

The Captures Clause (Part 1): Overview, Historical Context, and Drafting History

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This Legal Sidebar is the first installment in a two-part series discussing Congress’s power to “[make rules concerning Captures on Land and Water](#)” derived from Article I, Section 8, clause 11 of the Constitution. This provision, sometimes called the Captures Clause, provides Congress with [authority](#) to regulate the capture, condemnation, and distribution of enemy property. In addition, the Department of Justice’s Office of Legal Counsel in a [2009 memorandum](#) argued that the Framers of the Constitution understood Congress’s power to regulate captures to include the capture of enemy prisoners. Because the Captures Clause gives Congress control over the treatment of enemy property and, arguably, the treatment of enemy prisoners, Congress may find the Captures Clause to be of interest.

Part 1 of this series provides an overview of the Captures Clause, examines its historical context, and discusses its drafting and ratification history. [Part 2](#) examines the Supreme Court’s jurisprudence interpreting the Captures Clause and the role of captures in U.S. practice.

Overview of the Captures Clause

[James Wilson](#), one of the Constitution’s Framers, described the power to regulate captures as “[naturally connected](#)” to Congress’s [broader set of war powers](#), including its powers to [declare war](#) and issue letters of marque and reprisal that immediately precede the Captures Clause. From the [Founding era](#) to the [War of 1812](#), the United States [encouraged](#) naval commanders and privateers to capture enemy vessels by [granting](#) a [financial award](#), known as prize money, to successful captors. The system for awarding and distributing prize money was a critical component of early American military strategy and international relations, and the Captures Clause grants Congress the power to “make Rules” governing it.

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Article III of the Constitution allows federal courts to hear “all Cases of admiralty and maritime jurisdiction[.]” and the Supreme Court has interpreted admiralty jurisdiction to cover cases concerning captures. Through this jurisdiction, the Supreme Court has developed a large body of jurisprudence related to captures. Although captures cases became less prominent after Congress abolished prize money in 1899, the Captures Clause resurfaced during the debate over which branch of government was charged with regulating enemy detainees after the terrorist attacks of September 11, 2001. Whereas the George W. Bush Administration argued that the Captures Clause allows Congress to regulate only captures of enemy property—not persons—the Obama Administration later asserted that the Constitution’s Framers understood the Captures Clause to empower Congress to enact laws regulating enemy prisoners.

The Captures Clause and Prize Law

Congress’s power under the Captures Clause is interlinked with the prize system—a hallmark of 18th and 19th century warfare and international relations. Under the prize system, maritime vessels and other property captured by an enemy could be condemned in judicial proceedings and sold with the proceeds distributed to the properties’ captors. Property that was lawfully captured was known as prize, and its condemnation, sale, and distribution were governed by a body of law known as prize law. Captures could be carried out by members of a nation’s naval forces or by private citizens, known as privateers, who operated under government-issued letters of marque and reprisal. Both naval officials and privateers were incentivized to attack and subdue enemy vessels because they could receive a large portion of the proceeds of the sale of the captured property, known as prize money.

Although federal law still provides a system for adjudicating prize cases, Congress abolished prize money as a financial award in 1899. Rather than distribute prize money to a vessel’s captors, federal law now provides that all proceeds of sales of captured property are to be placed into the U.S. Treasury. In the 18th and early 19th centuries, by contrast, the financial lure of prize money contributed to the country’s early military successes at sea and was a central element of American naval warfare.

To initiate prize proceedings, captors of enemy property file a petition known as a libel in federal court, and courts apply prize law to determine whether the capture was lawful and how to divide the proceeds of the sale. Before it abolished prize money, Congress defined in statute how the proceeds of prizes captured by naval vessels would be distributed to a vessel’s commander, officers, and crew. Division of prize money among privateers was usually set by contract, but statutory formulas determined the distribution if no contract was in place. Congress also occasionally enacted laws granting captors additional bounties based on the number of crew aboard a captured or destroyed enemy vessel.

