



THE LEGEND OF THE PRIVATEER AIRSHIP AND THE CURRENTS THAT LIFTED IT

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THE FIRST YEARS of the new millennium reverberated with echoes from the past. Osama bin Laden sought to revive memories of medieval Crusades and countering campaigns of jihad. U.S. historians, working on a smaller time scale, noted that America's military engagements against terror networks in the Middle East were an echo, in some ways, of America's first foreign war – against Islamic raiders on the Barbary Coast. Then actual pirates emerged as a serious threat to international shipping off the coast of Somalia.

Amid all the other revivals, a number of legal commentators started to think about dusting off the congressional power to issue letters of marque. With so many defense commitments and such tightening constraints on our military resources, why not authorize private entities to assist?

If you were engaged in research for an article like that (as I was) about two years ago¹ and you turned to Wikipedia (as I did), you

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¹ For the fruit of that effort, see Jeremy Rabkin and Ariel Rabkin, *Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea*, 14 CHI J INT'L L

would have discovered that the last U.S. letter of marque was issued to the Goodyear Company, for blimps searching for Japanese submarines off the coast of California in 1942.

Wikipedia even provided citations, starting with a seemingly definitive account in the *Journal of the American Aviation Historical Society*, published in Spring 2001.² That article explained that, in February of 1942, a Japanese submarine had surfaced near Santa Barbara, California and “lobbed 17 shells” into an oil tank on shore. With “only one blimp on the entire West Coast” – the Goodyear blimp, *Resolute* – the navy “lost no time in issuing a ‘Letter of Marque,’ conferring ‘Privateer’ status on this airship and its crew.” And yet, as the article noted, “The only armament that the *Resolute* carried was the private hunting rifle of the captain.” How cool is that!

A bit too cool, actually. There is no record of Congress having authorized a letter of marque to Goodyear (or anyone else) in the Twentieth Century. There is no record of the Navy having issued anything that could plausibly be characterized as a letter of marque, with or without authorization.³ Say this for Wikipedia: The truth caught up with those entries. They were eventually corrected and the story of the privateer blimp recharacterized as “legend.”

But the “privateer” claim had been mentioned in Los Angeles newspapers at the time of the war.⁴ It was then repeated in a 1949

197 (2013). An earlier and far more thorough analysis of the analogy was offered by Major Theodore T. Richard, Air Force Judge Advocate, in *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB CONTR L J 411 (2010), to which I am indebted, among others things, for pointing me to several of the works that appear in the immediately ensuing footnotes.

² Richard V. Whitney, *The Goodyear Blimps Go to War*, J AM AVIATION HIST SOC’Y (Spring 2001), p. 66.

³ I say so not only on the authority of my very diligent research assistant, Lauren Mee-Salter, JD, GMU ’13 but also in reliance on the exhaustive research of Major Richard. See Richard, *Reconsidering the Letter of Marque* (n. 1, *supra*) at fn. 121 (“There is nothing in the Congressional Record authorizing any letters of marque during World War II, nor are there any executive orders commissioning those aircraft as privateers.”).

⁴ *Blimp Volunteer Mustered Out of Navy Service*, LOS ANGELES TIMES, Oct. 5, 1946, p. A1 (“The big gas bag went to war as a privateer just 10 days after Pearl Harbor”).

The Legend of the Privateer Airship

book about the history of Goodyear.⁵ A subsequent volume reaffirmed and then embellished the story, while offering a confident explanation of the legal technicalities: “The *Resolute*, operating in Los Angeles, was armed and in service even before completing the legal technicalities of swearing in the crew and commissioning [the airship into the Navy]. This made the crew members temporary pirates aboard a privateer”⁶ A later history confirmed the story.⁷ So it was an urban legend with a pedigree – or at least a compelling paper trail. Yet the story never made much sense.

When the Framers of the Constitution authorized Congress to issue “letters of marque and reprisal,” the practice was already centuries old. The letter of marque was an authorization to raid enemy shipping as an act of war (or of armed action short of all-out war). The holder of the letter was immunized against charges of piracy but still authorized to retain the booty as “prize of war” (after providing a cut to the government).⁸

The practice made sense when “privateers” – private ships bearing letters of marque – were fast sloops and the targets were slower moving merchant ships, usually with valuable cargoes and almost always with some resale value in the ship itself. Would the Goodyear Company really have been allowed to resell Japanese submarines to interested purchasers in 1942? Did the ammunition and food rations carried in those subs really have much resale value?

