

# The Captures Clause

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*The Captures Clause of the United States Constitution gives Congress the power to “make Rules concerning Captures on Land and Water.” A variety of courts, scholars, politicians, and others have recently cited the Clause to support conflicting arguments about the scope of Congress’s power to initiate and prosecute war. Some claim or assume that the Captures Clause gives Congress power over the taking and detention of people, while others conclude that the power is limited to property only. Similarly, those who view Congress’s power broadly understand the Captures Clause as giving Congress the general power to determine what (or whom) may be seized both as method of initiating conflict and as measure of war prosecution. Others maintain that the Clause only gives Congress power over the adjudication and division of property seized by armed private vessels. Many of these accounts rely on original history, yet none examines the Captures Clause in any detail.*

*This Article does so, tracing the meaning of captures through British and Colonial Admiralty documents, prominent works of international law, the Revolutionary War and Articles of Confederation, and the drafting and ratification of the Constitution. The result is that the eventual language in the Constitution could have been plausibly understood in a variety of ways prior to the Revolutionary War, but it probably did not include the power to determine what or whom could be taken. The Continental Congress used the word “captures” in a significantly different way—to authorize what goods (but not what people) could be taken by both public and private vessels. This is also the best reading of the Constitution’s text.*

*The Captures Clause illuminates a small but significant area of constitutional history, for captures were extremely important throughout the eighteenth century. It also sheds important light on the meaning of the Letters of Marque and Reprisal, Declare War, and Commander-in-Chief Clauses. Contrary to the views of almost everyone writing on these topics, the Letters of Marque and Reprisal Clause gave Congress only the power to license private vessels to make captures—it was the Captures Clause that gave Congress the power to determine what property was subject to capture by both public and private forces. This, in turn, supports at least a relatively broad reading of the Declare War Clause, because it gives Congress a power closely tied to the initiation of war. It also means that at least some questions of combat strategy were lodged with Congress, narrowing the possible scope of the commander-in-chief power. Finally, however, a careful look at the Captures Clause also illustrates gaps and overlaps in the Constitution’s allocation of war powers.*

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## INTRODUCTION

The Captures Clause, which gives Congress the power to “make Rules concerning Captures on Land and Water,” seems to be experiencing a heyday. Although it is one of the most arcane passages in the Constitution, the Clause was cited by the Supreme Court in *Hamdan v Rumsfeld*<sup>1</sup> and by lower courts in several recent opinions.<sup>2</sup> Dozens of law review articles and books have mentioned the Clause in the past few years,<sup>3</sup>

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<sup>1</sup> 548 US 557, 591 (2006) (“The Constitution makes the President the ‘Commander in Chief’ of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to ‘declare War . . . and make Rules concerning Captures on Land and Water,’ Art. I, § 8, cl. 11 . . .”).

<sup>2</sup> See *Kiyemba v Obama*, 561 F3d 509, 517 (DC Cir 2009) (Kavanaugh concurring); *Bancoult v McNamara*, 445 F3d 427, 433–34 (DC Cir 2006); *United States v Moussaoui*, 365 F3d 292, 320 (4th Cir 2004) (Williams concurring in part and dissenting in part); *Al Odah v United States*, 321 F3d 1134, 1136 (DC Cir 2003), revd, *Rasul v Bush*, 542 US 466 (2004); *Hamdi v Rumsfeld*, 316 F3d 450, 462 (4th Cir 2003), vacd, 542 US 507 (2004); *Harris v Kellogg, Brown & Root Services, Inc.*, 618 F Supp 2d 400, 422 (WD Pa 2009); *O.K. v Bush*, 377 F Supp 2d 102, 117 (DDC 2005).

<sup>3</sup> See, for example, David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv L Rev 941, 1020 (2008); Anthony J. Bellia, Jr. and Bradford Clark, *The Federal Common Law of Nations*, 109 Colum L Rev 1, 32, 41–42 (2009); Robert Gray Bracknell, *Real Facts, “Magic Language”, the Gulf of Tonkin Resolution, and Constitutional Authority to Commit Forces to War*, 13 New Eng J Intl & Comp L 167, 208, 215 (2007); Brian M. Christensen, *Extending Hamdan v. Rumsfeld to Combatant Status Review Tribunals*, 2007 BYU L Rev 1365, 1395–97 (2007); Tucker Culbertson, *The Constitution, the Camps & the Humanitarian Fifth Amendment*, 62 U Miami L Rev 307, 348 (2008); Robert J. Delahunty and John Yoo, *Response: Making War*, 93 Cornell L Rev 123, 125–26 (2007); Kathryn L. Einspanier, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 Georgetown L J 985, 998–99 (2008); Louis Fisher, *Preserving Constitutional Freedoms in Times of National Crisis*, 33 Vt L Rev 627, 639 (2009); Owen Fiss, *The Example of America*, 119 Yale L J Pocket Part 1, 6 (2009), online at <http://www.yalelawjournal.org/images/pdfs/764.pdf> (visited Nov 4, 2009); Elizabeth Holtzman, *Abuses of Presidential Power: Impeachment as a Remedy*, 62 U Miami L Rev 213, 219 (2008); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L Rev 1559, 1585 (2007); J. Andrew Kent, *A Textual and Historical Case against a Global Constitution*, 95 Georgetown L J 463, 480 n 93 (2007); Jules Lobel, *Conflicts between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 Ohio St L J 391, 395, 402–03 (2008); David Luban, *On the Commander in Chief Power*, 81 S Cal L Rev 477, 523 (2008); Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga L Rev 807, 827–28 (2006); Catherine Powell, *Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship between Internationalism and Constitutionalism*, 40 NYU J Intl L & Polit 723, 776 (2008); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 Tex L Rev 299, 319–21 (2008); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 Cornell L Rev 45, 60 (2007); Michael D. Ramsey, *Torturing Executive Power*, 93 Georgetown L J 1213, 1240 (2005); Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-first Century*, 1 Harv L & Policy Rev 3, 14 (2007); William Michael Treanor, *The War Powers outside the Courts*, 81 Ind L J 1333, 1336 (2006); Stephen I. Vladeck, *Congress, the Commander-in-Chief and Separation of Powers after Hamdan*, 16 Transnatl L & Contemp Probs 933, 939, 963 (2007); John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* 147 (Chicago 2005).

and it has featured prominently in two editorials in the *New York Times*.<sup>4</sup>

But what does it mean? In short, no one really seems to know, although conjecture abounds. The Clause occupies interesting constitutional real estate, following, as it does, immediately after the powers to “declare War” and “grant Letters of Marque and Reprisal.” Not surprisingly, interest in the Clause is generated in part by the longstanding debate over the scope of Congress and the president’s respective powers to initiate war.<sup>5</sup> But contemporary interest is also a function of the Clause’s potential significance in clarifying the respective powers of the president and Congress to prosecute war, an important issue particularly in the context of the wars in Iraq, Afghanistan, and the global fight against terrorism.<sup>6</sup> In both debates, the Captures Clause functions like a prop; it is pressed into the service of larger arguments, with little or no analysis of the history or meaning of the Clause itself.

This neglect does a disservice to the arguments that the Clause is invoked to support, for it is impossible to determine which, if any, modern arguments it bolsters without a better understanding of what the Clause itself means. Nor is the neglect a product of a consensus about the meaning of the Captures Clause. Instead, its significance is fundamentally—if superficially—contested along several dimensions. The reach of the Clause, for example, is unclear, particularly whether it includes persons or just property. The *New York Times* editorial page,<sup>7</sup> US senators,<sup>8</sup> and a

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<sup>4</sup> See Adam Cohen, *Congress, the Constitution and War: The Limits on Presidential Power*, *NY Times* A18 (Jan 29, 2007); Editorial, *Terrorism and the Law: In Washington, a Need to Right Wrongs*, *NY Times* WK11 (July 15, 2007).

<sup>5</sup> See, for example, Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 *U Pa L Rev* 1035, 1039 (1986); Prakash, 93 *Cornell L Rev* at 62 (cited in note 3); Michael D. Ramsey, *Textualism and War Powers*, 69 *U Chi L Rev* 1543, 1543 (2002); Yoo, *The Powers of War and Peace* at 8 (cited in note 3).

<sup>6</sup> See, for example, David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv L Rev* 689, 736 (2008); Lobel, 69 *Ohio St L J* at 402–03 (cited in note 3); Prakash, 87 *Tex L Rev* at 319–21 (cited in note 3).

<sup>7</sup> An editorial in the *New York Times* on July 15, 2007 made the following claim:

Congress and President Bush are engaged in a profound debate over what the founding fathers intended when they divided the powers to declare and conduct war between two co-equal branches of government. But on one thing, the Constitution is clear: Congress makes the rules on prisoners. At least that is what it says in Article 1, Section 8, Paragraph 11 of the Constitution, which gives Congress the power to “make rules concerning captures on land and water.” And it is good that Congress seems finally ready to get back on the job.

Editorial, *Terrorism and the Law*, *NY Times* at WK11 (cited in note 4).

<sup>8</sup> See Consideration of the Military Commissions Act of 2006, 109th Cong, 2d Sess, in 152 *Cong Rec S* 10354, S 10385 (Sept 28, 2006) (Sen Byrd); Consideration of the Department of

variety of scholars have assumed or argued in passing<sup>9</sup> that the Clause gives Congress power to control the detention and treatment of prisoners. The Supreme Court's citation to the Clause in *Hamdan* and other cases may suggest that it agrees,<sup>10</sup> but the Court has never directly considered this issue. Others assume or argue in passing that the Clause reaches property only.<sup>11</sup> Little evidence is cited in either direction.<sup>12</sup>

The type of control that the Clause gives Congress over captures is also unclear. "Rules concerning Captures" could mean rules for determining what (or whom) precisely is subject to capture by whom or it might mean procedural rules governing the disposition and treatment of captures.<sup>13</sup> Giving Congress the first kind of power—to deter-

Defense Appropriations Act, 2006, 109th Cong, 1st Sess, in 151 Cong Rec S 11061, S 11070 (Oct 5, 2005) (Sen Feinstein).

<sup>9</sup> See, for example, Barron and Lederman, 121 Harv L Rev at 736 n 143 (cited in note 6); Bracknell, 13 New Eng J Intl & Comp L at 211 (cited in note 3); Douglas A. Hass, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006*, 82 Ind L J 1101, 1103 (2007); Lobel, 69 Ohio St L J at 402 (cited in note 3); Justin W. Whitney, *FISA's Future: An Analysis of Electronic Surveillance in Light of the Special Needs Exception to the Fourth Amendment*, 47 Washburn L J 127, 142 (2007). See also Ramsey, 93 Georgetown L J at 1240 (cited in note 3) (suggesting that the Captures Clause "may also be read to encompass the seizure of persons"); Geoffrey Corn, *The Role of Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity, and Judicial Review*, 43 New Eng L Rev 17, 32 (2008) (same); Ingrid Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 Mich L Rev 61, 84 (2007) (same).

<sup>10</sup> See 548 US at 591 (listing the power to "make rules concerning Captures on Land and Water" among the relevant Article I authorities). See also *Ex parte Quirin*, 317 US 1, 10 (1942) (citing the Captures Clause); *Brown v United States*, 12 US (8 Cranch) 110, 126 (1814) (same).

<sup>11</sup> Prakash, 87 Tex L Rev at 319 n 82 (cited in note 3); John Yoo, *Transferring Terrorists*, 79 Notre Dame L Rev 1183, 1201–02 (2004). See also Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv L Rev 2047, 2133 (2005) (defining the Captures Clause in terms of property); J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 Harv J L & Pub Policy 465, 468 (2005) (same).

<sup>12</sup> The most extensive treatment of this question is found in two footnotes. Compare Prakash, 87 Tex L Rev at 319 n 83 (cited in note 3) (suggesting that captures does not include people) with Barron and Lederman, 121 Harv L Rev at 736 n 143 (cited in note 6) (suggesting that captures does include people).

<sup>13</sup> See Yoo, *The Powers of War and Peace* at 147 (cited in note 3) (arguing that the Captures Clause "involve[s] the power of Congress to recognize or declare the legal status and consequences of certain wartime actions, and not the power to authorize those actions."); Sidak, 28 Harv J L & Pub Policy at 468 (cited in note 11) (arguing that the Captures Clause refers to "legal rules to determine when, for example, the ownership of property captured by a private party during war lawfully transferred to the captor, thus extinguishing any subsequent claim of ownership by its owner at the time of capture"). Consider Paulsen, 40 Ga L Rev at 828 n 56 (cited in note 3) (reasoning that it is "exceedingly unlikely" that the Captures Clause "would grant Congress power to forbid or restrict the President's conduct with respect to captures of enemy vessels, prisoners, or resources in the course of waging war authorized by Congress"). See also John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* § 455–56 (Houghton Mifflin 1879).

mine what (or whom) may be taken—could, if the power includes control over the actions of the public armed forces,<sup>14</sup> make inroads on what is frequently believed to fall exclusively within the commander-in-chief power: tactical and combat decisions.<sup>15</sup> More generally, the Captures Clause is often cited for the broad proposition that Congress has significant war-related powers.<sup>16</sup> Resolving both the reach and type of control questions would help determine to what extent such citations are accurate.

There are other, related, uncertainties about the Clause, particularly its relationship to the declare-war and marque-and-reprisal powers. If “Rules concerning Captures” includes the power to determine what (or whom) may be taken, then Congress would have at least some power to initiate hostilities<sup>17</sup> and to conduct low-intensity warfare.<sup>18</sup> This could suggest, in turn that the Declare War Clause included war initiation, for it would be odd to give Congress the lesser, but not the greater power.<sup>19</sup> Does this reasoning not, however, make the Cap-

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<sup>14</sup> Some conclude that the Captures Clause gives Congress the power over property taken by private, but not public, vessels. See, for example, Sidak, 28 Harv J L & Pub Policy at 468 (cited in note 11); Prakash, 87 Tex L Rev at 319 (cited in note 3).

<sup>15</sup> See, for example, *Hamdan*, 548 US at 592 (“Congress cannot direct the conduct of campaigns . . .”); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 25 (Princeton 1993); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 51 (WW Norton 2d ed 1996); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Essay in Constitutional Interpretation* 115 n 123, 118 (Carolina Academic 2002); Ramsey, 93 Georgetown L J at 1236–42 (cited in note 3).

<sup>16</sup> See, for example, Holtzman, 62 U Miami L Rev at 219 (cited in note 3); Gary Lawson, *A Truism with Attitude: The Tenth Amendment and Constitutional Context*, 83 Notre Dame L Rev 469, 487 (2008); Lobel, 69 Ohio St L J at 395, 420, 453 (cited in note 3); Luban, 81 S Cal L Rev at 523 (cited in note 3); Powell, 40 NYU J Intl L & Polit at 776 (cited in note 3); Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 Transnatl L & Contemp Probs 965, 967 (2007).

<sup>17</sup> See Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 53, 61–67 (SMU 2d ed 1986); Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice under the Framers*, 40 L & Contemp Probs 12, 27 (Spring 1976); Charles A. Lofgren, *War-making under the Constitution: The Original Understanding*, 81 Yale L J 672, 697 (1972).

<sup>18</sup> Compare Jules Lobel, “Little Wars” and the Constitution, 50 U Miami L Rev 61, 67–69 (1995) (concluding that Congress has the power to control all low-intensity uses of force, by virtue of the Marque and Reprisal Clause). But see Ramsey, 69 U Chi L Rev at 1599 (cited in note 5) (concluding that the Marque and Reprisal Clause gave Congress the power to control only certain types of low-intensity warfare).

<sup>19</sup> See, for example, J. Andrew Kent, *Congress’s Under-appreciated Power to Define and Punish Offenses against the Law of Nations*, 85 Tex L Rev 843, 917 (2007). See also Prakash, 93 Cornell L Rev at 62 (cited in note 3) (making the same point with respect to letters of marque and reprisal).

tures Clause redundant of the Declare War Clause?<sup>20</sup> And why, then, did James Madison remark that the Captures Clause was redundant of a different power: to define and punish offences against the law of nations?<sup>21</sup> If the Captures Clause includes some power to conduct low-intensity warfare, is the Clause then duplicative of the Marque and Reprisal Clause? If—contrary to all of the foregoing—the Clause merely provides rules for the adjudication and division of seized property, this could support the argument that the declare-war and marque-and-reprisal powers similarly have little to do with war initiation.<sup>22</sup>

This Article undertakes to answer these questions by exploring the history and original meaning of the Captures Clause. Although the Article also describes the significance of the Clause in later debates, the focus is on the original history, for several reasons. First, there are few cases that explicitly consider the Captures Clause—most notable are *Brown v United States*<sup>23</sup> and *The Prize Cases*<sup>24</sup>—and these do not resolve the primary uncertainties surrounding the Clause.<sup>25</sup> Second, as described above, there is no generally accepted, well-settled contemporary understanding of what the Clause means. Third, debates about related provisions of the Constitution, such as the Declare War and Offenses Clauses, rely heavily on history.<sup>26</sup> Finally, in addition to resolving modern doctrinal questions about the Clause, this Article

<sup>20</sup> Delahunty and Yoo, 93 Cornell L Rev at 125–26 (cited in note 3). See also Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1175 (Little, Brown 1891) (“The power to declare war would of itself carry the incidental power to grant letters of marque and reprisal, and make rules concerning captures.”); Prakash, 93 Cornell L Rev at 55 n 40 (cited in note 3) (making the same point).

<sup>21</sup> Letter from James Madison to Joseph Cabell (Sept 18, 1828), in Jonathan Elliot, ed, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 600 (Lenox Hill 1974).

<sup>22</sup> See Yoo, *The Powers of War and Peace* at 147 (cited in note 3); Sidak, 28 Harv J L & Pub Policy at 468 (cited in note 11).

<sup>23</sup> 12 US (8 Cranch) 110 (1814).

<sup>24</sup> 67 US 635 (1862).

<sup>25</sup> See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw U L Rev 923, 963 (2009) (noting that the space for originalist methodology is larger when there is no conflict with established precedent and stare decisis).

<sup>26</sup> See, for example, Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw U L Rev 149, 149 (2009); Lobel, 69 Ohio St L J at 391 (cited in note 3); Kent, 85 Tex L Rev at 843 (cited in note 19); Yoo, *The Powers of War and Peace* at 90–106 (cited in note 3); Ramsey, 69 U Chi L Rev at 1543 (cited in note 5); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses against the Law of Nations,”* 42 Wm & Mary L Rev 447, 447 (2000); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 Yale L J 845, 865–86 (1996); Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* (Ballinger 1976); Lofgren, 81 Yale L J at 672 (cited in note 17). See generally Prakash, 93 Cornell L Rev 45 (cited in note 3).

seeks to provide a history of the Clause itself, on its own terms. Captures were of great legal, political, and economic significance when the Constitution was drafted; the history of the Captures Clause accordingly enriches our understanding of legislative power, and it also illustrates in dramatic fashion how the American colonists reworked familiar language and phrases, adapting them to the new government they had formed.

The history of the Captures Clause is difficult to write, as Part I describes, because “capture” and “captures” were commonly used in a variety of contexts in the mid- to late eighteenth century, but the Clause itself was the subject of almost no recorded discussion or debate. Not surprisingly, perhaps, today’s uncertainties about the Clause mirror uncertainties that arose throughout the nineteenth century. Part II describes the word “captures” up to and including seventeenth-century sources, many of which were still influential—either in their original form or because their language was incorporated into later documents—when the Constitution was drafted and ratified. Part III looks at eighteenth century British admiralty documents, international treatises, and other sources, including colonial American documents prior to the Revolutionary War. These reveal a dramatic mid-century increase in the use of the word “capture,” primarily in the context of property seized during maritime conflicts, but also occasionally to describe the taking of towns, armies, and individuals. This creates a spectrum of possible meanings for the Captures Clause.

Part IV analyzes the Articles of Confederation and documents from the Revolutionary period. As a result of the novel way in which federal power was allocated during the Revolutionary War, the colonists begin to use familiar language in new ways, including the word “captures.” The best reading of the Continental Congress’s power over “captures” was that it had a relatively narrow reach—not extending to persons, and only to certain kinds of property—but that the type of control it exercised was broad, including the power to determine what captures could be made by both private and public vessels. For a variety of reasons discussed in Part V, this is also the best reading of the text of the Constitution. In other words, none of the commentators, modern or historical, have correctly described the original meaning of the Captures Clause.

Part VI examines the significance of this new understanding of the Captures Clause. Because the Captures Clause has been ignored or misunderstood, commentators have also incorrectly described the Marque and Reprisal, Declare War, and Commander-in-Chief Clauses. This Part corrects those errors; indeed, it rewrites the meaning of the

Marque and Reprisal Clause as it is understood today. This Part also considers the relationship among these Clauses as well as those that give Congress the power to define and punish offenses against the law of nations, and to make rules for the government and regulation of the land and naval forces. Viewing these Clauses as a group, Part VI concludes that to a very remarkable extent, these powers granted to Congress are closely related to international law and the potential for conflict with foreign nations—the text of the Constitution unmistakably concentrates such powers not only in the federal government as a whole, but specifically in Congress.

This conclusion is consistent with other very recent historical scholarship that supports an expansive role for Congress in war initiation and prosecution. This new scholarship of congressional supremacy in war powers<sup>27</sup> has moved well beyond the old scholarship of congressional supremacy, which focused mostly on Congress's power to commit US forces to combat.<sup>28</sup> New congressional supremacists generally argue that as originally understood the Constitution gave Congress broad exclusive power over the initiation and conduct of war. Careful analysis of the Captures Clause is consistent with (and in some respects affirmatively supports) this view, but it also offers reasons to be skeptical of scholarship that attempts to provide a comprehensive, seamless account of the Constitution's original meaning on questions related to war.

## I. CAPTURES, CAPTURES EVERYWHERE

The word “capture” was used frequently in the late eighteenth century, except in the places that would be most immediately helpful to those seeking to understand the Constitution. In British practice

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<sup>27</sup> See Barron and Lederman, 121 *Harv L Rev* at 941 (cited in note 3); Lobel, 134 *U Pa L Rev* at 1035 (cited in note 5); Prakash, 87 *Tex L Rev* at 299 (cited in note 3); Wuerth, 106 *Mich L Rev* at 61 (cited in note 9). See also Kent, 85 *Tex L Rev* at 843 (cited in note 19); Luban, 81 *S Cal L Rev* at 477 (cited in note 3).

