 15 Cong., 2 sess., p.1430

<sup>22</sup> DuBois, 127

<sup>23</sup> DuBois, 127

<sup>24</sup> DuBois, 127

Congress passed another Slave Trade Act on March 15, 1820, defining the slave trade as piracy and making the crime punishable by death.<sup>25</sup> Legislators hoped that new teeth would help in enforcing the law, but the potential of the death penalty turned many juries away from guilty verdicts instead.<sup>26</sup> Furthermore, there were still no provisions to protect “freed” Africans who were left to the discretion of the state of the court that freed them.

In the first quarter of the 1800s Great Britain and the United States both passed laws prohibiting the slave trade. The spirit of the law was clear but the letter of the original law had few teeth and the legislatures of the two countries had to reformulate their laws to make them more effective. The United States Congress hoped that its citizens would be dissuaded from engaging in the trade by the potential of a conviction for piracy and the application of the death penalty. It had little power to police the trade and apprehend alleged “pirates” though and under the Constitution alleged lawbreakers were innocent until proven guilty; as the *Charleston Mercury* asserted: “Better a hundred criminals go free than one innocent be found guilty.”<sup>27</sup> The British eventually made slaving punishable by seven years transportation in Australia. Because they had a large navy they used the power of their navy casting a broad net in its sweep of slavers.

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<sup>25</sup> *Statutes at Large*, III. 600-1

<sup>26</sup> When asked why he had not yet been hanged Captain Charles G. Cox of the *Emperor* stated that “No jury in the United States would hang him for bringing negroes in the United States as an evidence of it he said they bailed him for four hundred dollars. Testimony from *United States v. the Schooner Emperor* as cited in Dorothy Dodd, “The Schooner *Emperor*: An Incident of the Illegal Slave Trade in Florida.” *The Florida Historical Quarterly* 13, No. 3 (Jan. 1935): 119.

<sup>27</sup> Howard, 38

Neither country could stop the slave trade in its entirety on its own. As long as any other country allowed the trade slavers could continue their work claiming the immunity of that flag. Cooperation was paramount, but and when the British sought to have the Americans join them in their crusade, the latter made it clear that they were not interested whatsoever. The British did little to help their diplomatic cause.

### CHAPTER THREE: IMPRESSMENT - SLAVERY BY ANOTHER NAME?

At the same time that the United States and Great Britain were passing legislation to close the trans-Atlantic slave trade another issue was arising between the two countries. By 1800 the war between Napoleon and Great Britain had devolved into a stalemate. In an effort to gain an advantage, both sides targeted neutral American shipping on the high seas. Originally, warships from both sides stopped American ships, boarded and inspected their cargoes, and redirected the ships to their own ports, but as the war dragged on the British resorted to impressment to man the ships of their navy. “Press gangs” dispersed throughout the port cities of Britain and her colonies, British merchant ships were stopped on the high seas, and sailors were “pressed” onto warships. More often than not Americans were caught in the sweep as well. The United States protested the actions, referencing freedom of the seas as codified in the Law of Nations.

#### **The Development of Maritime International Law**

The concept of the “Law of Nations,”<sup>28</sup> that sovereign states are governed by a common set of laws, originated with St. Augustine and gained prominence in the sixteenth century through the writings of Hugo Grotius and Emmerich de Vattel. By the nineteenth century most European states agreed to bind themselves to that system. With

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<sup>28</sup> The terms “Law of Nations” is used until roughly the 1850s. During the 1850s the term “International Law” became more common. The two terms have generally the same meaning.

no judge to hold a state to its obligations, the Law of Nations was essentially a set of “rules” by which each state “ought” to live. Laws governing state actions were generally based upon international conventions to which other major states were willing to bind themselves; the more states that acceded to a convention, the more it became codified as international law. States that refused to join these conventions found themselves isolated from the rest of the civilized world.

The legal issue that the British and Americans ultimately battled over was “Freedom of the Seas,” a concept that originated with Hugo Grotius in the fifteenth century. His book *Mare liberum* was a response to a papal edict granting Spain and Portugal sovereignty over the entirety of the oceans. Grotius argued that the oceans were the common good of all mankind and could not, by their nature, be occupied any more than the sky could be occupied. It was repugnant to the law of nature, therefore, for the pope to give to the Spanish and the Portuguese the right to possess the sea as their private property. Rather, every nation had the right to use the ocean as a highway for commerce.<sup>29</sup> Those countries opposed to the Spanish and Portuguese used Grotius to justify expanding their own maritime footprint.

Grotius’s tract was not immediately agreed upon by all nations, though. The loudest protest against freedom of the seas came from England. John Selden’s *Mare clausum* (1635) argued that the law of nature shows that the seas are not common to all mankind, but can be subject to the jurisdiction and the domain of individuals just as the land can. Taking possession of the oceans only required a fleet of warships. From this

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<sup>29</sup> Hugo Grotius, *Mare liberum*: 246, as cited in Grewe: 266-267

premise Selden argued that there was an *Oceanus Britannicus*, the waters around the British Isles, westward to North America and north to Scandinavia which the British were allowed to dominate.<sup>30</sup> This idea was supported by Charles Molloy in his book, *de Iure Maritimo et Navali: or, a Treatise of Affairs Maritime, and of Commerce* (1676). According to Molloy, the sea, like the land, needed the protection of governments, and therefore needed to be apportioned among States as they are able to rule, govern and defend them. God left it to the fleets to decide over the Empire of the World. Molloy adds that the seas are common to all and navigation upon them is open to all, but those upon the sea should not be “without Protection or government of some Prince or Republick.”<sup>31</sup> Although the British later renounced these ideas politically, they remained in the national subconscious for as long as their navy was the Mistress of the Seas. It is not a stretch of the imagination to see that the right to search the ships of other states is based upon the ideas of Molloy. The humanitarian act of searching the ships of alleged slavers in the nineteenth century has its roots in the writings of Molloy.

### **Impressment and the Violation of American Neutral Rights**

Violations of American shipping were the result of the ongoing war between Britain and Revolutionary France. In fact the violations of American neutral shipping began in the 1790s, not with the British, but with the French. The violation of American neutral rights led the United States and France to a “Quasi-War” that lasted until 1800.

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<sup>30</sup> John Selden, *Mare clausum*, as cited in Grewe, 268-270.

<sup>31</sup> Charles Molloy, *de Iure Maritimo et Navali: or, a Treatise of Affairs Maritime, and of Commerce*, as cited in Grewe, 272-273.

Following that peace, American shippers found larger problems with a much larger antagonist.

The British were likewise engaged in stopping neutral American shipping, searching their ships and seizing their cargoes. It was not long before the British were stopping and searching American ships for another reason. To help man the Royal Navy British sea captains resorted to impressing sailors. The low pay and the very high probability of death at sea led to the desertion of many British sailors to the American merchant marine or the American navy. The British often tried to recapture these deserters by stopping and searching American ships upon which they might have taken shelter. The crew of the American merchantman would be mustered, and the officers allowed to inspect them. Those that the British knew were deserters were taken, along with those they suspected were British deserters, and those that they thought could contribute to the running of their ship, whether British or not. The impressed men were then taken on board the Briton, flogged, and forced into labor.

In 1806 impressment turned deadly. The HMS *Leander*, commanded by Captain Henry Whitby, stood off of New York routinely detaining American ships and impressing sailors. When the American merchantman *Richard* refused to heave to and be inspected, the *Leander* put a shot into the ship. The ball decapitated the *Richard's* helmsman, John Pierce. The public outcry in New York was immediate and intense. It was further intensified when Whitby was acquitted by a British court martial, then announced that he would “be off of Sandy Hook again in a few months to kill another

John Pierce.”<sup>32</sup> American protests were largely ignored by the British; it was the duty of the Royal Navy, *a la* Charles Malloy, to offer the seas protection from the French.

### **The *Chesapeake* Incident**

The issue of impressment climaxed with the *Chesapeake* incident. When three French cruisers took shelter in Chesapeake Bay in May 1807, a British naval squadron took up positions along the American coast waiting for them to put to sea again. While the ships waited a number of British sailors found their way to shore. Upon hearing of the desertions the British Foreign Office warned the United States government not to enlist any British subjects, going as far as providing a list of their names.

On June 22 the USS *Chesapeake*, commanded by Commodore James Barron, left Hampton Roads, Virginia, for a cruise of the Mediterranean Sea. Ten miles off of the coast, the ship met the 56-gun HMS *Leopard*, commanded by Captain Salusbury Price Humphreys. The Briton sent a lieutenant to the *Chesapeake* with a letter stating their belief that the Americans had recruited five deserters from the HMS *Halifax*, listing them by name and asked for the right to search the ship for deserters. He offered Barron the reciprocal right to search his ship for possible American deserters. When asked about deserters among his crew, Barron stated that he did not know of any. When asked if he would muster his crew for inspection Barron refused and escorted the lieutenant to the gangway.

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<sup>32</sup> Robert E. Cray, Jr., “Remembering the USS *Chesapeake*: The Politics of Maritime Death and Impressment.” *Journal of the Early Republic* 25, No. 3 (Fall 2005): 457, 460.

When the lieutenant was safely on board the *Leopard*, Captain Humphreys hailed the *Chesapeake*, then fired a shot across its bow. He then fired a full broadside into the *Chesapeake*. Three American sailors were killed and eighteen wounded in the barrage, including Barron who took a splinter to the leg. With considerable damage done to the ship, Barron struck his colors. A British detachment boarded the *Chesapeake* and mustered the crew. The crew was lined-up and inspected, then four sailors were clapped in irons and transferred to the *Leopard*. One of the men taken from the *Chesapeake* was a British sailor that had deserted from the *Halifax*; he was hanged after being returned to his ship. The three others were impressed Americans that had deserted from HMS *Melampus*; they were returned to the ship and sentenced to five hundred lashes.<sup>33</sup>

The court-martial that followed found that Commodore Barron:

...did, on the probability of engagement, neglect to clear his ship for action: and did fail to encourage in his own person, his inferior officers and men to fight courageously: and did not do his utmost to take or destroy the aforesaid vessel of war the *Leopard*, which vessel it was his duty to encounter.<sup>34</sup>

He was suspended from command for five years, without pay or other emoluments.<sup>35</sup> This was not unprecedented; when a British cruiser stopped the USS

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<sup>33</sup> Cray, 447.

<sup>34</sup> “Proceedings of the General Court-Martial Convened for the Trial of Commodore James Barron, Captain Charles Gordon, Mister William Hook, and Captain John Hall of the United States Ship *Chesapeake*, in the Month of January, 1808.” Published by Order of Navy Department, 1822: 5

<sup>35</sup> Barron was in Denmark during the War of 1812. Upon his return to the United States he was given shore duty and never given command of another ship. Barron challenged Commodore Stephen Decatur, one of the members of the court-martial to a duel. Decatur was killed. Barron was hit but did not immediately die of his wounds.

*Baltimore* in 1798 and impressed five sailors President John Adams was compelled to remove the ship's captain from command.<sup>36</sup> Barron's court martial made it clear to naval captains that the proper response to British attempts to force a visit and search of American vessels was with force. In June 1810, Secretary of Navy Paul Hamilton reaffirmed the call for Americans to meet British force with force, stating:

The inhumane and dastardly attack on our Frigate *Chesapeake* – an outrage which prostrated the flag of our Country and has imposed on the American people cause of ceaseless mourning...what has been perpetrated may again be attempted. It is therefore our duty to be prepared and determined to at every hazard to vindicate the injured honor of the Navy and revive the drooping Spirit of the Nation.<sup>37</sup>

Naval officers bemoaned missing the opportunity to even the score against the British, for the sailors' code of honor prompted them to remember past indignities.<sup>38</sup> Retired Commodore Joshua Barney offered his services to Jefferson. An opportunity for vindication did come on June 26, 1810, in the Caribbean, when HMS *Moselle* fired two shots at the USS *Vixen*. The *Vixen*'s captain did not reply in kind. Captain Stephen Decatur lamented that the *Vixen* missed a "glorious opportunity to cancel the blot underneath which our flag suffers."<sup>39</sup> Decatur would get his opportunity a few years later.

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<sup>36</sup> Cray, 463.

<sup>37</sup> Tucker and Reuter, *Injured Honor*, 191, as cited in Cray, 468-469.

<sup>38</sup> Cray, 453.

<sup>39</sup> Cray, 468.

Commodore John Rodgers was determined to cancel the blot immediately. When word reached Rodgers in New York in the spring of 1811 that several American merchant ships had been interdicted by the HMS *Guerrière* and a number of Americans impressed, he set out in the 44-gun *President* to find the guilty party. On May 16 he made “strange sail,” and, suspecting that it was the *Guerrière*, gave pursuit. That evening the two ships stood next to each other and exchanged a series of broadsides. The Briton was seriously damaged. The next morning Rodgers discovered that it was not the *Guerrière* with whom he exchanged fire, but the smaller twenty-gun corvette *Little Belt*.<sup>40</sup> Rodgers’s reaction to British provocation was with force. There was no apology for the United States.

### **The War of 1812**

The following year the United States Congress voted to go to war against Great Britain. In his war message President Madison charged that:

British cruisers have been in the continued practice of violating the American flag on the great highway of nations, and seizing and carrying off persons sailing under it, not in the exercise of a belligerent right found in the law of nations against an enemy but as a municipal prerogative over British subjects. British jurisdiction is thus extended to neutral vessels in a situation where no laws can

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<sup>40</sup> *President* (U.S. Frigate), “Proceedings of a Court of Inquiry, Convened on Board the United States’ Frigate *The President*, In the Harbor of New York, on the Thirteenth Day of August, 1811, Pursuant to the Following Warrant: to Stephen Decatur, a Captain in the Navy of the United States.” (Washington, D.C., 1811)

operate but the law of nations and the laws of the country to which the vessel belongs....<sup>41</sup>

He added that “thousands of American citizens, under the safeguard of public law and of their national flag, have been torn from their country and everything dear to them.” For Madison and the Congress that voted for his recommendation the War of 1812 was for “Freedom of the Seas.”

On October 9, 1812, Stephen Decatur, now captain of the 44-gun heavy frigate *United States*, fell upon the HMS *Macedonian*. Seeing the Stars and Stripes atop the opposing frigate, impressed American sailors on board the *Macedonian* requested to be sent below rather than fight their countrymen. The captain, John Surinam Carden refused, threatening to kill any of the impressed Americans that did not do their duty.<sup>42</sup> Within a few hours the *United States* defeated the *Macedonian*; forty-three sailors on the *Macedonian* were killed, three of them impressed Americans.<sup>43</sup> It was an atrocity for impressed Americans to be made to fight for the British against the French in a war in which they wanted no part. Now the British were forcing them to fight against their own countrymen.

Some have suggested that American protests against a proposal that of British cruisers be allowed to stop and search American merchant ships was unreasonable. This

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<sup>41</sup> James Madison, “Special Message to Congress,” as cited by Brad D. Lookingbill, *American Military History: A Documentary Reader* (Malden, MA: Wiley and Blackwell, 2011): 71-72.

<sup>42</sup> Theodore Roosevelt, *The Naval War of 1812: the History of the United States Navy during the Last War with Great Britain, to which is appended an account of the battle of New Orleans*. (New York: Review of Reviews Co., 1904): 147.

<sup>43</sup> Roosevelt, 150.

is not true in the least. The American experience with British cruisers stopping and searching American ships, a violation of the law of nations, had caused nothing but anguish. The impressment, forced labor, and the unnecessary killing of their countrymen at the hands of the British would long remain in the minds of Americans. It is believed that as many as 6,500 American sailors were impressed by the British.<sup>44</sup> The memory of impressment was in the minds of Americans, particularly the veterans of 1812 that were charged with the protection of her citizens. The British suggestion that their warships be allowed to stop and search American merchant vessels found a very cold reception in the United States. Whether their ships were carrying cargo that was legitimate or not, allowing British cruisers to stop American ships was anathema: the Right to Search equaled the Right to Impress and the Right to Enslave. Opposition to impressment drove the resistance to stopping and searching of American ships on the high seas.

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<sup>44</sup> Cray, 461.

## CHAPTER FOUR: SEARCHING FOR THE RIGHT TO SEARCH

With the implementation of the British suppression laws the fear of many in Parliament proved true. As the Union Jack disappeared from the Atlantic Ocean, the slave trade started falling under the flags of other countries. British courts hamstrung the suppression efforts of its own country, ruling that the Law of Nations did not allow the Royal Navy to seize the ships of other countries even if they were known to be slavers. The British responded by negotiating bilateral treaties with other maritime powers, allowing each signatory the “Reciprocal Right to Search,” that allowed each to search the ships of the other. There were a few countries that resisted Britain’s demands, but with the recent memory of impressment the United States did.

### **The Napoleonic Wars and the Right to Search**

During its wars with Napoleon the British seized their own slavers, along with those of their belligerents, the French and Spanish. In 1808 the American-flagged and therefore neutral *Amedie* was captured trafficking slaves from Africa to the Spanish colonies in America. The British court ruled that, since the United States had abolished the slave trade, the ship and her cargo had to be “condemned” (confiscated).<sup>45</sup> The *Amedie* decision became the precedent for future captures of slavers, with the British

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<sup>45</sup> Acton, *Admiralty Reports*, Vol. I: 240, as cited in Wheaton: 60-62. Also Fischer: 34-35.

condemning slavers from the United States and other countries that had abolished the slave trade.

