DUE PROCESS OF WAR

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The application of the Due Process Clause of the Fifth Amendment to the government's deprivation of rights during war is one of the most challenging and contested questions of constitutional law. The Supreme Court has not provided a consistent or historically informed framework for analyzing due process during war. Based on the English background, the text and history of the U.S. Constitution, and early American practice, this Article argues that due process was originally understood to apply to many but not to all deprivations of rights during war. It proposes a framework for analyzing due process during war that accords with this history and suggests useful principles for the "war on terrorism."

First, all deprivations of rights during war were subject to the law of the land. During a state of war, rights were determined by the law of war, treaty, and statute. The President had no constitutional authority to deprive persons, including enemies, of rights contrary to that law. Second, many deprivations of rights during war were also subject to the Due Process Clause. The courts in England and the United States provided a number of judicial remedies to enforce the law of the land. Americans understood these remedies to be a requirement of due process. Importantly, those courts provided such remedies for many deprivations during war. English and American courts considered habeas petitions for enemy noncombatants; considered trespass suits brought against military officers by enemy noncombatants for deprivations of liberty and property; and reviewed the application of military law by courts martial. When such deprivations were within the jurisdiction of a federal court, they were subject to due process of law. Third, many deprivations of rights during war, though subject to the law of the land, were not subject to due process. The deprivation of rights of enemy combatants on a battlefield and the deprivations of rights of civilians by an officer exercising statutory authority to enforce martial law were subject to the law of the land, but not to due process.

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Introduction

The application of the Due Process Clause of the Fifth Amendment during war is one of the most important, challenging, and debated questions in American constitutional law. Unfortunately, the Supreme Court has not provided a consistent or coherent analytical framework. In *Hamdi v. Rumsfeld*, the Court's most recent case to directly address the issue, a plurality applied the *Mathews v. Eldridge* balancing test to determine the "process of law" that was "due" to a U.S. citizen detained in the United States as a terrorist.[1] In *Boumediene v. Bush*, the Court held that the privilege of habeas corpus extends to enemy aliens detained as terrorists at a U.S. base in Cuba.[2] This ad hoc approach has provided little guidance to the executive or lower courts, and the guidance it has provided is pernicious.

Consider the government's approach to targeted killings. When President Obama announced that he believed the Due Process Clause applied to the targeting of a U.S. citizen suspected of terrorism,[3] the Department of Justice (DOJ) analyzed the constitutional question according to the plurality's decision in *Hamdi*. After concluding that the Due Process Clause may apply to such a killing, the DOJ dutifully applied the *Mathews* balancing test to conclude that the executive department's internal checks and balances provide the "process of law" to which a target is "due."[4] The notion that the Due Process Clause's procedural due process requirement is satisfied without any judicial process threatens to dilute its protection across the board.[5]

The scholarly responses to the DOJ's analysis illustrate the lack of consensus—or theory, even—about how the Due Process Clause ought to apply during war. Some scholars argued that the Due Process Clause does not apply to the exercise of war powers; others took no position on whether the Clause might apply during war but agreed with the government that it had satisfied whatever the Clause might require. Some argued that the Clause

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1 Hamdi v. Rumsfeld, 542 U.S. 507, 509, 529 (2004) (plurality opinion); *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

2 Boumediene v. Bush, 553 U.S. 723, 771 (2008).

3 President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("I do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or with a shotgun—without due process . . . .").

4 U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force 5 (2011) [hereinafter DOJ White Paper] (assuming the Due Process Clause applies); Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to Attorney Gen., Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 38 (July 16, 2010), https://fas.org/irp/agency/doj/olc/aulaqi.pdf (determining that the Due Process Clause "likely" applies).

5 *See, e.g.*, H. Jefferson Powell, Targeting Americans 143 (2016) (arguing that the DOJ's theory, if extended, would "evacuate[e]" due process "of its traditional and settled content").

required post-hoc judicial review of a targeted killing, and others that it required judicial review before the killing.[6]

The most thorough, historically informed approach to rights during wartime has focused on the principle of reciprocal duties arising from the law of nations and the common law. A subject owes a duty of loyalty to a sovereign; in return the sovereign owes that subject the protection of the laws. According to Philip Hamburger, resident enemy aliens were not traditionally understood to be "subjects" entitled to the protection of the law.[7] Enemy aliens anywhere, and nonresident aliens outside the United States, enjoy no constitutional rights. While this framework is based on an important principle of the common law that informed the way American jurists conceived of rights, the categories it proposes are not supported by the text of the U.S. Constitution or the way that American jurists implemented it during the early republic.[8]

This Article proposes a different framework. Based on the English background, the text of the Constitution, and early American debates and judicial decisions, it argues that Americans understood all deprivations of rights during war to be subject to the law of the land. Many, but not all, of those deprivations were also subject to due process. The detention of prisoners of war and the deprivations of rights on a battlefield and pursuant to a lawful declaration of martial law were subject to the law of the land, but not to due process. All other deprivations of rights that fell within the jurisdiction of the courts were subject to judicial review—even during war. This was due process of war.

The key to grasping the due process implications of early American discussions of law, war, and rights is to unpack the concept of "due process of law" within Anglo-American constitutionalism. Americans equated due process with the traditional requirements of the "law of the land" clause of Chapter 29 of Magna Carta. In English law, the "law of the land/due process" requirement merged two concepts that were conceptually distinguishable: the requirement that deprivations of rights be according to law, and the requirement that they be subject to judicial procedures. In most cases, these concepts overlapped. The government could only deprive someone of a right according to lawful authority, while a court stood ready to enforce the law. Writs of habeas corpus and prohibition and damages suits against officers were routine judicial procedures for meeting the requirements of Chapter 29 of Magna Carta. Americans inherited this understanding of "law of the land/due process."

War introduced a wrinkle. English and American jurists agreed that deprivations of life, liberty, and property during war were subject to the law of the land. Under the law of nations, war changed many individual rights and duties. England had adopted the law of nations as part of the law of the

6 *See infra* Section I.A.

7 Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1833, 1860–64 (2009).

8 *See infra* Part III.

land. Moreover, many governmental deprivations of life, liberty, and property during war were governed by statute, the common law, or royal proclamation. In England, and later in the United States, the deprivation of rights during war was therefore subject to the law of the land. In this respect, Chapter 29 of Magna Carta applied to deprivations of rights during war.

