Brown v. United States, the Paquete Habana, and the Executive

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INTRODUCTION

Throughout the twentieth and twenty-first centuries, the United States has witnessed a tremendous expansion of executive power, prompted mainly by perceived threats to our national security, as in the current War on Terrorism, and threats to our position as a world superpower, as in the Cold War.1 The actions of the Executive during the ongoing War on Terrorism illustrate the vastness of modern executive power in international and military matters. Members of the executive have drawn upon a variety of sources, including nineteenth and twentieth century wartime cases, to support expansive executive authority, including the authority to violate customary international law. This Note examines one of the nineteenth century wartime cases relied upon by the Executive, *Brown v. United States*,2 and argues that the Executive’s reliance on this particular case is unfounded. Not only does *Brown* date back to an era when the Executive enjoyed far less power in international and military matters, contemporary executive officials have also relied upon a misinterpretation of the language in *Brown*, a misinterpretation that originated in the landmark case *The Paquete Habana*.3

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1. See, e.g., David S. Friedman, Waging War Against Checks and Balances—The Claim of an Unlimited Presidential War Power, 57 St. John’s L. Rev. 213, 214–16 (1983); J. William Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, 47 Cornell L.Q. 1, 1–7 (1961) (“[W]e must give the Executive a measure of power in the conduct of our foreign affairs that we have hitherto jealously withheld.”).
2. 12 U.S. (8 Cranch) 110 (1814).
3. 175 U.S. 677 (1900).
The Paquete Habana crystallized customary international law as a powerful limit on executive power by firmly establishing customary international law as part of the laws of the United States.\textsuperscript{4} The Paquete Court relied on customary international law to invalidate executive action, and thus not only established that customary international law "is part of our law,"\textsuperscript{5} but also that the Executive branch is bound by customary international law.\textsuperscript{6}

However, the opinion in \textit{The Paquete Habana} was far from watertight. Chief Justice Fuller's dissent, with which the majority partially agreed, was the first Supreme Court opinion to interpret \textit{Brown}, an earlier wartime case, as supporting the Executive's authority to violate customary international law. Both the majority and the dissent agreed that \textit{Brown} contained language that "might seem inconsistent"\textsuperscript{7} with the holding in \textit{The Paquete Habana}.\textsuperscript{8} The portion of \textit{Brown} that troubled both the majority and the dissent reads:

This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.\textsuperscript{9}

Chief Justice Fuller's dissenting opinion in \textit{The Paquete Habana} interpreted the above passage from \textit{Brown} to mean that the Executive, as the "sovereign," could violate customary international law, the "usage," at will.\textsuperscript{10} Justice Gray, writing for the majority, conceded that this language from \textit{Brown} seemed inconsistent with the Paquete Court's application of customary international law to the Executive, but pointed out that the Court's holding in \textit{Brown}, invalidating executive confiscation, supported the holding in \textit{The Paquete Habana}.\textsuperscript{11}

Chief Justice Fuller's dissent from \textit{The Paquete Habana}, which relies heavily on \textit{Brown},\textsuperscript{12} and Justice Gray's majority opinion, which conceded

\begin{footnotesize}
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\item Id. at 700 ("International [sic] law is part of our law."); see Black's Law Dictionary 835 (8th ed. 2004) (defining "customary international law" as "[i]nternational law that derives from the practice of states and is accepted by them as legally binding").
\item The Paquete Habana, 175 U.S. at 700.
\item Id. at 700-01.
\item Id. at 710.
\item Id. (majority opinion); id. at 715 (Fuller, C.J., dissenting).
\item 12 U.S. (8 Cranch) 110, 128 (1814).
\item The Paquete Habana, 175 U.S. at 715 (Fuller, C.J., dissenting) (quoting Brown, 12 U.S. (8 Cranch) at 128) (internal quotation marks omitted).
\item Id. at 710-11.
\item Id. at 715-16 (Fuller, C.J., dissenting).
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inconsistencies between *The Paquete Habana* and *Brown*, thus injected vulnerability into *The Paquete Habana* at the time of its inception. This Note proposes that this vulnerability is based on a misreading of *Brown*. Both Chief Justice Fuller and Justice Gray misunderstood *Brown*. When Chief Justice Marshall, the author of the *Brown* majority opinion, wrote, "[*]his usage is a guide which the sovereign follows or abandons at his will" he was not asserting that the Executive could violate customary international law at will. Chief Justice Marshall was actually asserting that when customary international law gives the "sovereign," by which he meant Congress, the right to act, it is up to the Congress to decide *whether* to act. In essence, this passage from *Brown* states a proposition analogous to prosecutorial discretion; although a law may give a prosecutor the right to act, i.e. to prosecute, the prosecutor must exercise discretion and *choose* to prosecute for the law to apply to a given offender. The law does not operate *ex proprio vigore*.

Has the *Paquete* Court's misinterpretation of *Brown* really been of consequence? One could argue that despite the majority and dissent's misinterpretation of *Brown*, *The Paquete Habana* has nevertheless served as a bulwark against executive carte blanche in international matters. The portions of *The Paquete Habana* opinion discussing the seemingly inconsistent language in *Brown* went largely unnoticed. However, today, members of the Executive are relying on the same misinterpretation of *Brown*, a misinterpretation that originated in *The Paquete Habana*, to support further expansion of executive power. Since the beginning of the War on Terrorism, several briefs filed in federal court arguing for expansive executive power have echoed Chief Justice Fuller's dissent in *The Paquete Habana*, adopting his misinterpretation of *Brown*. Furthermore, several memos generated by the Executive have also echoed Chief Justice Fuller's misinterpretation of *Brown*. The more legitimacy courts and practitioners give to this mistaken interpretation, the less effective cases such as *The Paquete Habana* become as a limit on executive power. What started as a snag in the

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13. Id. at 710–11.
16. See id.
analytical fabric of *The Paquete Habana* could end up rendering it an impotent limitation on executive power.