The courts ruled that this regulation was not true of ships flying the flag of a nation that had not abolished the slave trade. In September 1810 the *Diana*, a Swedish ship was seized and condemned by the British Vice Admiralty Court in Sierra Leone. When the case was appealed the British courts released the *Diana*, Sir William Scott ruling “the Lords of Appeal did not set themselves up to be the legislators of the whole world, or to presume in any manner to interfere with the commercial regulations of other states.” Because the Swedes had not abolished the slave trade, the British had no right to interfere with their slavers.<sup>46</sup>

What would happen if a ship were captured that purported to be of a nation that allowed slave trade but was suspected of being of a state that had abolished it? The *Fortuna* was first owned by an American but sold to a Portuguese citizen for the purpose of gaining the right to use the flag of Portugal, a nation that had not abolished the slave trade. It was seized in 1811 and inspection by the British courts showed that *Fortuna* was a slaver, liable to condemnation unless it could be proven that the slave trade was legal according to the laws of the flag-state, in this case Portugal. “If the ship should therefore turn out to be an American so actually employed,” the court stated, “...the case of the *Amedie* will bind the conscience of this court to pronounce a sentence of confiscation.”<sup>47</sup> Upon further evidence the court ruled that the *Fortuna* was an

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<sup>46</sup> Dodson, *Admiralty Reports*, Vol. I: 95, as cited in Wheaton: 65-66. Also Fischer: 35-36.

<sup>47</sup> Dodson, *Admiralty Reports*, Vol. I: 81, as cited in Wheaton: 63-65. Also Fischer: 35.

American, not Portuguese, and confiscated the ship. The case indicated that the British were willing to go to great lengths to determine the nationality of a ship and that they would show a healthy amount of skepticism when the situation demanded it.

When the Napoleonic Wars ended the French, Portuguese, Spanish, and Dutch prepared to restart the slave trade. Without war as a pretext the British could no longer stop slavers under those flags unless it was illegal under the Law of Nations. That would require a certain amount of diplomacy and cajoling. During the Congress of Vienna in 1815 the British had an opportunity to make their worldwide anti-slave trade crusade a reality. Lord Castlereagh lobbied the other Great Powers to equate slave trade with piracy; as pirates, slave traders would not be allowed the protection of their flag and could be met with deadly force on the high seas. After much negotiating the other states agreed to “The Vienna Declaration on the Abolition of the Slave Trade”:

considering the universal abolition of the slave trade as a measure particularly worthy of their attention, conformable to the spirit of the times and to the generous principles of their august Sovereigns, they are animated with a sincere desire of concurring in the most prompt and effectual execution of this measure by all the means at their disposal, and of acting in the employment of these means with all the zeal and perseverance which is due to so great and noble a cause.<sup>48</sup>

It soon became clear that not everyone was on board with the goal of suppressing the slave trade.

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<sup>48</sup> Christopher Lloyd, *The Navy and the Slave Trade: The Suppression of the African Slave Trade in the Nineteenth Century* (New York: Longman’s, Green and Company, 1949): 43.

### **The *Le Louis* Case and the Right to Search**

The Vienna Declaration was almost immediately challenged in the *Le Louis* case in 1817. The French slaver *Le Louis* was captured by the British cruiser *Queen Charlotte* after the crew of the slaver resisted violently, killing twelve British seamen. The ship was condemned by the Vice Admiralty Court in Sierra Leone under the 1815 Vienna Declaration. On an appeal to the High Court of the Admiralty, Sir William Scott ruled that the right to visit and search by a royal warship did not exist in peacetime, except in the case of piracy, but because the slave trade was not piracy under the Law of Nations, nor had the French declared the slave trade to be piracy, “No authority can be found which gives any right of visitation or interruption over the vessels of navigation of other states, on the high seas except what the right of war gives to belligerents against neutrals.” Scott added, “A nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force.” He completed his judgment by stating that no government could “force the way to liberation of Africa by trampling on the independence of the other states of Europe.”<sup>49</sup> Hence the slave suppression section of the Vienna Congress was nullified and the precedence of the *Amedie* case was overturned. The *LeLouis* case set a precedent that future British courts found difficult to skirt.

The *Le Louis* case made it clear that other countries were stating empty promises at Vienna and that they would not compromise their sovereignty, allowing their ships to

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<sup>49</sup> Dodson, *Admiralty Reports*, Vol. II: 210, as cited in Wheaton; also in Grewe: 562-563. Also Lloyd: 44.

be stopped, searched and seized by the British on the high seas. The British were also rebuffed in their own courts. Their only option was to obtain bilateral treaties with individual countries willing to aid in the suppression of the slave trade. In 1817 they negotiated a treaty with Spain in which the latter would abolish the trade and, to aid in the effort, both sides agreed to a reciprocal right to search in which warships from one country could search ships flying the flag of the other if they were suspected of engaging in the slave trade. Trials for those accused of slaving would take place in a Court of Mixed Commission in either Freetown or Havana. As encouragement to the Spanish to sign the treaty the British included a “subsidy” of £400,000 (\$28 million).<sup>50</sup> Portugal signed a similar arrangement with Britain during the same year and the Dutch in 1818.<sup>51</sup> For all intents and purposes, the “reciprocal” right to search meant the right of British cruisers to search the vessels of the other signatories, since the British were the only state that could expend its naval resources to engage in such a task.

Efforts to draw the French into the arrangement were rebuffed. British proposals for the reciprocal right to search and declaring the slave trade to be piracy were rejected at the Congress at Aix-la-Chappelle and at the Congress of Verona.<sup>52</sup> The Duke of Richelieu stated that “the offer of reciprocity would be illusory; and that disputes must inevitably rise from the abuse of that right, which would prove more prejudicial to the

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<sup>50</sup> Henry Wheaton, *Enquiry in to the Validity of the British claim to a Right of Visitation and Search of American vessels suspected to be involved in the African slave trade*. (Philadelphia: Lea and Blanchard, 1842): 33-34.

<sup>51</sup> Leslie M. Bethell, “The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century.” *The Journal of African History*, Vol. 7, No. 1 (1966), 80-81.

<sup>52</sup> Wheaton, 43-50.

interests of the two governments than the commerce they desire to suppress.”<sup>53</sup> The French were content to suppress the slave trade carried out under its own flag as they had since 1815, without British interference.

### **The United States and the Right to Search**

The ten year effort to draw the United States into a convention was unfruitful as well. In 1814 the United States and Great Britain met in Ghent, Belgium to make peace after the War of 1812. In Article Ten of the Ghent Treaty both sides agreed that:

Whereas the Traffic in Slaves is irreconcilable with the principles of humanity and Justice, and whereas both His Majesty’s government and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavors to accomplish so desired an object.<sup>54</sup>

But the “best endeavors” of the United States would ultimately prove to be like the “sincere desire” of the Europeans after the Congress of Vienna. What was left out of the treaty was a British agreement to end the practice of impressing American sailors into the Royal Navy. The British reasoned that, with the end of the war against Napoleon they no longer had reason to impress American sailors. Quizzically, there was no strong push by American negotiators to include that prohibition. Stopping and searching American ships

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<sup>53</sup> Supplement of the Fifteenth Annual Report of the Directors of the African Institution, 77, as quoted in Wheaton, 36.

<sup>54</sup> William M. Mallory (ed.), “Treaty of Ghent.” *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776-1909* (Washington D.C.: Government Printing Office, 1910): 618.

by the Royal Navy would soon come into play again with the memory of impressment still in the forefront of American memories.

When the British asked the United States to join in a reciprocal right to search agreement, Secretary of State John Quincy Adams responded with the American perspective: the British treaty with Spain, Portugal and the Netherlands demanded Mixed Courts in their colonies but the United States had no colonies in Africa or Latin America. Adams further stated a constitutional problem with American submission to a Mixed Court, carrying out penal statutes beyond the territories of the United States, consisting partly of foreign judges not subject to impeachment for corruption, and deciding on statutes against the persons, property and reputations of American citizens without the possibility of an appeal. Furthermore, slaves delivered to the United States could not be guaranteed the protection of the federal government, rather they would become subject to the laws of the state in which they were released. Alluding to the impressment of American sailors by the British that led to the War of 1812, Adams warned that “the admission of a right in the officers of foreign ships of war to enter and search the vessels of the United States in time of peace under any circumstances whatever would meet with universal repugnance in the public opinion of this country.”<sup>55</sup> When asked if there was any worse evil than the slave trade Adams replied that it would be a much worse evil if the United States Government should allow any vessel flying the Stars and Stripes to be stopped and examined by a British cruiser, for that would be to make slaves of the whole

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<sup>55</sup> John Quincy Adams Dispatch to Mr. Rush, Nov. 2, 1818, as cited in Wheaton: 38-41.

American people.<sup>56</sup> Americans, still stinging from the recent war fought over British searches of American ships, were now being asked to give the British that right all over again.

The British pressed the United States again in 1823, stating that only effective way of suppressing the slave trade was with a reciprocal right to search. Adams one-upped the British stating that the United States Act of 1820 declared the slave trade to be piracy, punishable by death, and noted that nothing in British law went so far as those of the United States.<sup>57</sup> Adams stated the hope of his government that the British, along with the rest of the world, would declare the slave trade to be piracy, therefore stripping the offender of any nationality, allowing him to be tried in the court of any nation, and punishable by death.

The following year the British approached the United States again proposing the right to search. This time Adams replied that

his government had an insuperable objection to its extension by treaty, lest it might lead to consequences still more injurious to the United States. That the proposed extension would operate, in time of peace, and derive its sanction from compact, produced no inducements to its adoption. On the contrary, they formed strong objections to it... If the freedom of the seas was abridged by compact for any new purpose, the example might lead to other changes. And if the operation of the right to search were extended to a time of peace as well as war, a new system would be commenced for the dominion of the seas, which might eventually, especially by the abuses to which it might lead, confound all

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<sup>56</sup> Ward: 161.

<sup>57</sup> Wheaton: 83-84.

distinctions of time and of circumstances, of peace and of war, and of right applicable to each state.<sup>58</sup>

Once again the United States remained leery of giving the British the right to search, no matter how altruistic the cause.

In March of 1824 British and American negotiators again attempted to compromise their differences. The resulting convention called for the British to recognize slave trading to be piracy, punishable by death, with an eye toward the international community making slave trade piracy under the Law of Nations. In return the United States would agree to a very limited right to search by armed cruisers of each nation off of the coast of Africa, America and the West Indies, and to accused slavers being tried in the courts of their own country. On April 30 the treaty was sent to the Senate for ratification. The Senate made a number of amendments to the treaty, excluding “America” from the areas where British cruisers had the right to search, and allowing each party the opportunity to renounce the treaty with six-month’s notice. The amended version of the treaty passed the Senate, but the changes were too much for the British cabinet who allowed the convention to die.<sup>59</sup>

British hopes for any reciprocal right to search agreement with the United States were dashed the following year. On December 6, 1825 HMS *Redwing* fired into the Boston-based *Pharos* while at anchor in the port of Freetown, Sierra Leone. Two sailors were taken off of the American and pressed into service for the British. After American

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<sup>58</sup> Wheaton: 92-93.

<sup>59</sup> Wheaton: 104-106.

protests one of the sailors was released. The British claimed the other to be a subject of queen and refused to release him.<sup>60</sup> With a return to violations of the sovereignty of the American flag, a reciprocal right to search agreement was a dead letter.

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<sup>60</sup> Consul Samuel Hodges Jr. to Secretary of State Henry Clay, 16 March, 1826, *American State Papers*, House of Representatives, 19<sup>th</sup> Congress 2 Session, vol. 6, 368.

CHAPTER FIVE: THE ATLANTIC SHELL GAME - ELUDING  
THE SUPPRESSION FLEET

Legal issues plagued the British anti-slave trade crusade. The Anti-Slave Trade Treaties signed by the British with the Spanish, Portuguese and Dutch allowed naval personnel from each nation to board the ships of another, but did not determine the penalty for slaving; convicted slavers were punished under their own national laws. Seven years transportation in Australia was a stiff penalty, but thousands of British subjects still involved in the slave trade did not go away overnight. With a well-established network of trade facilities on the African coast, many British slavers continued in their previous employment under the flags of other nations. “Very few real Spanish ships are employed,” a British commissioner reported concerning the slave trade, “the great masses of vessels are under the Spanish flag... several are supposed to belong to British merchants.”<sup>61</sup> Most of the Spanish and Portuguese slavers involved in the trade sailed British-built ships, used British capital, received credit from British banks, and were insured by British insurance companies. Lord Castlereagh testified before to the House of Commons in 1818, “It would be a great error to believe that the reproach of carrying on the slave trade illegally belonged to other countries...British subjects are

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<sup>61</sup> David Eltis, *Economic Growth and the Ending of the Atlantic Slave Trade* (New York: Oxford University Press, 1987): 55.

indirectly and largely involved.”<sup>62</sup> A Spanish merchant operating in London, accused of supplying goods to slave traders, testified to a British court, “If merchants in this country would not accept bills drawn by slave traders... the trade could not be carried out at all.”<sup>63</sup> Thus began the “Atlantic Shell Game.”

### **The Technicalities of Slave Trade Suppression**

Under all three suppression treaties suspected vessels were tried by a Court of Mixed Commission. Ships found to be illegally transporting slaves would be condemned, their crews turned over to the authorities of their own nation, and their human cargo granted their freedom. The British often had trouble before the Mixed Courts. The British judge often had to play the role of prosecutor against foreign judges that were predisposed to rule in favor of their own countrymen, even when the evidence was undeniable.<sup>64</sup> British captains were further hampered by the overly technical rules written into the treaties. The 1817 treaties stipulated that a ship could only be seized if there were captives actually on board, so slavers often simply threw their cargo overboard before a navy vessel could board them.<sup>65</sup>

To help with the problem of capturing empty slavers the British negotiated a new treaty with Spain in 1822 inserting an “Explanatory Article” stating that a vessel could be condemned if there was “clear and undeniable proof that slaves had been on board for the

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<sup>62</sup> Wheaton: 56.

<sup>63</sup> Eltis, 57-58.

<sup>64</sup> Bethell, 85-86.

<sup>65</sup> Hermann, 421.

purpose of illegal traffic in the particular voyage in which the vessel was captured.”<sup>66</sup>

Again, what was undeniable proof to British judges was easily deniable to the Spanish or the Portuguese. Additional teeth were put into the cause with “Equipment Clauses” which made the possession of specific equipment related to the slave trade *prima facie* grounds for condemnation.<sup>67</sup> New conventions were also signed with Denmark and Sweden, and the new American republics of Haiti, Uruguay, Venezuela, Bolivia, Argentina, Mexico, and Texas conditional on their taking appropriate steps against the slave trade, including acceding to the Right to Search.<sup>68</sup> The drive to codify the right to search into international law was gaining steam. A few major powers still held out.

In the early 1840s more than one-quarter of the entire British Navy stood off the coasts of West Africa, Brazil, and Cuba, invoking the new “Equipment Clauses.” Between 1839 and 1845 three hundred forty-six ships were adjudicated in the British Vice Admiralty and Mixed Courts at Sierra Leone, two hundred eighty having been

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<sup>66</sup> Lloyd, 46.

<sup>67</sup> This included: (1) Hatches with open gratings, instead of closed hatches which are used in merchant vessels, (2) Divisions, or bulkheads, in the hold or on the deck, in greater number than are necessary for vessels engaged in lawful trade, (3) Spare planks fitted for being laid down as a second or a slave deck, (4) Shackles, bolts, or handcuffs, (5) A larger quantity of water, in casks or in tanks, than is requisite for the consumption of the crew, (6) An extraordinary number of water casks, or of other receptacles for holding liquids, (7) A greater number of mess tubs or kits than are requisite for use by the crew, (8) A boiler, or other cooking apparatus of unusual size, (9) An extraordinary quantity of rice, or farena, or any other article of food beyond the probable wants by the crew, (10) A quantity of mats or matting greater than is necessary for the use of such merchant vessels; Lloyd, 46-47; also Wilson, 509-510, and Bethell, 86.

<sup>68</sup> Grewe, 499, 561; also Eltis, 58.

captured before any slaves could be loaded.<sup>69</sup> It is apparent that the British were doing everything within the letter of the law to suppress the trade even when others were not.

### **Slaving Under the Stars and Stripes**

Although they had laws making the slave trade illegal, the United States had no naval vessels committed to the African coast. Nor was there a treaty with the British. An 1820 report by a British officer stated that in spite of American laws, “American vessels, American subjects, and American capital, are unquestionably engaged in the trade, though under other colours and in disguise.”<sup>70</sup> In 1823 the commander of the American sloop-of-war *Cyane* reported ten searches within only a few days, adding “Although they are evidently owned by Americans, they are so completely covered in Spanish papers that it is impossible to condemn them.”<sup>71</sup> Perhaps understanding the situation on the African coast too well Secretary of Navy Samuel Southard stated in 1824, “None of these, or any other of our public ships have found vessels engaging in the slave trade, under the flag of the United States, and in such circumstances as to justify their being seized and sent for adjudication. And, although it is known that the trade still exists, as it is seldom, if ever, carried on under our own flag, it is impossible, with the existing regulations and instructions, to afford very efficient in exterminating it.”<sup>72</sup> He went on to state that the only possible way to attack the problem was “by the combined effort of the maritime

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<sup>69</sup> Wilson, 515.

