

# Article

## DUE PROCESS ABROAD

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**ABSTRACT**—Defining the scope of the Constitution’s application outside U.S. territory is more important than ever. In February, the Supreme Court heard oral argument about whether the Constitution applies when a U.S. officer shoots a Mexican teenager across the border. At the same time, federal courts across the country scrambled to evaluate the constitutionality of an Executive Order that, among other things, deprived immigrants of their right to reenter the United States. Yet the extraterritorial reach of the Due Process Clause—the broadest constitutional limit on the government’s authority to deprive persons of “life, liberty, or property”—remains obscure.

Up to now, scholars have uniformly concluded that the founding generation did not understand due process to apply abroad, at least not to aliens. This Article challenges that consensus. Based on the historical background, constitutional structure, and the early practice of federal law enforcement on the high seas, this Article argues that the founding generation understood due process to apply to any exercise of federal law enforcement, criminal or civil, against any person anywhere in the world. Outside the context of war, no one believed that a federal officer could deprive a suspect of life, liberty, or property without due process of law—even if the capture occurred abroad or the suspect was a noncitizen.

This history supports generally extending due process to federal criminal and civil law enforcement, regardless of the suspect’s location or citizenship. This principle has immediate implications for cross-border shootings, officially sponsored kidnappings and detentions abroad, the suspension of immigration benefits, and the acquisition of foreign evidence for criminal defendants.

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INTRODUCTION

One of the most perplexing questions in contemporary constitutional law is the extent to which the Bill of Rights applies outside the United

States.<sup>1</sup> The doctrine is quite literally all over the map. Aliens outside the United States appear to have few constitutional rights,<sup>2</sup> except, “paradoxically,” those held as enemies at Guantanamo Bay, Cuba.<sup>3</sup> Scholars presume that citizens enjoy the same rights abroad that they have at home,<sup>4</sup> but the only Supreme Court decision that is squarely on point suggests that due process rights for civilian citizens abroad depend on context.<sup>5</sup> The Court rarely decides cases about whether constitutional rights apply abroad,<sup>6</sup> and when it does, its decisions are often highly fractured.<sup>7</sup> The resulting doctrine is piecemeal, ad hoc, and unprincipled.

Recent events have highlighted this doctrinal mess. Last term, the Supreme Court dodged a case that presented the question of whether the Fourth and Fifth Amendments apply when a U.S. agent standing on U.S. soil shoots and kills a Mexican national on the other side of the border.<sup>8</sup> Meanwhile, President Donald Trump has issued a series of executive orders prohibiting “foreign nationals” of specific countries from immigrating to

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<sup>1</sup> See, e.g., KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?, at v (2009) (“[B]ecause this principle of territoriality is so commonplace, it is rarely examined and surprisingly ill defended.”).

<sup>2</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”). See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding that the Fourth Amendment does not apply to a search of an alien’s residence abroad); *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (holding that the Due Process Clause does not apply to enemy soldiers captured and detained abroad).

<sup>3</sup> See *Boumediene v. Bush*, 553 U.S. 723, 769 (2008). See generally Mary Van Houten, *The Post-Boumediene Paradox*, 67 STAN. L. REV. ONLINE 9 (2014) (discussing the “paradox” of extending the privilege of the writ of habeas corpus to enemy aliens detained at Guantanamo Bay, Cuba without extending the protections of the Due Process Clause to nonenemy aliens abroad).

<sup>4</sup> See RAUSTIALA, *supra* note 1, at 25 (“Today it is well accepted that the Bill of Rights protects U.S. citizens against their government wherever those citizens might be found.”).

<sup>5</sup> See *Reid v. Covert*, 351 U.S. 1 (1957).

<sup>6</sup> Throughout this Article I use the term *abroad* to mean “outside U.S. territory.” The term is tidier, though admittedly more ambiguous, than *extraterritorially*. See P.G. Wodehouse, *The Amazing Hat Mystery*, in THE BEST OF WODEHOUSE 393 (2007) (“‘It’s the Spirit of something,’ said Nelson. ‘I don’t know what, quite, but of something. You see it on all sides. Something very serious has gone wrong with girls nowadays. There is lawlessness and license abroad.’ ‘And here in England, too.’ ‘Well, naturally, you silly ass,’ said Nelson, with some asperity. ‘When I said abroad, I didn’t mean abroad, I meant abroad.’”).

<sup>7</sup> See *Verdugo-Urquidez*, 494 U.S. at 261 (Rehnquist, C.J., writing for the Court); *id.* at 275 (Kennedy, J., joining the Court’s opinion but offering a much more functional rationale); *id.* at 279 (Stevens, J., concurring in the result but not the rationale); *Reid*, 351 U.S. at 3 (Black, J., plurality opinion); *id.* at 41 (Frankfurter, J., concurring in the result); *id.* at 65 (Harlan, J., concurring in the result).

<sup>8</sup> *Hernández v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam), *vacating and remanding* *Hernández v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc) (holding that Mesa was entitled to qualified immunity on the Fifth Amendment claim and that the Fourth Amendment did not apply to the shooting).

the United States.<sup>9</sup> Each of the orders has raised questions about the applicability of the Bill of Rights to aliens abroad.<sup>10</sup> The government, lower courts, and those affected by the government's extraterritorial exercise of power would all benefit from a clearer formula for determining when the Bill of Rights applies abroad.

With respect to the Due Process Clause especially, the current doctrinal map is difficult to justify by reference to the constitutional text. The Clause provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>11</sup> As scholars have noted, the Clause seems to speak universally, without reference to location or citizenship.<sup>12</sup>

Yet scholars seem to uniformly agree that early American history supports the notion that due process stopped—especially for aliens—at the nation's borders.<sup>13</sup> Professor Gerald Neuman summarizes the consensus: “The authors of the Bill of Rights almost certainly viewed everyone's constitutional rights as territorially restricted by the national boundaries; that view is utterly discredited today, and the question whether nonresident aliens' rights should continue to be so restricted cannot be answered by direct recourse to eighteenth-century practice.”<sup>14</sup> The consensus is unsurprising. As Professor Andrew Kent has noted, “Globalists have not

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<sup>9</sup> The current Order is a Presidential Proclamation dated September 24, 2017. The Proclamation appears to update and in some respects to supersede Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017), which replaced Executive Order 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

<sup>10</sup> See *Trump v. Int'l Refugee Assistance Project*, No. 16-1436, 2017 WL 4518553 (Oct. 10, 2017), *vacating and remanding* 857 F.3d 554 (4th Cir. 2017) (upholding a nationwide injunction against the March 6, 2017 Order on the ground that it likely violated the Establishment Clause); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (upholding a nationwide injunction against the January 27, 2017 Executive Order on the ground that it likely violated the Due Process Clause).

<sup>11</sup> U.S. CONST. amend. V.

<sup>12</sup> See, e.g., Louis Henkin, *The Constitution as Compact and as Conscience*, 27 WM. & MARY L. REV. 11, 32 (1985); see also Ruth Bader Ginsburg, *Looking Beyond Our Borders*, 40 IDAHO L. REV. 1, 8 (2003); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871, 875–76 (1989).

<sup>13</sup> See GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION* 7 (1996) (“Strict territoriality prevailed as dogma for most of American constitutional history.”); RAUSTIALA, *supra* note 1, at 38; Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1904 (2009) (“[T]he law generally had no coercive force (and thus a court had no jurisdiction or process) outside sovereign territory.”); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 518–21 (2007) (presenting evidence that due process did not apply to aliens abroad); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 916–27 (1991) (canvassing a variety of views based on background law of nations principles); see also Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 234 (2010) (“Prevailing nineteenth-century law principles established that a nation's legal jurisdiction to regulate conduct was coterminous with its territory.”).

<sup>14</sup> NEUMAN, *supra* note 13, at 912.

presented *any* Founding era evidence that ‘due process’ was thought to protect aliens abroad.”<sup>15</sup>

This Article challenges the scholarly consensus. It argues that the Constitution’s historical background and text and early American practice all strongly support the conclusion that the founding generation understood the Due Process Clause to apply to U.S. law enforcement against anyone, anywhere. This history challenges the Court’s gerrymandering of due process on the basis of geography and citizenship.

The evidence falls into three broad categories. First, the British constitutional norm was that offenses at sea were tried according to due process. An Act of Henry VIII provided that special courts of Admiralty Sessions, composed of common law and admiralty judges, would try crimes committed within the admiralty jurisdiction by the “course of the common law . . . in like form and condition as if such offences had been done upon the land.”<sup>16</sup> To make it easier to suppress piracy in the colonies, however, Parliament provided that vice-admiralty courts could try piracy in the colonies according to the civil law.<sup>17</sup> American colonists generally objected to the trial of crimes by vice-admiralty courts because they believed Americans were entitled to the customary rights of Englishmen, especially trial by jury, the *sine qua non* of traditional due process.<sup>18</sup> In short, British law and American beliefs about that law suggest that Americans would have found the act of Henry VIII—requiring the trial of offenses at sea according to the common law—to be constitutionally required.

Second, the Constitution’s text suggests no territorial or citizenship limits on due process. As Professor Michael McConnell and I have argued, through the Antebellum Era, Americans understood due process to encapsulate a principle going back to Magna Carta that the government may deprive persons of “life, liberty, or property” only according to law.<sup>19</sup> To comply with due process, the federal government could deprive someone of rights only in compliance with the Constitution, statutes, treaties, court procedures, and general law, including the common law and the law of nations. The government had no authority to punish someone for

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<sup>15</sup> Kent, *supra* note 13, at 521 (emphasis added).

<sup>16</sup> 28 Hen. 8 c. 15 (1536); *see also* 27 Hen. 8 c. 4 (1536). *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES \*71 (noting that pirates were entitled to “the common law of the land”).

<sup>17</sup> An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3 c. 7 (1698), *reprinted in* 3 BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1600–1730, at 59 (Baer ed., 2007).

<sup>18</sup> *See infra* Section II.C.

<sup>19</sup> *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

a crime before a federal jury trial conviction or to enforce a forfeiture of property without a federal court judgment according to lawful procedures. Nothing in the constitutional text suggests that due process protected only citizens or applied only to deprivations of rights within U.S. territory.<sup>20</sup>

Third, and perhaps most importantly, early practice uniformly comported with the plain meaning of the constitutional text. All of the evidence from early practice suggests that Americans believed the Due Process Clause extended to all law enforcement, even to law enforcement against aliens abroad. So far, scholars examining the Constitution's extraterritoriality have largely ignored U.S. law enforcement on the high seas, but it occupied more federal resources than any other sort of law enforcement in the nation's first generation.<sup>21</sup> The federal statutes that defined piracy, the slave trade, and violations of U.S. neutrality stipulated that a defendant could be punished—criminally and civilly—only upon judgment in a federal court.<sup>22</sup> Federal officers who captured suspects on the high seas, in foreign territorial waters, and even on foreign soil transported them back to the United States, where those suspects received the same due process protections as any other federal defendant.<sup>23</sup> No one ever suggested that the rules could be different for suspects captured outside the United States, whether they were citizens or aliens. Criminal and civil law enforcement on the high seas overlapped in interesting ways, but for both, the federal government made a final deprivation of rights only after judgment in a federal court according to procedures stipulated by law—common law procedures and jury trial in criminal cases and admiralty procedures in civil condemnation suits.<sup>24</sup>

Americans never debated whether the Due Process Clause applied abroad. But the jurists and statesmen—such as Justice Iredell, William Wirt, Albert Gallatin, and John Quincy Adams—who considered the question concluded that the Fifth Amendment applied to all U.S. law enforcement.<sup>25</sup> Executive practice was consistent with this. Although U.S. officers sometimes used force against suspects who resisted arrest, there is no evidence that U.S. officers believed they could punish suspects captured on the high seas without ordinary federal court procedures.<sup>26</sup> Indeed, federal

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<sup>20</sup> See *infra* Part III.

<sup>21</sup> See DWIGHT F. HENDERSON, CONGRESS, COURTS AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 215 (1985) (admiralty and maritime crimes accounted for over 30% of indictments from 1801 to 1829).

<sup>22</sup> See *infra* Part IV.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See *infra* Section IV.B.

<sup>25</sup> See *infra* Sections V.A–B.

<sup>26</sup> See *infra* Section V.B.

courts would have held an officer who did so personally liable in a damages action for marine trespass.<sup>27</sup> Americans maintained this absolute, extraterritorial requirement of due process in spite of the fact that, as Britain had already discovered, common law protections made it difficult to suppress piracy (and the slave trade). Enforcing due process was costly, which suggests that Americans felt themselves obligated to do so.

Why has this evidence eluded legal scholars? The main reason, I think, is that those considering early extraterritoriality have tended to focus on the federal government's exercise of war powers rather than law enforcement.<sup>28</sup> But war was an exceptional legal state. Americans understood that enemies were different than those suspected of violating municipal (i.e., domestic) law. While the early understanding of due process during war has yet to be fully explored, the evidence suggests that the government understood itself to be able to deprive members of enemy military forces of "life, liberty, or property" through the exercise of war powers without the ordinary constraints of due process.<sup>29</sup> Studies that have focused on wartime deprivations have overlooked the evidence provided by the nation's early law enforcement activities on the high seas.

This Article proceeds as follows. Part I explains the gap in the historical scholarship. Part II introduces the British and law of nations background. Part III discusses the implications of the U.S. Constitution's structure and text. Parts IV and V present the early U.S. practice of law enforcement abroad, and Part VI explores implications of this history for contemporary constitutional doctrine.

## I. A HOLE THE SIZE OF THE SEA

The Due Process Clause appears to be "universalist"<sup>30</sup>—it provides without qualification that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law."<sup>31</sup> Based in part on this text, some

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<sup>27</sup> See *infra* Section V.C.

<sup>28</sup> See *infra* Section I.B.

<sup>29</sup> See *infra* Section V.B.3.

<sup>30</sup> See NEUMAN, *supra* note 13, at 916 (describing universalism as an approach to constitutional interpretation requiring that "constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place").

<sup>31</sup> U.S. CONST. amend. V; Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 868 (2003). See also *Reid v. Covert*, 354 U.S. 1, 8–9 (1957) (Black, J., plurality opinion) ("While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.").

scholars and judges have argued that due process should presumptively extend abroad, at least to citizens and aliens who are otherwise subject to U.S. law.<sup>32</sup>

Scholars have generally agreed, however, that the early history contradicts the apparently plain meaning of the Due Process Clause. They argue that background principles of law and politics, coupled with early U.S. military action abroad, show that Americans did not believe due process extended beyond the nation's borders, at least not for aliens.<sup>33</sup>

As this Part explains, no one has carefully explored the most salient historical evidence: early American law enforcement on the high seas, understood in light of the English historical background.

#### A. Background Political and Legal Principles

Some scholars have concluded that early Americans did not understand constitutional rights to extend beyond the nation's borders based on background principles of politics and law. The most fundamental of these was the social compact: Americans inherited the principle that a nation gains sovereignty from the consent of the governed.<sup>34</sup> This principle raises a question about who is entitled to the protection of the law. Relying on the social compact, a handful of Americans argued during the debates over the Alien Acts of 1798 that only citizens are entitled to due process of law.<sup>35</sup> Very few statesmen, even those who supported the Acts, adopted this position.<sup>36</sup> For most Americans, the social compact principle did not, of its

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<sup>32</sup> See NEUMAN, *supra* note 13, at 99–102; see also Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 314 (2004) (“[T]he text of the U.S. Constitution constrains neither the political branches from acting abroad nor the judicial branch from reviewing their actions.”); Bryan William Horn, Note, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367, 375 (1992) (arguing that the language of the Fifth Amendment does not restrict itself to trials involving citizens or define any geographical limits); Zachary Margulis-Ohnuma, Note, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. INT'L L. & POL. 147, 197 (1999) (arguing that constitutional rights extend abroad if the agent of the United States alleged to have violated a right was acting in a sovereign capacity over the alleged victim).

<sup>33</sup> See *supra* note 13 and accompanying text.

<sup>34</sup> See, e.g., EMER DE VATTEL, *THE LAW OF NATIONS* bk. I, ch. I, § 1 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) (“A nation or a state is, as has been said at the beginning of this work, a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.”); 1 BLACKSTONE, *supra* note 16, at \*47–48 (suggesting that the community should guard the rights of each individual member in return for the individual submitting to the laws of the community).

<sup>35</sup> NEUMAN, *supra* note 13, at 930–31. On the Alien and Sedition Acts generally, see JOHN C. MILLER, *CRISIS IN FREEDOM* (1951).

<sup>36</sup> See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 257 (1996) (noting that this position “seems simply wrong”); see also NEUMAN, *supra* note 13, at 937–43 (few endorsed it).

own accord, necessarily imply that the Constitution protected citizens alone.<sup>37</sup>

Other scholars, including Philip Hamburger, have argued that the reciprocal loyalty principle—another longstanding principle in the common law and the law of nations—would have extended the Constitution’s protections not only to citizens but also to resident aliens.<sup>38</sup> This principle placed a responsibility on the sovereign to provide the protection of the laws in exchange for political loyalty. This reciprocal relationship adhered between the sovereign and all subjects, including citizens and non-enemy resident aliens.<sup>39</sup> This principle excluded nonresident aliens from the protection of the law including, at least implicitly, the Constitution.

During the Alien Act debate, a number of Americans appear to have held some version of this view. John Marshall defended the Alien Friends Act on the ground that it authorized the President to dispense with ordinary protections of due process only for resident aliens suspected of being enemies or at least potential enemies.<sup>40</sup> Apparently he believed that such suspicion was sufficient to remove aliens from the protection of some of the laws (including the basic requirements of due process). James Madison, who opposed the Alien Friends Act on the ground that it deprived alien friends of due process of law,<sup>41</sup> nevertheless acknowledged that alien enemies—subjects of a nation with which the United States was in fact at war—were not entitled to the full protection of U.S. municipal (i.e., domestic) law.<sup>42</sup> Most importantly for the purpose of this Article, the proponents of this view were not concerned with the extension of U.S. law—punitive or protective—outside U.S. borders. Rather, they were principally concerned with whether enemies, including those found within the United States, were entitled to constitutional protections. As this Article argues, the legal category that most determined one’s municipal rights, including the right to due process, was war—not location or nationality. During war, location and nationality often did make a difference. Outside

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<sup>37</sup> See NEUMAN, *supra* note 13, at 937–43.

<sup>38</sup> See generally Hamburger, *supra* note 13.

<sup>39</sup> See 1 BLACKSTONE, *supra* note 16, at \*365–75; VATTEL, *supra* note 34, bk. I, ch. XIV, § 213.

<sup>40</sup> See NEUMAN, *supra* note 13 at 930–31 (discussing the Federalist Address to the Minority in the Virginia House, authored in part by Marshall and Henry Lee).

<sup>41</sup> James Madison, Madison’s Report on the Virginia Resolutions, in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556–57 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 2d ed. 1891) [hereinafter 4 ELLIOT’S DEBATES] (“Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.”).

<sup>42</sup> NEUMAN, *supra* note 13 at 936–37.

of war, the government was bound by the ordinary requirements of due process.

A third principle relied upon by those who argue against the extraterritorial application of the Constitution is the principle of territorial sovereignty.<sup>43</sup> Under the law of nations at the time of the Founding, and under international law today, a nation's legislative and judicial jurisdiction within its own territory is exclusive.<sup>44</sup> This means that ordinarily a nation cannot exercise authority over conduct within another nation's territory. There have always been important exceptions: nations may govern the conduct of their own subjects (and perhaps others) on the high seas<sup>45</sup> and nations may govern the conduct of those within another nation's sovereign territory with that sovereign's consent (usually by treaty).<sup>46</sup>

The implication of this principle for constitutional extraterritoriality is straightforward. The Due Process Clause is a law that does not purport to apply extraterritorially—why should it be understood to do so? Based in part on this principle, for instance, in 1891 the Supreme Court held that a U.S. consular tribunal that punished a U.S. seaman for violating Japan's law in Japanese waters did not have to comply with the Bill of Rights.<sup>47</sup> The Court reasoned that the law of Japan, not the U.S. Constitution, governs conduct in Japan.<sup>48</sup>

This conclusion does not follow from the principle of territorial sovereignty, however. U.S. law clearly did apply in Japan—it was U.S. law

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<sup>43</sup> See, e.g., *In re Ross*, 140 U.S. 453, 464 (1891) (“By the [C]onstitution a government is ordained and established ‘for the United States of America,’ and not for countries outside their limits.”).

<sup>44</sup> See Vattel, *supra* note 34, Preliminaries, §§ 4, 15; David L. Sloss et al., *Conclusion: Continuity and Change Over Two Centuries*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 589, 599 (Sloss et al. eds., 2011) (“[T]he presumption against extraterritoriality was born from the marriage of the *Charming Betsy* canon to customary international law rules limiting each nation's jurisdiction (with a few exceptions) to its own territory.”); Stéphane Beaulac, *Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV. 1327, 1340 (2003) (Vattel was responsible for the “externalization of sovereignty”); see also *id.* bk I, ch. I, § 4, ch. 3, § 37; *id.* bk. II, ch. IV, § 54.

<sup>45</sup> In an early case, a litigant before the Supreme Court “conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.” *Rose v. Himely*, 8 U.S. 241, 279 (1808) (Marshall, C.J.). The concession was not material to the case's resolution. See *id.* at 281 (Livingston, J., joined by Cushing, J., & Chase, J., concurring in the judgment). A majority of the Court was so reluctant to subscribe to such a limitation on a sovereign's right to govern conduct of nonsubjects on the high seas that they either expressly declined to take a position on the issue, see *id.*, or argued for an entirely different framework, see *id.* at 288 (Johnson, J., dissenting) (“Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent.”). As this Article discusses in Section V.A, by the 1820s, Congress exercised authority to punish piracy committed by some nonsubjects on the high seas, and the courts acquiesced.

<sup>46</sup> See, e.g., *infra* Part IV.

<sup>47</sup> *In re Ross*, 140 U.S. at 464.

<sup>48</sup> *Id.*

that authorized the consular tribunal to exercise any U.S. authority whatsoever. The question, then, was whether the Bill of Rights places *limits* on that authority, or, alternatively, whether the Bill of Rights stops at the borders, even when the Constitution's power-creating provisions go abroad.<sup>49</sup>

Early Americans subscribed to each of the foregoing principles—the social compact, reciprocal loyalty and protection, and exclusive territorial sovereignty—at some level of abstraction, for some purposes. These principles therefore formed *part of* the framework for the American understanding of constitutional extraterritoriality. But the principles were not determinative. As scholars of empire have shown, early modern nation-states like the United States struggled to understand the relationship between these three principles as they asserted various degrees of dominion and sovereignty over a patchwork of territory around the globe.<sup>50</sup> Most importantly, Americans integrated these principles into their understanding of their new constitutional system, one with a federal government with powers that were limited both inherently and by express provisions like the Due Process Clause.

### B. Distinguishing Law Enforcement from War

Scholars have also explored constitutional extraterritoriality by looking to the early extraterritorial conduct of the U.S. military. Andrew Kent, a “pioneer in the field,”<sup>51</sup> has made the most thorough historical case against the extraterritoriality of due process.<sup>52</sup> U.S. military operations abroad, including those with the purpose of enforcing U.S. law, “were governed by international law, diplomacy, and policy judgments, not the Constitution.”<sup>53</sup> In analyzing the historical evidence and coming to this conclusion, however, Kent blurred the line between war and law

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<sup>49</sup> See NEUMAN, *supra* note 13, at 944.

<sup>50</sup> See DAVID ARMITAGE, *THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE* 94 (2000) (“[T]he problem of united *imperium* and *dominium* . . . [was] the fundamentally and ultimately combustible dilemma at the core of the British imperial ideology.”); LAUREN BENTON, *SEARCHING FOR SOVEREIGNTY* 4 (2010); CHARLES MAIER, *AMONG EMPIRES* 101 (2006).