The due process, or judicial procedure, component of Chapter 29 of Magna Carta, however, applied to only some deprivations of rights during war, and the government enjoyed more leeway to restrict those procedures during war. Courts continued to supply habeas corpus, including to enemy aliens, but Parliament could suspend habeas for limited periods during war. Prize courts supplied elaborate civil-law procedures to enemy aliens and neutrals in prize cases. And officers remained subject to suit for trespass.

Yet many deprivations of life, liberty, and property during war, though subject to the law of the land, were not subject to due process. The deprivation of rights on the battlefield or pursuant to a lawful declaration of martial law or the suspension of habeas corpus were not subject to judicial review. Prisoners of war (POWs) were not entitled to habeas, but those detained as POWs could use habeas to challenge their status.

Americans inherited and amplified the English tradition of ensuring that deprivations of rights during war were subject to the law of the land. The U.S. Constitution gives all of the federal government's power to change rights during war to Congress, ensuring that the definition and authority to deprive persons of those rights would be according to law. The Constitution permits the government to suspend habeas and to authorize the quartering of soldiers but only upon certain limited conditions. The nation has all the powers necessary to implement its rights of war under the law of nations pursuant to its own municipal law, subject in many cases to ordinary judicial procedures.

Early debates and judicial decisions by many of the luminaries of the early republic confirm that Americans believed that although war changed the rights of citizens, enemies, and neutrals, the deprivation of those rights were still subject to the law of the land, and often to judicial procedures. Though Americans rarely expressly considered the application of the Due Process Clause per se during war, they frequently considered the relationship between war, individual rights, and the law of the land. John Jay, John Marshall, James Iredell, James Madison, Alexander Hamilton, and Albert Gallatin all maintained that deprivations of rights during war were subject to the law of the land—many of them tacitly or expressly holding that resident enemy aliens, in particular, were entitled to habeas and postwar suits (at least) to enforce their rights to liberty and property during war.

The sum of the historical evidence suggests a fresh framework for analyzing the application of due process during war. A juridical state of war authorizes the government to change the rights of citizens, subjects, and neutrals under U.S. law. In particular, Congress may authorize the deprivation of rights of armed enemies on the battlefield, the detention of POWs, and the deprivation of rights within the United States pursuant to martial law—all

without judicial review. Those deprivations would be subject to the law of the land but not to the Due Process Clause.[9]

Many deprivations of rights during war would be subject to due process. Congress may authorize the suspension of habeas corpus and the quartering of troops, but courts may review the constitutionality of those acts. Congress may likewise authorize the detention and removal of enemy aliens (and it has, with the Alien Enemy Act of 1798). But the deprivation of those rights would be subject to habeas and to suits for damages (if permitted by current doctrine). Congress may also enact rules governing the military. But deprivation by court martial outside of a declaration of martial law would be subject to review by federal courts.

The Article cannot address all the due process questions arising from the so-called war on terror. It focuses on the historical evidence regarding the relationship between war and the law of the land. Yet this history suggests a framework that offers principles for the war on terrorism. The key issues are whether Congress has authorized a deprivation, and if so, whether that deprivation is the sort for which a person would traditionally have had a right to judicial procedure. Targeted killings of terrorists are challenging because they do not fit neatly into any of the historical categories, but I believe they are best analogized to the killing of soldiers on a battlefield. In this respect, citizenship and location are irrelevant. Targeted killings of terrorists are subject to law, but not to due process.

The Article proceeds as follows. Part I discusses the current doctrinal and academic frameworks for analyzing due process during war. Part II frames the historical analysis by distinguishing between the "rule of law" and "judicial procedure" requirements of Chapter 29 of Magna Carta. Part III presents the English understanding of the relationship of the law of war, the law of the land, martial law, and judicial procedures. Part IV analyzes the U.S. Constitution in light of the English background and the American experience during the War for Independence. Part V explores a handful of episodes during the early republic in which statesmen and jurists contemplated the relationship between war and the law of the land. Part VI suggests some principles based on this framework for the war on terror.

I. Current Frameworks for Due Process During War

This Part critiques three existing frameworks for analyzing due process during war. The first is the Supreme Court's current doctrine, which applies a balancing test to determine what the Due Process Clause requires. This

9 Nothing practical turns on saying these are not subject to the Due Process Clause. One could just as easily conclude that such deprivations are subject to due process insofar as they are subject to law, though they are not subject to judicial procedures. Because I believe "due process of law" refers more specifically to the judicial procedure requirement of Chapter 29 of Magna Carta, I prefer a framework that clarifies that the Due Process Clause requires judicial procedures.

doctrine provides little guidance and has no support in early constitutional history.

Scholars have suggested two alternative approaches. The first is that the Due Process Clause simply does not apply to the exercise of war powers. While this approach is categorical, and therefore fairly clear, and has some basis in nineteenth-century doctrine, it has little basis in the original understanding and, importantly, fails to account for all the times the courts have reviewed the lawfulness of governmental deprivations of rights during war.

The second approach has a surer foundation in the early history: based on the common law and the law of nations, some scholars argue that early American jurists believed that all enemies (wherever they were) and nonresident aliens outside the United States were outside the protection of U.S. law—including the U.S. Constitution. By implication, of course, this means that the government could deprive them of life, liberty, or property without due process. As we shall see, this latter framework corresponds with general principles of the law of nations and the common law but fails to reflect the nuances of judicial doctrine and practice at the founding.

A. Doctrinal: The Supreme Court's Ad Hoc Approach

The Supreme Court's approach to due process during war has been inconsistent. Consider three data points. First, from the earliest days of the republic to the present, the Court has considered the lawfulness of the government's deprivation of life, liberty, and property during war.[10] The Court has never suggested that the Due Process Clause *requires* judicial review in these cases; it has simply supplied it.

Second, in *Miller v. United States*, the first case to directly address the application of the Due Process Clause during war, the Supreme Court determined that the Clause does not apply to the government's exercise of the "war powers."[11] The Court cited this as a reason to uphold an in rem judgment against enemy property pursuant to the Confiscation Act of 1862. As discussed below, the Court could have—and should have—reached the same conclusion by reasoning that the deprivation complied with the Due Process Clause. (Indeed, this was the view of the Congress that enacted the law.)[12] The Court has never expressly rejected its reasoning in *Miller*.