Part I of this Note provides a summary of the facts of *The Paquete Habana* and *Brown*, as well as an overview of the majority and minority analyses in both cases. Part II explains how Chief Justice Fuller's interpretation of *Brown* in his dissent from *The Paquete Habana* was actually a misinterpretation and misapplication of *Brown* and provides evidence illustrating that his interpretation of *Brown* was indeed mistaken. Part II also discusses how Justice Gray, writing for the majority in *The Paquete Habana*, shared Chief Justice Fuller's misinterpretation of *Brown* and how that misinterpretation undermined the majority opinion in *The Paquete Habana*. Part III draws upon historical information about Chief Justice Marshall, the author of the majority opinion in *Brown*, as further evidence that *Brown* did not advocate executive carte blanche to violate customary international law. Part IV demonstrates that although *Brown* and *The Paquete Habana* may be antiquated cases, several contemporary briefs, cases, and executive memoranda arguing for expansive executive power in the War on Terrorism echo Chief Justice Fuller's misinterpretation of *Brown*.

I. *The Paquete Habana* and *Brown v. United States*: An Overview

A. *The Paquete Habana*

*The Paquete Habana* occurred against the backdrop of the Spanish-American War. On March 25, 1898, the Paquete Habana, a Spanish fishing boat, sailed from Havana, Cuba. Her destination was a reef at the western end of the island, still within the territorial waters of Spain. The Paquete Habana remained at the reef for twenty-five days of fishing.

On April 19, 1898, while the Paquete Habana was still fishing the reef, the United States declared war on Spain, and the Spanish-American War began. President McKinley commanded the North Atlantic Squadron to blockade the north coast of Cuba. After the declaration of war, President McKinley issued an additional proclamation that the war "should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." An admiral implementing the blockade recommended to the Secretary of the Navy

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19. 175 U.S. 677, 712-14 (1900).
20. Id. 678-79.
21. Id.
22. Id.
25. Id. (internal quotation marks omitted).
that Cuban fishing crews should be detained to prevent them from aiding the enemy. In response to this recommendation, the Secretary of the Navy guardedly stated, "any such vessel or crew considered likely to aid enemy [sic] may be detained." Approximately a week later, as the Paquete Habana made her way back to Havana, the Castine, a United States gunboat, captured her as a prize of war.

The captors brought the Paquete Habana, along with another Spanish vessel, the Lola, to Key West and filed a libel for the condemnation of the vessels and their cargo as prizes of war. The captains of the two vessels filed claims alleging that the United States unlawfully confiscated the vessels. However, their claims were unsuccessful, and the Paquete Habana and the Lola were condemned and sold at auction. The owners of the Paquete Habana and the Lola appealed the condemnation of their vessels to the United States Supreme Court.

After disposing of the United States' argument that the Court lacked jurisdiction, Justice Gray, writing for the majority, turned to the question of whether the Castine legally captured the Paquete Habana and the Lola as prizes of war. The Court immediately turned to customary international law to address this question. The Court began by surveying the practices of "civilized nations" including England, France, Holland, Prussia, and the United States, over the preceding 300 years. After its survey of international practices the Court concluded that the consistent practice among states was to exempt coastal fishing vessels from capture.

The Court went on to review the works of jurists for "trustworthy evidence of what the law really is." Relying upon the works of De Cussy, Calvo, De Boeck, and Fiore, among others, the Court concluded, "the vessels of fishermen have been generally declared exempt from confiscation, because of the eminently peaceful object of their humble industry, and of the principles of equity and humanity."

26. Id. at 713.
27. Id.
28. Id. at 679.
29. Id.
30. Id.
31. Id.
32. Id. at 678.
33. Id. at 685–86.
34. Id. at 687–700. "Customary international law" is law based on consistent state action taken out of a sense of obligation. BLACK'S LAW DICTIONARY 835 (8th ed. 2004).
35. The Paquete Habana, 175 U.S. at 687–700.
36. Id. at 700.
37. Id. (citing Hilton v. Guyot, 159 U.S. 113, 163–64, 214–15 (1895)).
38. Id. at 701–08.
After its thorough inquiry into the practices of nations and scholarly works, the Court concluded:

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious [sic] order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.9

Having concluded that customary international law proscribed the capture of peaceful fishing vessels, the Court turned to the final issue before it: whether the Court could enforce this rule of customary international law against the executive branch.40 The Court's holding with respect to this particular issue is arguably the most well known passage from The Paquete Habana, stating: "International [sic] law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."41

Once the Court concluded that customary international law "is a part of our law" and that the Court must administer it, the Court had little choice but to enforce the rule of customary international law against the Executive.42 The Court therefore held that the capture of the Paquete Habana was invalid because it was in violation of customary international law.43

Had Justice Gray ended the majority's opinion there, The Paquete Habana would arguably provide precedent for the enforcement of customary international law against the Executive. But he did not. Justice Gray went on to point out that "there are expressions of Chief Justice Marshall [in Brown] which, taken by themselves, might seem inconsistent with the position above maintained of the duty of a prize court to take judicial notice of a rule of international law."44 By conceding this perceived vulnerability, a vulnerability based on a misunderstanding of Brown, Justice Gray unnecessarily weakened The

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9. Id. at 708.
10. Id.
11. Id. at 700.
12. Although Justice Gray made no reference to it, the Court's conclusion that the capture was invalid seems inescapable in light of the Take Care Clause, which charges the President with the responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 4.
13. The Paquete Habana, 175 U.S. at 714.
14. Id. at 710.
Paquete Habana's central holding that the Executive is subject to customary international law.