<sup>70</sup> *Parliamentary Papers*, 1821, Vol. XXIII, as cited in DuBois, 126-127.

<sup>71</sup> *House Reports*, 17 Cong., 1 sess. II. No. 92, pp. 15-20, as cited in DuBois, 127.

<sup>72</sup> Secretary of Navy to the President, Dec. 1, 1824, as cited in Canney, 18.

nations, each yielding to the others the facilities necessary to detect the traffic under its own flag.”<sup>73</sup> In the 1820s most Americans had no interest in any type of combined effort with the British.

American animus toward the British is seen in the Monroe Doctrine. As Spanish power receded in the Americas the people of Central and South America raised their own banners of independence. In the early 1820s a movement was set afoot by the “Holy Alliance” of Spain, Russia, Prussia and Austria to forcibly return the Latin Americans to their legitimate leaders. Great Britain and the United States both opposed the move, but when British Foreign Secretary George Canning proposed a Joint Declaration to be issued by both governments, President James Monroe replied that “he was averse to taking any course that should have the appearance of taking a position subordinate to that of Great Britain,” that “It would be more candid, as well as more dignified, to avow our principles explicitly to Russia and France, than to come in as a cock-boat in the wake of the British man-of-war.”<sup>74</sup> Instead the President unilaterally issued the Monroe Doctrine, stating that the United States would stand in the way of any attempts to “extend their system to any portion of this hemisphere.” The American government made it clear that they were standing on their own principles without subjecting themselves to an outside force, no matter how common were their intentions. On the subject of the slave trade the United States would never take their place in a cock-boat being pulled behind a British man-of-war, no matter how common were their intentions.

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<sup>73</sup> Secretary of Navy to the President, Dec. 1, 1824, as cited in Canney, 18.

<sup>74</sup> Charles Francis Adams, ed., *Memoirs of John Quincy Adams Comprising Portions of His Diary from 1795 to 1848* (Philadelphia: J.B. Lippencott, 1875), VI, 177-179.

In the same year the Supreme Court doubled back on the British in the *Antelope* case. Chief Justice Marshall ruled, like Sir William Scott before him, that all nations have equal access to the high seas, and that the slave trade must be allowed, unless all nations abolish it, “as no nation can proscribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.” Marshall denied that the slave trade could be considered piracy, therefore:

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this Court, that the right of bringing in for adjudication in times of peace, even when the vessel belongs to a nation which has prohibited the trade, cannot exist. The Courts of no country execute the penal laws of another; and the course of the American government on the subject of the visitation and search would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors.<sup>75</sup>

Since the slave trade was neither piracy, nor a violation of international law a ship could not be subject to condemnation, even if its own government had prohibited the trade. According to the precedence established in the *Antelope* case, the United States would not recognize a capture by any foreign nation on the high seas.

As the Explanatory Articles of 1822 and the Equipment Articles of 1835 were crushing the Portuguese and Spanish slave trading enterprises, American-flagged ships continued passing through the British suppression fleet unmolested. By the mid-1830s American ships covered by the Spanish flag and Spanish papers started to disappear from

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<sup>75</sup> Grewe, 564; also Fischer, 37.

the African coast, while ships with English names started arriving, cruising under the American flag. The shell game continued.

The British now took a stronger line towards visiting American ships. In December, 1838 the *Mary Ann Cassard* was detained by HMS *Brisk* in the Gallinas River on suspicion of slaving. The American “master,” John Bacon, headed a crew of Spaniards and carried eight passengers, one being Juan Barba who was authorized by the owners of the ship to “depose both the vessel and the cargo as he might think proper.”<sup>76</sup>

A study of the *Mary Ann Cassard*'s papers showed that:

The multiplication of powers of attorney on this case is inexplicable. Gilbert Cassard of Baltimore, appoints Edgar Montell, residing in the same place, as his attorney; and the letter, on the same day, names substitutes to act for him, although he was present at Matanzas when his substitutes sold the *Mary Ann Cassard* to Moncada. Then the latter appoints Barba to sell his newly-purchased property; and thus, in less than two months, the *Mary Ann Cassard* passed through the hands of five different persons.<sup>77</sup>

Despite the irregularities, the American consul in Matanzas was satisfied that the *Mary Ann Cassard* was an American vessel, properly navigated according to the laws of the United States, and issued a clearance certificate for the schooner which made its voyage to Africa under the American flag. Nevertheless the ship was seized as Spanish property

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<sup>76</sup> Great Britain, Foreign Office, “Report of the Case of the Schooner *Mary Ann Cassard*, John Bacon, Master.” *Correspondence on the Subject of Vessels Sailing under the Flag of the United States of America, which have been Visited or Detained by British Cruizers, on Account of Being Suspected of Being Engaged in the Slave Trade* (London: 1841): 9.

<sup>77</sup> Report of the Case of the Schooner *Mary Ann Cassard*, *Correspondence on Vessels under the Flag of the United States*: 7.

used in a slave trading enterprise in violation of the Spanish Anti-Slave Treaty and sent it to the Anglo-Spanish Mixed Court in Sierra Leone; the court refused to hear the case, though, because the ship was under the American flag and commanded by an American citizen when seized:

The captor himself has declared that the *Mary Ann Cassard* was “under American colours” at the time of her capture; and the papers of the vessel show that she was acknowledged to be an undoubtedly American vessel by the Spanish authorities at Matanzas, and by the Consular Agent of the United States at that port.<sup>78</sup>

By these facts the Mixed Court determined that, even if the ship was *prima facie* a slaver, they had no jurisdiction over the vessel. Upon hearing the report of the Mixed Court concerning the *Mary Ann Cassard* Viscount Palmerston took this case to his government’s lawyers who concluded:

[T]he circumstances disclosed in the papers of that vessel, sufficiently show that the *Mary Ann Cassard*, at the time of her detention, was Spanish, and not American property, and that the commissioners would have been justified in condemning her under the Treaty between Great Britain and Spain for the Suppression of the Slave Trade.<sup>79</sup>

The Royal Navy found similar cases of Spanish ventures disguised as Americans. In January, 1839, HMS *Saracen*, commanded by Lieutenant Hill, visited the *Florida* anchored off of Gallinas, under American colors, but suspected of being Spanish. Except for the American owner-master, David Williamson, everything on board gave the

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<sup>78</sup> Judgment given in the case of the American schooner *Mary Ann Cassard*, John Bacon, Master. *Correspondence on Vessels under the Flag of the United States*: 12.

<sup>79</sup> Viscount Palmerston to Her Majesty’s Commissioners at Sierra Leone, Foreign Office, September 5, 1839. *Correspondence on Vessels under the Flag of the United States*: 17.

indication that the enterprise was Spanish. Before Hill left the ship Williamson stated that the registry in his name was a forgery and that he feared for his life and sought protection from his all-Spanish crew. He surrendered the ship to the British, and a search turned-up equipment for the slave trade. The ship was seized and sent to Sierra Leone. Again, the Mixed Court refused to hear the case because the ship was seized while under an American master and flying the American flag. When Williamson refused to take the vessel to sea with the Spanish crew the ship was broken up.<sup>80</sup>

Between January and March 1839 the British seized five more American-flagged vessels on suspicion of being Spanish property: the *Hazard*, *Mary Cushing*, *Eagle*, *Clara*, and *Traveller*. In each case the ships were built in Baltimore, bought by an American, then sailed to Havana and sold to a Spanish citizen in Cuba. An American was then given nominal command of the vessel as “Captain of the Flag,” while the voyage was actually under the direction of a Spanish “supercargo” who commanded the Spanish crew. The clearance certificate was the proverbial “golden ticket,” issued by the American consul-general, that verified that the ship was American and being properly navigated under the laws of the United States.

With an American master and American clearance papers a ship had the right to fly the American flag. A ship flying the American flag, British courts continually reaffirmed, could not be visited by a British cruisers. Lieutenant Hill of HMS *Saracen* complained that “The Treaty between England and Spain is now defeated by the

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<sup>80</sup> Lieutenant Hill to Rear-Admiral Elliot, Her Majesty’s Brig *Saracen*, Sierra Leone, January 28, 1839. *Correspondence on Vessels under the Flag of the United States*: 21.

American flag and papers from the Havana, bearing the signature of Mr. Smith, the Vice-Consul of the United States.”<sup>81</sup> H.W. Macaulay added that “A remedy for such a state of things must soon be applied, either by the government of the United States, or by the Governments who will not consent to see the labours of thirty years absolutely thrown away, and rendered altogether useless and inconsequential, by the obstinate jealousy of one commercial Power.”<sup>82</sup> If the Americans were unable to enforce their own laws, the remedy was the Right to Search.

Following the seizure of *Hazard*, as with the many seizures before, Lord Palmerston sent a message to British ambassador to the United States, Mr. Fox:

You will, in a note to the United States Government, give the substance of the information contained in the enclosed papers; and you will urge that government to take measures for putting an end to the abuse of its flag for purposes of the slave trade, of which the case of the schooner *Hazard* furnishes so flagrant an instance.<sup>83</sup>

If the United States continued balking at taking action, Palmerston was prepared to take the issue to American’s front door.

The British commissioners to the Mixed Court in Sierra Leone went so far as to implicate the Americans of conspiring with the slave traders, writing to Viscount

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<sup>81</sup> Lieutenant Hill to Rear-Admiral Elliot, Her Majesty’s Brig *Saracen*, Sierra Leone, January 28, 1839. *Correspondence on Vessels under the Flag of the United States*: 22.

<sup>82</sup> Report explanatory of the decision pronounced in the Case of the American schooner *Mary Ann Cassard*, John Bacon Master, on the 24<sup>th</sup> of November, 1838, *Correspondence on Vessels under the Flag of the United States*: 15-16.

<sup>83</sup> Viscount Palmerston to Mr. Fox, Foreign Office, August 14, 1839, *Correspondence on Vessels under the Flag of the United States*: 49.

Palmerston: “owing to the numerous transfers of American vessels which have taken place in Havana, something more than a mere connivance in fraud may be thus brought home to gentlemen [Messrs. Trist and Smith], who already possess so many other claims on the gratitude of their slaving associates.”<sup>84</sup> In Havana the consul-general, who the British accused of covering Spanish enterprises with American papers, was Nicholas Trist.

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<sup>84</sup> The Sierra Leone Commissioners to Viscount Palmerston, Sierra Leone, January 31, 1839. *Correspondence on Vessels under the Flag of the United States*: 48.

## CHAPTER SIX: NICHOLAS TRIST - CONSUL-GENERAL IN HAVANA

As consul-general, Nicholas Trist was the official representative of the United States' government in Cuba. He was responsible for protecting American commercial interests in the Spanish colony. He was also responsible for authenticating the bill of sale of American ships with his notation on the ships official register. He was responsible for authenticating the ship's manifest of cargo shipped. His signature permitted slavers to clear Havana under the American flag, with the authority of the United States protecting them on the high seas. He was also charged with gathering information concerning violations of American law on the high seas, which included slaving. He was also to cooperate with local authorities concerning American citizens violating local laws.

Trist was driven by two interests: the ideals of the Enlightenment and hostility toward the British. He was married to Virginia Jefferson Randolph, a granddaughter of Thomas Jefferson. He studied law under Jefferson and adopted many of his ideals. His connection to the third President got him an appointment to West Point, just after the War of 1812 when American opposition to Britain was still peaked. In 1828 he was appointed to a position as clerk in the State Department of President John Quincy Adams who himself had continually protested British demands for the right to search as Secretary of State under James Monroe. Trist parlayed a friendship with Andrew Jackson Donelson into political appointments by the fervently anti-British President Andrew Jackson, culminating in his appointment as Consul-General in Havana in 1834.

Trist's actions as consul are best understood by knowing his feelings on slavery. His position was similar to that of Jefferson: Although personally opposed to slavery he felt that the practice was humane because it delivered Africans from the paganism of Africa. Southerners had built a well-regulated system in which slaves were well-cared for. He reported that he personally recalled a slave that wanted to remain a slave in America rather than return to Africa.<sup>85</sup> What he hated was the abolitionist movement, feeling that it was filled with fanaticism, hypocrisy and an eagerness to put the lives of Southerners at risk.<sup>86</sup> Slaves could not simply be emancipated as the abolitionists wanted since they lacked the intelligence and morality that was necessary for democratic society that the United States was trying to build.<sup>87</sup> As his mentor said, "We have the wolf by the ears." Therefore, slavery had to remain, even if it was a blight on the democratic society of the United States.

If his feelings about slavery were mixed, his hatred toward the British was clear. As an American nationalist he resented the British overstepping their rights under the Law of Nations in their suppression activities, what he stated was based upon "mock humanitarianism." He believed that the British had bullied the Spanish into a suppression treaty and that the Cubans were justified in skirting its provisions. He tried to stay on

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<sup>85</sup> Robert W. Drexler, *Guilty of Making Peace: A Biography of Nicholas Trist* (Lanham, MD.: University Press of America, Inc., 1991), 56.

<sup>86</sup> Wallace Ohrt, *Defiant Peacemaker: Nicholas Trist in the Mexican War* (College Station, TX: Texas A&M Press, 1997): 94.

<sup>87</sup> Howard, 36.

friendly terms with the Spanish Captain-General of Cuba, knowing that he was a large-scale criminal, pocketing money for every slave he allowed to disembark in Havana.<sup>88</sup>

As consul, Trist signed-off on the sale of ships, the changing of crews, and the granting of clearances. Trist did not see his position in Havana to be that of a policeman, a magistrate or an investigator; in fact he considered it unethical for the consul to pry into the cargo manifests of any commercial venture. He considered his role as consul to be more of a public notary, performing duties on behalf of American citizens at their request, and signing off on declarations made to him under oath. He did not investigate or pass judgment, his duty was to affix his signature and his seal to any declaration that a fellow citizen made before him.<sup>89</sup> Yet, in spite of appearances Trist did not seek unregulated slave trade. He succeeded in curbing the hiring of American seamen in the slave trade.<sup>90</sup> He suggested stricter legal requirements to make it more difficult for slavers to gain access to American ships, and made the recommendation that the United States use its own Navy to suppress the slave trade in an effort to preempt the British from assuming police powers over American vessels.<sup>91</sup> In lieu of the stricter legal requirements, Trist continued signing-off on clearance certificates for American ships, no matter who owned them.

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<sup>88</sup> Howard, 36.

<sup>89</sup> Howard, 38.

<sup>90</sup> Drexler, 56.

<sup>91</sup> Howard, 36.

During his stay in Havana Trist's rival was the British Commission on the Suppression of the Slave Trade. As Trist was arriving in Havana, Great Britain sent two abolitionists to Havana to act as the British Commission. Trist refused to recognize their status since the United States was not a signatory to any slave trade suppression treaty with Britain. For their part the commission reported to London every act of collusion between Trist and Cuba's slavers.

When the consul-general of Portugal was recalled because of his own corruption, the Portuguese appointed Trist to be acting Portuguese consul in Havana as well. He now issued registries and flags of both nations to shipping ventures. British commissioner Richard Madden was astonished, noting "The entire slave trade of the island of Cuba was then passing through the identical hands of N.P. Trist, the Consul-General of the United States at Havana."<sup>92</sup> During his time in Havana the British commissioners issued a number of protests to Trist and, when those went unanswered, to his superiors in Washington.

In 1840 the Commission delivered a report to Trist related to the activities of the *Venus* which left Cuba under the American flag, was visited by a British cruiser but not seized, then returned to Cuba under the Portuguese flag with 860 slaves. Trist returned the report to the commissioners without comment. He followed that up a few weeks later with a sixteen-page response, a "violent vindictive" toward the commission, the British government, and the British people whom he called, the "deluded victims of certain

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<sup>92</sup> Madden, 11

deceivers, self-seekers, practisers of theatrical exhibitions, and other kinds of public imposters.”<sup>93</sup> The letter refused to answer to the abuse of the American flag.

The British commission delivered a second letter to Trist reminding him of the agreement in the Treaty of Ghent to exchange information concerning slavers. Trist responded with a 276-page letter, described by Madden as being of “rude demeanor, supercilious carriage, insolent tone, and uncouth address.”<sup>94</sup> He responded to every complaint of the British in tedious detail, refuting that he knowingly and willingly issued American clearance certificates to slavers. The response asserted British hypocrisy, demanding that Trist preform “miracles” in apprehending slavers, while the commissioners watched as English-made iron shackles were being sold in Havana’s open markets. Trist further detailed his own opinions on the morality of slavery and finished with a diatribe explaining how, despite the institution of slavery, American democracy was a superior system to British oligarchy and how he looked forward “with heartfelt pleasure” to a time “when the people of England will be free – when the oppression under which, in every possible shape, their heads have been so long bowed into the very dust, shall have come to its end, when the House of Lords shall exist only on a page of history.”<sup>95</sup> Obviously the British were getting nowhere with the American consul-general.