<sup>51</sup> Martin Flaherty, *The Constitution Follows the Drone*, 38 HARV. J.L. & PUB. POL’Y 21, 35 (2015) (noting that “serious historical scholarship on Founding views and early practice concerning the extraterritorial reach of the Constitution to potential noncitizen belligerents has only just gotten underway”).

<sup>52</sup> See Kent, *supra* note 13, at 528–35.

<sup>53</sup> *Id.* at 536; see also *id.* at 526 (“[T]here was a strong current of opinion that treaties and the law of nations provided the legal framework governing the U.S. government’s action abroad, at least in the absence of contrary congressional regulation.”); *id.* (“It does not appear that extraterritorial coercive force by the United States government was thought to implicate constitutional rights of noncitizens.”).

enforcement.<sup>54</sup> This is understandable; there is a fair amount of evidence of early wartime extraterritorial military operations, and given the perennial importance of the Constitution's proper application during war, that evidence has been well researched.<sup>55</sup> Furthermore, scholars who have most recently looked at the historical evidence have done so with an eye for its implications for the war on terror, a conflict that blurs traditional lines between war and law enforcement.

Unfortunately, focusing on war muddies the historical analysis. Late eighteenth- and early nineteenth-century Americans understood war to be an exceptional legal state. Under the law of nations, war upended the rights and duties of belligerent and neutral states and their subjects.<sup>56</sup> The Suspension Clause and the Third Amendment respectively permit the federal government to exercise extraordinary power to protect Americans during “[r]ebellion or [i]nvasion”<sup>57</sup> or “in time of war”<sup>58</sup>—power that would ordinarily violate due process of law.<sup>59</sup> To show that waging war abroad reflects the inapplicability of due process abroad would require first showing that the exercise of power to wage war (anywhere) was subject to the ordinary requirements of due process.<sup>60</sup> If the question is whether due process applies abroad, asking whether it applies to the exercise of war powers abroad puts the cart before the horse. Better to inquire first whether due process applied to the conduct of U.S. officers abroad when they enforced U.S. law.

Other scholars have discussed aspects of the U.S. law of piracy and the slave trade in the late eighteenth and early nineteenth centuries, but none of them have reflected upon the implications of their evidence for the extraterritoriality of due process.<sup>61</sup> This is a significant lacuna in the

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<sup>54</sup> *Id.* at 536 (war and law enforcement “do not appear to have been always neatly distinguished”).

<sup>55</sup> The gold standard is ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

<sup>56</sup> *See* Section V.B.3. *See generally* *The Prize Cases*, 67 U.S. 635, 667 (1862); *Ware v. Hylton*, 3 U.S. 199, 224 (1796) (Chase, J.).

<sup>57</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>58</sup> U.S. CONST. amend. III.

<sup>59</sup> *See, e.g., Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

<sup>60</sup> *See, e.g.,* Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337 (2015).

<sup>61</sup> *See generally* DOUGLAS R. BURGESS, JR., *THE PIRATES' PACT* (2009) (exploring the legally dubious alliances between pirates and colonial American governors); DAVID HEAD, *PRIVATEERS OF THE AMERICAS* 7–8 (2015); ALFRED P. RUBIN, *THE LAW OF PIRACY*, at chs. 3–4 (2d ed. 1998); Eugene Kontorovich, *The Constitutionality of International Courts*, 158 U. PA. L. REV. 39, 79–85, 90–92 (2009); Jenny S. Martinez, *International Courts and the U.S. Constitution*, 159 U. PA. L. REV. 1069, 1072 (2011).

historical evidence of early federal constitutionalism. The new government took its rights and duties under the law of nations quite seriously<sup>62</sup> and devoted significant resources to law enforcement on the high seas.<sup>63</sup> Moreover, Americans inhabited a trans-Atlantic maritime culture; they were intimately acquainted with the law of maritime commerce, prize, piracy, and the fine distinctions among them.<sup>64</sup> Though the topic may seem antiquated, it was a priority of the early federal government.<sup>65</sup> As the next Parts of this Article argue, the historical evidence strongly suggests that Americans understood all those suspected of violating U.S. law—anywhere—to be entitled to due process of law before the government could deprive them of “life, liberty, or property.”

## II. THE HISTORICAL BACKGROUND OF DUE PROCESS ABROAD

Looking at due process through the facet of law enforcement abroad, rather than war, brings the relevant historical material into focus. Americans inherited their understanding of how to implement the U.S.’s rights and duties under the law of nations, including the rights and duties of law enforcement on the high seas, from British constitutionalism. Despite its admiralty origins, English courts had long tried piracy cases according to what Sir William Blackstone called “the common law of the land”—with a grand jury indictment, a petit jury trial, and the procedural and evidentiary requirements of the common law.<sup>66</sup> Pirates thus received the same due process as other criminals tried in the common law courts. Britain departed from this practice in the colonies, however, subjecting pirates to trial by vice-admiralty commissions that proceeded on ship or land according to the civil law. As we shall see, the U.S. government rejected this approach. Under the Constitution and federal statute, every criminal

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<sup>62</sup> See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 932 (2010); David L. Sloss et al., *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 44 at 7.

<sup>63</sup> See HENDERSON, *supra* note 21, at 215 (identifying admiralty and maritime offenses as over 30% of all criminal indictments).

<sup>64</sup> See generally 1 THE AMERICAN SHIP-MASTER’S DAILY ASSISTANT; OR, COMPENDIUM OF MARINE LAW, AND MERCANTILE REGULATIONS AND CUSTOMS (1807) (including chapters on each of those topics); see also DONALD A. PETRIE, THE PRIZE GAME (1999) (describing the origins of the law of maritime prize).

<sup>65</sup> See HENDERSON, *supra* note 21, at 215; see also 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815, at 407 (1981) (noting that “[t]he early years of the Marshall Court were dominated by the influx of appeals from prosecutions for illegal trade and by prize cases arising during the War of 1812 . . . amounting to at least 32 percent of all [Supreme Court] cases” from 1801–1815).

<sup>66</sup> 4 BLACKSTONE, *supra* note 16, at\*67.

suspect was entitled to a grand jury indictment, a jury trial, and the procedural protections of the common law, including those accused of offenses on the high seas.

*A. The Piracy–Prize Dichotomy Under the Law of Nations*

Before examining the application of British law on the high seas, it is important to first understand the “law of nations.” In its simplest formulation, the law of nations was “the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”<sup>67</sup> Where did those rights and duties come from? By the time of the War for Independence, English-speaking lawyers generally understood the law of nations to be “the rules of natural law” applied to the relationships between sovereign states, along with “mutual compacts, treaties, leagues and agreements between these several communities.”<sup>68</sup> The law of nations stood in contrast to a state’s “municipal law,” or “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”<sup>69</sup>

Though jurists generally conceived of the law of nations and municipal law as separate categories of law, they understood them to be dynamically related. According to Blackstone, the law of nations “is held to be a part of the law of the land” because it was “adopted in its full extent by the common law.”<sup>70</sup> The “law-merchant” applied in mercantile cases and the rules of capture applied in prize cases, shipwrecks, and the like.<sup>71</sup> There were also three “principal offences against the law of nations, animadverted on as such by the municipal law of England”: “1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”<sup>72</sup> By the late eighteenth century, therefore, it was not unusual for common law jurists to state that “the law of nations” was not only applied in English

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<sup>67</sup> Vattel, *supra* note 34, Preliminaries, § 3.

<sup>68</sup> 1 Blackstone, *supra* note 16, at \*43; *see also* Vattel, *supra* note 34, Preliminaries § 6 (“[T]he law of nations is originally no other than the law of nature applied to nations.”); *id.* §§ 24–25 (discussing the “law of nations, called conventional, or of treaties” and the “customary law of nations, or the custom of nations”).

<sup>69</sup> 1 Blackstone, *supra* note 16, at \*44.

<sup>70</sup> 4 Blackstone, *supra* note 16, at \*67 (“[T]hose acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world.”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*68.

courts, alongside municipal law, but that it “[was] part of the laws of England.”<sup>73</sup>

Importantly, the law of nations emerged from sixteenth-century conflicts among the western maritime nations over privateering and piracy on global trade routes.<sup>74</sup> The source of these conflicts was often the capture of a merchant ship laden with cargo bound for Europe from the East or West Indies.<sup>75</sup> Whether another sovereign had sanctioned the capture made all the difference. If so, it was an act of war. The victim’s sovereign could respond in kind by issuing a letter of reprisal authorizing a privateer to prey upon the enemy’s merchant vessels up to the amount of the damages. In some cases, the first capture could even be considered a declaration of war. If no sovereign had authorized the capture, however, it was an act of piracy. The pirate was, at least in theory, an “enemy of all,” liable to be put to death by anyone who captured him.<sup>76</sup>

The economics of privateering guaranteed a steady supply of pirates—it was big business.<sup>77</sup> To supplement public warships, a sovereign would commission private ships to prey on enemy merchants. A commissioned privateer would capture a ship that appeared to be within the authorization of the commission (usually an enemy) and place a “prize crew,” including a prize master, on board the captured ship, and the prize crew would sail the captured vessel to an admiralty court of the sovereign that had issued the commission.<sup>78</sup> The sovereign would libel (formally prosecute) the ship and its cargo, and the admiralty court would determine whether it was a good prize—whether it was within the scope of the privateer’s commission. If so, the admiralty court would condemn the ship and cargo, order it sold, and distribute the proceeds according to law. In England, the prize belonged to the Crown, but the Crown shared it voluntarily with the lords of admiralty and with the privateer master and crew according to statute or according to the terms of the commission.<sup>79</sup>

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<sup>73</sup> 2 RICHARD WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* 421 (1792).

<sup>74</sup> See David Armitage, *Introduction* to HUGO GROTIUS, *THE FREE SEA* xi, xi–xx (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) (1609).

<sup>75</sup> See *id.*

<sup>76</sup> See generally DANIEL HELLER-ROAZEN, *THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS* 16 (2009) (discussing the Ciceronian origin of the notion that pirates are the “common enemy of all”); RUBIN, *supra* note 61, at ch. 2; WOODDESON, *supra* note 73, at 421–57.

<sup>77</sup> See generally JAMES G. LYDON, *PIRATES, PRIVATEERS, AND PROFITS* (1970) (discussing the centrality of privateering for the economic development of New York in the eighteenth century).

<sup>78</sup> See PETRIE, *supra* note 64, at 37–38.

<sup>79</sup> The richest collection of commissions and opinions in early prize cases is found in volumes 1 and 2 of *DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA* (R.G. Marsden ed., 1915–16) and volumes 1 and 2 of *SELECT PLEAS OF THE HIGH COURT OF ADMIRALTY* (R.G. Marsden ed., 1892, 1897).

During times of peace, privateering commissions were far harder to come by. Privateering was after all an act of war or reprisal. Some privateers were not content to return to trade, however. Thus some percentage of them continued to capture merchant vessels without sovereign authority—as pirates.<sup>80</sup>

Because of the politics and economics of captures on the high seas, nations had reason to enforce piracy laws and to do so with care. Allowing foreign pirates to prey on merchants was simply bad for business. At the same time, a nation could hardly tolerate its own subjects attacking foreign vessels; it invited suspicion (sometimes well-founded) that the sovereign was encouraging the attacks.<sup>81</sup>

Prosecuting foreign pirates, however, carried its own risks. Suppose the defendant had been acting under the orders of another sovereign. Given the legal and diplomatic implications, this is something the prosecuting nation would want to know. First, the authorizing sovereign had committed an act of war. The victim's sovereign's rights and duties of war had been triggered. Second, as a consequence, the defendant was a prisoner of war, not a criminal, and as such entitled to the protections of the law of war. Executing the defendant as a pirate could violate the law of war and complicate diplomatic efforts.<sup>82</sup>

Such were the dynamics of piracy and prize in the early modern era. Although all the western maritime powers generally embraced the law of nations principles that gave rise to these dynamics, as we shall see, each state implemented its rights and duties according to its own constitution.

### *B. Blackstone: Pirates Entitled to the "Law of the Land"*

Since the sixteenth century, England had prosecuted pirates according to the common law. Under Acts of Parliament dating to 1535 and 1536, ad hoc commissions, not the court of admiralty, tried crimes committed on the high seas according "to the course of the common law."<sup>83</sup> Sitting as "Admiralty Sessions," these commissions ordinarily included common law

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<sup>80</sup> See HEAD, *supra* note 61, at 92.

<sup>81</sup> See, e.g., 4 BLACKSTONE *supra* note 16, at \*68 ("It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.").

<sup>82</sup> See, e.g., *Palachie's Case*, 81 Eng. Rep. 411 (1615) (K.B.) (Coke, C.J.) (holding that "if the taking was by an enemy it was not robbery but lawful capture"); see also RUBIN, *supra* note 61, at 63.

<sup>83</sup> 27 Hen. 8 c. 4 (1535); 28 Hen. 8 c. 15 (1536); see M.J. Prichard & D.E.C. Yale, *Introduction to HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION*, at cxxxvii (M.J. Prichard & D.E.C. Yale eds., 1993). The statutes both provide that a number of crimes would be punishable "in like form and condition as if such offences had been done upon the land." 27 Hen. 8 c. 4 & c. 15.

and civilian judges.<sup>84</sup> By statute, they proceeded according to common law procedures: indictment by a grand jury and verdict by a petit jury.<sup>85</sup>

Leading legal historians have missed the implications of this statute for the development of due process. The principal contemporary textbook on the history of the common law is, at best, imprecise: “[t]he admiralty courts dealt with maritime affairs, including crimes committed on the high seas . . . .”<sup>86</sup> Theodore Plucknett was less accurate when he concluded that the Acts of 1536 “inaugurated the new policy of strengthening Admiralty by confirming its jurisdiction over crime committed on the seas, and permitting trial by jury.”<sup>87</sup> To the contrary, the statute all but divested admiralty of control over crimes committed on the high seas. Instead of trial by admiralty judge according to the civil law, ad hoc commissions comprised of common law and civil law judges would preside over grand and petit juries and would proceed according to the common law.<sup>88</sup> It is true that the cases “arose at admiralty” in the sense that, because the facts giving rise to the suits occurred on the high seas, the case was within the admiralty jurisdiction. More importantly, however, the Acts of 1535 and 1536 effectively extended Magna Carta’s “law of the land” protection to those accused of crimes on the high seas.<sup>89</sup> Due process had set sail.

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<sup>84</sup> 28 Hen. 8 c. 15 (1536) (providing that each commission shall include the Lord High Admiral, a delegate, or the Warden of the Cinque Ports, “and three or four such other substantial persons as shall be named by the lord chancellor for the time being”); see also *Rex v. Dawson*, 13 How. St. Tr. 451, 451 (1696) (commission included Doctor Charles Hedges (President and Judge of the Admiralty), Sir John Holt (Lord Chief Justice of the King’s Bench), Sir George Treby (Lord Chief Justice of the Common Pleas), Sir Edward Ward (Lord Chief Baron of the Exchequer), three other judges of the King’s Bench, a justice of the Common Pleas, and a baron of the Exchequer, along with sundry knights “named in the said Commission”); *Trial of William Kidd*, 14 How. St. Tr. 123 (1701) (similar).

<sup>85</sup> See 28 Hen. 8 c. 15 (1536); see also SIR MATTHEW HALE, *PLEAS OF THE CROWN* 77 (5th ed. 1716) (“The Stat. 28 H. 8 alters not the offence; but it remains only an offence by the Civil Law: and therefore a pardon of all Felonies doth not discharge it: but it gives a trial by the course of the Common Law.”).

<sup>86</sup> JOHN H. LANGBEIN ET AL., *THE HISTORY OF THE COMMON LAW* 196 (2009) (citing George F. Steckley, *Collisions, Prohibitions, and the Admiralty Court in Seventeenth-Century London*, 21 *LAW & HIST. REV.* 41, 42–43 (2003)).

<sup>87</sup> THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 662 (5th ed. 1956).

<sup>88</sup> M.J. Prichard, *Crime at Sea: Admiralty Sessions and the Background to Later Colonial Jurisdiction*, 8 *DALHOUSIE L.J.* 43, 44–45 (1984).

<sup>89</sup> See EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 111 (London, E. & R. Brooke 1797) (1628) (describing piracy as acts occurring at sea “which by an act of Parliament are to be enquired of, heard, and determined according to the course of the common law, as if they had been done upon the land”). Professor Burgess has argued that the Crown and Parliament wrestled over authority to define and punish piracy in the early sixteenth to late seventeenth centuries, with Parliament taking the side of the common law courts and the Crown taking the side of the admiralty court. See DOUGLAS R. BURGESS, JR., *THE POLITICS OF PIRACY* 18–22 (2014). By the eighteenth century, anyway, it appears that British piracy suppression was regulated entirely by statute.

By the late eighteenth century, Blackstone could confidently assert that pirates were entitled to “the common law of the land.”

Formerly [piracy] was only cognizable by the admiralty courts, which proceed by the rules of the civil law. But it being inconsistent with the liberties of the nation that any man’s life should be taken away, unless by the judgment of his peers or the common law of the land, the statute 28 Hen. VIII. c. 15 established a new jurisdiction for this purpose, which proceeds according to the course of the common law . . . .<sup>90</sup>

Blackstone here references Magna Carta’s famed “law of the land” provision,<sup>91</sup> which became the textual origin of the English and American constitutional guarantee that the government may deprive someone of life, liberty, or property, only with “due process of law.”<sup>92</sup> English common lawyers had long equated the “law of the land” provision with “due process,” and the early American state and federal constitutional traditions treated those legal requirements interchangeably.<sup>93</sup> From the standpoint of late eighteenth-century English and American readers, Blackstone’s summary of the constitutional limits on the punishment of piracy could not have been more clear: pirates and others who committed offenses on the high seas were entitled to due process of law.

### C. *The Colonial Exception*

At the same time, Americans would have been keenly aware that Blackstone was writing about the rights enjoyed only by those tried in Britain. Pirates were not entitled to a common law trial in the British colonies. In 1699, Parliament provided that “piracy, robbery, or felony upon the sea” could be tried in the colonies by a special commission at sea

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See Prichard, *supra* note 88, at 57 (discussing the background of a 1699 statute authorizing the trial of piracy in the colonies by “inquisitorial procedure, not by jury”).

<sup>90</sup> 4 BLACKSTONE, *supra* note 16, at \*71.

<sup>91</sup> For commentary and sources, see Chapman & McConnell, *supra* note 19, at 1682–85 (“Chapter 29 of Magna Carta provided that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers [or/and] by the law of the land.””).

<sup>92</sup> See *id.* at 1682–92. On the importance of the “myth” of the Great Charter for “all the [seventeenth century] forces of liberalism” and English and American constitutionalism in general, see PLUCKNETT, *supra* note 87, at 25.

<sup>93</sup> See EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (photo. reprint 2004) (London, W. Clarke & Sons 1817) (1642) (equating Chapter 29 of Magna Carta with 28 Edw. 3 c.3 (1354), which first articulated due process as a limit on governmental deprivations); Chapman & McConnell, *supra* note 19, at 1714 (discussing Hamilton’s equation of “law of the land” and “due process” as limits on state legislatures).

or land that proceeded according to the civil law.<sup>94</sup> The statute did not alter the common law protections for those tried in Britain under the Act of 1536; it applied only abroad.<sup>95</sup> The point was to provide a “strict and more easy way” to suppress the pirates that were harassing British shipping interests near the colonies.<sup>96</sup> The statute shows that Parliament did not hesitate to depart from common law protections for pirates for the sake of expediency.<sup>97</sup> (Parliament was not, of course, subject to a written constitution that it could not change by ordinary statute.)<sup>98</sup> Free of “the obstructionism of the colonial courts,”<sup>99</sup> British officers prosecuted dozens

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<sup>94</sup> An Act for the More Effectual Suppression of Piracy, 1700, 11 Will. 3 c. 7, reprinted in 3 BRITISH PIRACY IN THE GOLDEN AGE, *supra* note 17, at 25 (noting that in 1684 England determined that under existing law “colonial courts lacked the jurisdiction to try pirates”); Peter T. Leeson, *Rationality, Pirates, and the Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1222–24 (2010).

<sup>95</sup> 2 DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA: A.D. 1649–1767, at xx (Marsden ed., Navy Records Society 1916) [hereinafter 2 LAW AND CUSTOM OF THE SEA]. There seems to have been some confusion among British lawyers about whether the 1536 act and the 1699 act could be enforced, according to their respective procedural requirements, in the colonies. In 1718, an Admiralty Session in South Carolina tried William Bonnett and others for offenses under the Act of 1536 and adhered to its procedural requirements. *The Trials of Major Stede Bonnet, and Thirty-three others, at the Court of Vice-Admiralty, at Charles-Town, in South-Carolina, for Piracy* (1718), in 15 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 1231 (David Jardine ed., 1812). Two years later Richard West delivered an opinion to the lords commissioners of trade and plantations, arguing that “the statute of Henry the eighth does not extend to the West Indies.” Richard West, *Opinion on the Admiralty Jurisdiction, in the Plantations* (June 20, 1720), in OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 200, 204 (George Chalmers ed., 1814).

<sup>96</sup> 11 Will. 3 c. 7; see Prichard, *supra* note 88 at 57.

<sup>97</sup> See *Quelch* Trial, 14 How. St. Tr. 1067, 1073–74 (1704) (statement of Paul Dudley, Attorney-General of the Province of the Massachusetts Bay). In *Quelch*, the first trial under the Act of 1700, Attorney-General Dudley is reported to have made inconsistent statements about the rights of pirates. After arguing that one who captures pirates “may expose them immediately to punishment, by hanging them at the mainyard,” *id.* at 1073, he acknowledged the protections afforded to pirates under the piracy statutes of Henry VIII, and discussed the new Act of 1699 as a modest departure from those longstanding rules, *see id.* at 1074. I think his assertion about hanging pirates at the mainyard is best understood either as an argument about the rights of captors to immediately execute judgment on pirates in a state of nature or as a rhetorical flourish designed to soften the blow of the Act of 1699 as a departure from the protections of the common law. “Besides,” he added, “the late statute [the Act of 1699] hath appointed such commissioners, as will take care to do equal justice to the prisoner on the one hand, and to the crown and allies of England on the other.” *Id.* at 1074. On the *Quelch* prosecution, see BURGESS, *supra* note 89, at 210–213.

<sup>98</sup> See generally J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955) (discussing different ideas about limits on parliamentary power in the 1700s). By the time of the Revolution, it was widely accepted that Parliament was sovereign, its lawmaking power beyond constraint. See 4 BLACKSTONE, *supra* note 16, at \*90–91; 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 94 (1978).

<sup>99</sup> See, e.g., BURGESS, *supra* note 89, at 210.

of pirates in the North American colonies by special commissions according to the civil law.<sup>100</sup>

Furthermore, British practice under the Act of 1699 confirms that while Parliament could depart from its prior decisions, the prosecution of pirates was nonetheless subject to the requirements of municipal law. Apparently, in 1720 the King's commanders and naval officers queried whether they could be commissioned to try pirates "at any place on the high seas at large," rather than in a colonial port.<sup>101</sup> The Crown's law officers concluded that the statute of Henry VIII had affirmatively divested the admiralty of jurisdiction over the prosecution of pirates and required their prosecution in England "by the common course of the laws of the land."<sup>102</sup> The Act of 1699 departed from this for pirates captured in the East or West Indies, allowing trial "in some colony or plantacon [sic] in the parts where they are taken."<sup>103</sup> The officers concluded, however, that "the intent" of the Act of 1699 was to require coordination between the captors (usually naval officers) and officers "in some plantacons" or

of some English factory, where, or on the sea adjoining thereto, such commission should be executed, and that a certain place should be specially appointed in such commission for the execution thereof, which will not be complied with by a commission to be executed in any place at large upon the sea.<sup>104</sup>

Such a commission, they concluded, "ought not by law to be granted."<sup>105</sup> The British tradition the Americans inherited was that the prosecution of offenses at sea, by whatever procedure, was subject to the specific requirements of municipal law.