In his dissent from The Paquete Habana, Chief Justice Fuller argued that customary international law did not prohibit the capture of enemy fishing vessels, and that even if it did, the Court could not revise executive action "taken in the ordinary exercise of discretion in the conduct of war." According to Fuller, "exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended." The only case that Fuller relied on in his dissent from The Paquete Habana was Brown.

B. Brown v. United States

Like The Paquete Habana, Brown occurred against the backdrop of war; however, in the case of Brown, it was the War of 1812, approximately ninety years before the Paquete Habana ever set sail. A British company chartered the Emulous, a cargo ship, to carry cargo including pine timber, from Savannah, Georgia to Plymouth, England. After the cargo was put on board, the Emulous set sail but was stopped shortly thereafter when the United States placed an embargo against Britain. Later that month, the owner of the Emulous and an agent of the British company that chartered the ship agreed that it should proceed to New Bedford, Massachusetts, where the ship's owners resided.

While the Emulous was in transit to New Bedford, the United States declared war on Great Britain and the War of 1812 began. Once the ship arrived in New Bedford, the pine timber remained aboard the ship for several months but was eventually removed. Realizing that the embargo against Britain might last quite a while and that the cargo could sit in New Bedford indefinitely, an American agent of the British company arranged to sell the cargo, including the timber, to another American citizen, Armitz Brown. What happened next is what prompted the claim in Brown. Although the owner of the Emulous, John Delano, advised the agent of the British company to sell the cargo, once the agent did so, Delano contacted an attorney for the United States and

45. Id. at 715 (Fuller, C.J., dissenting).
46. Id. at 720.
47. Id. at 715–21.
48. 12 U.S. (8 Cranch) 110, 121 (1814).
49. Id.
50. Id. at 111, 121.
51. Id.
52. Id. at 121.
53. Id. at 111, 121.
54. Id. at 121–22.
had him file a libel against the cargo on behalf of the United States, John Delano, "and all other persons concerned."\(^{55}\)

The District Court of Massachusetts dismissed the libel, but the circuit court reversed and held that the pine timber was "enemy property forfeited to the United States."\(^{56}\) Armitz Brown appealed the circuit court's decision to the U.S. Supreme Court.\(^{57}\)

Writing for the majority, Chief Justice John Marshall described the issues before the Court as (1) whether the confiscation of enemy property found on U.S. land was a "necessary consequence of the declaration of war"; and (2) if not, whether there was any legislative act authorizing the confiscation of enemy property.\(^{58}\)

In addressing the first issue, whether the declaration of war confiscated enemy property \textit{ex proprio vigore}, Chief Justice Marshall adopted an approach similar to the approach Justice Gray utilized decades later in \textit{The Paquete Habana}; he looked first to the practice of foreign nations, and then turned to the works of jurists for confirmation of the international practice.\(^{59}\)

Marshall concluded that there existed a "universal practice of forbearing to seize and confiscate debts and credits."\(^{60}\) After surveying the works of jurists including Bynkershoek, Vattel, and Chitty for evidence of the current customary international law regarding confiscation of enemy property,\(^{61}\) Marshall concluded that "[t]he modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated."\(^{62}\) He also noted that most of the commercial treaties between the United States and other nations included stipulations for the right to withdraw property upon the commencement of hostilities.\(^{63}\)

Marshall finally concluded that if it was not the customary practice to confiscate enemy property immediately upon declaring war, and if the works of jurists and existing treaties also indicated that it was not customary to confiscate enemy property upon declaring war, the declaration of war could not possibly act as a confiscation of property, \textit{ex proprio vigore}.\(^{64}\) However, Marshall made pains to assert that although

\(^{55}\) \textit{id.} at 111, 121.
\(^{56}\) \textit{id.} at 122.
\(^{57}\) \textit{id.}
\(^{58}\) \textit{id.} at 123.
\(^{59}\) \textit{id.; \textit{The Paquete Habana,} 175 U.S. at 686–707.}
\(^{60}\) \textit{Brown, 12 U.S. (8 Cranch) at 123.}
\(^{61}\) \textit{id.} at 124–25.
\(^{62}\) \textit{id.} at 125.
\(^{63}\) \textit{id.}
\(^{64}\) \textit{id.}
the declaration of war did not itself act as a confiscation of enemy property, the "sovereign" did have the right to do just that. Because the legislature had not chosen to exercise the right, the confiscation of the pine timber was invalid.

In his dissent from Brown, Justice Story took a much more pro-Executive stance than Chief Justice Marshall. Justice Story took the position that the Executive did not need the express authority of Congress to exercise the right to confiscate enemy property. However, he was still careful to point out that although, in his view, the Executive could unilaterally exercise a right conferred by customary international law, such as the right to confiscate enemy property, the Executive could not unilaterally violate a duty imposed by customary international law.