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<sup>93</sup> Madden, 11

<sup>94</sup> Madden, 11

<sup>95</sup> As quoted in Drexler, 57-58

The British next protested to Washington D.C. In July 1840, the House Commerce Committee concluded that “the documents submitted to them do not at all affect the character of Mister Trist for integrity and honor, and they are unanimously of the opinion that no case is presented calling for any action by the House of Representatives.”<sup>96</sup> An investigation by the State Department concluded that Trist should have been more active in investigating the illegal use of the American flag in the slave trade, but his “omission to do so has not been the result of indifference or any more corrupt motive; but of a settled conviction that any measures which he could take for the purposes alluded to would be entirely ineffectual from the impossibility of procuring such evidence as would be available in a court of justice.”<sup>97</sup> Trist was removed from his position after the Whigs won the White House in 1841, after which Secretary of State Daniel Webster told him that “this resolution has been adopted without his having formed any judgment of the charges which have been suggested against you.”<sup>98</sup> Ironically the number of ships clearing Havana for the African coast after 1841 declined significantly.<sup>99</sup>

The British recognized that the actions of Nicholas Trist, whether they were “sins of commission” or “sins of omission,” was a threat to their crusade to suppress the slave trade. The British charged that Trist was complicit in the falsifying of registrations and issuing of American flags at Havana. He mounted a strong defense and the House

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<sup>96</sup> *Washington Globe*, August 5, 1840, as quoted in Drexler, 58.

<sup>97</sup> *Foreign Relations*, 26<sup>th</sup> Congress, Document 115: 481, as cited in Drexler, 59.

<sup>98</sup> As quoted in Drexler, 59.

<sup>99</sup> Emory University, *Transatlantic Slave Trade Database*. “List of Voyages,” <http://www.slavevoyages.org/tast/database/search.faces>. Accessed April 2, 2013.

Commerce Committee – which was dominated by Northern representatives – cleared him of any wrongdoing, but the State Department found that he could have done more. Trist was a lawyer who took a “strict constructionists” view of the law. He never met with the British commissioners because his country was not party to any treaty with the British. What in Trist’s mind demanded that the relationship be adversarial? Was it in favor of advancing the slave trade? Not necessarily. He was ambivalent about slavery. In fact he supported Abraham Lincoln in the 1860 election, received no patronage from the President afterward, and remained loyal to the Union after Virginia seceded.

Trist was not ambivalent about the British, though. Like most other Americans in the first half of the nineteenth century Trist was simply hostile to the British, whom he had learned to hate at the start of his political career. As a Virginian he was also hostile to abolitionists, particularly those he was forced to deal with on the British Commission in Havana. Every time the abolitionists on the British Committee for the Suppression of the Slave Trade called him on an issue, he simply pushed back.

What is also apparent is that Trist was a “loose cannon” diplomatically. At the same time the British protest reached Congress the House Commerce Committee was already looking into a petition of 167 ships’ captains demanding the recall of Trist from his position in Havana. Their complaint was that Trist’s conduct was “tyrannical, unlawful, unjust, and highly injurious and offensive to our profession,” saying that he failed to protect American commercial interests by insulting and oppressing her captains

and favoring Spanish authorities over his fellow captains.<sup>100</sup> The new Whig government recalled Trist from Havana before the petition was not acted upon.

Trist returned to public life in 1847 when President James K. Polk sent him to Mexico City to negotiate an end to the Mexican War. A few months into the negotiations the prospects of the war changed and Polk ordered him to return. Trist refused and continued negotiating with the Mexican government, finalizing the Treaty of Guadalupe-Hidalgo on February 2, 1848. Trist negotiated the terms that Polk sought, but the President refused to pay his chief negotiator for his insubordination.

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<sup>100</sup> Trist stated that the captain of the *William Eng* “should have been made to break stones in the place of his crew.” Abraham Wendell, captain of the New York-based *Kremlin* was condemned to a Spanish prison in Cuba without trial by jury or receiving any help from the American consul, Toland: 12

## CHAPTER SEVEN: LEWIS CASS AND THE QUINTUPLE TREATY

With the increasing number of American-flagged ships the Royal Navy stepped-up its visitations. President Martin Van Buren, at first, welcomed the more intense scrutiny by the British looking for those prostituting the flag, but he later relented realizing that he was sanctioning British violations of American sovereignty under the Law of Nations. The United States diplomatic corps returned to a defiant stance, the most defiant taken by Ambassador Lewis Cass, whose actions scuttled a treaty with France and forced the British to negotiate a treaty with the United States that did not include the Right to Search.

### **The British Ramp-up Suppression**

As much as the United States was a thorn in the side of the international movement to suppress the slave trade, the French were equally troublesome. The French vacillated on the abolition of slavery altogether. In 1822 William Wilberforce lamented

the French government reprobates the traffic in the strongest terms, and declares that it is using its utmost efforts for the prevention of so great an evil:—That it is deeply to be regretted that a government which has been generally regarded as eminent for its efficiency, should here alone find its efforts so entirely paralyzed.

And yet,

Proposals are circulated for slave-trading voyages, inviting the smallest capitals, and tempting adventurers by the hopes of enormous profits:—that the few ships of

war of that country stationed in Africa, offer no material obstruction to the trade, nor do the governors of her colonies appear to be more active.<sup>101</sup>

France held firmly to the principles of their constitution that required French citizens to be tried in French courts. Here the suspected slave trader was out of the hands of the apprehending agency, facing a jury that was already hostile to most things British. France eventually agreed to treaties with Britain in 1831 and in 1833 giving both navies the reciprocal right to search in limited areas.<sup>102</sup> These treaties led to significant decreases in the slavers' use of the *tri-colour*.

As the French flag disappeared from the Atlantic, the Stars and Stripes became more prominent. One British commodore complained to the Admiralty of the "shameful prostitution of the American flag, for under that ensign alone is the Slave Trade now conducted."<sup>103</sup> Governor Buchanan of Liberia stated, "The chief obstacle to the success of the very active measures pursued by the British government for the suppression of the slave trade on the coast, is the American flag. Never was the proud banner of freedom so extensively used by those pirates upon liberty and humanity, as at this season."<sup>104</sup>

President Martin Van Buren conceded to Congress:

Recent experience has shown that the provision in our existing laws which relate to the sale and transfer of American vessels while abroad are extremely defective.

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<sup>101</sup> Speech by William Wilberforce, House of Commons Debate, June 27, 1822, *Hansard*, vol. 7: 1403

<sup>102</sup> Wheaton: 108-109.

<sup>103</sup> Lloyd, 57.

<sup>104</sup> Andrew Hull Foote, *Africa and the American Flag* (New York: D. Appleton and Co., 1854): 152.

Advantage has been taken of these defects to give to vessels, wholly belonging to foreigners and navigating the ocean an apparent American ownership. This character has been so well simulated as to afford them comparative security in prosecuting the slave trade – a trade emphatically denounced in our statutes, regarded with abhorrence by our citizens, and of which the effectual suppression is nowhere more sincerely desired than in the United States.<sup>105</sup>

Americans said they wanted suppression, but not if it meant British searches of American ships.

In August, 1839, the House of Lords tried a new approach to force the Americans to accept the reciprocal right to search. A bill was introduced giving the navy nearly unchallenged power to detain slavers by indemnifying officers countersued for illegal seizures of ships, covering their losses in court if a judgment went against them. Without the fear of losing thousands of pounds in a trial, captains could be more aggressive in stopping and searching slavers. Much of the debate leading up to the vote centered on American intransigence in the effort to stop the trade. The bill passed the Lords by a vote of 39-28,<sup>106</sup> but the government never enforced the bill because of “insuperable difficulties” in its execution.<sup>107</sup> Nevertheless the tough talk from Parliament sent a message to the Royal Navy concerning slavers flying the American flag.

In January 1839 the American-flagged *Eagle* was detained by British authorities, having an entirely Spanish crew save for the one American who called himself master

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<sup>105</sup> W.E.F. Ward, *The Royal Navy and the Slavers: The Suppression of the Atlantic Slave Trade*. (New York: Pantheon Books, 1969): 138-139.

<sup>106</sup> House of Lords Debate, 15 August, 1839, *Hansards*, Vol. 50: 300-339.

<sup>107</sup> Wheaton: 115.

and owner. Two months later the *Clara* was detained. In lieu of an American court or commission in West Africa, the two ships were delivered to Freetown to be adjudicated at the Anglo-Spanish Mixed Court. When the court refused to take responsibility for the ships, Commander William Tucker dispatched Lieutenant Fitzgerald of HMS *Buzzard* to escort the ships to New York with the following note:

Trusting it will be considered, that my only motive for taking upon myself this delicate interference can be but zeal for a strict discharge of my duty, which renders it imperative on me to take the earliest opportunity of laying before the government of a friendly power, with proofs, the abuse to which its national flag is subject on this Coast, in covering and protecting the property of persons (not citizens of the United States,) concerned in the inhuman traffic of slaves, which I am employed to suppress.<sup>108</sup>

Arriving in New York Harbor the *Eagle* and *Clara* became the first American ships to arrive as prizes of another country since the Revolutionary War. Palmerston sent a note to ambassador, Mr. Fox, directing him:

You will present the United States Government a note containing the substance of the information contained in these papers; and you will express, on the part of Her Majesty's Government, an earnest hope that to proof which the cases of these vessels afford, that the flag of the United States is now resorted to by the Slave Traders as protection for their piratical practices, may induce the United States to concur with Great Britain in admitting, under certain regulations, a mutual right of search of the merchant vessels of each nation, or else that the Government of the

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<sup>108</sup> "Commander Tucker to Lieutenant Charles Fitzgerald, commanding Her Majesty's brigantine *Buzzard*," Her Majesty's sloop *Wolverine*, Princes Island, April 5, 1839. *Correspondence on Vessels under the Flag of the United States*: 51.

United States may be able to devise some other effectual mode for preventing the flag of the Union from being applied to such iniquitous purposes.<sup>109</sup>

Two weeks later HMS *Harlequin* captured the American-flagged *Wyoming* and a prize crew sailed her into New York. In the fall HMS *Dolphin* seized the *Butterfly* and the *Catharine*, the latter with 350 pairs of handcuffs, 570 spoons, cooking arrangements for five hundred persons, and both English and Spanish logbooks.<sup>110</sup> These were sent to New York also. The flotilla of British prizes now moored in New York Harbor sent the message of American complicity in the slave trade.

Many Americans denounced the British action as a violation of “freedom of the seas,”<sup>111</sup> but President Van Buren decided to act, ordering District Attorney Benjamin F. Butler to look into the matter. The courts ruled that the *Eagle* and *Clara* were Spanish ships and they were returned to the British.<sup>112</sup> The New York court ruled that the *Wyoming*, the *Butterfly*, and the *Catharine* were American vessels and they were condemned. Their captains jumped bail before they could be prosecuted.<sup>113</sup> The British

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<sup>109</sup> “Viscount Palmerston to Mr. Fox,” Foreign Office, June 25, 1839. *Correspondence on Vessels under the Flag of the United States*: 64-65.

<sup>110</sup> Canney, 24-25.

<sup>111</sup> Howard, 38 n. 25.

<sup>112</sup> The American captain of *Eagle* was to be put on trial for slaving, but he jumped bail. Lieutenant Fitzgerald escorted the *Eagle* and *Clara* to Bermuda where a British Vice Admiralty Court ruled that the ships were Spanish and properly under the jurisdiction of the Freetown court. As Fitzgerald escorted the two back across the Atlantic they were struck by a storm. *Clara* got separated and was taken to Jamaica where it was condemned as unseaworthy. Before sinking, the crew of *Eagle* was transferred to *Buzzard*, and on Christmas Day Fitzgerald reached Freetown with neither of his prizes. A full year after their seizures, both ships were condemned as Spanish slavers. Ward, 144-146; also Howard, 38.

<sup>113</sup> Howard, 38.

Foreign Office next turned over to the United States letters showing that Baltimore shipbuilders were complicit in building and fitting out vessels for the slave trade.

Information taken from the *Catharine* showed that her original owners did not sell her to their front man in Havana and therefore had their names on the ship's registry. The British also had information implicating the owner of the schooner *Elvira* who was also arrested. Two more schooners were seized as they attempted to leave Baltimore.<sup>114</sup>

Prominent merchants of Baltimore were now under careful scrutiny.

Supreme Court Justice Roger B. Taney put the ships' owners on trial for violating an 1818 act which allowed the courts to prosecute the owners of slavers as they could captains. At their trials the men pleaded ignorance of any wrongdoing, were afforded high praise by their peers, and the juries of their fellow Marylanders readily believed them. By the time the case of the *Ann* came before him, the frustrated Taney condemned the vessel, denouncing the builder as a criminal, and sharply criticizing the flaunting of the law that had disgraced the American flag and the city of Baltimore. The city's shipbuilders took careful note of Taney's denunciation and condemnation of the *Ann*; new clippers would no longer be built in Baltimore specifically for slaving.<sup>115</sup> British pressure successfully provoked the American government into action. That action would not last long.

Van Buren's acceptance of the British seizures and the prosecutions that followed led the latter to step-up their enforcement on the high seas. Now any ship flying the Stars

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<sup>114</sup> Howard, 38.

<sup>115</sup> Howard, 39.

and Stripes would be seized even if the evidence was that it was Spanish-owned. Several American-flagged ships were condemned as their papers were deemed worthless. The American flag disappeared from the African coast. Van Buren and Secretary of State John Forsyth realized that they had sanctioned British violations of American sovereignty under the Law of Nations. Strongly worded protests were sent to London demanding that British cruisers not molest American vessels even if their flags and papers appeared fraudulent. When pressed by the British, U.S. ambassador Stevenson conceded that much of the slave trade was still going on under the Stars and Stripes. Lord Aberdeen responded that the admission was, “reasonable ground of suspicion which the Law of Nations requires in such a case. The admitted fact of this abuse creates the right of inquiry.”<sup>116</sup> The British believed that international law gave them the right, and they were resolved, to continue visiting American-flagged ships.

### **Ambassador Cass Scuttles the Quintuple Treaty**

On December 20, 1841, Great Britain, France, Austria, Russia and Prussia finalized the Quintuple Treaty for the Suppression of the Slave Trade. The five nations agreed to equate the slave trade with the crime of “piracy,” and as pirates the slavers’ ships would be denationalized and the crew would lose the protection of their flag. Furthermore, like the Spanish, Portuguese and Dutch treaties, each nation agreed to the reciprocal right to search, giving the cruisers of each nation the right to detain and search vessels “on reasonable grounds of being suspected of being engaged in the traffic in

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<sup>116</sup> Van Alstyne, 33

slaves.”<sup>117</sup> With the five major European powers on board, along with three maritime powers and the new republics of Latin America, the British were on their way to changing the Law of Nations to allow the right to search.

One American smelled a rat. On February 1, 1842, soon after the treaty became public, a pamphlet emerged in Paris entitled “An Examination of the Question now in Discussion, between the American and British Governments, Concerning the Right to Search, By an American.” The “American” was Minister to France, Lewis Cass. In his “Examination” Cass made an appeal to the Law of Nations. Britain’s motivation for reciprocal right to search agreements was so that the action would become accepted practice under international maritime law. As the only objector to the practice the United States would be backed into the corner as a “rogue” state that did not play by the same rules as everyone else.

Cass decried the British attempt to impose the right to search on the ships of every nation on the high seas as if it were the “Constable of the Oceans.” If the treaty were allowed, “To their flag it will give virtual supremacy of the seas... because it will be found in practice, that ninety-nine times out of one hundred, it would be their cruisers which will search the vessels of other nations.”<sup>118</sup> Cass noted that the right of search that the British sought was “arbitrary, vexatious, and not only liable, but necessarily liable, to

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<sup>117</sup> Grewe, 562.

<sup>118</sup> Lewis Cass, *An Examination of the Question now in discussion between the United States and British governments concerning the Right to Search, By an American*. (Baltimore: N. Hickman, 1842): 8-9.

serious abuse,”<sup>119</sup> for upon a visit “hatches will be broken open, the cargo overhauled, property dilapidated, and many articles will be taken without permission and without compensation.”<sup>120</sup> For Cass the right to search ships along the African coast promoted British efforts to protect their interests and trade as the Royal Navy was likely to send vessels to trial under very slight pretenses. The British government had already stated that they would consider foreign-flagged ships operating in certain latitudes to be *ipso facto* “suspicious.”

Recognizing American feelings the British offered to forego the “right to search” a ship in order to have the “right to visit,” to ascertain if a ship had the right to fly the American flag. This was little more than a semantic game for Cass, who remained intransigent, arguing that “One may call it a search and the other a visit, but both would be found *vexatious visitations* [italics his]”<sup>121</sup> A “search” and a “visit” were one and the same.