Third, during the war on terrorism, the Court has used an ad hoc approach rather than drawing a sharp distinction between war and peace. The controlling opinion in *Hamdi v. Rumsfeld* concluded that the Due Process Clause applies to U.S. citizens detained as enemy combatants within the

10 *See* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963 (2007). *See generally infra* Part V (examining such review).

11 Miller v. United States, 78 U.S. (11 Wall.) 268, 304–06 (1870); *see also* Juragua Iron Co. v. United States, 212 U.S. 297 (1909) (rejecting a U.S. company's claim for compensation for property destroyed by U.S. forces in Cuba during the Spanish-American War).

12 *See* Christopher R. Green, Our Bipartisan Due Process Clause 41–44 (Oct. 25, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249845.

United States.[13] By also holding that habeas corpus extends to noncitizen combatants detained in Guantanamo Bay, Cuba,[14] the Court has strongly suggested that due process does too.[15] What process is due? According to the *Hamdi* plurality, whatever the Court decides based on an application of the *Mathews v. Eldridge* cost-benefit analysis.[16] Either the Court has rejected *Miller*'s proposition that the Due Process Clause does not apply to the exercise of war powers or it has carved out a limited exception for the war on terror.

Relying on *Hamdi*, the Obama Justice Department concluded that the Due Process Clause applies to the government's targeting of a U.S. citizen on foreign soil who was suspected of being a terrorist leader.[17] Most surprisingly, perhaps, the government concluded that the executive department could unilaterally supply whatever process the Clause requires.[18] In effect, the DOJ lawyers reasoned that their own authority was so convoluted with overlapping bureaucratic jurisdictions that the executive branch itself supplied whatever checks and balances were necessary to comply with due process.[19]

The scholarly response to the DOJ's argument illustrates the current doctrine's lack of clarity and guidance. Some scholars question whether the Clause applies to targeted killings at all,[20] while others seem to agree with the

13 *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion). Professor Kent argues that *Milligan* was a narrow exception to the Civil War–era Court's view that the Bill of Rights does not normally apply to the exercise of war powers. *See* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1846 (2010) (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)).

14 Boumediene v. Bush, 553 U.S. 723, 771 (2008).

15 *See id.*; Martin S. Flaherty, Essay, *The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards*, 38 HARV. J.L. & PUB. POL'Y 21, 37 (2015) ("*Boumediene* makes clear that due process and habeas are difficult to separate"); *see also* Mary Van Houten, Essay, *The Post-*Boumediene *Paradox: Habeas Corpus or Due Process?*, 67 STAN. L. REV. ONLINE 9, 11 (2014).

16 *Hamdi*, 542 U.S. at 529; *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

17 *See supra* note 4 and accompanying text.

18 *See supra* note 4 and accompanying text.

19 *See* DOJ WHITE PAPER, *supra* note 4, at 2. Such overlapping jurisdiction is presumably different from policy squabbles among career and politically appointed bureaucrats. *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55; M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 646 (2001).

20 Noah Feldman, *Obama's Drone Attack on Your Due Process*, BLOOMBERG (Feb. 8, 2013), https://www.bloomberg.com/view/articles/2013-02-08/obama-s-drone-attack-on-your-due-process ("The white paper should have said that due process doesn't apply on the battlefield."); *see* POWELL, *supra* note 5, at 143 (arguing that the DOJ's theory, if extended, would "evacuate[e]" due process "of its traditional and settled content"); *see also* Michael Stokes Paulsen, Essay, *Drone On: The Commander in Chief Power to Target and Kill Americans*, 38 HARV. J.L. & PUB. POL'Y 43, 45 (2015) ("The same Supreme Court decision [*Hamdi*] that wrongly seems to make citizenship relevant also seemingly implies, equally wrongly, that targeting decisions are subject to judicial review or some other form of judicial legal process . . . .").

government that whatever the Clause requires was satisfied by purely executive branch checks.[21] Some argue for judicial review before a killing;[22] others for judicial review afterward.[23] Dean Trevor Morrison's qualifications nicely capture the doctrine's uncertainty: "The Fifth Amendment *might* apply, but the Supreme Court's explication of its meaning in the domestic context *might* not."[24] One might go further—between *Miller* and *Hamdi*, the Court has a range of doctrinal options during war, even for deprivations in the domestic context.

B. Historical

The plurality decision in *Hamdi* owed little to history, and, as the DOJ's use of *Hamdi* illustrates, the *Mathews* balancing test provides precious little guidance for constitutional decisionmakers when the interests on either side of the scales are especially weighty.

Several scholars have suggested more historically rooted frameworks for analyzing due process claims during war. No historical case is straightforward. Americans during the early republic did not directly discuss the application of the Due Process Clause to the deprivation of rights during war. There is no "smoking gun." We must therefore infer from underlying legal concepts and early practices what Americans might have understood the Clause to require during war. Both of the historical frameworks proposed by scholars to varying degrees makes sense of some of the historical evidence, but neither of them accounts for the nuanced relationship of the law of war, the law of the land, and due process.

1. The War Powers Exception Framework

The first framework rests on a dichotomy between a state's "sovereign rights" and "belligerent rights": the Bill of Rights applies to the government's exercise of sovereign rights but not to its exercise of belligerent rights.

The sovereign-belligerent rights dichotomy derives from the seventeenth- and eighteenth-century law of nations. During peace, sovereigns had

21 *See* Jack L. Goldsmith, *A Just Act of War*, N.Y. TIMES (Sept. 30, 2011), https://www.nytimes.com/2011/10/01/opinion/a-just-act-of-war.html (arguing that "[w]hat due process requires depends on context" and "these procedures are wholly unprecedented in war, and they exceed anything the law requires"); *see also* Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1, 52–54 (2013) (arguing that the Obama administration did not supply sufficiently robust executive branch procedures).

22 Flaherty, *supra* note 15, at 42; *see also* Benjamin Wittes, *On Due Process and Targeting Citizens*, LAWFARE (Oct. 1, 2011, 11:47 AM), https://www.lawfareblog.com/due-process-and-targeting-citizens ("I think [due process] requires a strong preference for the capture, instead of the kill—and it requires the exhaustion or non-availability of reasonable options either for a conventional trial or for military detention with appropriate habeas review.").

