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Like a Sturgeon?: Royal Fish, Royal Prerogative and Modern Executive Power

Jonathan M. Gutoff*

Those familiar with the Upper West Side of Manhattan on weekends may be aware of what might be thought of as either a great schism or a dynastic struggle. On Amsterdam Avenue the heirs of Barney Greengrass claim title to sturgeon king while a short walk away, is Murray's Sturgeon Shop, domain of another sturgeon king looks out on Broadway.¹ That both proclaim themselves to be "king" is hardly surprising. There are all manner of commercial kings and who would want to proclaim a business to be the equivalent of some lesser sort of royalty, much less mere nobility. But why is the claim to the kingdom of sturgeon rather than the more familiar salmon or even whitefish? Could it be related to the fact that from early as the thirteenth century sturgeon had the privilege of being the sole fish, along with the whale, which is, of course, a mammal, to be classified as a "royal fish," that is a fish that belonged to the Crown by its prerogative? But the question of royalty and sturgeon and its relation to claims of smoked fish dominance in the twentieth century is beyond the scope of this paper. Rather, I would as the reader to take her mind away from the jewel box like surroundings of Murray's or the crowded table of Barney Greengrass, back earlier, to the foundations of the Common Law in the middle ages when the kings of England asserted their claim to sturgeon as royal fish.

The impetus for this journey comes from the recent debate and ongoing debate over the executive powers in the current fight against al Qaeda. The most forceful and articulate proponent of that power has been John Yoo, who, in a very small nutshell, argues that the waging of war was part of the Royal prerogative, that the fight against terrorists is the same as war, and that therefore the executive branch, as the depository of the royal prerogative, has plenary and, outside Congress' funding power, unreviewable powers in its conduct of the fight.² The legal arguments for Yoo's position have been extensively explored elsewhere, but a question that has been unexplored is the full nature of the royal prerogative. This essay looks at one aspect of the prerogative – the Sovereign's right to sturgeon -- as an illustration of the prerogative. This illustration show a power that arose in England in the middle ages, existed there at the time of the founding and survives in that country as a curiosity but might not necessarily be an

* Associate Professor of Law, Roger Williams University School of Law. Thanks to fellow panelists and others at the Association for the Study of Law, Culture and the Humanities, Annual Meeting, Panel on Food and Law (I) for their helpful comments and especially to Chris Butafusco for organizing the panel. Thanks to Julia Gage and Kathryn Petit for their research assistance.

¹ Compare Douglas Martin, "Moe Greengrass, 84, King of a Sturgeon Shrine" N.Y. TIMES, Jan. 5, 2002, sec. B, p. 7, col. 1 (noting the death of Moe Greengrass, "who became Manhattan's 'Sturgeon King' when his father, Barney Greengrass, left him the family's Upper West Side shrine to smoked fish, chopped liver and a good joke") with Douglas Martin, "Murray Berstein, Westside Sturgeon King Dies at 87," N.Y. TIMES, Feb. 23, 2000, sec. C, p. 27, col.1; Sara Rimer, "On West 89th Street, Lives Reflect Upheaval," N.Y. TIMES, Aug. 7, 1987, sec. B, p. 1, col. 2 (noting the retirement of "the sturgeon king of Broadway, Murray Bernstein,").

² See, generally, JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006); *id.*, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

integral part of our constitutional structure. Without further elaboration I'd like to move on to the tastiest right of the British Monarchy.