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<sup>100</sup> See, e.g., *The Trial of Eight Persons Indicted for Piracy &c* (Boston, B. Green for John Edwards, 1718); *The Trials of Five Persons for Piracy, Felony and Robbery* (Boston, T. Fleet for S. Gerrish, 1726); *An Account of the Pirates, with Divers of Their Speeches, Letters, &c., and a Poem Made by One of Them: Who Were Executed at Newport, Rhode Island, July 19, 1723* (Newport, 1723) reprinted in 7 R.I. HIST. MAG., 1886-87, at 259 (recounting the execution of twenty-six pirates who had resisted arrest and then surrendered on the high seas); *The Tryals of Sixteen Persons for Piracy, &c. Four of Which Were Found Guilty, and the Rest Acquitted* (Boston, Joseph Edwards, 1726); *An Account of the Trial of Joseph Andrews for Piracy and Murder* (New York, 1769) (vice admiralty trial and execution in New York); see also BURGESS, *supra* note 89, at 222-24 (describing several trials for piracy in the early 1700s).

<sup>101</sup> *Opinion of the Law Officers as to the Validity of a Commission to Try Pirates Anywhere on the Sea, Addressed to Commanders and Officers of H.M. Ships* (1720), in 2 LAW AND CUSTOM OF THE SEA, *supra* note 95, at 253.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 254.

<sup>105</sup> *Id.*

Americans, for their part, resented trial by colonial vice-admiralty courts when the defendant would have been entitled to trial by jury according to the common law in England (most notably in cases arising under the Stamp Act).<sup>106</sup> As we shall see, Congress never attempted to follow Parliament's lead by authorizing the trial of pirates by an extraordinary legal process. Throughout the early years of the federal republic, the U.S. commitment to due process for pirates, wherever in the world they were apprehended, stood in stark contrast to the British approach of trying them by the closest possible specially commissioned court. The difference was the U.S. Constitution's separation of powers, and its requirement of due process of law.

#### D. *The United States Joins the Nations*

##### 1. *The War for Independence*

During the War for Independence, Americans became familiar with how a nation's "municipal" or domestic law could determine the boundary between lawful privateering and piracy. Privateers played a crucial role in the war. From the earliest days, American merchants fitted out their ships for reprisals against British merchants.<sup>107</sup> By one estimate in the House of Lords, American privateers "captured or destroyed" over 700 ships with cargoes "worth over ten million dollars,"<sup>108</sup> or well over three times the number of ships taken by the Continental Navy.<sup>109</sup> "Over the course of the War, 1,697 privateer ships manned by 58,400 men roamed the seas."<sup>110</sup> Spurred by a blend of patriotism and a quest for fortune, American privateers converted the wealth of British imperial trade into the "old money" of the eastern seaboard.<sup>111</sup>

All of this was entirely lawful—from the Americans' perspective. Midway through the war—as American privateers harassed British ships in

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<sup>106</sup> See 1 JOHN PHILLIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 52 (2003); see also 1 GOEBEL, *supra* note 98, at 52; Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 334–35 (1996); J. Franklin Jameson, *The Predecessor of the Supreme Court*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1775–1789*, at 5 (1889); David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776*, 16 WM. & MARY Q. 459, 460–61 (1959); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1720 (2009).

<sup>107</sup> See 3 JOURNALS OF THE CONTINENTAL CONGRESS 371 (1775).

<sup>108</sup> EDGAR STANTON MACLAY, *A HISTORY OF AMERICAN PRIVATEERS*, at viii–ix (1899); see also Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 BUFF. L. REV. 477, 487 n.38 (2015).

<sup>109</sup> Mask & MacMahon, *supra* note 108, at 487.

<sup>110</sup> *Id.* at 488.

<sup>111</sup> See ROBERT H. PATTON, *PATRIOT PIRATES* 115 (2008); Mask & MacMahon, *supra* note 108, at 488.

the Irish Sea, the North Sea, and elsewhere in Europe—Britain declined to treat captured American privateers as prisoners of war. In 1777, Parliament enacted The Pirate Act, which authorized the Crown “to secure and detain persons charged with, or suspected of, the crime of high treason committed in North America, or on the high seas, or the crime of piracy.”<sup>112</sup> Britain did not recognize America as a sovereign state, so it likewise did not recognize Congress’s authority to authorize privateers. Without authority, the privateers were pirates. Britain’s decision illustrates the degree to which a nation’s view of the legality of captures at sea depended on its own municipal law, which in some cases depended on its own political interests. Indeed, after its alliance with the United States, France allowed Benjamin Franklin to sit as an admiralty judge in prize cases brought into French port by American privateers.<sup>113</sup> Ultimately George III’s strategy of treating American rebels as common criminals proved unpopular and eroded support for the costly war at home.<sup>114</sup>

On the other side of the Atlantic, the Continental Congress tried to ensure that American privateers complied with the law of nations, acting within the authority of their commissions and receiving the prize to which they were lawfully due. To this end, Congress passed a series of resolves that lodged appellate jurisdiction over state prize courts in a congressionally appointed court that became progressively more stable and independent.<sup>115</sup> The rebels’ experience with this court ultimately provided the basis for the Constitution’s delegation of admiralty jurisdiction to the federal courts.<sup>116</sup>

## 2. *The Articles of Confederation*

Under the Articles of Confederation, the United States took halting steps toward what would ultimately be the Constitution’s structural arrangement for adjudicating cases arising on the high seas. The Articles of Confederation formally delegated much of the new federation’s “external sovereignty” to Congress.<sup>117</sup> Article IX gave Congress power to “appoint[ ] courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all

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<sup>112</sup> 17 Geo. 3 c. 9 (1777). The statute was extended annually until January 1, 1783. *See* 18 Geo. 3 c. 1 (1778); 19 Geo. 3 c. 1 (1779); 20 Geo. 3 c. 5 (1780); 21 Geo. 3 c. 2 (1781); 22 Geo. 3 c. 1 (1782).

<sup>113</sup> PETRIE, *supra* note 64 at 62.

<sup>114</sup> *See generally* E. GORDON BOWEN-HASSELL ET AL., SEA RAIDERS OF THE AMERICAN REVOLUTION (2003); RICHARD BUEL JR., IN IRONS (1998).

<sup>115</sup> *See* GOEBEL, *supra* note 98, at ch. 4 (discussing this development).

<sup>116</sup> *See generally id.* (discussing the initial creation of appellate jurisdiction based on the appeals court for cases of capture).

<sup>117</sup> *See Penhallow v. Doane’s Admin’rs*, 3 U.S. (3 Dall.) 54, 91 (1795).

cases of capture.”<sup>118</sup> Rather than establishing such courts, however, Congress passed an ordinance that delegated jurisdiction in piracy cases to courts to be created by the states.<sup>119</sup> Many states enacted such statutes,<sup>120</sup> but the practice under them is unclear. Upon motion by James Madison, Congress considered, and ultimately rejected, the idea of appointing the judges of the Court of Appeals in Cases of Capture to also try cases of piracy.<sup>121</sup>

### III. THE UNITED STATES CONSTITUTION

Based on their experience during the War for Independence and under the Articles of Confederation, the constitutional framers understood that the exercise of power over “all matters and questions touching the law of nations”<sup>122</sup> needed to be uniform, predictable, and controlled by the institutions responsible for discharging the nation’s duties.<sup>123</sup> The Framers accordingly consolidated power over foreign affairs in the federal government. Section A provides a brief overview of how the Constitution delegated authority over these issues among the three federal departments. Section B considers the sparse historical evidence about the drafting history of the Define and Punish Clause of Article I, Section 8. I argue that the framers most likely intended to give Congress broad power to define and punish crimes on the high seas and against the law of nations without incorporating limits on that power from the definition of piracy and crimes under the law of nations. Section C summarizes the original understanding of due process. Contrary to the contemporary understanding, which sorts due process into “procedural,” “jurisdictional,” and “substantive” rights, Section C shows that early Americans understood due process to require that deprivations of “life, liberty, or property” be according to law. This

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<sup>118</sup> *Id.*; see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 283 (Max Farrand ed., 1911) [hereinafter 1 FARRAND’S RECORDS] (June 18, 1787) (Madison) (explaining that at the Philadelphia convention, Hamilton listed “cases of piracy” as an example where the federal government already exercised authority over individuals).

<sup>119</sup> 19 JOURNALS OF THE CONTINENTAL CONGRESS 354–56 (Apr. 5, 1781).

<sup>120</sup> See, e.g., 5 STAT. AT LARGE OF S.C. (Feb. 27, 1788); MASS ACTS AND RESOLVES, Jan. Sess. 1783, c. 10.

<sup>121</sup> GOEBEL, *supra* note 98, at 173.

<sup>122</sup> 13 JOURNALS OF THE CONTINENTAL CONGRESS 281–84 (Mar. 5, 1779) (letter from Congress to the states).

<sup>123</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.) (“[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide that those laws should be respected and obeyed . . . .”); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) (“When the United States declared its independence, it was bound to receive the law of nations in its modern state of purity and refinement.”).

would include compliance with the constitutional separation of powers and applicable court procedures.

### A. *Structural Overview*

The Constitution distributes authority over matters that touch on the nation's rights and responsibilities under the law of nations, including law enforcement abroad. Seeing the big picture provides context for understanding early discussion and practice relevant to the extraterritorial reach of due process. Article I gives Congress power to make law that reaches beyond U.S. territory. Most obviously based on the text alone, it gives Congress power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”<sup>124</sup> and “[t]o . . . make Rules concerning Captures on Land and Water.”<sup>125</sup> Congress has also asserted power to make law governing private conduct on the high seas under the Foreign Commerce Clause, among others.<sup>126</sup>

Article II provides that the President “shall take Care that the Laws be faithfully executed.”<sup>127</sup> It does not have a territorial limitation; apparently the President's duty to take care that the laws be faithfully executed is coterminous with the law. Article III extends “[t]he judicial Power” “to all Cases of admiralty and maritime Jurisdiction”<sup>128</sup> and provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”<sup>129</sup> Article III expressly contemplates that crimes may be committed outside of a state and provides that in those cases “the Trial shall be at such Place or Places as the Congress may by Law have directed.”<sup>130</sup>

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<sup>124</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>125</sup> *Id.* art. I, § 8, cl. 11.

<sup>126</sup> *See, e.g.*, ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE 252 (1803).

<sup>127</sup> U.S. CONST. art. II, § 3.

<sup>128</sup> *Id.* art. III, § 2, cl. 1. This power was, according to James Wilson, “proper and unexceptionable” 2 ELLIOT'S DEBATES, *supra* note 41, at 445–46 (Wilson); *see id.* (pointing to the “ample experience we have had in the courts of admiralty with regard to captures”). The Virginia, New Jersey, and Hamilton plans all would have given power to federal courts over cases of piracy and captures at sea. 1 FARRAND'S RECORDS, *supra* note 118, at 22 (May 29) (Madison); *id.* at 28 (May 29) (Madison, Paterson); *id.* at 211 (June 12) (Journal); *id.* at 244 (June 15) (Madison); *id.* at 292 (June 18) (Madison).

<sup>129</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>130</sup> *Id.* In the Crimes Act of 1790, Congress provided that the trial of crimes committed outside any state shall be in the state where the defendant is brought or may be found. Crimes Act of 1790, ch. 9, § 8, 1 Stat. 112, 113–14.

### B. *The Define and Punish Power*

Section 8 of Article I gives Congress authority to “define and punish Piracies and Felonies committed on the high Seas.”<sup>131</sup> The Framers discussed several ways to write this clause. They appeared to agree about what they wanted it to mean; the question was how to avoid misunderstanding. The first draft said that Congress would “declare” the law and punishment for piracies and felonies on the high seas.<sup>132</sup> Madison and Randolph, however, argued that “felony at common law is vague” and “defective” and, therefore, needed more clarity. Casting about for alternative formulas, they rejected “foreign law,” which they argued “should [not] be a standard farther than is expressly adopted”<sup>133</sup> and “the laws of the states” because they lacked uniformity.<sup>134</sup> During the ratification debates, Madison defended the generality of the final text with essentially the same arguments that he and Randolph had made in Philadelphia.<sup>135</sup> Besides this, and the light discussion about how best to give the federal courts jurisdiction over piracy and other cases arising on the high seas,<sup>136</sup> the constitutional framers and ratifiers had little to say about those crimes.<sup>137</sup>

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<sup>131</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>132</sup> 2 FARRAND’S RECORDS, *supra* note 118, at 137, 143 (July 24–26) (Committee of Detail, IV) (Randolph’s hand); *id.* at 163, 168 (July 24–26) (Committee of Detail, IX) (Wilson’s hand); *id.* at 614 (Sept. 14) (Madison).

<sup>133</sup> *Id.* at 316 (Aug. 17) (Madison); *see id.* at 312–13 (Aug. 17) (Journal) (recording the votes).

<sup>134</sup> *Id.* at 314, 316 (Aug. 17) (Madison).

<sup>135</sup> *See* THE FEDERALIST NO. 42 (James Madison). In his essay, Madison appeared to depart from the arguments he made in Philadelphia in a couple of respects. The most important, and most puzzling, is that he opened his discussion of the Define and Punish Clause by asserting that “[t]he provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offences.” *Id.* This argument does not square with the text of the Clause, which gives Congress power to “define and punish” those crimes, and it is also manifestly contrary to the rest of Madison’s argument about the Clause. Madison goes on to discuss the importance of giving Congress power to define felonies on the high seas because there was no standard definition. *Id.* The second possible departure from his position in Philadelphia is his vague assertion that “[t]he definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes.” *Id.* This reads as though Madison was ambivalent about whether the power to define piracies was “necessary and proper.” *Id.* Both of these somewhat strange arguments can be attributed to a desire during the ratification debates to soft-pedal Congress’s power to create new crimes.

<sup>136</sup> *See* U.S. CONST. art. III, § 2; 2 FARRAND’S RECORDS, *supra* note 118, at 135 (Committee of Detail, III) (introducing admiralty jurisdiction); *id.* at 146–47 (Committee of Detail, IV) (same); *id.* at 157 (Committee of Detail, VII) (which still includes specific provision of jurisdiction over “all Cases of Capture from an Enemy—in all Cases of Piracies and Felonies on the high Seas”); *id.* at 172–73 (Committee of Detail, IX) (consolidating the specific provisions into “all Cases of Admiralty and Maritime Jurisdiction”); *id.* at 186 (Aug. 6) (Madison) (same); *id.* at 432 (Aug. 27) (Mason) (same).

<sup>137</sup> *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1160 (1833) (stating that the Clause received little “serious” attention at Philadelphia); Eugene Kontorovich,

Given the English background, the language of the clause likely reflects the framers' understanding that "piracy," though sometimes reduced in both English law and the law of nations to "robbery on the high seas," could also refer to other acts on the high seas made criminal by a nation's municipal law.<sup>138</sup> The provision gives Congress power to define not only "piracy" but "Piracies," suggesting that there are a variety of offenses that might qualify as piracy. Contrast this provision, for instance, with the Treason Clause, which incorporates a particular definition of treason from English law and forbids Congress and the federal courts from expanding that definition.<sup>139</sup> The Define and Punish Clause seems calculated to give Congress maximum discretion over the definition and punishment of piracy.

The additional power to "define and punish" "[f]elonies committed on the high Seas" creates something of a puzzle. At common law, a felony was defined as a crime punishable by attainder. Only a common law court had the authority to impose that punishment, and so only a common law court could try a felony. Crimes committed on the high seas were within the admiralty jurisdiction, though under the Act of 1536 they were tried "by the course of the common law."<sup>140</sup> The Act of 1536 did not make crimes on the high seas *felonies*; rather, it made anything that would be a felony on land a crime if committed on the high seas.<sup>141</sup> Pirates and others convicted under the Act of 1536 were not subject to attainder.<sup>142</sup> The power to define and punish "felonies committed on the high seas," therefore, appears to be a thoroughly modern, and thoroughly American, locution. In my view, the best reading of the clause is that the framers meant to give Congress wide latitude to define and punish crime on the high seas without being moored to an existing definition, whether under the law of nations, the common law, or another nation's statute law.<sup>143</sup>

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*The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 150, 159 (2009) ("The Define and Punish Clause was among the least controversial in the Constitution."); see also ST. GEORGE TUCKER, *supra* note 126, at 163.

<sup>138</sup> See CORNELIUS VAN BYNKERSHOEK, *DE DOMINIO MARIS DISSERTATIO* 44 (Ralph Van Deman Magoffin trans., Oxford University Press 2d ed. 1744) (listing the offenses considered piracy in the Netherlands); 2 WOODDESON, *supra* note 73, at 431–35 (discussing the English law of piracy).

<sup>139</sup> U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." (emphasis added)). See generally JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES*, at ch. 4 (1945) (explaining how the framers crafted Article III's definition of treason based on English law).

<sup>140</sup> 28 Hen. 8 c. 15 (1536).

<sup>141</sup> See HALE, *supra* note 85, at 77.

<sup>142</sup> *Id.*

<sup>143</sup> *But see* Kontorovich, *supra* note 137, at 167. Professor Eugene Kontorovich argues that the Define and Punish Clause's enumeration of "piracies" and "other felonies on the high seas" separately

As discussed briefly above, the Constitution allocates other powers to Congress, the Executive, and the courts that pertain to the exercise of authority abroad. The framing and ratification debates reveal little about how Americans understood their application to conduct abroad. Accordingly, this Article considers them in turn as they are relevant to understanding the early practice and as that practice reflects the founding generation's understanding of their extraterritorial application.

### C. *Due Process of Law*

The Constitution provided for a government of limited powers, and it divided and limited those powers in ways that would have been understood to overlap with the requirement of due process of law.<sup>144</sup> But the Constitution's opponents were still skeptical of vesting such power in a centralized government without placing further restrictions on it.<sup>145</sup> To satisfy them, at James Madison's insistence, the First Congress enacted and the states ratified the Bill of Rights.<sup>146</sup>

Tucked into the Fifth Amendment, the Due Process Clause provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>147</sup> On its face, the provision applies to *any* governmental deprivation of life, liberty, or property, by any government agent, against any one and anywhere.<sup>148</sup>

Evaluating the application of due process abroad during the early years of the republic requires first approximating the founding generation's understanding of due process of law. It was in some ways quite different from the due process doctrines that the Supreme Court has articulated in the modern era.

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may be read to incorporate the law of nations distinction between piracy as a universal crime and felonies as a municipal crime requiring a nexus to the proscribing sovereign. I disagree. While the Framers understood that every nation had a right and duty to punish piracy, they also understood that every nation had done so uniquely according to its own municipal law. See 4 BLACKSTONE, *supra* note 16, at \*71–72 (discussing the English law of piracy); VAN BYNKERSHOEK, *supra* note 138, at 44 (listing the offenses considered piracy by the Netherlands).

<sup>144</sup> Chapman & McConnell, *supra* note 19, at 1717–20.

<sup>145</sup> See, e.g., PAULINE MAIER, RATIFICATION 51 (2010); JACK RAKOVE, ORIGINAL MEANINGS 143 (1996).

<sup>146</sup> See MAIER, *supra* note 145, at 446–52.

<sup>147</sup> U.S. CONST. amend. V.

<sup>148</sup> See, e.g., CURRIE, *supra* note 36, at 257 nn.160–61 (citing to scholars who acknowledge that the clause's text appears to provide for global and universal protection).

Scholars agree that through the Antebellum Era “due process of law” had a core meaning.<sup>149</sup> Due process prohibited the government from depriving persons of “life, liberty, or property” without the application of standing law by a court proceeding according to the appropriate procedures.<sup>150</sup> Moreover, as the Court put it in one of the earliest cases arising under the Due Process Clause of the Fourteenth Amendment, due process guaranteed “[t]he enforcement of [constitutional] limitations by judicial process.”<sup>151</sup> Federal and state courts routinely articulated this understanding and applied a range of constitutional provisions that were either synonymous with or overlapped due process of law.<sup>152</sup>

For the purposes of this Article, scholarly disputes about whether the framers understood “due process of law” to place limits on the legislature’s ability to regulate certain forms of private conduct—today’s “substantive due process”—are beside the point.<sup>153</sup> All agree that, at a minimum, due process was understood to require what Chancellor James Kent called “law in its regular course of administration through courts of justice”<sup>154</sup> and what

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<sup>149</sup> See Chapman & McConnell, *supra* note 19, at 1676 n.5 (collecting sources that discuss the core meaning of due process as a prohibition on unlawful deprivations of rights). *But see id.* at n.6 (collecting sources that argue that due process *also* entailed “substantive” or natural rights).

<sup>150</sup> *Id.* at 1729 nn.245–46, 1733 n.274 (collecting cases).

<sup>151</sup> *Hurtado v. California*, 110 U.S. 516, 536 (1884) (noting further that judicial enforcement “is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government”); see also 1 BLACKSTONE, *supra* note 16 at \*141–42 (discussing the relationship between English legal protections against unlawful deprivations of life, liberty, or property and the “third subordinate right of every Englishman [which] is that of applying to the courts of justice for redress of injuries”).

<sup>152</sup> See *Hurtado*, 110 U.S. at 536; *Murray’s Lessee v. Hoboken Land Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); *Bloomer v. McQuewan*, 55 U.S. 539, 553 (1852); Chapman & McConnell, *supra* note 19, at 1714–16 (discussing Hamilton’s use of “due Process of law” in the New York legislature); *id.* at 1727–29 (analyzing antebellum state cases); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 429 (2010) (noting that “law of the land” was understood to be synonymous with “due process of law”); see also COKE, *supra* note 93, at 50.

<sup>153</sup> Compare, e.g., CHESTER ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 351–55 (1997) (citing antebellum cases protecting natural rights), Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009) (arguing that “law” in “due process of law” was understood to refer to an act that complies with natural law), and Williams, *supra* note 152, at 411–12 (arguing that the Fourteenth Amendment, but not the Fifth Amendment, was understood to include “substantive” due process rights), with Chapman & McConnell, *supra* note 19, at 1672 (arguing that due process applied against the legislature, but not as a species of “substantive” due process).

<sup>154</sup> JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 16 (John M. Gould ed., Boston, Little, Brown, and Company, 1896).

Justice Swayne called “the application of law as it exists in the fair and regular course of administrative procedure.”<sup>155</sup>

As the next Part illustrates, it was this notion of due process that applied to the deprivation of rights arising from federal law enforcement abroad. Due process required the ordinary constitutional, statutory, and common law criminal procedures before the punishment of any suspect captured outside U.S. territory; the ordinary statutory and law of nations procedures before the deprivation of property for a violation of U.S. law on the high seas; and the right to sue a federal officer for the unauthorized deprivation of rights committed outside U.S. territory. Indeed, many captures on the high seas could give rise to all three forms of action at law; together they could be summed up as due process of law.

#### IV. AN OVERVIEW OF EARLY FEDERAL LAW GOVERNING CONDUCT ABROAD

The following three Parts of this Article turn to early practice. Together they show that early Americans apparently understood that all persons suspected of violating federal law were entitled to due process of law. The federal government could not deprive them of rights, except according to the structural and procedural conditions required by federal law. This applied to aliens and citizens alike, regardless of where federal officers captured them.

This Part begins by providing an overview of the early federal law governing private conduct abroad. The next Part focuses on criminal punishment for conduct abroad and distinguishes it from war. The following Part turns to civil condemnation and trespass suits against officers arising from captures on the high seas.