23 Stephen I. Vladeck, Response, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 18, 23–27 (2014).

24 Trevor Morrison, *The White Paper and Due Process*, LAWFARE (Feb. 7, 2013, 7:53 PM) (emphasis added), https://www.lawfareblog.com/white-paper-and-due-process.

certain rights and duties toward one another and one another's subjects.[25] The rights and duties changed when the nations became belligerents.[26] Early American courts took account of this principle of the law of nations for some purposes,[27] but there is no evidence that Americans during the early republic understood the dichotomy to entail that constitutional rights had no effect against the government's exercise of belligerent powers.

The first American to suggest this notion was apparently John Quincy Adams.[28] In 1836, he argued on the floor of the House of Representatives that the federal government could exercise its belligerent rights, which he equated with the enumerated war powers, to abolish slavery without constitutional limitations.[29] Adams's argument was famous at the time, partly because it was "shocking."[30] Americans did not widely embrace it until the Civil War,[31] when Charles Sumner, Adams's protégé, advanced it on the Senate floor,[32] and President Lincoln embraced it as the basis for the Emancipation Proclamation.[33] The Supreme Court then relied on the belligerent-sovereign dichotomy in *Miller v. United States*, discussed above, to conclude that the Confiscation Act of 1862 did not violate the Fifth and Sixth Amendments.[34]

H. Jefferson Powell has recently argued that this dichotomy remains the best way to understand due process during war. Simply put, it does not apply. When the government exercises its war powers, the resulting deprivations of life, liberty, or property may be subject to international law,[35] but

25 *See* EMER DE VATTEL, THE LAW OF NATIONS bk. III, §§ 69–77, at 509–511 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

26 *See id.*

27 *See, e.g.*, Rose v. Himely, 8 U.S. (4 Cranch) 241, 272 (1808) ("[A]dmitting a sovereign [France] who is endeavoring to reduce his revolted subjects [in Haiti] to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act."), *overruled by* Hudson v. Guestier, 10 U.S. (6 Cranch) 281 (1810).

28 *See, e.g.*, JAMES TRAUB, JOHN QUINCY ADAMS: MILITANT SPIRIT 438 (2016) ("Adams appears to have been the first to publicly raise this shocking prospect."); Kent, *supra* note 13, at 1845–46.

29 24 REG. DEB. 4036 (1836); *see* TRAUB, *supra* note 28, at 428–39.

30 TRAUB, *supra* note 28, at 438; *see* Kent, *supra* note 13, at 1845 n.23 ("The speech was widely reprinted.").

31 *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 204 (2012) ("Building on Adams' unorthodox late-career account, antislavery men in 1861 and 1862 argued that, properly understood, the laws of war permitted the emancipation of enemy slaves.").

32 Kent, *supra* note 13, at 1845–46 (citing CONG. GLOBE, 37th Cong., 2d Sess. 2964 (1862) (statement of Sen. Sumner)).

33 *See* TRAUB, *supra* note 28, at 438; WITT, *supra* note 31, at 214–15.

34 Miller v. United States, 78 U.S. (11 Wall.) 268, 292–93, 304–05 (1870).

35 POWELL, *supra* note 5, at 129 n.40; *see* David Golove, *The Supreme Court, the War on Terror, and the American Just War Constitutional Tradition*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 561 (David L. Sloss et al. eds., 2011); *see also* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43–44 (1800) (Chase, J., concurring).

they are not subject to the Due Process Clause of the Fifth Amendment.[36] Call this the "war powers exception" framework.

The framework has several difficulties. First, the constitutional text. The Constitution does not refer to "sovereign" powers and it has no "war powers" clause. In fact, when the Constitution acknowledges that a state of war may authorize the government to do some things that would ordinarily be unlawful, it does so expressly. The Suspension Clause and the Third Amendment both prohibit the federal government from depriving persons of particular rights *except* during war and then only by law.[37] As this Article discusses in more detail below, the Constitution's text carefully enumerates and distributes between the legislative and executive branches a number of powers necessary to begin and fight a war, while likewise distributing to the judicial branch the authority to ensure that certain rights are respected during war. At the same time, the Constitution carefully enumerates the conditions on the suspension of specific rights during war.[38] None of this is consistent with a binary approach to wartime rights.

Second, the war powers exception framework does not take into account the original understanding of due process. As discussed below, early American jurists understood the Due Process Clause to implement the English requirement that governmental deprivations of rights accord with the law of the land, and that courts review the lawfulness of those deprivations according to established procedures suited to the case. It was not an all-or-nothing proposition, i.e., either the government must comply with the full protections of a common-law criminal trial or it may deprive persons of rights summarily. It was, rather, an overarching principle that applied to virtually any governmental deprivation of rights, one limber enough to adapt to changed legal contexts. Due process did not require the same procedure for the deprivation of property upon conviction of a crime as it required for the deprivation of property by distress warrant to satisfy a debt owed to the sovereign.[39] While the war powers exception framework accounts for the historical evidence that war was understood to change the rights and duties of sovereigns and individuals, it fails to account for the capacity of due process to absorb and adapt to those changes.

Third, the war powers exception seems never to have been as extreme in practice as it was in the Supreme Court's rhetoric.[40] *Miller v. United States* was about the constitutionality of the Confiscation Act of 1862 (the "Act"). The Act authorized the confiscation of a Southerner's shares of stock by civil con-

36 POWELL, *supra* note 5. Powell allows that the exercise of war powers might be subject to other constitutional limitations, such as the First Amendment, but does not explain why the war powers might trump one constitutional right and not another. *See id.* at 63.

37 U.S. CONST. art. I, § 9; *id.* amend. III.

38 *See infra* Part III.

39 *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). *See generally* EDWARDO COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50–55 (London, W. Clarke & Sons 1817) (1642).