<sup>28</sup> See, for example, Louis Fisher, *Presidential War Power* 3–12 (Kansas 2d ed 2004); Lobel, 134 *U Pa L Rev* at 1035 (cited in note 5); Lofgren, 81 *Yale L J* at 677–88 (cited in note 17); W. Taylor Reveley, III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* 55–115 (Virginia 1981). See also Stromseth, 106 *Yale L J* at 861–63 (cited in note 26) (defending a strong view of congressional power to initiate war, at least as a matter of history). As late as 2002, Professor Jefferson Powell suggested that there was no disagreement about the president's exclusive tactical control over the armed forces. See Powell, *The President's Authority over Foreign Affairs* at 114–15 n 123 (cited in note 15). See also Ely, *War and Responsibility* at 25 (cited in note 15) (defending a robust Congressional power to declare war, but noting nonetheless that the Commander-in-Chief Clause was designed “to keep Congress out of day-to-day combat decisions once it had authorized the war in question”).

and international law it generally meant a seizure, usually by a maritime vessel, of moveable property either during war or in response to harm caused by a foreign nation. The property itself was often referred to as “prize,” or sometimes as “capture.” The capture of enemy vessels by ships sailing from America had been of substantial military and economic importance during wars since the late 1730s, and the cases that such captures generated became relatively commonplace in many colonial vice-admiralty courts.<sup>29</sup> Even in the opening days of the Revolutionary War, Congress and the colonies passed legislation permitting the capture of certain British vessels and enabling courts to hear captures cases. As in the 1740s, pamphlets and other documents discussed the political, military, economic, and practical aspects of capturing enemy vessels at sea.<sup>30</sup> Many of the documents most closely related to the drafting and ratification of the Constitution, however, such as the notes of those attending the Constitutional Convention, the Federalist Papers, and the records of the state ratifying conventions barely mention captures. Even the standard works of international law most familiar in eighteenth-century America, such as those by Grotius, Vattel, Pufendorf, and Burlamaqui, tended to use the word “capture” generally and relatively infrequently.<sup>31</sup>

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<sup>29</sup> Carl E. Swanson, *Predators and Prizes: American Privateering and Imperial Warfare, 1739–1748* 6–28, 37–48, 113–51 (South Carolina 1991).

<sup>30</sup> See, for example, *An Essay of a frame of government for Pennsylvania*, in James Humphreys, ed., *Early American Imprints, Series 1: Evans, 1639–1800*, No 14748 (Readex) (suggesting that the appeal of captures cases is limited to a court appointed by the United States of America); *Resolves of the General Assembly of the state of Massachusetts-Bay* (Nov 1777), in *Early American Imprints*, No 15417 (resolving to replace men’s guns lost in capture); *Notes of the General Assembly of the Colony of Rhode Island* (Feb 1776), in *Early American Imprints*, No 15044 (granting women whose boat was captured by Captain Wallace the ability to recover their personal property); James Chalmers, *Plain truth, Addressed to the inhabitants of America, containing, remarks on a late pamphlet, entitled Common Sense, 1776*, in *Early American Imprints*, No 42999 (noting that during the war of 1756, Holland’s ships were continually captured by the British); William Henry Drayton, *A charge, on the rise of the American empire, delivered by the Hon. William-Henry Drayton, Esq; chief-justice of South-Carolina; to the Grand Jury for the District of Charlestown, 1776*, in *Early American Imprints*, No 14741 (describing American captures of British West-Indian ships); Samuel Baldwin, *A sermon, preached at Plymouth, December 22, 1775*, in *Early American Imprints*, No 14657 (praising the recent capture of British ships); John Mein, *Sagittarius’s letters and political speculations* (Boston 1775), in *Early American Imprints*, No 14255 (arguing that the capture of Austrian and Swiss ships by Bostonians will not pay a third of their debts); James Burgh, *Political disquisitions; or, An enquiry into public errors, defects, and abuses* (Philadelphia 1775) in *Early American Imprints*, No 13851 (describing how, in 1768, the king had given up his share of the captures, 7,000 pounds, to lessen the debt); *The Journal of the Proceedings of the Provincial Congress of North-Carolina, held at Halifax on the 4th day of April, 1776*, in *Early American Imprints*, No 14948 (“To reimburse the loss they have sustained by the capture and detention of the sloop Joseph.”).

<sup>31</sup> See text accompanying notes 61–93.

The key sources are, for the most part, less familiar ones, such as British admiralty documents and the records of the Continental Congress. Indeed, the resolutions and ordinances of the Continental Congress are the most important material for understanding the Captures Clause. Their titles and wording are closer to the text of the eventual Constitution than the language used in other British, colonial, or international sources. Moreover, the text of the Articles of Confederation about captures—which was drafted and ratified as these resolutions and ordinances were written, debated, and enacted—is similar to that used in the Constitution. Except for the organization and jurisdiction of the federal courts, there is little reason to think that the different wording about captures in the Constitution reflected any change in meaning from the Articles of Confederation. The work of the Continental Congress during the Revolutionary War with respect to captures was, in turn, directly influenced by British admiralty practice and, to a lesser extent, by treatises on international law. Beginning with these sources and moving forward chronologically—as this Article does—makes clear the context in which the Articles of Confederation and the Constitution were drafted.

These sources show that the meaning of the word “capture” changed over time, and that by the 1770s it had both a broad, general meaning as well as a more narrow and specific one. For the most part, however, these definitions were not mutually exclusive. Moreover, there were other plausible definitions of capture that fell somewhere in between. Adding to the complexity, and despite these variations in prior usage, the Continental Congress used the word “captures” in yet a different way. The variety of plausible definitions of the word, the comparable lack of precision with respect to the word “rules,” the changes in usage over time, and the absence of contemporary debate around this Clause of the Constitution all contribute to longstanding confusion as to its meaning.

In the late nineteenth century, for example, John Norton Pomeroy defined the Captures Clause narrowly in one sense, to include only the “things taken” and not “the very act itself of taking,”<sup>32</sup> meaning that the Clause gave Congress the limited power to control “the disposition of all things taken.”<sup>33</sup> In terms of reach, however, he understood the Clause very broadly to include enemy property taken on land or sea, enemy territory, and the “persons of the enemies taken prison-

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<sup>32</sup> Pomeroy, *Introduction to the Constitutional Law of the United States* at § 455 (cited in note 13).

<sup>33</sup> *Id.*

ers.” John Tucker’s late nineteenth-century treatise on the Constitution is less clear, but suggests that the Clause had a narrow reach—to include property, not people—but conferred broader control, to include the power to regulate the act of taking itself.<sup>34</sup>

Similar questions also divided two famous jurists writing earlier in the nineteenth century: Chief Justice John Marshall and Justice Joseph Story. In the Court’s most important Captures Clause case, *Brown v United States*, Chief Justice Marshall, writing for the majority, invalidated the seizure of enemy property by a US Attorney. Relying in part on the Captures Clause, the Court concluded that the seizure was unlawful because it lacked specific statutory authorization.<sup>35</sup> Justice Story disagreed that specific statutory authorization was necessary; he viewed the Captures Clause as duplicative of the Declare War Clause<sup>36</sup> and understood the Declaration of War in 1812 as authorizing such captures.<sup>37</sup> Chief Justice Marshall also appears to have understood the Captures Clause as including people although this point was dicta.<sup>38</sup> The case does make clear that the Captures Clause gives Congress some control over the authorization to seize enemy property, but its precedential value is limited because the seizure was made by a US attorney (not the president, or someone acting under his direction) and because the seizure was made during war, thus not directly implicating questions of presidential power or war initiation. Moreover, as Justice Story pointed out in his dissent, the majority appeared to concede that had the property been outside the United States the seizure would have been lawful, but the Captures Clause itself does not make that distinction.<sup>39</sup>

The Civil War generated debate as to whether the Captures Clause gave Congress the power to confiscate rebel property and to free slaves; some argued that the type of control conferred by the Captures Clause was limited to determining procedural rules for the confiscation of property,<sup>40</sup> while others appeared to view the Clause more broadly.<sup>41</sup> In *The Prize Cases*, the Court upheld the president’s

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<sup>34</sup> John Randolph Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation* 578 (Callaghan 1899).

<sup>35</sup> *Brown*, 12 US (8 Cranch) at 110.

<sup>36</sup> Story, *Commentaries* at 62–64 (cited in note 20).

<sup>37</sup> *Brown*, 12 US (8 Cranch) at 137, 149 (Story dissenting).

<sup>38</sup> *Id* at 126–27.

<sup>39</sup> *Id* at 137–39, 151–52 (Story dissenting).

<sup>40</sup> Cong Globe, 37th Cong, 2d Sess 1573 (Apr 8, 1862) (Sen Hendersen).

<sup>41</sup> See, for example, Cong Globe, 37th Cong, 2d Sess 2930 (June 25, 1862) (Sen Wade) (defending broad Congressional powers to “appropriate” Confederate property to pay down war

seizure of vessels that had violated a blockade of southern ports, even though Congress had not declared war. Although this might suggest a narrow reading of the Captures Clause (at least as an exclusive grant of power to Congress), it is difficult to draw that conclusion because Congress ratified the seizures, the Court relied heavily on international law, and the president was responding to an armed attack (rather than initiating the conflict himself).

Contemporary uncertainty about the Captures Clause thus mirrors nineteenth-century uncertainty: whether its reach includes people, whether the type of control includes the power to authorize captures, its relationship to the Declare War and Letters of Marque and Reprisal Clauses—all were unclear then and still are today. The roots of these uncertainties date back to the mid-seventeenth century.

## II. THROUGH THE SEVENTEENTH CENTURY

Early British admiralty documents were in Latin, but by the end of the fifteenth century some were drafted in English and these already used the terms “prize” or “prizes.” A proclamation from the king in 1490, for example, which prohibited the harboring of pirates, complained that pirates were “suffered to utter and sell their prizes, spoiles, and pillages”;<sup>42</sup> an earlier proclamation from 1484 also uses the term in several places, referring to “any prise or goodys takyn on the see.”<sup>43</sup> Proclamations of neutrality,<sup>44</sup> other proclamations and orders,<sup>45</sup>

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debt, as well as to enact rules for the treatment of belligerents, such as that they be “hung or shot as a traitor” or granted “amnesty”). Nor were these issues resolved by *Miller v United States*, 78 US 268 (1870). *Miller* upheld the Confiscation Act, but did not distinguish between Congress’s declare-war power and the captures power, the executive branch did not challenge the Act, and the Court took pains to explain how the seizure was consistent with international law, although it left open whether such consistency was constitutionally required. *Id.* at 304–10.

<sup>42</sup> See *Proclamation against harbouring pirates, or buying their goods, 1490*, 6 Hen VII, in R. G. Marsden, ed, 1 *Documents Relating to Law and Custom of the Sea, A.D. 1205–1648* 145, 145–46 (Navy Records 1916).

<sup>43</sup> *Proclamation against piracy. All ships to give security for good behaviour before sailing, 1484*, 2 Rich III, in Marsden, ed, 1 *Law and Custom* 136, 136–38 (cited in note 42). See also *The Council, at the captor’s instance, declare the meaning of the King’s proclamation as to contraband, 1630*, in Marsden, ed, 1 *Law and Custom* 467, 467 (cited in note 42) (using the word “prize”).

<sup>44</sup> See, for example, *Proclamation of neutrality, 1536*, in Marsden, ed, 1 *Law and Custom* 149, 150 (cited in note 42) (referring to predatory maritime practices “whereby both parties suffer losse and detriment in their prizes”).

<sup>45</sup> See, for example, *Grant by Elizabeth to Lord Clinton, Lord High Admiral, of one third of his prizes, 1560*, in Marsden, ed, 1 *Law and Custom* 169, 169 (cited in note 42) (“[W]e are pleased that of all such prizes as are or shall happen to be taken upon thennemyes of our sayd navye . . . .”); *Instructions to Sir Richard Bingham to seize ships of the Low Countries to recompense the Queen for moneys (£35,000) lent by her, 1583*, in Marsden, ed, 1 *Law and Custom* 231, 232–33

legal opinions,<sup>46</sup> orders in council,<sup>47</sup> and documents issued by the Lord High Admiral<sup>48</sup> all referred to “prize” throughout the sixteenth and seventeenth centuries.

The term “capture,” by contrast was scarcely used during this period.<sup>49</sup> Instead of using the verb “capture,” these early British documents used “take”<sup>50</sup> and “surprise”<sup>51</sup> or phrases like “arrest, sease, and

(cited in note 42) (“[D]o your best endeavor to take one of them . . . so as the prizes to be taken by you may [ ] countervail the debt which her Highnes seketh to recover . . .”).

<sup>46</sup> See, for example, *Legal opinions as to whether, in time of war between the Emperor and France, a ship of Ragusa, with Venetian goods on board, captured by Frenchmen, and retaken by Dutchmen, was good prize to the Dutchmen, 1544*, in Marsden, ed, 1 *Law and Custom* 158, 159 (cited in note 42) (“The question is whether, this case thus standing, the shipp and goodds be to the Dutche men a juste prize or noe.”); *Opinion of civilians as to the law in the case of a capture made by one belligerent of a ship of the other in a friend’s harbour, 1564*, in Marsden, ed, 1 *Law and Custom* 179, 180 (cited in note 42) (“[W]hate so ever the enemye dothe take from thenemye in the harborrowe of a frende, that is no prise.”); *Opinions of the doctors upon matters of prize law, 1568*, in Marsden, ed, 1 *Law and Custom* 181, 181 (cited in note 42) (“[A] prise can not be good onles it be taken on the sea within the jurisdiccon of one of the two princes in controversye.”).

<sup>47</sup> See, for example, *Order of Council as to enemy goods in friends’ ships, and friends’ goods in enemy ships, 1557*, in Marsden, ed, 1 *Law and Custom* 165, 166 (cited in note 42) (“[Y]f the shippes of our subjects do take by sea any other shippes . . . or men of our enemyes . . . the whole shalbe judged to be of good prise.”).

<sup>48</sup> See, for example, *Warrant for letter of reprisal against Spain and those of the Low Countries, with authority to capture those supplying them with food or war material, 1585*, in Marsden, ed, 1 *Law and Custom* 242, 243 (cited in note 42) (authorizing the “tak[ing] as lawfull prizes all those which relieve them with victuall, or ayde them with munition, under such articles which are sett downe by the Lordes of her Majestie’s most honorable privie counsell for breakeing bulke”); *Howard to Sir John Gilbert and others, 1590*, in Marsden, ed, 1 *Law and Custom* 257 (cited in note 42) (using prize frequently, not capture); *A ship captured by a Frenchman at the entrance to Plymouth Sound, with Genoese goods on board for London, restored with the consent of the French Ambassador, 1569*, in Marsden, ed, 1 *Law and Custom* 182, 183 (cited in note 42) (“[B]ecause the sayde shippe and goodes were taken within the Queene’s Majestie’s porte, whereby the same can be not good prise, . . . the sayde shippe and goodes should be restored agayne to the owners thereof.”).

<sup>49</sup> Modern English translations of original Latin documents do use the term “capture,” but it is difficult to assess how the terms would have been translated contemporaneously. See, for example, *Sentence of the Admiralty Court, condemning the St. Anthony and her cargo as good prize, 1589*, in Marsden, ed, 1 *Law and Custom* 254, 255 (cited in note 42).

<sup>50</sup> See, for example, *Warrant to the Warden of the Cinque Ports to issue letters of reprisal, 1563*, in Marsden, ed, 1 *Law and Custom* 174 (cited in note 42) (using “take” not “capture”); *Commission of reprisals to George Reyman from the Queen, 1591*, in Marsden, ed, 1 *Law and Custom* 270, 271 (cited in note 42) (authorizing Reyman to “take by violence, or any other wayes, all suche shippes and vessells as shall belonge unto the Kynge of Spayne, or to any his subjects”); *Instructions to Richard Jeoferyes, captain of the H.M.S. Thomas, from Sir Henry Stradlinge, 1649*, in R. G. Marsden, ed, 2 *Documents Relating to Law and Custom of the Sea, AD 1649–1767* 1, 2 (Navy Records 1916) (using “take into your possession”); *Sentence condemning as prize French goods in a Hamburg ship, 1656*, in Marsden, ed, 2 *Law and Custom* 30, 31 (referring to goods “taken and lawfully seized by some shippe or shippes in the immediate service of this Commonwealth . . .”); *Order of the Council of State that suits touching captures made under foreign commissions be speedily heard, 1659*, in Marsden, ed, 2 *Law and Custom* 38, 38 (mentioning “shippes lately surprised at sea”); *Instructions to the Lords of the Admiralty to issue a commission to Sir*

apprehend”<sup>52</sup> and “cause them to be broughte into some of our portes.”<sup>53</sup> For a noun referring to property, they use “prize,” “goods,” “shippes,” and “merchandize.”<sup>54</sup> A prize sentence of admiralty judges from 1652—the period of the Commonwealth, when the King was killed and the office of Lord High Admiral was abolished—illustrates the absence of the word “capture” by using instead the awkward phrase “att the tyme of the said surprizall.”<sup>55</sup> By the middle of the next

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*Thomas Grantham to assist the East India Company against the King of Bantam, 1683*, in Marsden, ed, 2 *Law and Custom* 105, 107 (alluding to “all prizes that shall be taken by him”).

<sup>51</sup> See, for example, *Proclamation as to captures made after the death of Elizabeth, 1603*, in Marsden, ed, 1 *Law and Custom* 342, 342 (cited in note 42) (referring to “the surprizing and taking of the said King’s subjects and goods . . . as lawful prize.”); *Appointment of Sir Henry Middleton to be general of three ships sent out by the East India Company, with power to use force in defence of himself, 1609*, in Marsden, ed, 1 *Law and Custom* 375, 376 (cited in note 42) (“[Y]ou doe not attempte or goe aboute to sett upon, take, or surprize their persons, shippes, vessells, goodes, or merchaundizes . . .”); *Orders for reprisals against Spain, 1655*, in Marsden, ed, 2 *Law and Custom* 23, 24 (cited in note 50) (directing that Spanish property “may bee surprized and seized”).

<sup>52</sup> See, for example, *Letters of Marque to William and George Winter authorising them to seize, within the realm, Portugese ships and goods in recompense for their losses; with recognisance of the Winters to surrender the letters when their losses were satisfied, 1569*, in Marsden, ed, 1 *Law and Custom* 184, 185 (cited in note 42) (authorizing the Winters to “arrest, sease, and apprehend, all suche shippes, goods, wares, merchandizes, debts, and things whatsoever apperteyinge, belonginge, or due to oure sayde good brother”). This same pattern holds for colonial documents not issued by admiralty. See, for example, *A Proclamation, issued by William Penn, 1699*, in *Early American Imprints*, No 894 (cited in note 30) (offering a reward for apprehending pirates and using the phrase “pursue, apprehend and secure”).

<sup>53</sup> See, for example, *Commission from the Queen to the Lord High Admiral to issue commissions to capture pirates; and commission in pursuance thereof, to William Holstocke, 1572*, in Marsden, ed, 1 *Law and Custom* 191, 195 (cited in note 42).

<sup>54</sup> See, for example, *Letters of marque authorising George Barnstra, having also a commission from the King of France, to capture Leaguer prizes and to bring them to England, 1591*, in Marsden, ed, 1 *Law and Custom* 273, 274–75 (cited in note 42) (allowing Barnstra “to take and apprehend, by waye of hostility, them, their shippes, merchandizes, and goodes . . . [provided that] they bringe all suche prizes as they shall so take”); *Letters of reprisal to John Kitchin against Spain, 1585*, in Marsden, ed, 1 *Law and Custom* 237, 238–41 (cited in note 42) (using language such as: “myghte be licensed to staye, apprehende, and take, the goods of subjectes of the King of Spayne”; “susteyned by reason of their shippes and goods so taken”; “graunte commissions for apprehending and taking”; “to have and enjoye the same as lawfull prizes”; “or as juste prizes in the tyme of warre”); *Commission to the Earl of Cumberland to capture Spaniards, with authority to divide the spoil, 1592*, in Marsden, ed, 1 *Law and Custom* 278, 279 (cited in note 42) (referring to “such distributions of shares of goods and prizes”); *Articles sett downe by the Lords and others of His Majesty’s most honorable privy council, 1625*, in Marsden, ed, 1 *Law and Custom* 410, 411 (cited in note 42) (using “prize,” not “capture,” in instructions to privateers); *Raynsford to the Lords of the Admiralty, as to a valuable prize taken by a non-commissioned captor, 1695*, in Marsden, ed, 2 *Law and Custom* 169, 170 (cited in note 50) (same).

<sup>55</sup> *Sentence condemning French goods, 1651*, in Marsden, ed, 2 *Law and Custom* 12, 12–13 (cited in note 50). See also *Sentence of the Vice Admiralty Court of Jamaica condemning a prize captured under the above, 1663*, in Marsden, ed, 2 *Law and Custom* 45, 45 (cited in note 50) (“[T]hey belonged to such Spanish subjects at the time of the seisure and surprizall, and . . . were lawfully surprized by force.”).

century, this usage had become common—but with the word “capture” instead of “surprizall.”

By the mid-seventeenth century, the word “capture” appears in instructions (apparently directed to privateers) for reprisals against Holland. The instructions used “capture,” like the word “surprizall” above, to refer to the act of seizing a vessel, as in “on board at the tyme of the capture.”<sup>56</sup> Subsequent instructions used the term in the same way,<sup>57</sup> as did an order of the Scottish Admiralty Court<sup>58</sup> and a letter of marque from 1694.<sup>59</sup> A warrant from the Lords of Admiralty to the Vice Admiralty Court of Jamaica in 1694 to hear prize cases also used the word “capture” as a noun, but to refer to property taken from the enemy.<sup>60</sup> In all of these, “capture” was used to describe an event or property that would later be the subject of a prize proceeding.

The most significant international law treatise of the seventeenth century, Hugo Grotius’s *The Rights of War and Peace*<sup>61</sup> from 1625, uses the words “capture” and “captures” once each, apparently with reference to moveable property, to describe both the act of taking and the property itself.<sup>62</sup> The term “captive” appears far more frequently and,

<sup>56</sup> *Instructions against Holland and France, 11th May 1666*, in Marsden, ed, 2 *Law and Custom* 408, 410 (cited in note 50).

<sup>57</sup> *Instructions against Holland and France, 22nd May 1672*, in Marsden, ed, 2 *Law and Custom* 411, 411 (cited in note 50) (referring to “an accompt or intelligence of their captures or proceedings at sea”); *Instructions against France, 2nd May 1693*, in Marsden, ed, 2 *Law and Custom* 414, 418 (cited in note 50) (indicating that violations of the instructions will lead to liability for damages others “susteine by any capture, imbezilment, demurrage, or otherwise”).

<sup>58</sup> *Danish ship captured under a Swedish commission to be restored by the Scottish Admiralty Court, 1676*, in Marsden, ed, 2 *Law and Custom* 93, 94 (cited in note 50) (noting “all his Majestie’s English subjects on board at the capture”).

