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# THE ORIGINAL UNDERSTANDING OF THE CAPTURE CLAUSE

*Aaron D. Simowitz\**

## INTRODUCTION

The Congress shall have power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.<sup>1</sup>

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.<sup>2</sup>

It is impossible to read these two statements without thinking that something is amiss. Either the Constitution does not mean what it seems to say, or the Office of Legal Counsel was in error. The former proposition has been the received wisdom for the past century and a half.<sup>3</sup> This Article is devoted to the possibility of the latter.

While the Capture Clause may seem obscure today, the power it embodies was crucially important to the early republic. General George Washington declared, even during the Revolutionary War, that a centralized and standardized system for the handling of prizes was vital to the war effort.<sup>4</sup> The first court established by the fledgling federal government was the Federal Appellate Court of Prize.<sup>5</sup> This court heard over one hundred and eighteen cases before it was dissolved by Article III of the Constitution.<sup>6</sup>

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\* Associate, Gibson, Dunn & Crutcher L.L.P.; J.D., University of Chicago Law School, 2006. The working version of this Article was originally posted on Social Science Resource Network on March 13, 2008. Many thanks in particular to David Currie, Tom Dupree, Martin Totaro, Samuel Bray, Maeva Marcus, Danny Marcus, Dennis Hutchinson, and Judge D. Brooks Smith, as well as Mary Dudziak and the readers of the Legal History Blog who sent helpful suggestions.

1. U.S. CONST. art. I, § 8, cl. 11.

2. Memorandum from the Office of Legal Counsel, U.S. Dept. of Justice, to Alberto R. Gonzales, Counsel to the President, 35, 39 (Aug. 1, 2002) [hereinafter 8/1/02 Interrogation Opinion], available at [news.findlaw.com/wp/docs/doj/bybee80102mem.pdf](http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf) (last visited Oct. 6, 2009).

3. See *infra* notes 36–57 and accompanying text.

4. See William F. Swindler, *Evolution, Law and Order*, in SUPREME COURT HISTORICAL SOCIETY 1976 YEARBOOK 12 (1976), available at [http://www.supremecourthistory.org/publications/images/SCHS\\_publications-1976.pdf](http://www.supremecourthistory.org/publications/images/SCHS_publications-1976.pdf). Washington endorsed the creation of a national prize court eight months before the Declaration of Independence was signed. *Id.*

5. The first appeal was heard by an ad hoc panel in 1776. *Id.* at 13.

6. *Id.* Eight of these decisions appear in Dallas's first volume of Supreme Court cases. *Id.*

The Federal Appellate Prize Court was responsible for reviewing the decisions of state prize courts that were charged with dividing up the spoils of captured enemy ships.<sup>7</sup> The federal government, first under the Articles of Confederation and then under the Constitution, was responsible for prescribing the rules under which enemy ships and prisoners could be taken.<sup>8</sup> The value of captured ships financed the early navy and privateer system.<sup>9</sup> However, the early law of capture also concerned captured persons who could sometimes be redeemed or ransomed for “head money.”<sup>10</sup> Later scholars correctly concluded that the capture of property was more important to the Framers of the Constitution than the capture of persons.<sup>11</sup> They also assumed incorrectly that the Capture Clause did not apply to persons.<sup>12</sup>

This Article shows that the majority view of the Capture Clause as a provision that governs only property is based on a faulty and even perhaps disingenuous statement from 1833.<sup>13</sup> This Article will also show that the majority view is inconsistent with the admiralty law of the late eighteenth century and with later congressional practice.<sup>14</sup> The conclusion is simple: when the Framers gave Congress the power to make “Rules concerning Captures on Land and Water,”<sup>15</sup> they understood this power to cover enemy persons as well as property.

This thesis directly implicates a pressing issue in constitutional law. With the arrival of the Obama Administration, the Office of Legal Counsel (OLC) quickly withdrew several of the Bush Administration

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7. See generally HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775-1787* (1977).

8. *Id.* at 39.

9. See 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, 963-66 (1997) (describing the commercial nature of privateering, which proved to be the “life blood” of New England during the Revolution”). Although Marshall argues for a far narrower construction of the Marque and Reprisal Clause than is argued for in this Article, he also endorses an interpretation of the quasi-powers (powers related to the military that can be exercised in or out of a state of declared war) as independent of the power to declare war. See *id.* at 977-78. Marshall’s proposed limitation to the Marque and Reprisal Clause would not cabin the Capture Clause because the power embodied in the Capture Clause applies to all American forces, including privateers and the conventional military. See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1668 (2002).

10. Gomer Williams, *HISTORY OF THE LIVERPOOL PRIVATEERS AND LETTERS OF MARQUE WITH AN ACCOUNT OF THE LIVERPOOL SLAVE TRADE* 133 (London, Heinemann 1897) (noting the “head and gun money” received in connection with the capture of a French privateer).

11. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2093 & n.202 (2005).

12. *Cf. id.*

13. See *infra* notes 36-57 and accompanying text.

14. See *infra* notes 58-123 and accompanying text.

15. U.S. CONST. art. I, § 8, cl. 11.

OLC's prior memoranda, including the one quoted above.<sup>16</sup> Relying on many of the sources previously identified in this Article, the OLC concluded: "[W]e have substantial doubts about the assertion that the Captures Clause grants no power to Congress with regard to the detention and treatment of enemy combatants."<sup>17</sup> Although no federal court considering the enemy combatant issue has addressed the Capture Clause in its holding, one Judge on the United State Court of Appeals for the District of Columbia recently observed in a concurrence, and without further comment—"Congress possesses express constitutional authority to make rules concerning wartime detainees"—citing the Capture Clause.<sup>18</sup>

## II. THE CAPTURE CLAUSE AND THE QUASI-WAR POWERS

To understand the debate over whether "captures on land and water" covers persons or only property, one must first understand the larger debate: whether the Capture Clause and the Marque and Reprisal Clause constitute independent substantive powers, or whether they are merely explanatory of the power to "declare war."<sup>19</sup> Justice Joseph Story took the latter position in his 1833 *Commentaries on the Constitution of the United States*.<sup>20</sup> This position is implausible, however, for several reasons. First, each commentator of the late eighteenth and early nineteenth century to consider the issue concluded that the powers to issue letters of marque and reprisal and the power to prescribe rules of capture are necessarily part of the power to declare war.<sup>21</sup> Second, it seems unlikely that the Framers would have

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16. See Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to file 3-4 (Jan. 15, 2009), available at <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf> (last visited on Oct. 1, 2009).