II. THE MISINTERPRETATION OF BROWN V. UNITED STATES

Chief Justice Fuller's misinterpretation of Brown in his dissent from The Paquete Habana was manifold. First, Fuller misread the passage from Brown regarding the discretion of the sovereign to "follow[] or abandon[]" the modern usage "at his will," the passage upon which he premised so much of his dissent, to mean that the Executive had discretion to abandon customary international law. In fact, when Marshall referred to the discretion of the sovereign in Brown, he was referring to the legislature. Second, Fuller misunderstood what type of discretion Chief Justice Marshall was discussing in Brown. Fuller misread the above-mentioned passage to mean that the Executive could violate customary international law. When Marshall referred to the sovereign's discretion to follow or abandon the modern usage, he in fact meant that the sovereign could choose to exercise a right conferred by customary international law, not that the sovereign could violate a duty imposed by

65. Id. (emphasis added).
66. Id. at 129.
67. Id. at 149 (Story, J., dissenting) ("[T]he executive must have all the right [sic] of modern warfare vested in him, to be exercised in his sound discretion, or he can have none."). But see id. at 128 (majority opinion) ("It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation . . . . This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed.").
68. Id. at 149 (Story, J., dissenting).

[The majority] seems tacitly to concede, that, by virtue of the declaration of war, the executive would have a right to seize enemies' property . . . . If the argument be correct, that the power to make captures on land or water must be expressly called into exercise by congress, before the executive can, even after war, enforce a capture and condemnation, it will be very difficult to support the concession.

Id. at 151.
69. Id. at 153.
70. Id. at 128 (majority opinion).
71. Id.
customary international law. Because Fuller failed to appreciate the distinction between the discretion to exercise a right and the obligation to adhere to a duty, he mistakenly believed that the majority position in The Paquete Habana was irreconcilable with Brown. The fact that Justice Gray, writing for the majority, shared much of Chief Justice Fuller’s misinterpretation of Brown is mainly notable because it prevented him from adequately responding to Fuller’s dissent.

A. CHIEF JUSTICE FULLER’S MISINTERPRETATION OF BROWN V. UNITED STATES

Chief Justice Fuller’s dissent from The Paquete Habana, which relies heavily on Brown, actually turns Brown on its head. While Brown stands for the proposition that the legislature must make a clear statement before the Executive may exercise a right created by customary international law, Chief Justice Fuller relied on language in Brown to support his argument that the Executive could unilaterally violate a duty imposed by customary international law.

1. The Executive as the “Sovereign”

Chief Justice Fuller specifically relied upon the passage in Brown in which Chief Justice Marshall stated:

“This usage is a guide which the sovereign follows or abandons at his will. The rule, like others precepts of morality, of humanity and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.”

Chief Justice Fuller clearly believed the portion of Brown mentioning the “sovereign” referred to the Executive because, in his dissent from The Paquete Habana, he relied upon this portion of Brown to argue that the Court could not revise executive action.

However, the second question presented in Brown was whether the legislature authorized the confiscation of enemy property during the War of 1812. The question itself presumes that in order for the right of confiscation to be exercised, even during war, the Executive must have legislative authorization. In Brown, Marshall explicitly stated, “[i]t appears to the Court, that the power of confiscating enemy property is in

72. See id.
73. The Paquete Habana, 175 U.S. at 720 (Fuller, C.J., dissenting).
74. Id. at 715 (quoting Brown v. United States, 12 U.S. (8 Cranch) 110, 121 (1814)).
75. Id. (“I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been takeu [sic] in the ordinary exercise of discretion in the couduct [sic] of war.”).
76. Brown, 12 U.S. (8 Cranch) at 123 (“The questions to be decided by this court are: ... Is there any legislative act which authorized such seizure and condemnation?”).
the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war."77 Therefore, Fuller's interpretation of Brown as supporting executive discretion is squarely at odds with its holding.

Some may point to Marshall's references to the "sovereign's" will as "his" will as evidence that Marshall was in fact referring to the President when he discussed the "sovereign's" right to "follow[] or abandon[]" the modern usage at will.78 However, as other commentators have explained, Marshall's references to the sovereign's will as "his" will can be attributed to the fact that when he wrote the Brown decision, the vast majority of sovereign's throughout the world were in fact individual males.79 Because the case dealt with international law, Marshall utilized the term most appropriate for the majority of sovereigns internationally.80 The United States was a minority in that its "sovereign" was the legislature.

The dissent in Brown further demonstrates that there is no reading of Brown supporting Chief Justice Fuller's interpretation of the "sovereign" as the Executive. In his dissent from Brown, Justice Story took a much more pro-Executive stance than Chief Justice Marshall did writing for the majority.81 Justice Story took the position that the Executive did not need the express authority of Congress to exercise the right to confiscate enemy property.82 Story saw the right to capture enemy property as a right incidental to the right to execute war, and thus a right vested in the Executive by the legislature's declaration of war.83 Despite Story's pro-Executive approach, he was still careful to point out