##### A. *The Conduct Regulated*

From the beginning, the federal government regulated a wide range of conduct on the high seas. Over time it exercised more authority to reach foreigners and conduct in foreign territory related to conduct on the high seas, especially the capture of slaves on foreign shores. Congress enacted

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<sup>155</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 127 (1873) (Swayne, J., dissenting); *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.) (“It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”); 1 BLACKSTONE, *supra* note 16, at \*44 (explaining that law is “not a transient sudden order . . . to or concerning a particular person; but something permanent, uniform, and universal”); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 284 (Peter Laslett ed., Cambridge, Cambridge University Press 1988) (1690); Chapman & McConnell, *supra* note 19, at 1733 n.274 (collecting cases); *id.* at 1729 nn.245–46 (same).

the Crimes Act of 1790, the first federal criminal provision, before the states had ratified the Bill of Rights.<sup>156</sup> Five of the Act's thirty-three sections prohibit piracy and other felonies on the high seas.<sup>157</sup> The broadest provision applied to "any person or persons" who commits "murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death"; to "any captain or mariner" who "shall piratically and feloniously run away with [a] ship or vessel," "or yield up such ship or vessel voluntarily to any pirate"; and to "any seaman" who "shall lay violent hands upon his commander" "or shall make a revolt in the ship."<sup>158</sup> The provision applied to conduct "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state."<sup>159</sup>

The Crimes Act of 1790 was only the beginning. Congress continued to enact laws prohibiting conduct outside U.S. territory. Many of them, especially Non-Intercourse Acts and Embargoes, responded to diplomatic and commercial changes arising from wars between European powers (especially between Britain and France) or between a European power and its American colonies. Others simply extended the federal government's control over particular practices that were unlawful during war and peace alike, such as piracy or the slave trade.

Early extraterritorial federal regulations fell into several categories. The first was piracy and other felonies on the high seas. This included conduct that would have been a felony, or at least a serious crime, under the common law had it been committed on land: theft, assault, arson, and the like. Throughout this period Congress broadened the definition of piracy and felonies on the high seas, reaching more conduct committed by more persons.<sup>160</sup> The Supreme Court agreed that Congress could extend piracy beyond its traditional bounds with a statute clearly intended to do so.<sup>161</sup>

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<sup>156</sup> See Crimes Act of 1790, ch. 9, 1 Stat. 112.

<sup>157</sup> See *id.* §§ 8–13.

<sup>158</sup> *Id.* § 8.

<sup>159</sup> *Id.* Congress later discussed whether it had the authority to prohibit piracy in the Chesapeake but seemed to conclude that Virginia and Maryland likely had joint jurisdiction over the Chesapeake and indefinitely tabled the issue. 17 ANNALS OF CONG. 1007–09 (1807); 18 ANNALS OF CONG. 2279 (1808).

<sup>160</sup> See Crimes Act of 1825, ch. 65, 4 Stat. 115; Piracy Act of 1820, ch. 113, 3 Stat. 600; Piracy Act of 1819, ch. 77, 3 Stat. 510.

<sup>161</sup> See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) ("The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States."); *id.* at 630 (concluding that Section 8 of the

The second category of regulations comprised prohibitions on the slave trade. The earliest law against the slave trade, enacted in 1794,<sup>162</sup> provided for civil forfeiture. In 1800, Congress authorized the criminal punishment of any U.S. citizen who served on a U.S. vessel “employed or made use of in the transportation or carrying of slaves from one foreign country or place to another.”<sup>163</sup> The Act of 1808 extended the civil forfeiture provisions and authorized criminal punishment for buying a slave imported from a foreign shore.<sup>164</sup> The Slave Trade Act of 1818 extended this criminal jurisdiction and made it clear that it was subject to due process of law. Section 4 provided that any U.S. citizen or resident who “shall take on board, receive, or transport from any of the coasts or kingdoms of Africa, or from any other foreign place, or country, or from the sea” anyone “in any ship, vessel, boat, or other water craft for the purpose” of selling them as a slave shall be subject not only to forfeiture of money and ship but imprisonment “on conviction, *by due course of law*.”<sup>165</sup>

The Piracy Act of 1820 expanded the definition of piracy to include “robbery” committed “on shore” by the crew of a pirate vessel.<sup>166</sup> The Act also extended the definition of piracy, and the specter of capital punishment, to those engaged in the slave trade.<sup>167</sup> Both of these provisions extended U.S. municipal criminal law beyond the definition of piracy under

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1790 Crimes Act extended to murder, robbery, or *any other* offence, which committed within a county, would be punishable with death).

<sup>162</sup> The Constitution forbade Congress to prohibit the slave trade before 1808. U.S. CONST. art. I, § 9, cl. 1. Congress could, though, discourage the slave trade by taxing it. The First Congress debated a \$10 per capita duty on slaves, shelved the proposal, and never returned to it.

<sup>163</sup> Slave Trade Act of 1800, ch. 51, §4, 2 Stat. 70; *see* W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA 1638–1870*, at 80–84 (1896).

<sup>164</sup> Act to Prohibit the Importation of Slaves, ch. 22, § 2, 2 Stat. 426, 426 (1807) (owners and masters forfeit the ship); *id.* § 3 (aiders and abettors forfeit \$20,000). The law went into effect on January 1, 1808. Great Britain enacted a similar law after the Act of 1808 that went into effect before it. *See* An Act for the Abolition of the Slave Trade, 47 Geo. III Sess. 1 c. 36. *See generally* PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 133 (3d ed. 2014); Matthew E. Mason, *Slavery Overshadowed*, 20 J. EARLY REPUBLIC 59 (2000) (explaining that the congressional debates, which foreshadowed the sectionalism that would fully emerge later in the century, were overshadowed by concern about Burr’s alleged rebellion in the southwest and the Napoleonic wars in Europe). *See also* *The Josefa Segunda*, 23 U.S. (10 Wheat.) 312 (1825); *United States v. Preston*, 28 U.S. (3 Pet.) 57 (1830).

<sup>165</sup> Slave Trade Act of 1818, ch. 91, § 4, 3 Stat. 450, 451 (emphasis added); *see also id.* §§ 3, 6 (likewise specifying the requirement that the government follow the “due course of law”); *see, e.g.*, *The Merino et al.*, 22 U.S. (9 Wheat.) 391, 405 (1824) (applying the Act of 1818 against U.S. citizens who “[took] on board” slaves “in one foreign place, for the purpose of their being held to service or labour”).

<sup>166</sup> Piracy Act of 1820, ch. 113, § 3, 3 Stat. 600, 601.

<sup>167</sup> *Id.* § 4; *see also* A. H. FOOTE, *THE AFRICAN SQUADRON* 3 (1855) (stating in an address to the annual meeting of the board of directors of the American Colonization Society that “the African slave trade has been pronounced by the United States piracy *only in a municipal sense*—not piracy by the law of nations”).

the common law or the law of nations.<sup>168</sup> And both of them expressly conditioned criminal punishment upon “conviction . . . before the circuit court of the United States for the district into which [the defendant] shall be brought, or in which he shall be found.”<sup>169</sup>

The third major category of extraterritorial federal crimes involved conduct that violated U.S. neutrality or interfered with U.S. foreign trade policy. They included: the Neutrality Act of 1794 (made permanent in 1800);<sup>170</sup> the Non-Intercourse Acts enacted during the Quasi-War with France from 1798 to 1800;<sup>171</sup> the Non-Intercourse Act of 1808 (amended twice);<sup>172</sup> and the non-intercourse act known as “Macon’s Bill Number 2” of 1810 and a supplementary act.<sup>173</sup> These statutes often blended wartime or diplomatic concerns with the mechanisms of ordinary criminal law enforcement: the statutory definition of a crime, the criminal punishment of fines and/or imprisonment, the authorization of searches and seizures by U.S. warships (either within U.S. territory or on the high seas), and adjudication by federal courts pursuant to ordinary criminal procedures.

The U.S. government actively enforced these laws. American sailors understood them well.<sup>174</sup> Before 1800, the most frequently indicted federal

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<sup>168</sup> See *Le Louis*, 165 Eng. Rep. 1464 (1817) (High Ct. Adm.) 1471 (holding that the slave trade was not a violation of the law of nations and therefore not punishable as piracy except under the vessel’s sovereign’s municipal law); *The Antelope*, 23 U.S. (10 Wheat.) 66, 118–20 (1825) (also holding that the slave trade was not a violation of the law of nations and therefore not punishable as piracy except under the vessel’s sovereign’s municipal law). See generally JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977).

<sup>169</sup> Piracy Act of 1820, ch. 113, §§ 3,4, 3 Stat. 600.

<sup>170</sup> Neutrality Act of 1794, ch. 50, 1 Stat. 381–86.

<sup>171</sup> Act of Feb. 27, 1800, ch. 10, 2 Stat. 7; Act of Feb. 9, 1799, ch. 2, 1 Stat. 613; Act of June 28, 1798, ch. 62, 1 Stat. 574; Act of June 13, 1798, ch. 53, 1 Stat. 565; Act of May 28, 1798 ch. 48, 1 Stat. 561. See generally HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15*, at 408–15 (1981) (discussing illegal smuggling during the “Quasi-War” with France from 1797 to 1800).

<sup>172</sup> Non-Intercourse Act of 1808, ch. 24, 2 Stat. 528, amended by Act of May 30, 1809, ch. 1, 2 Stat. 547, and Act of June 28, 1809, ch. 9, 2 Stat. 550.

<sup>173</sup> Macon’s Bill Number 2, ch. 39, 2 Stat. 605 (1810). I am putting to one side a number of laws that criminalized conduct that could be characterized as outside U.S. territory but that, for purposes of this Article, are not. The United States provided ordinary due process in these cases too, but because they may be characterized as being within U.S. territory, they are less salient for my argument. The first include crimes by or against Indians or in Indian territory. See Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (providing for punishment of crimes committed in Indian territory); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (establishing penalties for crimes committed in Indian territory). The second include criminal conduct within U.S. port or territorial waters in violation of an embargo. See Enforcement Act, ch. 33, 2 Stat. 473 (1808) (establishing penalties and forfeitures for exporting goods during embargo); Embargo Act of 1807, ch. 5, 2 Stat. 451 (laying an embargo on shipping in the U.S.).

<sup>174</sup> AMERICAN SHIP-MASTER’S DAILY ASSISTANT, *supra* note 64 (including chapters on U.S. slave trade laws and piracy law).

crime was “assault and battery aboard ship.”<sup>175</sup> From 1800 to 1830, “[a]dmiralty and [m]aritime” crimes accounted for more than 30% of federal indictments.<sup>176</sup> In absolute numbers, 406 of the 2,718 indictments during this period were for piracy.<sup>177</sup> The prosecution and punishment of extraterritorial crimes, including crimes committed by aliens, was one of the federal government’s top priorities.

*B. The Enforcement Mechanisms: Criminal Trial and Civil Condemnation*

To regulate the foregoing conduct abroad, the federal government principally used two enforcement mechanisms—punishment after criminal trial, and civil forfeiture after a condemnation by a federal court sitting in admiralty. The Crimes Act of 1790, for instance, provided for criminal punishments consisting of fines, incarceration, death, and dissection.<sup>178</sup> Other provisions, especially trade regulations, were enforced only by bonds (for which the owner would be liable at common law)<sup>179</sup> and civil forfeiture.<sup>180</sup> Congress passed many of these regulations to enforce the nation’s international position during a period of quasi-war. Some regulations authorized U.S. warships to capture enemy and friendly vessels violating neutrality acts and embargoes.<sup>181</sup> U.S. courts handled the condemnation proceedings arising from such captures as they would have handled a prize case. As Justice Story explained, these captures were not “strictly *jure belli*” because they were not condemnations of the vessels of an enemy with whom the United States was formally at war; instead, they were “public acts *in the nature of captures jure belli*.”<sup>182</sup>

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<sup>175</sup> HENDERSON, *supra* note 21, at 13.

<sup>176</sup> *Id.* at 215.

<sup>177</sup> *Id.*

<sup>178</sup> The propriety of dissection as a punishment for those convicted of capital crimes was one of the only aspects of the bill debated in the House. *See* 2 ANNALS OF CONG. 1519 (1790). The penalty was only carried out once—against four men arrested in Copenhagen and returned in 1818 to Boston, where they were tried, convicted, and executed for murder and piracy. *See* HENDERSON, *supra* note 21, at 134.

<sup>179</sup> *See, e.g.*, *Speake v. United States*, 13 U.S. (9 Cranch) 28, 35–36 (1815) (Story, J.) (holding that a bond for more than double the value of the ship was valid because it was taken voluntarily).

<sup>180</sup> Enforcement Act of 1809, ch. 5, 2 Stat. 506; Act of Apr. 25, 1808, ch. 66, 2 Stat. 499; Embargo Act of 1808, ch. 33, 2 Stat. 473; Act of Jan. 9, 1808, ch. 8, 2 Stat. 453; Embargo Act of 1807, ch. 5, 2 Stat. 451; Second Non-Intercourse Act, ch. 2, 1 Stat. 613 (1799); First Non-Intercourse Act, ch. 53, 1 Stat. 565 (1798); Act of June 28, 1798, ch. 62, 1 Stat. 574 (providing for distribution of prize awards); Act of May 28, 1798, ch. 48, 1 Stat. 561 (non-intercourse act); *see also* Slave Trade Act of 1794, ch. 11, §§ 1–2, 1 Stat. 347, 349 (requiring forfeiture for violation of the Act).

<sup>181</sup> *See, e.g.*, Act to Prohibit the Importation of Slaves, ch. 22, § 7, 2 Stat. 426, 428 (1807) (authorizing capture of US slave traders on the high seas); Act of July 9, 1798, ch. 86, 1 Stat. 578 (authorizing capture and condemnation of any armed French vessel).

<sup>182</sup> *The Palmyra*, 25 U.S. (12 Wheat.) 1, 11 (1827) (Story, J.) (emphasis added).

Some statutes, however, regulated the same conduct with both mechanisms of enforcement.<sup>183</sup> Although arising from the same conduct abroad and the same capture, a criminal prosecution and related civil condemnation suit would proceed entirely independently of one another.<sup>184</sup> The criminal prosecution was in personam and usually arose under the exclusive original jurisdiction of a federal circuit court that proceeded according to the course of the common law.<sup>185</sup> Condemnation proceedings, by contrast, were in rem and arose under the admiralty and maritime jurisdiction of a district court that proceeded “according to the course of the civil law.”<sup>186</sup> In the civil suit, the owners of the captured vessel could countersue the capturing officer for maritime trespass, i.e., for exceeding his authority under congressional act, executive order, and the law of nations.<sup>187</sup>

Americans appeared to believe that both enforcement mechanisms were consistent with due process of law. The Piracy Act of 1819, for instance, made it a crime for “any person or persons whatsoever” to “commit the crime of piracy, as defined by the law of nations” and authorized capital punishment “upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought.”<sup>188</sup> The Act also made vessels “from which any piratical aggression . . . shall have been first attempted or made” subject to condemnation “after *due process* and trial, in any court having admiralty jurisdiction . . . .”<sup>189</sup> The process that was *due*, in other words, depended on the case. Criminal prosecutions proceeding in personam had to be

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<sup>183</sup> See, e.g., Piracy Act of 1819, ch. 77, §§ 2–5, 3 Stat. 510, 512–14 (permitting seizure of any vessel or boat that committed or attempted to commit “piratical aggression,” and permitting the infliction of punishment on any person convicted of piracy after trial in a United States district court).

<sup>184</sup> *Palmyra*, 25 U.S. at 15 (“[T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.”).

<sup>185</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (giving circuit courts general jurisdiction over federal crimes); see also *id.* § 9 (giving district courts jurisdiction over crimes with relatively minor punishments).

<sup>186</sup> *Id.* § 9 (conferring “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction” on district courts); The Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (providing that federal courts sitting in admiralty shall proceed according to the civil law); *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794) (interpreting this jurisdiction to include “all the powers of a court of Admiralty, whether considered as an instance, or as a prize court”).

<sup>187</sup> See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

<sup>188</sup> Piracy Act of 1819, ch. 77, § 5, 3 Stat. 510, 513–14, amended by Piracy Act of 1820, ch. 113, 3 Stat. 600 (extending section 5 indefinitely); see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (holding that the provision was reasonably certain).

<sup>189</sup> Piracy Act of 1819, ch. 77, § 4, 3 Stat. 510, 513 (emphasis added).

according to the common law; civil forfeiture suits in rem had to be according to the civil law. Both forms of proceeding were understood to amount to “due process and trial.”<sup>190</sup>

A well-known case illustrates these enforcement mechanisms.<sup>191</sup> Off the shore of Africa, *The U.S.S. Alligator* approached a vessel that appeared to be in distress.<sup>192</sup> After the *Alligator* showed the U.S. flag, the other vessel opened fire.<sup>193</sup> The two exchanged fire until the other vessel allowed the U.S. captain to board and inspect her papers.<sup>194</sup> The papers showed the vessel to be a Portuguese merchant, *The Marianna Flora*; the ship’s captain said that she fired on the U.S. ship believing her to be a pirate.<sup>195</sup> The U.S. captain was unsatisfied; the ship had acted like a decoy, papers are easy to falsify, and there was no reason (other than general distrust) for the *Marianna Flora* to have suspected the *Alligator* of piracy.<sup>196</sup>

A British man-of-war in the same circumstance almost certainly would have sailed the vessel to a vice-admiralty court in one of the British colonies in Africa.<sup>197</sup> Because it was outside of England, that court would have tried the Portuguese captain and crew for piracy and entertained a condemnation suit.<sup>198</sup> The *Alligator* did not have that option. Nor did it have lawful authority to try the Portuguese crew itself.

Suspecting the vessel of piracy, the U.S. captain put a “prize crew”—a detail from his own ship—on the *Marianna Flora* with instructions to sail it to the U.S. for condemnation proceedings.<sup>199</sup> The crew put the Portuguese crew in irons and sailed to Boston. Upon arrival, the American master libeled the *Marianna Flora*, seeking condemnation and sale of the ship and

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<sup>190</sup> See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (holding that traditional procedures satisfied due process of law even when they were different from the ordinary requirements of the common law).

<sup>191</sup> See generally *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1825); *The Marianna Flora*, 16 F. Cas. 736 (Story, Circuit Justice, C.C.D. Mass. Oct. 1822). See also *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (Story, J.); HENDERSON, *supra* note 21, at 130 (discussing the libel of the brig *B* and the concurrent indictment of Thomas Jones before the federal district court in Rhode Island in 1817); Circular from Secretary of State Adams to District Attorneys (Microcopy M 40), reel 28, pp. 164–65 (May 1823) (asking for copies of proceedings “in cases of Foreign Vessels brought on suit into Port upon charges of Piracy, aggression upon vessels of the United States; or relating to the slave trade; and in cases of process against or trial of individual Foreigners for those offenses”).

<sup>192</sup> *The Marianna Flora*, 16 F. Cas. at 736.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *The Marianna Flora*, 24 U.S. at 7–8 (Blake, arguing for the respondents).

<sup>197</sup> See *supra* Section II.C.

<sup>198</sup> *Id.*

<sup>199</sup> *The Marianna Flora*, 16 F. Cas. at 736.

cargo and distribution of the proceeds.<sup>200</sup> The owner counterclaimed for damages, arguing that the captain of the *Alligator* had lacked probable cause to seize the vessel in the first place, much less to sail it from Africa to the United States for proceedings.<sup>201</sup> Ultimately the Supreme Court concluded that the captain, though proven wrong, was justified in capturing and detaining the vessel because of its unusual maneuvers and its firefight with the U.S. vessel.<sup>202</sup> The capture and suits appeared to arise from an unfortunate (and expensive) misunderstanding, and since it was a case of first impression, the Court decided to let both sides go without further costs.<sup>203</sup>

The case illustrates several points. First, the potential for maritime misunderstandings which could precipitate international conflict provided a powerful motivation for subjecting disputes about rights and duties on the high seas to an independent tribunal that could carefully weigh the evidence. These dangers were exacerbated on the high seas, where subterfuge was commonplace.<sup>204</sup> The law of nations had long provided rules that all of the western powers recognized.<sup>205</sup> The United States followed these rules but implemented and supplemented them through its unique municipal law—through captures authorized by Congress and legitimized by an Article III court with jurisdiction over both piracy and prize cases.<sup>206</sup>

Second, though a capture on the high seas could give rise to several different legal remedies, all of them were supplied by federal courts. This approach was inconvenient and expensive. By design, the courts lacked the authority to respond to changing concerns about the nation's foreign affairs; instead, they were obligated to review captures on the high seas for compliance with the law of nations and U.S. law. In doing so, they extended due process to all who came within the United States' law enforcement jurisdiction.

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 11–12 (1825).

<sup>203</sup> *Id.* at 58.

<sup>204</sup> *See, e.g., The Antelope*, 23 U.S. (10 Wheat.) 66, 126 (1825) (“Whether the *General Ramirez*, originally the *Antelope*, is to be considered as the prize of a commissioned belligerent ship of war unlawfully equipped in the United States, or as a pirate, it seems proper to make some inquiry into the title of the claimants.” (emphasis added)).

<sup>205</sup> *See Condemnation of Prize*, 1 Op. Att’y Gen. 78, 79 (1797) (“[T]he rule [arising from the law of nations] before mentioned is designed to prevent piracy and other unjust seizures on the high seas, which it is in the interest of all nations to prevent.”).

<sup>206</sup> *See, e.g., Prize Ship and Crew*, 1 Op. Att’y Gen. 85, 85 (1798).

## V. THE EVIDENCE FOR DUE PROCESS ABROAD

The previous Part provided an overview of early federal criminal law enforcement abroad. This Part more carefully explores evidence showing that all three departments of the federal government understood due process to be a limit on federal law enforcement outside U.S. territory. First, Congress and the courts believed that due process limited Congress's power to authorize punishment for crimes committed on the high seas. Even before the ratification of the Bill of Rights, Congress placed due process limits on federal criminal punishment.<sup>207</sup> After the ratification of the Bill of Rights, Justice Iredell acknowledged that the Constitution's express limits on congressional power—including the Bill of Rights' criminal procedural protections—limited Congress's power to “define and punish” piracy.<sup>208</sup> Second, the Executive Department uniformly complied with due process in the enforcement of U.S. law abroad. The most potent evidence of this commitment came during a period of sustained law enforcement against pirates in Puerto Rico and Cuba.<sup>209</sup> The United States consistently supplied due process for foreign pirates who menaced U.S. merchant vessels, even when doing so was extraordinarily costly. Congress considered giving the President authority to try and punish pirates on the spot but declined to do so for reasons that sounded in due process of law (though Congress did not expressly cite the Fifth Amendment).<sup>210</sup> The piracy scourge ended only when the *Spanish* coerced confessions and executed dozens of pirates captured in a joint operation with the U.S. Navy.<sup>211</sup> Moreover, U.S. officials consistently distinguished between the federal government's power to operate against criminals and its power against foreigners who claimed sovereign status and threatened the United States with war. Finally, U.S. courts routinely heard suits against U.S. officers for exceeding their authority to capture a foreign vessel on the high seas.<sup>212</sup> Such suits mirrored common law trespass suits that many scholars believe to have been a mechanism for enforcing constitutional rights.

*A. Congress's Power to Authorize Punishment for Conduct Abroad*

Congress and the courts believed that Congress could not authorize punishment for conduct abroad without due process of law. The best evidence of Congress's constitutional understanding are the terms of the

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<sup>207</sup> See *infra* Section V.A.

<sup>208</sup> See *infra* Section V.A.

<sup>209</sup> See *infra* Section V.B.1.

<sup>210</sup> See *infra* Section V.B.1.

<sup>211</sup> See *infra* Section V.B.1.

<sup>212</sup> See *infra* Section V.B.3.

statutes themselves. The statutes that defined extraterritorial federal crimes stipulated that punishment would follow conviction in a federal court. This requirement began with the Crimes Act of 1790. The Act provides that those “adjudged” and “convicted” of being a pirate and a felon “shall suffer death,” stipulating that the trial for pirates “shall be in the district where the offender is apprehended, or into which he may first be brought.”<sup>213</sup> The Act made no exceptions for noncitizen defendants. Subsequent statutes followed suit, whether they authorized punishment following a criminal trial or civil forfeiture following a condemnation proceeding.<sup>214</sup>

Conditioning punishment on conviction in a court in a district into which the defendant “may first be brought” provides crucial insight into the statute’s extraterritorial reach. The statute supposes that some pirates would be captured outside the jurisdiction of a federal court. But it nevertheless conditions punishment of such a suspect on conviction in a federal court. There is no plausible way to read the provision as authorizing the President to punish pirates upon capture on the high seas. The statute required trial in a federal court. Any executive power to punish pirates or other criminals captured outside the United States would have to come directly from the Constitution.<sup>215</sup> As the remainder of this Part demonstrates, the President never argued that the Constitution gave him power to punish criminal suspects captured outside U.S. territory absent congressional authority. Rather, the President understood the Executive’s authority to execute the law abroad was subject to the terms of that law.<sup>216</sup> Additionally, federal courts enforced congressional limits on executive law enforcement abroad.<sup>217</sup>

Why did Congress expressly condition criminal punishment on conviction in an Article III court? Did Congress believe that the Constitution did not require conviction in a federal court before criminal punishment? The most obvious answer, I believe, is that Congress assumed judgment to be constitutionally required before punishment, and stipulated conviction, condemnation, or some other form of judgment to clarify the

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<sup>213</sup> Crimes Act of 1790, ch. 9, § 8, 1 Stat. 112, 113–114.