Against British arguments that the Americans were only trying to promote the slave trade, Cass replied, “Its connexion to the African slave trade is but incidental.”<sup>122</sup> With the memory of impressment in the War of 1812 and the events of 1825 still fresh in the minds of many Americans seventeen years later, he added emphatically, “No, it is not African slavery the United States wish to encourage. It is...the slavery of American

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<sup>119</sup> Cass, 17.

<sup>120</sup> Cass, 19.

<sup>121</sup> Cass, 40-41.

<sup>122</sup> Cass, 7.

sailors, they seek to prevent.”<sup>123</sup> In referencing the *Le Louis* decision Cass reminded the British that their own courts had ruled against the right of their own ships to search foreign ships in times of peace.<sup>124</sup> “Until now the right of search has been a belligerent right, belonging only to a state at war,” he asserted. “Here is the first formal claim to exercise it in time of peace.”<sup>125</sup> He restated the American concern that British searches of American ships under the pretext of slave trade suppression might lead to impressment in time of peace and derided the reciprocal right to search is a “mockery,” as the American officer would board a British ship to search, while a British officer would board an American to search and impress.<sup>126</sup> He concluded that the slavery of impressment is as bad and repugnant as African slavery, and that the United States was prepared to fight against it.

[T]he first man impressed from the ship of his country, and detained, with an avowal of the right, by order of the British government, will be the signal of a war. A war too, which will be long, bitter and accompanied, it may be, with many vicissitudes. For no citizen of the United States can shut his eyes to the power of Great Britain, nor to the gallantry of her fleets and armies. But twice the Republic has come out honorably for a similar contest, and with a just cause, she would again hope for success. At any rate, she would try.<sup>127</sup>

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<sup>123</sup> Cass, 13.

<sup>124</sup> Cass, 14.

<sup>125</sup> Cass, 36-37.

<sup>126</sup> Cass, 74.

<sup>127</sup> Cass, 39.

Cass returned to the successes of the Law of Nations in recent history stating, “Piracy has been put down, without any violation of the freedom of the seas, or of the independence of nations. The slave trade may be put down also, with the same sacred regard to those principles.”<sup>128</sup> It was for that sacred regard that the United States would remain a persistent objector.

The intended audience for the “Examination on the Question” was not Britain but France. The persistent objections of the United States were intended to slow down the trend toward the codification of the right to search into the Law of Nations; Cass hoped that additional objections from France would reverse the inertia the British had created. At its worst Britain was trying to engineer a war of Europe against the United States, for, as Cass suggested, “In order to avoid war with Europe the United States must submit to the demands of Britain.”<sup>129</sup> Cass chided Britain for “[T]hat excess of philanthropy which would tilt a spear at every nation, and light up the flames of general war, in order to accomplish its own charitable views, in its own exclusive way, almost at the end of the world.”<sup>130</sup> For Cass, philanthropy by force was not philanthropy at all.

For France not to sign the Quintuple Treaty the Americans would have a strong ally against the British effort.

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<sup>128</sup> Cass, 57.

<sup>129</sup> Cass, 10-11.

<sup>130</sup> Letter, Cass to Webster, February 15, 1842, in *Message from the President*: 191.

The reply to Cass was quick. In a “Response to an ‘American,’” Sir William Gore Ouseley praised Cass for “great, though mischievous, ingenuity in hair-splitting.”<sup>131</sup> He was incredulous that anyone would question the humanitarianism of the British:

It appears scarcely credible that in the same pages containing these ingenious professions and disclaimers, England is accused directly, or by implication, of the basest motives, of sordid self-interest, masking under pretended philanthropy, that it is asserted that there would be a ‘disgrace’ in entering into mutual agreements with her.<sup>132</sup>

Ouseley presupposes that American opposition to the Quintuple Treaty was prompted by the interests of the Southern states: “...the covert reason be the opposition of the slave holding interests, which, as long as the present system of the United States Government exists, will be exerted to prevent aught which may ensure the extinction of the slave-trade and shew real opposition to slavery.”<sup>133</sup> In response to the notion that the British were interested in expanding their commerce in Africa by slowing others, Ouseley states that, in fact, “The commerce of all nations, parties to the slave-trade suppression treaties has prodigiously increased in the years that have passed, during which the right to search has mutually existed.”<sup>134</sup> Of Cass’s argument that the reciprocal right to search would lead to the impressment of Americans, Ouseley stated that British law no longer allowed impressment in time of peace. He further mocked the American-established

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<sup>131</sup> Sir William Gore Ouseley, *Reply to an “American’s Examination” of the “Right to Search.”* London, J Rodwell, 1842): 111.

<sup>132</sup> Ouseley, 2.

<sup>133</sup> Ouseley, 9.

<sup>134</sup> Ouseley, 10.

circumstances by which British officers may stop an American-flagged ship: “Thus you may visit a vessel bearing the United States flag, *if she be not an American*; how are you supposed to ascertain that fact without boarding?”<sup>135</sup> In the conclusion Ouseley makes a plea to the “American,” recognizing his willingness to use arms against forcible detention, he urges, “For the respect of the present and future ages – by your hopes of freedom and love of God, do not go to war on behalf of the slave trade!”<sup>136</sup>

On February 13, Francois Guizot, French minister of foreign affairs, received from the American legation in Paris an official protest against the French entry into the Quintuple Treaty, Minister Cass stating, “The United States do not fear that any such united attempts will be made upon their independence. What, however they may reasonably fear is that in the execution of the treaty measures will be taken which they must resist.” As a signatory to the treaty “it is the duty of France to pursue the same course.... It is obvious the United States will do to her as they do to Britain, if she persists in this attack upon their independence.”<sup>137</sup> The end result of the Quintuple Treaty was the illegal searches of American ships. The only American response was war.

The French had other interests in rejecting the Quintuple Treaty. The successive French governments of the 1830s all promoted free enterprise and trade with West Africa. Much of that trade was in the form of “auxiliaries,” delivering goods to be traded for slaves, which were then to be delivered to Brazil via a second ship. British naval

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<sup>135</sup> Ouseley, 15.

<sup>136</sup> Ouseley, 111.

<sup>137</sup> Letter, Lewis Cass to M. Francois Guizot, February 13, 1842, in *Gen. Cass and the Quintuple Treaty* (Washington D.C.: National and Jackson Democrat Association Committee, 1848).

captain Richard Madden reported that the French were the second largest trader of goods to slave dealers after the United States<sup>138</sup>; most of the trade was through the commercial house of *Regis frères* based in Marseilles.<sup>139</sup> There was still some money to be made in the slave trade.

One week after Cass delivered his protest to Guizot, the commander of the French squadron off of West Africa, Captain Bouet, reported that French merchant vessels landing cloth, spirits, and iron were being harassed and interfered with by British cruisers. The British justified their actions by saying that “France, which was against slavers, could not wish to supply them.” Bouet also complained that the British were allowing their own merchant vessels with the same cargoes to land without harassing them. The Royal Navy did not distinguish between legitimate and illegitimate French traders and only seemed to be trying to impede French trade with Africa.<sup>140</sup> French anger with the British was peaking at the same time that the Quintuple Treaty was up for ratification and when the treaty reached the National Assembly opposition was so profound that its members voted against it nearly unanimously. The French next went to work dismantling the right to search treaties of 1831 and 1833.<sup>141</sup> Cass had successfully playing upon French jealousy of Britain and the belief that the British were

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<sup>138</sup> *Parliamentary Papers*, 1842, vols. XI-XII (vol. XI, 632-633), as cited by Jennings, 516.

<sup>139</sup> Jennings, 517.

<sup>140</sup> Jennings, 517.

<sup>141</sup> Letter, Cass to Webster, May 26, 1842, in *Message from the President*: 199.

condescending in their approach to the Treaty. The drive to insert the right to search into the maritime code of the law of nations had hit a major stumbling block.

France's failure to ratify the Quintuple Treaty left the British dumbfounded. Palmerston noted that the proposal did not originate with the British government, but with the British and the French together. The two governments approached Russia, Prussia and Austria together. It was unprecedented for a government to back out of a treaty that it had itself sanctioned and approved. Palmerston observed, "no reason, consistent with the practice of governments, could be assigned by the government of France, for refusing its ratification to what was concluded by its own direction and sanction."<sup>142</sup> For the most part the blame for the failure of the French to ratify the Quintuple Treaty falls on the shoulders, not of anyone French, but on those of American ambassador Lewis Cass.

What interest did Cass have in scuttling the Quintuple Treaty? Cass was a Northern Democrat, but he was not a "doughface," a Northerner with Southern sympathies. He was not in favor of slavery. He twice ran for President in the 1840s, but his moderate stance on slavery cost him both elections. He lost the Democratic nomination in 1844 to James K. Polk, a slaveholder from Tennessee. He finally won the Democratic nomination when Polk did not run for a second term in 1848. During the campaign for the general election he endorsed "popular sovereignty" in the new territories gained in the war with Mexico. Southern Democrats reacted by throwing their

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<sup>142</sup> Speech of Viscount Palmerston, House of Commons Debate, 21 February 1842, *Hansard*, vol. 60: 722

support to the Whig nominee, Zachery Taylor, a slaveholder from Louisiana. Taylor won the election and Cass returned to Michigan where he won a seat representing that state in the United States Senate.

Understanding Cass's moderate position on slavery shows that he was not interested in scuttling the Quintuple Treaty on behalf of the slave power in the South as Sir William Gore Ouseley suggested. He was using the Law of Nations to justify a shot at the British, whom he detested. All better if nullifying the right to search made it difficult for the British to enforce their slave trade suppression policies. The connection to the slave trade was coincidental. Cass simply wanted to thumb his nose at his lifetime foe.

Cass was referred to as "General" for his efforts during the War of 1812, fighting the British and their Native allies in furious action in his home state of Michigan. Cass biographer Andrew C. McLaughlin concedes that "The prime motives for the actions of Cass in this affair was his inveterate dislike and distrust of England....It will be remembered that not until 1839 did the English give up their efforts in the Northwest,...and that his whole life preceding his admission to Jackson's cabinet had brought him into antagonism with British aggression."<sup>143</sup> In a note to Daniel Webster, Cass admitted, "All I have is on the frontier liable to be ruined by war, but let it all go, rather than yield an inch to a haughty nation."<sup>144</sup> The evidence shows that Cass was a moderate on the issue of slavery. His opposition to the "right to search" was not because he wanted to protect the American slave trade rather it was based upon his respect of

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<sup>143</sup> McLaughlin, 185-186.

<sup>144</sup> Cass to Webster, Jan. 24, 1842, a quoted in Willard Carl Klunder, *Lewis Cass and the Politics of Moderation* (Kent, OH.: Kent State University Press, 1996), 111.

American sovereignty under the Law of Nations, and his long-standing hatred of Great Britain.

## CHAPTER EIGHT: WEBSTER-ASHBURTON - THE CREATION OF AN AMERICAN SUPPRESSION SQUADRON

The British would not relent in their efforts to gain the right to search from the United States. Lord Palmerston distinctly stated that “the exemption of the vessels of the United States from search is a doctrine to which the British government never can and never will subscribe.”<sup>145</sup> The scuttling of the Quintuple Treaty set them back significantly, though. Without the French the drive to codify the right to search into the maritime code of the Law of Nations hit a major snag. Without the French to put diplomatic pressure on the United States the British had to go back to face-to-face negotiations with the Americans. Fortunately for the British Cass was an ambassador, not one with authority in the diplomatic arena. The British had a friendlier ear in Secretary of State Daniel Webster. With Webster, the British successfully negotiated a more robust American effort in suppressing the slave trade.

### **The Webster-Ashburton Treaty**

In scuttling the Quintuple Treaty Cass had jumped the gun; in the interest of time he made his protest to the French without consulting Washington. When word reached President John Tyler, he sanctioned the protest and accepted the doctrines included. Thereafter the American position on British visits to American merchants became:

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<sup>145</sup> Letter, Cass to Webster, February 15, 1842, in *Message from the President*: 189.

1<sup>st</sup>. That in the absence of treaty stipulations, the United States will maintain the immunity of merchant vessels on the seas, to the fullest extent to which the Law of Nations authorizes.

2<sup>nd</sup>. That if the government of the United States, animated by a sincere desire to put an end to the African slave trade, shall be induced to enter into treaty stipulations, for that purpose with any foreign power, those stipulations will be such as shall be limited to their true and single object, such as shall not be embarrassing to innocent commerce, and such especially, as shall neither imply any inequality,...Nor can tend in any way to establish such inequality, in their practical operations.<sup>146</sup>

American negotiators kept these two points in mind when they next sat down with the British. The immunity of American ships was absolute. But what would the United States do about the prostitution of the flag?

Incidents unrelated to the slave trade brought the United States and Great Britain back to the negotiating table in 1842. The bulk of the Treaty of Washington – more commonly referred to as the Webster-Ashburton Treaty – concerned the disputed boundary between Maine and Canada, but the British brought the issue of the right to search to the table. Webster rejected the right to search again, but he did commit the United States to making a greater commitment to suppress the slave trade. In article eight of the treaty both nations agreed to commit to the African coast squadrons -

to carry in all not less than eighty guns, to enforce, separately and respectively, the laws rights and obligations of each of the two countries, for the suppression of the Slave Trade, the said squadrons to be independent of each other, but the two

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<sup>146</sup> Letter, Daniel Webster to Lewis Cass, April 5, 1842, in *Gen. Cass and the Quintuple Treaty*.

Governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces, as shall enable them most effectually to act in concert and cooperation, upon mutual consultation, as exigencies may arise, for the attainment of the true object of this article.<sup>147</sup>

With no specific statement concerning the searching of vessels there was still a question of how far either side could go in enforcing the dictates of the treaty.

The issue of impressment still continued to swirl through political circles. In his address to the Senate President Tyler admitted that, although the British reject the policy of impressment during time of peace, the topic was still important to many in the Senate and that it has been thought the part of wisdom now to take it into serious and earnest consideration.<sup>148</sup> Webster notified Lord Ashburton that the United States' interpretation of the treaty was that, "In every regularly documented American merchant vessel the crew who navigate it will find their protection in the flag which is over them."<sup>149</sup> Webster vigorously reaffirmed to Congress that impressment was illegal, and that "the deck of every American vessel is inaccessible, for any such purpose."<sup>150</sup> In no way was impressment allowed under the terms of the Webster-Ashburton Treaty. But what of the right to search? Webster stated that "regularly documented" merchant ships had

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<sup>147</sup> William M. Malloy (ed.), "The Treaty of Washington (1842)." *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other World Powers 1776-1909* (Washington D.C.: Government Printing Office, 1910): 655.

<sup>148</sup> President John Tyler Address to the United States Senate, 11 August 1846, *Senate Executive Journal*, 124.

<sup>149</sup> Webster, 85.

<sup>150</sup> Webster, 70.

immunity from British searches, but that left open the possibility of British “visits” to American merchants to check paperwork and determine if the ship had the right to carry the American flag. Many Americans still saw British “visits” as a search by a different name.

The Senate ratified the treaty but it faced significant opposition. Upon hearing of the ratification of the Webster-Ashburton Treaty, Lewis Cass resigned, arguing that by signing the treaty we “place our municipal laws, in some measure, beyond the reach of Congress.”<sup>151</sup> Cass’s friends in Congress argued that the Treaty of Washington forced the United States to give up its immunity from British searches. Webster’s response was that,

We had no such right to give up.... The arrangement made by this treaty was designed to carry into effect those stipulations in the Treaty of Ghent which we thought binding on us, as well as to effect an object important to this country, to the interests of humanity, and to the general cause of civilization throughout the world, without raising the difficulty of the right to search. The object of it was to accomplish all of that, in a way that should avoid the possibility of subjecting our vessels, under any pretense, to the right to search.<sup>152</sup>

The Webster-Ashburton Treaty put the United States Navy in the position to protect American merchant vessels against those very searches. In a speech to the Senate, President Tyler said of the right to search:

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<sup>151</sup> Cass to Webster, 206.

<sup>152</sup> Webster, 67-68.

No such concession should be made and that the United States had both the will and the ability to enforce their own laws and protect their flag from being used for purposes wholly forbidden by those laws, and obnoxious to the moral censure of the world....The United States have been standing up for the freedom of the seas, they have not thought proper to make that a pretext for avoiding the fulfillment of their treaty stipulations, or a ground for giving countenance to a trade reprobated by our laws.<sup>153</sup>

Under the Webster-Ashburton Treaty, Tyler and Webster believed that the United States had the best of both worlds. They upheld the dictates of humanity by doing their part in suppressing the slave trade, yet still had justice by not allowing British searches.

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<sup>153</sup> *Congressional Globe*, 27 Congress III Session, 30-31

## CHAPTER NINE: THE U.S. NAVY'S "AFRICA SQUADRON"

From its first cruise of in 1843 it was clear that slave trade suppression was not the sole purpose of the United States Navy's Africa Squadron. Nor was it the most important purpose. The squadron was first charged by the Secretary of Navy with protecting legitimate American commerce from bad actors along the African coast and from overzealous British naval officers. Flag Officer Commodore Matthew C. Perry had the task of establishing an American naval presence off of West Africa, and also a great interest in seeing to the security of Liberia the nation in whose founding he played a major role. The suppression of the slave trade was almost an afterthought for the first Africa Squadron.