40 Miller v. United States, 78 U.S. (11 Wall.) 268 (1870).

demnation through in rem proceedings in a federal district court.[41] The question was whether this process violated the Fifth and Sixth Amendments. The Supreme Court asserted the following:

> [I]f the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments.[42]

The Court held that the condemnation provision was "an exercise of the war powers" and therefore not subject to the Fifth Amendment, including the Due Process Clause.[43]

The sovereign-belligerent dichotomy was not the most obvious framework the Court could have used to reach the same conclusion. As Christopher Green has recently shown, Congress spent a tremendous amount of time debating the Confiscation Act of 1862 (more than 500 pages in the congressional reports).[44] The chief concern was that confiscating enemy property that was not directly used in the war effort with an in rem proceeding would violate the Due Process Clause. This debate would have been meaningless under a war powers exception framework. Ultimately, a majority of the members concluded that the confiscation would comply with due process because in rem proceedings against enemy property were typical in prize cases.[45] While the Confiscation Act of 1862 applied the principle to property on land, it was a sensible extension of procedures traditionally used in similar cases. The Court itself had relatively recently held that the procedures traditionally used in a specific type of case satisfied due process.[46]

The Court's mistake in *Miller* stemmed from the way the case had been litigated. The litigants had framed the question as whether being an enemy amounted to a crime, such that the government could only deprive an enemy of property pursuant to the constitutional requirements of criminal procedure.[47] This is why the Court addressed both the Fifth and the Sixth Amendments. As the Court concluded, crime was a red herring—the Act treated enemies as enemies, not as criminals. It was thus correct to conclude that the Sixth Amendment did not apply. But it was too hasty to apply the same logic to the Due Process Clause. As Congress understood, and as the Court itself had already explained in an earlier case,[48] the Due Process Clause applied to

41 *See id.* at 293–94, 304–05; *see also* Confiscation Act of 1862, ch. 195, 12 Stat. 589.

42 *Miller*, 78 U.S. (11 Wall.) at 304–05.

43 *Id.*

44 Green, *supra* note 12.

45 *Id.* at 41–44.

46 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

47 *Id.* at 304.

48 *See id.*; *see also* Justices v. Murray, 76 U.S. (9 Wall.) 274, 276–77, 282 (1869) (invalidating part of the Habeas Corpus Suspension Act of 1863, arguably enacted under the war powers, for violating the Seventh Amendment).

civil as well as criminal cases, and its requirement depended on the traditional procedures in similar cases.[49]

More generally, the war powers exception does not account for the federal courts' longstanding tradition of reviewing the lawfulness of governmental deprivations of rights during war.[50]

2. The Reciprocity Framework

The current framework that best captures the eighteenth-century history of the scope of due process is one that emphasizes the reciprocal relationship between a sovereign and subject. In short, sovereigns and subjects were bound by mutual allegiance. The subject owed a duty of obedience, the sovereign a duty of protection. The common law distinguished between natural subjects who owed allegiance by birth and temporary or local subjects who owed allegiance by residing peaceably and voluntarily within the sovereign's domains. Aliens who owed a local allegiance were entitled to the protection of the laws, though they did not necessarily enjoy all the rights of natural subjects (for instance, they could not own land within England). The principle of reciprocal allegiance had roots in both the law of nations and the common law and was reflected in a variety of specific common-law doctrines. Edward Coke,[51] Matthew Hale,[52] and William Blackstone[53] all attested to the centrality of this principle for purposes of determining the extent to which a person was within the protection of the law of the land.[54] American courts and treatise writers often cited these doctrines as part of what we would now consider the general common law.[55]

The difficult question was whether resident enemy aliens counted as a "local" subject entitled to the protection of the law. An enemy alien was one who owed a natural allegiance to a sovereign who was at war with England, for instance a French merchant residing in London when war broke out between England and France. In a massive and largely persuasive study that

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49 Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U. L. Rev. 377, 409–14 (2017).

50 Powell notes that the federal courts are given power to try treason and admiralty cases, but offers no legal justification for federal courts' tradition of reviewing deprivations of rights during war. Powell, *supra* note 5, at 79 n.44. Instead, he suggests that judicial review of wartime deprivations is "[p]erhaps most important" for "play[ing] an important legitimating role by confirming the lawfulness of the government's actions." *Id.* (citing Boumediene v. Bush, 553 U.S. 723, 797 (2008)). It is curious that Powell cites *Boumediene*, a case in which the Court invalidated the executive's actions.

51 Calvin's Case (1608) 77 Eng. Rep. 377; 7 Co. Rep. 1a; *see* Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case, 9 Yale J.L. & Human. 73 (1997).

52 Sir Matthew Hale's The Prerogatives of the King 56 (D.E.C. Yale ed., 1976) (1640) [hereinafter Hale's Prerogatives].

53 1 William Blackstone, Commentaries *354.

54 *See* Paul D. Halliday, Habeas Corpus: From England to Empire 203 (2010) ("The force of this inclusive reciprocity was widely accepted."); *see also* Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 927–43 (1991).

55 *See* Kent, *supra* note 13, at 1857–58 (listing authorities).

outlines the contours of the "principle of protection,"[56] Philip Hamburger has argued that enemy aliens were categorically outside the protection of the law.[57] The King could voluntarily extend protection to them through proclamations, passports, and papers of safe conduct.[58] But the presumption, Hamburger argues, was that enemy aliens owed no duty of allegiance to the Crown; without express license from the Crown, they were entitled to no protection under the law.[59] Hence, they would not have been entitled to the protection of Chapter 29 of Magna Carta, which, as we shall see, most jurists equated with the requirements of "due process of law."[60]

Hamburger's account, as he says, offers "an elegant solution to a wide range of important problems."[61] Unfortunately, it may be more elegant than the common law actually was. To be sure, jurists during the early republic often cited a principle that enemy aliens were "totally *ex lex*" without "some [sovereign] act of public authority that puts him in the king's peace *pro hac vice*."[62] Yet the practice on the ground was more complicated. John Baker has recently noted that by the early seventeenth century, the most "orthodox position" among English common lawyers was that alien enemies "were free men" under the protection of Chapter 29 of Magna Carta, "but that the *lex terrae* [law of the land] restricted the rights of certain categories of people without placing them beyond the rule of law."[63] As Paul Halliday has shown, from 1600 to 1800, King's Bench drew no distinction between enemy aliens and friendly aliens for purposes of habeas corpus (though they did for prisoners of war).[64] Even prisoners of war, who were not entitled to be released by habeas, could use the writ to have their status reviewed.[65] Matthew Hale, in his unfinished manuscript on the Crown's prerogatives, wrote that "[I]f an alien enemy reside or come into the kingdom, and not in open hostility, he owes an allegiance to the king *ratione loci*, and if he attempt any treason, he shall be indicted as doing it *contra ligeantiae suae debitum*."[66] Hamburger com-

56 Hamburger, *supra* note 7.

57 *Id.* at 1833, 1860–64.