<sup>214</sup> *See, e.g.*, Piracy Act of 1819, ch 77, § 5, 3 Stat. 510, 513–514; Slave Trade Act of 1818, ch. 91, § 4, 3 Stat. 450, 451–52; Act to Prohibit the Importation of Slaves, ch. 22, § 7, 2 Stat. 426, 428 (1807).

<sup>215</sup> *See* U.S. CONST. art. II, § 1, cl. 1 (vesting “the executive power” in the President).

<sup>216</sup> *See, e.g.*, *Prosecutions for Piracy*, 1815, 1 Op. Att’y. Gen. 185, 186 (1815) (directing district attorney to prosecute piracy committed outside the jurisdiction of any particular state in the district where the offender is apprehended or into which he may first be brought, and holding that it would be at the option of the capturing vessel to carry the offender or offenders to such port or district of the United States for trial “as was thought proper”).

<sup>217</sup> *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding a U.S. captain liable for exceeding congressional authority).

applicable rules of procedure. For the Crimes Act of 1700, in particular, there are especially good reasons to suspect that Congress specified punishment upon conviction of pirates for clarity rather than because they believed the issue to be a matter of discretion. Requiring federal courts to try pirates according to the course of the common law was a departure from recent British practice in the colonies.<sup>218</sup> The Crimes Act of 1790 simply returned to the procedural protections of the statute of Henry VIII that had been enforced in England since 1536.<sup>219</sup> The Act was drafted alongside the Bill of Rights and went into effect before the states ratified the Bill of Rights. The other provisions of the Crimes Act that applied to conduct within the jurisdiction of the federal courts likewise specify that punishment must follow conviction.<sup>220</sup> It seems unlikely that Congress would have thought the Bill of Rights, once ratified, would not apply to prosecutions under the Act.

In many respects, the constitutional Framers had determined this course of action before Congress ever convened or considered the Bill of Rights. Article III of the Constitution vested admiralty jurisdiction in the federal courts and required those courts to try all crimes by a jury.<sup>221</sup> Even if Congress had wanted to authorize punishment for piracy without the ordinary protections of a common law trial (which was unlikely given the nation's antipathy to vice-admiralty courts), the Constitution gave it little choice but to require that punishment for piracy and other felonies on the high seas must follow conviction in an Article III court. Adding the requirement of "due process of law" in the Fifth Amendment simply guaranteed that courts would enforce these restrictions (and others) in individual cases.

Justice Iredell articulated this understanding of congressional power when he charged one of the earliest federal grand juries to consider piracy charges. In a style typical of the day, Iredell at once elaborated on grand themes of constitutional principle while admonishing the jurors to do their civic duty.<sup>222</sup> He proposed to systematically explain the Constitution's "restrictions on the criminal law."<sup>223</sup> He began with what are now commonly understood as structural restrictions: the Suspension Clause, the Ex Post Facto Clause, the Bill of Attainder Clause, and the jury trial rights

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<sup>218</sup> See *supra* Section II.C.

<sup>219</sup> See *supra* Section II.B.

<sup>220</sup> See, e.g., Crimes Act of 1790, ch. 9, § 15, 1 Stat. 112, 114–15 (falsifying records); *id.* § 16 (larceny).

<sup>221</sup> See *supra* Section III.A.

<sup>222</sup> 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 386–387 (J. McRee Griffith ed., 1857).

<sup>223</sup> *Id.* at 392.

of Article III and the Fifth and Sixth Amendments.<sup>224</sup> Iredell explained that these provisions were “calculated to secure . . . the invaluable possession of personal liberty, so that it may not be unjustly sacrificed to any arbitrary measures.”<sup>225</sup> His instruction was a mini-treatise on the separation of powers principles that early American courts often enforced as a requirement of due process of law.<sup>226</sup>

Only after articulating all of these constitutional limits on the government’s power to punish crimes in general did Iredell arrive at “the authority of the Legislature” to “define and punish” crimes on the high seas.<sup>227</sup> Apparently Iredell believed the Constitution’s limits on Congress’s power to punish crimes applied with full force to crimes, such as piracy, committed on the high seas. Under his reasoning, it also applied with full force to any governmental action meant to punish criminal conduct, whether that conduct was within the jurisdiction of a federal court or not. Rather, his reasoning extended the early understanding of due process to any federal criminal punishment, at home or abroad.

### B. Executive Practice

Members of the Executive Department apparently believed that they lacked authority to deprive criminal suspects of rights without a trial in an Article III court. The most powerful evidence of this comes from the federal government’s efforts to quell piracy in Cuba and Puerto Rico from 1815 to 1825.<sup>228</sup> The government’s commitment to jury trial in the United States despite its inefficiency, especially compared to how other nations dealt with pirates, strongly suggests that Americans believed the Constitution limited the government’s authority to punish them without due process. During the same period, the Monroe Administration declined to enter into a treaty with Great Britain that would have subjected U.S. sailors to a mixed tribunal of British and American judges upon suspicion of engaging in the slave trade, on the ground that the tribunals would not comply with Article III.<sup>229</sup> While U.S. officers on the high seas of course used force against those resisting arrest,<sup>230</sup> they never punished pirates or

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<sup>224</sup> *Id.* at 388–92.

<sup>225</sup> *Id.* at 391.

<sup>226</sup> See Chapman & McConnell, *supra* note 19, at 1727.

<sup>227</sup> IREDELL, *supra* note 222, at 392.

<sup>228</sup> See *infra* Section V.B.1.

<sup>229</sup> See *infra* Section V.B.2.

<sup>230</sup> See, e.g., SOFAER, *supra* note 55 at 156 (citing 1 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 77 (1935)) (quoting instructions to a U.S. captain during the Quasi-War with France: “[if] attacked by any armed Vessel . . . . To defend yourself to the Utmost. If the Assailant strikes, examine her Papers, and if She has not a regular Commission, and then

other suspects captured on the high seas without a conviction in a federal court. In contrast, during this period, the U.S. military engaged in several forays in Florida that deprived persons of rights without trial.<sup>231</sup> The difference was that the government considered them to be enemies, not criminals.

### 1. *The End of the Pirates of the Caribbean*

After the War of 1812, Americans got on with business—including privateering for Spanish American colonies in revolt against Spain. Beginning in 1815, agents of those colonies issued commissions to as many as seventy sailors operating mostly out of New Orleans and Baltimore.<sup>232</sup> Accepting such commissions or fitting out a privateer to cruise against a neutral nation, such as Spain, violated U.S. neutrality laws.<sup>233</sup> The U.S. government tried to enforce these laws in federal court, but convictions were hard to come by.<sup>234</sup> A number of privateers used their licenses to prey on Spanish (and other) ships and gained the affection of the local populace by smuggling cargo onto the mainland and selling it at a discount.<sup>235</sup> Others successfully argued to juries that the practice of accepting commissions from Spanish colonies was so open and notorious that “it was inferred that the government purposely connived at it.”<sup>236</sup> Still others may have relied

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in force, bring her into some Port of the United States, to be tried as a Pirate.”); GARDNER W. ALLEN, *OUR NAVY AND THE WEST INDIAN PIRATES* 2–3 (1929) (recounting the defense of U.S. merchant vessels from Haitian pirates in 1800 by Lieutenant Maley and Captain Little of the *Experiment* and the *Boston*, respectively); *id.* at 84 (quoting account of the capture of Caribbean pirates by joint U.S. and British warships in 1825).

<sup>231</sup> See *infra* Section V.B.3.c.

<sup>232</sup> HENDERSON, *supra* note 21, at 125–26.

<sup>233</sup> See Act of April 20, 1818, ch. 88, 3 Stat. 447, *repealing* Act of March 3, 1817, ch. 58, 3 Stat. 370, Act of June 14, 1797, ch. 1, 1 Stat. 520, *and* Act of June 5, 1794, ch. 50, 1 Stat. 381; see also *The Estrella*, 17 U.S. (4 Wheat.) 298 (1819) (holding that Spanish libel of ship for violating Act of 1818 must fail because the captain had a valid commission from Venezuela); 32 ANNALS OF CONG. 1403–34, 1452–55 (1818) (Debates in the House of Representatives); HENDERSON, *supra* note 21, at 132–33.

<sup>234</sup> See, e.g., *The Case of the Fourth-of-July Privateer*, 1 Op. Att’y Gen. 249, 249, 252–53 (1818) (Honorable William Wirt wrote to District Attorney Elias Glenn with instructions to prosecute under various provisions of the Crimes Act of 1790 and neutrality acts, depending on whether the defendants purported to hold commissions from Artigas, which the Executive had recognized as a sovereign nation); see also HENDERSON, *supra* note 21, at 134–35 (the defendants were tried; one was acquitted, the other was convicted, but judgment was arrested and the district attorney ultimately entered a *nolle prosequi*).

<sup>235</sup> The most famous of these privateer–smugglers were the Lafitte brothers in Barataria Bay, Louisiana. See HENDERSON, *supra* note 21, at 125. For their service in the Battle of New Orleans, President Madison issued a proclamation granting their compatriots a full pardon for all deeds committed before January 8, 1815. *Id.* For a full account of the Lafittes in Barataria Bay, Galveston, and afterwards, see generally HEAD, *supra* note 61, at ch. 2.

<sup>236</sup> HENDERSON, *supra* note 21, at 127 (quoting Letter from Wirt to Rush (Dec. 2, 1816), regarding the acquittal of William Hitching and John J. Mitchell in Virginia).

on popular support for the revolutionaries and the view that “[h]owever irregular may have been their proceedings, it is believed they were not of sufficient enormity to deserve the dreadful punishment of Death.”<sup>237</sup>

By the late 1810s, however, the situation had changed. The Spanish-American civil wars had subsided. Privateers responded to the market change by freelancing. Increasingly, they targeted American merchant vessels. All branches of the government responded accordingly, with the result that the Executive had maximum authority to address the growing crisis. As the nation’s extraterritorial criminal law enforcement expanded, due process kept pace.

Beginning in 1818, the Executive brought a “dramatically” higher number of cases to trial,<sup>238</sup> and juries began to convict.<sup>239</sup> At the same time, Congress expanded the definition of piracy well beyond what it had been at common law or under the Crimes Act of 1790. In 1818, the Supreme Court interpreted “piracy” under the Crimes Act of 1790 to exclude an act by a foreigner against a foreigner on a foreign vessel.<sup>240</sup> Chief Justice Marshall noted that Congress *could* authorize punishment of such offenders but stated that the Court was reluctant to recognize this authorization without a clearer statement of Congress’s intent to do so.<sup>241</sup> Congress responded in 1819 by authorizing the punishment of anyone who committed piracy “as defined by the law of nations” and authorizing U.S. warships and merchant vessels acting in defense to capture them.<sup>242</sup> Within a year, the Supreme Court clarified that its prior holding limiting the scope of piracy under the Act of 1790 did not apply to offenses committed by a foreigner on board a vessel “possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.”<sup>243</sup> Furthermore, the Court also upheld the

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<sup>237</sup> *Id.* at 129–30; *id.* (“The American people almost universally held the attitude expressed by the editors.”); *see also* *United States v. Hutchings*, 26 F. Cas. 440 (C.C.D. Va. 1817) (No. 15,429) (Marshall, C.J.) (jury acquitted of piracy under the Crimes Act of 1790, probably at least in part because the robbery would not have been punishable by death had it occurred on land).

<sup>238</sup> HENDERSON, *supra* note 21, at 134; *see* FRANCIS B. C. BRADLEE, *PIRACY IN THE WEST INDIES AND ITS SUPPRESSION* 13–17 (1923) (recounting the capture of forty pirates sent to Charleston for trial).

<sup>239</sup> *See* HENDERSON, *supra* note 21, at 134.

<sup>240</sup> *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 633–34 (1818).

<sup>241</sup> *Id.* at 630–31 (“The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.”).

<sup>242</sup> Piracy Act of 1819, ch. 77, 3 Stat. 510.

<sup>243</sup> *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 417 (1820) (Washington, J.); *see also* *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 153 (1820) (Marshall, C.J.) (distinguishing the facts in *Palmer*, holding that “the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruising piratically and committing piracy on other vessels”).

“law of nations” provision under the Act of 1819 as a proper exercise of Congress’s “define and punish” power.<sup>244</sup> In 1820, Congress indefinitely extended the “law of nations” provision,<sup>245</sup> further expanded the definition of piracy under U.S. law to clearly reach anyone who commits robbery on any vessel,<sup>246</sup> and broadened the definition of piracy under U.S. law to any U.S. citizen engaged in the international slave trade.<sup>247</sup> This expansion of U.S. criminal law never outran due process—even as applied to the law enforcement operations of the U.S. military on the high seas, foreign waters, and foreign soil.

By the early 1820s, the pirates grew bolder. Tales of pirate depredations against U.S. merchant and war vessels multiplied.<sup>248</sup> The Cuban and Puerto Rican pirates grew increasingly ruthless and violent, allegedly dispatching whole crews of American merchantmen, apparently to avoid having to transfer them to a place of safety.<sup>249</sup> The pirates would retreat to sparsely populated coasts of Cuba when given chase.<sup>250</sup> Their bases were on land, up rivers and inlets that larger war vessels could not navigate, well within Spanish territory.<sup>251</sup>

In 1822, after repeated stories of violence had turned U.S. sentiment against the pirates of Cuba and Puerto Rico, the House Committee on Naval Affairs considered whether Congress should authorize the Navy to punish pirates upon capture. The Committee had been asked whether (1) it

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<sup>244</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820) (Story, J.). At the trial, Chief Justice Marshall and Judge St. George Tucker disagreed. Marshall charged the jury that “it was impossible that ‘the Act of Congress could apply to any case, if it did not to this’ yet the standard referred to by the Act of Congress must be admitted to be so vague as to admit some doubt. The writers on the law of nations give us no definition of the crime of piracy.” HENDERSON, *supra* note 21, at 140.

<sup>245</sup> Piracy Act of 1820, ch. 113, § 2, 3 Stat. 600.

<sup>246</sup> *Id.* § 3.

<sup>247</sup> *Id.* § 5.

<sup>248</sup> Pirate attack survival tales appears to have been a popular subgenre. *See, e.g.*, BARNABAS LINCOLN, NARRATIVE OF THE CAPTURE, SUFFERINGS AND ESCAPE OF CAPT. BARNABAS LINCOLN AND HIS CREW (1822).

<sup>249</sup> 38 ANNALS OF CONG. 151–52 (1822) (Sen. Johnson of Louisiana stating that “we hear almost every day of recent acts of piracy” including the murder of whole crews, especially in Cuba).

<sup>250</sup> *See* Act of Dec. 20, 1822, ch.1, 3 Stat. 720; 40 ANNALS OF CONG. 29, 32–33, 35, 277–78, 287, 314, 331–32, 348–49; Senate Naval Committee Correspondence, No. 215 (Dec. 12, 1822), in 1 AMERICAN STATE PAPERS, NAVAL AFFAIRS 822 [hereinafter NAVAL AFFAIRS]; BRADLEE, *supra* note 238, at 29–33 (discussing the events precipitating a more concerted American effort to suppress the pirates in Cuba).

<sup>251</sup> *See* Letter from Monroe to Senate, No. 213 (Dec. 9, 1822), in 1 NAVAL AFFAIRS, *supra* note 250, at 815 (asking for “a particular kind of force, capable of pursuing them into the shallow waters to which they retire, effectually to suppress them”); BRADLEE, *supra* note 238, at 33 (quoting an article from the *Baltimore Chronicle* asserting that “[i]f the Spanish Government is unable to drive the pirates from their strongholds in Cuba, the Chronicle suggests the necessity of occupying the island with American forces for that purpose”).

would be expedient “to authorize the destruction of persons and vessels found at sea, or in uninhabited places, making war upon the commerce of the United States without any regular commission” and (2) whether “it would be inconsistent with public law or general usage to give any authority to destroy pirates and piratical vessels found at sea or in uninhabited places.”<sup>252</sup> The second question is ambiguous. While “general usage” almost certainly referred exclusively to the practices of other nations, “public law” could have been understood to refer more broadly to any public law, whether treaty, statute, or Constitution.<sup>253</sup> It is unclear where the request originated, but it may well have been the Executive Department. The request certainly reflects the President’s goal to do everything possible to end piracy against American vessels. At the same time, though, the second request reflects a sensitivity to the legal parameters of doing so.

The Committee rejected the proposal. Its legal reasons were likewise at a very high level of abstraction.

The committee are of [the] opinion that it would be dangerous, and productive of great evil, to vest in the commanders of our public vessels an authority to treat as pirates, and punish without trial, even such persons as above described [murderous pirates off the coasts of Cuba and Puerto Rico]. It is not necessary for the accomplishment of the object in view that such an authority should be given, and it is essentially due to the rights of all, and the principles of ‘public law and general usage,’ that the consequences and punishment of piracy should follow only a legal adjudication of the fact.<sup>254</sup>

The Committee did not cite the U.S. Constitution. Given its ambiguous mandate, perhaps this is unsurprising. But the Committee’s reasoning seemed far more consistent with the notion that pirates were entitled to due process of law, rather than simply to the protections of the law of nations. It is doubtful that the law of nations required “that the consequences and punishment . . . of piracy should follow only a legal adjudication of fact,”<sup>255</sup> and it certainly did not require a grand jury indictment and jury trial.<sup>256</sup> This sounds much more like Blackstone’s view that pirates were entitled to the “common law of the land,” incorporated

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<sup>252</sup> Additional Number of Small Vessels to be Employed for the Suppression of Piracy, No. 207 (Mar. 2, 1822), in 1 NAVAL AFFAIRS, *supra* note 250, at 787–88.

<sup>253</sup> See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 11 (1827) (Story, J.) (referring to captures at sea pursuant to neutrality and embargo statutes as “public acts in the nature of captures *jure belli*”).

<sup>254</sup> Suppression of Piracy, 1 NAVAL AFFAIRS, *supra* note 250, at 788.

<sup>255</sup> *Id.* But see VATTEL, *supra* note 34, bk. I, ch. XIX, § 233 (“[A]s it is *proper* to have criminals regularly convicted by a trial in due form of law, this is a second reason for delivering up malefactors of that class [including pirates] to the states where their crimes have been committed.” (emphasis added)).

<sup>256</sup> See *infra* Section V.D (discussing British and French practices).

into U.S. practice, than to Cicero's well-known rhetorical trope that pirates were the enemies of all mankind.<sup>257</sup> In any case, the U.S. Navy would continue to enforce the laws against piracy according to due process of law.

The instructions of Smith Thompson, Secretary of Navy, to Commodore Porter, the officer in command of the West Indies Squadron, are illustrative. Thompson authorized Porter to pursue pirates into the settled areas of Cuba “[to] aid[] the local authorities or people” in apprehending the suspects.<sup>258</sup> Porter was authorized to pursue suspects “into the unsettled parts of the islands or foreign territory” only with the tacit permission of the local authority.<sup>259</sup> Upon capture, Thompson instructed Porter to “deliver them over to the proper authority, to be dealt with according to law” and to “furnish such evidence as shall be in [his] power to prove the offense alleged against them.”<sup>260</sup> In the event that the local authorities declined to prosecute, Porter was *not* authorized to try or punish the suspects himself but rather must “keep them safely and securely on board some of the vessels under your command and report without delay . . . the particular circumstances of such cases” to the Department of the Navy.<sup>261</sup> In such a case, the government would decide whether to prosecute the suspects and whether to hold Spain responsible under the law of nations for declining to do so. The orders balanced the U.S. commitment to due process of law and respect for Spain's territorial sovereignty.

After Congress had declined to authorize the Navy to kill pirates upon capture, they grew bolder.<sup>262</sup> In response, merchantmen from Maine and New York petitioned Congress to purchase the appropriate array of ships and adequately fund the Navy to protect their shipping interests.<sup>263</sup>

In January of 1825, President Monroe made an appeal for authority to pursue the pirates “to the settled as well as the unsettled parts of the island,” to engage in reprisals “on the property of the inhabitants,” and to

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<sup>257</sup> See RUBIN, *supra* note 61, at 14–19, 17 n.61 (discussing the origin of the phrase “*hostes humani generis*”).

<sup>258</sup> Commodore Porter's Orders, Navy Dep't (Feb. 1, 1823), in ALLEN, *supra* note 230, at 101–02.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Suppression of Piracies in the West Indies, No. 373 (May 19, 1824), in 5 AMERICAN STATE PAPERS, FOREIGN RELATIONS 343 [hereinafter FOREIGN RELATIONS]; 1 REG. DEB. 34 (1824) (resolve of Senator Barbour requesting that the President “state the additional means necessary and expedient to be entrusted to the Executive for the suppression of [piracies]”).

<sup>263</sup> Piracies on the Commerce of the United States in the West Indies, No. 381 (Dec. 13, 1824), in 5 FOREIGN RELATIONS, *supra* note 262, at 428 (letter from “citizens of New York” to House of Representatives); Piracies on the Commerce of the United States in the West Indies, No. 385 (Dec. 16, 1824), in 5 FOREIGN RELATIONS, *supra* note 262, at 471 (letter from merchants of Portland, Maine, to House of Representatives).

“blockade . . . the ports” of Cuba and Puerto Rico.<sup>264</sup> Congress carefully debated these measures. On the one hand, the situation for U.S. shipping was dire and Spain could not be bothered to take responsibility for the depredations committed from its own territory. On the other, placing U.S. troops on Spanish soil, authorizing reprisals against Spanish merchants, and blockading Spanish ports—though perhaps justified under the law of nations—were steps towards war and they might not have had the intended effect of ending piracy.<sup>265</sup>

Ultimately Congress authorized the President to enlarge the Navy but declined to give him power to engage in warlike measures against Spain.<sup>266</sup> Apparently the congressional debate alone was sufficient to send a message to Spain. Before long, Spain sent soldiers to cooperate with the U.S. Navy in an operation against one of the pirate strongholds on Puerto Rico.<sup>267</sup> After a firefight, the Americans handed the captives over to the Spanish. Within days the Spanish court-martialed, shot, and dismembered the pirates, sending their remains to other ports around the island as a warning.<sup>268</sup> The Spanish approach to discouraging pirates proved extremely effective. Piracy in the Caribbean dwindled.<sup>269</sup>

The episode invites reflection on what Congress believed to be the right of punishment only upon a legal adjudication of fact when it declined to authorize U.S. captains to punish pirates on the spot.<sup>270</sup> Did Congress consider authorizing Navy captains to court-martial pirates? At least in theory, it could have done so. Perhaps the difference is that the United States considered the pirates in Puerto Rico and Cuba to be criminals, whereas the Spanish military considered them to be enemies who were

<sup>264</sup> 1 REG. DEB. 198–99 (1825) (Monroe to Senate); Message and Documents Relative to Piracies Near the Spanish West India Islands, No. 391, in 5 FOREIGN RELATIONS, *supra* note 262, at 490.

<sup>265</sup> See generally 1 REG. DEB. 714–35 (1825) (House considers bill on piracy); 1 REG. DEB. 375–79 (1825) (statement of Senator Mills); 1 REG. DEB. 303–18 (1825) (statements of Senator Tazewell; statement of Senator Barbour); 1 REG. DEB. 275–84 (1825) (statement of Senator Barbour; statement of Senator Smith).