17. *Id.* at 6. The OLC memorandum cites to sources that suggest that the Founders understood "captures" to include the capture of prisoners. See ALEXANDER HAMILTON, *The Examination, No. 1*, in 25 THE PAPERS OF ALEXANDER HAMILTON 444, 454-57 (1977); RICHARD LEE, A TREATISE ON CAPTURES IN WAR 56 (London, Sandby 2d ed. 1803); MONSIEUR DE Vattel, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 356 (Gaunt ed. 2001) (1849); GEORG FRIEDRICH VON MARTENS, AN ESSAY ON PRIVATEERS, CAPTURES, AND PARTICULARLY ON RECAPTURES, ACCORDING TO THE LAWS, TREATIES, AND USAGES OF THE MARITIME POWERS OF EUROPE (Thomas Hartwell Horne trans., Brooke 1801) (1795).

18. *Kiyemba v. Obama*, 561 F.3d 509, 517 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

19. U.S. CONST. art. I, § 8, cl. 11.

20. See JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1170-1171, at 62-64 (Da Capo Press 1970) (1833). Justice Story's position is discussed further *infra* Part III.

21. See, e.g., WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 251 (Univ. of Chi. Press 1979) (1765); JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 53-67 (O. Halsted 1826).

specified something so readily apparent.<sup>22</sup> Third, the Articles of Confederation did not place the *marque* and *reprisal* power and the capture power alongside the “sole and exclusive right and power of determining on peace and war.”<sup>23</sup> Article IX of the Articles of Confederation conferred the analog of the capture power as well as the power to “grant[ ] letters of *marque* and *reprisal* in times of peace.”<sup>24</sup>

Thus, the more natural understanding of the powers to grant letters of *marque* and *reprisal* and to make rules of capture is that they are quasi-war powers.<sup>25</sup> In other words, they constitute independent substantive powers exercisable by Congress outside of wartime, although they are by nature military powers. This is consistent both with the practice that letters of *marque* could be, and often were, granted during peacetime and with the American practice after the Revolutionary War.<sup>26</sup> The U.S. Supreme Court endorsed this view of the Capture Clause in *Brown v. United States*, in which the question was squarely presented for the first time.<sup>27</sup> This decision was presaged by the Court in its earlier decisions arising from the undeclared war with Bourbon France from 1798 to 1800.<sup>28</sup> In particular, in *Bas v. Tingy*, the Court held that the quasi-war powers are exercisable without a declaration of war, essentially endorsing congressional action in an “imperfect”

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22. See BLACKSTONE, *supra* note 21, at 251; KENT, *supra* note 21, at 53–67.

23. ARTICLES OF CONFEDERATION art. IX, *replaced by* U.S. CONST. The relevant article reads in full:

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; 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.

*Id.*

24. *Id.*

25. See 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. POL’Y 465, 465–66 (2005). Sidak’s article contains an excellent discussion of the “quasi-war powers” and their scholarly treatment. Although it brings a vastly different perspective to the issue, a few of the assertions it makes are irreconcilable with this Article.

26. *Id.* at 479–80 (describing the “extraordinary role” that privateers played in the American Revolution).

27. 12 U.S. (8 Cranch) 110, 124–26 (1814).

28. See Sidak, *supra* note 25, at 480–82 (describing the “Undeclared Quasi War with France”).

conflict.<sup>29</sup> In *Talbot v. Seeman*, the Court affirmed the relevance of Congress's capture power to imperfect conflicts and held that "congress may authorize general hostilities . . . or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."<sup>30</sup> In *Little v. Barreme*, the Court held that once Congress prescribes the manner in which captures shall be made, the President is bound to follow it.<sup>31</sup>

These cases have attracted increased attention in times of incomplete or imperfect war. After the Vietnam War, numerous scholars asserted that these cases indicated that Congress has the sole responsibility for regulating imperfect conflicts.<sup>32</sup> This Article makes no such claim; instead, it begins with a narrower and relatively uncontroversial point: the Framers gave Congress enumerated powers over certain forms of military action that could be, and were, exercised outside a declared state of war.<sup>33</sup> One such power is to authorize attacks on foreign vessels.<sup>34</sup> Another is the power to regulate how the captures of these vessels, their cargo, and their crew should take place.<sup>35</sup> To erase any doubt that the Capture Clause applies with full force to any imperfect conflict, such as the undeclared war in Iraq or against international terrorism, the foregoing discussion illustrates the larger debate that surrounds the issue.

### III. THE CAPTURE CLAUSE: THE CONVENTIONAL WISDOM

The traditional understanding of the Capture Clause has been aptly summarized by John Yoo:

It might be argued that Article I, Section 8, Clause 11, which grants Congress the power to "make Rules concerning Captures on Land and Water," addresses the power to regulate captured enemy soldiers. That provision has never been applied by the courts or by Congress to captured persons, however, and appears always to have been understood as pertaining to captured property only. Article IX of the Articles of Confederation, from which the provision is derived, more clearly indicated that the power extended only to property, stating that Congress would have the power "of establishing rules for deciding in all cases, what captures on land or water

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29. 4 U.S. (4 Dall.) 37, 38–41 (1800).