The Fish

The sturgeon is an archaic fish, which, while diversified into 25 species, has not changed much in the last 65 million years. Long lived, it does not reach sexual maturity until relatively late. Certain species can grow in excess of 20 feet and provide hundreds of pounds of fatty flesh. It is the sturgeon's late sexual maturity and high fat content that makes it especially vulnerable to over-fishing and pollution. Over-fishing will result in the taking of stock before they have the chance to reproduce, and pollution will result in the accumulation of toxins in the fish's fatty flesh which will continue to build up over the years and possibly poison the fish before it can reach maturity. The European Sturgeon, like its cousin from the Americas, is a diadromous fish that spends various phases of its life in either fresh or saltwater. Specifically, like the salmon, sea trout, shad and lamprey, the sturgeon is an anadromous fish. Its reproduces in freshwater and migrates to sea to breed.³

Prior to the industrial age and the resultant pollution of rivers the sturgeon was common throughout Western Europe and North America. Into the 19th Century North America was able to supply Europe with caviar, salted sturgeon roe. That dish, now an exclusive treat, for many tasted only as part of a New Year's Eve splurge, was a regular salty snack on the bars of New York during the nineteenth century, and the flesh of the sturgeon was common enough to be known as "Albany beef."⁴

While the sturgeon had been wide-spread around the Northern Atlantic for much of history, it does not appear to have been a regular frequenter of the British Isles at any point in recorded history. To be sure, as reported by Ziggy Otto and Tirstan Hatton-Ellis, the giant freshwater mussel, which has parasitic larvae which use the sturgeon as their host, has been found in the bed of the River Thames dating to 4,000 years ago. On the other hand, Drs. Otto and Hatton-Ellis note there are no "authenticated records of sturgeon spawning in British rivers," which would be the "best evidence" of sturgeon reproduction. They conclude that by the time Edward II promulgated the statute declaring sturgeon to be a royal fish, it was already rare in England. Since the time of Edward, there have been the occasional sturgeon caught, but it was, and continues to be, a rarity. Even the sturgeon that do appear in England are probably visitors from Europe or perhaps the Americas.⁵

The rarity of the sturgeon, its potential size and the quality of its flesh combined to make it prized at a time when fish in general were in demand and fatty fish were a luxury.

³ See World Wildlife Fund, *WWF Fact Sheet: Sturgeon* (available at <http://www.panda.org/species> (last viewed July 31, 2007)).

⁴ WAVERLY ROOT, *FOOD: AN AUTHORIATIVE AND VISUAL HISTORY AND DICTIONARY OF THE FOODS OF THE WORLD*, 54-55 (1980).

⁵ See Ziggy Otto and Tristan Hatton-Ellis, *Migrants or Vagrants?* 3-4 (n.d.) (available at http://www.walescoastalpartnership.org.uk/images_client/resource/Migrants%20or%20Vagrants.doc (last viewed July 31, 2007)). A shorter version of the piece may be found WALES COASTAL AND MARITIME PARTNERSHIP BULLETIN, No. 9, Mar. 2005 pp. 3-4 (copy on file with author).

The Fish on the English Table

Outside of Barney Greengrass, Murray's Sturgeon Shop and similar places, the flesh of sturgeon does not make much of an appearance in the United States or England.⁶ Regardless, its dense and fatty flesh makes excellent eating. And it is the flesh, not caviar, that was valued during the middle ages.

The fattiness of sturgeon, and other fish, was especially prized in medieval and early modern Europe, where in the numerous fast days of the Catholic Church, fatty fish provided a ready substitute for the caloric density and mouth feel of pork and beef. For example, smoked whale blubber, was a popular and costly item in medieval Paris during lent.⁷ While both savory and high in caloric density, fish with high fat content are more difficult to keep, for unless properly preserved the fat will go rancid and become a host to insect larvae.⁸ Its difficulty of preservation and the desirability of its flesh made fat fish a luxury item. In Saxon times, a special impost was placed on fat fish coming into London.⁹ It is not surprising that by custom, the fat-loaded whale and sturgeon should have been appropriated to the royal prerogative.