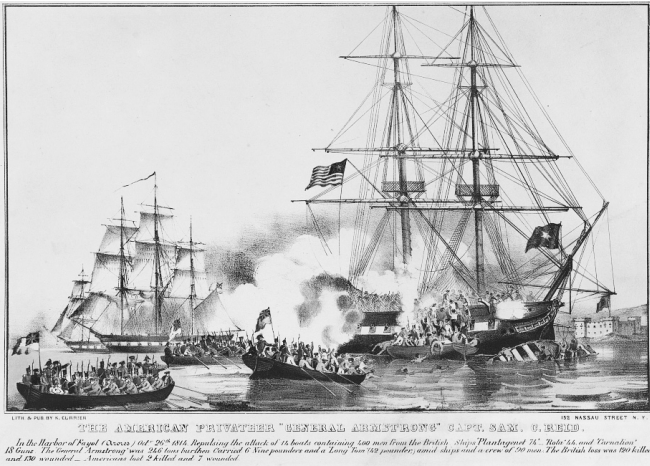
And how, precisely, were the blimps going to effect the capture? The submarines were armed with deck guns that could point upward.

⁵ Hugh Allen, *THE HOUSE OF GOODYEAR* 513 (1949): “The Goodyear blimp in California became the first privateer in Navy service since the War of 1812”

⁶ Maurice O’Reilly, *THE GOODYEAR STORY* 92-93 (1983).

⁷ James R. Shock and David R. Smith, *THE GOODYEAR AIRSHIPS* 43 (3d ed. 2002): “The Los Angeles based *Resolute* . . . operated for the Navy under privateer status, armed only with the pilot’s hunting rifle, until joining the Navy officially.”

⁸ Donald A. Petrie, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL* (1999), one of the best accounts, notes this additional incentive: adjudications by prize courts were accepted by merchants around the world as binding determinations, allowing privateers to transfer reliable title along with the captured assets – and so realize market value when selling their “loot.”



The U.S. privateer "General Armstrong" under attack by British forces during the Battle of Fayal in the Azores (1814).

That hunting rifle on Goodyear's *Resolute* was not likely to stop a Japanese submarine. Even if better armed, the rubber skin of the blimp was surely more vulnerable to attack than the steel hull of a submarine. And if — by some miracle of tactical virtuosity — the blimp "defeated" a submarine, how would it ensure that the sub meekly followed the blimp into the nearest American port? Would the sub be dragged along on an aerial tow-line?

Only a bit of reflection should have persuaded a skeptical editor to question the blimp-as-privateer story. Yet somehow, reputable publications printed the story that the U.S. Navy had issued a letter of marque to a Goodyear blimp. And subsequent writers, relying perhaps on wartime sources or on hazy recollections of Old Salts in later years, continued to accept the story of the blimp "privateer." Perhaps the confusion could be explained by the remoteness of the practice; no letters of marque had been issued in well over a century. But, then, why was the association still current in the 1940s?

There is a useful adage attributed to Mark Twain: history does not repeat itself but it does sometimes rhyme.⁹ As readers of Shake-

⁹ But according to Wikiquote, the saying is misattributed as it cannot be found in

The Legend of the Privateer Airship

spare notice, however, the rhyme of one era may not scan as such in later times. For linguists, such not-quite rhymes are a clue that the sound of certain words has shifted over the centuries. When it comes to semantic shift – changes in the overtones or associations of a word, rather than its sound – the shift can occur in mere decades. Writers in the mid-Twentieth Century heard something in “privateer” that we no longer hear. It is worth a bit of effort to recover some of those associations. The world keeps turning – and returning – to concerns supposed to have been left behind.

I.