77. Id. at 129.
78. Id. at 128 ("The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without oblivion, yet it may be disregarded." (emphasis added)).
79. Dodge, supra note 14, at 200.
80. Id.
81. Compare Brown, 12 U.S. (8 Cranch) at 149 (Story, J., dissenting) ("[T]he executive must have all the rights of modern warfare vested in him, to be exercised in his sound discretion, or he can have none.")., with id. at 128 (majority opinion) ("It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation . . . .This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed.").
82. Id. at 151 (Story, J., dissenting) ("[T]he majority] seems tacitly to concede, that, by virtue of the declaration of war, the executive would have a right to seize enemies' property . . . .[I]f the argument be correct, that the power to make captures on land or water must be expressly called into exercise by congress, before the executive can, even after war, enforce a capture and condemnation, it will be very difficult to support the concession.").
83. Id. at 143 ("In respect to the goods of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted . . . ."); id. at 152 ("[T]he power to carry the war into effect, gives every incidental power which the law of nations authorizes and approves in a state of war.").
that although, in his view, the Executive could exercise a right under customary international law without express congressional authority, the Executive could not unilaterally violate a duty imposed by customary international law.\textsuperscript{84} Regarding the duties imposed by customary international law upon the Executive, Story stated, "[the Executive] cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."\textsuperscript{85} Given that Chief Justice Marshall's majority opinion in \textit{Brown} required express congressional authority to exercise a right under customary international law, and that even Justice Story's pro-Executive dissent asserted that the Executive could not unilaterally violate customary international law, Chief Justice Fuller's reliance on \textit{Brown} for his assertion that the Executive can unilaterally violate customary international law is clearly misplaced.

2. \textit{The Executive's Right to Violate Customary International Law and the Right/Duty Distinction}

Chief Justice Fuller's second mistake in interpreting \textit{Brown} was his belief that \textit{Brown} stood for the proposition that the sovereign could violate customary international law at will. Fuller, discussing the Court's authority to review executive action, stated, "I am unable to conclude... that this court can properly revise action which must be treated as having been taken in the ordinary course of discretion."\textsuperscript{86} Relying on the language in \textit{Brown} where Chief Justice Marshall stated, "[t]he usage is a guide which the sovereign follows or abandons at his will,"\textsuperscript{87} Fuller argued, "[customary international law] is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended."\textsuperscript{88}

However, the language from \textit{Brown} that Chief Justice Fuller relied upon actually referred to the authority to exercise the right to confiscate enemy property under customary international law, not the authority to violate customary international law. Marshall was arguing that the customary international law giving the sovereign the right to confiscate property did not operate independently of the sovereign, but that the sovereign\textsuperscript{89} must choose to exercise that right.

The context of Marshall's statement within the \textit{Brown} opinion supports this conclusion. Marshall made the statement that the sovereign could follow or abandon the usage at his will in rebuttal to the dissent's

\textsuperscript{84} Id. at 153.
\textsuperscript{85} Id.
\textsuperscript{86} The Paquete Habana, 175 U.S. 677, 715 (1900) (Fuller, C.J., dissenting).
\textsuperscript{87} Id. at 715 (quoting \textit{Brown}, 12 U.S. (8 Cranch) at 128).
\textsuperscript{88} Id. at 720.
\textsuperscript{89} The legislature, as explained in Part II.A.1, \textit{supra}.
contention that the declaration of war acted as confiscation of enemy property, *ex proprio vigore*. According to Marshall, the dissent asserted, "in executing the laws of war, the executive may seize and the Courts condemn all the property which, according to the modern law of nations, is subject to confiscation." Marshall rejected this contention stating:

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force... This usage is a guide which the sovereign follows or abandons at his will.

Put in the proper context, it becomes clear that Marshall was not asserting that the Executive could adhere to or abandon customary international law at will. In fact, he was arguing just the opposite, that the rule of customary international law did not act "by its own force," and that the Executive therefore needed Congressional authority in order to *exercise* the right and set customary international law into motion.

Chief Justice Fuller’s misinterpretation of *Brown* underscores an important distinction between *Brown* and *The Paquete Habana*. In *Brown*, the Court conceded that the Executive had the right to confiscate enemy property, and only addressed the question of *how* that right could be exercised, i.e., with or without the legislature’s authorization. In contrast, in *The Paquete Habana*, the Court addressed the question of whether customary international law prohibited the confiscation, thereby imposing a *duty* limiting the Executive’s power to confiscate. The right/duty distinction follows naturally from the holding in *Brown*; if, as the Court said in *Brown*, the Executive cannot exercise a *right* conferred by customary international law without express authority from Congress, surely the Executive cannot violate a *duty* imposed by customary international law without express congressional authority.

Some of the early debates surrounding executive authority illustrate that Chief Justice Marshall’s contemporaries, no matter what their political persuasion, understood that customary international law imposed duties upon the Executive. In his *Letters of Pacificus*, Alexander

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90. *Brown*, 12 U.S. (8 Cranch) at 147 (Story, J., dissenting) ("The title of the enemy is not by war divested, but remains *in proprio vigore*, until a hostile seizure and possession has impaired his title.").

91. Id. at 128 (majority opinion).

92. Id.

93. Id. at 128–29 ("[T]he question, what shall be done with enemy property in our country... is proper for the consideration of the legislature, not of the executive or judiciary.").

94. Id. at 123 ("The questions to be decided by this court are: 1st. May enemy’s property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war? 2d. Is there any legislative act which authorizes such seizure and condemnation?").