While the sturgeon did belong to the king, the right to it could be granted or gained by prescription, so it was possible for the non royal with landholdings along rivers where the occasional sturgeon might have been caught to enjoy the fish. As a result there are some medieval recipes. Thus a manuscript dating from the fifteenth century found in the library of Samuel Pepys, the Secretary of the Admiralty under the Commonwealth and Charles II, provides for the boiling of a sturgeon dressing it in vinegar or cider, which forms a sauce with which to serve the fish.¹⁰

However desirable, the sturgeon was rare and its appearance on the great menus of the medieval period was not common. Thus, while one fish day (that is a fast day when no meat was allowed) menu from the medieval period lists, among other treats, "sturgeon with crab"¹¹ on many occasions it would appear that sturgeon, like cucumbers in *The Importance of Being Earnest*, could be not

⁶ See generally, CHARLES OLIVER, *DINNER AT BUCKINGHAM PALACE* (2001) (including no recipes for sturgeon, but three for salmon); IRMA S. ROMBAUER ET AL., *THE JOY OF COOKING* (75th Anniversary ed. 2006)(listing a variety of recipes for salmon, including smoked salmon with bagels, but none for sturgeon).

⁷ See REAY TANNAHILL, *FOOD IN HISTORY*, 224 (1989).

⁸ Thus mackerel, an exceptionally fatty fish, is also the paradigmatic rotting fish. See *FOOD* at 233 (quoting Shakespeare and John Randolph).

⁹ DEBBY BANHAM, *FOOD AND DRINK IN ANGLO-SAXON ENGLAND*, 63 (paperback ed. 2004) (noting the association of fat fish with wine and the "huge toll of 6s as well as a twentieth part of the fish"); see also ANN HAGEN, *ANGLO SAXON FOOD AND DRINK* 165 (2006).

¹⁰ See MS Pepys 1047 (n.d.) (dated by British Library to the Fifteenth Century) (providing in full: "Take and lay hym in Water over nyght seth hym and let hym kele and lay hym in vyneAger or yn Aysell that sauce in kyndely ther to serue hit furth"). See also, JOSEPH GIES AND FRANCIS GIES, *LIFE IN A MEDIEVAL CASTLE*, 137 (1974) (noting that Sturgeon whale and porpoise were rare delicacies).

¹¹ See SARA PASTON-WILLIAMS, *THE ART OF SARA DINING* 66 (1999).

have been had, even for ready money.¹² For example, at the enthronement of the Archbishop of York in 1466, the archdiocese provided a spread that must have come close to stripping the north of England. The feast included the royal dishes of swan and porpoise,¹³ but no sturgeon. The prestige, yet lack, of sturgeon are further evidenced by the existence of mock sturgeon recipes, vaguely presaging the Italian *vitello tonato*.¹⁴

Into the early modern period, with the rise of the Baltic trade, the opportunity for the English to enjoy pickled sturgeon was increased, and the preserved sturgeon seems to have been a prestige treat. Thus, in the seventeenth century, Samuel Pepys, often considered the organizational genius behind the rise of English naval dominance during the course of the Dutch wars, thought a couple of barrels of sturgeon along with a dozen bottles of wine a fitting gift for his cousin, Roger Pepys, who married the heiress of the Duke of Workingham.¹⁵ Earlier, Pepys had thought pickled sturgeon a proper dish to entertain one of the Lords Commissioners of the Admiralty, although the entertainment could not have gone as planned for the sturgeon was improperly preserved and wormy. It may be pleasing to think that the sturgeon was from one of the barrels with which navel contractors occasionally bribed him.

For himself, Pepys was able to get a bribe of a keg of sturgeon from “Sir. W. Batten” a naval contractor involved in the Baltic trade in tar.¹⁶ In spite of Pepys misgiving about the contractor, by whom the King “was abused so horribly in the prices of what we buy,”¹⁷ he appears to have kept the fish. On another occasion, Pepys happily dined on a “piece of sturgeon of a barrel sent [to him] by Captain [George] Cocke,” another naval contractor.¹⁸

Aside from bribes, on one occasion, Pepys was able to enjoy a fresh sturgeon provided at a great banquet by the Mayor of Southampton. Although he does not record how it was cooked, he does note that the catch of a sturgeon was

¹² Oscar Wilde, *The Importance of Being Earnest*, Act. 1, pt. 1 (1895) (after having eaten all the cucumber sandwiches prior to his aunt’s arrival, Algernon informs her: “I am greatly distressed, Aunt Augusta, about there being no cucumbers, not even for ready money.”)