THE DISPUTE ABOUT ARMING MERCHANT SHIPS

At the outset of the Second World War, the term “privateer” was most likely to be associated with actual sea-going ships – as in the old days. There had, in fact, been a long, ongoing dispute about the extent to which non-naval ships could participate in military actions. The dispute was connected, in some ways, with earlier disputes about privateering. But it was not at all a remote dispute at the outset of the Second World War.

European powers had declared privateering “abolished” in the 1856 Declaration of Paris.¹⁰ That did not end disputes about what commercial ships could do in wartime. The Hague Conference of 1907 sought to provide more clarity with a Convention on the Rights and Duties of Neutral States in Naval War.¹¹ It recognized that neutral states were free to trade with belligerents, if they traded without discrimination. What neutrals were not allowed to do was to provide naval bases for warships of belligerent powers. To ensure

Twain’s collected works: www.en.wikiquote.org/wiki/History#Misattributed (last visited May 14, 2015).

¹⁰ Paris Declaration Respecting Maritime Law (1856), in Natalino Ronzitti, *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 61 (1988).

¹¹ Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War (1907), available at www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=06A47A50FE7412AFC12563CD002D6877&action=openDocument.

that neutral ports did not provide havens for belligerent warships, neutrals were forbidden to allow such ships to enter their ports for more than 24 hours.¹²

Less than a decade later, the First World War put these provisions under strain. Britain's Royal Navy tried to stop imports into German ports. Germany retaliated by authorizing submarine attacks on ships entering British ports. The British responded by arming their merchant ships, first with deck guns, later with devices to hurl depth charges against submarines.¹³

What was the status of these armed merchant ships? Germany insisted that arming merchant ships violated the Declaration of Paris. When a German naval patrol captured a British merchant ship in 1916, the latter's captain (having tried to ram a German submarine) was tried as a pirate and then executed.¹⁴

The British government took a different view: Their merchant ships were "defensively armed" to deal with a very specific menace, as merchant ships in the Eighteenth Century routinely carried guns to deal with pirate attacks. Since they were not warships, armed merchant ships would not violate the Hague treaty restriction if they stayed in neutral ports for more than the 24-hour limit. That was a convenient conclusion; merchant ships needed more than 24 hours to unload and reload their cargo bays.¹⁵

Somewhat grudgingly, the Wilson administration accepted the British arguments. One indication that it did not find the arguments

¹² *Id.*, art. 12.

¹³ Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 Protocol*, 65 Int'l L Studies 28, 37-38 (1993) (on pre-war initiatives, expanded at outset of submarine war).

¹⁴ For an account of the episode, see Paul Halpern, *A NAVAL HISTORY OF THE FIRST WORLD WAR* 296 (1994). Before the war, the leading English-language treatise on international law had affirmed, "Any merchantman of a belligerent attacking a public or private vessel of the enemy would be considered and treated as a pirate and members of the crew would be liable to be treated as war criminals." Lassa Oppenheim, II INTERNATIONAL LAW 226 (2d ed. 1912).

¹⁵ Levie, *Submarine Warfare* (n. 13, *supra*) at 65. For British legal defense at the time: A. Pearce Higgins, *Armed Merchant Ships*, 8 Am J Int'l L 705 (1914).

The Legend of the Privateer Airship

altogether persuasive is that American ships remained unarmed. Not until February 1917 did the Wilson administration direct the arming of American merchant ships — only a few weeks before the United States formally declared war on Germany.

Here's where this history begins to intersect with the blimps. By the 1930s, many Americans had concluded that intervention in Europe's last great war had, after all, been a mistake. Critics insisted that the Wilson administration had compromised American neutrality from the outset and so made eventual U.S. participation inevitable. The critics demanded a more detached American posture in the event of future wars. Neutrality legislation enacted in the mid-1930s prohibited the arming of American merchant ships. It also authorized the President to bar the wartime "use of the ports and territorial waters of the United States to the submarines or armed merchant vessels of a [belligerent] foreign state."¹⁶

When war broke out in Europe in 1939, President Roosevelt went through the motions of protecting American neutrality. He duly banned submarines from U.S. ports.¹⁷ On August 30, 1939, a front-page headline in the *New York Times* informed readers: "Roosevelt Would Prevent Any Privateering." Federal officials, the article explained, had carefully searched German, British, and French passenger liners docked in New York, to "make sure they did not intend engaging in offensive warfare on the high seas."¹⁸ But Roosevelt declined to prohibit "defensively" armed merchant ships from using American ports. That provoked some criticism from advocates for continuing neutrality.¹⁹ Congress did not again authorize the arming of U.S. merchant ships until the fall of 1941.²⁰

¹⁶ 22 U.S.C. § 451.

