

# The Captures Clause (Part 2): Jurisprudence and U.S. Practice

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This Legal Sidebar is the second 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 (OLC) 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.

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

## Jurisprudence and U.S. Practice Related to Captures

After the Constitution’s ratification, Congress [continued](#) to [enact](#) legislation [regulating](#) captures and dictating how the prize system would operate—as the national government had during the Articles of Confederation and Second Continental Congress periods discussed in [Part 1](#). The Supreme Court eventually [developed](#) a [large body](#) of [prize](#) law [jurisprudence](#) addressing the legality of specific captures, but the Court decided comparatively few cases that interpret the scope of the Captures Clause itself. The following sections examine the Supreme Court’s jurisprudence interpreting the Captures Clause and highlights changing U.S. practices related to captures.

## Congressional Control over Captures and the Role of International Law

The Supreme Court has [stated](#) that Congress’s power over captures and prize law is plenary, and “[n]o one can have any right or interest in any prize” unless “sanction[ed] by an act of Congress.” At the same time, international law informs domestic prize law, and the Supreme Court has [applied](#) international [norms](#) in adjudicating prize cases, provided those norms were not modified by a treaty or by legislative or executive action. For example, when the U.S. Navy blockaded Cuban ports during the Spanish-American War, the Supreme Court held that a rule of international law exempting unarmed, coastal fishing vessels

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from capture [applied](#) in the absence of a conflicting treaty provision or action from the political branches. Similarly, when [Congress](#) passed [legislation](#) during the Civil War creating a process to confiscate Confederate property, the Court [held](#) that the United States could still condemn a vessel and its cargo using international legal principles because Congress did not intend its confiscation acts to displace the traditional prize system rooted in international law.

## The Capture Clause's Role in the War of 1812

The Supreme Court's most in-depth examination of the Captures Clause came in *Brown v. United States*, when the Court addressed whether the executive branch could condemn a British-owned cargo of timber during the War of 1812. The United States [argued](#) that, once Congress declared war on Great Britain, the executive branch was empowered to "execut[e] the laws of war," which permit condemnation of enemy property. The Supreme Court [rejected](#) that view and held that specific congressional authorization was required to authorize the confiscation; a general declaration of war did not suffice. Observing that the Constitution uses separate provisions to grant Congress the power to declare war and to make rules concerning captures, the Supreme Court [reasoned](#) that the power to regulate captures is an "independent substantive power" that is "not included in that of declaring war." The issue of "what shall be done with enemy property in our country, is a question rather of policy than of law[.]" the Court [stated](#) in an opinion by Chief Justice John Marshall. "Like all other questions of policy," the Court [continued](#), "[i]t is proper for the consideration of the legislature, not of the executive or judiciary."

Justice Story dissented and [expressed the view](#) that a declaration of war subsumes the right to confiscate enemy property. The exercise of that belligerent right, Justice Story [reasoned](#), devolves upon the President "to whom the execution of the laws and the prosecution of the war are confided." Justice Story also [took the view](#) that Congress impliedly authorized the condemnation through legislation permitting the President to use U.S. land and naval forces, issue letters of marque and reprisal, restrict trade, and take other adversarial actions to advance the war effort.

## The Capture Clause and the Civil War

While *Brown* could be read to suggest that precise statutory language is always required to authorize captures, a later opinion issued during the Civil War seemed to reject such a rigid rule. In *The Prize Cases* (discussed in [other products](#)), the Supreme Court upheld the constitutionality of executive-ordered seizures of vessels as part of a blockade of Confederate ports—even though Congress was not in session and had not specifically authorized the seizures. The Court did not directly overrule *Brown* in *The Prize Cases*, but it appeared to reject much of the *Brown* majority's reasoning by [quoting](#) Justice Story's dissent with approval. The Court's opinion in *The Prize Cases* [describes](#) a more robust version of presidential war power in which Presidents have at least some inherent constitutional authority over captures when responding to an attack on the U.S. homeland.

The Civil War also led to [debate](#) over whether the Captures Clause empowered Congress to seize and condemn rebel-owned property and emancipate enslaved persons. Some Members of Congress [argued](#) that the Captures Clause conferred only a limited power to set procedural rules for confiscating enemy property; others [interpreted](#) congressional power more expansively and argued that Congress could enact a comprehensive statute governing all condemnation of Confederate property. Congress eventually [enacted](#) two [statutes](#), known as the Confiscation Acts, which directed the President to seize Confederate property and emancipate enslaved persons owned by Confederate officers and officials. When the Supreme Court upheld the Confiscation Acts' constitutionality in an 1870 case, *Miller v. United States*, it [cited](#) both the Declare War Clause and the Captures Clause as sources of congressional power, but it did not distinguish between the two or resolve the tension between *Brown* and *The Prize Cases*.

## The Captures Clause in Modern Conflicts

The 20th century brought changes in the United States' practice related to seizure of enemy property. The [economic mobilization](#) and “[total war](#)” nature of the First and Second World Wars prompted the United States to target and seize new forms of foreign-owned property, particularly foreign corporations, to undermine its enemies and support the war effort. In statutes such as the [Trading with the Enemy Act](#) and [International Emergency Economic Powers Act \(IEEPA\)](#), Congress facilitated these developments by creating durable and comprehensive statutory frameworks that allow the President to seize enemy property during wartime and in other emergencies. (For in-depth analysis of the Trading with the Enemy Act and IEEPA, see this [CRS report](#).)

## Relationship Between the Captures Clause and Treatment of Enemy Detainees

The meaning of the Captures Clause reemerged as the subject of debate after the terrorist attacks of September 11, 2001—this time in the context of the capture and treatment of enemy *persons* rather than enemy-owned *property*. After the September 11 attacks, the George W. Bush Administration adopted a [broad view](#) of presidential power and [asserted](#) that Article II of the Constitution specifically commits to the President “the power to dispose of the liberty” of individuals captured by U.S. forces. In a 2002 memorandum, the OLC [argued](#) that control over the treatment of captured enemy personnel is an exclusive presidential prerogative that “is not reserved by the Constitution in whole or in part to any other branch of the government.” A different 2002 OLC [opinion](#) claimed the Captures Clause does not empower Congress to regulate enemy combatants or detainees because it only grants authority to address captured property, such as enemy vessels and war materiel.

During the Obama Administration, the OLC expressed “[substantial doubts](#)” about its earlier interpretation of the Captures Clause. In a 2009 memorandum, the OLC [argued](#) that the Framers of the Constitution understood Congress’s power to regulate captures to include the capture of enemy prisoners. Among other sources, the 2009 memorandum [cited](#) U.S. practice during the Revolutionary War when the Second Continental Congress passed [resolutions](#) that not only regulated the capture of enemy vessels, they also [dictated](#) how individuals on board captured ships should be treated in accordance with international law.

The Supreme Court has not directly addressed whether the Captures Clause covers treatment of captured persons, but it has [decided](#) a [body](#) of cases [arising](#) out of the post-September 11 military actions. In *Hamdan v. Rumsfeld*, the Court [listed](#) the Captures Clause among the authorities that were relevant to a dispute over the legality of a military commission system created during the George W. Bush Administration. Because the Court mentioned the Captures Clause as germane to a legal challenge to military commissions that were responsible for adjudicating crimes by individuals, some [observers](#) view *Hamdan* as implicitly rejecting the view that the clause only pertains to property. Nonetheless, *Hamdan* did not definitively resolve the debate over the scope of the Captures Clause, and the clause’s relationship to the treatment of detainees remains the [subject of debate](#).

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