¹³ The feast included: 300 quarters of wheat; 300 tuns of ale; 1,000 tuns of wine; 104 oxen; 6 wild bulls; 1,000 sheep; 304 calves; 304 swine; 400 swans; 2,000 geese; 1,000 capons; 2,000 pigs; 4,000 plovers; 100 dozen quail; 200 dozen female sand pipers; 104 peacocks; 4,000 mallards and teal; 204 cranes; 204 kid; 400 heron; 200 pheasants; 5,000 partridge; 400 woodcock; 100 curlew; 1,000 egrets; more than 500 deer; 4,000 cold venison pasties; 2,000 hot custards; 608 pikes and bream; and 12 porpoises and seals. See FELIPE FERNANDEZ-ARMESTO, *NEAR A THOUSAND TABLES: A HISTORY OF FOOD*, 104 (2002).

¹⁴ See CONSTANCE B. HEATT AND SHARON BUTLER, *CURYE ON ENGLISH: ENGLISH CULINARY MANUSCRIPTS OF THE FOURTEENTH CENTURY (INCLUDING THE FORME OF CURY)*, 155-56 (1985). Like *vitello tonato*, the recipe is based on veal. Unlike that dish, however, it looks to honey rather than canned fish to provide the flavor, and it involves boiling the veal until it falls apart, after which it is pressed in canvas into a shape for slicing. While not willing to discourage any research, I cannot recommend it.

¹⁵ See Samuel Pepys, *Diary*, Thursday, July 16, 1663.

¹⁶ See *id.*, Saturday, June 13, 1663.

¹⁷ *Id.*

¹⁸ *Id.* Sunday, May 11, 1662.

an occurrence “which do[es] not happen in twenty years” and that the fish “was well ordered.”¹⁹

Competition from Salmon

Like sturgeon, salmon is anadromous, but unlike like it, it is a regular migrant to Britain. The fishing of anadromous fish as they swim inland to spawn is evidenced in the medieval period by the provision in the King John’s Great Charter preventing the placing of fish weirs in the River Thames and other rivers.²⁰ Salmon, due to its richness and flavor was often in demand at major feasts. For example, Pepys served a fresh “jowl,” that is the head and flesh just past the head, of salmon, to celebrate the fourth anniversary of the cutting out of his kidney stone.²¹ On the other hand, both by lack of royal control and by its common presence in Britain it was available for common purposes. Pepys, again, for example, enjoyed a “piece of buttered salmon” as a casual dinner in the buttery of a friend’s house.²²

In the eighteenth century a trade in salted salmon from Scotland developed, and in the latter part of that century the development of ice-packed shipping allowed fresh salmon from Scotland to reach the London market. The amount of salmon coming into England was so great that a local ordinance of Gloucester provided that apprentices could not be served salmon more than twice a week,²³ and by in the nineteenth century “poverty and salmon went together.”²⁴ In the middle of the nineteenth century, the premier English cookbook gives ten recipes for salmon, along with advice to the aspiring household manager on how to choose one, but for sturgeon only warns that the fish is rare in the London market and gives but two recipes.²⁵

Now, several centuries after Pepys was bribed and feted with the fish, sturgeon is longer listed as one of the culinary highlights of dinner with the Royals, or one would guess, the Mayor of Southampton. Nonetheless it retains its status at law as royal as it has for nearly a millennium.

The Fish at Law

Pre-Conquest Scandinavian and Saxon Kings of England may have claimed the right to all fish washed ashore in the realm. Kings Cnut and Edward the Confessor had given grants to the fish washed up on the shore, indicating that they had claimed the right for

¹⁹ *Id.* Saturday, April 26, 1662.