¹⁷ Proclamation 2371, Oct. 18, 1939, in 1939 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 552 (1941).

¹⁸ *Bremen Searched; Due to Sail Today, Roosevelt Would Prevent Any Privateering*, NEW YORK TIMES, Aug. 30, 1939, p. 1.

¹⁹ Edwin Borchard, *Armed Merchantmen*, 34 AM J INT'L LAW 107 (1940).

²⁰ By amendment of the 1936 Neutrality Act, enacted Nov. 17, 1941. For background on the political debate: S.E. Morison, 1 HISTORY OF U.S. NAVAL OPERATIONS IN WORLD WAR II: BATTLE OF THE ATLANTIC 296-97 (1975).

Then the Japanese bombed Pearl Harbor and invaded American island possessions in the Pacific. With fear of an imminent invasion of California, no one was inclined to protest the U.S. Navy's temporary reliance on civilian airships.

But was it consistent with international law? Perhaps there was some vague recollection of recent debates about armed merchant ships. If blimps were not regular naval ships, wasn't it wrong for them to participate in military activities? Or would that problem be cured by having the government give formal authorization for the blimps to help the Navy? Wasn't there some old formula for handling that? Letter of marque or something?

II.

BANS ON RECRUITMENT OF NEUTRALS FOR FOREIGN WARS

There had also been several other live debates on the eve of the war that might have sown confusion. Perhaps the most immediately relevant was the recruitment of civilians into foreign armed forces.

Along with conventions on naval war, the Hague Conference of 1907 had produced a convention on the rights and duties of neutral powers in war on land.²¹ That convention did not require neutral states to prevent their nationals from volunteering to fight in foreign wars, but it did require neutral states to prevent foreign armies from recruiting on their own (neutral) territory.²²

American legislation had long prohibited such practices, but with the convention, enforcing the prohibition became an international commitment. A federal statute authorized penalties of up to three years imprisonment or \$1,000 fine for anyone "within the territory or jurisdiction of the United States" who "enlists or enters himself,

²¹ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), available at www.icrc.org/ihl/INTRO/200?OpenDocument.

²² *Id.*, art 4.

The Legend of the Privateer Airship

or hires or retains another person to enlist or enter himself,” to serve “any foreign prince, state, colony, district, or people, as a soldier”²³

In the atmosphere of the 1930s, the U.S. government took this obligation quite seriously. When civil war broke out in Spain, the State Department denied passports to some 200 American citizens suspected of seeking to enlist in the Spanish army.²⁴ In its January 16, 1937 edition, the *New York Times* reported that the U.S. Attorney’s office in New York City had been questioning one Eddie Schneider, a 25-year-old aviator, who had briefly served the Loyalist forces in the Spanish Civil War, after being recruited by “a New York lawyer.”²⁵ When Schneider told reporters he had quit over a dispute about pay, his lawyer “interrupted to say on behalf of his client that he had really quit Spain because he wished to comply with President Roosevelt’s neutrality program.”

The issue got more attention on the eve of a general war in Europe. On September 1, 1939 the *Times* reported that the federal government had prepared regulations “intended to prevent the arming and outfitting here of air privateers by belligerents”²⁶

On September 11, 1941, with the United States still officially a neutral, President Roosevelt announced that U.S. Navy ships would be authorized to “shoot first” when encountering German U-boats. The new policy, he insisted, was required by the German policy of “indiscriminate violence against any vessel sailing the seas – belligerent or non-belligerent.” And this German policy “was piracy – legal-ly and morally.”²⁷ As a legal matter, this designation was highly du-

²³ 35 Stat 1089 (codified as amended at 18 U.S.C. § 959).