### **The U.S. Navy "Africa Squadron" and Commodore Perry**

To command the first Africa Squadron the navy selected Matthew Calbraith Perry, a logical choice as he had served on two previous cruises off of West Africa. His first cruise in 1819 was as first lieutenant of *Cyane*, escorting the first volunteers of the American Colonization Society's effort to repatriate freed slaves to Africa. His second cruise was in 1821, as captain of the armed-schooner *Shark*, with orders to convey a new American commissioner to the "Negro colony" of Liberia. Between the two cruises

Perry gained experience in diplomacy with the British at Sierra Leone, the Portuguese at the Cape Verde Islands, and the natives on the continent.<sup>154</sup>

During his two previous cruises Perry took part in interdicting more than a dozen slavers. One of the ships he had stopped was the French-flagged *Caroline*, carrying 133 slaves bound for the French West Indies. The physical state of the cargo inside is best expressed by Midshipman Lynch, one of Perry's crew:

The overpowering smell and the sight presented by her slave-deck can never be obliterated from the memory. In a space of about 15 by 40 feet, and four feet high, between-decks, 163 [sic] negroes, men, women, and children were promiscuously confined....Their bodies were so emaciated, and their black skins were so shrunk upon their facial bones, that in their torpor, they resembled so many Egyptian mummies half-awakened in to life....

I never saw the sympathies of our men more deeply moved than were those of our crew. Immediately after taking possession, while the papers were being examined, we hoisted up a cask of water, and some bread and beef, and gave each poor slave a long drink and a hearty meal.

Perry's possession of the *Caroline* was short-lived, though. Noting that the ship's papers were in order and that the French were not bound by any international treaty to suppress the slave trade, Perry was compelled to release her over the protests of his officers. Perry was well-acquainted with the horrors of the trade and now returned to Africa with orders to put it down where possible.

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<sup>154</sup> Details of Perry's first two cruises to west Africa may be found in John H. Schroeder, *Matthew Calbraith Perry: Antebellum Sailor and Diplomat* (Annapolis: Naval Institute Press, 2001): 24-33, and in Samuel Eliot Morison, *Old Bruin: Commodore Matthew Calbraith Perry* (Boston: Little, Brown and Company, 1967): 62-69.

There were likely other motives with the choice of Perry as first flag officer of the Africa Squadron involving diplomacy with the British. His father, Captain Christopher Perry, had been captured and imprisoned by the British during the American Revolution. His brother, Oliver Hazard Perry, led an American squadron to victory against the British at Lake Erie in the War of 1812. Matthew himself was a midshipman during the war. The Navy further thumbed its nose at the British by assigning Perry the *Macedonian* as his flagship, formerly a Royal Navy frigate, captured during the War of 1812, and “razeed” by the Americans. If the Navy sought a leader to follow the “letter” of the Webster-Ashburton Treaty, but perhaps not so much the “spirit,” Perry was the right choice.

Before leaving New York in June 1843 aboard *Saratoga* he received the following instructions from Secretary of the Navy, Abel P. Upshur:

The right of citizens engaged in lawful commerce are under the protection of our flag; and it is the chief purpose as well as the chief duty of our naval power to see that these rights are not improperly abridged or invaded.

...It is to be borne in mind, that while the United States sincerely desires the suppression of the slave trade, and design to exert their power, in good faith, for the accomplishment of that object, they do not regard the success of their efforts as their paramount interest, nor as their paramount duty. They are not prepared to sacrifice to it any of their rights as an independent nation; nor will the object in view justify the exposure of their own people to injurious and vexatious interruptions in the prosecution of their lawful pursuits.<sup>155</sup>

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<sup>155</sup> Canney, 57.

This directive, with the primary duty being the protection of American commerce and slave trade suppression being secondary, became the standard order to the squadron.<sup>156</sup>

Even though the goal of suppressing the slave trade was second on the priority list issued to Perry, Upshur added the following to his instructions:

The claim of the United States that their trading vessels should not be visited for any purpose...presupposes that the vessel is *really* an American. The United States certainly do not claim that the mere hoisting of a flag shall give immunity to those that have no right to wear it.<sup>157</sup>

The hard rhetoric of Lewis Cass notwithstanding, Upshur was well-aware that the American flag was being prostituted by slave traders.

Perry quickly made the American presence in the eastern Atlantic known. He arrived in Porto Praya in the Cape Verde Islands on June 20, 1843 and got permission from the Portuguese to establish a supply depot. He then penned a note to John Foote, commander of the British Africa Squadron, suggesting ways to cooperate in accordance with Webster-Ashburton. He agreed that the two squadrons should exchange their “private signals” and communicate information to each other concerning the activities of slavers.<sup>158</sup> The following month Perry inquired of Liberian President Joseph J. Roberts about the status of the slave trade in the area and was assured that no slavers flying the

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<sup>156</sup> Seven years later Flag Officer Francis H. Gregory communicated to Andrew Hull Foote of the brig *Perry*: “The object of the cruise [is] to protect the lawful commerce of the United States, and, under the laws of the United States, to prevent the flag and citizens of the United States from being engaged in the slave-trade; and to carry out, in good faith, the treaty stipulations between the United States and England.” Foote, 256.

<sup>157</sup> Upshur to Perry, March 30, 1845, as cited in Van Alstyne, 38.

<sup>158</sup> Canney, 59.

Stars and Stripes had been seen during the past two years.<sup>159</sup> In the fall Perry engaged in a series of palavers, “meetings of leaders,” with the local African nations around Liberia, during which he displayed a fist of steel inside of a velvet glove. He usually started his palavers with a show of force, but conducted them giving even-handed treatment of the native nations. In these palavers Perry received assurances that American trade would not be harassed and that Liberian sovereignty would be recognized.

Concerning the slave trade Perry reported back to Secretary of Navy Upshur from Monrovia in July 1843, that “So far as I can learn through diligent inquiry, the American flag has not been used, within two years, on this part of the coast, by any vessel engaged in the slave trade.”<sup>160</sup> He repeated his assertion in a report to Secretary of Navy David Henshaw in November, noting, “With all my observation and inquiry, I have not seen or heard of a single instance of an American being engaged in the slave trade.”<sup>161</sup> This may have been true in the area around Liberia and the adjoining British colony of Sierra Leone, but the American flag was still providing cover for slavers operating in the Bight of Biafra and the Gulf of Guinea.

When Perry received word from William Jones, the new commander of the British squadron, of a possible American slaver operating in the Gallinas River, he dispatched the sloop *Decatur* to investigate. In the calm evening winds the sloop was

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<sup>159</sup> Canney, 59.

<sup>160</sup> “Report from Matthew C. Perry to Secretary of Navy Abel P. Upshur,” 21 July 1843, as quoted in Schroeder, 114.

<sup>161</sup> “Report from Matthew C. Perry to Secretary of Navy David Henshaw,” 22 November 1843, as quoted in Schroeder, 114.

roped to the steam frigate *HBM Penelope* and towed up river. After visiting the brig *Lima* the captain of the *Decatur* determined that she was a legitimate trader. In appreciation of the American help Jones sent a note to Perry expressing his wishes for further cooperation between the squadrons.<sup>162</sup> Anglo-American cooperation, as expected by Webster-Ashburton, was at a high point.

Upon hearing news that a supply ship was wrecked, leaving the squadron strained for supplies, Perry ordered the fleet to Madeira in the Canary Islands, partly in search of provisions and partly for recreation. There were no ports on the African coast for the men to take “liberty” and Madeira proved the closest place to Africa for crews to get rest and recreation. The fleet returned to the Cape Verdes in July the following year.<sup>163</sup> Perry had now been in the eastern Atlantic for a full year and had yet to engage in any suppression activities.

The only slaver taken under Perry’s command was in spring 1844 when Lieutenant Thomas Craven of the *Porpoise* fell in with the Baltimore-built *Uncas* off of Gallinas. In the previous month officers from HMS *Alert* boarded *Uncas*: no slaves were on board but she had gratings for hatches, cargo “suited to the slave marts,” and there were numerous irregularities in her papers. The British refused to seize her in order to avoid any “unpleasant correspondence” between Britain and the U.S. When Craven learned of the murder of the vessel’s master he used that as a pretext to board the ship. An inspection of its papers showed that it had cleared from New Orleans with a crew of

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<sup>162</sup> Abbot Report, April 18, 1844, as cited in Canney, 63.

<sup>163</sup> Morison, 177.

eight, then made port in Havana where the crew was replaced by a crew of Danes and Italians, all with false names. Craven seized the ship upon this evidence and sent it to New Orleans for adjudication, but because it had no slaves on board, the ship was acquitted by the New Orleans court.<sup>164</sup> Perry later penned a letter to Secretary of Navy Henshaw complaining of a “want of vigilance at Havanna [sic] and perhaps at the Ports of the United States...in suffering a vessel to clear as the *Uncas* did from New Orleans.”<sup>165</sup>

Perry’s command ended in February, 1845.<sup>166</sup> Through Perry’s diplomacy, in eighteen months of cruising, he had established the United States Navy as a presence in West Africa. In his numerous palavers he had secured the sovereignty of Liberia and forced the local nations to respect the American flag and not injure American commerce. Of his dealings with the British he was not averse to cooperation, agreeing to “mutual acts of courtesy and friendship.” Yet Perry insisted that the British not infringe on the rights of any American in the region, as he reminded his commanders:

Under no circumstances are you to permit, without resistance to the extent of your means, any foreign vessel of war of whatever force or nation, in the exercise of any assumed right of search or visitation, to board in your presence (you having first forbidden it) any vessel having the American flag displayed.<sup>167</sup>

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<sup>164</sup> Canney, 64.

<sup>165</sup> Letter from Perry to Secretary of the Navy David Henshaw, as cited in Canney, 65.

<sup>166</sup> Morison, 177-178.

<sup>167</sup> “Perry to Commanding Officers of Vessels...,” Aug. 1, 1843, as quoted in Schroeder, 117.

When Admiral Foote, commander of the British Africa Squadron, suggested a joint cruising plan Perry thanked him but pointed out that the American Squadron was limited by its small size. When Foote further suggested that the two sides assist each other in bringing to and visiting vessels of whatever flag suspected of being a slaver, Perry refused, concerned that the British would expect him to relax his strict policy that only U.S. Navy ships had the right to stop and board vessels flying the American flag. Upon receiving word that a British officer had boarded and acted insolently toward the master of the American-flagged barque *Roderick Dhu*, Perry requested an immediate explanation from Foote. There was a brisk exchange between the two, but rather than let this explode into the open, Perry wrote to Foote that both the British and American governments sought “to suppress a traffic obnoxious to religion and humanity” and expressed the hope that both navies would emulate each other in carrying out their instructions and not interfere with each others’ duties.<sup>168</sup> In his time in the station Perry earned the respect of the British in regards to the U.S. Navy. In November 1844 Perry reported that, with one exception, there had not been a “solitary instance of an improper interference with the American flag. On the contrary, there appears to be a mutual disposition...to cultivate a friendly understanding.”<sup>169</sup> In Perry’s time in the station he had developed an amicable relationship with the British.

Despite their commander’s feelings in opposition the slave trade, in eighteen months along the slaving areas of Africa, Perry’s squadron only netted one slaver. It is

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<sup>168</sup> Schroeder, 118.

<sup>169</sup> Letter from Perry to J. Mason, November 25, 1844, as quoted in Schroeder, 119.

clear that slave trade suppression was low on the list of priorities; Perry's record in this endeavor left much to be desired. For the respect that the British showed to Perry and the United States Navy, questions still must have lingered concerning American commitment to slave trade suppression.

### **Limitations of the Squadron**

Throughout the life of the squadron it was hampered by limitations. The Webster-Ashburton Treaty demanded that the United States commit eighty guns to suppression, but did not determine how they would be mounted. For most of its life the navy mounted those guns on larger ships more conducive to warfare in the open seas. Two ships of the squadron, the *United States* and the *Constitution* were 44-gun heavy frigates that saw action in the War of 1812. Perry and most of the flag officers after him begged the navy to give the squadron smaller ships useful in West Africa's estuaries and broad rivers, and more of them. Flag officers also requested steam ships for use in Africa's often calm winds. The navy did finally send steamers in the late 1850s.

Perry, out of necessity, established the Africa Squadron's supply depot at Porto Praya in the Cape Verde Islands. While Monrovia seemed a more logical choice, it was in the region of Africa known as the "White Man's Grave" because of the diseases that afflicted Europeans in the area. Nor was there a real port on that part of the coast. Porto Praya, though, was thousands of miles from the slaving areas in the Bight of Biafra and the Gulf of Guinea, minimizing the time that the fleet could spend on suppression duty. Because of the lack of good ports in West Africa for personnel to take liberty captains took their ships to Madeira in the Canary Islands, even farther from the slaving regions for rest and relaxation. Again, it was not until the late 1850s that the navy moved the

supply depot to Loanda, in the middle of the slaving areas, that the squadron became more effective.

As for flag officers of the Africa Squadron the United States Navy seemed to simply be throwing darts at a list of names. Two of the commanders died immediately after their service. Three were “unemployed” by the navy for extended periods of time – a mark of an undistinguished record. Some commanders were officers of note. Perry was the most important American naval commander between the War of 1812 and the Second World War. Commodore Charles Skinner was the only commander of the group to see action during the Civil War.<sup>170</sup> Isaac Mayo commanded a squadron that bombarded Veracruz during the Mexican War, leading a party in support of General Winfield Scott’s landing. Francis Gregory had nearly forty years of service before assignment to the Africa Squadron, eighteen of those years in active sea service; he became Superintendent of the Ironclad Bureau during the Civil War and was promoted him to Rear Admiral before retirement.<sup>171</sup> Andrew Hull Foote rose to the rank of Rear Admiral during the Civil War.<sup>172</sup> One cannot make the charge that the flag officers of the squadron were ill-prepared for their work. The captains could not have been prepared to take on the friendly fire delivered from home.

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<sup>170</sup> Canney, 71.

<sup>171</sup> Canney, 121.

<sup>172</sup> Canney, 125.

### Captains Versus Courts

The flag officers did not get a lot of help from their own courts. The legal issues that plagued the British suppression squadron in the 1820s now plagued the Africa Squadron in the 1840s. American courts were not always on the side of the navy, particularly when the captain making the charge was out to sea thousands of miles away. The proviso in the 1819 act, that the alleged slavers be tried in courts from the port in which they left, got the slavers trials in front of friendly juries. Convictions were further slowed by the 1820 law equating slaving with piracy and punishing piracy with death; juries were not keen to put their countrymen to death. Only one master was convicted under the 1820 law and hanged.

Different judges looked at evidence differently. Some judges looked at the cargo taken from the ship independently and justified each piece as potential goods to be sold on the African coast for possibly something other than slaves and, therefore, threw out the case. Other judges pieced the cargo together into a pattern of goods usually sold for slaves or used in the transport of slaves and brought the alleged to trial. It did not take captains long to figure out exactly what ships were likely to be let go and which had the potential to be condemned. Seeing the port city on the paperwork allowed a captain to judge the likelihood of condemnation. “Capture all of the Key West vessels you want, but don’t touch one from Charleston.” “Judge Sprague at Boston is all right, but watch out for Judge Betts at New York.” “Try to get your prizes into Norfolk because Judge Hallyburton gives good decisions.”<sup>173</sup> There was no point in sending a ship to a court

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<sup>173</sup> Howard: 98.

that was going to rule in favor of the ship's owner and potentially have a countersuit filed against them.

Sending a ship to the wrong judge may have hit a naval captain in the pocketbook as well. Captains John Bispham of the *Boxer* and Lewis Simonds of the *Marion* made what they believed were good seizures of alleged slavers in 1846. The judges in the United States ruled that the seizures were made wrongfully and released the ships and their owners. The judges, though, did not issue "Certificates of Probable Cause" and the ships owners filed suit against the captains for damages. When the Bispham asked the navy to indemnify him the navy refused.<sup>174</sup> The squadron made no seizures until 1850 a year after Federal Judge John J. Kane ordered that captains not be made liable for seizures of ships reasonably believed to be slavers.<sup>175</sup> Yet even after the Kane decision captains worried about the dispositions of their cases. As late as 1860 William E. LeRoy of the *Mystic* seized a suspicious vessel and sent a note to the court pleading:

Should my expectations not be realized, I most earnestly hope that the Court will find the cause of suspicion sufficiently strong to relieve me from all claims for damage &c., that terror of all our naval officers who strive for conscious discharge of their duties on this station.<sup>176</sup>

The vessel was in fact released, but the seizure was "reasonable" enough in the eyes of the judge to issue a certificate of probable cause, saving LeRoy from a potential damage suit.

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<sup>174</sup> Howard, 102-103.

<sup>175</sup> *The Malaga*, Fed. Cas. #8,985, vol.16, pp. 535-540, as cited in Howard, 107.

<sup>176</sup> *New York Daily Tribune*, Aug. 16, 1860, as cited in Howard, 108.