²⁰ Magna Charta cap. 33 (1215) (providing: “Omnes kydelli de cetero deponantur penitus de Tamisia, et de Medewaye, et per totam Angliam, nisi per costeram maris” that is, “all fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.”)

²¹ See Samuel Pepys, *Diary*, March 26, 1662.

²² See *id.* February 14, 1659/60.

²³ A THOUSAND TABLES at 127.

²⁴ FOOD at 431 (citing Charles Dickens).

²⁵ Compare ISABELLA MARY MAYSON, MRS. BEETON’S BOOK OF HOUSEHOLD MANAGEMENT, 301-309 (1861) (discussing salmon) with *id.* at 332-33 (discussing sturgeon).

themselves.²⁶ As early as the middle of the thirteenth century, Bracton appended to the discussion of the king's right to wreck, that is the remains of wrecked vessels and, more importantly their cargo, washed up on shore,²⁷ a discussion "about great fishes, that is sturgeon and whale"²⁸ Even more strange, perhaps, is what Bracton had to say about sturgeon and whale; for, according to him for sturgeon the king gets the whole thing on account of his prerogative, but with the whale it will suffice if the King gets the head and the Queen the tail."²⁹ Within the next hundred years, just a short while before he was to suffer the appalling death at the instigation of his wife,³⁰ Edward II promulgated a statute dealing with the royal prerogative which provided that whale sturgeon and porpoise were all Royal Fish, and within the prerogative of the crown.³¹ The embodiment of the prerogative in the Statute *Prerogative Regis* of Edward II does not have a clear origin, but it may have stemmed from a desire to control conspicuous consumption. Edward II promulgated a variety of sumptuary laws,³² and his son, Edward III, promulgated further sumptuary legislation, in response to the "excessive and over costly meats" being consumed by his subjects, which provided that

No man of whatever condition or estate, shall be allowed more than two courses at dinner or supper, or more than two kinds of food in each course, except on principal festivals of the year, when three courses at the utmost are to be allowed³³

Just over two-and-a-half centuries later Sir Edward Cooke, though not citing statute, would look to the rules for the royal prerogative over fish to help him decide who had ownership of a flock of swans.³⁴ Was it the person who had captured them, as every law student in the United States knows, is the rule for foxes?³⁵ The answer was no, for swans, being royal birds, returned to the ownership of the crown. At the end of his

²⁶ ANGLO SAXON FOOD AND DRINK at 165.

²⁷ While the topic of wreck might seem quaint, it is still of considerable importance. Recently the merchant vessel Napoli, fully laded with cargo containers, broke up off of the west coast of England. In spite of the authorities' reminders to the public that all cargo that washed ashore in the containers was to be brought into the Receiver of Wreck, people broke into various containers and made off with assorted pieces of merchandise, including a container full of BMW motorcycles. Because they were shipped with gasoline in their tanks, the BMWs were exceptionally mobile. Of the 17 motorcycles taken, 13 were reported to the Receiver of Wreck and two have been recovered by the police. See, "The First Napoli Container Raised from the Seabed," WESTERN MORNING NEWS (PLYMOUTH), Mar. 8, 2007, p. 4.

²⁸ 2 BRACTON, DE LEGIBUS ET CONSTUETUDINIBUS ANGLIAE 339 (n.d.) (giving the topic heading "[D]e grosso pisce, scilicet sturgio et baleno.>").

²⁹ *Id.* at 340 ("De sturgione vero ita observatur, quod rex illum habebit integrum propter suum privilegium. De balena vero sufficit secundum quosdam si rex inde habuerit caput et regina caudam.")

³⁰ He had a red hot poker inserted into his rectum. On his death see generally, ROY MARTIN HAINES, KING EDWARD II: EDWARD OF CAERNARFON HIS LIFE, HIS REIGN, AND ITS AFTERMATH 1284-1330 at 177-218 (2003).

³¹ STATUTE PREROGATIVE REGIS, 17 EDWARD II cap. 1 (1317).