30. 5 U.S. (1 Cranch) 1, 28 (1801).

31. 6 U.S. (2 Cranch) 170, 177–78 (1804).

32. See, e.g., Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 695–97 (1972); Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 27 (1976).

33. See Sidak, *supra* note 25, at 465–66.

34. *Id.* at 481.

35. *Id.* at 477.

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.” The Articles of Confederation provision clearly did not apply to captured enemy soldiers, as persons can neither be “divided” nor “appropriated.” Moreover, the term capture, which is used both in the Articles of Confederation and in the Constitution, is defined by international law as “[t]he taking of property by one belligerent from another or from an offending neutral.” Thus, in his exhaustive commentaries on the Constitution, Justice Story noted that Article I, Section 8, Clause 11 confers on Congress the power to “authorize the seizure and condemnation of the property of the enemy within, or without the territory of the United States,” yet he made no mention of any authority being vested in Congress over captured persons. This contextual understanding of the text of Article I, Section 8, Clause 11, buttressed by the absence in the historical record of any invocations of the clause by Congress or the courts in support of legislation applying to captured persons, confirms that Congress’s power “to make Rules concerning Captures on Land or Water” applies only to captured property.<sup>36</sup>

This is the conventional wisdom: scholars across the ideological spectrum have stated either that the Capture Clause only governs property<sup>37</sup> or that it has never been invoked with regard to federal power over persons.<sup>38</sup> In recent years, members of Congress have rarely raised the Capture Clause as a possible ground for congressional regulation of prisoners of war or conflict.<sup>39</sup>

This interpretation of the Capture Clause relies on a single principal source: Justice Story’s 1833 *Commentaries*.<sup>40</sup> Justice Story’s view, given without explanation, was that the Capture Clause covered only property.<sup>41</sup> But Justice Story’s was the *minority* viewpoint. During the War of 1812, the Marshall Court interpreted the Capture Clause as

36. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201–02 (2004); see also John Yoo & James C. Ho, *Captures Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 131–32 (Edwin Meese III et al. eds., 2005).

37. See Bradley & Goldsmith, *supra* note 11, at 2093 n.202 (“Congress’s Article I power to make rules concerning captures on land [means] that the Constitution required Congress to authorize specifically the President to capture enemy property.”).

38. See Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1240 (2005). Ramsey states, “Though the central point of that clause no doubt was to address the seizure of things, it may also be read to encompass the seizure of persons.” *Id.* However, he offers no support for the latter reading.

39. The notion that the Capture Clause could be read to encompass the capture of people has occasionally been raised by legislators. See, e.g., 151 CONG. REC. § 1977 (daily ed. Oct. 5, 2005) (statement of Sen. Feinstein) (citing, in passing, the Capture Clause in support of Congressional limits on inhumane treatment of detainees).

40. See STORY, *supra* note 20, § 1172, at 64. For discussions of the Capture Clause that rely on Justice Story’s commentaries, see, for example, Yoo, *supra* note 36, at 1201–02; Yoo & Ho, *supra* note 36, at 131–32.

41. See STORY, *supra* note 20, § 1172, at 64.

a broad grant of power that is independent of the power to declare war. Illustrative of this interpretation, the U.S. Supreme Court held in *Brown v. United States* that the President could not seize enemy property without congressional authorization because this power was expressly reserved to Congress by the Capture Clause.<sup>42</sup> Chief Justice John Marshall stated in the majority opinion that

[i]t would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are exterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to congress of the power in question as an independent substantive power, not included in that of declaring war.<sup>43</sup>

Justice Marshall further stated that the Capture Clause applies both extra- and intra-territorially.<sup>44</sup> Chief Justice Marshall also seems to imply that the Capture Clause covers *people* in addition to property:

The acts of congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

The “act for the safe keeping and accommodation of prisoners of war,” is of the same character.<sup>45</sup>

Here, Chief Justice Marshall referred to the capture of persons to exemplify a power that the President could not exercise without express statutory authorization.<sup>46</sup> Chief Justice Marshall did not cite to any

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42. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 124–26 (1814). Congress made no provision for the seizure of enemy property within the United States at the outbreak of hostilities. *Id.*

43. *Id.* at 126.

44. *Id.*

45. *Id.*

46. For this purpose, Justice Marshall referred to An Act Concerning Alien Enemies, which was enacted 1798 and is still in force today in a modified form. See 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2006)). In the Act, Congress authorized the President to detain or deport enemy aliens in time of war. See *id.*; see also Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39, 39–40 (2005). Neuman and Hobson explain,

The Alien Enemies Act of 1798, which is still in force in modified form, authorizes the President to detain, relocate, or deport enemy aliens in time of war. It was enacted in 1798 in anticipation of war with France, but first employed against British aliens during the War of 1812. A few weeks after Congress declared war, Secretary of State James



constitutional provision beyond the Capture Clause, a fact strongly suggesting his belief that the Capture Clause granted power to Congress over property and persons.

Justice Story, dissenting in *Brown*, set out a much narrower vision of the Capture Clause. He argued that “[t]he words are merely explanatory, and introduced *ex abundanti cautela*,” and that the Framers were speaking only of property because that was the understanding under the Articles of Confederation—an understanding that, according to Justice Story, was not altered by the Framers in the Constitution.<sup>47</sup> Justice Story recorded his minority viewpoint in his *Commentaries*. And yet, within decades, Justice Story’s dissenting viewpoint became the prevailing view, later reflected in the Bush Administration’s argument that congressional regulation on detainees violates the principle of separation of powers.<sup>48</sup>

Justice Story’s argument, expanded upon by Professor Yoo, makes sense based on a cursory examination of the understanding of the capture power under the Articles of Confederation.<sup>49</sup> The Articles of Confederation’s analogue to the U.S. Constitution’s Capture Clause states,

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . 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 said courts.<sup>50</sup>

Under this power, the Continental Congress ordered “captains or commanders of private armed vessels commissioned by letters of marque or general reprisals, or otherwise, by the authority of the United States in Congress assembled” to

by force of arms attack, subdue, and seize all ships, vessels and goods, 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, on the high seas, or

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Monroe issued a notice ordering all British subjects to report themselves to U.S. marshals.