**Andrew Hull Foote: “Praying Like a Saint; Fighting Like the Devil”**

Judge Kane’s decision opened the door for a reinvigorated Africa Squadron. The most vigorous of its captains was Lieutenant Andrew Hull Foote. Foote was a Connecticut “Yankee” known for his religious fervor, a lay preacher who kept his ship “dry” by convincing his crew to take monetary compensation rather than the standard ration of grog. His religion fueled his zealous approach in his work against the traffic in slaves. Gregory said of Foote that he “prays like a Saint and fights like the devil.”<sup>177</sup> He had already made three seizures while cruising off of Brazil between December 1848 and February 1849.<sup>178</sup>

Foote’s zeal was tempered by an appreciation for the situation in which he was thrust. In his recollection of the Africa Squadron, *Africa and the American Flag*, he noted the difficulty of the position in which American captains were placed:

Every person interested in upholding the rights of humanity, or concerned in the progress of Africa, will sympathize with the capture and deliverance of a wretched cargo of African slaves from the grasp of a slaver, irrespective of his nationality. But it is contrary to national honor and national interests that the right of capture should be entrusted to the hands of any foreign authority. In a commercial point of view, if this were granted, legal traders would be molested, and American commerce suffer materially from a power which keeps afloat a force of armed vessels, more than four times the men-of-war commissioned by the United States. The deck of an American vessel, under its flag, is the territory

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<sup>177</sup> Canney, 125

<sup>178</sup> Canney, 234

of the United States, and no other authority but the United States must ever be allowed to exercise jurisdiction over it.<sup>179</sup>

On June 7, 1850, near Ambriz, Foote overhauled a large ship, with two tiers of port holes, flying American colors. It was the *Martha*. When the boarding party went on board the captain, noticing the U.S. Navy uniforms, lowered the Stars and Stripes and hoisted Brazilian colors. When the officers from the *Perry* arrived the captain stated that they could not seize a ship flying Brazilian colors. When asked for papers and other proof of nationality, the captain replied that he had none, to which the officer from the *Perry* stated that a ship without papers could be seized as a pirate and the master hanged. At the same time the captain's desk was thrown overboard. A second boat from the *Perry* fished the desk out of the water; inside were papers indicating that the captain was an American and that the ship was three-fifths owned by an American living in Rio de Janeiro. The captain relented, admitting that he intended to load eighteen hundred slaves on the coast and slip the blockade. Inside the hull of the ship was 166 casks of water, one hundred fifty barrels of farina, several sacks of beans, four boilers, four hundred spoons, a slave deck already laid, and between thirty and forty muskets. The *Martha* was seized and sent to New York where it was condemned as a slaver. The captain paid three thousand dollars bail, and promptly disappeared, avoiding the death penalty. The mate was sentenced to two years in prison.<sup>180</sup>

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<sup>179</sup> Foote, 300-301.

<sup>180</sup> Foote, 287-290.

Foote put in at Loando to discuss with the British two visits of American merchants by their cruisers. In March the barque *Navarre* was seized by the British steamer *Fire Fly*. The *Navarre* flew the American flag when it was boarded, but the boarding officer had doubts of its true nationality since its papers did not appear to be in order. When the officer stated that it was his duty to send the vessel to an American man-of-war or to New York the master hauled down the American flag, tossed it overboard, and replaced it with Brazilian colors. A second man came on deck claiming to be the master and that the ship was Brazilian. When the hatches were opened and the *Navarre* was shown to be fully-fitted for the slave trade, the vessel was seized.<sup>181</sup>

On July 2, 1850, the British steam sloop *Rattler* made a visit to the American-flagged *Volusia*, which was likewise fully-equipped for the slave trade. Upon inspection of her papers the signatures on the registry were found to have been erased, while other papers seemed to be forgeries as well. The master, the supercargo and chief mate of the vessel made declarations that the ship was a *bona fide* Brazilian and promptly destroyed the registry and the muster roll. The vessel was taken to the British court at St. Helena for adjudication.<sup>182</sup>

The British claimed to pay every respect to the American flag; visits were made in strict accordance to the Webster-Ashburton Treaty and possession of ships was only taken after the American flag was taken down.<sup>183</sup> The British commodore explained to

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<sup>181</sup> Foote, 265-266.

<sup>182</sup> Foote, 295-299.

<sup>183</sup> Foote, 267.

Foote that the vessels were either wholly or in part owned by Brazilians, and were they known to be American, no British officer would have presumed to capture or interfere with them. Foote replied from the documents and other testimony that the *Navarre* and *Volusia* were *bona fide* American vessels that had been interfered with and, whether legitimate or illegitimate traders, they were not to be touched by British cruisers.<sup>184</sup> He emphasized that the slave trade was not illegal under the Law of Nations, but the United States had declared the slave trade illegal in a municipal sense, and that “we choose to punish our rascals our own way.”<sup>185</sup> The British acceded and, with the American legal point made, the two sides returned to patrolling.

It would not be long before the British molested another American-flagged ship. The brigantine *Louisa Beaton* was closely watched by the British at Ambriz and had been visited on the suspicion of having taken on slaves. This proved to be untrue. HMS *Dolphin* fell in with the *Louisa Beaton* on September 9 as it made its way from the coast and a chase ensued; the *Dolphin* was compelled to put a shot across the American’s bow to force it to heave to. When the *Louisa Beaton* was boarded the master provided the ships registry and a “Transfer of Masters” form, but when asked for further papers, he refused. One of the crew was recognized as having been in charge of another slaver, the *Lucy Ann*. Suspicions raised, the commander seized the *Louisa Beaton* to be delivered to the Americans.

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<sup>184</sup> Foote, 299.

<sup>185</sup> Foote, 300.

When Foote visited the *Louisa Beaton* it was noted that the ship's registry and the "Transfer of Masters" form was all that needed to be inspected and, those being in order, were not grounds for seizure. The master was under no obligation to show any other paperwork. The British were compelled to resign the ship and Foote pronounced the seizure and detention of the vessel "wholly unauthorized" and "contrary to both the letter and the spirit of the eighth article of the Treaty of Washington." Foote further stated that if the master demanded remuneration for the "unfortunate detention," he was entitled to it. The British expressed great regret for what had occurred, begged pardon of the master, stated that no disrespect was offered to the American flag, and that they would do anything in their power to "repair the wrong."<sup>186</sup> The master made no such claim.

Having spent the bulk of his cruise south of "The Line," Foote recommended a greater United States presence at Loanda. He noted that the United States carried more legitimate traffic in the area than Britain or France and without an American naval presence slavers were not deterred from prostituting the American flag. His suggestion for resolving the problem was the creation of a supply depot and the stationing of two permanent ships, along with the appointment of a consul for the region.<sup>187</sup> A larger presence would deter the British from illegally visiting legitimately American-flagged traders.

The workhorse of the Africa Squadron in the early 1850s was Lieutenant Andrew Hull Foote, the most important captain since Perry. The capture of the *Martha* and the

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<sup>186</sup> Foote, 312-318.

<sup>187</sup> Foote, 260

*Chatsworth*, with the three slavers he captured off of Brazil in three months of 1848-1849, gave Foote more seizures than any other captain in the history of the squadron. His deft handling of diplomatic issues of the right to visit American-flagged ships by British men-of-war showed that naval captains, with the proper amount of zeal, could balance the line between interdicting those engaged in the inhumane traffic, while protecting the American flag. In the larger scheme Foote's zeal may have been counterproductive. The protection that the U.S. Navy was affording American-flagged ships caused the British Parliament to reconsider its position on slave trade suppression. In 1850, it nearly voted to give up the effort.

## CHAPTER TEN: PARLIAMENT RECONSIDERS SUPPRESSION

In the 1840s two legal situations cast additional doubt on the legality of the British suppression operations. The first called into question the actions of the navy on land: pressuring African kings to abolish slavery, obtaining treaties with those kings, and burning warehouses containing the goods that White traders used to buy slaves in their kingdoms. The other case involved slavers from the new nation of Brazil; a former possession of Portugal, Brazil did not accede to the anti-slave trade provisions of the Anglo-Portuguese treaty, rather, they stepped-up their own operations. Coupled with the legal issues raised by the United States, Parliament, sensing that it was not worth the cost diplomatically, seriously considered giving up the effort.

### **Captain Denman fires the Barracoons**

In 1840 Captain Stephen Denman of the Royal Navy took the effort against the slavers inland. Captain Denman implemented a close port blockade of the Gallinas River, between Sierra Leone and Liberia, a major outlet for Spanish slavers that included “barracoons” holding 900 slaves ready for transport. Denman was asked by the governor of Sierra Leone to liberate two Sierra Leoneans that were being held by the King of Gallinas. Denman went ashore visiting the king and demanding that he release the English subjects and further demanded that he abolish the slave trade in his kingdom.

When the king assented Denman took the British subjects back to his ship and instructed his marines to release the slaves and set fire to the barracoons.<sup>188</sup>

Lord Palmerston directed the Navy to start similar operations on other parts of the coast, but some within the government refused to back the actions, wondering “What security had any merchant [of legitimate commerce], British or foreign, that an overzealous naval officer would not burn his goods on the beaches of Africa?” Lawyers doubted that these actions were covered by existing treaties.<sup>189</sup> One of the slavers in the Gallinas operation, a Spaniard named Buron, sued Denman for trespassing and seizure of his property. In the resulting case of *Buron vs. Denman* the Attorney General, arguing for Denman on behalf of the Crown, stated that, if Buron owned the slaves in the barracoon it was in violation Spanish law and the terms of the Anglo-Spanish treaty. Denman was furthermore authorized to destroy the barracoons by virtue of the treaty signed with the King of Gallinas. The court found Denman not guilty, and the blockade and burn operations continued.<sup>190</sup>

Lord Aberdeen questioned the decision of the court. Citing the *Le Louis* case he issued a letter to the navy advising them that the tactics employed by Denman were not supported by the government. An effective tool was taken from the navy and when the Aberdeen Letter became public, slavers became more aggressive in their own operations.

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<sup>188</sup> Lloyd, 94-95.

<sup>189</sup> Lloyd, 97.

<sup>190</sup> Lloyd, 99.

The Royal Navy's suppression efforts, like those of the U.S. Navy, were once again being challenged by their own government.

### **The Felicidade Case**

On February 27, 1845 HMS *Wasp* captured *Felicidade* in the Atlantic fully-equipped for the slave trade. Eighteen men were ordered to navigate the slaver to Sierra Leone while the Brazilian crew was detained in a lower hold of the ship. As the two navigated toward the African coast another slaver, *Echo*, was sighted and they gave chase. The better sailing qualities of *Felicidade* allowed her to outrun *Wasp* and ultimately capture *Echo* laden with 400 slaves. Ten men of *Felicidade*'s prize crew were commanded to detain the crew of *Echo* and navigate her into Sierra Leone, leaving eight men on the former. As the two ships turned toward Africa again the detainees on board *Felicidade* broke free from the hold and killed their British captors, dumping their bodies overboard. *Felicidade* next sheered-off from *Echo* and headed out to sea.

Three days later *Felicidade* was stopped by HMS *Star*. The crew was detained again and the ship was searched. The wounds on the crewmen and the bloodstains on the ship's deck piqued the interest of the captain, and when the master of ship and a servant confessed to the attack, the Brazilians were put in irons, loaded on board the *Star*, and taken to Britain where they were convicted by a British court and sentenced to be hanged. Four days before the execution date the lawyer for the "*Felicidade* pirates" got a retrial. Lawyers asked who were the pirates: The Brazilian crew of the Brazilian ship, or the seamen of the Royal Navy which boarded her and detained her crew? The 1826 treaty between Britain and newly-independent Brazil did not have an Equipment Clause, without which the ship was seized under false pretenses. The killing of the British sailors

was justified as it was during the fight to retake their own ship. The British appeals court exonerated the Brazilians, and the government paid for their return to Brazil.<sup>191</sup>

With the acquittal of the *Felicidade* pirates, slavers began flying Brazilian colors. The British determined that Brazil was not enforcing the Anglo-Brazilian treaty and that they were allowing their flag to be flown under false pretenses. Parliament passed the Aberdeen Act in 1845, allowing the Royal Navy to seize Brazilian ships, full or empty, north or south of the Equator, outside or inside of Brazilian territorial waters.<sup>192</sup> In 1850 the British began an undeclared war against Brazil, going so far as to seize and burn Brazilian slavers inside of Brazilian territorial waters. Brazil's legislature was strong-armed into voting to abolish the slave trade.<sup>193</sup>

### **Lord Hutt's Attack on the Fleet**

Some in Parliament questioned the tactics of the suppression fleet and its effectiveness. In 1848 Sir William Hutt asked the House of Commons "For the Appointment of a Select Committee to consider the best means which Great Britain can adopt for the providing for the final Extinction of the Slave Trade." The title of the bill was a thin veil for Hutt's purpose, for the author had no interest in improving the station. He sought to end its mission. He believed that he could convince most men "whose heads were not filled with spurious philanthropy" that the squadron was not carrying out its mission. It could not carry out its mission, and that the British were merely "pouring

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<sup>191</sup> Lloyd, 85-88; also Rees, 257-259.

<sup>192</sup> Lloyd, 141.

<sup>193</sup> Lloyd, 144-146; also Wilson, 517.

forth human blood like water, for an object which it was impossible...to obtain.”<sup>194</sup> Hutt questioned the morality of enforcing philanthropy at the point of a gun and demanding that all other countries follow their lead in suppressing the slave trade. As it was, most other countries had withdrawn their support for a suppression fleet: Spain and Portugal never had fleets of their own and France had recently withdrawn theirs. Although the United States had a squadron, it was too small to be effective and the Webster-Ashburton Treaty allowed it to be withdrawn at any time.<sup>195</sup> Suppression of the slave trade by Britain and the United States was a great hypocrisy anyway, as most of the ships being used were “clippers” built in Baltimore, and much of the capital used in the trade was manufactured in English factories.

Hutt also argued that the fleet was allowing enormous profits for slavers rather than making their lives more difficult. Slaves could be bought on the African coast for four pounds and sold in Brazil or Cuba for eighty pounds. At the same time the fleet was making the life of slaves in transport more difficult. The fear of detection by British cruisers caused slavers to become hasty in their work; when slaving was legal slavers would have taken time to “properly” load their cargo, now slavers loaded quickly, sometimes leaving needed provisions behind in the rush to get to sea undetected. Once underway, slavers modified their ships to look like legitimate traders compromising the health of their victims below. Hutt lastly protested the high cost of maintaining the station, estimating that the British taxpayer could be saved £600,000 (\$42 million) per

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<sup>194</sup> Sir William Hutt, House of Commons Debate, 22 Feb., 1848, *Hansard*, Vol. 96: 1092.

<sup>195</sup> The Treaty allowed either signatory to withdraw their squadron five years after 1842.

year by withdrawing the squadron. The human cost of lives spent “in the most pestilential region in the world” was also too enormous for so small a return.<sup>196</sup>

Lord Palmerston then rose. He had devoted his political career to maintaining the squadron, negotiating American involvement in suppression, protesting the decisions of the British courts to release slavers on technicalities, and strong-arming the Brazilians into abolishing the trade. And while he doubted many of the facts of Hutt’s speech, Palmerston stated that he would not oppose the creation of the committee that Hutt had proposed.<sup>197</sup>

The Select Committee heard testimony throughout 1848 and 1849. Faith in the power of the Navy to suppress the trade was mixed. A statement from Her Majesty’s confidential advisors doubted that using Royal Navy could ever suppress the trade as “It is an evil that can never be adequately encountered by any system of mere prohibition and penalties.”<sup>198</sup> Commodore Sir Charles Hotham testified that the squadron was not able to diminish the demand for slaves in America, and despite twenty-six vessels specifically given to that mission the navy was not up to the task of suppressing the trade. Other officers expressed their doubt that the Royal Navy could suppress the trade. A few officers argued that the trade could be suppressed with more ships and appropriate treaties with African kings. Captain Denman stated that he would put down the slave trade within two years by a plan of his own.

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<sup>196</sup> Sir William Hutt, House of Commons Debate, 22 Feb., 1848, *Hansard*, Vol. 96: 1093.

<sup>197</sup> Lord Palmerston, HC Deb, 22 Feb., 1848, *Hansard*, Vol. 96: 1119-1126

<sup>198</sup> HC Deb, 19 March, 1850, *Hansard*, Vol. 109: 1097.

On March 19, 1850, Hutt introduced his bill to bring home the suppression fleet. In introducing his bill he stated the historical fact that the complete suppression of an illegal trade is not possible, noting that in the days of Napoleon's continental system British goods made it to all of the capitals of Europe, "and frequently were laid at the very doors of the Tuileries."<sup>199</sup> Hutt stated numerous reasons for his opposing the use of the Suppression Squadron. He opposed the squadron based on its expense. He opposed the squadron based upon its futility. He opposed it on account of its cruelty.<sup>200</sup> He opposed it because he hated to see such a great and noble country engaged in a conflict carried on by a means so violent and, at the same time, so inadequate to the ends proposed, so as to cut us off from the cooperation and sympathy of other states. He opposed the squadron because of the bad terms it had placed the people of Britain with Brazil, France, and the United States.<sup>201</sup> Hutt recounted the history of the suppression fleet and the measures that failed bring about the extinction of the slave trade – an "Equipment Clause," a close blockade of the African coast, a joint cruising arrangement with the French navy, an undeclared war with Brazil – all of these failed to slow the trade. Any further action was as well likely to end in failure.