95. The Paquete Habana, 175 U.S. 677, 686 (1900) ("We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States.").

Hamilton, a staunch Federalist and a proponent of a strong executive branch, argued for plenary executive power. Hamilton viewed the grant of "executive power" to the President in Article II, section 1 of the United States Constitution as a grant of "general" executive power, and the enumerated powers in Article II, section 2 as examples of, not limitations on, that general executive power. However, despite Hamilton's view that the Constitution vested the Executive with plenary power, he still recognized that the Executive had a duty to adhere to customary international law, or in the parlance of the time "the law of nations." For example, Hamilton stated, "[t]he executive is charged with the execution of all laws, the law of nations, as well as the municipal law." Although Hamilton felt that the Executive's interpretation of treaty obligations and obligations under customary international law should be given great weight because the Executive served "[a]s the organ of intercourse between the nation and foreign nations," he still acknowledged that customary international law cabined executive authority. When describing the relationship between the Executive and customary international law, Hamilton stated, "it belongs to the 'executive power' to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign powers."

James Madison, a staunch Republican and opponent of a strong centralized government, responded to the Letters of Pacificus in his Letters of Helvidius. Unlike Hamilton, Madison believed that the executive powers included only those powers explicitly vested in the Executive, i.e., only those executive powers enumerated in the Constitution. Madison declared that the Constitution itself, via enumeration of powers, defined executive power and legislative power. Despite their differing opinions on the scope of executive authority under the Constitution, there was at least one point on which Madison and Hamilton agreed: the duty of the Executive to abide by customary international law. Quoting Hamilton's Letters of Pacificus, Madison stated "'[t]he executive is charged with the execution of all laws, the laws of nations as well as the municipal law which recognizes and adopts those...

98. Id. at 407-08.
99. Id. at 408.
100. Id.
101. Id. at 407.
102. Id. at 410.
104. Id. at 435.
105. Id. at 435, 440.
laws.'” Madison professed his agreement with this statement, declaring, "[this] sentence is a truth." The debate between James Madison and Alexander Hamilton regarding executive power, and their consensus regarding the Executive's duty to abide by customary international law, demonstrates that whichever stance one adopted—the plenary executive power approach, or the enumerated executive power approach—it was universally accepted that customary international law bound the Executive. It is therefore extremely unlikely that Marshall, a contemporary of Hamilton and Madison, advocated the Executive's authority to violate customary international law in *Brown*.

**B. JUSTICE GRAY'S MISINTERPRETATION OF *BROWN V. UNITED STATES***

Chief Justice Fuller's dissent from *The Paquete Habana*, and his misinterpretation of *Brown*, would have little importance if it were not for the fact that Justice Gray, writing for the majority in *The Paquete Habana*, seemed to share Chief Justice Fuller's belief that there might be some inconsistency between *Brown* and *The Paquete Habana*. Because he shared Chief Justice Fuller's misinterpretation of *Brown*, Justice Gray failed to effectively respond to Fuller's dissent from *The Paquete Habana*.

Justice Gray stated that there were portions of *Brown* that "might seem inconsistent with the position above maintained, of the duty of a prize court to take judicial notice of a rule of international law." However, in *Brown*, Chief Justice Marshall, writing for the majority, did take notice of customary international law when he concluded, "[t]he modern rule then would seem to be, that tangible property belonging to an enemy . . . ought not to be immediately confiscated."

It is really Justice Gray's brief concession to apparent inconsistencies between *Brown* and *The Paquete Habana* that injected vulnerability into *The Paquete Habana*'s force. If Justice Gray had interpreted *Brown* in a manner suggested by this Note, he might have crafted a more effective rejoinder of Chief Justice Fuller's dissent.

**III. CHIEF JUSTICE MARSHALL, THE EXECUTIVE, AND CUSTOMARY INTERNATIONAL LAW**

Chief Justice Marshall's jurisprudence, his personal views, and his experiences in the arena of international affairs, all indicate that he

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106. Id. at 443 (quoting Hamilton, supra note 97).
107. Dodge, supra note 14, at 200 n.188.
111. Dodge, supra note 14, at 201.
believed that customary international law bound the Executive. Marshall's jurisprudence as Chief Justice illustrated his belief that it was important for the United States to follow international law if the United States was to establish itself as a member of the international community. He was careful to apply customary international law "as often as questions of right depending upon it [were] duly presented," in order to establish the United States, then a tyro in the international arena, as one of the civilized nations of the world. For example, in the prize case The Venus, Marshall applied customary international law and expressed his belief that customary international law "is a law founded on the great and immutable principles of equity and natural justice." In The Nereide, discussed further below, Marshall concluded that if Congress wished to violate customary international law, it would have to do so via express legislation, again demonstrating his hesitance to diverge from the tenets of customary international law. In the landmark case, Murray v. The Charming Betsy, Marshall established the eminence of customary international law relative to domestic law, stating "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Marshall's decisions as the Chief Justice of the Supreme Court depict a man who believed it was vitally important for the United States to adhere to customary international law and underscore the unlikeliness of Chief Justice Fuller's position that Marshall's opinion in Brown was an assertion of executive discretion to violate customary international law.

Chief Justice Marshall's other decisions regarding executive authority further undermine Fuller's contention that Brown stands for executive discretion to violate customary international law. In several wartime cases, Marshall demonstrated his belief that much of the war power resided in the legislature. For example, in The Nereide, another case arising from the War of 1812, Chief Justice Marshall stated:

>If it be the will of the government to apply... any rule respecting captures... the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."

Like The Paquete Habana, The Nereide involved the capture of an enemy vessel at sea. However, The Nereide differed from Brown and The Paquete Habana in that it involved the capture of an enemy ship
chartered by a neutral. In *The Nereide*, the Court interpreted a treaty between Spain and the United States, as well as customary international law, to decide the question of whether the goods on board the Nereide acquired the status of enemy goods by virtue of being aboard an enemy ship. The Court concluded that in the absence of a contrary congressional statement, the United States had a duty to restore the goods of a neutral under customary international law. Chief Justice Marshall's holding in *The Nereide* therefore illustrated his view that in the face of congressional silence, customary international law is binding upon the courts and the Executive.