47. *Brown*, 12 U.S. (8 Cranch) at 151.

48. See 8/1/02 Interrogation Opinion, *supra* note 2, at 39.

49. See Yoo, *supra* note 36, at 1201–02.

50. ARTICLES OF CONFEDERATION art. IX.

between high-water and low-water marks. And you may also annoy the enemy by all means in your power, by land as well as by water, taking care not to infringe or violate the laws of nations, or laws of neutrality.<sup>51</sup>

At first blush, both texts fail to mention persons and seem suggestive of property.

Examine the argument further, however, and cracks begin to appear. While it is true that the Constitutional Convention occasioned no significant debate about the capture power, it is simply inaccurate to state that the text remained unchanged. The Articles of Confederation conferred on Congress the power “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”—a passage that Yoo points to as suggestive of property.<sup>52</sup>

However, Yoo’s argument is in tension with both the text and original understanding. Textually, there is no reason to assume that the specific power to determine how prizes “shall be divided or appropriated” limited the general power “of establishing rules” for captures.<sup>53</sup> In addition, the term “prizes” was distinct from “captures.”<sup>54</sup> There is more to consider in terms of the original understanding as well. Charles Pinckney’s proposed text for the Constitution contained a phrase that was analogous to the capture clause provision in the Articles of Confederation, “To make rules concerning Captures from an Enemy.”<sup>55</sup> At the Constitutional Convention, “[i]t was moved and seconded to strike out the words ‘all captures from an enemy,’” a mo-

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51. 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 361 (Gaillard Hunt ed., Government Printing Office 1912) (1781).

52. ARTICLES OF CONFEDERATION art. IX; *see also* Yoo, *supra* note 36, at 1201–02.

53. ARTICLES OF CONFEDERATION art. IX, *replaced by* U.S. CONST.

54. *See infra* notes 63–95 and accompanying text. Popular eighteenth century legal dictionaries illustrate the distinctions between the terms. *See* T. CUNNINGHAM, NEW AND COMPLETE LAW DICTIONARY (The Lawbook Exchange, Ltd. 3d ed. 2003) (unpaginated) (defining “capture” as “the taking of a prey, an arrest, or seizure; and it particularly relates to prizes taken by privateers in time of war, which are to be divided between the captors”); GILES JACOB, A NEW LAW-DICTIONARY (The Lawbook Exchange, Ltd. 5th ed. 2004) (unpaginated).

55. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. D, at 598 (Max Farrand ed., 1911) (laying out the Pinckney Plan). Charles Pinckney was a delegate from South Carolina who went on to become governor of South Carolina and a member of both the U.S. Senate and the U.S. House of Representatives. Pinckney submitted a plan for the new Constitution to the Convention on the same day that Madison’s Virginia Plan was introduced. Pinckney’s ideas were later derided by Madison, but nevertheless a great deal of what Pinckney proposed eventually appeared in some form in the Constitution, including a bicameral legislature, an executive called the President, and a federal judiciary. *See generally* MARTY D. MATTHEWS, FORGOTTEN FOUNDER: THE LIFE AND TIMES OF CHARLES PINCKNEY 39–45 (2004).

tion that “passed in the affirmative,”<sup>56</sup> giving us the current text that confers on Congress the power to “make rules concerning captures on land and water.”<sup>57</sup> Although we do not know why, the text that Justice Story relies on—“captures from an enemy”—was decisively rejected in favor of language that more clearly appears to admit powers extending beyond property.

In short, it appears that the traditional, dismissive approach to the Capture Clause is built on shaky ground. A fresh look at the original understanding of the Capture Clause is warranted.

#### IV. CAPTURE AND PRIZE LAW AT THE TIME OF THE FRAMING

The relevant contemporary commentators, the early Congresses, and the early courts all point to the conclusion that the Framers understood the Capture Clause as an enumerated power of Congress that included the power to regulate captured persons.

A starting point is Blackstone’s *Commentaries on the Laws of England*, which spoke directly to this issue and left little doubt that the power to regulate captures of property and of persons went hand in hand: “In this case letters of marque and reprisal (words in themselves synonymous and signifying a taking in return) may be obtained, in order to seize *the bodies or goods* of the subjects of the offending state, until satisfaction be made, wherever they happen to be found.”<sup>58</sup>

Not long before Justice Story penned his *Commentaries*, James Kent reaffirmed the principle described by Blackstone, namely, that a state enjoys equal and linked powers over its enemies’ persons and property:

When hostilities have commenced, the first objects that naturally present themselves for detention and capture, are the persons and property of the enemy, found within the territory at the breaking out of the war. According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and detain the persons as prisoners of war.<sup>59</sup>

The message of these two oft-cited commentators is clear: the power to capture property necessarily went hand-in-hand with the power to capture persons.

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56. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 211.

57. *Id.* at 182, 320.