²⁴ David Resiman, *Legislative Restriction on Foreign Enlistment and Travel*, 40 COLUM L REV 793 (1940), p. 807, fn. 92a. The article also describes bills in Congress which would have imposed forfeiture of U.S. citizenship on Americans who enlisted in foreign armies. *Id.*, 806-09.

²⁵ *Flier Says Lawyer Sent Him to Spain*, NEW YORK TIMES, Jan. 16, 1937, p. 3.

²⁶ *Our Aviation Rules For War Are Ready*, NEW YORK TIMES, Sept. 1, 1939, p. 8.

²⁷ *When You See a Rattlesnake Poised to Strike, You Do Not Wait Until He Has Struck before you Crush Him*, Fireside Chat to the Nation, Sept. 11, 1941, in 1941 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 384 (1950).

bious. “Piracy” was traditionally seen as armed robbery on the seas – when not authorized by a government. But Roosevelt was painting with a broad brush for a national audience.

The same speech denounced “Nazi plots” involving “Hitler’s advance guards – not only his avowed agents but also his dupes among us.” “Within the past few weeks,” Roosevelt revealed, “the discovery was made of secret air landing fields in Colombia, within easy reach of the Panama Canal.”²⁸ The speech implied that these “secret landing fields” had been constructed for the Germans by local recruits in Colombia or perhaps even by American private contractors, already engaged in construction and engineering work in the Caribbean basin.

What linked all these concerns was a general sense that war should be confined to uniformed combatants; civilians should not be participants in, nor objects of, war measures. That was the heart of the complaint against the U-boats. They snuck up on their prey, then attacked indiscriminately – against neutrals and belligerents, against civilian shipping and warships, alike. To attack civilian ships was to behave as a pirate. To assist those who would attack civilian shipping was to assist pirates and perhaps to acquire piratical taint by that association.

These distinctions were by no means clear, even to American naval authorities. Two months after Roosevelt announced the Navy’s new mission against German U-boats in the Atlantic, the attack on Pearl Harbor brought the United States into all-out war in the Pacific. The Navy promptly turned loose its own submarines against Japanese shipping – including civilian cargo ships.

A recent book reports that the Navy had, in fact, been planning to mount a submarine campaign against Japan for months before Pearl Harbor.²⁹ That was why, on the very day Congress declared war on Japan, the Chief of Naval Operations could order the submarines to take the offensive.

²⁸ *Id.*, 387.

²⁹ The story is told in Joel Ira Holwitt, *EXECUTE AGAINST JAPAN: THE U.S. DECISION TO CONDUCT UNRESTRICTED SUBMARINE WARFARE* (2009).

The Legend of the Privateer Airship



A U.S. Navy blimp starts out on patrol duty (1943).

Unlike the German U-boats, the U.S. Navy did not attack neutral shipping. There was scarcely any neutral shipping left in Pacific waters by mid-December of 1941. Nor did the U.S. Navy attack civilian passenger liners. Again, there was scarcely any traffic of that sort left in Pacific waters by that time. Most non-military ships sunk by the U.S. Navy were carrying vital war supplies to Japan, rather than cargoes related to civilian commerce.

The White House did not announce any change in U.S. policy, however. Nor did the Navy, itself, offer any public explanation. Decades later, historians could not even verify that President Roosevelt had given prior approval to the Navy's resort to unrestricted submarine warfare in the Pacific – though there are indications that he endorsed the new policy by telephone and in private meetings with naval commanders.³⁰

³⁰ *Id.*, 143-49.

So at the time the Goodyear blimps “went to war,” the prevailing idea was still that military operations should steer clear of civilians and civilians should steer clear of the military. The idea that the Goodyear blimps were simply civilians aiding the military – that may have seemed disturbing, sneaky, the sort of thing our enemies would do.

As a matter of fact, the Navy did quickly take full control of the blimp fleet. The pilots were trained by Goodyear, but served through the war as naval officers. The actual airships were sold or leased to the Navy and given formal listings as Navy craft.³¹

But if the blimps joined the Navy in 1942, what was their status before that? If they were still civilian craft, wasn’t that somehow against international law? It was soothing to think of them as . . . officially approved civilian auxiliaries. Didn’t there used to be a name for that? “Privateers,” perhaps?