³² PHILLIPA PULLAR, CONSUMING PASSIONS: BEING AN HISTORIC INQUIRY INTO CERTAIN ENGLISH APPETITIES, 90 (1970).

³³ 10 EDWARD III ch. 3 (quoted in CONSUMING PASSIONS at 90).

³⁴ *The Case of Swans*, 77 Eng.Rep. 431(QB 1592)

³⁵ See *Pierson v. Post*, 3 Caine's R. 175 (N.Y. 1805).

opinion Sir Edward explained that, while a person could have the right to swans on an estate, and one could have a right to royal fish, by prescription, nonetheless, without prescription the fish, like the swans, belonged to the crown.³⁶

Jumping ahead nearly two centuries, we come to Blackstone's Commentaries, which explains Bracton's seemingly odd observation about the division of the head and tail:

ANOTHER antient perquisite belonging to the queen consort, mentioned by all our old writers, and, therefore only, worthy notice, is this: that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "De sturgione observetur, quod rex illum habebit integrum: de balena vero sufficit, si rex habeat caput, et regina caudam." The reason of this whimsical division, as assigned by our antient records, was, to furnish the queen's wardrobe with whalebone.³⁷

Later, the same learned justice of the Common Pleas went on to explain.

The restrictions which are laid upon this right [of capture], by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of game; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege³⁸

While Blackstone's view about game other than Royal Fish was disputed fairly soon after he wrote,³⁹ and was eventually rejected by the House of Lords,⁴⁰ the prerogative of the Crown as set out in the statute of Edward II and explained by Blackstone has been cited in a variety of judicial opinions into the Twentieth Century.

Occasionally it comes up of discussion of Royal grants of land or the rights of the Admiralty. Thus, for example, the fact that royal fish can be subject to salvage⁴¹ is discussed in a case dealing with whether a floating light buoy was subject of salvage.⁴²

³⁶ *Case of Swans*, 77 Eng. Rep. at 435.

³⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *216 (1765-1769).

³⁸ 2 *id.* at * 403.

³⁹ See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 419 n.9 (New York, W.E. Dean 1832) (containing the commentary of William Christian, and noting that "if all wild animals belonged to the crown, it would have been superfluous to have specified whales, sturgeons, and swans. Lord Coke tells us, that 'a swan is a royal fowl; and all those the property whereof is not known, do belong to the king by his prerogative: and so whales and sturgeons are royal fish, and belong to the king by his prerogative:' But these are the only animals which our law has conferred this honour upon").

⁴⁰ *Blades v. Higgs*, 11 Eng. Rep. 1474 (H.L. 1865).

⁴¹ A maritime claim that gives a party (the "salvor") rescuing property from marine peril the ability to recover an award not just based on her time and effort, as in *quantum meruit* as a form of quasi contract, but rather a reward based on the salvor's risk, skill, effort and success. The modern law of salvage is now set out in what is known to admiralty lawyers as SALCON 89, INTERNATIONAL CONVENTION ON SALVAGE, Apr. 28, 1989, S. TREATY DOC. NO. 102-12 (1991), 1953 U.N.T.S. 193.

⁴² See *The Gas Float Whitton No. 2*, [1895] P 301 (Divisional Court) (allowing salvage).

In another case, dealing with a parcel of land on which a fish weir was built to catch the salmon in a stream, which was claimed by the plaintiff to be a public nuisance, the court rejected the precedent offered by Scots law on the ground that “in Scotland the salmon was a royal fish, and there were special grounds, therefore, for its legislative protection.”⁴³

Among the Commonwealth nations there does not appear to be any force to the crown prerogative over the fish. In New Zealand, for example, the entire concept of a royal prerogative in any fish, or at least whales, has been rejected as incompatible with the treaty obligations owed by that country to the native Maoris.⁴⁴ Were one to view the treatment of the concept of royal fish as emblematic anything, it might be the lack of systemization, or even the downright silliness, of our legal heritage.⁴⁵