58. BLACKSTONE, *supra* note 21, at 250–51 (emphasis added).

59. KENT, *supra* note 21, at 53–54.

The first federal court of the United States was the Federal Appellate Prize Court.<sup>60</sup> The study of the prize court has been much neglected. Over its life from 1775 to 1787, the prize court heard one hundred and eighteen cases.<sup>61</sup> Alas, the records of many cases have been lost.<sup>62</sup> In other cases, the court issued only written dispositions without reasons.<sup>63</sup> The records that still exist indicate that the law of prize was far from clear. It was defined principally by the few extant treatises of the day.<sup>64</sup> The prize court's most famous case, that of the captured ship *Lusanna*, is typical: one party relied upon Monsieur de Vattel's *Law of Nations*,<sup>65</sup> the other upon Richard Lee's *A Treatise on Captures in War*.<sup>66</sup> Until the 1795 publication of Georg Friedrich von Martens' treatise on privateers and capture, these were the two pillars on which the law of capture rested.<sup>67</sup> And both indicate that the treatment of persons was covered under the law of capture.

Lee's treatise on the law of capture contains an extensive discussion of how prisoners may be treated. He discussed at length what can be done to prisoners taken on the seas; for instance, they cannot be killed, but they may be ransomed.<sup>68</sup> Lee went so far as to say that, although making slaves of one's captives is a "custom . . . now much worn out amongst most nations . . . even among christians they still make slaves of captives" if the prisoners are not ransomed.<sup>69</sup> Lee also described how the capture of prisoners interacted with the condemnation of property. For example, "the bare seizure of the person of the enemy, is not a sufficient title to the property of all his effects, unless we really take possession of these effects, at the same time."<sup>70</sup> After all, "though a King happen to be made prisoner of war, his enemies have not, therefore, acquired his kingdom with him."<sup>71</sup>

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60. See generally BOURGUIGNON, *supra* note 7.

61. See Swindler, *supra* note 4, at 13.

62. *Id.*

63. See BOURGUIGNON, *supra* note 7, at 242, 295.

64. Sidak, *supra* note 25, at 471-72.

65. MONSIEUR DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 356 (Philadelphia, T. & J.W. Johnson 1849).

66. RICHARD LEE, A TREATISE OF CAPTURES IN WAR 56 (London, W. Clarke & Sons 2d ed. 1803). See BOURGUIGNON, *supra* note 7, at 244-47 (discussing the *Lusanna* case); see also *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 63 (1795) (citing Lee's treatise).

67. Sidak, *supra* note 25, at 471.

68. LEE, *supra* note 66, at 56.

69. *Id.* at 49.

70. *Id.* at 111.

71. *Id.*

Vattel also endorses the ransoming of prisoners and the condemnation of prisoners as slaves.<sup>72</sup> Although Vattel describes slavery as a “disgrace to humanity that is happily banished from Europe,” he nevertheless states that it “[i]s lawful to condemn prisoners of war to slavery . . . in cases which give a right to kill them.”<sup>73</sup> As to ransom, Vattel states that persons may be detained “with a view to obtain from their sovereign a just satisfaction, as the price of their liberty.”<sup>74</sup>

In 1795, Georg Friedrich von Martens published what became the dominant authority on the law of capture, his *Essay on Privateers, Captures, and Particularly on Recaptures*.<sup>75</sup> In 1801, Thomas Hartwell Horne translated the treatise into English.<sup>76</sup> The work is remarkable for its clarity, comprehensiveness, and exhaustive citation to the statutes, commentators, and decisions of nearly every European power. Although the work itself postdates the framing of the Constitution, it describes the law of capture in the second half of the eighteenth century. The book’s second chapter is entitled “Of the Rights of Privateers, with Respect to Captures in general,”<sup>77</sup> and it is mostly concerned with property,<sup>78</sup> but capture of persons is also given careful treatment.<sup>79</sup> Von Martens notes the manner in which various nations legislated on the capture of prisoners:

When a privateer has made any prisoners of war, who are afterwards ransomed, the profit of them is in like manner bestowed on him. In Holland he is sometimes even reimbursed the sums expended in supporting the prisoners till they are delivered to the courts of admiralty. In England, privateers are permitted to make use of them in their ships. If the subjects of a sovereign have been taken as hostages to secure the ransom, and are found on board the prize, they are free in Holland, but are obliged to pay the third part of the sum secured to the captor. In France they are considered as free without any recompense. It is a consequence of the ransoms being declared void; the same point ought therefore to take place in England.<sup>80</sup>

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72. VATTEL, *supra* note 65, at 356.

73. *Id.*

74. *Id.*

75. See, e.g., Sidak, *supra* note 25, at 471–72 (“According to the publisher of Horne’s 1801 translation of de Martens, only two other English treatises on the subject then existed: one published by Richard Lee in 1759 that was essentially a translation of Bynkershoek’s 1737 treatise *Quaestionum Juris Publici*, and another published by Charles Jenkinson in 1758.”).

76. GEORG FRIEDRICH DE MARTENS, AN ESSAY ON PRIVATEERS, CAPTURES, AND PARTICULARLY ON RECAPTURES, ACCORDING TO THE LAWS, TREATIES, AND USAGES OF THE MARITIME POWERS OF EUROPE (Thomas Hartwell Horne trans., London, E. & R. Brooke 1801).

77. *Id.* at 36.

78. *Id.* at 65–67. Section twenty-three is entitled “Of the Ransom of an Enemy’s Goods.”

79. *Id.* at 92. Section thirty-two is entitled “Exchange or Ransom of Prisoners.”

80. *Id.* (footnotes omitted).