With these arguments set before the House of Commons Lord Hutt proposed:

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<sup>199</sup> HC Deb, 19 March, 1850, *Hansard*, Vol. 109: 1102.

<sup>200</sup> Anstey concurred, opposing the efforts of the British to "promote the pacification of Africa by making war against the rest of the world." Anstey, HC Deb, 19 March 1850, *Hansard*, Vol. 109: 1132-1133.

<sup>201</sup> Sir William Hutt, HC Deb, 19 March, 1850, *Hansard*, Vol. 109: 1109.

that an humble Address be presented to Her Majesty, praying that Her Majesty will be pleased to direct that negotiations be forthwith entered into for the purpose of releasing this country from all treaty engagements with Foreign States, for maintaining armed vessels on the coast of Africa to suppress the traffic in slaves.<sup>202</sup>

One of Hutt's allies was Anstey. He defended the Aberdeen letter, noting that it was wholly consistent with Lord Stowell's decision in the *Le Louis* case; Britain was not justified in assuming rights which did not belong to her, merely because she intended to employ them for a laudable purpose. That being the case he regretted the untenable position that the squadron had placed men like Denman: to act on the suspicion of a vessel being a slaver makes them liable in civil courts for an illegal seizure, but to not act makes them liable to military courts on charges of mutiny for disobeying the orders of his superiors.<sup>203</sup>

Those on the other side of the aisle defended the humanitarianism of the squadron. Many refused to accept a proposal to reverse the suppression policies already established.<sup>204</sup> Others argued that the British had prevented a large number of slaves from being sent to Brazil and to the Spanish colonies, despite the self-defeating measures

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<sup>202</sup> Sir William Hutt, HC Deb, 19 March, 1850, *Hansard*, Vol. 109: 1110.

<sup>203</sup> Anstey, HC Deb, 19 March 1850, *Hansard*, Vol. 109: 1132-1133.

<sup>204</sup> Mr. LaBouchere argued that the removal of the squadron would make the British a "barren mockery," and cited testimony from Sir Captain Charles Hotham who stated "to withdraw the squadron, without offering a substitute, would be highly injurious to the honor of this great country." Mr. Labouchere, HC Deb, 19 March 1850, *Hansard*, Vol. 109: 1118-1119. Also, Mr. Cardwell "deeply regretted" the possibility of relieving the squadron of its duty to bring civilization to Africa. Lord John Russell lamented the possibility of "undoing all that we have hitherto done." Lord John Russell, HC Deb, 19 March, 1850, *Hansard*, Vol. 109: 1173-1174.

from the Foreign Office and the Board of the Admiralty: warships that were sent to the station were inappropriate for the work, treaties with Spain and Brazil emasculated the squadron in facing ships bearing their flag, and the letter from the Earl of Aberdeen, criticizing Denman's actions against the Gallinas barracoons, gave great encouragement to slavers at the expense of Britain's own officers. For the supporters of suppression, what Hutt perceived as the failures of the fleet could easily be corrected.

At the end of the day the House divided: "Ayes" were 154 and "Noes" were 232.<sup>205</sup> The Suppression Squadron would continue its operations. It seems as though Parliament was split along the lines of humanitarianism and economy. Most of the debate in favor of relieving the squadron was based upon what was best for the British taxpayer and those opposed to relieving the squadron did so for humanitarian reasons. Part of Hutt's argument was wrapped around the immunity of ships under foreign flags; American and French protests were beginning to find allies in Parliament. Hutt would bring the issue to the floor again eight years later.

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<sup>205</sup> HC Deb, 19 March 1850, *Hansard*, Vol. 109: 1093-1184.

## CHAPTER ELEVEN: CONCESSION: GREAT BRITAIN RENOUNCES THE RIGHT TO SEARCH; THE UNITED STATES ALLOWS THE RIGHT TO SEARCH

A series of incidences occurring in the second half of the 1850s compelled the British to reverse course on demanding the right to search from the United States. The two countries were taken to the brink when a number of American ships were fired upon by British cruisers in the Caribbean and the Gulf of Mexico. In an effort to quiet American voices clamoring for war the British decided to stop agitating for the right to visit. For a moment it seemed that the Americas had gotten their way.

With the outbreak of the Civil War in 1861 the United States was forced to give-up its own slave trade suppression duties. As the navy was recalled to blockade the Confederacy the United States was unable to uphold its part of the Webster-Ashburton Treaty. Secretary of State William Seward negotiated a new treaty with Britain allowing the British to the right to visit and search American-flagged ships. The slave trade suppression plans had come full circle and the British finally received that for which they were looking.

### **The Return of Lewis Cass**

In 1857 a person familiar with Great Britain, the suppression of the slave trade, and the right to visit and took the reins of the State Department. Democrat James Buchanan won the Presidential election of 1856 and made Lewis Cass his Secretary of State. Cass had not held a position at the national level since he resigned as Minister to

France in 1842 in protest of the Webster-Ashburton Treaty. With his appointment as Secretary of State in 1856 he was now the main representative of the United States in matters of foreign policy.

At this time the slave trade was focused mainly on the island of Cuba, so the British changed their focus from the Atlantic to the Caribbean believing that it was easier to intercept inbound slavers in a small ring around the island than to blockade the entire coast of Africa. This change put them in more direct contact with the United States near and sometimes inside of American waters. Recognizing the collision course that the British had set the two nations upon, Secretary of State Cass delivered a reminder to the British concerning visits of American merchant ships:

There, no doubt, may be circumstances which would go far to modify the complaints a nation would have a right to make for such a violation of sovereignty. If the boarding officer had just grounds for suspicion, and departed himself with propriety in the performance of his task, doing no injury, and peaceably retiring when satisfied of his error, no nation would make such an act the subject of serious reclamation.<sup>206</sup>

Fourteen years after the Quintuple Treaty, Cass continued to be inflexible concerning British visits of American ships.

In April and May 1858 there was a series of what the United States considered unnecessary British visits of American ships in the Gulf of Mexico and inside Cuban waters. Reports of American merchant ships being fired into by British cruisers, boarded,

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<sup>206</sup> Cass to Napier, April 10, 1858; *United States Documents*, Ser. No. 929, Document 49: 49, as cited in Richard W. Van Alstyne, "The British Right of Search and the African Slave Trade." *The Journal of Modern History* 2, No. 1 (March, 1930): 39.

and searched without permission, appeared in New York newspapers. One report stated that a British boat manned by fifteen men and an officer visited twelve American vessels in the harbor of Sagua la Grande, Cuba, inspecting papers, searching the ships' holds and breaking into casks.<sup>207</sup> News of these incidents caused outrage in the United States and Cass delivered a formal protest to the British government.<sup>208</sup>

The British government informed the American ambassador in London, George M. Dallas, that if the reported actions did, in fact occur, that they were unwarranted. The British suggested that the young and inexperienced officers of the West India Squadron were to blame, acting with excessive zeal in carrying out their instructions.<sup>209</sup> Orders were dispatched to the West India Squadron to be cautious in its approach to American merchant ships.

The United States would not let the issue go away quietly. In Congress there were calls for war. Representative Clark Cochrane of New York complained of the British that, "No nation can arrogate to herself the police and espionage of the ocean, without violating its freedom and trampling upon the honor and rights of others."<sup>210</sup> He then made a plea to international maritime law:

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<sup>207</sup> House of Commons Debate, 31 May, 1858, *Hansard*, vol. 150: 1248.

<sup>208</sup> Cass to Dallas, May 18, 1858; *United States Documents*, Ser. No. 980, Document 59: 8, as cited in Van Alstyne: 39.

<sup>209</sup> House of Lords Debate, 26 July, 1858, *Hansard*, vol. 151: 2087.

<sup>210</sup> Speech of Clark B. Cochrane, June 8, 1858. *Congressional Globe*, House of Representatives, 35 Congress I Session: 497.

It follows as a necessary corollary from these settled doctrines of international and maritime law – doctrines forever fixed and forever closed to the discussions of mankind – that an assault upon or the assumption of control over the ships of one country, no matter for what cause or under what pretext...is an act of hostility, an invasion of national jurisdiction, and a breach of public law, and if avowed, constitute a just cause of war.<sup>211</sup>

Cass used these incidences to gain concessions from the British.

In London Ambassador Dallas appealed to Foreign Secretary Malmesbury to modify the way that British cruisers visited American ships. Malmesbury responded with a memorandum stating that it was necessary for the two sides to come to an arrangement to verify the nationality of vessels suspected of carrying false colors, and, until then, “orders will be given to discontinue search of United States vessels.”<sup>212</sup> The United States took the memorandum as the British yielding on the issue of the right to visit and search American ships.

Another player taking note of the events in the Caribbean was Lord William Hutt. With the actions of the navy as a pretext he reopened discussion in the House of Commons for ending the mission of the suppression fleet again. The bill died, but he did get the following concession when the Commons ruled that:

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<sup>211</sup> Cochrane: 496-497.

<sup>212</sup> *United States Documents*, Ser. No. 997, Document 2: 35, as quoted in Van Alstyne, 40.

It is expedient to discontinue the practice of authorizing Her Majesty's ships to visit and search vessels under Foreign Flags, with a view of suppressing the Slave Trade.<sup>213</sup>

The following year Foreign Secretary Lord Malmesbury acceded to the change in policy. The House of Lords sought clarity in the modified position of the British toward the right to visit and search. Lord Lyndhurst referenced Sir William Scott, stating:

No nation can exercise the right of visitation and search on the high seas except on the belligerent claim. No such right has ever been claimed, nor can it be exercised, without the oppression of interrupting and harassing the real and lawful navigation of other countries, for the right, when it exists at all, is universal, and will extend to all countries. If I were to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce.<sup>214</sup>

He proceeded to state his opposition to the British-assumed "Right to Visit." The right to visit is the same thing as the right to search, for

the moment you call for an examination of the papers—the moment you ask a single question the visit becomes a search—so that the visit to a particular vessel for the purpose of inquiry, is in effect the exercise of a right comprehended in the words *droit de visite*.... [W]hat right, I ask, has any person to go on board a vessel to visit it without the consent of the master? The same principle applies that I have just laid down.<sup>215</sup>

Foreign Secretary Lord Malmesbury then confirmed:

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<sup>213</sup> House of Commons Debate, 12 July, 1858, *Hansard*, vol. 151: 1292.

<sup>214</sup> House of Lords Debate, 26 July 1858, *Hansard*, vol. 151: 2080.

<sup>215</sup> HL Deb, 26 July, 1858: 2082.

[W]e have abandoned the right of search and visit; and that the American Government have agreed to entertain and to consider any suggestion we may make to give security against the fraudulent use of the flags of either nation; and that the French Government are ready and anxious to assist us in our endeavours to attain the same object.<sup>216</sup>

Interestingly, at the time that the British were giving up the right to search, American slave trade suppression became much more effective. In the fall of 1860 the squadron under flag officer William Inman seized three slavers carrying a total more than two thousand slaves. Nathaniel Gordon, the master of the *Erie* which was carrying 900 slaves, was convicted of piracy and became the only person hanged under the 1820 law.<sup>217</sup> Then suppression came to an abrupt end.

### **The Civil War and the Slave Trade Suppression Treaty of 1862**

With the election of Abraham Lincoln in 1860 and the secession of Southern states in the following months, the stage was set for an end to the semantic game that plagued the effort of suppress the slave trade. With Southern senators recalled to their states, the North dominated Senate complied with each of the administrations attacks on the slave trade. With American warships on patrol in the blockade of the Confederacy the United States could not uphold its end of the Webster-Ashburton Treaty. Secretary of State John Seward negotiated a treaty with Great Britain in 1862 allowing them the right

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<sup>216</sup> HL Deb, 26 July, 1858: 2085.

<sup>217</sup> Canney, 216.

to search vessels flying the American flag.<sup>218</sup> The British finally received what they sought for half a century. It is ironic that Parliament had rescinded that right just four years earlier. With the Union victory in the Civil War and abolition of slavery by the Thirteenth Amendment the slave trade slowed to a trickle. When the Spanish abolished slavery in Cuba in 1880 the Transatlantic Slave Trade was drawn to a close.

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<sup>218</sup> “Treaty for the Suppression of the African Slave Trade (1862).” William M. Malloy (ed.), *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers, 1776-1909* (Washington: Government Printing Office, 1910): 674-687.

## CHAPTER TWELVE: CONCLUSION - BEING “THE CONSTABLE OF THE WORLD”

The trade in slaves was ultimately brought to a close with pressure on both ends of the supply chain. On the American demand side the United States ended slavery with the thirteenth amendment to the Constitution following the Civil War. Brazil ended slavery in the 1850s, leaving Cuba the only market for slaves; the Spanish ended slavery in Cuba in the 1880s. On the African supply side the integration of Africa into the European colonial system with the Berlin Conference in 1875 drove the slave factories out of business. Does this mean that the British suppression fleet and the U.S. Navy Africa Squadron were failures? Many have said so. For Africans packed in the hull of a slaver, chained two-by-two at the wrists and ankles, with no room to sit up on the slave deck, and kept alive on farina, horsebeans and a cup of water a day, they would likely say differently.

### **Sovereignty and the Right to Search**

Despite the detractors the British should be honored for taking the lead in the suppression of the slave trade. In doing so they opened up a new form of diplomacy based upon human rights. Unlike others that sat on the sideline the British poured millions of dollars and hundreds of lives into the effort. Their diplomatic efforts are to be commended as well, exposing those nations whose flags still covered an inhumane

trade, not the least of which was the United States. But this episode in history shows just how difficult it is to enforce human rights laws.

The United States itself was walking a thin line between the humanity of suppressing the slave trade and the legal right of sovereign states as codified in the Law of Nations. International Law recognizes the deck of a ship sovereign territory of the flag-state under which it sails. British Justice Sir William Scott and United States Justice John Marshall both ruled that, the fact that two states had abolished the slave trade did not mean that one could adjudicate for the other. The British could not seize American ships on the premise that the United States had abolished the trade. Under the Law of Nations at the time the British could only seize American ships by the terms of a reciprocal right to search treaty, but the United States had serious issues with granting the British the right to stop and board their ships. This arrangement smacked of impressment, and sailors being forced to serve and die for the Royal Navy remained long in the collective American memory. John Adams exposed the hypocrisy of the British claim for the right to search equating the impressment of American sailors with African slavery. In both cases a human being was inspected, clapped in irons, taken from their home, flogged, and forced into labor against their will. Impressment was still an issue as late as 1842 when Great Britain and the United States negotiated the Webster-Ashburton Treaty.

The Northerner most adamant against British claim for the right to search was Lewis Cass of Michigan. Part of Cass's motivation may have been youthful exuberance following his own fight against the British in the War of 1812. What was Cass's motivation for undermining the Quintuple Treaty and his vehemence against the

Webster-Ashburton Treaty though? His opposition to the right to search was not because he wanted to protect the American slave trade; it was based upon the respect of American sovereignty under the Law of Nations.

The Southerner most opposed to British suppression policies was Nicholas Trist of Virginia, the American Consul-General in Havana. His actions were not particularly in the interest of promoting slavery, although he had strong opinions concerning abolitionists trying to incite slaves to rebellion in the South. He believed that the British were overstepping their legal bounds in their suppression activities and, when Palmerston sent to abolitionists to act as the Commission for the Suppression of the Slave Trade, he never recognized their legal standing and ignored them for as long as he could.

The British eventually conceded that *bona fide* American vessels were immune from British interference, but what, they asked, was to be done with ships that had obtained the right to the flag illegally? To allow those ships to be boarded and searched would lead to a slippery slope. One British officer would make the claim that “I *knew* it was not an American.” The next would claim that “I *believed* that it was not an American.” The third would claim that “I *thought* it was not an American.” The slippery slope leads from “knowing,” to “believing,” to “thinking.” Ultimately it leads to “I did not know, so I put a shot across his bow, forced him to heave to, boarded him, broke open his hatches, and inspected his cargo.” The British claimed that this was never their intention, but in the 1842 Captain Bouet, the commander of the French squadron in West Africa, charged that the British were making no distinction between legitimate and illegitimate trade, and were stopping and harassing French merchant ships all along the African coast while letting their own ships pass unmolested.

Lord Aberdeen was adamant that the British had the right to “visit” suspicious vessels under the cover of the American flag, boarding them only for the purpose of inspecting the ship’s papers to check if it had the right to fly the flag. This was justification for British stopping of American ships in the 1830s. Not everyone in Great Britain was behind Aberdeen though. Lord Lyndhurst claimed that when an officer boarded a ship, the moment a paper was examined, the moment that a question was asked, the visit became a search. Cass called this a “vexatious visit,” and liable to serious abuse. In 1858 young British captains made “vexatious visits,” firing cannon into American merchant ships, called overly “zealous” in the carrying out of their orders. These actions forced Parliament to end the claim to the right to visit and the right to search. The statute of international law stating that a ship was the sovereign territory of the flag under which it sailed was preserved.

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