<sup>59</sup> *Letter of Marque for an East Indiaman, 1694*, in Marsden, ed, 2 *Law and Custom* 158, 158–59 (cited in note 50) (“And if you are outward bound at the time of such capture, you are to carry such French ships.”).

<sup>60</sup> *Warrant from the Lords of Admiralty to the Vice Admiralty Court of Jamaica to hear prize cases, 1694*, in Marsden, ed, 2 *Law and Custom* 161, 161 (cited in note 50) (ordering the court “to take cognizance of, and judicially to proceed upon all and all manner of captures, seizures, prize, and reprizalls of all ships and goods alreedy seized and taken, or which hereafter shall be seized and taken”).

<sup>61</sup> Hugo Grotius, 1 *The Rights of War and Peace* (Liberty Fund 2005) (originally published 1625). This edition is based on a 1738 English translation of the Latin edition prepared by Jean Babeyrac in 1720 which was extremely popular; George Washington owned a copy. Id at xi.

<sup>62</sup> Hugo Grotius, 3 *The Rights of War and Peace* 597 (Liberty Fund 2005) (“[I]t is in the Power of the People to grant the Spoils to others, as well as other Things; and that not only after Acquisition, but also before it; so that the *Capture* following, the *Donation* and the taking *Possession* are united.”) (emphasis added); id at 685 (emphasis added):

There is great Reason to presume, that the Sovereign in having authorised Volunteers, Partisans, and those who fit out Vessels to make Incursions upon the Enemy, and to keep the Booty for themselves, was also willing, that the Whole, however great it were, should be theirs;

consistent with modern usage, referred exclusively to a person.<sup>63</sup> “Captor” also appears frequently, and spans the two foregoing usages to refer to someone who takes either property or prisoners.<sup>64</sup> Grotius also used the more common term “prize” to refer to people, as well as both immovable and moveable property.<sup>65</sup>

At the end of the seventeenth century, the term “capture” was used infrequently, always as a noun, and it referred either to the act of taking moveable property or to such property itself. In British admiralty documents it was limited to takings that would result in a prize proceeding.

### III. THE EIGHTEENTH CENTURY

The use of the word “capture” increased dramatically in the eighteenth century, particularly as neutral rights became more important during the early and mid-century wars. British documents, including letters of marque and reprisal, reports from Admiralty, and the Prize Acts, were generally available in America<sup>66</sup> and from the beginning of the century on they uniformly use “capture” to refer to moveable property seized in a maritime conflict, or to the act of taking such property. As in the seventeenth century, these documents do not, however, use “capture” as the language of authorization. International law treatises saw a similar increase in the use of the word “capture,” but sometimes with a much broader meaning.

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unless he had previously reserved a Part of it to himself. These *Captures* are generally not considerable enough with regard to the State, tho' they are so to the private Persons who take them, and may therefore be left entirely to them, without Prejudice to the Publick.

In an earlier English translation, “capture” was used to refer to the act of seizing goods. Hugo Grotius, *Of the law of warre and peace* 618 (T. Warren 2d ed 1654) (Clement Barksdale, trans) (“Neither ought the Capture of hostile goods in a just War be judged without sin.”).

<sup>63</sup> See, for example, Grotius 3 *The Rights of War and Peace* at 565–66, 573, 614–16, 620–21, 639, 661 (cited in note 62).

<sup>64</sup> See, for example, *id* at 519, 603–05, 608, 629, 676.

<sup>65</sup> See, for example, *id* at 581 (using “prize” in reference to moveable property); *id* at 588 (same); *id* at 593 (using “prize” to refer to a woman); *id* at 600 (using “prize” to refer to property taken on water); *id* at 603 (using “prize” to refer to people and things). Samuel von Pufendorf, in *The Whole Duty of Man According to the Law of Nature*, also an important work in eighteenth century America, makes no mention of capture or prize. See generally Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature* (Liberty Fund 2003) (Andrew Tooke, trans) (originally published 1673).

<sup>66</sup> Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775–1787* 184–85 (American Philosophical Society 1977); Anthony Stokes, *A View of the Constitution of the British Colonies, in North-America and the West Indies, at the Time the Civil War Broke out on the Continent of America* 270–317 (B. White 1783).

## A. International Law

Emmerich Vattel has been described as the Founders' "clear favorite" among international authorities,<sup>67</sup> and his 1758 book *The Law of Nations*<sup>68</sup> was well known in colonial America.<sup>69</sup> It uses the verb "seize" when discussing reprisals and letters of marque;<sup>70</sup> it also analyzes the just causes of war and the declarations of war without using the term "capture," and discussed neutral rights and contraband with language such as "attack," "a lawful prize," and "seize."<sup>71</sup> The word "capture" appears first at the end of the chapter on neutrality, where Vattel refers to "prisoners and goods not yet perfectly in the enemy's power, whose capture is, as it were, not yet fully completed."<sup>72</sup> This reference to the act of taking is broad; it includes people and property. Vattel's discussions of postliminium, private persons in war, and wartime agreements also occasionally use the term "capture," both broadly to refer to people and property (both moveable and immoveable)<sup>73</sup> and more narrowly to refer to property seized by maritime vessels.<sup>74</sup> The word "capture" is far more frequent—and invariably used in the narrower sense—in the notes added in the 1854 edition put out by Joseph Chitty.<sup>75</sup>

<sup>67</sup> Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum L Rev 830, 847–48 (2006).

<sup>68</sup> Emmerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (C.G. and J. Robinson 1797) (originally published 1758).

<sup>69</sup> See Bourguignon, *The First Federal Court* at 183 (cited in note 66) (describing Vattel as the "most popular" European writer on the law of nations among American prize lawyers). See also Bernard Bailyn, *The Ideological Origins of the American Revolution* 27 (Belknap 1967) ("In pamphlet after pamphlet the American writers cited . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.").

<sup>70</sup> Emmerich de Vattel, *The Law of Nations* bk 2, ch 13, § 201 at 190 (London 1760) (originally published 1758) ("[I]f any one wrests or withholds from me my right, I may . . . to indemnify myself, deprive him also of some of his rights, or seize and detain them till I have obtained complete satisfaction."); id at ch 18, §§ 343–45 at 249–50.

<sup>71</sup> Id at bk 3, ch 7, §§ 112–14 at 40–41 (using "seize," "confiscate," and "lawful prize" with respect to the right to search neutral vessels).

<sup>72</sup> Id at § 132 at 46.

<sup>73</sup> Id at ch 13, § 196 at 78; id at ch 14, § 206 at 84.

<sup>74</sup> Vattel, *The Law of Nations* at ch 15, § 229 at 90 (cited in note 70) ("Persons fitting out private ships to cruise on the enemy . . . acquire the property of the capture. . . . The sovereign either gives up to them the whole capture or a part."). See also id at ch 16, § 239 at 94.

<sup>75</sup> Emmerich de Vattel, *The Law of Nations* lv (T. & J.W. Johnson 1854) (Joseph Chitty, ed) ("[T]he sovereign . . . has . . . [the] sole power of deciding upon questions of booty, capture, prize, and hostile seizure."); id at bk 3, ch 9, § 160 at 364 n 164 (referring to "the legal right of embargo and capture, as it affects commerce"); id at § 165 at 365 ("[W]hatever might be the legality of the capture . . . still the party had mistaken his remedy in prosecuting it."); id at ch 13, § 196 at 385 n 168 (directing readers to later sections "as to the effect of capture, as to moveables and immoveables"); id at § 202 at 390–91.

Jean Jacques Burlamaqui, who published *The Principles of Natural Law* and *The Principles of Politic Law*<sup>76</sup> in 1748, a decade before Vattel's better known work, discussed the familiar range of issues related to the initiation and waging of war, including reprisals, when title to property vests after it is taken in war, and differences between moveable and immovable property. Although "prize" is used frequently with respect to moveable property,<sup>77</sup> the term "capture" appears only once, also to describe moveable property taken from an enemy during war.<sup>78</sup>

Use of the word "capture" became more common in the mid-eighteenth century. Vattel used it more than his predecessors had, and in 1759 Richard Lee published *A Treatise of Captures in War* in English.<sup>79</sup> The book begins by defining "war"; "capture" is used first on page thirty-two in reference to the seizure of the governor of the Canary Islands in 1693.<sup>80</sup> This is the book's only explicit use of the word "capture" to refer to the taking of people; the word "captive," by contrast, is used frequently to refer to people.<sup>81</sup> There are, however, a chapter and a subchapter about the taking and treatment of people.<sup>82</sup> Given the title of the book, this suggests the reach of "captures" included people.<sup>83</sup> But these chapters do not use the word "capture" and the book addresses a number of other topics related to war that would not fall under any definition of "capture," including the definition of

<sup>76</sup> Jean Jacques Burlamaqui, *The Principles of Natural Law* (J. Nourse 1752) (Thomas Nugent, trans); Jean Jacques Burlamaqui, *The Principles of Politic Law: Being a Sequel to the Principles of Natural Law* (J. Nourse 1752) (Thomas Nugent, trans).

<sup>77</sup> See, for example, Burlamaqui, *The Principles of Politic Law* at bk 2, pt 4, ch 7, § 14 at 295 (cited in note 76) ("[T]he tranquility of nations, the good of commerce, and even the state of neutrality, require that they should always be reputed lawful prize."); id at § 16 at 295–96 ("I see no reason why the prizes, taken from the enemy, should not become our property as soon as they are taken. For when two nations are at war, both of them have all the requisites for the acquisition of property, at the very moment they take a prize."); id at § 18 (similar); id at § 23 (similar).

<sup>78</sup> Id at § 17 at 296 ("The greater or smaller difficulty the enemy may find, in recovering what has been taken from him, does not hinder the capture from actually belonging to the conqueror.").

<sup>79</sup> See Richard Lee, *A Treatise of Captures in War* (W. Sandby 1759). "Generously referred to as a translator of Bynkershoek (less generously as 'an inferior hack writer of the Seven Years War'), Lee closely patterns his treatise after the first book of Bynkershoek's *Quaestionum juris publici*." Tara Helfman, *Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War*, 30 *Yale J Intl L* 549, 557 (2005). Only in 1803, when *Quaestionum juris publici* was retranslated into English, was Bynkershoek revealed as the true author. Id at 557 n 44.

<sup>80</sup> Lee, *A Treatise of Captures* at 1–12, 31, 32 (cited in note 79).

<sup>81</sup> See, for example, id at 56–57, 63, 67.

<sup>82</sup> These are Chapter 4, *Of the Nature of War between Enemies; and the rights which war gives over the Persons of the Enemy; and of their extent and bounds*, and Chapter 20, Section 4, *Hostages*. Id at 68, 262.

<sup>83</sup> See Barron and Lederman, 121 *Harv L Rev* at 735 n 143 (cited in note 6).

war, whether deceit is permitted in war, and whether a public declaration of war is required.<sup>84</sup> Thus, the chapter on persons does not necessarily mean that the word “captures” itself would have been understood to extend that far, although, as cited above, in one instance the book clearly uses the word “capture” to include people.

Throughout the book, “capture” is used relatively infrequently (at least for a book with this title),<sup>85</sup> generally in reference to moveable property,<sup>86</sup> and sometimes to the act of taking.<sup>87</sup> Lee used “prize” more often,<sup>88</sup> generally denoting property taken at sea (by either public or private vessels) for which the captor sought judicial determination of ownership, as in the phrases “lawful prize,”<sup>89</sup> “good prize,”<sup>90</sup> “of the method of trying prize,”<sup>91</sup> and “condemnation thereupon as prize.”<sup>92</sup> This is arguably narrower than some similar uses of the term “capture,” but there was also much overlap.<sup>93</sup>

The eighteenth century also brought changes in the use of letters of marque and reprisal, which authorized the practice called privateering. The earliest use of reprisals was to permit private subjects aggrieved by the conduct of a foreign nation to seize the people or property of that nation to compensate for their own injuries.<sup>94</sup> This use of

<sup>84</sup> Lee, *A Treatise of Captures* at 1–39 (cited in note 79).

<sup>85</sup> Lee next uses “capture” more than forty pages later in a discussion of when moveable goods become the property of the captor. *Id.* at 72.

<sup>86</sup> *Id.* at 95 (“if the Capture were brought into the port of a friend”); *id.* (“an Adjudication of the Capture in such a port”); *id.* at 97 (“if the Capture is not brought to safety”); *id.* at 98 (“if a privateer was to be allowed one eighth part of the Capture”). See also *id.* at 123, 125, 134 (more examples).

<sup>87</sup> *Id.* at 215 (“[E]very Thing ought to have been restored to them which they had before the Capture.”); *id.* at 222 (using the phrase “assist in the capture” twice). See also *id.* at 238, 246 (more examples).

<sup>88</sup> See Lee, *A Treatise of Captures* at 78 (cited in note 79) (“As to moveables, such as ships, goods, and merchandize, or whatever else can become prize.”); *id.* at 32–33 (using “prize” interchangeably with “capture” to refer to a person); *id.* at 112 (“The States General, in the year 1599, published an edict, concerning all goods indiscriminately; wherever found: whereby they declared all persons and goods that belonged to the King of Spain, in all places whatsoever, to be good prize.”). See also *id.* at 130, 153, 163, 173, 174, 177, 187, 193, 194, 198–204, 209, 215 (more examples).

<sup>89</sup> *Id.* at 94, 110, 179; *id.* at 142 (“justly condemned and confiscated as prize of war”).

<sup>90</sup> *Id.* at 78, 112, 190.

<sup>91</sup> The title of Chapter XVIII is: *Of the Method of Trying Prizes taken in War: Appeals, and Cost.* *Id.* at 238.

<sup>92</sup> Lee, *A Treatise of Captures* at 239 (cited in note 79).

<sup>93</sup> As with other treatises, subsequent editions of *A Treatise of Captures in War*, including the one issued in 1803, use “capture” with greater frequency. For example, in chapter XVI, on page 77, the verb “taken” was changed to “captured” in the 1803 edition.

<sup>94</sup> Lee, *A Treatise of Captures* at 40–41 (cited in note 79). But see Vattel, *The Law of Nations* at bk 2, ch 13, § 201 at 190 (cited in note 68).

reprisals was already infrequent by the eighteenth century,<sup>95</sup> and the seizure of people through letters of reprisal had apparently become obsolete, except in retaliation for a similar seizure.<sup>96</sup> General reprisals functioned more like declarations of war; they gave private citizens and sometimes public forces license to take property (or people, historically) to compensate for harms done to the nation as a whole.<sup>97</sup> Letters of marque frequently referred to arming merchant vessels and authorizing them to respond to any acts of aggression,<sup>98</sup> although the terminology varied considerably.

By the eighteenth century, however, the most common form of privateering took place during war, as private vessels licensed with letters of marque or reprisal sought to take enemy ships, especially merchant ships, and claim them as prize. This became especially important during eighteenth-century wars in which England attempted to cut off trade between Spain and France and their colonies.<sup>99</sup> Captures of Spanish and then French vessels by American privateers proved extremely lucrative for the owners and crews of many of the vessels, made a “major contribution to British sea power by disrupting Spanish and French commerce,”<sup>100</sup> were the subject of thousands of newspaper accounts,<sup>101</sup> and brought many prize cases to the colonial vice-admiralty courts.<sup>102</sup> In this form, privateering did involve capturing people, who could, at least early on, be ransomed by their captors. But

<sup>95</sup> M. de Martens, *An Essay on Privateers, Captures, and Particularly on Recaptures* 14–15 (E. and R. Brooke 1801) (Thomas Horne, trans); Richard Pares, *Colonial Blockade and Neutral Rights, 1739–1763* 3 (Clarendon 1938); Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 *Am J Intl L* 694, 720–22 (1933); S. Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 *Cambridge L J* 60, 64–65 (1924); Albert E. Hindmarsh, *Force in Peace: Force Short of War in International Relations* 52–55 (Harvard 1933); Gardner Weld Allen, *Massachusetts Privateers of the Revolution* 9 (Mass Hist Socy 1927).

<sup>96</sup> See Vattel, *The Law of Nations* at bk 2, ch 18, § 351 at 287 (cited in note 68); Lee, *A Treatise of Captures* at 46 (cited in note 79).

<sup>97</sup> Matthew Hale, 1 *The History of the Pleas of the Crown* 162–63 (E. Rider 1800).

<sup>98</sup> See Martens, *Essay on Privateers* at 41 (cited in note 95).

<sup>99</sup> Pares, *Colonial Blockade and Neutral Rights* at 2 (cited in note 95).

<sup>100</sup> Carl E. Swanson, *American Privateering and Imperial Warfare, 1739–1748*, 42 *Wm & Mary Q* 357, 359 (1985).

<sup>101</sup> Swanson, *Predators and Prizes* at 12–28 (cited in note 29). See also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 *Harv Intl L J* 183, 213–14 (2004) (emphasizing the popularity and significance of privateering).

<sup>102</sup> See Swanson, *Predators and Prizes* at 360 n 9 (cited in note 29); Dorothy S. Towle, ed, *Records of the Vice Admiralty Court of Rhode Island, 1716–1752* 35–42 (American Historical Association 1936). American privateering and prize cases in colonial courts date back more than a century before the Seven Years’ War. See Marguerite Appleton, *Rhode Island’s First Court of Admiralty*, 5 *New Eng Q* 148, 150–52 (1932) (describing privateering and prize cases in Rhode Island in 1653—when England was at war with the Dutch—and in 1694).

that practice was phased out, and by the eighteenth century it appears that prisoners were taken—at least by privateers—largely because they happened to be aboard the vessels that were seized as prize.

Thus the eighteenth century saw a dramatic increase in the importance of neutral rights and prize, a decrease in the use of specific reprisals, and a decrease in the importance of individual prisoners (at least in the context of maritime war). Use of the word “capture” increased in international treaties both as a noun to describe the act of taking property or the property itself, but also—this usage was less frequent—more broadly to describe the act of taking people, towns, or other property.

### B. British and Colonial Practice

The first significant, sustained use of the term “capture” came in acts of Parliament beginning in the early eighteenth century. The Prize Acts, usually passed after the initiation of hostilities by the Crown, were designed in part to encourage the outfitting of private vessels and enlistment in the Royal Navy.<sup>103</sup> To this end, they frequently gave the crew (and in the case of private vessels, the owners) the “sole interest and property” in any vessels or goods that they took which were “adjudged lawful prize.”<sup>104</sup> They also employed a variety of measures to try to ensure that prize proceedings were “speedy” and free of corruption. The word “capture” was used neither to refer to the act of taking something, nor to the authorization to use force or take property.<sup>105</sup> But beginning in 1707,<sup>106</sup> many sections of the Prize Acts used “capture” as a noun to refer to a vessel or goods that had been seized

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<sup>103</sup> See Pares, *Colonial Blockade and Neutral Rights* at 6–7 (cited in note 95).

<sup>104</sup> See, for example, Statute of 6 Anne, ch 37, §§ 2, 3 (1707); Statute of 17 Geo 2 ch 34, §§ 1, 2 (1744); Statute of 29 Geo 2, ch 34, §§ 1, 2 (1756); Statute of 16 Geo 3, ch 5, § 3 (1776); Statute of 19 Geo 3, ch 67, §§ 1, 2 (1779).

<sup>105</sup> The 1707 Act, for example, required the issuance of Commissions to private ships of war “for the attacking, surprising, seizing, and taking, by and with such Ship or Vessel of her Majesty’s Enemies,” Statute of 6 Anne, ch 37, § 2 (1707), but capture was not used in this context. Similarly, the Act authorizes her Majesty to grant Commissions “for the attacking, surprising, taking or destroying any Ships, Goods Moveables, and Immoveables . . .” *Id.* at § 14. See also Statute of 17 Geo 2, ch 34, §§ 1, 16 (1744) (using identical language); Statute of 29 Geo 2, ch 34, § 2 (1756) (using similar language); Statute of 19 Geo 3, ch 67, § 2 (1779) (using similar language).

<sup>106</sup> The first Prize Act, from 1692, see Pares, *Colonial Blockade and Neutral Rights* at 3 (cited in note 95), did not use the term “capture.” See also Marsden, ed, *2 Law and Custom* at xii (cited in note 50). Neither did earlier legislation dealing with naval and maritime issues. See, for example, Statute of 15 Car 2, ch 7 (1663); Statute of 13 Car 2, ch 9 (1661); Statute of 12 Car 2, ch 18 (1660).

but not yet condemned (or acquitted) as prize.<sup>107</sup> These sources suggest a narrow understanding of both the reach and type of control denoted by the term “captures,” limited to moveable property taken during maritime conflict for later adjudication as prize.

British and colonial practice, outside of the Prize Acts, sometimes used the term “capture” as a noun to refer to the act of seizing a vessel or goods,<sup>108</sup> or (as in the Prize Acts) to property itself.<sup>109</sup> Both usages occurred in the context of property that would be taken to a prize court. As an example, “capture” was used often in the extremely influential report from 1753 on Frederick II’s decision to withhold payment of interest on a loan as a reprisal for losses to Prussian vessels at the hands of English privateers.<sup>110</sup> The report argued that the Prussian

<sup>107</sup> One statute from 1707 included the following examples: “[e]xamination of the Persons commonly examined in such Cases, in order to prove the Capture to be lawful Prize”; “and in case no Claim of such Capture, Ship, Vessel, or Goods shall be duly entered or made in the usual form”; “either to discharge and acquit such Capture, or to adjudge and condemn the same as lawful Prize”; “and also of the Writings found taken in or with such Capture”; “proceed to such Sentence, as aforesaid touching such Capture”; “whether such Capture be lawful Prize or not”; “Judge or Judges shall forthwith cause such Capture to be appraised by Persons”; “in case any such Capture or Captures shall be adjudged not to be lawful prize”; “all such Captures as aforesaid, which shall be brought into any of her Majesty’s Colonies or Plantations in America.” See Statute of 6 Anne, ch 37, §§ 4, 5, 6. For more examples of virtually identical language, see Statute of 17 Geo 2, ch 34 (1744); Statute of 29 Geo 2, ch 34 (1756); Statute of 16 Geo 3, ch 5 (1776); Statute of 19 Geo 3, ch 67, §§ 17–19 (1779).