58 *Id.* at 1873–79.

59 *Id.* at 1879–81.

60 *See infra* Parts II.

61 Hamburger, *supra* note 7, at 1831.

62 HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 211 (1815).

63 JOHN BAKER, THE REINVENTION OF MAGNA CARTA 1216–1616, 431 (2017).

64 HALLIDAY, *supra* note 54 at 206; *see also* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME 271 (2017).

65 HALLIDAY, *supra* note 54, at 169; *see id.* at 172 ("POWs were consistently understood as being within the protection of a subjecthood that arose from surrender, by which hostility ceases." (internal quotation marks omitted)).

66 HALE'S PREROGATIVES, *supra* note 52, at 56. Hamburger argues that Hale's statement above, read in context, applied only to enemy aliens with an express license from the Crown. Unfortunately, he does not supply a quotation or citation to support this argument. Hamburger, *supra* note 7, at 1877. To the contrary, the text following the quoted passage supports its plain meaning: peaceable enemy aliens are within protection. "But there are two cases wherein he that is within the king's dominions owes not an allegiance

pletely ignores the law and procedures of prize courts as evidence that at least some enemy aliens were entitled to the law of the land for at least some purposes (the deprivation of property captured on the high seas). At a minimum, Hamburger rejects important evidence that resident alien enemies behaving themselves peacefully were presumed to be local subjects, entitled to the protection of the law, including habeas and Chapter 29 of Magna Carta. This is not to say that the Crown could not authorize the detention and removal of enemy aliens consistent with the law of the land (and the law of nations). The question is whether the legal default, or presumption, was that resident enemy aliens owed no duty of obedience and therefore were entitled to no protection of the law.

There is another challenge to incorporating Hamburger's framework wholesale into U.S. constitutional law: the U.S. Constitution makes no direct reference to the principle of reciprocal duties. The separation of the legislative and executive powers complicates the question of whether enemy aliens are entitled to the protection of the law by raising a related one: Which federal department has the authority to determine the rights of enemy aliens? The Suspension Clause seems to take it for granted that "the privilege" of habeas corpus exists without stipulating its scope, and the Due Process Clause prohibits the deprivation of the rights of any "person" "without due process of law."[67]

Hamburger does not address the specifics of the U.S. Constitution and how it may have been understood to alter the common law. Virtually all of his evidence is from the period before the Constitution's drafting and ratification.[68] A number of American judicial decisions during the War of 1812 suggest that at least some jurists believed that the President lacked the authority to detain and remove enemy aliens without statutory authorization; Hamburger does not address this implication.[69] Rather, he argues that the Alien Enemy Act of 1798 "explicitly provided some protection to non-dangerous enemy aliens."[70] But the Alien Enemy Act did not expressly license anyone or give anyone rights they did not already have. Instead, the Enemy Alien Act authorized the President to detain and remove dangerous enemy

local." HALE'S PREROGATIVES, *supra* note 52, at 56. The first case is when "a foreign prince, or the natural subject of a foreign . . . prince, not being a natural or acquisite [sic] subject of the king, comes in hostility within the realm." *Id.* Such should "be dealt with as an enemy, and not as a traitor." The second case is when a foreign king comes into the dominion without a safe conduct. *Id.*

67 U.S. CONST. art. I, § 9; *id.* amend. XIV, § 1.

68 For instance, Hamburger details an episode in which Virginia addressed the appearance of several unarmed Algerians during the 1780s. He discusses the episode as though it illustrates the American view on "executive power" without discussing whether the U.S. Constitution should be understood to implement the same view. *See* Hamburger, *supra* note 7, at 1925–29.

69 *Id.* at 1880 n.191 (discussing Clarke v. Morey, 10 Johns. 69, 71 (N.Y. 1813)); *id.* at 1895–96 (same); *id.* at 1896–97 (discussing "the *Lockington* cases"); *id.* at 1993 n.515 (discussing the *Williams* case).

70 *Id.* 1895–96.

aliens.[71] As Chancellor James Kent reasoned, the structure and terms of the Enemy Alien Act *presumed* that nondangerous enemy aliens were entitled to the protection of the law.[72] Hamburger does not wrestle with this plain reading of the statute. Moreover, he nowhere cites the leading case of the early republic to address the issue. In *Brown v. United States*, the Supreme Court held (over a strong dissent by Justice Story) that the President may not capture, and courts may not condemn, enemy property within the United States without express congressional authorization.[73]

While Hamburger's account of the principle of reciprocal allegiance is generally historically sound and provides a useful framework for a theory of due process, it ultimately fails to grapple with some of the most important evidence of the early-Republic scope of due process during war. This Article takes much of the reciprocal duty principle for granted but provides an alternative framework for analyzing rights during war by focusing on due process of law.

II. Two Conceptions of Due Process

This Article suggests an alternative framework for analyzing the requirements of the Due Process Clause by drawing a conceptual distinction between two historical requirements of due process: that deprivations of rights must follow the law, and that deprivations of rights are subject to traditional judicial procedures. This Part introduces that conceptual distinction. Subsequent Parts show how the distinction makes sense of the Anglo-American tradition of due process during war. All deprivations of rights during war were subject to law, and many, although not all, were likewise subject to judicial process.

A. Distinguishing the Rule of Law and Judicial Procedure Requirements of Chapter 29 of Magna Carta

American jurists in the early republic took their understanding of due process from the English Constitution. According to common lawyers such as Sir Edward Coke, "due process of law" was synonymous with the requirement of Chapter 29 of Magna Carta 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 and by the law of the land."[74] American

71 An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798). The contemporary version of this statute is 50 U.S.C. §§ 21–24 (2012).

72 *See Clarke*, 10 Johns. at 70–72 (Chancellor Kent wrote the majority opinion). *But see* Hutchinson v. Brock, 11 Mass. (10 Tyng) 119, 121–22 (1814) (arguing that enemy aliens were not presumptively licensed).

73 Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); *see infra* Section V.D.