<sup>266</sup> Act of March 3, 1825, 4 Stat. 131 (authorizing the building of ten sloops of war); see also Crimes Act of 1825, 4 Stat. 115–23; 1 REG. DEB. 154–56, 165–69, 348–55, 718 (1825).

<sup>267</sup> See *Capture of a Pirate*, 19 SAILOR’S MAGAZINE AND NAVAL JOURNAL, August 1847, at 369, 369–70 (quoting a publication from Hunt’s Magazine of a portion of a biography of Commodore Sloat).

<sup>268</sup> See *id.* (court-martial); *Extract of a Letter From Lieut. Comdt. John D. Sloat, Commanding U.S. Schr. Grampus, to the Secretary of the Navy Dated St. Thomas 5<sup>th</sup> April, 1825*, NILES’ WEEKLY REG., April 30, 1825, at 142 (“[T]he captain general assured me that these miscreants should have the most summary justice . . . [and] [t]hose already executed have been beheaded and quartered, and their parts sent to all the small ports round the island to be exhibited.”).

<sup>269</sup> ALLEN, *supra* note 230, at 86. The last recorded piracy in the Atlantic was from the *Mexican*, which was captured on the high seas in the North Atlantic. Six of the crew were tried and executed in Boston in 1835. *Id.* at 89.

<sup>270</sup> See 1 NAVAL AFFAIRS *supra* note 250 and accompanying text.

violating the laws of war. In any case, it is clear that the United States, when it had opportunity and motive to do so, declined to reduce the protections of due process for noncitizens engaged in depredations against U.S. interests on the high seas and within foreign waters—even when other maritime powers were supplying far less procedural protections for the same conduct. The strong implication is that Congress believed it was constrained by U.S. law, and the only U.S. law that could constrain Congress was the Constitution. The Due Process Clause summarized all of the constitutional constraints on Congress’s authority to reduce structural and procedural protections for criminal suspects.

## 2. *The Monroe Cabinet’s Objections to Mixed Tribunals*

Pirates were not the only criminals abroad protected by due process. While the United States was fighting pirates in the Caribbean, it was also negotiating a treaty with Britain to suppress the Atlantic slave trade. The Monroe Cabinet ultimately declined to sign this treaty because it would have subjected Americans suspected of engaging in the slave trade to trial by a “mixed tribunal” composed of U.S. and British judges. This would have violated the Constitution’s requirement that persons charged with federal crimes be tried in a U.S. court.

Britain had already entered into a number of bilateral treaties subjecting the ships of both nations to search and seizure by the other’s officers and subjecting those ships to confiscation upon condemnation by an ad hoc tribunal composed of judges appointed by both nations.<sup>271</sup> For Americans, the mutual-search provision was a sticking point; they still smarted from British impressment of American sailors during the Napoleonic Wars.<sup>272</sup> But the Monroe Cabinet also objected to the mixed tribunals on a variety of constitutional grounds.<sup>273</sup>

In an 1818 Cabinet meeting, Attorney General William Wirt argued that the mixed courts would violate a number of constitutional

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<sup>271</sup> See Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 *YALE L.J.* 550, 552, 576–78 (2008).

<sup>272</sup> See Martinez, *supra* note 61, at 1094 (“[V]iewing the full context of the negotiations between the British and the Americans, it is clear that the United States’ main objection was to the right of maritime search that the treaties conferred on the British government.”).

<sup>273</sup> Scholars have debated the implications of these objections for the constitutionality of the United States’ contemporary involvement with the International Criminal Court (ICC), but they have not explored the implication of the evidence for the original reach of due process abroad. See Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 *U. PA. L. REV.* 39, 75–81 (2009) (arguing that submitting to the ICC is unconstitutional); Martinez, *supra* note 61, at 1125 (arguing that the Monroe Administration arguments do not foreclose the constitutionality of submitting to the ICC).

protections.<sup>274</sup> But Secretary of State John Quincy Adams pointed out that the United States already relied on mixed tribunals in some cases. Wirt “distinguished the two” by saying that the existing tribunals enforced “the law of nations,” whereas the proposed courts would “carry into effect our municipal and penal statutes.”<sup>275</sup> At the time, the slave trade was not a violation of the law of nations. Attorney General Wirt’s position seems to have won the day. In 1819, the Cabinet instructed the U.S. negotiator, Richard Rush, to reject the mixed tribunals on the ground that the United States had no territory abroad that would be convenient for them to hold their sessions and on the ground that the judges would not be amenable to impeachment.<sup>276</sup>

At first Secretary Adams believed that there was no constitutional difficulty with the tribunals.<sup>277</sup> As the negotiations progressed, he either changed his view or decided to go along with the other members of the Cabinet. By the fall of 1820, he appears to have been in full agreement with them. In a conversation with Stratford Canning, the British diplomat, Adams argued that the Fifth Amendment “amounts to an express prohibition to subjecting any citizen of the United States to trial before such a tribunal.”<sup>278</sup> Two months later, in a letter to Canning, he expressed concern that under the proposal Americans would be “called to answer for any penal offence without the intervention of a grand jury to accuse, and of a jury of trial to decide upon the charge.”<sup>279</sup> He reiterated the same concern in a letter to Canning in 1821.<sup>280</sup> Likewise, Albert Gallatin, then Minister to

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<sup>274</sup> Diary Entry of John Quincy Adams (Oct. 30, 1818), in 4 MEMOIRS OF JOHN QUINCY ADAMS 148, 151 (Charles Francis Adams ed., J.B. Lippincott & Co. 1875).

<sup>275</sup> See *id.*

<sup>276</sup> Diary Entry of John Quincy Adams (Apr. 14, 1819), in 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 274, at 333, 335.

<sup>277</sup> Diary Entry of John Quincy Adams (Oct. 30, 1818), in 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 274, at 148, 151.

<sup>278</sup> Diary Entry of John Quincy Adams (Oct. 26, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 274, at 191, 191–92.

<sup>279</sup> Letter from John Quincy Adams to Stratford Canning (Dec. 30, 1820), in 7 WRITINGS OF JOHN QUINCY ADAMS 84, 86 (Worthington Chauncey Ford ed., 1917). Adams’ concerns about the grand jury and trial jury clauses of the Fifth Amendment suggest that he believed that the tribunals would exercise criminal jurisdiction. Britain’s other bilateral treaties on the topic contemplated only civil enforcement. It is possible that Adams was confused about the British proposal. More likely, Britain had suggested giving the tribunals authority to enforce the two nations’ respective criminal laws against the slave trade.

<sup>280</sup> Letter from John Quincy Adams to Stratford Canning (Aug. 15, 1821), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 279, at 171, 174 (objecting to “subjecting [American citizens] to trial for offences against their municipal statutes, before foreign judges in countries beyond the seas”); see also Letter from John Quincy Adams to Richard Rush (June 24, 1823), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 279, at 489, 495 (emphasizing that “there is no uniformity in the modes of trial to which piracy by the law of nations is subjected in different European countries” and that if the “slave-

France, wrote to Adams that “we never would agree that the property and, above all, the persons of our citizens should, for any presumed violation of our own laws, be tried by a foreign or mixed tribunal.”<sup>281</sup> Adams, Gallatin, and Wirt all made arguments articulating the importance of due process abroad for citizens accused of violating U.S. law.<sup>282</sup>

The two nations’ diplomats agreed in 1824 to a treaty that provided for condemnation proceedings in the owner’s domestic courts—not before a mixed tribunal.<sup>283</sup> This assuaged the Cabinet members’ constitutional concerns about the mixed tribunals.<sup>284</sup> It also probably reduced the concern about arbitrary British seizures—British captains seizing U.S. vessels could be held liable in U.S. federal courts for overstepping their authority.<sup>285</sup> To the extent, therefore, that the Americans sought to gain some domestic oversight of British captains, the plan had worked.<sup>286</sup>

Notwithstanding the Executive’s commitment to due process for criminal suspects captured on the high seas, there is evidence that in some cases U.S. captains destroyed pirate vessels and cargoes on the spot rather than taking them in for condemnation.<sup>287</sup> To some extent, then, Americans treated persons captured on the high seas differently than property. This may have been for sheer expediency. It would have been easier, less expensive, and less troublesome to a long-term mission to detain a suspect

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trade should be recognized as piracy under the law of nations,” though the ships would be “seizable by the officers and authorities of every nation, they should be triable only by the tribunals of the country of the slave-trading vessel” to “guard the innocent navigator against vexatious detentions, and all the evils of arbitrary search”).

<sup>281</sup> Letter from Albert Gallatin to John Quincy Adams (Feb. 2, 1822), in 2 WRITINGS OF ALBERT GALLATIN 229, 230 (Henry Adams ed., Philadelphia, J.B. Lippincott & Co. 1879).

<sup>282</sup> Jenny Martinez suggests that the American constitutional concerns may have been phony or straw men, deployed for negotiating leverage. See Martinez, *supra* note 61, at 1073. There is no evidence that the Americans did not believe the arguments they advanced. And given the way Americans appear to have understood due process abroad, the arguments are eminently plausible. In general, a legal argument’s usefulness tends to correlate directly with its plausibility.

<sup>283</sup> See Suppression of the Slave Trade, No. 374 (May 21, 1824), in 5 FOREIGN RELATIONS, *supra* note 262, at 344, 344–46 (Monroe to Senate).

<sup>284</sup> *Id.* at 345.

<sup>285</sup> Letter from John Quincy Adams to Stratford Canning (June 24, 1823), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 279, at 498, 502 (“The objections to the right of search, as incident to the right of detention and capture, are also in a very considerable degree removed by the introduction of the principle that neither of them should be exercised, but under the responsibility of the captor, to the tribunals of the captured party in damages and costs. This guard against the abuses of a power so liable to abuse would be indispensable.”).

<sup>286</sup> But apparently it had not worked enough: the Senate rejected the treaty. It was not until 1862, after the slave trade had become a crime under the law of nations, that the United States and Britain finally agreed to cooperate to put an end to the trade. Martinez, *supra* note 61 at 1086.

<sup>287</sup> See, e.g., ALLEN, *supra* note 230, at 85 (“The prize schooners were brought away but afterwards went ashore in a squall and were set on fire.”).

aboard the captor's vessel than to put a prize crew aboard a suspected pirate vessel and sail it to the United States for condemnation proceedings. The benefit of doing so would have been especially low when the captured vessel and cargo had little value. Nevertheless, destroying the vessel and cargo without condemnation would have deprived *someone* (whether the pirate or his victims) of property rights (however meager) without due process of law. The fact that these property rights were valued and honored under the law of nations is illustrated by the rule that a court that condemned pirate property was obligated to hold it notoriously for a year before selling it on the open market, so the original owner would have a chance to claim it.<sup>288</sup> During the Colonial Era, the lords of admiralty knew this rule and generally complied with it, but simultaneously instructed their warships "to use their best endeavours to take, sink, and burn, or otherwise destroy such pirates as may infest [colonial waters]."<sup>289</sup> By contrast, the Piracy Act of 1819, enacted during the height of the U.S. "war on Caribbean piracy," authorized the President to instruct naval commanders "to subdue, take, and send into any port of the United States, any armed vessel or boat" when the crew "shall have attempted or committed any piratical aggression."<sup>290</sup> That same statute provided that condemnation of pirate ships would be by "due process and trial."<sup>291</sup> To the extent American vessels departed from such instructions, they acted unlawfully, though perhaps in some cases they could claim necessity.

### 3. *Distinguishing War*

Some scholars have looked at the early conduct of the U.S. military abroad and concluded that due process did not apply extraterritorially.<sup>292</sup> They rely heavily on evidence of the military's exercise of war power rather than ordinary law enforcement. It is easy to confuse the evidence. The most thorough scholarly book on the Constitution during war in the early Republic treats the Navy's actions against the pirates of Cuba and Puerto Rico alongside the nation's other military ventures.<sup>293</sup> And as discussed above, many federal criminal and civil statutes authorized the President to enforce them with public warships.<sup>294</sup> But Americans

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<sup>288</sup> The Lords to Newcastle, Disapproving of a Proposal for Joint Operations by French and English Ships Against Pirates, and Sharing of Captures, in 2 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA, *supra* note 95, at 258, 258–60.

<sup>289</sup> *Id.*

<sup>290</sup> Piracy Act of 1819, ch. 77, § 2, 3 Stat. 510, 510.

<sup>291</sup> *Id.* § 4.

<sup>292</sup> *See supra* Section I.B.

<sup>293</sup> *See* SOFAER, *supra* note 55, at 337.

<sup>294</sup> *See supra* note 242 and accompanying text.

consistently distinguished between the constitutional limitations on the Navy's law enforcement powers abroad and the government's constitutional authority to make war. This Section discusses three episodes where the government did not supply ordinary due process. On the surface, the episodes may seem factually indistinguishable from others where the government did supply due process. On closer scrutiny, however, it is clear that the government considered the departures from due process to be justified by its exercise of war power.

*a. An Exercise in Line Drawing: Attorney General Lee, 1798*

During the naval war with France, Attorney General Charles Lee sent an illuminating memo. In 1798, the *U.S.S. Constitution* brought the *Nigre* into Norfolk as a prize.<sup>295</sup> The ship's officers and crew included Americans and foreigners. Lee carefully instructed Thomas Nelson, District Attorney for Virginia, to engage in a "due inquiry"<sup>296</sup> to determine whether "the ship is regularly commissioned and authorized by France as a public or private ship of war."<sup>297</sup> Lee instructed Nelson that if France had commissioned the vessel, he was to hold the foreigners as prisoners of war and prosecute the Americans for treason or for piracy under the Crimes Act of 1790.<sup>298</sup> If the ship was operating without sovereign authority, however, Nelson was to prosecute them all for piracy in the circuit court "according to the law of the United States, without respect to the nation which each individual may belong, whether he be British, French, American, or of any other nation."<sup>299</sup> Lee took special care to instruct Nelson that the trial should proceed according to federal rules, not according to Virginia practice, which "is a species of trial that gives a chance of acquittal unknown in other states."<sup>300</sup> Lee reminded Nelson that, while the circuit court was the proper venue for trying crimes on the high seas, "proceedings" "against the ship and cargo" "are to be had before the *district* court of the United States in Virginia, according to the laws of Congress and the usage and practice of courts of admiralty in prize causes."<sup>301</sup> Like any responsible prosecutor, Lee intended to give the defendant whatever process was *due by law*—in this case, the Judiciary Act of 1789—not necessarily the process most favorable to the defendant. Lee understood that the process due to defendants before the government could deprive them of property for conduct on the high seas

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<sup>295</sup> Prize Ship and Crew—How to be Disposed of, 1 Op. Att'y. Gen. 85, 85 (1798).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 86.

<sup>298</sup> *Id.* Regarding the Crimes Act of 1790, see *supra* Section V.A.

<sup>299</sup> Prize Ship and Crew—How to be Disposed of, 1 Op. Att'y. Gen. at 86 (1798).

<sup>300</sup> *Id.* at 87.

<sup>301</sup> *Id.*

differed from the process due before the government could deprive them of liberty. Altogether the instructions show that Lee knew that the detainees' rights of liberty and property, and the process due before the government could deprive them of those rights, depended on whether their conduct amounted to war or crime.

*b. Countering Quasi-Sovereign Groups:  
Amelia Island, 1816–17*

In 1817, the United States took possession of Amelia Island, just southeast of Georgia, and dispersed a band of brigands who had taken it from the Spanish.<sup>302</sup> From the United States' standpoint, the enterprise amounted to an exercise of war power because it entailed military action against a group with political pretensions that had taken territory adjacent to the United States by force.

Formally the island belonged to Spain. Several groups claiming authority from Mexico and New Granada—two rebellious Spanish colonies—had successively taken the island from Spanish troops.<sup>303</sup> They used it as a base for privateering and smuggling.<sup>304</sup> The leader at the time was Louis de Aury, a Frenchman who modestly claimed the title of “Captain-General of the Navy of the Independent States of Mexico and New Granada, Political and Military Chief of the Island of Amelia, and General-in-chief of the sea and Land Forces destined to expel the Authorities of the King of Spain from the Provinces of Florida.”<sup>305</sup>

President Monroe was concerned about the group's privateering and smuggling into the United States.<sup>306</sup> He ordered the Navy to take the island—without bloodshed if possible.<sup>307</sup> The exercise held little risk for U.S. diplomacy. The United States did not think that Aury held a commission and had reason to believe that Spain would be glad to be rid of the freebooters.<sup>308</sup>

Although Aury and his band may not have been technically “enemies” under the law of nations, the U.S. capture of the island proceeded like an

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<sup>302</sup> SOFAER, *supra* note 55, at 337–44.

<sup>303</sup> Gregor MacGregor (a former British officer) took the island with a small force in June 1817. Luis de Aury (a Frenchman) arrived shortly thereafter, having been ousted from Galveston by the Lafittes, who had been ousted by the U.S. government from Baratavia Bay, Louisiana. *See generally* HEAD, *supra* note 61, at ch. 4; SOFAER, *supra* note 55, at 337–44.

<sup>304</sup> HEAD, *supra* note 61, at ch. 4; SOFAER, *supra* note 55, at 337–44.

<sup>305</sup> HENDERSON, *supra* note 21, at 131.

<sup>306</sup> SOFAER, *supra* note 55, at 337 (Monroe's speech to Congress on December 2, 1817).

<sup>307</sup> Letter from George Graham to James Bankhead, No. 290 (Nov. 12, 1817), in 4 FOREIGN RELATIONS, *supra* note 262, at 141–42.

<sup>308</sup> *See* SOFAER, *supra* note 55, at 337–44.

act of war. The U.S. officers addressed “General Aury” as the “Commander-in-chief” and ordered “the forces under [his] command” to evacuate the island with “such property as unquestionably belongs to them” and to leave behind any public property.<sup>309</sup> Aury and his men surrendered without a fight but questioned how the U.S. forces could constitutionally determine the occupants’ property rights without trial by a tribunal with jurisdiction over Amelia Island.<sup>310</sup> Potential disputes over the movable property on the island did not seem to disturb the U.S. officers. They were probably just glad to have the men leave with what little they could carry. And leave they did. Despite having been motivated by concerns about law enforcement, the United States did not institute prosecutions or “punish” any of the men for criminal conduct, and the recapture of the island was, strictly speaking, without due process of law.<sup>311</sup>

After the fact, Congress considered whether the capture had been lawful. A House Select Committee offered two justifications. The first was Section 7 of the Slave Trade Act of 1807, which authorized the President to use naval forces to curb smuggling.<sup>312</sup> The Act was a municipal criminal law, and if it had been the sole basis of the Executive’s authority to capture Amelia Island, the incident suggests that law enforcement abroad was not subject to due process of law. The Select Committee offered an additional justification, however, that applied specifically to the capture of Amelia Island and that fits better with the other evidence of early law enforcement abroad. In 1811, the House and Senate had jointly resolved to authorize the President to use the military to take possession of Amelia Island “in the event of an attempt to occupy the said territory, or any part thereof, by any foreign Government or Power.”<sup>313</sup> Congress had thus given the President conditional authority to exercise the nation’s war power—by taking possession of the island—upon a specific condition precedent. The President expressly relied on this congressional resolution to justify the capture of Amelia Island to Spain.<sup>314</sup>

The only question was whether Aury’s occupation of the island satisfied the condition laid out by the resolution. Some scholars have suggested that the claim that Aury and his men amounted to a “foreign . . .

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<sup>309</sup> Letter from J.D. Henley & James Bankhead to Louis-Michel Aury, No. 290 (Dec. 22, 1817), in 4 FOREIGN RELATIONS, *supra* note 263, at 139, 139.

<sup>310</sup> Letter from Louis-Michel Aury to J.D. Henley & James Bankhead, No. 290 (Dec. 22, 1817), in 4 FOREIGN RELATIONS, *supra* note 262, at 140, 140.

<sup>311</sup> See SOFAER, *supra* note 55, at 344.

<sup>312</sup> Committee on Foreign Relations Report on Suppression of Piratical Establishments, No. 290 (Jan. 10, 1818), in 4 FOREIGN RELATIONS, *supra* note 262, at 133.

<sup>313</sup> *Id.*

<sup>314</sup> See SOFAER, *supra* note 55, at 339.

Power” “within the intendment of Congress” “is difficult to suppose.”<sup>315</sup> While the bandits certainly presented themselves as being aligned with a foreign power, the United States did not recognize the validity of their commissions from Mexico (and indeed was reluctant to recognize the sovereignty of Mexico itself).<sup>316</sup> However, the United States could still have plausibly believed that the group was a “foreign . . . Power.” The resolution’s breadth suggests that Congress had intended to include political groups that did not amount to a “Government.” In any case, the evidence strongly suggests that Congress and the President understood the capture of Amelia Island to be an exercise of war power. As such, it was subject to the law of war, not to ordinary due process of law.

*c. Attacking Enemies: Pensacola, 1817–19*

Between 1817 and 1819, General Andrew Jackson defeated the Seminoles in Florida and captured Pensacola and Ft. St. Marks from the Spanish.<sup>317</sup> Along the way, he captured two British agents suspected of fomenting the Seminoles against the Americans, tried them by court-martial, and, upon conviction, ordered them executed.<sup>318</sup> At the time, Jackson defended his actions by arguing that the British agents had engaged in piracy and therefore did not deserve due process of law. “It is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and a pirate.”<sup>319</sup> With this assertion, Jackson showed how little he knew about the law of nations, piracy, and due process; the entire statement was a jumble of mistakes.

The House of Representatives debated the lawfulness of Jackson’s conduct in the context of considering a motion to censure him. His political star was on the rise, ensuring that the debates would be shaped by partisan interests. Nevertheless, the two official reports out of Congress both insisted that the conduct was lawful, if at all, because it was justified under the law of war. The House Committee on Military Affairs could “find no

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<sup>315</sup> *Id.* at 340–41 (quoting Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 859 (1972)).

<sup>316</sup> President Monroe, in his speech to Congress, called the freebooters’ control of Amelia Island a “private, unauthorized adventure.” SOFAER, *supra* note 55, at 337; *see also* Letter from George Graham to James Bankhead, in 4 FOREIGN RELATIONS, *supra* note 262, at 141 (“It appearing to the satisfaction of the President that the persons who have lately taken possession of Amelia island have done it without the sanction of any of the Spanish colonies, or of any organized Government whatever, and for purposes unfriendly to and incompatible with the interests of the United States, he has decided to break up that establishment, and take temporary possession of Amelia island.”).

<sup>317</sup> *See* SOFAER, *supra* note 55, at 342–45 (describing the attack).

<sup>318</sup> *Id.* at 344.

<sup>319</sup> 33 ANNALS OF CONG. 516–17 (1819).

law of the United States, authorizing a trial, before a military court, for such offences as are alleged against” them with the exception of the charge of espionage, of which they were acquitted.<sup>320</sup> Neither did “any ‘usage authorize,’ or exigency appear from the documents accompanying the report of the trial” that would “justify the assumption and exercise of power by the court martial, and the commanding General.”<sup>321</sup> In other words, Congress believed that neither U.S. law nor the laws of war authorized the proceedings. In response to Jackson’s assertion that the agents had been guilty of “piracy,” the Committee asked “by what system of interpretation the offences charged could be considered as piracies, which imply, in common acceptance, offences upon the high seas, of which the court could not assume cognizance.”<sup>322</sup> Of course the only courts that could exercise jurisdiction over piracy were the federal courts. The Committee “disapprove[d] the proceedings.”<sup>323</sup>

The Committee also produced a minority report.<sup>324</sup> The minority report did not even try to justify the court-martial as a proper court for the trial of piracy. Rather, the report argued that Jackson’s whole expedition into Florida was justified under the law of nations and that the trial and executions were justified as exemplary retaliation against those who, aiding and abetting “the savages,” “excit[ed] them to the war” against the United States.<sup>325</sup>

Ultimately the House declined to formally censure Jackson. Although Congress had not authorized the venture, a majority of the House apparently concluded that the President had the constitutional authority to do so on the ground that the expedition was a defensive maneuver.<sup>326</sup> However, the debate among the members of the House Committee on Military Affairs about the legality of the court-martial is telling. Punishment for piracy could only follow conviction in a court with jurisdiction over the crime. Therefore, any constitutional authority the President may have to try and execute prisoners must arise from a lawful exercise of war powers.<sup>327</sup>

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<sup>320</sup> *Id.* at 516.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 517.