<sup>108</sup> See, for example, Charles Jenkinson, *Discourse on the Conduct of the Government of Great-Britain, in Respect to Neutral Nations, during The Present War* 21 (London 1759) (“those Principles, on which this Right of Capture is grounded”); *id.* at 22 (“It has been pretended, that the Liberty of Navigation is destroyed by Means of these Captures.”); *id.* at 42 (“As for the Captures at Sea, they must be considered as belonging to the American War”); *Letter from Penrice to Burchett, 1721*, in Marsden, ed, 2 *Law and Custom* 256, 257 (cited in note 50) (“all things relating to captures made in the British or Northern seas or Elsewhere”); *Sentence of the Antigua Vice Admiralty court, 1730*, in Marsden, ed, 2 *Law and Custom* 276, 276 (cited in note 50) (ordering restitution of a French ship and declaring “the said seizure, or capture, and detention of the said shallop” to be unlawful). For more examples, see *Agreement between England and Spain as to steps to be taken to put a stop to hostilities in American waters, 1732*, in Marsden, ed, 2 *Law and Custom* 279, 280 (cited in note 50); *A Proclamation By the Honorable the President and Council of the Province of Pennsylvania, April 1, 1748*, in *Early American Imprints*, No 40473 (cited in note 30); *A state of the trade carried on with the French on the island of Hispaniola 2*, in *Early American Imprints*, No 41170 (cited in note 30).

<sup>109</sup> *Warrant for delivery to the East India Company of a French prize captured by one of their ships without commission, 1768*, in Marsden, ed, 2 *Law and Custom* 400, 401 (cited in note 50) (“And whereas the said armed ship called the Revenge, not having at the time of the said capture of the Indien any letter of marque or commission for war . . . the said capture has been condemned by the sentence of Our said court as a droit of Admiralty.”).

<sup>110</sup> The report was authored by the law officers of the crown. See *Report of the Law Officers of the Crown*, in Ernest Satow, *The Silesian Loan and Frederick the Great* 77, 77–106 (Clarendon 1915). Anthony Stokes calls this report one of “the most useful books to a lawyer in the Colonies, in questions on captures at sea in time of War.” Stokes, *Constitution of the British Colonies at*

reprisals were unlawful and used “capture” to describe both the act of taking property<sup>111</sup> and the property itself.<sup>112</sup>

Although the word “capture” was used with increasing frequency starting in the mid-eighteenth century, it was still used as a noun, did not generally refer to people, did not act as the language that authorized the taking of property, and remained far less common than the older term “prize.”<sup>113</sup> British materials from the American Revolution generally followed the same pattern, and frequently borrowed language from earlier documents. On May 2, 1776, for example, the king granted a commission to the High Court of Admiralty to “judicially [ ] proceed upon all and all manner of seizures, forfeitures, captures, recaptures, prizes, and reprisals, of all ships and goods already seized and taken, or which shall hereafter be seized and taken.”<sup>114</sup> This language is virtually identical to other commissions dating back nearly a century.<sup>115</sup>

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277–78 (cited in note 66). See also Marsden, ed, 2 *Law and Custom* at xxii (cited in note 50) (describing the report’s influence).

<sup>111</sup> See, for example, *Report of the Law Officers* at 78 (cited in note 110) (“Whatever is the Property of the Enemy, may be acquired by Capture at Sea”); id at 83 (“but, from the Circumstances of the Capture”); id at 82, 86, 96 (more examples).

<sup>112</sup> Id at 78 (“By the Maritime Law of Nations, universally and immemorially received, there is an established Method of Determination, whether the Capture be, or be not, lawful Prize.”); id at 95–96 (more examples).

<sup>113</sup> Like similar documents from the seventeenth century, a warrant from 1744 to issue letters of marque uses the phrase “apprehend, seize and take,” as well as “liable to confiscation” and “prizes,” but not the word “capture.” *Warrant to issue letters of marque for the Endeavour, 1744*, in Marsden, ed, 2 *Law and Custom* 304, 304–08 (cited in note 50). See also *Letter from Penrice to Corbett; as to contraband and other goods in Hamburg ships, 1744*, in Marsden, ed, 2 *Law and Custom* 308, 310 (cited in note 50) (using “seized as prize”; “seizure”; and “seized as good and lawful prize”). Similarly, 1744 French Prize Regulations do not use the word “capture,” but do use, many times, “legal prize” and “lawful prize.” *French prize regulations, 1744*, in Marsden, ed, 2 *Law and Custom* 312, 312 (cited in note 50). See also *Order of the Lords to captains of H.M. ships to seize naval stores in neutral ships bound to an enemy port, 1745*, in Marsden, ed, 2 *Law and Custom* 321, 321 (cited in note 50). Similar verbs were used in the colonies with respect to the seizure of people. See *A Proclamation by Samuel Shute, Esq., Captain General and Governor in Chief in and over His Majesties’ Province of Massachusetts-Bay in New England, November 25, 1718*, in *Early American Imprints*, No 39687 (cited in note 30) (ordering people to “apprehend and bring” escaped felons to his Majesties’ Justice of the Peace); *Proclamation by His Excellency William Shirley, Esq., Governor of Massachusetts, October 18, 1744*, in *Early American Imprints*, No 40338 (cited in note 30) (similar); *Proclamation by His Excellency William Shirley, Esq., April 26, 1746*, in *Early American Imprints*, No 40405 (cited in note 30) (similar); *Proclamation By the Honourable Robert Hunter Morris, Esq; lieutenant governor, and commander in chief of the province of Pennsylvania, and counties of New-Castle, Kent and Sussex, upon Delaware, April 14, 1756*, in *Early American Imprints*, No 7754 (cited in note 30) (similar).

<sup>114</sup> Stokes, *Constitution of the British Colonies* at 331 (cited in note 66).

<sup>115</sup> Compare id at 278–80 (providing an example from the Vice Admiralty Court of the Leeward Islands from 1756) with *Warrant from the Lords of the Admiralty to the Vice Admiralty Court of Jamaica to hear prize cases, 1694*, in Marsden, ed, 2 *Law and Custom* 161, 161 (cited in note 50). These commissions were thought necessary to give the Admiralty Courts (and Vice

In 1778, instructions were issued for private vessels with letters of marque and reprisal against France; like earlier instructions, they used the phrases “person who was present at the capture” and “to give intelligence of their captures.”<sup>116</sup>

### C. Control of Captures by Crown and Parliament

Another way to think about the possible antecedents of the Constitution’s language is to focus on how captures were regulated by the British Parliament, Crown, and Admiralty courts. Maybe the allocation of authority among these institutions—if not the precise use of the word “capture” itself—points to a discrete unit of power or powers associated with the Constitution’s eventual language.

Under British practice, the Crown traditionally initiated hostilities,<sup>117</sup> authorized letters of marque and reprisal (which were often issued by Admiralty),<sup>118</sup> proclaimed neutrality,<sup>119</sup> determined what counted as contraband<sup>120</sup> and what property was otherwise subject to

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Admiralty Courts) jurisdiction over prize cases. See Pares, *Colonial Blockade and Neutral Rights* at 78–79 (cited in note 95).

<sup>116</sup> *Instructions for the Commanders of such Merchant Ships or Vessels, who shall have Letters of Marque and Reprisals for private Men of War, against the French King*, in Stokes, *Constitution of the British Colonies* at 347, 349, 351 (cited in note 66).

<sup>117</sup> *Declaration of War 1739 (England against Spain)*, in David Bayne Horn and Mary Ransome, eds, *English Historical Documents, 1714–1783* 849, 851 (Eyre & Spottiswoode 1957) (requiring “generals and commanders” of British forces and the “commissioners for executing the office of our High Admiral of Great Britain,” as well as others, to “do and execute all acts of hostility, in the prosecution of this war against the King of Spain, his vassals and subjects,” prohibiting the transportation of contraband goods to any of the Spanish territories, and providing that contraband goods headed to Spanish territory be “taken” and “condemned as good a lawful prize”); *Louis XV’s View of the Seven Years’ War, in Declaration of War 1756*, in James Harvey Robinson and Charles A. Beard, eds, 1 *Readings in Modern European History* 77, 79 (Ginn 1908); *Declaration of War 1702*, in Robinson and Beard, eds, 1 *Readings in Modern European History*; *1689 Declaration of War against France*, in Robinson and Beard, eds, 1 *Readings in Modern European History* 36, 38 (we “Declare War” and will “vigorously prosecute the same by Sea and Land”).

<sup>118</sup> *Order for general reprisals against the Dutch, 1664*, in Marsden, ed, 2 *Law and Custom* 48, 49 (cited in note 50) (authorizing private vessels, “as well as his Majesty’s fleet and shipp” to seize property belonging to the Dutch). See also *Instructions to the Lords of the Admiralty to issue a commission to Sir Thomas Grantham to assist the East India Company against the King of Bantam, 1683*, in Marsden, ed, 2 *Law and Custom* 105, 105–10 (cited in note 50); *Order in Council, 29 July 1778*, in *London Gazette*, No 11896 (July 28–Aug 1, 1778) (ordering general reprisals against the French).

<sup>119</sup> *Proclamation; neutrality, 1668*, in Marsden, ed, 2 *Law and Custom* 70, 70–75 (cited in note 50).

<sup>120</sup> See *Decision of the High Court of Admiralty 1745*, in Frederic Thomas Pratt, *Law of Contraband of War* 39, 39–40 (London 1856); *A proclamation to prevent the furnishing of the King of Spaine and his subjects with provisions for shipping, or munition for the warres, and with victuals, 1627*, in Marsden, ed, 1 *Law and Custom* 433, 433–35 (cited in note 42); *The Louisa, Decision of the High Court of Admiralty, March 3, 1745–46*, in Pratt, *Law of Contraband* 61, 61–62; *Decision of the High Court of Admiralty, June 29 1750*, in Pratt, *Law of Contraband* 198, 198–99; *Some of the Council to the Admiralty judges; specifying certain articles which, in their view, are contraband, and urging*

seizure,<sup>121</sup> issued instructions for privateers<sup>122</sup> and for public vessels,<sup>123</sup> dictated the treatment of prisoners aboard captured vessels,<sup>124</sup> ordered the release of captured property when so desired,<sup>125</sup> and determined the division of prizes that went to the crews of public vessels.<sup>126</sup> During the seventeenth century, prize cases were treated, at least in part, as matters of both state policy and law.<sup>127</sup> Questions of power tended to revolve around the relationship between admiralty and the Crown.<sup>128</sup> After the Revolution of 1688, direct executive control over prize cases waned and Parliament increasingly enacted legislation controlling some aspects of prize.<sup>129</sup>

By the eighteenth century, Parliament generally determined how prize cases would be adjudicated,<sup>130</sup> and it also regulated some aspects

*their condemnation, 1665*, in Marsden, ed, 2 *Law and Custom* 57, 57–58 (cited in note 50). See also Satow, *The Silesian Loan* at 119 (cited in note 110).

<sup>121</sup> *Order in Council that the Admiralty Court proceed against the French, 1666*, in Marsden, ed, 2 *Law and Custom* 66, 66–67 (cited in note 50); *Order in Council explaining a late proclamation as to English goods in foreigners' prizes brought to England, 1684*, in Marsden, ed, 2 *Law and Custom* 111, 111–12 (cited in note 50).

<sup>122</sup> See, for example, *Instructions, 19th Dec, 1649*, in Marsden, ed, 2 *Law and Custom* 404, 404–07 (cited in note 50). See also Pares, *Colonial Blockade and Neutral Rights* at 32–64 (cited in note 95) (describing instructions).

<sup>123</sup> *A draught of certain Instructions for the ordering of the captains and companies serving as man of warr in his Majestie's shippes, 1626*, in Marsden, ed, 1 *Law and Custom* 416, 416–22 (cited in note 42).

<sup>124</sup> *Additional instructions as to prisoners taken in prizes, 1744*, in Marsden, ed, 2 *Law and Custom* 430, 430 (cited in note 50); *Instructions for the Commanders of such Merchant Ships and Vessels as may have Letters of Marque, or Commissions for Private Men of War against the King of Spain, his Vassals and Subjects, November 30, 1739*, in John Franklin Jameson, ed, *Privateering and Piracy in the Colonial Period: Illustrative Documents* 347, 349 (Macmillan 1923).

<sup>125</sup> *Order in Council for restitution, to their English owners, of goods captured by Portuguese in a Spanish ship, 1665*, in Marsden, ed, 2 *Law and Custom* 59, 59–61 (cited in note 50). See also Pares, *Colonial Blockade and Neutral Rights* at 85–86 (cited in note 95) (“[I]n earlier times interference [by the government] with particular [prize] cases was very common.”).

<sup>126</sup> *Proclamation as to prize, gun money, and pillage, 1664*, in Marsden, ed, 2 *Law and Custom* 51, 51–53 (cited in note 50). See also 1 *The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, Civil and Military* 514 (A. Millar 1746) (referring specifically to a Declaration by the king from March 29, 1744).

<sup>127</sup> Pares, *Colonial Blockade and Neutral Rights* at 86 (cited in note 95).

<sup>128</sup> *Opinion that the Lord Admirall can, without special authority from the crown, issue commissions to capture pirates, 1579*, in Marsden, ed, 1 *Law and Custom* 224, 224–26 (cited in note 42); *Order in Council for restitution to their English owners of goods captured by Portuguese in a Spanish ship, 1665*, in Marsden, ed, 2 *Law and Custom* 59, 59 n 1 (cited in note 50); *Opinion of the judges as to the power of the crown to affect by treaty the right of English subjects to arrest and claim their goods in prizes brought to England by a foreign captor, 1689*, in Marsden, ed, 2 *Law and Custom* 124, 124 n 1 (cited in note 50).

<sup>129</sup> See Pares, *Colonial Blockade and Neutral Rights* at 42–95 (cited in note 95).

<sup>130</sup> Earlier, the King in Council controlled many of these aspects of prize. See, for example, *Rules and Directions Appointed by his Majesty in Councill to be observed by the High Court of Admiralty in the Adjudication of Prizes, June 3, 1672*, reprinted in Pratt, *Law of Contraband* 252–

of how prizes would be distributed. For example, a 1756 act of Parliament<sup>131</sup> sought to encourage naval service and privateering by giving the crews in His Majesty's Service, or privateers, the sole interest in property they took as lawful prize.<sup>132</sup> Consistent with the king's power to authorize hostilities, the first sections of the act did not determine what prize would be lawful, or who constituted the "enemy," but referred instead to the declaration of war by the king. They do not use the word "capture."

The act goes on to regulate prize adjudication in detail, including time limits on the proceedings; burden of proof; examination of witnesses; taking of security, appeals, appraisal, and sale of prizes; payment of judges and officers of the court of admiralty; customs and tariffs on imported prize goods (providing for a special bounty when ships of war were taken); recaptures; and court martial. "Capture," as noted above, was used with some frequency in this part of the act.<sup>133</sup>

Admiralty courts, following these procedures, determined whether captured property was good prize by applying the law of nations, treaties, and, to a lesser extent, statutes and proclamations issued by the Crown.<sup>134</sup> The Crown thus controlled the legality of prizes in a general sense through its power to declare war; these declarations not only determined enemy status (rendering enemy property subject to seizure under international law), they also at times provided for the seizure of particular kinds of property. The 1762 Declaration of War against Spain, for example, warned British citizens and all others not to transport contraband to Spain, and provided that any doing so would be condemned as "good and lawful prize."<sup>135</sup> The Crown also

53 (cited in note 120); *Rules for the Admiralty court in the adjudication of prizes, 1665*, in Marsden, ed, 2 *Law and Custom* 53, 53–57 (cited in note 50). See also Pares, *Colonial Blockade and Neutral Rights* at 94–95 (cited in note 95).

<sup>131</sup> *An Act for the Encouragement of Seamen, and the more speedy and effectual Manning his Majesty's Navy*, Statute of 29 Geo 2, ch 34 (1756). The 1756 act is substantially identical to *An Act for the better Encouragement of Seamen in his Majesty's Service, and Privateers, to annoy the Enemy*, Statute of 17 Geo 2, ch 34 (1744). See 1 *Laws, Ordinances, and Institutions* at 513 (cited in note 126).

<sup>132</sup> 1 *Laws, Ordinances, and Institutions* at 513–14, 556 (cited in note 126).

<sup>133</sup> *Id.* at 514–15 (declaring that, in cases of private capture, the prize "shall be shared by the Owner's and Ship's Company who were the Captors"; "if no Claim of Capture shall be duly enterr'd and attested on Oath").

<sup>134</sup> Pratt, *Law of Contraband* at 128 (cited in note 120) ("Instructions cannot alter the law of nations."). See also Marsden, ed, 1 *Law and Custom* at i–xxx (cited in note 42).

<sup>135</sup> *The Declaration of War of his Majesty King George III against the King of Spain, January 2, 1762*, in 3 *The British Magazine* 41, 43 (Fletcher 1762). See also Pares, *Colonial Blockade and Neutral Rights* at 92 (cited in note 95) (discussing similar language in the declaration of 1739 and explaining that it violated treaties with Holland and France).

concluded treaties, which frequently had detailed terms governing naval warfare, and which played a key role in the resolution of many prize cases.<sup>136</sup> Generally the Admiralty courts were supposed to issue decisions independent of pressure from the Crown in individual cases, but this relationship was somewhat unclear at times.<sup>137</sup>

In some respects the relationship between the Crown, admiralty, and Parliament was actually more complicated than the foregoing description suggests. The Instructions issued by the king, for example, often repeated some language of the acts of Parliament, perhaps suggesting overlapping authority. Some of the Prize Acts provide that the king could give “such further Rules to his Courts of Admiralty for the Adjudication of Prizes, as by his Majesty, with the Advice of his Privy Council, shall be thought proper,” which may suggest that the Crown retained some control over admiralty procedure.<sup>138</sup> On the other hand, the Prize Acts generally *required* admiralty to issue commissions to privateers,<sup>139</sup> a practice noted by William Blackstone.<sup>140</sup> Parliament occasionally controlled what goods were subject to capture,<sup>141</sup> even by public forces, even in a declared war against Spain.<sup>142</sup>

<sup>136</sup> Pares, *Colonial Blockade and Neutral Rights* at 90–91 (cited in note 95) (noting that treaties took precedence over statutes, and usually were unfettered by the common law).

<sup>137</sup> See, for example, Letter from Newcastle to Penrice (1740), in Marsden, ed, 2 *Law Custom* 289, 289–90 (cited in note 50); *Judge of the Minorica Vice Admiralty Court, to the Lords; he will follow their orders in condemning ships, 1746*, in Marsden, ed, 2 *Law Custom* 323, 323 n 1 (cited in note 50).

<sup>138</sup> Statute of 29 Geo 2, ch 34, § 32 (1756). See also Pares, *Colonial Blockade and Neutral Rights* at 99 (cited in note 95) (citing this as evidence of “government interference” in prize cases).

<sup>139</sup> Statute of 6 Anne, ch 37, § 2 (“The Lord high Admiral . . . shall . . . cause to be issued forth . . . one or more Commission or Commissions.”). Some contemporary sources seem to argue that this language does not mean what it says: “nor was the King’s Perogative in the least diminished by them, but remain’d at the Common Law, to judge when ‘twas expedient to grant them.” 1 *Laws, Ordinances, and Institutions* at 210 (cited in note 126).

<sup>140</sup> William Blackstone, 1 *Commentaries on the Laws and Constitution of England* \*258 (Chicago 1979).

<sup>141</sup> The 1707 Prize Act provides that it shall

not be lawful to any commander of any of her Majesty’s Ships of War, Privateer or Merchant Ships Having Letter of Marque to attack, surprise, seize, take, destroy, or offer any Violence, Spoil, or Molestation whatsoever between Rio la Hacha . . . on the Spanish Coast in America . . . or within five leagues at sea . . . to any boat, goods . . . belonging to any subject of Spain who shall be concerned in any Intercourse of Trade with any of her Majesty’s Subjects.

6 Anne, ch 37 § 2. The Act also extends previous prohibition on contraband to include goods taken to Spain. *Id.*

<sup>142</sup> *Her Majesties Declaration of War against France and Spain, May 4, 1702*, in William Cobbett, 6 *The Parliamentary History of England from the earliest period to the year 1803* 15–16 (Hansard 1812). See also Statute of 16 Geo 3, ch 5, § 1 (1776) (regulating “Trade and Intercourse” with the colonies and providing that certain ships and cargo “shall become forfeited to

Thus the Crown usually authorized captures and (relatedly) determined what captures would be legal; these were powers that controlled the initiation of war and compliance with international law. The words “capture” or “captures” were used less frequently in this context. Parliament generally controlled the procedural aspects of prize adjudication and determined the division of property deemed good prize; “capture” and “captures” were used much more frequently here.

#### D. Rules

The word “rules”—which should help determine the type of control over captures that the Constitution vested in Congress—was apparently not used in conjunction with the word “capture” in British and international practice, thus there is no clear precursor to the phrase “Rules concerning Captures.” Moreover, “rules” referred to norms generated by international law,<sup>143</sup> orders issued by the Crown,<sup>144</sup> and acts of Parliament.<sup>145</sup> Substantively, it denoted what was subject to capture as prize,<sup>146</sup> the division of prize money,<sup>147</sup> and the procedures

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his Majesty, as if the same were Ships and Effects of open Enemies, and shall be so adjudged, deemed and taken in all Courts of Admiralty, and in all other Courts whatsoever”).

<sup>143</sup> See Jenkinson, *Discourse on the Conduct of Great-Britain* at 6 (cited in note 108) (“those Laws which are the established Rules of Conduct between Nations”); *Report of the Law Officers* at 81 (cited in note 110) (“Tho’ the Law of Nations be the general Rule, yet it may, by mutual Agreement between two Powers, be varied or departed from.”); id at 90 (noting that Prussian property would “be[] condemned . . . if the treaties with Holland were to be the rule between Great Britain and Prussia”); *Report of the Lord Admiral upon a petition by a Captain to be reinstated, 1705*, in Marsden, ed, 2 *Law and Custom* 201, 202 (cited in note 50) (“known rules and practice of the sea”).

<sup>144</sup> See, for example, Statute of 29 Geo 2, ch 34, § 32 (1756) (“such further Rules and Directions to his Courts of Admiralty for the Adjudication of Prizes, as by his Majesty, with the Advice of his Privy Council, shall be thought proper”); Statute of 16 Geo 3, ch 5, § 34 (1776) (similar language); *Rules and Directions* at 252–53 (cited in note 130); *Rules for the Admiralty court* at 53, 53–58 (cited in note 130); Burlamaqui, *Principles of Politic Law* at pt 4, ch 7, § 18 (cited in note 76) (referring to how long prize must be in an enemy’s possession before it is lost: “every sovereign has a right to establish such rules, in regard to this point, as he thinks proper”).

<sup>145</sup> Statute of 17 Geo 2, ch 34 (1744) (“[D]ivers Rules and Regulations are therein established for the Adjudication and Condemnation of prizes taken from the Spaniards.”). See also Statute of 20 Geo 3, ch 23 (1780) (using “several Regulations and Provisions respecting the Grant of Commissions or Letters of Marque” to refer to prior legislation).