74 The provision was Chapter 39 of the 1215 Magna Carta, and Chapter 29 in the 1225 and subsequent versions. *See* BAKER, *supra* note 63, at 2–3; COKE, *supra* note 39, at 50; *Magna Carta*, c. 29 (1215), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964); *see also* The Statute of the Twenty-Eighth Year of King Edward III 1354, 28 Edw. 3 c. 3 (Eng.), *reprinted in* 1 THE STATUTES OF THE REALM 345 (photo. reprint 1963)

constitutions used "law of the land" and "due process" clauses interchangeably and American jurists generally drew no distinction between the two requirements.[75]

Yet the due process/law of the land requirement of Chapter 29 and the Due Process Clause of the Fifth Amendment merged two conceptions of lawfulness. The first is a generic requirement that deprivations of rights must comply with law. For this reason, by the early seventeenth century, English common lawyers believed that the law of the land requirement of Chapter 29 was tantamount to a statutory guarantee of the rule of law. Accordingly, jurists could claim that any act of an official was subject to the law of the land. Such a claim *evoked* Chapter 29 without necessarily *invoking* it as a legal requirement.

The second concept bound up in due process/law of the land language owes more to the requirement of due process of law. This was the requirement that a deprivation follow certain traditional judicial procedures or be subject to review according to such procedures. The origins of this concept are the fourteenth-century due process statutes which referred at the time to particular writs for review by the courts at Westminster.[76] By the early seventeenth century, common lawyers understood these statutes to elaborate, clarify, or establish the requirement of Chapter 29 for certain kinds of cases.[77]

This "judicial process" requirement included the rule of law requirement but added institutional and procedural requirements that the deprivation be subject to review by a court according to the procedures appropriate to the case.[78] By the late seventeenth century, the Crown-in-Parliament could alter judicial procedures, or create a new court with new procedures, but the Crown, acting alone, could not abrogate the traditional judicial procedures without violating Chapter 29.[79]

The rule of law and judicial procedure conceptions of the law of the land requirement usually overlapped in practice. Criminal punishment was

(1810) (providing that "no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law"). Some historians have questioned the extent to which Coke overstated the equation of "due process" and "law of the land" requirements. *See* Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 272 (1975).

75 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1713–17, 1723–24, 1728–29 (2012).

76 *See* Jurow, *supra* note 74.

77 BAKER, *supra* note 63, at 46. As an example of this form of constitutional reasoning, see The Act for the Abolition of the Court of Star Chamber 1641, 17 Car. I c. 10, § 1 (Eng.), *reprinted in* SAMUEL RAWSON GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625–1660, at 179 (3d ed. 1906), which is a long litany of the acts of Parliament, beginning with "the Great Charter," expounding the rights of life, liberty, and property according to the law of the land and due process of law. *See id.*

78 *See* HALE'S PREROGATIVES, *supra* note 52, at 191 (defining "process of law" as the "legal coercion" which "precedes judgment" and contrasting it with "execution," the coercion which follows judgment).

79 *Id.* at 181–84.

the paradigmatic example of a deprivation of rights that was subject to the requirement. The government could punish someone only for a violation of a standing law (the rule of law requirement), and only after procedures applicable to the alleged crime (i.e., an indictment or presentment, jury trial, and so forth).

Though the rule of law and procedural understandings of the due process requirement usually overlap, they have given rise to different conceptual disputes through the centuries. In early modern England, for instance, the question was whether a certain law applicable to a case was part of the "law of the land" such that it might authorize a detention consistent with Chapter 29.[80] Once it is established that a deprivation is subject to the law of the land requirement, however, an entirely different question arises: What, exactly, is the judicial process required by Chapter 29 (and related provisions)? In the American context, yet another question arises: May the legislature abrogate traditional procedural requirements, as Parliament undoubtedly may?[81] Courts continue to struggle with these questions, especially in the context of war. As we shall see, English and American jurists often spoke of deprivations of rights during war being subject to the law of the land, even when they were not subject to judicial procedures.

B. Rereading Blackstone on the Law of the Land

The jurist who probably most influenced the American Framers' understanding of due process was Sir William Blackstone, so his views are worth exploring in some depth. Blackstone made the law of the land and its protection of life, liberty, and property central to the constitutional reflections that open his four-volume commentary on the common law.[82]

For Blackstone, life is a natural right that may be taken only according to law. For this he cites Chapter 29 and two of the due process statutes of Edward III.[83] This combines the rule of law and judicial procedure requirements of due process.

"[P]ersonal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's inclination may

80 *See* HALLIDAY, *supra* note 54, at 137–47 (discussing, among other things, the arguments of John Selden and others in "the Five Knights' case").

81 *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856); Hurtado v. California, 110 U.S. 516 (1884).

82 *See* 1 BLACKSTONE, *supra* note 53, at *122–45. In particular, see *id.* at *133–34 for a discussion of life, *id.* at *134 for a discussion of liberty, and *id.* at *138 for a discussion of property. Blackstone also cites an array of other statutes that likewise protect life, liberty, and property. *See id.* at *133–34 (citing 5 Edw. 3 c. 9 (1331) (Eng.)); *id.* at *135 (citing 3 Car. 1 (1627) (Eng.)); *id.* at *142 (first citing 2 Edw. 3 c. 8 (1328) (Eng.); then citing 11 Ric. 2 c. 10 (1387) (Eng.); then citing Statute the Second, 18 Edw. 3 c. 4 (1344) (Eng.); then citing The Bill of Rights, 1 W. & M. 2 c. 2 (1689) (Eng.); and then citing 16 Car. 1 c. 10 (1640) (Eng.)).

83 *Id.* at *133.

direct, without imprisonment or restraint, unless by due course of law."[84] Liberty is a natural right that may be taken only "with[ ] the explicit permission of the laws."[85] He again cites Chapter 29 and notes that "many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law."[86] Here we see both the rule of law and judicial process components of the law of the land requirement.

Among the laws Blackstone lists as enforcing the law of the land requirement are the "petition of right" and "the *habeas corpus* Act,"[87] both of which require judicial review of the lawfulness of detentions.[88] Only Parliament could suspend the Habeas Corpus Act, and only "for a short and limited time."[89]

> To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*.[90]

To comply with the law of the land requirements, therefore, deprivations of liberty had to be authorized in advance by a court according to traditional procedures, or subject to post-hoc habeas review. Both types of judicial procedures were mechanisms of enforcing the Chapter 29 law of the land requirement.