The Supreme Court has decided a large body of prize cases, which have addressed issues such as what actions constitute a capture, how to classify enemy property subject to capture, and neutral vessels’ rights. Other prize cases resulted in Supreme Court opinions that extend beyond prize law and touch on constitutional and domestic legal topics such as presidential power, Congress’s authority to conduct “limited” wars, statutory interpretation, and international law’s role in the domestic legal system. Although federal courts still possess jurisdiction to hear prize cases, the Spanish-American War was the last conflict to produce a large body of prize law jurisprudence, and prize cases faded in volume and significance during the 20th century.

The Early American Experience with Captures

In early American history, regulation and adjudication of captures evolved from a power exercised by the colonies to a predominately national power. In British practice, the Crown historically determined what property would be subject to capture and how prizes would be divided, but Parliament gradually exerted greater control over captures and prize law after the Glorious Revolution of 1688. As the armed independence movement emerged in the American colonies, some colonies equipped vessels to protect

their waters, and Massachusetts [established](#) a prize court system to determine the lawfulness of captures. At then-General [George Washington's urging](#), the Second Continental Congress soon sought greater influence over captures, and it passed a [resolution](#) in November 1775 providing that all armed vessels engaged “in the present cruel and unjust war against the United Colonies” shall be “seized and forfeited.”

The November 1775 resolution planted the seed for the [first national court](#) created in the United States. The resolution [cautioned](#) that, unless “some laws be made to regulate, and tribunals erected competent to determine the propriety of captures,” American colonial forces might unintentionally inflict violence on neutral vessels that were not loyal to Great Britain. Accordingly, the resolution [recommended](#) that colonial legislatures establish judicial tribunals capable of adjudicating captures and that the cases arising from those captures be made triable by jury with the Continental Congress having jurisdiction over appeals. A committee of members of Continental Congress initially [functioned as the appellate body](#); however, this system led to disagreements with colonial governments over the committee’s [power](#) to review jury determinations that did not conform to international law governing captures and neutrality. The Continental Congress later [resolved](#) that the “legality of all captures on the high seas must be determined by the law of nations[.]” and it formalized its appellate review system by [replacing](#) the appellate committee with a [Court of Appeals in Cases of Captures](#)—the United States’ first national judicial tribunal.

As the Revolutionary War unfolded, the Continental Congress continued to exercise power over captures and to refine its rules over how captures would be conducted. In the spring of 1776, it began to [issue](#) letters of marque and reprisal authorizing privateers to attack and capture British vessels. In conjunction with those instruments, the Second Continental Congress provided a set of [instructions](#) requiring captors to bring captured vessels into port, initiate prize proceedings, provide written accounts of their captures, and punish crew members who killed, maimed, or tortured captives. Although captors were [instructed](#) to [follow](#) international customs for using force and respecting neutrality, the Continental Congress received [complaints](#) from [neutral countries](#) about privateers’ practices. These complaints prompted it to order American vessels’ commanders to refrain from capturing neutral vessels, follow all congressional instructions and resolutions regarding captures, and pay “[sacred regard](#)” to international customs and neutral powers’ rights.

Captures Under the Articles of Confederation

After the [Articles of Confederation](#) were adopted, the newly created [Confederation Congress](#) was given the exclusive [power](#) of “establishing rules for deciding . . . what captures on land or water shall be legal and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.” Using this authority, the Confederation Congress revoked all prior regulations concerning captures on water, and it issued a [comprehensive ordinance](#) governing maritime captures and division of prize. The Articles of Confederation also gave the Confederation Congress exclusive [power](#) to create courts “for receiving and determining finally appeals in all cases of captures.” Rather than create a new judicial body, the Confederation Congress [allowed](#) the Court of Appeals in Cases of Captures to continue to operate.