<sup>146</sup> *Rules and Directions* at 252–53 (cited in note 130); *Rules for the Admiralty court* at 53, 53–58 (cited in note 130) (providing, for instance, that any ship containing Dutch goods be condemned as prize); Jenkinson, *Discourse on the Conduct of Great-Britain* at 6, 10 (cited in note 108) (citing “those laws which are the established rules of conduct between nations,” explaining that enemy property on neutral vessel can be seized as “lawful prize,” and calling this a “rule”); *Report of the Law Officers* at 97 (cited in note 110) (“[Spanish captures] were not judged of by Courts of Admiralty, according to the Law of Nations and Treaties, but by Rules, which were themselves complained of, in Revenue Courts.”).

that applied in prize adjudication.<sup>148</sup> It is difficult to generalize, but “rules”—regardless of their subject and source—were most often directed to the Admiralty courts,<sup>149</sup> suggesting that the word includes the trial and division of property and decisions about what could lawfully be captured, but perhaps not authorization to make captures.

#### E. “On Land and Water”

The phrase “on Land and Water” helps define the reach of the Captures Clause. It could refer, as is generally assumed, to seizures made by land or naval forces on land or on water. There is, however, a narrower possibility. As we have seen, “captures” referred overwhelmingly to seizures made by maritime vessels, and “on Land and Water” could refer to such seizures, including those made on land. Lee’s *Treatise of Captures*, for example, writes about a Spanish ship chased by the French into an English (neutral) port.<sup>150</sup> The Spanish “unloaded their tackle, sails, etc, and carried them into the houses of inhabitants.” The French landed and took the Spanish property from houses, “[h]ereupon the King of England ordered all the captures to be restored, and directed his ambassador to prosecute the injury in France.”<sup>151</sup> Although these kinds of captures on land were not particularly common, neither was usage of the term “capture” with respect to the taking of property by land forces.

#### F. Broad or Narrow?

This leaves us with three possible meanings for the phrase “Captures on Land and Water,” based on British and colonial American sources prior to the American Revolution. It could, most generally, refer to people and all kinds of property taken from an enemy or to redress harm inflicted by another country. Some international treatis-

<sup>147</sup> See Burlamaqui, *Principles of Natural Law* at bk 2, pt 4, ch 7 §§ 26–27 (cited in note 76).

<sup>148</sup> Statute of 17 Geo 2, ch 34 (1744).

<sup>149</sup> See, for example, *Report of the Law Officers* at 91 (cited in note 110) (“[A] New Rule, for the Court of Admiralty, to decide by”).

<sup>150</sup> Lee, *A Treatise of Captures* at 123 (cited in note 79).

<sup>151</sup> *Id.* at 124. For more examples of maritime forces acting on land, see *Brown*, 12 US (8 Cranch) at 139 (Story dissenting) (discussing the scope of prize jurisdiction); Worthington Chauncey Ford and Gaillard Hunt, eds, 10 *Journals of the Continental Congress 1774–1789* 196 (Feb 26, 1778) (GPO 1908) (instructing privateers to “annoy the enemy by all the means in their power, by land or water, taking care not to infringe or violate the laws of nations, or the laws of neutrality”); Worthington Chauncey Ford and Gaillard Hunt, eds, 16 *Journals of the Continental Congress 1774–1789* 404 (GPO 1910) (same instruction); *A Proclamation By the Honorable the President and Council of the Province of Pennsylvania, April 11, 1748*, in *Early American Imprints*, No 40473 (cited in note 30) (similar instruction).

es, in particular Vattel's influential work, support this reading. English admiralty documents, however, used "capture" in a much more specific context to refer either to moveable property seized by maritime vessels or to the act of seizing such property, including any seizures made by maritime vessels "on Land" when the property would ultimately be claimed as prize. Works of international law began to use captures in this more narrow sense, beginning to some extent with Lee's *Treatise of Captures in War*. This is not surprising, as the dominant questions of international law that arose during the Seven Years' War involved the right to seize property at sea; "captures," like the more common term "prize," was used frequently in the discussion of these issues. Although the narrow usage was most common by the late eighteenth century, it was not one that necessarily excluded the broader reading. The third possibility is some intermediate position—such as property seized by both land and naval forces, but not persons.

What about "rules concerning"? The most common usage points to a narrow understanding: determining the ownership interest in, and procedures related to, seized property. This definition dovetails well with the narrower definition of "captures on land and war" and best mirrors the British division of power between the Crown and Parliament. But the admiralty documents and international treatises do not foreclose an additional broader meaning: the power to determine what gets taken in the first place and by whom.

Thus these sources do not yield two clearly distinct, mutually exclusive meanings for the language "Rules concerning Captures on Land and Water," but instead a continuum of possibilities. Moreover, although the narrower usages were more common in British, colonial, and international sources, this might mean that the phrase would have been identified with this narrower meaning, or perhaps the phrase would have been generally understood to have a broader meaning with the narrower simply the most common usage.

We could push these questions further at this point, but it makes more sense to turn first to the best evidence of the Constitution's language about captures, which emerges from the records of the Continental Congress during the Revolutionary War.

#### IV. THE REVOLUTIONARY WAR

As the Continental Congress began the process of waging war in 1775, the division of power in the United Colonies was obviously quite different from what it was in Britain. Lacking a king (and even an executive branch), Congress was forced to do not only the work traditionally associated with Parliament, but also to some extent that of the

king and even the Admiralty courts themselves. Questions about the division of government power tended to revolve around a new axis: the colonies versus the Continental Congress.<sup>152</sup> And, with respect to the taking of enemy property, the Continental Congress borrowed some language from earlier English acts of Parliament and Orders in Council, but it also began to use the term “capture” in a new way, expanding the type of control it denoted.

#### A. “Captures” and the Continental Congress

Captures were an important issue for the Continental Congress from the beginning.<sup>153</sup> During the fall of 1775, the Continental Congress and George Washington sought ways to both cut off British supplies to Boston and to seize British vessels and cargo for use by the colonists.<sup>154</sup> On November 25, 1775, Congress passed a resolution stating that the colonies had fitted out armed vessels, and expressing concern that some people who did not actually support the British government may suffer “unless some laws be made to regulate, and tribunals erected competent to determine the propriety of captures.”<sup>155</sup> The terms “laws,” “made to regulate,” and “captures” are closer to the eventual text of the Constitution than any language found in British legislation. The resolution went on to provide that all ships of war and “armed vessels as are or shall be employed in the present cruel and unjust war against the United Colonies” shall be “seized and forfeited.”<sup>156</sup> In other words, this resolution, which was a “law[]” that “regulate[d]” “captures,” authorized the seizure and condemnation of certain British vessels.

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<sup>152</sup> Consider Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress, 1781–1789*, 41 *Am J Legal Hist* 411, 413–14 (1997).

<sup>153</sup> See Charles Oscar Paullin, *The Navy of the American Revolution: Its Administration, Its Policy, and Its Achievements* 35–37 (Chicago 1906); Philip Morin Freneau, *The British prison-ship: a poem, in four cantoes.—Viz. Canto 1. The capture* (1781), in *Early American Imprints*, No 17159 (cited in note 30).

<sup>154</sup> Congress gave Washington instructions to intercept brigs coming from England loaded with arms and powder “for the use of the continent.” Worthington Chauncey Ford and Gaillard Hunt, eds, 3 *Journals of the Continental Congress 1774–1789* 278 (Oct 5, 1775) (GPO 1906). See also *id* at 293 (Oct 13, 1775); *id* at 316 (Nov 2, 1775).

<sup>155</sup> *Id* at 371–75 (Nov 25, 1775).

<sup>156</sup> *Id* at 373. Transport vessels, however, were handled differently. Those having on board “troops, arms, ammunition,” and so on, were made liable to seizure but only the cargo could be confiscated, unless the vessel belonged to “inhabitants of these United Colonies” (that is, to loyalists), in which case the vessel as well as the cargo was subject to confiscation. *Id.* The list of what could be seized was expanded on December 19, 1775, to include all vessels used to transport goods “to the United Colonies for use of the British Navy.” *Id* at 437 (Dec 19, 1775).

In March of 1776, the Continental Congress listed its complaints against Britain and concluded that it was justifiable for the colonies to “make reprisals upon their enemies, and otherwise to annoy them, according to the laws and usages of Nations.”<sup>157</sup> This resolution explicitly authorized privateering and expanded the property subject to seizure by either private or public vessels to include “all ships and other vessels” and “all goods, wares, and merchandizes, belonging to any inhabitant or inhabitants of Great Britain.”<sup>158</sup> Noting that the colonists had many “friends in Great Britain” who could “suffer by captures,” Congress “trust[ed]” that they will “impute it to the authors of our common calamities.”<sup>159</sup> The legislation, which authorized the use of force (by both public and private vessels)<sup>160</sup> against an enlarged set of British property, again used “captures” in the prologue to refer to that exercise of force.

Congress issued corresponding instructions to commanders of private ships of war in April 1776; these instructions authorized the capture of contraband and directed the treatment of prisoners.<sup>161</sup> In some respects these were similar to instructions issued by the English Crown.<sup>162</sup> They began with the authorization that “you may, by force of arms, attack, subdue, and take all ships and other vessels belonging to the inhabitants of Great Britain.”<sup>163</sup> Well-known British instructions included almost identical language.<sup>164</sup> Although the American instructions were far shorter than the English ones, both required in almost

<sup>157</sup> Worthington Chauncey Ford and Gaillard Hunt, eds, 4 *Journals of the Continental Congress 1774–1789* 230 (Mar 22, 1776) (GPO 1906).

<sup>158</sup> *Id.* at 230–31.

<sup>159</sup> *Id.* at 230.

<sup>160</sup> For discussions of captures made by the public vessels, see Paullin, *The Navy of American Revolution* at 164–78 (cited in note 153); Swanson, *Predators and Prizes* at 20–21, 50–51, 100–03 (cited in note 29) (discussing prizes taken by the British Navy in the 1740s).

<sup>161</sup> Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 253–54 (Apr 2, 1776) (cited in note 157).

<sup>162</sup> See Bourguignon, *The First Federal Court* at 55 (cited in note 66) (emphasizing the relationship between this document and its British antecedents).

<sup>163</sup> Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 253 (Apr 3, 1776) (cited in note 157).

<sup>164</sup> *Instructions for privateers against France and Spain, 23rd Dec, 1704*, in Marsden, ed, 2 *Law and Custom* 420, 420 (cited in note 50) (permitting authorized privateers “to sett upon by force of arms and subdue and take then men of war, ships, and other vessels whatsoever, as also the goods, moneys, and merchandizes belonging to France and Spain”); *Instructions for the Commanders of such Merchant Ships or Vessels, who shall have Letters of Marque and Reprisals for private men or war, against the French King, 1778*, in Stokes, *Constitution of the British Colonies* at 347, 348 (cited in note 66) (“[I]t shall be lawful for the Commanders of ships, authorized by Letters of Marque and Reprisals, for private men of war, to set upon by force of arms, and subdue and take the men of war, ships and vessels . . . of King of France.”).

identical language that the papers of any captured vessels be presented to the judge “as they were received and taken, without any fraud, addition, subtraction, or embezzlement”;<sup>165</sup> both prohibited the ransoming of prisoners; both required an affidavit;<sup>166</sup> and both warned that failure to follow the instructions would result in forfeiture of the commission and liability for damages. The American instructions, unlike the British, however, used the word “capture” in the title, to denote what the private ships of war were authorized to do: “Instructions to the commanders of private ships or vessels of war, which shall have commissions or letters of marque and reprisal, *authorizing them to make captures of British vessels and cargoes.*”<sup>167</sup> This makes clear that Congress here exercised a power that traditionally belonged to the king, that of issuing instructions and authorizing the taking of enemy property, and that this power came under the heading of “captures” as it was used by the Continental Congress.

On April 3, 1776, the Continental Congress resolved that anyone outfitting a private ship of war must post a bond to ensure compliance with the commission to take enemy property and with “certain Instructions therewith to be delivered.” The form of bond provided that the person making the obligation had applied for a “Commission, or Letters of Marque and Reprisal, to arm, equip, and set forth to Sea the said [blank] as a private Ship of War, and to make Captures of British Vessels and Cargoes . . . .”<sup>168</sup> The first part was standard language from English bonds granted during the eighteenth century.<sup>169</sup> But the phrase

<sup>165</sup> *Instructions against the French King* at 349 (cited in note 164); Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 254 (Apr 3, 1776) (cited in note 157).

<sup>166</sup> *Instructions against the French King* at 349 (cited in note 164); Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 254 (Apr 3, 1776) (cited in note 157).

<sup>167</sup> Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 253 (cited in note 157) (emphasis added). The full title of the 1778 British instructions was:

Instructions for the Commanders of Such Merchant Ships or Vessels, who shall have Letters of Marque and Reprisals for private Men of War, against the French King, his Vassals and Subjects, or others inhabiting within any of his countries, territories, or dominions, by virtue of our Commission granted under our Great Seal of Great Britain, bearing date the fifth day of August 1778. Given at our Court at St. James’s, the fifth day of August 1778, in the eighteenth year of our reign.

Stokes, *Constitution of the British Colonies* at 347 (cited in note 66). See also *Instructions from 1739*, in Wyndham Beawes, *Lex Mercatoria Rediviva* 221 (J. Moore and E. Comyns 1752) (using an almost identical title).

<sup>168</sup> Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 252 (Apr 3, 1776) (cited in note 157).

<sup>169</sup> See *Warrant for issue of letter of marque; bail for good behavior, 1719*, in Marsden, ed, 2 *Law and Custom* 246, 247–49 (cited in note 50) (noting that a captain had been “authorized by letters of marque, or a commission for a private man of war, to arm, equip, and set forth to sea

“to make Captures of [enemy property]” was not part of the standard English bonds. Again, “captures” is used here by the Continental Congress as the language of authorization itself, not just to refer to the taking of the vessel or the property itself.<sup>170</sup> Subsequent bonds did not always include this language, but did provide for the seizure of property which “shall be declared to be subjects of capture by any resolutions of Congress, or which are so deemed by the law of nations.”<sup>171</sup>

Responding to complaints that American vessels were violating international law, Congress issued a proclamation in May 1778 ordering captains and commanders “that they do not capture, seize or plunder any ships or vessels of our enemies, being under the protections of neutral coasts.”<sup>172</sup> Like the earlier American documents, but unlike their British antecedents, this proclamation uses “capture” as language of authorization; here, it is used as a verb, and in the context of setting out particular property to which authorization did not extend. This language was repeated in instructions to privateers issued in May 1780.<sup>173</sup>

In response to requests for greater protections of neutral vessels, a committee report listed property to be protected and provided that public and private vessels must observe “the propositions above stated

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the ship called the Happy Janet”). For an example of “caution or security” issued from the vice-admiralty court of St. Christopher in 1762, see *The Form of a Caution or Security entered into on the granting the Commission of a Private Ship of War*, in Stokes, *Constitution of the British Colonies* 315, 316 (cited in note 66) (stating that the bearer of the letter of marque is authorized to “arm, equip, and set forth to sea the said schooner called the Pelican . . . to set upon by force of arms, and to subdue, seize and take the men of war ships, and other vessels . . . belonging to the French King, or any of his vassals and subjects”). See also Bourguignon, *The First Federal Court* at 56 (cited in note 66) (emphasizing the similarity between these bonds and those issued for British privateers).

<sup>170</sup> The goods and vessels subject to capture (by both public and private vessels) were expanded yet again on July 24, 1776 to include all ships and goods belonging to “any subject or subjects of the King of Great Britain, except the inhabitants of the Bermudas, and Providence or Bahama islands.” Worthington Chauncey Ford and Gaillard Hunt, eds, 5 *Journals of the Continental Congress 1774–1789* 606 (July 24, 1776) (GPO 1906). This exception, which according to Madison was based on “compassion to the distresses of its inhabitants,” was lifted in a resolution of March 15, 1781 (except with respect to salt for Bermuda), when members of Congress argued the exception made possible “a clandestine trade and intercourse” with the enemy. Worthington Chauncey Ford and Gaillard Hunt, eds, 19 *Journals of the Continental Congress* 270 (Mar 15, 1781) (GPO 1912).

<sup>171</sup> Ford and Hunt, eds, 16 *Journals of the Continental Congress* at 406 (May 2, 1780) (cited in note 151).

<sup>172</sup> Worthington Chauncey Ford and Gaillard Hunt, eds, 11 *Journals of the Continental Congress 1774–1789* 486 (May 9, 1778) (GPO 1908) (proscribing “piratical” conduct because Congress had “received information and complaints” about violence to neutral vessels).

<sup>173</sup> Ford and Hunt, eds, 16 *Journals of the Continental Congress* at 407 (May 2, 1780) (cited in note 151) (“[Y]ou are not to capture, seize or plunder.”).

as a rule of conduct.”<sup>174</sup> Corresponding instructions from the Board of Admiralty provide that “[y]ou are not to seize or capture any effects belonging to the subjects of Belligerent Powers on board Neutral Vessels except contraband goods.”<sup>175</sup> Here the term “rule of conduct” referred to the instruction not to capture certain kinds of property. The word “rules” also referred to the body of law applied by courts in adjudicating captures cases.<sup>176</sup>

An ordinance from March 27, 1781—weeks after the ratification of the Articles of Confederation—also mixed language drawn from English sources with this new use of the word “capture.” The ordinance was entitled: “An ordinance relative to the capture and condemnation of prizes.”<sup>177</sup> Like the resolution from March 1776, this title, which has no clear antecedents in English practice, comes very close to the language the Constitution would eventually use: “Rules concerning Captures.” Also, like the earlier American resolution, this one authorized the taking of property by both private and public vessels:

[T]he fleets and ships of these United States, as also all other ships and vessels commissioned by letters of marque or general reprisals . . . shall and may lawfully seize all ships . . . belonging to the King or Crown of Great Britain, or to his subjects or others inhabiting within any of the territories or possessions of the aforesaid King of Great Britain.<sup>178</sup>

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<sup>174</sup> Worthington Chauncey Ford and Gaillard Hunt, eds, 18 *Journals of the Continental Congress* 864–66 (Sept 26, 1780) (GPO 1910).

<sup>175</sup> *Id.* at 1008 (Nov 3, 1780).

<sup>176</sup> *Acts and laws, made and passed by the General Court or Assembly of the English Colony of Connecticut, in New-England, in America, holden at Hartford, in said Colony* (May 1776), in *Early American Imprints*, No 14689 (cited in note 30) (“That the respective County courts in this Colony be, and they are hereby authorised . . . to try judge and determine as in other Cases, concerning all Captures that have or shall be taken and brought into the said respective counties. And that the Civil Law, the Law of Nations, and the Resolutions of Congress be the Rule of their Adjudications, Determinations and Proceedings therein.”); Worthington Chauncey Ford and Gaillard Hunt, eds, 21 *Journals of the Continental Congress 1774–1789* 1153, 1158 (Dec 4, 1781) (GPO 1912) (providing that “[t]he rules of decision in the several courts shall be the resolutions and ordinances of the United States in Congress assembled, public treaties when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe. Public treaties shall have the pre-eminence in all trials.”).

<sup>177</sup> Ford and Hunt, eds, 19 *Journals of the Continental Congress* at 314 (Mar 27, 1781) (cited in note 170). See also Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 1153 (Dec 4, 1781) (cited in note 176) (“An ordinance, ascertaining what captures on water shall be lawful. In pursuance of the powers delegated by the Confederation in cases of capture on water.”).

<sup>178</sup> Ford and Hunt, eds, 19 *Journals of the Continental Congress* at 315 (Mar 27, 1781) (cited in note 170).

The 1781 resolution expanded the British property subject to capture, but it still included one exemption: it did not “extend to authorize the capture or condemnation of any vessel belonging to any inhabitants of Bermudas, which, being loaded with salt only, may arrive in any of these United States, on or before the first day of May next.”<sup>179</sup> Here again, unlike earlier English documents, the word “capture” is used in connection with the authorization (or not) to take property.<sup>180</sup> In other sections, the 1781 resolution used language identical to that found in English documents. It ordered, for example, courts of admiralty “judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals” and determine them “according to . . . the laws of nations.”<sup>181</sup> This language is identical to that used in 1694 English documents discussed above.<sup>182</sup>

These documents show the extent to which the Continental Congress regulated the use of force against Great Britain through rules related to captures. The rules were tailored to suit specific diplomatic and strategic goals, and to ensure compliance with international law. The treatment of neutral vessels illustrates these points well. The May 1778 resolution discussed above resulted from reports to Congress that American vessels had been violating the rights of neutrals by capturing enemy vessels “whilst under the protection of neutral coasts, contrary to the usage and custom of nations.”<sup>183</sup> So Congress directed all captains of any American armed vessel not to capture such vessels and to “govern themselves . . . [in accordance with] the instruction and resolutions of Congress; particularly that they pay a sacred regard to the rights of neutral powers.”<sup>184</sup> In 1780, Congress worked to develop a response to the agreement on neutrality entered into by some of the European powers, and it eventually agreed to adopt those same prin-

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<sup>179</sup> Id at 316.

<sup>180</sup> See also Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 1156 (cited in note 176) (“Besides those who are duly authorised to make captures by a special commission.”); Worthington Chauncey Ford and Gaillard Hunt, eds, 22 *Journals of the Continental Congress 1774-1789* 10 (Jan 8, 1782) (GPO 1914) (providing for rules concerning proceeds of a capture of an enemy ship “by any armed vessel belonging to the United States, and duly authorised to make captures”).

<sup>181</sup> Ford and Hunt, eds, 19 *Journals of the Continental Congress* at 315 (Mar 27, 1781) (cited in note 170). See also id at 364 (Apr 7, 1781) (ordering the Board of Admiralty to generate “regulations for the conducting and governing the vessels of war of the United States and other armed vessels”).

<sup>182</sup> See note 60 and accompanying text.

<sup>183</sup> Ford and Hunt, eds, 11 *Journals of the Continental Congress* at 486 (May 9, 1778) (cited in note 172).

<sup>184</sup> Id (proclaiming that willful violators of this order will not be protected from the punishment of other states).

ciples. The resolution, which expanded the rights of neutrals in several ways, directed “[t]hat all captains and commanders of armed vessels whether public . . . or private” were “strictly enjoined and required to observe the propositions above stated as a rule of conduct and govern themselves accordingly.”<sup>185</sup>

These carefully calibrated rules regulating the capture of neutral property, as well as those regulating the capture of British property, were not intended merely to determine the legal title to property already taken. Instead, they determined whether the property could be taken at all. The resolution protecting neutral vessels and property, for example, would mean little if public vessels could seize such property notwithstanding the rule. The purpose of the rule, in other words, was to limit the kinds of enemy property that could be seized, not simply to determine ownership. The two issues were linked, of course; title could only be perfected in property that Congress had subjected to seizure. But the purpose of Congress’s actions was not limited to determining legal title but was instead designed to control the seizure of property and control the risk that other nations would join the war against the United States.