In another wartime case, *Talbot v. Seeman*, Chief Justice Marshall again communicated his belief that many war powers reside in the legislature, not the Executive. *Talbot* involved the capture of the Amelia, a vessel from Hamburg, by the French. Hamburg and France were not belligerents at the time of the capture and, therefore, the Court concluded that under the law of nations, the Amelia did not convert to a French vessel upon capture, but remained a vessel of Hamburg. The Amelia, now commanded and manned by the French captors, was in turn captured by a U.S. warship, the Constitution. The question before the Court was whether Captain Talbot, the captain of the Constitution, had the right to seize the Amelia, and if so, whether he was entitled to a salvage fee for “saving” the Amelia from French condemnation. In deciding the first question, Marshall looked exclusively to acts of Congress to determine whether Talbot had a right to confiscate the Amelia, given that the U.S. and France were engaged in hostilities. Marshall explained his approach thus: “[t]he whole powers of war being by the Constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.” Together, *The Nereide* and *Talbot* demonstrate that Marshall believed that Congress, not the Executive, wielded “[t]he whole powers of war.” Therefore, Fuller’s interpretation of *Brown*, another Marshall opinion, as

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118. *Id.* at 418.
119. *Id.* at 418–19.
120. *Id.* at 418 ("The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged.").
121. 5 U.S. (1 Cranch) 1 (1801).
122. *Id.* at 5.
123. *Id*.
124. *Id.* at 5, 9. France and the United States were engaged in hostilities at the time. *Id.* at 1.
125. *Id.* at 6.
126. *Id.* at 19 ("It was not contemplated by any act of congress that our vessels should capture Hamburgh vessels.").
127. *Id.* at 28.
128. *Id.*
supporting executive discretion in war-related matters is simply implausible.

Although he may not have referred to it as such, Chief Justice Marshall also recognized the right/duty distinction. In his personal correspondence, Marshall wrote "[the law of nations] forms, independent of compact, a rule of action by which the sovereignties of the civilized world consent to be governed. It prescribes what one nation may do . . . and what, of consequence, another may and ought to permit." Marshall's references to what a nation "may do" (a right) under customary international law, and what a nation "ought to do" (a duty) under customary international law illustrates that he perceived that customary international law both conveyed rights and imposed duties.

Contrasting a case such as Brown, where Marshall concluded that customary international law conferred a right, with cases in which Marshall concluded that customary international law imposed a duty, further illustrates his understanding of the right/duty distinction. In The Nereide, Marshall concluded that customary international law imposed a duty to return property belonging to a neutral, but carried on an enemy vessel. Chief Justice Marshall applied this rule of customary international law without any reference to legislative or executive authorization. In fact, Justice Marshall applied the rule because Congress had said nothing at all, and in the face of Congressional silence, customary international law served as the default rule of law. The Nereide stands in contrast to Brown, wherein Marshall refused the Executive's ability to exercise a right conferred by customary international law without explicit congressional authority. The two cases, and Marshall's different approach to each, therefore serve as examples of the right/duty distinction. When customary international duty confers a right, as in Brown, the legislature must choose to exercise that right. However, when customary international law imposes a duty, as in The Nereide, the rule operates ex proprio vigore. It is unlikely that Chief Justice Fuller would have relied so heavily on Brown, a "right" case, in The Paquete Habana, a "duty" case, had he fully appreciated the right/duty distinction. His failure to appreciate this difference further undermines his reliance on Brown.

Chief Justice Marshall was immersed in international law throughout his career as a political leader, an attorney, and a judge. For
example, Marshall was a member of the envoy President John Adams sent to France in 1797 in an effort to avert war with France.\textsuperscript{134} The delegation was ultimately unable to achieve its objective, returning to the United States after French officials attempted to illicit bribes from the delegation in what is known as the XYZ Affair.\textsuperscript{135} However, John Marshall's participation undoubtedly increased his understanding of international affairs and diplomacy. President Adams also appointed John Marshall as his Secretary of State in 1800.\textsuperscript{136} During Marshall's tenure as Secretary of State, he negotiated multiple international agreements including neutrality agreements and peace treaties with France and Britain.\textsuperscript{137} Given Marshall's extensive experience in foreign affairs prior to joining the Supreme Court, it is unsurprising that he manifested a strong belief in the binding nature of international law in his jurisprudence as Chief Justice.

As a young attorney, Marshall argued many cases involving rights under international law. Marshall, a Virginian, defended Virginians against the claims of British creditors in the landmark case \emph{Ware v. Hylton}.\textsuperscript{138} In \emph{Ware}, Marshall argued to uphold Virginia laws confiscating the debts of British subjects.\textsuperscript{139} The Virginia debtors, represented by Marshall, hoped to avoid collection of their debts by asserting the validity of Virginia laws.\textsuperscript{140} Marshall relied heavily on customary international law, arguing that Virginia, as a sovereign nation, had a right to confiscate private debts under customary international law.\textsuperscript{141} Some might argue that Marshall's position in \emph{Ware} is inconsistent with his position in \emph{Brown}; in \emph{Ware} Marshall argued for confiscation of enemy debts, but in \emph{Brown}, he decided to invalidate confiscation of enemy goods. However, the two cases are reconcilable. As explained above, in \emph{Brown}, Marshall did not deny the sovereign's right to confiscate enemy property; he only stated that the sovereign must choose to exercise that right.\textsuperscript{142} In \emph{Ware}, Marshall argued that Virginia, as a sovereign state, had the right to confiscate enemy debts, and had chosen to do so.\textsuperscript{143} Although Marshall did not prevail in \emph{Ware},\textsuperscript{144} his experience in that case, as well as his experiences as a diplomat and political leader, illustrate that he was