There was one other reason for writers in the 1940s to worry over the status of the airships: the history of helium.

III.

BELlicOSE POTENTIAL OF AN INERT GAS

Helium is an inert gas. Therefore, it is not flammable (nor, for that matter, poisonous). It has nearly the same lifting capacity as hydrogen, but poses none of the dangers associated with hydrogen balloons. Two other considerations brought helium to the attention of Congress. First, abundant sources of helium are present in natural gas deposits in Texas and Oklahoma. Helium could therefore be secured, relatively cheaply, as a by-product of drilling for natural gas. That was discovered in 1917. The second fact was confirmed over the next few years: no other country had such abundant and readily accessible supplies of the gas.

³¹ *Blimp Pilots to be Trained in Washington*, WASHINGTON POST, Sept. 11, 1941, p. 6 (on eligibility of trainees for naval service); *Blimp Fleet Taken Over by Navy After Pearl Harbor*, WALL STREET JOURNAL, Sept. 28, 1942, p. 8.

The Legend of the Privateer Airship

In 1922, Congress was urged to protect the American strategic advantage. Congressman John Jones (D-Texas) emphasized the danger from lighter-than-air craft in the wrong hands. During the world war, even with “the great handicaps which arose from use of hydrogen,” German zeppelins were “able to throw bombs on London and cause great danger and terror.” More alarmingly: it was “an established fact that the Germans were planning just before the war closed to send a giant Zeppelin for the purpose of bombing New York City.” Then Jones sounded his chilling conclusion: “how much easier and less hazardous would it have been had the same machines been filled with helium?”³²

Two years later, Congressman Fritz Lanham (another Democrat of Texas – by no coincidence) emphasized the unique opportunity for the United States: “No other country on earth . . . has this rare element in sufficient volume to make its continued extraction feasible either commercially or as a factor in national defense.” The moral was inescapable: “[W]e have been peculiarly blessed by the Almighty with this wonderful asset of offense and defense.”³³

So in 1925, Congress enacted legislation imposing control over the sale and export of helium. By 1930, President Hoover thought it necessary to dispel the “entirely mistaken notion that the United States is preventing the use of helium in the development of lighter-than-air navigation. . . . We have not only given every export permit [private companies] have applied for, but even urged them to get into the foreign business.”³⁴ But German leaders seemed to doubt that American helium would be reliably supplied. Germany’s great zeppelin, the *Hindenburg*, continued to rely on hydrogen – and burst into flames on landing in New Jersey in May of 1937.

Bills to liberalize export of helium were introduced in Congress. President Roosevelt mobilized a cabinet committee to advise. New legislation reflected the committee’s assurance that commercial

³² CONG REC, Mar. 14, 1922, p. 3883.

³³ CONG REC, Mar. 15, 1924, p. 4277.

³⁴ *Statement about the Export of Helium*, Oct. 10, 1930, in HERBERT HOOVER, PUBLIC PAPERS AND ADDRESSES 430 (1976).



The Legend of the Privateer Airship



U.S. Army blimps around the Washington Monument (left) and the Lincoln Memorial (above) (circa 1920-1932).

export could be properly controlled. When the Deutsche Zeppelin company applied to purchase helium, the Interior Department blocked the sale on the grounds that it might be used for military purposes. Sales were subsequently approved to Britain and France – but not delivered, due to the outbreak of war.³⁵

³⁵ *Recommendation as to a Policy for the Exportation of Helium*, May 25, 1937, in 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 223 (1941) (with end notes tracing history up to 1939).

So the Goodyear blimps “went to war” after a decade of debate about whether helium could be restricted to innocent commercial service – or whether it would inevitably be diverted into military action. On the eve of the war, there was much concern about whether ostensible civilian purchasers – like the Zeppelin company in Germany – were secretly acting in furtherance of the Nazi military build-up.

If Goodyear were engaged in military activities . . . the government needed to say so and say so with some official imprimatur. “Privateer”?

IV.