It is unsurprising that Congress controlled the seizure of property by public as well as private vessels during the Revolutionary War. Congress, after all, controlled virtually every aspect of naval policy during the war, notwithstanding Esek Hopkins’s title as “Commander in Chief” of the fleet.<sup>186</sup> On January 5, 1776, for example, the Naval Committee issued a precise set of orders detailing where Hopkins should sail.<sup>187</sup> By late summer 1776, Congress was disappointed with Hopkins’s performance and resolved that “during his cruize to the southward,” Hopkins “did not pay due regard to the tenor of his instructions, whereby he was expressly directed to annoy the enemy’s ships upon the coasts of the southern states; and, that his reasons for not going from Providence immediately to the Carolinas, are by no means satisfactory.”<sup>188</sup> Thus, in this sense, the Continental Congress’s

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<sup>185</sup> Ford and Hunt, eds, 18 *Journals of the Continental Congress* at 864–66 (Sept 6, 1780) (cited in note 174); id at 1008 (Nov 3, 1780).

<sup>186</sup> See McCormick, 41 *Am J Legal Hist* at 413 (cited in note 152) (“The early Congress is best conceptualized as a directorate, exercising every power relevant to the prosecution of war.”).

<sup>187</sup> See Paullin, *The Navy of the American Revolution* at 56 (cited in note 153) (explaining that Hopkins had been ordered to sail “directly for Chesapeake Bay . . . [and] strike the enemy’s fleet”).

<sup>188</sup> Ford and Hunt, eds, 5 *Journals of the Continental Congress* at 659 (Aug 15, 1776) (cited in note 170). For other examples of the Continental Congress exercising detailed control over tactics and strategy with respect to public armed vessels, see id at 631 (Aug 5, 1776); id at 846

exclusive ability to control public vessels by regulating captures was not particularly important from a separation of powers perspective; with no real executive branch in place, Congress controlled many aspects of war prosecution. The key question is how much of this power the Captures Clause of the Constitution vested in Congress.

## B. Prize Money and Courts

The Continental Congress also determined how prize money for captured vessels would be allocated and attempted to provide for courts that would resolve individual cases of capture. On November 25, 1775, Congress provided that for vessels fitted out by one of the colonies or at the continental charge, two-thirds of value of the prizes it took would go to the government that fitted her out, while one-third would be divided among the captors.<sup>189</sup> This aspect of Revolutionary War legislation was very similar to the eighteenth-century English prize acts.

The November 1775 ordinance also recommended that the colonies establish courts to determine captures, or “give jurisdiction to the courts now in being for the purpose of determining concerning the captures.”<sup>190</sup> The relationship between colonial and congressional judicial power over captures proved to be controversial throughout the war. The colonies already had British vice-admiralty courts, which traditionally decided prize cases; this arrangement allowed British vessels to bring prizes to the colonial courts for adjudication rather than taking them back to England. These courts—which lacked juries—were also responsible for enforcing the trade laws against the colonists, rendering them extremely unpopular.<sup>191</sup> Not surprisingly, when the Continental Congress recommended that colonies provide courts to resolve cap-

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(Oct 3, 1776). See also Worthington Chauncey Ford and Gaillard Hunt, eds, 6 *Journals of the Continental Congress 1774–1789* 882 (Oct 16, 1776) (GPO 1906); Worthington Chauncey Ford and Gaillard Hunt, eds, 15 *Journals of the Continental Congress 1774–1789* 1217 (Oct 28, 1779) (GPO 1909) (creating a Board of Admiralty “to superintend the naval and marine affairs of these United States” and authorizing it “to form proper plans for increasing the naval force of the United States”).

<sup>189</sup> Ford and Hunt, eds, 3 *Journals of the Continental Congress* at 374–75 (Nov 25, 1775) (cited in note 154). See also Ford and Hunt, eds, 6 *Journals of the Continental Congress* at 883 (Oct 3, 1776) (cited in note 188).

<sup>190</sup> Ford and Hunt, eds, 3 *Journals of the Continental Congress* at 373–74 (Nov 25, 1775) (cited in note 154).

<sup>191</sup> See, for example, SC Const of 1776, preamble (listing the expansion of the admiralty courts as one of the complaints against Great Britain). See also Appleton, 5 *New Eng Q* at 153–54 (cited in note 102) (describing colonial Rhode Island’s opposition to English efforts, beginning in 1696, to expand the jurisdiction of the Admiralty Courts and to ensure that their judges were “royal appointees independent of colonial influence”).

tures cases, it also recommended that they provide for jury trials; most did so.<sup>192</sup> The Continental Congress had the power to determine appeals from these colonial courts in cases of capture<sup>193</sup> or, later, to establish a court to hear such appeals.<sup>194</sup> British admiralty courts and the Privy Council had previously exercised appellate review over vice-admiralty courts, although many details of how this worked remain unclear.<sup>195</sup>

Individual prize cases created significant friction between the colonies and the Continental Congress. In the case of the *Active*, for example, a protracted conflict arose over the power of Congress to review a jury determination on appeal.<sup>196</sup> Congress discussed the case a number of times and eventually issued a resolution emphasizing that the “legality of all captures on the high seas must be determined by the law of nations,” that the power of war and peace was entrusted to Congress, and that Congress must be able to avoid the violations of treaties or the law of nations that could result from a jury verdict.<sup>197</sup> After much debate, the Continental Congress formed a court of appeals in 1780, and then passed “an Ordinance Relating to Captures,” which consolidated and superseded all previous legislation on the subject.<sup>198</sup>

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<sup>192</sup> See, for example, *Acts and laws, made and passed by the General Court or Assembly of the English Colony of Connecticut, in New-England, in America, holden at Hartford, in said Colony* at 419 (cited in note 176); *An act to empower the Court of Admiralty to have jurisdiction in all cases of capture of the ships and other vessels of the inhabitants of Great-Britain, Ireland, the British West-Indies, Nova Scotia, and East and West Florida; to establish the trial by jury in the Court of Admiralty in cases of capture, and for the other purposes therein mentioned* (South Carolina Apr 11, 1776), in *Early American Imprints*, No 43162 (cited in note 30). Delaware (and Pennsylvania after 1780) did not use juries at all. Maryland, North Carolina, and Massachusetts did not always use them. See Bourguignon, *The First Federal Court* at 192 (cited in note 66).

<sup>193</sup> Ford and Hunt, eds, 3 *Journals of the Continental Congress* at 374 (Nov 25, 1775) (cited in note 154).

<sup>194</sup> Ford and Hunt, eds, 15 *Journals of the Continental Congress* at 1220 (Oct 29, 1779) (cited in note 188).

<sup>195</sup> See Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations 177–213* (Columbia 1950).

<sup>196</sup> See Worthington Chauncey Ford and Gaillard Hunt, eds, 13 *Journals of the Continental Congress 1774–1789* 135 (Feb 2, 1779) (GPO 1909); id at 284 (Mar 5, 1779). See also Worthington Chauncey Ford and Gaillard Hunt, eds, 14 *Journals of the Continental Congress 1774–1789* 626, 635 (May 22, 1779) (GPO 1907); Worthington Chauncey Ford and Gaillard Hunt, eds, 20 *Journals of the Continental Congress 1774–1789* 762–64 (July 18, 1781) (GPO 1909).

<sup>197</sup> Ford and Hunt, eds, 13 *Journals of the Continental Congress* at 283–84 (Mar 5, 1779) (cited in note 196).

<sup>198</sup> Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 961–64 (Sept 14, 1781) (cited in note 176). State constitutions drafted during the Revolutionary War did not use the word “capture,” with the exception of Georgia’s 1777 constitution, which explicitly provided for the judicial resolution of captures cases. Ga Const of 1777 Art XLIV.

### C. Captures and Prisoners

The Continental Congress used “capture” and “captured” with reference to people, and it also determined the treatment of prisoners. George Washington frequently sought guidance from the Continental Congress as to the treatment and exchange of prisoners,<sup>199</sup> and it passed a variety of resolutions on this topic. In 1777, it directed that all subjects of Great Britain taken on “board any prize made by any continental vessel of war, be hereafter considered as prisoners of war, and treated as such.”<sup>200</sup> Other resolutions required private armed vessels to bring prisoners to shore (or risk losing their commissions),<sup>201</sup> directed that crews of captured vessels were to be confined on board prison ships,<sup>202</sup> and decided the terms upon which prisoners would be exchanged or paroled.<sup>203</sup> Instructions to private armed vessels included (as their English antecedents had) directions to treat prisoners humanely and not to ransom any persons on board captured vessels.<sup>204</sup>

Moreover, the Continental Congress used “capture” and “captured” to describe people, as did other documents from the American Revolution. A 1778 resolution included, for example, the phrase “if the enemy will not consent to exempt citizens from capture, agreeably

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<sup>199</sup> See, for example, Ford and Hunt, eds, 3 *Journals of the Continental Congress* at 357–58 (Nov 17, 1775) (cited in note 154); Ford and Hunt, eds, 15 *Journals of the Continental Congress* at 1018 (Sept 3, 1779) (cited in note 188); Ford and Hunt, eds, 16 *Journals of the Continental Congress* at 47–52 (Jan 13, 1780) (cited in note 151); Ford and Hunt, eds, 18 *Journals of the Continental Congress* at 1028–31 (Nov 7, 1780) (cited in note 174).

<sup>200</sup> Worthington Chauncey Ford and Gaillard Hunt, eds, 9 *Journals of the Continental Congress 1774–1789* 776 (Oct 6, 1777) (GPO 1907). See also Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 370 (May 21, 1776) (cited in note 157); Ford and Hunt, eds, 5 *Journals of the Continental Congress* at 630 (Aug 5, 1776) (cited in note 170).

<sup>201</sup> Ford and Hunt, eds, 16 *Journals of the Continental Congress* at 48 (Jan 13, 1780) (cited in note 151) (voicing concern about the “various directions” being taken by “divers commissaries independent of each other”).

<sup>202</sup> Ford and Hunt, eds, 14 *Journals of the Continental Congress* at 837 (July 15, 1779) (cited in note 196) (providing for “crews of vessels captured from the enemy, to be confined on board prison ships”).

<sup>203</sup> Ford and Hunt, eds, 3 *Journals of the Continental Congress* at 428 (Dec 15, 1775) (cited in note 154); Ford and Hunt, eds, 5 *Journals of the Continental Congress* at 598–99 (July 22, 1776) (cited in note 170); id at 665–66 (Aug 17, 1776); Ford and Hunt, eds, 16 *Journals of the Continental Congress* at 48–52 (Jan 13, 1780) (cited in note 151); Ford and Hunt, eds, 18 *Journals of the Continental Congress* at 1029 (Nov 7, 1780) (cited in note 174). See also Ford and Hunt, eds, 10 *Journals of the Continental Congress* at 295 (Mar 30, 1778) (cited in note 151).

<sup>204</sup> Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 254 (Apr 3, 1776) (cited in note 157). See also *Instructions to the Commanders of Private Ships or Vessels of War, Issued by His Excellency, William Greene, Esquire, Governor, Captain-General, and Commander in Chief of and over the State of Rhode Island and Providence Plantations* (June 28, 1779), in *Early American Imprints*, No 43690 (cited in note 30).

to the law of nations”;<sup>205</sup> in 1779 it referred to “prisoners [ ] captured by Continental vessels of War”;<sup>206</sup> and in 1781 the Continental Congress discussed issues “relating to Mr. Laurens’s capture.”<sup>207</sup> John Dodge published a pamphlet about his capture entitled “A Narrative of the Capture and Treatment of John Dodge by the English at Detroit.”<sup>208</sup> In the diplomatic correspondence from the Revolutionary War, “captures,” “capture,” and “captured” are used more than a 150 times, with about 70 percent of the references to property or vessels, about 20 percent to individual persons or troops, and about 10 percent to real property.<sup>209</sup>

The foregoing provides some support for the claim that “rules” concerning “captures”—the language in the Constitution—might be understood to include the treatment and exchange of captured prisoners. But there is countervailing evidence. Even during the Revolutionary War, “capture” was used overwhelmingly to refer to property;

<sup>205</sup> Ford and Hunt, eds, 10 *Journals of the Continental Congress* at 295 (Mar 30, 1778) (cited in note 151).

<sup>206</sup> Ford and Hunt, eds, 13 *Journals of the Continental Congress* at 105 (Jan 23, 1779) (cited in note 196). See also Ford and Hunt, eds, 9 *Journals of the Continental Congress* at 1052 (Dec 24, 1777) (cited in note 200); Worthington Chauncey Ford and Gaillard Hunt, eds, 12 *Journals of the Continental Congress 1774–1789* 934 (Sept 19, 1778) (GPO 1908); Ford and Hunt, eds, 19 *Journals of the Continental Congress* at 363 (Apr 7, 1781) (cited in note 170); Ford and Hunt, eds, 20 *Journals of the Continental Congress* at 673 (June 18, 1781) (cited in note 196).

<sup>207</sup> Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 780 (July 23, 1781) (cited in note 176). See also Ford and Hunt, eds, 18 *Journals of the Continental Congress* at 864 (Sept 26, 1780) (cited in note 174).

<sup>208</sup> John Dodge, *A Narrative of the Capture and Treatment of John Dodge by the English at Detroit* (1779), in *Early American Imprints*, No 16262 (cited in note 30). See also Moses van Campen, *A narrative of the capture of certain Americans, at Westmorland, by savages; and the perilous escape which they effected, by surprizing specimens of policy and heroism. To which is subjoined, some account of the religion, government, customs and manners of the aborigines of North-America* (1780), in *Early American Imprints*, No 18273 (cited in note 30); Timothy Dwight, *A sermon, preached at Northampton, on the twenty-eighth of November, 1781: occasioned by the capture of the British Army, under the command of Earl Cornwallis* (1781), in *Early American Imprints*, No 17144 (cited in note 30); Nathan Fiske, *An oration delivered at Brookfield, Nov 14, 1781. In celebration of the capture of Lord Cornwallis and his whole army at York-Town and Gloucester, in Virginia, by the combined army under the command of His Excellency General Washington, on the 19th of October, 1781*, in *Early American Imprints*, No 17153 (cited in note 30); Abbé Robin, *New travels through North-America: in a series of letters; exhibiting, the history of the victorious campaign of the allied armies, under His Excellency General Washington, and the Count de Rochambeau, in the year 1781. Interspersed with political, and philosophical observations, upon the genius, temper, and customs of the Americans; also narrations of the capture of General Burgoyne, and Lord Cornwallis, with their armies* 42 (1783), in *Early American Imprints*, No 18167 (cited in note 30).

<sup>209</sup> See U.S. Congressional Serial Set, online at <http://www.gpoaccess.gov/serialset/index.html> (visited Dec 18, 2009) (database search performed July 28, 2008).

the references to people are far less frequent. This is especially true in the legislation from the Continental Congress with titles or language that comes closest to that used in the Constitution.

Moreover, the word “captures” itself—with an “s” but without a specific noun as a referent—was apparently *not* used in conjunction with people. The diplomatic correspondence, for example, includes “the capture of Lord Cornwallis,”<sup>210</sup> “Mr. Laurens’ capture,”<sup>211</sup> and “to capture British invading troops.”<sup>212</sup> But the word “captures,” used (as in the text of the Constitution) without referring to a specific taking, did not refer to people, as in “yet it becomes important from the number of captures made on this coast”<sup>213</sup> or “an ordinance of Congress, which comprises all their former resolutions with respect to captures.”<sup>214</sup> Finally, as discussed below, it seems clear that the language in the Articles of Confederation about “captures” did not refer to people.

<sup>210</sup> *Robert Morris to Luzerne* (Nov 3, 1781), in Francis Wharton, ed, 4 *The Revolutionary Diplomatic Correspondence of the United States* 818, 820 n \* (GPO 1889) (discussing a “*Te Deum*, sung on account of the capture”). See also *Dana to Livingston* (Dec 21, 1782), in Francis Wharton, ed, 6 *The Revolutionary Correspondence of the United States* 156, 157 (GPO 1889) (referring to “the capture of Lord Cornwallis and his army”).

<sup>211</sup> *Report of Communications from the French Minister* (July 25, 1781), in Wharton, ed, 4 *Revolutionary Correspondence* at 600, 601 (cited in note 210).

<sup>212</sup> *Report of Foreign Affairs, to the Commissions at Paris* (Oct 18, 1777), in Francis Wharton, ed, 2 *The Revolutionary Correspondence of the United States* 415 (GPO 1889).

<sup>213</sup> *Livingston to Admiral Digby* (Apr 12, 1783), in Wharton, ed, 6 *Revolutionary Correspondence* 369, 370 (cited in note 210). See also *A. Lee to Committee of Foreign Affairs* (Nov 27, 1777), in Wharton, ed, 2 *Revolutionary Correspondence* 429, 430–31 (cited in note 212) (“Captain Hart, has taken an English merchantman in the mouth of the Garonne. These captures have given great offense to the two courts.”); *J. Adams to President of Congress* (June 2, 1780), in Francis Wharton, ed, 3 *The Revolutionary Correspondence of the United States* 758, 759 (GPO 1889) (“... and other artifices to the end to prevent the capture of their vessels. From this have followed the numerous captures and detentions.”); *Franklin to Torris* (May 14, 1780), in 3 *Revolutionary Correspondence* 740, 741 (“[A] void the trouble and expense likely to arise from such captures”); *Jay to Livingston* (Apr 28, 1782), in Francis Wharton, ed, 5 *The Revolutionary Correspondence of the United States* 336, 342 (GPO 1889) (“the evidence of captures in the manner specified in the above-mentioned order”).

<sup>214</sup> *Livingston to Franklin* (Dec 16, 1781), in Wharton, ed, 5 *Revolutionary Correspondence* 53, 53 (cited in note 213). See also *Livingston to Luzerne* (Dec 21, 1781), in Wharton, ed, 5 *Revolutionary Correspondence* 67, 67 (cited in note 213) (“an extract of my letter to Dr. Franklin on the subject of the late ordinance of Congress relative to captures”); *Livingston to Dana* (Mar 2, 1782), in Wharton, ed, 5 *Revolutionary Correspondence* 209, 212 (cited in note 213) (“I enclose an ordinance relative to captures which will show the respect paid by these States to the armed neutrality. It will be evident to you that this is not a mere empty compliment.”).

#### D. The Articles of Confederation

The Articles of Confederation agreed upon by the Continental Congress in 1777 and ratified on March 1, 1781, provided Congress

the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article . . . of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.<sup>215</sup>

This language confirms the observations made in the preceding parts. The Continental Congress assumed powers traditionally associated largely with the Crown—“determining on peace and war” and that of “establishing rules for deciding in all cases, what captures on land or water shall be legal”—and the terms “rules” and “captures” are used to describe part of that power. Congress had, as we have seen, the exclusive power to determine the captures that both public and private vessels could make, and this is the language used to identify that power.<sup>216</sup> The Articles of Confederation go on to use different language to describe the distinct power to determine “in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.”<sup>217</sup> This is part of what the traditional Prize Acts did—determined how prizes made by public vessels would be divided up as between the government and various members of the crew. Here, that power is given to Congress, excluding vessels within

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<sup>215</sup> Articles of Confederation Art VII (1777). There is no mention of “captures” in Benjamin Franklin’s proposed articles of confederation. Worthington Chauncey Ford and Gaillard Hunt, eds, *2 Journals of the Continental Congress 1774–1789* 195–99 (GPO 1905). The final language seems to be close to that of John Dickinson’s draft from July 12, 1776:

Of establishing Rules for deciding in all Cases, what Captures on Land or Water shall be legal—In what Manner Prizes taken by land or naval Forces in the Service of the United States shall be divided or appropriated—Granting Letters of Marque and Reprisal in Times of Peace . . . Establishing Courts for receiving and determining finally Appeals in all Cases of Captures.

Ford and Hunt, eds, *5 Journals of the Continental Congress* at 550 (cited in note 170).

<sup>216</sup> See Part IV.A.

<sup>217</sup> See note 215 and accompanying text.

the service of the colonies. This second part of the captures power also points away from a narrow understanding of “captures on land.” The phrase could mean, as we have seen, captures by naval forces of property on land, but this understanding is eliminated by the language “taken by land or naval forces in the service of the United States.”

The third aspect of Congress’s power over captures under the Articles of Confederation was that of “establishing courts for receiving and determining finally appeals in all cases of captures.”<sup>218</sup> The Continental Congress devoted substantial time to this aspect of its authority, which was the only seriously contested issue related to the power over captures during the Revolutionary War.<sup>219</sup>

The language used in the Articles of Confederation did not reach persons, however. The middle part quite obviously did not, and neither did “appeals in all cases of captures,” because cases of capture determined ownership of property, not the rights or status of individuals. The initial language “what captures on land and water shall be legal” might seem to apply to people, but this is not the best reading. In both British and American documents a “lawful” or “legal” capture referred to property, the taking of which had been duly authorized by a sovereign, and which was consistent with international law.<sup>220</sup> This usage continued in the documents issued by the Continental Congress after the ratification of the Articles of Confederation, as in “it shall be lawful to capture and to obtain condemnation of the property.”<sup>221</sup>

<sup>218</sup> *Id.*

<sup>219</sup> See Part IV.B.

<sup>220</sup> Ford and Hunt, eds, 3 *Journals of the Continental Congress* at 373 (Nov 25, 1775) (cited in note 154) (referring to property in discussing the necessity of “laws [to] be made to regulate, and tribunals erected competent to determine the propriety of captures . . .”); Ford and Hunt, eds, 13 *Journals of the Continental Congress* at 283–84 (Mar 5, 1779) (cited in note 196) (“[N]o finding of a jury in any court of admiralty, or court for determining the legality of captures on the high seas can or ought to destroy the right of appeal and the re-examination of the facts reserved to Congress.”); *id.* (resolving that, referring to property disputes decided by courts, “the legality of all captures on the high seas must be determined by the law of nations”); *id.* at 284 (noting that a control by appeal should extend to “the decisions of juries as judges in courts for determining the legality of captures on the sea”); Ford and Hunt, eds, 18 *Journals of the Continental Congress* at 865 (Sept 26, 1780) (cited in note 174) (“[T]he principles above stated [relating to property] ought to serve as a rule in all proceedings whenever there is a question concerning the legality of captures”). See also Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 231–32 (Mar 22, 1776) (cited in note 157) (discussing “lawful prize[s]”); *id.* at 248 (Apr 2, 1776) (noting that courts may proceed “to condemn the said captures, if they be adjudged lawful prize”); Ford and Hunt, eds, 9 *Journals of the Continental Congress* at 804 (Oct 17, 1777) (cited in note 200) (discussing the measures for “making lawful prize British vessels [ ] brought into . . . the United States”).