The Role of Captures in the Drafting of the Constitution

Because the United States gradually increased its control over captures during the Revolutionary War and transition to the Articles of Confederation, the Constitution’s assignment to Congress of the power to “make Rules concerning Captures on Land and Water” [did not generate controversy](#) during the Constitution’s framing and ratification. Most delegates that [proposed plans of government](#) to the Constitutional Convention initially did not mention the power to regulate captures at all. The [Virginia Plan](#), [New Jersey Plan](#), and a [plan](#) advanced by New York delegate Alexander Hamilton all proposed to

vest certain legislative rights in Congress, but none mentioned captures specifically. Some historical records show that South Carolina delegate Charles Pinckney proposed a plan that would have given Congress power to “[make rules concerning Captures from an Enemy](#),” but the documentary history is [not uniform](#) on whether this clause was [actually part](#) of Pinckney’s proposal.

Although the power to *regulate* captures was not part of the early proposed plans of government, those plans did address what courts would *adjudicate* captures cases. The [Virginia](#), [New Jersey](#), [Hamilton](#), and [Pinckney](#) plans all included provisions concerning jurisdiction over captures cases, and there were some differences among the proposals. For example, whereas the Virginia Plan would have created a federal court system with [exclusive power](#) to hear cases concerning captures, the New Jersey Plan created only a supreme court with [appellate review](#) over captures. The focus on captures in the judicial context was likely borne out of delegates’ experience during the Revolutionary War when friction arose over the national government’s [power to overturn jury verdicts](#) that did not comport with international law governing captures and neutrality. The Constitution ultimately provided that the judicial power of the United States extends to “[all Cases of admiralty and maritime jurisdiction](#)[.]” and the Supreme Court has [interpreted](#) admiralty jurisdiction to encompass cases concerning captures. Congress, by [statute](#), has given federal courts exclusive jurisdiction over captures cases.

On the few occasions during the early stages of the Constitutional Convention when the delegates discussed the power to regulate captures, it was generally to [emphasize](#) that the states had [previously assigned](#) that authority to the national government in the Articles of Confederation. Some delegates who advocated for a stronger centralized government [raised](#) this [point](#) in response to arguments that the plans being considered were so broad that they exceeded the scope of what the Convention had been called to consider.

Convention delegates directly addressed how to define and assign the power to regulate captures when the [Committee of Detail](#) prepared the [first draft](#) of a constitution in late July and early August 1786. The Committee appears to have considered a [draft](#) prepared by its chair, Edmund Randolph of Virginia, that would have given Congress the [power](#) to “declare the law of piracy, felonies and captures on the high seas, and captures on land[.]” however, it did not ultimately adopt that version. Instead, the Committee rewrote Randolph’s proposed clause and separated it from Congress’s power over piracy and felonies on the high seas. The text that the Committee reported to the Convention in early August 1787 included a separate [clause](#) authorizing Congress “To make rules concerning captures on land and water[.]” That provision remained a stand-alone congressional authority until September 10, 1787, when the [Committee of Style](#) moved the Captures Clause into its [final position](#) after the Declare War and Letters of Marque Clauses. The Committee of Style’s realignment [may have been intended](#) to consolidate three interrelated war powers in Article I, Section 8, clause 11, but the delegates did not describe their reasons for the change.

Captures in the Ratification Debates

The Captures Clause’s role in the ratification debates largely mirrored that of the Constitutional Convention: there was some [controversy](#) over the federal judiciary’s [power](#) to decide captures cases without juries, but Congress’s power to regulate captures was not openly questioned. The Constitution’s proponents [argued](#) that juries in state courts were not equipped to decide captures cases because those cases often depended upon complex principles of international law. In the Virginia ratifying convention, James Madison [observed](#) that the Articles of Confederation had already given the national government “an exclusive right of establishing rules for deciding, in all cases, what captures should be legal, and establishing courts for determining such cases finally.” Madison also responded to the argument that the Constitution would infringe on States’ sovereignty by allowing the central government to regulate individuals directly rather than through the States. In *The Federalist No. 40*, Madison [observed](#) that, in

cases of capture and other contexts, the Articles of Confederation already empowered the national government to “operate immediately on the persons and interests of individual citizens.”

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