Von Martens also describes the “Rewards of Privateers.”<sup>81</sup> First among these is

[a] sum of money for every enemy slain, or prisoner made on board a *ship of war or privateer* belonging to the enemy, and a similar sum for every cannon found on board the ship taken or destroyed, according to its bore; which is divided in England as the prize is; but in France the crew alone participate in it.<sup>82</sup>

Thus, the law of capture, as understood by the era’s greatest commentators, clearly encompassed the capture of persons. In some instances, persons could even be included under the law of prize, under which they could be ransomed or condemned as slaves.<sup>83</sup> These treaties were certainly known to the American legislators of the day and they were the common currency of the nation’s first federal court.<sup>84</sup> Modern scholars have been confused by the distinction between the law of “prize” and that of “capture.” While the law of prize dealt almost entirely with property, the following examination of the law in and around the time of the Framers makes clear that the law of capture encompassed both the taking of prizes and the treatment of captured persons.

#### V. THE CAPTURE CLAUSE IN CONGRESS

By the Civil War, Justice Story’s view that the Capture Clause applied only to property had taken hold. Before then, Congress had occasionally exercised its authority over captured enemy persons. Although Congress tended not to invoke this power explicitly, it was clearly understood to possess it.

In 1798, Congress debated the Act Concerning Alien Enemies and the Act Concerning Alien Friends.<sup>85</sup> In the Act Concerning Alien Enemies, Congress gave the President the power to relocate, remove, or incarcerate alien enemies during a declared war.<sup>86</sup> In the Act Concerning Alien Friends, Congress gave the President the power “to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are

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81. *Id.* § 33, at 93.

82. *Id.* at 93–94 (footnotes omitted).

83. See Vattel, *supra* note 65, at 356.

84. See Bourguignon, *supra* note 7, at 244–47.

85. Congress enacted the Act Concerning Alien Enemies, 1 Stat. 577, and the Act Concerning Alien Friends, 1 Stat. 570, in 1798 in preparation for the undeclared war with Bourbon France. Although the Act Concerning Alien Friends was enacted with a two-year sunset provision, the Act Concerning Alien Enemies remains in effect today. See 50 U.S.C. §§ 21–24 (2006).

86. 1 Stat. 577–78.

concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.”<sup>87</sup>

These Acts and the debates that surrounded them make clear that Congress enjoyed the authority to regulate the bodies of alien enemies. Representative Albert Gallatin, from the Commonwealth of Pennsylvania, vigorously opposed much of the Act Concerning Alien Friends. But he accepted without reservation Congress’s power “of making regulations with respect to alien enemies, who are liable to be treated as prisoners of war,” and he recognized that “[b]y virtue of that power, and in order to carry it into effect, Congress could dispose of the persons and property of alien enemies as it thinks fit.”<sup>88</sup> Congress debated the Act Concerning Alien Friends at length, struggling to clarify which, if any, portion of the Constitution granted it power over alien persons outside a state of war.<sup>89</sup> Congress was never able to settle on a conclusion, except that it did enjoy that power.

Although Congress did not explicitly invoke the Capture Clause as the source of its power to regulate captured persons, it repeatedly exercised this power when granting letters of marque and reprisal, the Capture Clause’s sister provision. Before and during the War of 1812, privateers carried “Instructions for the Private Armed Vessels of the United States,” signed by then-Secretary of State James Monroe. These instructions provided that

[t]he master and one or more of the principal persons belonging to the captured vessels, are to be sent, as soon after the capture as may be, to the judge or judges of the proper court in the United States, to be examined upon oath, touching the interest or property of the captured vessel and her lading.<sup>90</sup>

Thus, providing for the disposition of captured persons was necessary to the disposition of captured property.

Shortly before the War of 1812 broke out, Congress passed a new version of An Act Concerning Letters of Marque, Prizes, and Prize Goods.<sup>91</sup> Enacted pursuant to Congress’s quasi-war powers, the Act provided

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87. *Id.* at 570–71 (emphasis omitted); see also Louis Fisher, *The Domestic Commander in Chief: Early Checks by Other Branches*, 29 *CARDOZO L. REV.* 961, 990–93 (2008) (describing the Act as “transfer[ing] extraordinary powers to the president”).

88. 5 *ANNALS OF CONG.* 1980 (1798) (statement of Rep. Gallatin), available at <http://memory.loc.gov/ammem/index.html>.

89. *Id.* at 1785–91, 1973–81, 1989–2029.

90. James Monroe, Instructions for the Private Armed Vessels of the United States, available at [memory.loc.gov](http://memory.loc.gov) (visited on Mar. 1, 2008). The instructions also provided that “[t]oward enemy vessels and their crews, you are to proceed, in exercising the rights of war, with all the justice and humanity that characterize the nation of which you are members.” *Id.*

91. 2 *Stat.* 759 (1812).

[t]hat all prisoners found on board any captured vessels, or on board any recaptured vessel, shall be reported to the collector of the port in the United States in which they shall first arrive, and shall be delivered into the custody of the marshal of the district . . . who shall take charge of their safe keeping.<sup>92</sup>

Another section of the same Act provided a bounty of twenty dollars for each enemy killed in the event that the enemy vessel was destroyed.<sup>93</sup>

The young republic adopted the European practice of paying tribute to the Barbary States in order to be free of piracy.<sup>94</sup> In 1795, the United States negotiated a treaty with Algiers to determine the amount of tribute that the United States would pay the Dey of Algiers.<sup>95</sup> It reflected the understanding that nations could consider persons as prize if they so chose. The Treaty provided that “[s]hould any American citizen be taken on board an enemy-ship, by the cruisers of this Regency, having a regular passport, specifying they are citizens of the United States, they shall be immediately set at liberty,” but if, “[o]n the contrary, they having no passport, they and their property shall be considered lawful prize; as this Regency knows their friends by their passports.”<sup>96</sup> Unfortunately, we have no indication of any congressional authorization of or response to this provision.

Alexander Hamilton provides a vivid example of the Jefferson Administration’s robust commitment to congressional control of capturing prisoners.<sup>97</sup> From the 1780s through the early 1810s, the United

92. *Id.* at 761.