\begin{itemize}
  \item[\textsuperscript{135}] 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 256–59 (1916).
  \item[\textsuperscript{136}] JOHNSON, supra note 134.
  \item[\textsuperscript{137}] Id. at 11.
  \item[\textsuperscript{138}] Id. at 11–12; 3 U.S. (3 Dall.) 199 (1801).
  \item[\textsuperscript{139}] Id. at 11; 3 U.S. (3 Dall.) at 214–15.
  \item[\textsuperscript{140}] Ware, 3 U.S. (3 Dall.) at 214–15.
  \item[\textsuperscript{141}] Id. at 210.
  \item[\textsuperscript{142}] See supra Part I.B.
  \item[\textsuperscript{143}] 3 U.S. (3 Dall.) at 199–200.
  \item[\textsuperscript{144}] Id. at 284–85.
\end{itemize}
intimately connected with international affairs before becoming Chief Justice of the U.S. Supreme Court in 1801.  

IV. THE MODERN RELEVANCE OF BROWN V. UNITED STATES AND THE PAQUETE HABANA

Chief Justice Fuller’s mistaken reliance on Marshall’s opinion in Brown to support his argument that the Executive may unilaterally violate customary international law would be no more than a historical curiosity if the mistake were limited to The Paquete Habana. However, Chief Justice Fuller’s misinterpretation of Brown lives on. Several recent cases, briefs, and memos addressing executive power in the War on Terrorism echo Fuller’s argument and construe Marshall’s words in Brown to support executive authority to violate customary international law. For example, in a memo written by Professor John Yoo, then a Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel to the President (Yoo-Delahunt Memo), Yoo and Delahunty advised William Haynes, General Counsel for the Department of Defense, that “[i]t is well accepted that the political branches have ample authority to override customary international law.” The Yoo-Delahunt Memo advised the Department of Defense and the President that neither the War Crimes Act of 1996 nor the Geneva Conventions applied to alleged Al-Qaeda and Taliban detainees held at Guantanamo Bay. Furthermore, the memo advised the President and the Department of Defense that “customary international law [regarding prisoners of war] does not bind the President.” Yoo and Delahunty adopted Fuller’s interpretation of Brown, and cited the same passage from Brown that Chief Justice Fuller cited in his dissent from The Paquete Habana.

Yoo and Delahunty also translated this passage from Brown into what they called “twenty-first century words” and restated it as, “overriding customary international law may prove to be a bad idea, or be subject to criticism, but there is no doubt that the government has the power to do it.” Their “translation” of the passage from Brown illustrates the fact that they shared Chief Justice Fuller’s mistaken belief that Brown stands for the proposition that the Executive can unilaterally violate customary international law.

145. JOHNSON, supra note 134, at 10, 11.
146. Yoo & Delahunty, supra note 18, at 36.
148. Yoo & Delahunty, supra note 18, at 36.
149. Id. at 39.
150. Id. at 36; The Paquete Habana, 175 U.S. 677, 715 (1900) (Fuller, C.J., dissenting) (quoting Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814)).
151. Yoo & Delahunty, supra note 18, at 36.
William Haynes, the recipient of the Yoo-Delahunty memo, sent a memo to Alberto Gonzales, then Counsel to the President, adopting the same misinterpretation of *Brown* that Yoo and Delahunty set forth in their memo.\(^{152}\) Haynes cited the same passage from *Brown* to support his position that the political branches could override customary international law.\(^{153}\)

This mistaken interpretation of *Brown* worked its way up the ranks, and in June of 2002, President George W. Bush signed an order outlining the treatment of Al-Qaeda and Taliban detainees, explicitly adopting Yoo and Delahunty's legal conclusions.\(^{154}\) The fact that contemporary jurists have adopted Chief Justice Fuller's misinterpretation of *Brown* demonstrates that Chief Justice Fuller's dissent is not just an interesting historical artifact. It is an insidious misrepresentation of *Brown*, a case that in reality stands for the proposition that the Executive *cannot* unilaterally violate customary international law.

**CONCLUSION**

*The Paquete Habana* and *Brown* serve the important role of illustrating how customary international law historically cabined executive authority. However, both the majority and dissenting opinions in *The Paquete Habana* unnecessarily weakened the case's effectiveness as a limit on executive power when they referenced passages of *Brown* that they believed were inconsistent with the Court's holding in *The Paquete Habana*. Both Chief Justice Fuller, in his dissent from *The Paquete Habana*, and Gray, in the majority opinion, misunderstood *Brown*. Fuller misunderstood *Brown* as supporting the Executive's right to violate customary law. However, the language of the *Brown* opinion, the prevailing views regarding executive power at the time Chief Justice Marshall wrote *Brown*, and Marshall's jurisprudence all indicate that *Brown* in fact stands for the opposite proposition—that the Executive cannot unilaterally violate customary international law.

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152. Bybee, *supra* note 18, at 34.
153. *Id.*
154. *Id.*