However silly or not, like large parts of our legal heritage, both in the US and in Great Britain, the royal prerogative over sturgeon survives. In 1971, the Wild Creature and Forest Laws Act of 1971 abolished “any prerogative right of Her Majesty to wild creatures (*except* for royal fish and swans).”⁴⁶ The sturgeon, however, has not been left to the lone discretion of the Crown. The European sturgeon, deemed threatened with extinction and the subject of international treaties is now protected in Great Britain by various laws and administrative rules.⁴⁷

It was these laws and rules that caused Robert Davies of Wales no little grief. In 2004 Davies, a fisherman who had been dredging for Dover sole caught a nine foot, 264 pound sturgeon off the coast of Wales. Aware of the fish’s royal status, Davies offered it to Buckingham palace, which faxed leave to dispose of it as he wished. He took it to a fish market where it fetched £650. The catch and the sale attracted some publicity, and because sturgeon – known to the local press as “Stanley” -- was protected by statute, the police engaged in a fish-hunt and caught up with Stanley at the wholesale fish mongers, Moby Nick’s of Plymouth, that had bought it from Mr. Davies. Stanley was then turned over to Natural History Museum in London. Mr. Davies was dismayed at being the subject of a criminal investigation, but showing the devotion to the rule of law for which the English are known, the police inspector in charge of the case explained:

Alive or dead, sturgeon is protected by both international and UK legislation, having the type of protection that animals like giant panda and

⁴³ See *Lord Leconfield v. Lord Lonsdale*, [LR] 5 CP 657 (C.P. 1870) (holding the fish weir not to be a nuisance).

⁴⁴ *Baldick v. Jackson* 30 NZLR 343, 344-5 (1910).

⁴⁵ See, e.g., Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEG. STUD. 297 (2005) (noting an objection to the classification of obligations into contract, tort and restitution which sated “it is theoretically as unsound as a classification of birds and mammals by their structure and fishes as things that swim in water, although the student of Blackstone who knows that whales are ‘royal fish’ might perhaps find that this new science confirms the wisdom of the common law.”) (quoting R.M. Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95, 95-96 (1938)).

⁴⁶ Wild Creatures and Forrest Laws Act 1971, 1971 Ch. 47 § 1(a) (emphasis added).

⁴⁷ See 1975 Ch. 59 (Sch. 5), reference to sturgeon inserted by SI 1992/2350, art. 2; 1975 Ch. 76 (Sch. 5), reference to Sturgeon inserted by SI 1992/2350, art. 2; 1978 Ch. 26 (Sch. 5), reference to sturgeon inserted by SI 1992/2350, art 2; 1981 Ch. 69 (Sch. 5), reference to sturgeon inserted by SI 1992/2350, art 2

tigers have. They are all very rare animals and we are duty-bound to investigate facts behind any person or company being in possession of such an endangered species.⁴⁸

Apparently, the permission of the Crown was no defense.

What is relevance of the status of sturgeon in England to the government of the United States? Perhaps this fish story should give the proponents of an executive vested with the untrammelled royal prerogative some pause. First, it's worth noting that Parliament's recognition of the Crown's prerogative over sturgeon has not prevented it from enacting binding legislation on the same subject. Why can't Congress legislate on those aspects of the prerogative that have accrued to the President? Also, when those who voted on the ratification of the Constitution considered that document were they considering the whole history of the British Crown and its prerogatives? If not, what basis is there to say that the right to sturgeon, or any other part of the Royal Prerogative accrued to the executive or any other branch of government? If so, then why shouldn't the right to sturgeon be included in the powers of the President? Moreover, just as a struggle against an array of stateless actors may be considered the functional equivalent of a declared war then salmon should be considered the equivalent of sturgeon and also subject to the pleasure of the executive. On the other hand, it may be that the war power is not like a sturgeon. But those who argue for presidential powers based on the royal prerogative should explain why.

⁴⁸ See "Stanley the Sturgeon Installed at Museum," WESTERN MORNING NEWS (PLYMOUTH), June 9, 2004, p. 8.