93. *Id.*

94. Thomas Jefferson demonstrated an early respect for congressional power in his 1790 report on how best to deal with the attacks of Barbary pirates who operated under the auspices of the Dey of Algiers:

Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of reestablishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the cooperation of other Powers. If tribute or ransom, it will rest with them to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage.

Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 348 (2001) (quoting Thomas Jefferson, *Mediterranean Trade* (Dec. 28, 1790), in 1 *AMERICAN STATE PAPERS, FOREIGN RELATIONS* 172, 172–74 (photo. reprint 1998) (Walter Lowrie & Matthews St. Clair Clarke eds., Washington, Gales & Seaton 1833)).

95. For a more in depth discussion of the conflict and resulting treaty, see Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 *WM. & MARY L. REV.* 211, 242–60 (1989).

96. A Treaty of Peace and Amity, U.S.-Algiers, art. XIII, Sept. 5, 1795, 8 *Stat.* 133, 135.

97. ALEXANDER HAMILTON, *The Examination, No. 1*, in 25 *THE PAPERS OF ALEXANDER HAMILTON* 444, 454–57 (Harold C. Syrett ed., 1977) (Dec. 17, 1801). We get some sense of Hamilton’s attitude from the opening words of this passage: “The Message of the President, by



States was forced to deal with the more or less constant piracy of the so-called Barbary Powers—the autonomous Ottoman regencies Algiers, Tunis, and Tripoli.<sup>98</sup> Annoyed by the United States' decreasing willingness to pay tribute, the Bashaw of Tripoli declared war in 1801.<sup>99</sup> The United States did not respond in kind (and again declined to declare war eleven years later, when hostilities flared up with Algiers).<sup>100</sup> This illustrates an early example of incomplete war, where hostilities existed without a declaration of war. In *The Examination No. 1*, Hamilton expressed his displeasure with Jefferson's belief "that though Tripoli had declared war in form against the United States, and had enforced it by actual hostility, yet that there was not power, for want of the sanction of Congress, to capture and detain her cruisers with their crews."<sup>101</sup> Hamilton described how a Tripolitan cruiser, "subdued in a bloody conflict" by an American ship, was then "permitted quietly to return home."<sup>102</sup> Hamilton related that without congressional authorization, "[n]o one dreamt of a scruple as to the right to seize and detain the armed vessel of an open and avowed foe, vanquished in battle."<sup>103</sup> He declared it a "strange absurdity" that without congressional authorization "our public force may destroy the life, but may not restrain the liberty, or seize the property of an enemy."<sup>104</sup> Without congressional action, American soldiers and sailors could defend themselves from attackers, but could not take the step of "making them prisoners, and sending them into confinement."<sup>105</sup> Finally, in early 1802, Congress expressly authorized the President to "subdue, seize, and make prize" of the Algerian ships.<sup>106</sup>

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whatever motives it may have been dictated, is a performance which ought to alarm all who are anxious for the safety of our Government, for the respectability and welfare of our nation." *Id.* at 454.

98. See Casper, *supra* note 95, at 243.

99. *Id.* at 255.

100. *Id.* ("Relations with Algiers began to sour once again in 1812. New hostages were taken. On February 23, 1815, Madison asked Congress for a declaration of war. Congress responded on March 3, not with a formal declaration of war, but with legislation authorizing the President to employ 'such of the armed vessels of the United States as may be judged requisite.'").

101. HAMILTON, *supra* note 97, at 454 (emphasis omitted).

102. *Id.*

103. *Id.* (emphasis omitted).

104. *Id.* at 456.

105. *Id.*

106. See An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, 2 Stat. 129, 130 (1802). For a more extensive discussion of the Tripolitan conflict, see Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 2D 169 (1999). Kosma suggests that the Tripolitan conflict was not an imperfect conflict—like the earlier trouble with France—but a "real war" solely because of Tripoli's declaration of war. See *id.* at 177. Kosma also suggests that Hamilton's disagreement with Jefferson was rooted not in differences of constitutional interpretation, but rather in the question of whether a state of war could be

We have no definite indication of why Justice Story was so determined to cabin the Capture Clause to matters of property. Justice Story may well have been concerned about a particular problem that perplexed Congress for many years: the capture of slave ships. Justice Story was no friend of the slave system.<sup>107</sup> He may have believed that federal control over slave ship seizures would produce a policy that was more friendly to the slave trade than if the issue were left to the Northern states, where most American privateers docked.<sup>108</sup>

In fact, the capture of enemy ships—and the subsequent sale of the captives into slavery—was more common than the capture of slave ships.<sup>109</sup> Pirates quickly learned to stow a few slaves in their hold so that if they were taken, they could claim to be slave traders.<sup>110</sup> After all, slave trading was then regarded by some as respectable and it would, at least, save them from the immediate punishment meted out for piracy: hanging.<sup>111</sup> Few records of these captures exist today, but one surviving record illustrates the confusion that reigned in this area of the law and the extent to which parties relied on Congress, typically in vain. In 1830, Captain John Branch seized the *Fenix*, a Spanish ship

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established based solely on a foreign power's declaration of war. Such a declaration, in Hamilton's view, would convey certain powers to the executive. *See id.* at 177–78; *see also* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (refuting the claim that the President can order military attacks on foreign powers without Congress's approval so long as no formal declaration of war is involved).

107. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 239–40 (1975).

108. If this was the case, Justice Story's concern may have been misplaced. The first federal court to consider whether captured slaves were property or persons concluded that the congressional ban on the importation of slaves dictated, by implication, that captured slaves had to be treated as prisoners of war. *See Almeida v. Certain Slaves*, HALL L.J. 459 (D.S.C. 1814). This case was decided five months after *Brown v. United States*. *Id.*

109. *See* Jonathan M. Gutoff, *The Law of Piracy in Popular Culture*, 31 J. MAR. L. & COM. 643, 644–47 (2000) (providing a brief but engaging summary of the law of piracy in the mid- to late-eighteenth century).