<sup>221</sup> Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 1153 (Dec 4, 1781) (cited in note 176).

This interpretation of the Articles of Confederation does create one potential difficulty, however: under what authority did the Continental Congress control the taking and treatment of prisoners? With respect to prisoners detained by public forces, the power might come from that of making “rules for the government and regulation of the said land and naval forces, *and directing their operations.*”<sup>222</sup> Many of the resolutions dealt with the treatment of prisoners on board vessels taken as potential prizes; this power might be incidental to the captures power or the power to grant letters of marque and reprisal.<sup>223</sup> Other resolutions and correspondence dealt with the terms of agreements with England to release, exchange, or furlough prisoners; this power may have come within Congress’s power of “entering into treaties and alliances.”<sup>224</sup>

### E. Conclusion

Records of the Continental Congress probably provide the best available information about the meaning of captures in the Constitution. The Continental Congress dealt extensively with captures, and made a number of “resolutions” and “ordinances” regulating them; this language is similar to that used in the Constitution. Many of the delegates to the Continental Congress involved in formulating these regulations went on to play important roles in the framing of the Constitution, including James Madison,<sup>225</sup> Edmund Randolph,<sup>226</sup> and Oliver

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<sup>222</sup> Articles of Confederation Art IX (emphasis added). This clause of the Articles of Confederation was incorporated into the Constitution without the italicized language.

<sup>223</sup> See, for example, Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 254 (Apr 3, 1776) (cited in note 157). Under British practice it was the Crown that issued such instructions. See, for example, *Additional instructions as to prisoners taken in prizes, 1744*, in Marsden, ed, 2 *Law and Custom* 430, 430 (cited in note 50). As instructions to privateers, enforced through the bond required of such vessels, they may well have been understood as a function of the power over Letters of Marque and Reprisal.

<sup>224</sup> Articles of Confederation Art IX.

<sup>225</sup> Ford and Hunt, eds, 19 *Journals of the Continental Congress* at 270 (Mar 15, 1781) (cited in note 170); id at 314 (Mar 27, 1781); id at 374 (Apr 12, 1781); Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 967–68 n 1 (Sept 17, 1781) (cited in note 176).

<sup>226</sup> Randolph played an important role in drafting the Continental Congress’s prize regulations and was one of the Members of Congress who heard prize appeals during the Revolution. Ford and Hunt, eds, 20 *Journals of the Continental Congress* at 764 (July 18, 1781) (cited in note 196); Ford and Hunt, eds, 21 *Journals of the Continental Congress* at 861–68 (Aug 14, 1781) (cited in note 176); id at 1147 (Nov 30, 1781). He also served as attorney general for both Virginia and the United States, as governor of Virginia, as a judge on a state admiralty court, as the head of the Virginia delegation, and as a member of the Committee of Detail at the Constitutional Convention. William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 *Am J Legal Hist* 117, 118–19 (1993).

Ellsworth.<sup>227</sup> Congressional control over captures extended to authorizations for both public and private maritime vessels to seize certain property; with these authorizations, Congress made important decisions about strategy and compliance with international law. This power over captures was significant not just for initiating conflict, but also in how it was waged. Consistent with British practice, Congress also had the narrower power to determine ownership interests in lawful captures. Congressional power over captures likely did not extend to people, however. Finally, the only significant dispute about the power over captures involved the federal power to review state court prize decisions, particularly those rendered by a jury.

The point of the Constitution was to ramp up the Articles of Confederation, so the distribution of power under the Articles is obviously not in and of itself determinative of the Constitution's division of authority. What is important, however, is the meaning of the language used in the Constitution and, in the case of captures, the experience under and the language of the Articles of Confederation sheds important light on the meaning of the Constitution's text.

## V. THE CONSTITUTION

### A. The Federal Convention

Not surprisingly given the experience of the Revolutionary War and the concerns that arose during the critical period, the preliminary plans for a Constitution focused on "captures" in terms of the federal courts. The Hamilton and Virginia plans would have given federal courts the complete power to hear cases involving captures: Hamilton as a matter of original jurisdiction in a supreme court, and the Virginia plan by vesting lower federal courts, as well as a supreme court, with the power to decide such cases.<sup>228</sup> The New Jersey Plan, as recorded in

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<sup>227</sup> On Ellsworth's drafting of the first Judiciary Act, see Casto, 37 *Am J Legal Hist* at 139–40 (cited in note 226). Of the fifty-five delegates at the Constitutional Convention, twenty-four had served in the Continental Congress. Martin Diamond, *The Founding of the Democratic Republic* 17 (F.E. Peacock 1981).

<sup>228</sup> Virginia Plan, Version A: "Resd that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature . . . the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy." *Virginia, Version A*, The Avalon Project (May 29, 1787), online at [http://avalon.law.yale.edu/18th\\_century/vatexta.asp](http://avalon.law.yale.edu/18th_century/vatexta.asp) (visited Nov 6, 2009). Hamilton's Plan, Version A: "VII. The supreme Judicial authority to be vested in . . . This Court to have original jurisdiction in all causes of capture." *Hamilton's Plan, Version A*, The Avalon Project (1787), online at [http://avalon.law.yale.edu/18th\\_century/hamtexta.asp](http://avalon.law.yale.edu/18th_century/hamtexta.asp) (visited Nov 6, 2009).

James Madison's notes, created only a supreme court and gave it only appellate review power over cases of captures.<sup>229</sup> The Pinckney Plan, by contrast, allowed Congress to create in each state a court of admiralty and to appoint "the Judges etc of the same for all maritime Causes which may arise therein respectively."<sup>230</sup> In the end, of course, the Constitution gave Congress the power to create lower federal courts and also provided that the "judicial power" of the United States shall extend "to all cases of admiralty and maritime jurisdiction."<sup>231</sup> As to direct congressional power over captures, by contrast, the plans said little. The Virginia plan proposed that the "National Legislature" under the Constitution "enjoy the Legislative Rights vested in Congress by the Confederation," which included the language on captures in the Articles of Confederation.<sup>232</sup> The Patterson Plan was similar,<sup>233</sup> and Hamilton's vested the "supreme legislative power" in Congress.<sup>234</sup> Pinckney's plan may have given Congress power to "make Rules concerning Captures from an Enemy."<sup>235</sup>

Captures were occasionally mentioned in the opening days of the Constitutional Convention to emphasize the "national" character of the government under the Articles of Confederation, in response to the claims that the proposed Constitution gave the government too much authority and lay beyond the power of the Convention to

<sup>229</sup> Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 244 (June 15, 1787) (Yale 1911). Farrand's version of the New Jersey Plan does not include this language. See Max Farrand, ed, 3 *The Records of the Federal Convention of 1787* 611–16 (Yale 1911).

<sup>230</sup> *The Plan of Charles Pinckney (South Carolina), Presented to the Federal Convention, May 29, 1787*, in *Sketch of Pinckney's Plan for a Constitution, 1787*, 9 *Am Hist Rev* 735, 741–47 (1904).

<sup>231</sup> US Const Art III, § 2. On June 12, 1787, the Convention apparently agreed to remove the language "all captures from an enemy" from the Virginia Plan; this language concerned the power of the judiciary. Farrand, ed, 1 *Records of the Federal Convention* at 211 (June 12, 1787) (cited in note 229). The Supreme Court has held that admiralty jurisdiction includes prize cases. See *Glass v The Sloop Betsey*, 3 US (3 Dall) 6, 7–12 (1794).

<sup>232</sup> *Id* at 21.

<sup>233</sup> "Resd that in addition to the powers vested in the U. States in Congress, by the present existing articles of Confederation." *Variant Texts of the Plan Presented by William Patterson – Text A*, The Avalon Project (1787), online at [http://avalon.law.yale.edu/18th\\_century/patexta.asp](http://avalon.law.yale.edu/18th_century/patexta.asp) (visited Nov 6, 2009).

<sup>234</sup> *Variant Texts of the Plan Presented by Alexander Hamilton to the Federal Convention – Text A*, The Avalon Project (1787), online at [http://avalon.law.yale.edu/18th\\_century/hamtexta.asp](http://avalon.law.yale.edu/18th_century/hamtexta.asp) (visited Nov 6, 2009) (outlining Hamilton's proposal for the functions and procedures of the legislature).

<sup>235</sup> Farrand, ed, 3 *The Records of the Federal Convention* at 598 (cited in note 229). Max Farrand documents uncertainty about the content of the Pinckney Plan, *id* at 595, and the *American Historical Review* provides a version without this language. 9 *Am Hist Rev* at 741–47 (cited in note 230). The Pinckney Plan played little recorded role at the Constitutional Convention, although it was referred to the Committee of Detail. Farrand, ed, 3 *Records of the Federal Convention* at 595 (cited in note 229).

enact.<sup>236</sup> Specific language about the Captures Clause was addressed first by the Committee of Detail at the end of July, which wrote:

5. To make war<: (and)> raise armies. <& equip Fleets.>

6. To provide tribunals and punishment for mere offences against the law of nations.

<Indian Affairs>

7. To declare the law of piracy, felonies and captures on the high seas, and captures on land.

<to regulate Weights & Measures>

8. To appoint tribunals, inferior to the supreme judiciary.<sup>237</sup>

The version from the Committee of Detail reported out to the Convention on August 6, 1787 consolidated the captures language and moved it out of the clause on piracy and felonies:

To constitute tribunals inferior to the Supreme Court;

To make rules concerning captures on land and water;

To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

To subdue a rebellion in any State, on the application of its legislature;

To make war;

To raise armies;

To build and equip fleets.<sup>238</sup>

On August 17, “declare War” was substituted for “make War,”<sup>239</sup> and on the following day “and grant Letters of Marque and Reprisal”

<sup>236</sup> Farrand, ed, 1 *Records of the Federal Convention* at 314 (June 19, 1787) (cited in note 229) (remarks of James Madison); id at 323–24 (remarks of Mr. King); id at 447 (remarks of Mr. Madison). Franklin also used the word “captures” in passing on August 7, in a discussion of the qualifications of electors. Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 210 (Aug 7, 1787) (Yale 1911) (“An English ship was taken by one of our men of war. It was proposed to the English sailors to join ours in a cruise and share alike with thm in the captures.”).

<sup>237</sup> Farrand, ed, 2 *Records of the Federal Convention* at 143–44 (cited in note 236) (showing markup in original).

<sup>238</sup> Id at 182 (Aug 6, 1787).

<sup>239</sup> Id at 319.

was added after “declare war.” This basic arrangement persisted through September 10,<sup>240</sup> but then the Committee of Style moved the captures language into its final position, immediately following the Marque and Reprisal Clause.<sup>241</sup>

What does this tour through the future Article I, § 8 mean? In its initial wording (“declare the law of . . . captures”) and placement (with piracy and felonies) the language seems directed to the courts, meaning that it would not have included authorization or people. But the language and placement were quickly changed, in the August 6 report, to “rules concerning” and moved into its own clause. Both point toward a broader type of control: the move takes it out of a clause arguably related to what courts do, and “rules” comes from the Articles of Confederation, which did include authorization. Even on August 6, however, the captures language stayed several lines removed from the powers most directly related to war.

The Convention as a whole made the “declare War” change and added Letters of Marque and Reprisal. It was the Committee of Style—which was not authorized to make substantive changes<sup>242</sup>—that moved the captures language to its final position with these other powers. From the perspective of the Captures Clause—which, before the Committee of Style got to it, was best read to include authorization—the best understanding of this move is that the Declare War and Letters of Marque and Reprisal Clauses also included power related to war initiation, and the three powers were united in the final version for this reason.

## B. Change from the Articles of Confederation?

The foregoing analysis suggests that, in the end, the captures language in the Constitution has the same meaning that it had in the Articles of Confederation. Other considerations support this analysis as well.<sup>243</sup> As a purely textual matter, the Articles of Confederation used

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<sup>240</sup> Farrand, ed, 2 *Records of the Federal Convention* at 570 (Sept 10, 1787) (cited in note 236) (“To constitute tribunals inferior to the supreme court; To make rules concerning captures on land and water; To define and punish piracies and felonies committed on the high seas, to punish the counterfeiting of the securities, and current coin of the United States, and offences against the law of nations; To declare war; and grant letters of marque and reprisal”).

<sup>241</sup> *Id.* at 595 (granting Congress the power “[t]o declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water”).

<sup>242</sup> See *Powell v McCormack*, 395 US 486, 537–39 (1969).

<sup>243</sup> See generally Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 *Const Comment* 463 (2004) (emphasizing the continuity between legislative powers in the Articles of Confederation and those in the Constitution).

“of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.”<sup>244</sup> The Constitution’s language is: “make Rules concerning Captures on land and water.”<sup>245</sup> One could argue that the Constitution’s phrasing seems to eliminate the second part of the power under the Articles of Confederation, regarding the apportionment of prizes, but this is extremely implausible. As we have seen, the English Parliament had controlled—with little controversy—this aspect of prizes for almost a century.<sup>246</sup> Moreover, “ordinances” and “regulations” passed by the Continental Congress determined the division of prizes, and the term “rules concerning” is best understood to be broader than “rules for deciding . . . what . . . captures shall be legal” so as to encompass the second part as well.

The debates from the state ratification conventions are of little help. Records from Maryland, Massachusetts, Connecticut, New Hampshire, New York, and North Carolina do not mention captures at all.<sup>247</sup> The South Carolina, Pennsylvania, and Virginia Conventions mentioned captures in the context of the jurisdiction of the federal courts and the right to a jury trial.<sup>248</sup> There is no record of any discussion of the captures language from Article I. In the *Federalist Papers*, Madison referred to captures as he had during the Federal Convention, to illustrate the scope of the federal government’s power under the Articles of Confederation.<sup>249</sup>

<sup>244</sup> Articles of Confederation Art IX.

<sup>245</sup> US Const Art I, § 8.

<sup>246</sup> See notes 103–07 and accompanying text.

<sup>247</sup> See generally Jonathan Elliot, ed, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (J.B. Lippincott 1891).

<sup>248</sup> *Convention of Virginia*, in Jonathan Elliot, ed, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 468–69 (J.B. Lippincott 1891); *id* at 535–36 (June 20, 1788); *Convention of South Carolina*, in Jonathan Elliot, ed, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 307–08 (J.B. Lippincott 1891). See also *James Wilson: Address to a Meeting of the Citizens of Philadelphia on October 6, 1787*, in Farrand, ed, 3 *Records of the Federal Convention* at 101 (cited in note 229):

Besides, it is not in all cases that the trial by jury is adopted in civil questions: for causes depending in courts of admiralty, such as relate to maritime captures, and such as are agitated in the courts of equity, do not require the intervention of that tribunal. How, then, was the line of discrimination to be drawn? The convention found the task too difficult for them; and they left the business as it stands . . . .

<sup>249</sup> *Federalist* 40 (Madison), in *The Federalist* 258, 262 (Wesleyan 1961) (Jacob E. Cooke, ed).

An English language dictionary published in 1789 in Philadelphia provides the following definitions:<sup>250</sup>

**To Captivate, kap<sup>n</sup>ti<sup>o</sup>vate<sup>2</sup>.** v. a. to take prisoner ; to charm, to subdue.  
**Captivation, kap<sup>i</sup>ti<sup>o</sup>vafun<sup>2</sup>.** f. the act of taking one captive.  
**Captive, kap<sup>i</sup>ti<sup>o</sup>v<sup>1</sup>.** f. one taken in war ; one charmed by beauty.  
**Captive, kap<sup>i</sup>ti<sup>o</sup>v<sup>1</sup>.** a. made prisoner in war.  
**Captivity, kap<sup>i</sup>ti<sup>o</sup>v<sup>1</sup>ty<sup>1</sup>.** f. subjection by the fate of war.  
**Captor, kap<sup>i</sup>tur<sup>1</sup>.** f. he who takes a prisoner, or a prize.  
**Capture, kap<sup>i</sup>tur<sup>1</sup>.** f. the act or practice of taking any thing ; a prize.

Consistent with common practice during the Revolution, “Capture” as used here does not refer to people, but instead to the act of taking “any thing” or to the thing (prize) itself. Although this definition is not limited to property taken in the context of maritime conflicts, it is best understood as applying only to moveable (“any thing”) property.<sup>251</sup> In the end, captures are probably best understood to include moveable property taken by land or naval forces, so long as judicial determination of ownership is sought, making them analogous to “prize.”

### C. The First Years of the Republic

In the first decade after ratification of the Constitution, the word “captures” was used much as it had been during the Revolutionary War, generally to mean the taking of moveable property by a maritime vessel for subsequent adjudication as prize.<sup>252</sup> This subject was an

<sup>250</sup> Thomas Sheridan, *A Complete Dictionary of the English Language* (1789), in *Early American Imprints*, No 45588 (cited in note 30).

<sup>251</sup> The dictionary defines “prize” as something taken by adventure or plunder.

<sup>252</sup> 7 Annals of Cong 65 (May 19, 1797) (describing a letter from Major General Mountflorencia to General Pinckney, dated Paris, February 14, which mentioned “the capture of a vessel from Boston, and another from Baltimore, by an American citizen on board a privateer”); id (describing another letter from Pinckney “mentioning the capture of several American vessels”); id at 66 (describing a letter from the Secretary of State to the Minister of Spain regarding the Jay Treaty, which “afforded satisfaction to our mercantile citizens for the capture of our ships and cargoes”); id at 92 (May 23, 1797) (“... the French were guilty of the first aggression as to captures at sea.”). Article VII of the Jay Treaty states: “divers merchants and others, citizens of the United States” who complained of “irregular or illegal captures or condemnations of their vessels and other property, under colour of authority or commissions from his Majesty.” Treaty of

important one, particularly as the second Washington administration sought to stay neutral as between France and England in 1793,<sup>253</sup> and the Adams administration struggled to respond to French attacks on American shipping during the quasi-war beginning in 1798.<sup>254</sup> Thus, it is not surprising that the term “capture” was used in this context—these were the issues of the times. More surprising, perhaps, is that when the respective constitutional powers of the president and Congress were discussed, little was said about the captures power itself.

Most significant for the foregoing discussion is legislation passed in early 1799 that dealt with the treatment of prisoners. President John Adams was considered politically weak, and he knew that the prospect of war with France was very unpopular in some quarters. Whether for political or constitutional reasons, Adams sought approval from Congress for most aspects of the response to French aggression—arming merchant vessels, authorizing seizures of French property by public vessels, and retaliating against French prisoners.<sup>255</sup> Legislation from February entitled, “An Act concerning French Citizens that have been, or may be captured and brought into the United States” gave the president the power to “exchange or send away” French prisoners aboard captured vessels.<sup>256</sup> In March, Congress vested the president with the “power of retaliation” and required him (under certain circumstances) to “cause the most rigorous retaliation to be executed on any such citizens of the French Republic, as have been or hereafter may be captured in pursuance of any of the laws of the United States.”<sup>257</sup>

These pieces of legislation, both of which use the verb “capture” with respect to people, may suggest that Congress can control the taking and disposition of prisoners under the Captures Clause.<sup>258</sup> The participants in the House debates never explicitly made this argument,

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Amity, Commerce and Navigation, Between His Britannic Majesty and the United States of America, 8 Stat 116 (1794).

<sup>253</sup> See William R. Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* 22–23 (South Carolina 2006).

<sup>254</sup> Sofaer, *War, Foreign Affairs, and Constitutional Power* at 144–45 (cited in note 26).

<sup>255</sup> *Id.* at 132, 137–66.

<sup>256</sup> An Act Concerning French Citizens that have been, or may be captured and brought into the United States, 1 Stat 624 (1799).

<sup>257</sup> An Act vesting the power of retaliation, in certain cases, in the President of the United States, 1 Stat 743 (1799).

<sup>258</sup> Other similar legislation did not use the word “capture” with respect to people. See An Act to authorize the defence of the Merchant Vessels of the United States against French depredations, 1 Stat 572, 573 (1798); An Act in addition to the act more effectually to protect the Commerce and Coasts of the United States, 1 Stat 574, 575 (1798); An Act further to protect the Commerce of the United States, 1 Stat 578, 580 (1798).

however. During the debate on the Act of March 3,<sup>259</sup> Harrison G. Otis argued that it came within Congress's power because the retaliation was, in effect, a reprisal.<sup>260</sup> Other language in the debates may suggest that legislation related to prisoners was viewed in terms of the declare war power, because it risked provoking a full-scale war with France.<sup>261</sup> To the extent that such legislation might have been understood as a function of the captures power, it still points to a narrow power over prisoners that extends only to those on board vessels taken as prize.

## VI. CAPTURES AND OTHER WAR-RELATED POWERS

The previous Part concluded that the Captures Clause gave Congress the power to determine what moveable property could be taken by public and private armed forces as prize, and the power to control the adjudication and division of such property. Contrary to some commentators<sup>262</sup> and to what the Court has suggested,<sup>263</sup> it did not give Congress power over the taking and treatment of people, except perhaps as an incident to the capture of a vessel. Contrary to other commentators, the Clause was limited neither to private vessels<sup>264</sup> nor to procedural rules,<sup>265</sup> but instead also gave Congress control over the conduct of public vessels with respect to moveable property. With this understanding of captures in place, we can consider its relationship to the other closely related constitutional powers.

### A. Letters of Marque and Reprisal and the Offenses Clause

Commentators have struggled to understand the Marque and Reprisal Clause; perhaps it controls all forms of low-intensity warfare and war initiation,<sup>266</sup> or both public and private seizures of property (but not other kinds of low-intensity warfare),<sup>267</sup> or perhaps it conferred only the power to license private vessels to make lawful cap-

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<sup>259</sup> 9 Annals of Cong 3045–51 (Mar 2, 1799).

<sup>260</sup> Id at 3051.

<sup>261</sup> Id.

<sup>262</sup> See notes 7–9.

<sup>263</sup> See note 10.

<sup>264</sup> See Prakash, 87 Tex L Rev at 319 (cited in note 3); Sidak, 28 Harv J L & Pub Policy at 468 (cited in note 11).

<sup>265</sup> Yoo, *The Powers of War and Peace* at 147 (cited in note 3); Sidak, 28 Harv J L & Pub Policy at 468 (cited in note 11).

<sup>266</sup> Lofgren, 81 Yale L J at 699–700 (cited in note 17); Lobel, 50 U Miami L Rev at 67–70 (cited in note 18).