<sup>323</sup> *Id.* at 518.

<sup>324</sup> *Id.* at 518–27.

<sup>325</sup> *Id.* at 526–27.

<sup>326</sup> SOFAER, *supra* note 55 at 360–63.

<sup>327</sup> See also 33 ANNALS OF CONG. 374 (1818) (Cobb, of Georgia, noting—tongue firmly in cheek—that “[i]f it be not war” “to send a detachment of our army to carry on operations beyond our own limits” “and we must give it some other name, let it be called a man-killing expedition which the President has a right to direct whenever he pleases”).

*C. Suits Against U.S. Officers*

The right of those captured unlawfully abroad to sue the captor in federal court reinforces the notion that due process extended wherever the United States exercised federal law enforcement power. Scholars have long recognized that those subject to unlawful searches, seizures, and other interferences with private rights could sue the officer or government agent in state court for common law trespass.<sup>328</sup> The defendant official could attempt to justify the trespass by pointing to lawful authority. Without it, he would be liable for damages. These damages were understood to enforce constitutional norms.

As we have seen above, those harmed by unlawful official conduct on the high seas and in foreign territory were likewise entitled to sue the officer in federal court for damages arising from maritime trespass.<sup>329</sup> Under the law of nations, seizures on the high seas were subject to the authority of the captor's sovereign.<sup>330</sup> The sovereign's agent could seize a vessel only upon reasonable suspicion that the vessel was within that authority.<sup>331</sup> Without reasonable suspicion, the capture was unlawful and the owner was entitled to restitution in the captor's courts.<sup>332</sup> Without probable cause for the capture, the captor could be held liable for damages.<sup>333</sup>

The United States Constitution authorized Congress to define crimes on the high seas and make rules governing captures.<sup>334</sup> Captains of U.S. warships seeking to enforce a criminal or civil municipal law on the high seas, therefore, could only seize vessels upon reasonable suspicion of a violation of that law. Courts enforced these laws, which arose under the

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<sup>328</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774–79 (1994) (discussing the historical and structural connection between the Fourth and Seventh Amendments); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 409–11 (1995) (same); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997).

<sup>329</sup> See, e.g., *supra* Section IV.B.; see also JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 14–15 (2017) (discussing the extraterritorial application of U.S. law in suits against officers).

<sup>330</sup> HENRY WHEATON, DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 47–48 (1815).

<sup>331</sup> *Id.* at 45

<sup>332</sup> JOSEPH STORY, NOTES ON THE PRINCIPLES AND PRACTICE OF PRIZE COURTS 35 (Frederick Thomas Pratt ed., 1854).

<sup>333</sup> See *id.* (“And although the whole property may, upon a hearing, be restored, yet, if there was probable cause of capture, they are not responsible in damages.”); Letter from Lee et al. to George II (Jan. 18, 1753) (enclosed within Letter from Scott and Nicholl to Jay (Sept. 10, 1794)), in WHEATON, *supra* note 326, at 320. See generally STORY, *supra* note 330 at 39–40 (“If the capture is made without probable cause, the captors are liable . . . [I]f the captors unjustifiably neglected to proceed to adjudication, the Court will, in case of restitution, decree demurrage against them.”).

<sup>334</sup> WHEATON, *supra* note 330, at 29.

law of nations, by awarding damages to those whose ships were seized without lawful authority.<sup>335</sup> The subject matter of the U.S. law the officer had been attempting to enforce apparently was irrelevant—courts evaluated the lawfulness of seizures made to enforce non-intercourse acts,<sup>336</sup> embargoes,<sup>337</sup> criminal laws,<sup>338</sup> and war.<sup>339</sup> Complying with an executive order that exceeded congressional authorization was no defense—the authority had to come from Congress.<sup>340</sup>

To my knowledge, Americans did not conceive of a maritime trespass suit against a U.S. officer as a mechanism to enforce the Bill of Rights in the way that Americans may have understood a common law trespass suit against a federal officer to enforce the Fourth Amendment.<sup>341</sup> But the suits illustrate that federal courts enforced separation of powers limits on the Executive's authority to enforce U.S. law against anyone, anywhere. As the Supreme Court later noted, due process entails "[t]he enforcement of these [constitutional] limitations by judicial process."<sup>342</sup> Functionally, suits against officers ensured due process of law for anyone threatened by unlawful deprivations, regardless of where the deprivation occurred.

#### D. Addressing Alternative Explanations

Much of the foregoing historical evidence is indirect. It consists of practice, rather than affirmative assertions about what the Due Process Clause requires. Some of the evidence is ambiguous—Did Congress

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<sup>335</sup> Congress often indemnified by private bill federal officers held liable for trespass. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1905–06 (2010). This included officers held liable for their conduct on the high seas. See *id.* at 1902 (noting that Congress indemnified Captain Little for the award against him in *Little v. Barreme*).

<sup>336</sup> See, e.g., *Sands v. Knox*, 7 U.S. (3 Cranch) 499, 500–01 (1806) (Marshall, C.J.); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 488–90 (1806); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (Marshall, C.J.); *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804) (Marshall, C.J.).

<sup>337</sup> See, e.g., *Sloop Active v. United States*, 11 U.S. (7 Cranch) 100, 106 (1812) (finding that a ship was not legally searched under embargo law because the ship did not leave port, which is necessary for an offense under such law).

<sup>338</sup> See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 17–18 (1827) (holding that the capturing officer had sufficient grounds for seizing a suspected pirate ship).

<sup>339</sup> See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (finding that the power to confiscate property during war is reserved to Congress, which had not declared a will to confiscate property when it declared war; thus, a confiscation of property under a pretense of powers to confiscate enemy property was illegitimate).

<sup>340</sup> *Little*, 6 U.S. at 177–79 (1804) (holding that an executive order instructing officers to capture ships coming from French ports did not justify the capture of such a ship when the statute only authorized the capture of ships going to French ports).

<sup>341</sup> See, e.g., *Amar*, *supra* note 328, at 774–78.

<sup>342</sup> *Hurtado v. California*, 110 U.S. 516, 536 (1884); see generally *supra* note 151.

decline to authorize the President to destroy pirates upon capture because it believed the Fifth Amendment prohibited such a deprivation of life or for some other reason? Here I consider several other possible explanations for the evidence. It is important to note, however, that these explanations are not mutually exclusive. Rather, many are mutually reinforcing. Sometimes diplomatic strategy coincides with constitutional obligation, and so on.

The first possibility to consider is that Americans provided due process because they believed the law of nations required them to do so. For civil admiralty suits, that is almost certainly the case. Admiralty law and procedures were well-known and applied by admiralty courts in all the maritime powers.<sup>343</sup> But each of those powers also had their own municipal constitutional structures that affected the relationship of those courts to the rest of the government, and they also had their own municipal laws governing conduct on the sea.<sup>344</sup> While a prize respondent could expect courts in England, France, and the United States to use nearly identical procedures, the respondent could not expect the courts to take the same approach to the nation's substantive law, because that law would be governed by domestic constitutional principles.<sup>345</sup> In any case, at the highest level of abstraction, the law of nations and due process of law are probably best understood as reinforcing the required procedural protections in civil admiralty cases.

Criminal admiralty cases were different. The law of nations may have held that pirates were entitled to a trial of some kind.<sup>346</sup> But the law of nations said nothing about the nature of that trial.<sup>347</sup> Every nation proceeded according to its own municipal law. The United States, alone, uniformly tried offenses on the high seas (and foreign waters) according to the same structural and procedural protections that applied to all other criminals.<sup>348</sup> As we have seen, Britain had a dual system.<sup>349</sup> A long list of offenses on the high seas were tried in England by Admiralty Session according to the course of the common law. Throughout the eighteenth century, however,

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<sup>343</sup> See *supra* note 205 and accompanying text.

<sup>344</sup> See *supra* Section II.D.1.

<sup>345</sup> See, e.g., *supra* note 206 and accompanying text.

<sup>346</sup> See Vattel, *supra* note 34, bk. I, ch. XIX, § 233 (“[A]s it is proper to have criminals *regularly convicted by a trial in due form of law*, this is a second reason for delivering up malefactors of that class [including pirates] to the states where their crimes have been committed.” (emphasis added)).

<sup>347</sup> See Letter from John Quincy Adams to Richard Rush (June 24, 1823), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 276, at 489, 495 (noting that “there is no uniformity in the modes of trial to which piracy by the law of nations is subjected in different European countries”).

<sup>348</sup> See *supra* note 185 and accompanying text.

<sup>349</sup> See *supra* Section II.C.

England tried piracy, robbery, and felonies committed on the high seas before special commissions in the colonies according to the civil law.<sup>350</sup>

Interestingly, in 1806, some fifteen years after the first criminal law statute in the United States expressly provided that pirates would be tried according to due process of law, Britain reversed course again. A Mr. Jervis introduced a bill in the House of Commons “for altering and expediting the trial of offences committed in distant parts on the high seas.”<sup>351</sup> The dual system, he claimed, had two problems. The Act of 1699 covered only a subset of the offenses covered by the Act of 1536; the commissions in the colonies could only try a handful of crimes on the high seas, many of which went unpunished because it was so difficult to transport the accused to Britain for trial.<sup>352</sup> The second problem was that the commissions in the colonies “acted upon the principles of the civil law, which were very different from those of the common law of this country. . . . The design of [Jervis’s] bill, therefore, was to prevent the necessity for bringing home the offenders, and also that they might enjoy the benefit of the trial by jury, and not be tried according to the forms of the civil law.”<sup>353</sup> Parliament enacted the bill in essentially the same form, extending “one uniform course of trial” for all offenses at sea to commissions sitting in the colonies.<sup>354</sup> They would “adjudge according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise.”<sup>355</sup>

This 1806 bill underscores two points about the foregoing account of due process. First, the trial procedures for crimes committed on the high seas were a matter of municipal law, not the law of nations. For more than a century, Britain had two different procedural regimes. Neither were understood to be required by, or to offend, the law of nations. When Britain unified the regime, it did not do so because of the law of nations. Second, Britain itself came to acknowledge that its own constitutional tradition counseled trying offenses at sea by the common law. Well after the American Revolution, and after the United States had committed itself to trying all crimes by jury, Britain extended “the benefit of the trial by

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<sup>350</sup> *Id.*

<sup>351</sup> 6 Parl. Deb. HC (1st ser.) (1806) col. cc723–24.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> The Offences at Sea Act 1806, 46 Geo. 3 c. 54.

<sup>355</sup> *Id.*

jury”<sup>356</sup> and the “common course of the laws of [the] realm” to all offenses at sea, wherever the trial would be held.<sup>357</sup>

Britain was not alone in trying pirates in special courts. Throughout this period, French law provided for the trial of pirates in special admiralty courts, outside of the ordinary criminal courts.<sup>358</sup> As we have seen, Spain sometimes tried pirates by court-martial.<sup>359</sup> Nothing in the law of nations itself, or in the practice of other nations, suggests that a nation was obligated to try offenses at sea or outside of its sovereign territory in the same courts and according to the same procedures that it used to try other offenses.

The second possibility is that the United States provided due process for the trial of conduct abroad for reasons of diplomacy. The foregoing evidence about other nations’ municipal law and practice regarding the trial of extraterritorial conduct undermines this argument. While every nation was expected to supply admiralty courts for the trial of prize cases and civil maritime suits,<sup>360</sup> there is no evidence that the United States relied on ordinary federal courts to punish offenses at sea because of diplomatic pressure. And since other nations did things differently, they would have had no reason to push the United States to provide more rather than less procedural protections for pirates.

Another possibility is that the Executive and Judicial Departments provided due process simply because Congress required it in the relevant statutes. Congress, according to this view, lawfully could have provided for a different procedural regime for offenses at sea had it wanted to do so. This seems unlikely, for several reasons. All of the officials who expressly considered the application of the Fifth Amendment to the punishment of crimes committed abroad concluded that the provision required conviction in a federal court.<sup>361</sup> Moreover, Congress had the incentive and the

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<sup>356</sup> 6 Parl. Deb. HC (1st ser.) (1806) col. cc723–24.

<sup>357</sup> The Offences at Sea Act 1806, 46 Geo. 3 c. 54.

<sup>358</sup> In 1681, a marine ordinance gave jurisdiction over piracies and other offenses on the sea to the Judges of the Admiralty. Marine Ordinance of August 1681, bk. 1, tit. 2, art. X; *see* Piracy Laws, AM. J. INT’L L. SUP. 963 (1932) (summary in English). In an act of 1825, France provided that pirates would generally be tried by maritime courts. *See* Law for the Safety of Navigation and Maritime Commerce, April 10, 1825, tit. III, art. 17; AM. J. INT’L SUP. 966 (English translation). There were exceptions for some French citizens, however. A French citizen who accepted a privateering commission from a foreign power without the French king’s authority would be “tried in accordance with the procedure of and by the ordinary courts.” *See id.* Furthermore, certain French citizens accused of being an accomplice would be “tried by the ordinary courts.” Act of 1825, tit. III, art. 19; *see* AM. J. INT’L L. SUP. 967 (English translation).

<sup>359</sup> *See supra* Section V.B.1.

<sup>360</sup> *See supra* Section II.A.

<sup>361</sup> *See supra* note 25 and accompanying text.

opportunity to abrogate due process of law for offenses at sea during the early 1820s when it equipped the Navy to suppress piracy in the West Indies.<sup>362</sup> It declined to do so, concluding instead that it was “essentially due to the rights of all” to try pirates in ordinary federal courts according to the common law<sup>363</sup>—at the same time that Spanish colonial forces were trying and executing pirates by courts-martial.

Finally, perhaps Congress was constrained by the separation of powers provisions of the Constitution, not by the Fifth Amendment. After all, Article III provides that the trial of all crimes shall be by jury.<sup>364</sup> It vests the admiralty jurisdiction in the federal courts.<sup>365</sup> In light of these provisions, perhaps the Due Process Clause was redundant. In some ways, this is true. The Due Process Clause forbade the government from depriving rights except according to law. The Constitution was the law. Had Congress enacted a law that purported to vest the power to adjudicate piracy in a non-Article III court, or to authorize a court to try piracy without a jury trial, the law would have been subject to the charge that it violated Article III.<sup>366</sup> When the Executive, or the statutory tribunal, attempted to deprive a defendant of life, liberty, or property according to that law, the *deprivation* would have violated the Due Process Clause. What the Clause added was the right to enforce the law, including the Constitution, in federal court. This would have included not only suits for damages but also the right to make motions and raise objections to any unlawful procedure by which the government attempted to deprive a party of life, liberty, or property. The totality of the historical evidence strongly suggests that Americans believed that the Due Process Clause, along with the separation of powers, applied to governmental deprivations of rights—anywhere, and against anyone.

## VI. DUE PROCESS ABROAD TODAY

This Part considers the implications of the foregoing history for the scope of due process abroad today. It briefly notes the challenges of doing so; argues that the history strongly supports extending due process to U.S. law enforcement against anyone, anywhere in the world; and discusses the specific implications of the history for suits arising from cross-border shootings, officially-sponsored kidnappings and detentions, governmental deprivations of statutory immigration benefits, and criminal procedure.

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<sup>362</sup> See *supra* Section V.B.1.

<sup>363</sup> See *supra* note 252 and accompanying text.

<sup>364</sup> U.S. CONST. art. III, § 2.

<sup>365</sup> *Id.*

<sup>366</sup> See *id.*

*A. Of Water and Bridges*

While most jurists and scholars agree that the early history matters for contemporary constitutional interpretation and application,<sup>367</sup> everyone has their own view about which historical evidence is most salient, how much weight it should have, and when it should yield to subsequent developments in law, society, and political morality. Even self-proclaimed originalists have splintered like medieval scholastics into competing methodological schools.<sup>368</sup> If “we are all originalists now,”<sup>369</sup> then perhaps no one is.

Moreover, translating the early history of constitutional extraterritoriality into contemporary doctrine presents unique challenges. The United States seems to have abandoned a strict adherence to due process abroad shortly after the period this Article explores. In 1828, the Supreme Court held that Congress had constitutional authority to create territorial courts that did not comply with the requirements of Article III.<sup>370</sup> During the nation’s rapid expansion in the nineteenth century, the federal government systematically declined to extend equal rights as a matter of constitutional law (as opposed to congressional policy) to Indians, immigrants, and residents of new territories.<sup>371</sup> The Court maintained that the federal government possessed powers inherent in sovereignty—powers the Constitution neither expressly gave nor expressly limited.<sup>372</sup> While these developments each have their own history and require their own legal analysis, it may not be too much to generalize that Americans, faced with the challenges and prospects of a far-flung and culturally pluralistic empire, to some extent embraced the reasoning of the imperial British constitution

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<sup>367</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1984) (identifying history as one of the types of constitutional argument).

<sup>368</sup> See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); Keith Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 599 (2009); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) [<https://perma.cc/7NEA-5D24>].

<sup>369</sup> ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* 1–77 (2011); Doug Kendall & Jim Ryan, *Do Kagan, Roberts Actually Agree?*, *POLITICO* (Aug. 4, 2010), <https://www.politico.com/story/2010/08/do-kagan-roberts-actually-agree-040600> [[perma.cc/P84-X7UR](https://perma.cc/P84-X7UR)] (quoting Justice Elena Kagan in her confirmation hearing).

<sup>370</sup> *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.).

<sup>371</sup> See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1 (2002). See also RAUSTIALA, *supra* note 1, at ch. 2.

<sup>372</sup> See Cleveland, *supra* note 371.

that they had once repudiated. By doing so, they quietly abandoned an early commitment to due process abroad.

In addition, much of the historical evidence on which this Article's argument relies is of an unusual sort: inference from early practice. Although some expressly considered the issue and concluded that due process applies abroad, most Americans simply supplied it routinely, even when doing so undermined the government's policy goals and even when competing nations did not. This form of evidence raises intriguing questions for originalists—How much should early practice bear on an analysis of the “original understanding” of the constitutional text? Should unarticulated but clearly consistent early practices bind contemporary constitutional decisionmakers?

For my part, I am persuaded that early Americans understood that due process applied to law enforcement activities abroad, even when they did not articulate it as contemporary jurists would. The historical background, constitutional text, the testimony of some of the brightest legal lights of the founding generation, and the uniform early practice of U.S. officers all support this conclusion. Whether there is too much water under the bridge to return to the original understanding is another question, and, like all legal questions, a matter of judgment.

## *B. Contemporary Implications*

### *1. General Principles*

The early history supports extending due process to the enforcement of U.S. law against anyone, anywhere. As a general matter, this means that the government may not in the course of enforcing U.S. law deprive anyone of “life, liberty, or property” without complying with applicable substantive, structural, and procedural law. It also means that the procedures by which the United States deprives someone of rights must meet a minimum constitutional threshold of notice and opportunity to respond.

Although the United States usually provides the full panoply of due process protections in litigation based on foreign conduct, the Supreme Court has never squarely held that the Due Process Clause requires this. The last time the Court considered the issue, in *Reid v. Covert*, the Justices could not reach a majority opinion about whether the Clause applies universally, applies conditionally depending on functional concerns, or categorically does not apply to trials arising from conduct abroad.<sup>373</sup> The majority opinion in *Boumediene v. Bush* holds that the Suspension Clause

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<sup>373</sup> 354 U.S. 1 (1957).

applies to the detention of enemy aliens at Guantanamo Bay, Cuba.<sup>374</sup> But it remains unclear whether the Court's ad hoc and fact-dependent reasoning applies to the Due Process Clause or to detentions by U.S. officers on territory that the United States has not leased from another sovereign for an indefinite term.<sup>375</sup> By contrast, the early enforcement of piracy and other crimes on the high seas suggests that Americans understood due process to keep pace with Congress's power to define and punish crimes and civil wrongs abroad.

Some may object that most of the evidence above pertains to law enforcement on the high seas, not on foreign soil. Several early statutes criminalized conduct in foreign territory,<sup>376</sup> but I am unaware of any indictments based on such conduct. As discussed above, the doctrine of territorial sovereignty held that a nation could only extend its criminal legislation to another state's territory with that state's consent.<sup>377</sup> Perhaps, then, the evidence above does no more than show that due process extended to the high seas; maybe citizens and aliens on foreign soil are different. The U.S. now extends its criminal statutes, by treaty, to a wide range of conduct committed on foreign territory.<sup>378</sup> Perhaps, the argument might go, the federal government may avoid the limits of due process of law by acting on foreign territory pursuant to a statute enacted to comply with a treaty. This argument, however, has two flaws.

First, treaties are almost certainly subject to constitutional limits. The Supreme Court has held that a treaty may authorize Congress to enact a statute that it would otherwise lack the constitutional *power* to enact,<sup>379</sup> but it does not follow that the Constitution's limitations, such as ex post facto and due process provisions, do not apply to statutes enacted to enforce a treaty.<sup>380</sup> Whatever legislative power a treaty may add to Congress, it

<sup>374</sup> 553 U.S. 723 (2008).

<sup>375</sup> See Van Houten, *supra* note 3.

<sup>376</sup> See Slave Trade Act of 1818, ch. 91, § 4, 3 Stat. 450, 451 (punishing any "citizen or [resident] of the United States" who "shall . . . take on board, receive, or transport, from any of the coasts or kingdoms of Africa, or from any other foreign kingdom, place, or country, or from [the] sea" in any vessel any person for the purpose of enslaving them).

<sup>377</sup> See *supra* Section I.A.

<sup>378</sup> See generally CHARLES DOYLE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 40–63 (2012) (collecting statutes). See also TONYA L. PUTNAM, COURTS WITHOUT BORDERS 4 (2016) (arguing that U.S. courts are most likely to apply U.S. law abroad when "extraterritorial conduct poses a threat to the functioning of U.S. law inside U.S. territory" and "when U.S. citizens and others with close U.S. ties are accused of violating a short list of rights at the core of American political identity").

<sup>379</sup> Missouri v. Holland, 252 U.S. 416, 434–35 (1920).

<sup>380</sup> See Reid v. Covert, 354 U.S. 1, 16–17 (1957) (Black, J., plurality opinion) ("It would be manifestly contrary to the objective of those who created the Constitution, as well as those who were

derives from the government's constitutional authority to make treaties and enact legislation. These laws are subject to the Constitution's express limits.

More basically, allowing Congress to skirt constitutional limits by treaty is inconsistent with the notion that the government derives its authority from the American people. Why would those people have authorized their government to avoid constitutional limits—but only when the government teams up with a foreign sovereign? As Justice Hugo Black noted, “[i]n effect, such construction [of the Constitution] would permit amendment of that document in a manner not sanctioned by Article V.”<sup>381</sup>

## 2. *Translating Early Due Process Into Contemporary Due Process*

Before turning to the more specific applications of due process abroad, it will be helpful to distinguish among the varieties of contemporary due process doctrines. Courts rely on due process for *jurisdictional* limits—the authority of a sovereign to exercise power over a certain person. They likewise recognize limits on the procedures by which the government deprives someone of rights, usually called “procedural due process.” Finally, “substantive due process” holds that there are certain fundamental rights with which the government may not interfere no matter how much process it provides. Of these three categories, the historical understanding of due process explored in this Article most closely resembles today's “procedural due process.” The original understanding, however, is different from the balancing test of contemporary procedural due process. The original understanding of due process guaranteed that courts would enforce constitutional and statutory limits on governmental deprivations of “life, liberty, or property.”

There are currently a number of unanswered questions about the application of due process to the nation's extraterritorial jurisdiction.<sup>382</sup> The

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responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.”); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

<sup>381</sup> *Reid*, 354 U.S. at 17.