110. *See* Letter from Isaac Mayo (commanding the U.S. Schooner *Grampus*), in 3 AMERICAN STATE PAPERS, NAVAL AFFAIRS, 21st Cong., no. 435, at 867 (1831) (“It is very certain that the slave trade has become a pretext, and most piracies have been committed by slavers.”).

111. The punishment for piracy is neatly summed up by G. Jacob's *A New Law Dictionary*, published in 1762:

A Piracy attempted on the Ocean, if the Pirates are overcome, the Takers may immediately inflict a Punishment by hanging them up at the Main-yard End; though this is understood where no legal judgement may be obtained; And hence it is, that if a Ship shall be on a Voyage to any Part of America, or the Plantations there, or a Discovery of the Parts; and in her Way is attacked by a Pirate, but in the attempt the Pirate is overcome, the Pirates may forthwith be executed without any Solemnity of Condemnation, by the Marine Law.

*Id.* (quoting G. Jacob, *A NEW LAW DICTIONARY* (8th ed. 1762)).

carrying approximately seventy-four slaves.<sup>112</sup> Captain Branch was unsure how to judge the captured sailors' claims to be legitimate slave traders, and even more perplexed as to what should be done with the slaves.<sup>113</sup> He appealed to Congress, stating simply that this issue would "require legislative provision by Congress."<sup>114</sup> No less a figure than President Andrew Jackson, not generally known as a congressional supremacist, appealed to Congress:

I submit to the consideration of Congress the accompanying report and documents from the Navy Department, in relation to the capture of the Spanish slave vessel, called the Fenix, and recommend that suitable legislative provision be made for the maintenance of the unfortunate captives, pending the legislation which has grown out of the case.<sup>115</sup>

Congress was also petitioned, on occasion, to make provision for bounty or prize money to be given in exchange for capture of prisoners. These petitions indicate an understanding that persons could be considered part of the prize process and that Congress was the appropriate authority. For example, a Mr. Irving—his activities unfortunately lost to history—"presented a petition of the owners of private armed vessels fitted out of the port of New York, praying for a bounty on the destruction of enemy's vessels, and an increase of the bounty for persons captured."<sup>116</sup> Congress simply "[o]rdered, That the said petitions be referred to the Committee on Naval Affairs."<sup>117</sup>

Finally, it is worth noting, though it has often been noted elsewhere, that the Executive Branch took principal control of captured persons not on its own initiative but by delegation from Congress. In the heat of the War of 1812, Congress passed An Act for the Safe Keeping and Accommodation of Prisoners of War.<sup>118</sup> It provided that the President is "authorized to make such regulations and arrangements for the safekeeping, support and exchange of prisoners of war as he may deem expedient, until the same shall be otherwise provided for by law."<sup>119</sup> Congress later enacted legislation that regulated the treat-

112. See Letter from John Slidell to the Office of the U.S. Dist. Attorney (July 20, 1830), in 3 AMERICAN STATE PAPERS, NAVAL AFFAIRS, 21st Cong., no. 435, at 866 (1831).

113. *Id.*

114. *Id.*

115. Letter from President Andrew Jackson to the House of Representatives (Jan. 15, 1831), in 3 AMERICAN STATE PAPERS, NAVAL AFFAIRS, 21st Cong., no. 435, at 865 (1831).

116. H.R. JOURNAL 266 (Jan. 31, 1814).

117. *Id.*

118. 2 Stat. 777 (1812).

119. *Id.* The complete text of the Act reads,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby authorized to make such regulations and arrangements for the safe keeping, support*

ment of British prisoners<sup>120</sup> and debated authorizing the President to impress British seamen into service,<sup>121</sup> thereby rejecting “the opinion that such a power already existed, from usage and from the nature of things, and was inseparable from sovereignty.”<sup>122</sup> It is true that Congress did not explicitly name the Capture Clause in these debates and that the executive did not always await the niceties of Congressional action.<sup>123</sup> However, it is also true that Congress clearly believed that it possessed power over captured persons and that it exercised the power in a manner consistent with the Capture Clause.

## VI. CONCLUSION

The purpose of this Article is not to make plain, beyond any reasonable doubt, that the Capture Clause should be understood to make treatment of prisoners an enumerated power of Congress. Much time has passed since the days of privateers, and information from this era is now scarce. However, this Article does demonstrate three propositions with reasonable clarity. First, the conventional wisdom that the Capture Clause only governs property rests on shaky ground, specifically on Justice Story’s minority opinion, which, over time, became the consensus by virtue of his *Commentaries*. Second, an examination of the contemporary law of capture, as best we can reconstruct it from the writings of the leading scholars of the day, indicates that the capture and treatment of prisoners would have fallen within the Framers’ understanding of the Capture Clause. Third, the early Congresses repeatedly regulated the capture of persons pursuant to their power under the quasi-war clauses, strongly suggesting that this power flowed from the Capture Clause. Put together, these conclusions indicate, at the least, that the Capture Clause should not have been forgotten. Rather, it should be central to the debate over who has the power to regulate prisoners of war.

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and exchange of prisoners of war as he may deem expedient, until the same shall be otherwise provided for by law; and to carry this act into effect, one hundred thousand dollars be, and the same are hereby appropriated, to be paid out of any monies in the treasury not otherwise appropriated.

*Id.*

120. An Act Vesting in the President of the United States the Power of Retaliation, 2 Stat. 829–30 (1813).

121. 25 ANNALS OF CONG. 1009–10 (1813).

122. *Id.* at 1144.

123. See Yoo, *supra* note 36, at 1210–15, for an effective rendition of this argument.