<sup>267</sup> Ramsey, 69 U Chi L Rev at 1613–19 (2002) (cited in note 5); Wuerth, 106 Mich L Rev at 90 (cited in note 9).

tures.<sup>268</sup> The foregoing discussion strongly supports the third view, because contrary to the assumption of virtually all scholars working in this area,<sup>269</sup> it was the Captures Clause—not the Marque and Reprisal Clause—that gave Congress the power to determine what property was subject to capture. This resolves a key uncertainty about the Marque and Reprisal Clause: it seems only to apply to the licensing of *private* vessels, yet Congress was clearly understood to control what property could be taken by public vessels as well.<sup>270</sup>

This tension is resolved by the Captures Clause, which applied to both public and private forces. Congress did control the taking of property by public vessels (including takings of property characterized as reprisals), but it did so under the Captures Clause. Letters of Marque and Reprisal referred, as the word “letters” suggests, to the licensing of private vessels, not to the determination about what kinds of property those vessels could take.<sup>271</sup> This interpretation is supported by the Articles of Confederation, which gave states the power to grant letters of marque and reprisal during war.<sup>272</sup> This language gave states the power to license private vessels, but it did not confer upon states any power to determine what enemy or neutral property was subject to taking. That power belonged to Congress during the Revolutionary War, as part of its authority over captures.

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<sup>268</sup> Kent, 85 Tex L Rev at 920 (cited in note 19).

<sup>269</sup> Ramsey, 69 U Chi L Rev at 1617–18 (cited in note 5); Reveley, III, *War Powers of the President and Congress* at 63–64 (cited in note 28); Lobel, 50 U Miami L Rev at 67 (cited in note 18); Lofgren, 81 Yale L J at 696–97 (cited in note 17). Some scholars have argued that the Marque and Reprisal Clause covers just the licensing of private vessels, without understanding that the Captures Clause confers the substantive power to determine what moveable property may be seized by private and public vessels. See Yoo, *The Powers of War and Peace* at 147 (cited in note 3); Sidak, 28 Harv J L & Pub Policy at 468 (cited in note 11); C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U Chi L Rev 953, 953–54 (1997).

<sup>270</sup> Consider Lofgren, 81 Yale L J at 695–96 (cited in note 17) (conceding that the technical definition of letters of marque and reprisal meant only the power to give letters to private individuals, but rejecting this interpretation as inconsistent with the overall allocation of powers to Congress and the president); Ramsey, 69 U Chi L Rev at 1618 (cited in note 5).

<sup>271</sup> This is precisely how James Madison described letters of marque and reprisal in Federalist No 44, where he wrote that under the Constitution “these licenses must be obtained as well during war as previous to its declaration, from the government of the United States. This alteration [from the Articles of Confederation] is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those, for whose conduct the nation itself is to be responsible.” Federalist 44 (Madison), in *The Federalist* 299, 299 (cited in note 249). See also Treaty of Friendship, Limits and Navigation Between The United States of America, and the King of Spain, Art XIV, 8 Stat 138 (1795); Ford and Hunt, eds, *5 Journals of the Continental Congress* at 774 (Sept 17, 1776) (cited in note 170) (proposing similar language for a treaty with France).

<sup>272</sup> Articles of Confederation Art XIII.

Moreover, references to reprisals—not to *letters of marque* and reprisal—were the common way to describe the substantive power to take goods.<sup>273</sup> This usage is best explained by the argument advanced here: Congress controlled the substantive power over reprisals (that is, to determine what property gets taken) and other kinds of captures (including property taken in war), but that power is conferred by the Captures Clause or some other clause in Article I, not by the power to issue letters to particular private individuals. A reprisal power that extended to taking people—already uncommon by the late eighteenth century—might have been given to Congress by virtue of its power to “define and punish . . . Offenses against the Law of Nations.” And, of course, Congress may have had the power to determine the treatment of prisoners taken aboard prize vessels as a function of its captures power. Reprisals were granted as a response to wrongdoing by other countries, and were thus one means of punishing an offense against the law of nations.<sup>274</sup> Indeed, this is likely why James Madison thought the Captures Clause was redundant to the Offenses Clause—the latter gave Congress a *general* power to act against countries that violated the law of nations, the former was a more specific power that could be used for the same purpose.<sup>275</sup>

To be sure, some eighteenth-century authors did suggest that the peacetime granting of *letters of marque* and reprisal was associated with war initiation, which undermines the claim that the significant, substantive power over reprisals and other taking of property was actually found in the Captures Clause. Blackstone, for example, wrote that “the prerogative of granting” letters of marque or reprisal “is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally

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<sup>273</sup> Burlamaqui, *Principles of Politic Law* at pt 4, ch 3, §§ 30–32 (cited in note 76) (discussing substantive power in terms of reprisals, not letters); Vattel, *The Law of Nations* at 284–89 (cited in note 70) (same); Hale, 1 *History of the Pleas* at 161 (cited in note 97) (same); Ford and Hunt, eds, 4 *Journals of the Continental Congress* at 230 (cited in note 157) (“It being therefore necessary to provide for their defence and security, and justifiable to make reprisals upon their enemies, and otherwise to annoy them.”); *Opinion of Mr. Jefferson, Sec. of State, May 16, 1793*, in 7 *Jefferson’s Works* 628, reprinted in John Bassett Moore, ed, 7 *A Digest of International Law* 123 (GPO 1906) (making the same argument); Letter from Alexander Hamilton to James McHenry (May 17, 1798), in Harold C. Syrett, ed, 21 *The Papers of Alexander Hamilton* 461, 461–62 (Columbia 1974) (“[T]his must fall under the idea of reprisals and requires the sanction of that Department which is to declare or make war.”).

<sup>274</sup> Kent, 85 *Tex L Rev* at 915 (cited in note 19).

<sup>275</sup> See note 21 and accompanying text.

ending in a formal declaration of war.”<sup>276</sup> This language does suggest that power over “letters” of marque and reprisal includes the power to determine what property was taken. But Blackstone’s use of the term was obviously not coextensive with the constitutional meaning of letters of marque and reprisal. He goes on to say that

[t]hese letters are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal . . . may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made.<sup>277</sup>

This language describes specific, peacetime reprisals in which individuals seek compensation for harm done to them personally. The Constitution unequivocally includes both war and peacetime letters of marque and reprisal.<sup>278</sup>

The definition provided by Blackstone also does not account for the changes in the use of the word “capture” during the Revolutionary War. And, equally significant, the specific, private reprisals to which Blackstone is referring in this passage were already obsolete in practice when Blackstone wrote.<sup>279</sup> Under the old practice—when reprisals allowed an aggrieved private individual to seek redress from the subjects of another country—the letter itself provided the power to seize the goods. With general reprisals or the seizure of enemy property during war—where private parties took property based not on harm to them specifically, but instead based on harm to the nation as a whole<sup>280</sup>—it was not the letter that provided that power, but a general order (British practice) or an act of Congress (American practice during the Revolutionary War and thereafter) that did so. The letter merely licensed a particular private individual to take goods, the sei-

<sup>276</sup> Blackstone, 1 *Commentaries* at \*250 (cited in note 140); Letter from Alexander Hamilton to Theodore Sedgwick (Jan 20, 1797), in Harold C. Syrett, ed, 20 *The Papers of Alexander Hamilton* 473, 473–75 (Columbia 1973).

<sup>277</sup> Blackstone, 1 *Commentaries* at \*250–51 (cited in note 140). See also Letter from James McHenry to John Adams (May 18, 1798), in Sofaer, *War, Foreign Affairs and Constitutional Power* at 155 (cited in note 26) (referring to whether an act comes within “the sphere of reprisals and . . . require[s] the explicit sanction of the branch of the government, which is alone constitutionally authorised to grant letters of marque and reprisal”).

<sup>278</sup> The Articles of Confederation distinguished between war and peacetime letters of marque and reprisal. The Constitution does not. See Federalist 44 (Madison) at 299 (cited in note 271) (explaining the reason for the change).

<sup>279</sup> See text at notes 94–102.

<sup>280</sup> See note 97.

zure of which had already been generally authorized. As early as 1664, for example, the king ordered general reprisals against the States General (the Dutch) by both public and private vessels.<sup>281</sup> A separate commission to the Lord High Admiral allowed him to license private subjects to seize Dutch property.<sup>282</sup> Similarly, a letter of marque from 1760 authorized Birchman Pillans to seize the property of “enemies.” It was the declaration of war that enabled the seizure of property; the letter of marque merely identified an individual that was licensed to do so.<sup>283</sup> As described above, captures of property during the Revolutionary War were controlled by acts of Congress that directed what could be taken; letters only authorized specific people to do so. Indeed, the specific letters of marque and reprisal described by Blackstone were rarely issued even by the British during the eighteenth century and were never issued at all by the United States.<sup>284</sup>

Careful understanding of the Captures Clause has thus resolved longstanding and fundamental confusion about the Marque and Reprisal Clause. We turn now to the significance of both in relation to the language that immediately precedes them: “Declare War.”

## B. Declare War

The Captures Clause is cited on all sides of the Declare War debate. Some argue that the Declare War Clause includes only the power to make a legal declaration about the state of hostilities;<sup>285</sup> others

<sup>281</sup> Marsden, ed, 2 *Law and Custom* at 48–49 (cited in note 50). See also Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 *Am J Intl L* 694, 720–22 (1933) (describing this authorization for general reprisals); Hale, 1 *History of the Pleas* at 161 (cited in note 97) (distinguishing general reprisals from the commissions that private parties needed before taking the ships or goods of the adverse party).

<sup>282</sup> Marsden, ed, 2 *Law and Custom* at 50 (cited in note 50) (authorizing the Lord High Admiral to grant such commissions “to anie such of our loving subjects and others as you shall deeme [ ] qualified”).

<sup>283</sup> *Letter of marque, 1760*, in Marsden, ed, 2 *Law and Custom* 390, 390–93 (cited in note 50) (granting a commission to a particular captain to capture a particular ship). As another example, in 1739 the Privy Council authorized the issuance of letters of marque with the following language:

Owing to the many and repeated depredations of Spanish guarda costas in the West Indies and elsewhere, and to the non-payment by Spain of the sum agreed on as reparation by the convention of 14 January last, his Majesty, by and with the advice of his Privy Council, orders general reprisals against Spanish ships, and the issue of letters of marque.

Swanson, *Predators and Prizes* at 30 (cited in note 29). This order of the Privy Council does not actually grant any letters of marque or reprisal, it merely orders that such letters be granted. Colonial governors, for example, were empowered by the secretary of state in charge of the colonies to actually grant the letters authorized by the Privy Council. *Id.*

<sup>284</sup> Hindmarsh, *Force in Peace* at 53–54 n 1 (cited in note 95).

<sup>285</sup> Yoo, *The Powers of War and Peace* at 143–55 (cited in note 3).

maintain that it gives Congress the complete power to bring the country into a state of war, including the power to commit troops both offensively and defensively;<sup>286</sup> others take an intermediate view that the Declare War Clause gives Congress the power to commit troops or otherwise initiate war offensively, but that once the United States is attacked the president has the power to bring the United States into a state of war.<sup>287</sup> For those with a narrow view of the Declare War Clause, the task has been to minimize the Captures and Marque and Reprisal Clauses; these scholars have argued that the Captures Clause confers on Congress only control over the procedural aspects of captures and reaches only takings by private, not public vessels. As described above, however, the Captures Clause confers on Congress the broad power to determine the property subject to capture both during and before a full-scale war, allowing Congress to initiate or escalate hostilities.<sup>288</sup> This cuts against a narrow reading of the Declare War Clause, for the Captures Clause gives Congress control over one method of initiating war.<sup>289</sup>

For those with a broad view of the Declare War Clause, the task has been to explain whether (and if so, why) the Captures Clause is redundant of the Declare War Clause.<sup>290</sup> Over the dissent of Justice Story, the Court in *Brown* reasoned in effect that that the Captures Clause was not entirely redundant of the Declare War Clause. The Court held that the declaration of war in 1812 did not itself provide authorization for the taking of enemy property on land at the outset of hostilities.<sup>291</sup> The Court is best understood as reasoning that the Captures Clause requires very clear congressional authorization for the taking of enemy property, and that absent the Captures Clause executive branch officials might have had greater power pursuant to the Declare War Clause.<sup>292</sup> But there is another way in which the Clauses are not redundant: even an expansive view of the declare war power to include all forms of war initiation would not include the

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<sup>286</sup> Prakash, 93 Cornell L Rev at 46–48 (cited in note 3).

<sup>287</sup> See Michael D. Ramsey, *The President's Power to Respond to Attacks*, 93 Cornell L Rev 169, 170 (2007).

<sup>288</sup> See Parts IV and V.

<sup>289</sup> Ramsey, 69 U Chi L Rev at 1602 (cited in note 5) (making this argument based on the Marque and Reprisals Clause).

<sup>290</sup> See Delahunty and Yoo, 93 Cornell L Rev at 127 (cited in note 3); Prakash, 93 Cornell L Rev at 55 nn 38, 40 (cited in note 3).

<sup>291</sup> *Brown*, 12 US (8 Cranch) at 129.

<sup>292</sup> Justice Story viewed the Captures Clause as merely explanatory of the Declare War Clause, included in the Constitution out of an abundance of caution. See *id.* at 151 (Story dissenting).

power to determine how captured property would be adjudicated and divided; this power belonged to Parliament (for the most part) under the British system, to the Continental Congress (with respect to its vessels) during the Revolutionary War, and now to Congress under the Constitution. Moreover, *Brown* suggests the Captures Clause gave Congress more power to control the prosecution of an ongoing war than it would have enjoyed under the Declare War Clause alone. It is also very clear, however, that the Captures Clause and the Declare War Clause do overlap in significant ways. The power to declare war may well have included the power to grant general reprisals (which is also a function of the Captures Clause), and, as we have seen, declarations of war occasionally directed that specific kinds of property were subject to capture; Congress's war powers under Article I were partially overlapping, and arguments that seek to avoid such overlap should be treated with suspicion.

A careful analysis of the Captures Clause thus makes significant contributions to the enduring debate about the Declare War Clause. It has cleared up a fundamental and longstanding error as to the scope of the Letters of Marque and Reprisal Clause: it does indeed pertain only to the licensing of private vessels, but the Captures Clause gave Congress power over the taking of property by public and private forces. This reorientation arguably supports a broad reading of the Declare War Clause in three ways. First, it makes clear that Congress controlled a potential method of war initiation, strengthening the case that the Declare War Clause included more than the power to issue a legal declaration. Second, it answers the argument that the Clauses are thereby redundant, for the captures power also had a procedural side and significance in war prosecution, which would not necessarily have been part of the declare war power. Finally, for the same reason, this understanding of the Captures Clause undermines the argument that the Declare War Clause should not be read to include all measures short of war on the grounds that this reading would make it redundant with the Captures and Marque and Reprisal Clauses.

### C. Rules for the Government and Regulation of the Armed Forces

One starting point for understanding this grant of power to Congress is the Articles of War that the Continental Congress enacted during the Revolutionary War,<sup>293</sup> although the language of the Consti-

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<sup>293</sup> See *American Articles of War of 1775*, in William Winthrop, 2 *Military Law* 953, 953–60 (W.H. Morrison 1886); *American Articles of War of 1776*, in Winthrop, 2 *Military Law* 961, 961–

tution is more limited than that of the Articles of Confederation.<sup>294</sup> The Articles of War functioned as codes of conduct for those in the military, outlining rules against swearing, cowardice, and insubordination (among other things), providing for punishment, and authorizing trials by court-martial.<sup>295</sup> They did not mention the taking or treatment of enemy prisoners. Moreover, the Articles of War set out general standards of conduct and behavior for those serving in the military, but did not provide specific tactical directions for activities like the treatment or exchanges of particular prisoners.

One commentator has nevertheless suggested that the government-and-regulation power includes a comprehensive power over enemy prisoners, and over the direction of military operations generally.<sup>296</sup> Not much direct evidence supports this claim, however. With respect to prisoners this argument is supported with citations to US legislation from the 1790s (described in part above) and to British legislation from 1749 (and earlier) generally governing the treatment of people aboard vessels taken as prizes,<sup>297</sup> but apparently nothing links these specifically to the government-and-regulation power in the Constitution. Justice Story discusses the power only with respect to the appropriate punishment for those serving in the “fleets and armies,”<sup>298</sup> which is the way that the Supreme Court has understood the government-and-regulation power.<sup>299</sup>

And there are several alternative theories for the source of the power that Congress exercised over prisoners during the 1790s. Perhaps this authority came from the Offenses Clause, as suggested above,<sup>300</sup> or

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71. See also *Parker v Levy*, 417 US 733, 745–46 (1974) (relying generally on the Articles of War to interpret the Government and Regulation Clause).

<sup>294</sup> See Michael D. Ramsey, *Response: Directing Military Operations*, 87 Tex L Rev See Also 29 (2009), online at <http://www.texasrev.com/seealso/vol/87/responses/ramsey> (visited Nov 6, 2009). See also note 222 and accompanying text.

<sup>295</sup> *American Articles of War of 1775*, in Winthrop, 2 *Military Law* 953, 953–60 (cited in note 293); *American Articles of War of 1776*, in Winthrop, 2 *Military Law* 961, 961–71 (cited in note 293) (providing a general code of conduct; for instance, recommending attendance at religious services).

<sup>296</sup> Prakash, 87 Tex L Rev at 338–39 (cited in note 3). Consider Wuerth, 106 Mich L Rev at 95 (cited in note 9) (attributing in passing Congress’s power over prisoners to either the Captures Clause or the Government and Regulation Clause).

<sup>297</sup> *Id.*

<sup>298</sup> Story, 3 *Commentaries* at § 1197 (cited in note 20) (noting that the power to regulate “is more safe in the hands of Congress than of the executive; since, otherwise, the most summary and severe punishments might be inflicted at the mere will of the executive”).

<sup>299</sup> See, for example, *Loving v United States*, 517 US 748, 753 (1996); *Ryder v United States*, 515 US 177, 186 (1995); *Solorio v United States*, 483 US 435, 438 (1987); *Chappell v Wallace*, 462 US 296, 305 (1983); *Toth v Quarles*, 350 US 11, 15 (1955).

<sup>300</sup> See Part VI.A.

as a function of the Declare War Clause, or (with respect to prisoners taken aboard prize vessels) as incidental to the Captures or Marque and Reprisal Clauses. Or perhaps these Acts of Congress from the late 1790s—a full decade after the Constitution was ratified—were already a departure from the original understanding of the Constitution, facilitated by the political weakness of President Adams.<sup>301</sup>

#### D. The Commander-in-Chief Power

Congressional authority over captures also suggests that in one sense the commander-in-chief power is more limited than many descriptions suggest, for with this power Congress controls at least one aspect of the way force is deployed and used, even during an ongoing war. It gives Congress control over what property can be seized by both public and private forces for the purposes of perfecting title through a judicial proceeding. As a function of naval power, this was tremendously important during the Revolutionary War—as well as in the earlier eighteenth-century wars and in the foreign policy difficulties that would arise in the 1790s. On the other hand, the Captures Clause did not give Congress a general power to control the taking and detention of people.

#### E. Congressional Supremacy, War, and Foreign Affairs

The foregoing analysis of the Captures Clause adds to a growing body of scholarship that emphasizes congressional supremacy in war and foreign affairs as a matter of history, practice, and doctrine. Some scholars have argued, for example, that the president has no exclusive powers as commander in chief and that Congress has the power to fully and comprehensively regulate the initiation and prosecution of war and other armed conflicts.<sup>302</sup> Others have emphasized the significance of the Offenses Clause and Congress's power to establish lower federal courts—both allowed Congress to control the US response to violations of international law and to limit the situations in which the United States would be drawn into armed conflict.<sup>303</sup>

The Captures Clause provides some support for these arguments, because it vests in Congress the exclusive power to determine what

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<sup>301</sup> See note 255 and accompanying text.

<sup>302</sup> See Lobel, 69 *Ohio St L J* at 393 (cited in note 3); Prakash, 87 *Tex L Rev* at 344 (cited in note 3); Barron and Lederman, 121 *Harv L Rev* at 1106–11 (cited in note 3). See generally Luban, 81 *S Cal L Rev* 477 (cited in note 3) (suggesting a strong role for Congress).

<sup>303</sup> Kent, 85 *Tex L Rev* at 854–55, 927 (cited in note 19); Bellia and Clark, 109 *Colum L Rev* at 32, 44–45 (cited in note 3). See also Wuerth, 106 *Mich L Rev* at 84 (cited in note 9).

moveable property could be taken by public and private armed vessels, which was extremely important in the late eighteenth century—both tactically and legally. As rich and significant as the history of the Captures Clause is, however, it also provides reasons to be skeptical of attempts to read the Constitution's text in the area of war and foreign affairs power to find overarching answers or ones that avoid overlap, gaps, and uncertainties. Even with respect to the conclusions drawn in this Article about the Clause itself, there is countervailing evidence. Moreover, the Declare War and Captures Clauses give Congress overlapping authority, and the Offenses Clause may overlap with both. And Congress's power to dictate the taking and treatment of prisoners seems to have been understood during the Revolutionary War and the 1790s, yet the source of that power is unclear. Finally, it gives reason to be skeptical of constitutional analysis that trades heavily on continuity with the British and colonial past: on the surface, the Captures Clause may look like it is drawn wholesale from the earlier practice, but careful analysis reveals innovation, discontinuity, and a clear break from the past.

#### CONCLUSION

The original meaning of the Captures Clause does not emerge from the historical record as clearly as one might hope. Use of the word "captures" changed in several ways through the course of the eighteenth century, but the word was a common, not technical, one, and the changes yield a continuum of potential meanings instead of sharp binary choices. Moreover, until the work of the Continental Congress during the Revolutionary War, the word "captures" was not used in direct conjunction with either phrases like "land and water" or "rules concerning." Textually, the relationship between the language of the Articles of Confederation and the ordinances and resolutions of the Continental Congress is close and significant. The importance of this relationship does not emerge from these documents alone, however, but instead from the lack of any similar language in the British and American documents that preceded them. The colonists were making it up as they went along, and documents related to captures offer a striking example: traditional documents related to maritime warfare were edited and reworded to fit the new organization of government, and the term "captures" was used in a new way. The text of the Constitution is far closer to these distinctive, novel usages, than it is to anything that came before.

The best understanding of the Clause is narrow in terms of object, including moveable property taken for adjudication as prize, but not

persons. The type of control is broad: it includes the power to authorize the making of captures and also to determine their legality. This conclusion helps, in turn, to make sense of other uncertainties about congressional and presidential power. It resolves a longstanding confusion about the Marque and Reprisal Clause, which provides only the power to license private vessels. That conclusion has been resisted because Congress clearly exercised the power to determine what property could be taken by both private and public vessels. This power is a function of the Captures Clause, however, not the Marque and Reprisal Clause. With this congressional power established, it becomes clear that the declare war power includes at least some methods of war initiation and some measures short of war. Finally, any claim that the president, as a matter of constitutional text and history, controls all tactical decisions about how force is deployed, is put to rest by a careful reading of the Captures Clause.