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Title: Letter from Roger B. Taney to Samuel Nelson

Date: March 9, 1863

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Monday. March 9. 1863

My Dear Sir

What do you think of inserting the following paragraph in the dissenting opinion.

The acts of 1795 and 1807 did not & could not under the constitution confer on the President the power of declaring war against a state of this Union, or of deciding that war existed, and upon that ground ~~to~~ authorizing the capture & ~~confiscation~~ ~~of~~ ~~the~~ ~~property~~ ~~of~~ ~~every~~ ~~citizen~~ ~~of~~ ~~the~~ ~~state~~ ~~whenever~~ ~~it~~ ~~was~~ ~~found~~ ~~upon~~ ~~the~~ ~~water~~ - The laws of war whether ^{the war be} civil or international, converts ~~that~~ every citizen of the hostile state into a public enemy

treats him accordingly whatever
may have been his previous con-
duct. This great power over the
business & property of the citizen is
reserved to the legislative ~~power~~ ^{Department}
by the express words of the constitution.
It cannot be delegated or surrendered
to the executive. Congress alone
can determine whether war exists
or war should be declared. And until
they have acted no citizen of a state
can be punished in his person
or property, unless he has committed
some offence against a law of con-
gress passed before the act was
committed, which made ~~that~~ ^{it}
a crime & defined the punishment.
The penalty of confiscation for the
acts of others with whom he had no
concern, cannot lawfully be im-
posed - nor can the court receive evidence
of what was said or done by a state. The right
to determine whether war exists or not

is a legislative and not a judicial
power - Congress must decide upon the suit
itself.

You will understand I am not
lenacious of this paragraph - I
submit it to your judgment.
I do not indeed know that it con-
tains any thing more than you
have said - except that it more
distinctly asserts the principle
that Congress cannot delegate or
surrender to the Executive the
Legislative power which the
Constitution requires it to ex-
ercise - and this point is of
great importance at the pre-
sent time & in the present
temper of the man in power.

You will however deal with
this matter as you think best - and
rest assured that I shall be en-
tirely content whatever you
may do with it.

Very truly, B. J. T. J.

W. Justice Nelson your friend B. B. T. J.

Am. B. p. 100. 7.

A Letter to Justice Nelson concerning the Dissent in the Prize Cases

The Prize Cases of 1863 upheld the validity, in respect to both international law and the Federal Constitution, of the seizure of foreign ships which had violated Lincoln's blockade of Southern ports before Congress either declared war or passed supporting legislation. The majority of the Supreme Court held that Congressional Acts of 1795 and of 1807, if not the executive powers implied in the Constitution itself, had authorized the President to take all measures necessary to suppress the Rebellion, which had developed into a state of war in the eyes of international law.

Four Justices, including the Chief Justice and Associate Justice Samuel Nelson, held that the prizes should have been released: the acts of 1795 and 1807 authorized the President to put down rebellions, but not to proclaim a blockade, which would be an act of war; Congressional action is needed for even a civil war to exist.

Justice Nelson, who wrote the dissent, quotes much of the paragraph which Taney offers in his letter; at page 693 (2 Black 635), the dissent reads:

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or inter gentes, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared;

and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

My Dear Sir

Monday, March 9, 1863

What do you think of inserting the following paragraph in the dissenting opinion.

The acts of 1795 and 1807 did not and could not under the constitution confer on the President the power of declaring war against a state of this union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the state whenever it was found upon the waters. The laws of war whether the war be civil or inter gentes, convert every citizen of the hostile state into a public enemy treats him accordingly whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the Legislative Department by the express words of the constitution. It cannot be delegated or surrendered to the executive. Congress alone can determine whether war exists or war should be declared. And until they have acted no citizen of a state can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime and defined the punishment. The penalty of confiscation for the acts of others with whom he had no concern, cannot lawfully be inflicted. Nor can the Court receive evidence of what was said or done by a state.

The right to determine whether war existed or not is a legislative and not a judicial power. Congress must decide before the Court can act.

You will understand I am not tenacious of this paragraph. I submit it to your judgment. I do not indeed know that it contains anything more than you have said — except that it more distinctly asserts the principle that Congress cannot delegate or surrender to the Executive the legislative power which the constitution requires it to exercise. And this point is of great importance at the present time and in the present temper of the man in power. You will however deal with this matter as you think best, and rest assured that I shall be entirely content whatever you may do with it .

Very truly

_____ Your Friend

R. B. Taney

Mr. Justice Nelson