EVERYTHING COMES AROUND

The concerns of the 1930s and ’40s may now seem far away. The Goodyear Company has entered into a partnership with the German firm of Zeppelin Luftschifftechnik, successor to the firm that built the *Hindenburg*. Together they have designed and constructed a new airship, superseding the famous Goodyear blimps that guarded American coasts in the Second World War. The new airship will be called a “zeppelin.” It was engaged in test flights in the spring of 2014, near the Goodyear headquarters in Akron.³⁶

Who would now regard big balloons in the sky as a threat? As it happens, the Defense Department has plans to set up a surveillance balloon – a so-called “aerostat,” a lighter-than-air craft tethered to the ground – in Maryland. Similar devices have been deployed in war zones. This one is supposed to scan the skies outside Washington, to alert the military to threats from “low-flying cruise missiles.” But who could object to that?

In fact, according to the *Washington Post*, a recent poll finds that 71 percent of local residents worry that the balloon will be a threat to their own “privacy.” If the blimps can spot vehicles on roads below, warns a civil liberties advocate at the Electronic Frontier

³⁶ For background, see the March 14, 2014 press release, *Goodyear Unveils New State-of-the-Art Blimp*, available on the company website: www.goodyear.com/cfm/web/corporate/media/news/story.cfm?a_id=1003.

The Legend of the Privateer Airship

Foundation, “You could imagine a scenario in which the location information can reveal where you go to church, what doctor you’re going to, whether you’re cheating on your wife, all those types of details.”³⁷ There is worry, in other words, that military defense measures will be entangled with other purposes, some not directly related to defense against foreign military threats.

After years of renewed debate, Congress enacted the Helium Stewardship Act³⁸ in 2013, extending federal supervision of helium production and sales for at least another decade. But the larger concern is not limited to blimps.

Only a few years earlier, the Department of Defense relied on private contractors to provide a range of services for American installations in Iraq and Afghanistan. Among other things, firms like Blackwater were recruited to provide security services. Is that a problem? According to critics, very much so!

A slew of articles and books has appeared in the past decade, arguing that “privatization” of military functions is a threat to democratic accountability, constitutional integrity, military discipline, and compliance with international norms. Some of the criticism seems alarmist or demagogic, but some critics offer learned and serious arguments. A careful assessment of the competing claims would exceed the space limits imposed in this “entertaining journal of law.”

But it is worth noticing here that, while the underlying concerns are enduring, the response varies from one episode to the next. Back in 1942, as the Navy was recruiting a Goodyear blimp for surveillance on the California coast, the Coast Guard recruited a much larger “Coastal Picket Patrol” to keep watch on the Atlantic and Gulf coasts. It consisted of “borrowed and requisitioned yachts, motorboats, converted fishing boats and small freighters” which were “often crewed by their owners” or by “college students, boy scouts, beachcombers, ex-bootleggers, rum-runners, and those disqualified

³⁷ Craig Timberg, *Blimplike surveillance craft set to deploy over Maryland heighten privacy concerns*, WASHINGTON POST, Jan. 22, 2014 (web).

³⁸ 127 Stat 534 (2013).

by age or minor physical defects from serving in the regular Navy or Coast Guard.”³⁹

These volunteers were known in the Coast Guard as the “Corsair Fleet.” Historically, the term “corsair” referred to pirates – or privateers. Yet no comparably embroidered legend developed in published literature about the issuance of “a letter of marque” to the boy scouts and rum-runners who assisted the Coast Guard.⁴⁰

We might speculate about why that legend attached to the Goodyear blimp in Los Angeles and not to the “Corsair Fleet” on the other coasts. Perhaps the “Corsairs” seemed even more removed from serious war service than the Goodyear airships. The Goodyear airships and their pilots were, after all, finally incorporated into the U.S. Navy – unlike those motorboats with the young boy scouts and the old rum-runners.

Or perhaps the lesson is that people see what they want to see. Letters of marque for the Goodyear airships may just have seemed a better story.



³⁹ Quoting Richard, *Reconsidering the Letter of Marque* (n. 1, *supra*) at fn. 128, summarizing the more extended account in S.E. Morison, *A HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II: THE BATTLE OF THE ATLANTIC* 268 (1947).

⁴⁰ Not even Wikipedia has noticed such a claim.