<sup>382</sup> See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (explaining that the Supreme Court has not addressed whether the Fifth Amendment limits extraterritorial application of substantive federal law); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1310–11 (2014) (distinguishing between prescriptive jurisdiction (power to prohibit) and adjudicative jurisdiction (power to adjudicate)); Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 531–45 (2016) (arguing that the only fairness limit on U.S. extraterritorial criminal jurisdiction should be whether the nation in which the defendant committed the conduct would punish it to the same degree as U.S. law); Brian M. Kelly, *Due Process, Choice of Law, and the Prosecution of Foreign Nationals for Providing Material Support to Terrorist Organizations in Conflicts Abroad* (Harvard Law School Addison Brown Student Writing Prize, May 2015), <http://nrs.harvard.edu/urn->

evidence presented in this article does not directly address these issues. For the most part, it appears that early congresses conscientiously crafted extraterritorial statutes to regulate only the conduct of U.S. citizens, conduct that otherwise directly affected the interest of U.S. citizens, or conduct that could plausibly be understood to amount to a violation of a universal norm under the law of nations. Whether Congress placed these tacit limits on extraterritorial criminal statutes out of a concern for the law of nations, the Constitution, international comity, or a combination of them is beyond this Article's scope.<sup>383</sup> Although the early Supreme Court held that Congress must clearly state its intent to depart from the law of nations,<sup>384</sup> I am aware of no cases in which the Court declined to enforce a federal law because Congress lacked the power to reach the particular extraterritorial conduct. Nor am I aware of a case in which the Court declined to exercise adjudicative jurisdiction on the ground that the defendant lacked sufficient contacts with the United States.

The evidence above likewise does not support the notion that early courts enforced what jurists call "substantive due process." There is simply no evidence from early U.S. extraterritorial law enforcement that the founding generation believed the federal government's authority to make general and prospective laws was limited by fundamental rights, whether sounding in the right to contract<sup>385</sup> or the right of physical privacy.<sup>386</sup>

The evidence does, however, support the application of something more akin to contemporary procedural due process to the government's law enforcement abroad. The government was obligated to comply with the separation of powers, the Executive was obligated to comply with congressional authority, and the courts were obligated to comply with appropriate procedures before a suspect or defendant could be deprived of rights. This understanding was reflected in the laws themselves, the instructions and conduct of executive officers, and judicial enforcement.

### 3. *Applying Due Process Abroad*

This section discusses the implications of this broad principle for specific cases. At the outset, it must be noted that constitutional law distinguishes between rights and remedies. Although the Supreme Court

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3:HUL.InstRepos:16645037 [https://perma.cc/49DZ-E78L] (analyzing a circuit split among federal courts over the standard for determining personal jurisdiction of criminal defendants). *See generally* RESTATEMENT (FOURTH) ON FOREIGN RELATIONS LAW § 101 (AM. LAW INST., Tentative Draft No. 3, 2017) (presenting the basic rules of extraterritorial jurisdiction).

<sup>383</sup> *See, e.g.*, Kontorovich, *supra* note 137.

<sup>384</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>385</sup> *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>386</sup> *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

long ago observed that a right implies a remedy,<sup>387</sup> the Court has exercised great discretion over when and under what circumstances a judicial remedy will be available for an acknowledged constitutional violation.<sup>388</sup> For instance, during much of the nineteenth century, a party could sue an officer for an unreasonable and unwarranted search and seizure;<sup>389</sup> by contrast, the primary remedy for a Fourth Amendment violation today is exclusion of evidence procured by the violation.<sup>390</sup> Each implication of the historical evidence for a given case must therefore be attuned to this distinction between the scope of a due process right and the appropriate remedy for a violation of that right. The following Sections will therefore discuss both rights and remedies.

*a. Cross-border shootings*

The historical evidence supports applying the Due Process Clause to cross-border shootings. In *Hernández v. Mesa*, a Border Patrol agent in Texas shot and killed a Mexican teenager on the other side of the border.<sup>391</sup> The victim's parents sued the officer for violating the Fourth and Fifth Amendments. The Fifth Circuit, sitting en banc, concluded that the Fourth Amendment did not apply to the shooting because the victim lacked sufficient contacts with the United States.<sup>392</sup> The judges could not agree about whether the Due Process Clause applied to the shooting, but they unanimously concluded that, even if it did apply, the officer was entitled to qualified immunity because there was no prior case law on point.<sup>393</sup>

Earlier this year, the Supreme Court remanded the case with instructions to consider whether the plaintiffs had a cause of action for damages against the officer consistent with the Court's doctrine about when such actions are available.<sup>394</sup> With respect to the plaintiffs' due

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<sup>387</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>388</sup> See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993) (“[T]here is no right to an individually effective remedy for every constitutional violation.”); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (“[T]here will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies.”).

<sup>389</sup> See Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 531 (2013) (discussing the mechanics and limitations of constitutional torts before *Bivens*).

<sup>390</sup> See Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1912 (2014) (arguing that the exclusionary rule might be best understood as a requirement of due process).

<sup>391</sup> 137 S. Ct. 2003 (2017) (per curiam).

<sup>392</sup> *Hernández v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (per curiam).

<sup>393</sup> *Id.* at 120.

<sup>394</sup> 137 S. Ct. at 2006–07. The Court's jurisprudence about when someone may sue a federal officer for damages springs from *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). In

process claim, the Court tweaked the lower court's analysis. The lower court had based its decision that the officer was entitled to qualified immunity on the due process claim in part because the victim was an alien and had few contacts with the United States.<sup>395</sup> But the officer did not know those facts when he pulled the trigger.<sup>396</sup> So they should not count, the Supreme Court said, when determining whether the officer could have reasonably known whether his conduct was unlawful.<sup>397</sup> This direction, though it could expose the officer to suit in this case, implies that the Supreme Court believes that the victim's nationality and location are salient for at least some due process claims (when the officer knows the victim is an alien, or is outside the United States, or both). This is unfortunate. The historical evidence discussed in this article strongly supports the application of the Due Process Clause to a law enforcement official's extraterritorial "depriv[ation]" of an alien's "life" "without due process of law."

One difficulty of analyzing the constitutionality of a cross-border shooting is that courts ordinarily analyze officer shootings under the Fourth Amendment "excessive force" doctrine.<sup>398</sup> Indeed, the Government argued that the plaintiffs' claims in *Hernández* were "cognizable only under the Fourth Amendment and not under the Fifth Amendment."<sup>399</sup> Analyzing extraterritorial claims under the Fourth Amendment presents difficulties that do not arise under the Fifth Amendment. The first is that the Supreme Court has clearly held that the Fourth Amendment does not apply to extraterritorial searches and seizures of alien property, at least for purposes of the exclusionary rule.<sup>400</sup> The second is that the Fourth Amendment speaks of the "right of the people to be secure in their persons, houses, papers, and effects."<sup>401</sup> While the "right of the people" may or may not have been historically understood to refer only to the rights of U.S. citizens or nationals, the Fourth Amendment suggests that possibility in a way that the Fifth Amendment does not. Still, courts considering whether to apply the Fourth Amendment to cross-border shootings could distinguish *Verdugo-Urquidez* on the facts: a cross-border shooting does not raise any of the

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*Hernández*, the Court remanded with instructions to consider the *Bivens* question in light of its recent opinion in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). 137 S. Ct. at 2006–07.

<sup>395</sup> 137 S. Ct. at 2007.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> See *Graham v. Connor*, 490 U.S. 386, 394–95 (1989).

<sup>399</sup> *Hernández*, 137 S. Ct. at 2007.

<sup>400</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990).

<sup>401</sup> U.S. CONST. amend. IV; see *Verdugo-Urquidez*, 494 U.S. at 264–65 (distinguishing the Fourth Amendment from the Fifth Amendment, in part on this ground).

practical difficulties raised when U.S. officers engage in an investigation abroad.<sup>402</sup> Justice Anthony Kennedy, in particular, has been drawn to a functional approach to constitutional extraterritoriality.<sup>403</sup>

By contrast to the Fourth Amendment, analysis of cross-border shootings under the Due Process Clause would be clear, without territorial and citizenship exceptions. The text of the clause apparently extends to all U.S. deprivations of rights regardless of place or person. Moreover, the history presented above corroborates this reading.<sup>404</sup>

Even were a court to hold that the Due Process Clause applies to a cross-border shooting, it might nevertheless conclude that special factors about such a shooting “counsel hesitation” about allowing a cause of action against the federal officer.<sup>405</sup> In particular, a court could conclude that permitting a damages suit for extraterritorial conduct could raise diplomatic and foreign affairs issues best left to the political branches.<sup>406</sup>

The foregoing history does not support that conclusion. During the early years of the Republic, Americans enforced constitutional rights with common law suits against government agents.<sup>407</sup> As this Article has shown, citizens and aliens alike routinely sued federal officers and agents for violating their rights on the high seas.<sup>408</sup> Furthermore, there is strong

<sup>402</sup> See *Hernández*, 137 S. Ct. at 2007 (“The Fourth Amendment question in this case, however, is sensitive and may have consequences that are far reaching. It would be imprudent for this Court to resolve that issue when, in light of the intervening guidance provided in *Abasi*, doing so may be unnecessary to resolve this particular case.”).

<sup>403</sup> See *Verdugo-Urquidez*, 494 U.S. at 278. See generally *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>404</sup> Applying the Due Process Clause to a deliberate killing does not require an account of “substantive due process.” The Court has sometimes suggested that governmental deprivations of life raise a question of substantive due process. See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). As I have argued elsewhere, the label *substantive due process* misdescribes the Court’s analysis in those cases—the constitutional question is whether the government had lawful authority to deprive the person of life, i.e., whether another law justified the killing. See *Chapman & McConnell*, *supra* note 19, at 1788–90.

<sup>405</sup> See James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in *FEDERAL COURTS STORIES* 275, 297 (Judith Resnik & Vicki C. Jackson eds., 2009). See generally *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (articulating the hesitation doctrine).

<sup>406</sup> Even if the Court holds that parties may sue an officer for a cross-border shooting, it will probably hold that the defendant in *Hernández* is entitled to qualified immunity on the ground that the extraterritorial application of the Fourth Amendment was not well established when the shooting occurred. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

<sup>407</sup> See James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 *GEO. L.J.* 117, 123 n.28 (2009) (“Although no brief summary can capture the complexity of the accountability rules in the nineteenth century, individuals could bring a variety of actions (injunction, mandamus, trespass, assumpsit, ejection) to test the legality of government action.”); *Woolhandler*, *supra* note 328, at 100.

<sup>408</sup> See *supra* Section V.C.

historical support for the notion that Americans understood that due process required courts to enforce constitutional and statutory limits on governmental deprivations of life, liberty, or property.<sup>409</sup> At a minimum, the early cases provide powerful evidence that the federal courts did not categorically exclude a suit against a federal officer on the ground that it arose from extraterritorial conduct against aliens.

*b. Officially sponsored extraterritorial kidnapping and detention*

The foregoing analysis applies with equal force to officially sponsored deprivations of liberty in the form of unlawful captures and detentions. The historical evidence discussed in this article suggests that captures and detentions attributable to a U.S. law enforcement officer acting under color of law are subject to due process of law—that is, officers must act according to authority conferred by law and suspects are entitled to the Constitution’s separation of powers and procedural protections. The location of the capture or detention and the political loyalty of the defendant are immaterial.<sup>410</sup> Yet the Supreme Court has held that a court is not obligated to dismiss a prosecution on the ground that the defendant was brought into the court’s jurisdiction unlawfully.<sup>411</sup> U.S. courts thus apply the principle of *male captus, bene detentus*, which ensures that a defendant will not escape punishment because of an officer’s wrongdoing.<sup>412</sup>

Two questions about deprivations of physical liberty abroad remain. First, what is the appropriate remedy for a violation? It need not be dismissal of the case. In the early Republic, courts awarded damages against officers who, by exceeding their authority, committed trespass on the high seas. The legislature routinely indemnified officers who had been found liable.<sup>413</sup> The Court could simply revive this practice today, perhaps under the Alien Tort Act. Thus courts would provide a remedy for

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<sup>409</sup> See *supra* Section III.C.

<sup>410</sup> See *supra* Section V.C.

<sup>411</sup> *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (unlawful rendition from Mexico); *Frisbie v. Collins*, 342 U.S. 519 (1952) (interstate abduction); *Ker v. Illinois*, 119 U.S. 436 (1886) (defendant abducted from Peru); see *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (holding that defendant was entitled to hearing on whether the United States engineered his kidnapping in Uruguay). “Whether the inherent power of a court to sanction the prosecution for outrageous conduct might extend to government behavior in capture and rendition has not been tested.” RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 311 Reporter’s Note 5 (AM. LAW INST., Tentative Draft No. 4, 2017).

<sup>412</sup> See RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 311 Reporter’s Note 7.

<sup>413</sup> See Pfander & Baltmanis, *supra* note 403, 123 n.28.

extraterritorial conduct that violated the Due Process Clause without abandoning the principle of *male captus, bene detentus*.<sup>414</sup>

The second question has to do with the application of the Constitution to the conduct of a foreign sovereign or private party. Should the Constitution prohibit the government from relying on the conduct of another party that, if performed by a U.S. agent, would violate the Due Process Clause? For instance, suppose Iraqi police capture and torture a suspect and then send him, along with evidence gathered as a result of the torture, to the United States for prosecution.

The history explored above does not speak directly to this point, but it does offer some hints. Americans did engage in joint law enforcement activities with other sovereigns, notably working with Spain and Britain to capture pirates in Cuba and Puerto Rico. While American officers did not personally violate the suspect's due process rights, they apparently had no qualms with capturing suspects in Cuba and handing them over to Spanish authorities for trial and punishment by courts-martial.<sup>415</sup> This might suggest that Americans hewed to a strict understanding of sovereign responsibility or what, in the context of U.S. constitutional doctrine, would be known as "state action."<sup>416</sup> U.S. law governed American officers but did not apply to other nations. U.S. officers bore no legal responsibility for another sovereign's independent decisions. The evidence above does not resolve whether this logic would have applied when the United States sought to prosecute someone whose presence had been procured by an independent sovereign (or private party) by means that would violate due process.

*c. Deprivation of immigration benefits*

The principle of due process abroad applies as well to immigration and other governmental entitlements. President Trump's recent Executive Orders instituting bans on travel to the United States by certain nonimmigrants are to some extent in tension with this principle. The first Order, for instance, purported to suspend the right of certain immigrants (those with green cards) and nonimmigrants (those with temporary visas) who had traveled abroad, or who wished to travel abroad, to reenter the

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<sup>414</sup> See *Frisbie*, 342 U.S. at 522 ("There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.").

<sup>415</sup> See *supra* Section V.B.1.

<sup>416</sup> See generally Nathan S. Chapman, *The Establishment Clause, State Action, and Town of Greece*, 24 WM. & MARY BILL RTS. J. 405, 408–11 (2015) (explaining the distinction between state and private action in the Establishment Clause doctrine).

United States.<sup>417</sup> The restriction appeared to apply whether the alien was abroad or within the United States when the President issued the Order.<sup>418</sup>

The Supreme Court has held that a “returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.”<sup>419</sup> The cases in which the Court has applied this doctrine all arise from a permanent resident’s attempt to reenter the United States after traveling abroad.<sup>420</sup> While Congress has vast discretion to determine the procedures to which immigrants are entitled,<sup>421</sup> the Court has made it clear that due process of law requires the government to comply with those statutory procedures on a case-by-case basis.<sup>422</sup> Furthermore, the Court has held that the Due Process Clause requires some minimum procedural protections, although it has not clarified what those protections are.<sup>423</sup> The underlying right is a statutory right of reentry. Therefore, it is probably best understood as a form of “new property”<sup>424</sup> subject to deprivation according to the “procedural due process” test articulated in *Mathews v. Eldridge*.<sup>425</sup> Under this test, courts weigh the claimant’s right—in this case the right of reentry—against the government’s interest in depriving the claimant of the right and the relative cost of procedures that would afford a more accurate adjudication.<sup>426</sup>

The foregoing history provides very little evidence that is directly on point. The founding generation did not consider statutory rights to be a form of “property” that the legislature could not change for an entire class without an adjudication.<sup>427</sup> They did, however, understand that the government could not deprive persons of rights abroad without due process. Translating the due process regime of the Founding Era into our

<sup>417</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8,977, § 3(c) (Jan. 27, 2017).

<sup>418</sup> See *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017) (“It was reported that thousands of visas were immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained.”).

<sup>419</sup> *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963); see also *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601–03 (1953). But see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213–15 (1953) (holding that an alien who had left the United States to spend nearly twenty months “behind the Iron Curtain” was not entitled to a hearing before exclusion from the country).

<sup>420</sup> See *Landon*, 459 U.S. at 33; *Fleuti*, 374 U.S. at 460; *Kwong Hai Chew*, 344 U.S. at 591–92.

<sup>421</sup> See *Mezei*, 345 U.S. at 214–16.

<sup>422</sup> See *Landon*, 459 U.S. at 33–34.

<sup>423</sup> See *id.* at 34–35 (“The constitutional sufficiency of procedures in any situation, of course, varies with the circumstances.”).

<sup>424</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.8 (1970).

<sup>425</sup> 424 U.S. 319, 332–33 (1976).

<sup>426</sup> *Id.* at 335.

<sup>427</sup> See *Chapman & McConnell*, *supra* note 19, at 1781–82.

own, therefore, suggests that permanent residents *would* be entitled to some minimum procedural protections before being deprived of the statutory right to return to the United States. Understood this way, the history does support the current doctrine, although because it requires a translation of the historical understanding of property, it may go too far to conclude that the government is required to provide a trial in federal court for each permanent resident before it may deprive the resident of the right to return. In such cases, *Mathews* may strike the right balance.<sup>428</sup>

*d. Criminal procedure*

The principle that due process protects those abroad from unlawful governmental deprivations likewise has implications for procedures in criminal prosecutions in U.S. courts. Most obviously, it suggests that criminal defendants are entitled to equal procedural safeguards regardless of whether they are prosecuted for conduct abroad and regardless of their nationality.

Difficulties can arise when the allegedly criminal conduct occurred abroad. For instance, Michael Farbiarz has noted that although the government has wide authority pursuant to treaties to discover evidence abroad, some defendants may be unable to rely on a subpoena to obtain evidence abroad.<sup>429</sup> This gives the government an advantage in discovery that it does not have in prosecutions that do not rely on extraterritorial evidence. The government did not have this advantage in the first years of the Republic. Originally, the government and defendant were equally disadvantaged by a dearth of evidence and witnesses in cases arising on the high seas or within foreign territory. Evidence and witnesses for the government and defendant alike were ordinarily restricted to the ship, cargo, papers, and crews involved in the capture. The U.S. Navy was not an investigative outfit.

To solve the modern mismatch, Farbiarz proposes that courts issue a Rule 17 order that *prosecutors* would be obligated to enforce. Rule 17 authorizes a court to issue a subpoena requiring a witness to appear and testify, to produce evidence, or to attend a deposition.<sup>430</sup> Under Farbiarz's proposal, a subpoena issued on behalf of a defendant requiring the testimony or production of evidence of a witness outside the United States

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<sup>428</sup> This Article takes no view on whether nonimmigrant rights to enter or reenter the United States should be understood as "property" under the Due Process Clause. The Court has usually evaluated whether a public right amounts to "property" by reference to the specific entitlement statute, regulations, and social context. *See Goldberg*, 397 U.S. at 262 & n.8. That analysis is beyond this Article's scope.

<sup>429</sup> Farbiarz, *supra* note 382, at 628.

<sup>430</sup> *See* FED. R. CRIM. P. 17(a), (c)(1), (f).

would obligate the prosecutor to work with treaty partners to procure that testimony or evidence.<sup>431</sup> Unfortunately, Farbiarz does not explain how the court would ensure compliance with such a subpoena. At one point he suggests that “dismissal of the case” might be an appropriate remedy for failure to comply, at least in some cases,<sup>432</sup> but later states that “as a practical matter,” “the prosecutor would” “enforce” the court’s Rule 17 decision.<sup>433</sup> Elsewhere he asserts that “structural concerns should have no role to play in shaping such a due process doctrine.”<sup>434</sup>

Relying on a prosecutor to enforce due process does not comply with the historical understanding of due process. Under that understanding, courts ensured that government agents did not deprive persons of rights except by law. If due process requires the government to provide a defendant with equal opportunity to gather evidence abroad, allowing the prosecutor to oversee that opportunity would not satisfy due process. Farbiarz’s proposal would more closely approximate historical due process if the court supervised and enforced the subpoena by threat of discipline against the government officers who failed to comply, whether through contempt, dismissal of the indictment, or some other form of discipline. This would preserve the court’s structural role as the institution responsible for safeguarding the defendant’s due process rights and incentivize the prosecutor’s compliance.

#### 4. *War*

Many of the most contentious questions of constitutional extraterritoriality arise from the nation’s prosecution of the “war on terror.” This Article has focused on the early history of the nation’s *nonwar* law enforcement abroad, but it does have some implications for an analysis of due process during war. The evidence suggests that, outside of war, at least, due process applied not only to those captured abroad and tried in the United States but also to the conduct of U.S. officers abroad.<sup>435</sup> This alters the baseline question for the original understanding of due process during war. Location alone cannot resolve the application of the Bill of Rights to the exercise of war powers abroad.<sup>436</sup>

The Constitution itself provides for departures from ordinary due process during war. The Suspension Clause and the Third Amendment

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<sup>431</sup> Farbiarz, *supra* note 382, at 679.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at 683.

<sup>435</sup> See *supra* Section V.B.

<sup>436</sup> *Contra, e.g., Kent, supra* note 13, at 518–21.

condition such departures upon war and require that the departures be according to law.<sup>437</sup> Likewise, the Constitution gives Congress the authority to provide for different procedures for the military justice system,<sup>438</sup> and Congress has done so from the beginning.<sup>439</sup> These are entirely consistent with the notion of due process of law this Article has assumed—Congress may provide, by law, for departures from ordinary due process of law *because the Constitution, a higher law, says so*.

The more interesting historical questions are whether, when, and how a state of war entitled Congress to depart from ordinary due process of law with respect to enemies at home and abroad. Likewise, could the President do so, in the course of repelling an attack or during a state of war, without congressional authority? These are issues I would like to explore more fully in future scholarship that builds on this Article’s historical groundwork. Outside of the context of a criminal investigation, prosecution, and punishment, the foregoing historical evidence has little to say about the proper application of due process to the government’s antiterrorism efforts.

#### CONCLUSION

The application of due process to the government’s conduct abroad is of immediate and vital importance. Cases involving cross-border shootings, the suspension of immigration benefits, and the investigative conduct of U.S. officers abroad fill the headlines, and cases raising similar issues will likely continue to proliferate. Unfortunately, the doctrine regarding the extraterritoriality of the Due Process Clause remains woefully underdeveloped, vague, and inconsistent. The Supreme Court seems intent on extending constitutional rights abroad on an ad hoc, functional basis that exacerbates uncertainty and maximizes judicial discretion. Scholars have justified this approach, at least with respect to the Due Process Clause, on the basis of original history. This Article upends that historical account. Based on the English background, the Constitution’s text and structure, and early federal practice, this Article argues that at its Founding, the federal government could not exercise its powers of law enforcement to deprive a

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<sup>437</sup> U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *id.* amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

<sup>438</sup> U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .”); *see id.* art. I § 8, cl. 14 (giving Congress power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).

<sup>439</sup> *See* An Act for the Government of the Navy of the United States, ch. 24, 1 Stat. 709 (1799).

person of life, liberty, or property without due process of law. The location of the illegal conduct, the location of the capture, and the nationality of the defendant were immaterial. A corollary of this principle was that everyone could sue a U.S. officer in federal court for an unauthorized deprivation of rights abroad. This history has important implications for contemporary U.S. law enforcement abroad, the suspension of immigration benefits, and suits against U.S. officers. It also resets the baseline assumptions for considering the historical relationship between the separation of powers and individual rights during war. The question going forward is to what extent the war powers authorize the government to depart from the ordinary requirements of due process of law before depriving enemies, neutrals, and even citizens of life, liberty, or property.