Property was somewhat different. While "[t]he original of private property is probably founded in nature," "certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society."[91] Once again, Blackstone cites Chapter 29 and related statutes for the proposition that the government may not deprive a person of property rights "against the great charter, and the law of the land."[92] Blackstone does not list specific judicial procedures for protecting property rights other than to explain the ways that limitations on the powers of eminent domain and taxation ensure that they are exercised consistent with the rule of law.[93]

Throughout his discussion of the ways that English law protects the rights to life, liberty, and property, Blackstone alludes to both the rule of law and the judicial procedure conceptions of the Chapter 29 law of the land

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84 *Id.* at *134.

85 *Id.*

86 *Id.* at *135 (internal citation omitted).

87 *Id.*

88 *Id.* at *135 (first citing Habeas Corpus Act 1640, 16 Car. 1 c. 10 (Eng.); and then citing Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.)).

89 *Id.* at *136.

90 *Id.* at *137.

91 *Id.* at *138.

92 *Id.* at *138–39.

93 *Id.* at *139–40.

requirement. With respect to the rule of law, what did Blackstone mean by the "law of the land"? Elsewhere in the *Commentaries* he suggests that the law of the land was synonymous with the laws of England, the laws that England had adopted as its own. Two sorts of laws were in force in England yet were not part of the law of the land. The first were laws that did not govern the whole of England: the special customs, usages, and laws of communities such as London.[94] The second were laws that originated outside of England but had not been "introduced and allowed" by English law.[95] The civil and canon law systems were the principal examples.[96] Those ancient systems had purchase in England only to the extent England had received them.[97] "[I]n all points in which the different systems [the law of England and the civil law] depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical."[98] As we shall see, England had adopted many aspects of the law of nations into its own municipal law, thus making it part of the law of the land. In particular, much of the law of war was part of the law of the land.

As for judicial procedures, which are required by the Chapter 29? The answer depends on the type of deprivation. Deprivation of life, liberty, or property as a punishment for the violation of a crime must follow the appropriate forms of indictment or presentment and jury trial. All deprivations of liberty must follow judicial process or be upon written warrant subject to habeas review.

To these Blackstone adds the right "of applying to the courts of justice for redress of injuries."[99] For this proposition, he leans principally on the *nulli vendemus* provision of Chapter 29 and is less straightforward that it is a necessary implication of the law of the land provision of that same Chapter. Yet it is clear from his discussion that the right of judicial redress of injuries against governmental officers arises from the same statutory prohibitions against deprivations contrary to the law of the land that he has been citing from the beginning of his discussion.[100] As we shall see, courts used many of the traditional judicial processes to ensure that deprivations of life, liberty, and property were according to the law of the land—even during war, and even, in some cases, for enemies.

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94 *Id.* at *75, *83; *see* HALLIDAY, *supra* note 54, at 189–92.

95 1 BLACKSTONE, *supra* note 53, at *14.

96 *Id.* (noting that foreign laws "have in some particular cases, and in some particular courts, been introduced and allowed by our laws"); *see also* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND, AND AN ANALYSIS OF THE CIVIL PART OF THE LAW 45–46 (Charles Runnington ed., 6th ed. 1820).

97 *See* HALLIDAY, *supra* note 54, at 145–46 (mentioning a 1616 lecture by Francis Ashley that the law of the land included "all forms and processes 'warranted by custom'").

98 1 BLACKSTONE, *supra* note 53, at *15.

99 *Id.* at *141.

100 *Id.* at *141–42 (first citing 2 Edw. 3 c. 8 (1328) (Eng.); then citing 11 Ric. 2 c. 10 (1387) (Eng.); and then citing The Bill of Rights, 1 W. & M. 2, c. 2 (1689) (Eng.)).

III. The English Background

Americans inherited not only the English notion of due process but also the English understanding of law during war. This Part therefore explains the English background to the American framework of due process during war.

By the late eighteenth century, English jurists maintained that the law of nations, including the law of war, was part of the law of the land because England had adopted it as its own law. The law of nations at once bound England against other nations and also shaped the rights of individuals under English municipal (or domestic) law. A state of war changed many of the rights of subjects, enemies, and neutrals, both under the law of nations and under municipal law. Yet deprivations of rights during war were still subject to the law of the land.

Many but not all of those deprivations were also subject to judicial procedural requirements. Courts entertained habeas petitions by enemies and prisoners of war held within the Crown's domains. Admiralty courts applied a combination of the law of nations and municipal law to adjudicate prize suits. Crown courts supervised the application of military law by courts martial and awarded damages against military officers who exceeded their lawful authority under a variety of circumstances. Wartime deprivations that were beyond judicial oversight included deprivations on the battlefield and according to lawful suspensions of habeas corpus or declarations of martial law. Americans largely adopted this framework, adapting it to their government's constitutional separation of powers and judicial structure.

A. The Law of War as the Law of the Land

1. The Law of Nations

In the late eighteenth century, the law of nations consisted of an intricate network of natural law, treaties, and customs that governed the relationships among nations and between nations and individuals. There were a number of influential learned treatises on the law of nations,[101] but Americans relied heavily on the work of Emmerich de Vattel.[102]

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101 *See, e.g.*, 2 Alberico Gentili, De Iure Belli Libri Tres (John C. Rolfe trans., London, Humphrey Milford 1933) (1612); 2 Hugo Grotius, De Jure Belli Ac Pacis Libri Tres (Francis W. Kelsey trans., London, Humphrey Milford 1925) (1625); Thomas Hobbes, Leviathan (Richard Tuck ed., Cambridge Univ. Press 1996) (1651); Samuel Pufendorf, *De Jure Naturae et Gentium (On the Law of Nature and of Nations), in* The Political Writings of Samuel Pufendorf 95 (Craig L. Carr ed., Michael J. Seidler trans., Oxford Univ. Press 1994) (1744); Francisco de Vitoria, *On the American Indians (De Indis), in* Political Writings 231 (Anthony Pagden & Jeremy Lawrance eds., 1991); Francisco de Vitoria, *On the Law of War*, *in* Political Writings, *supra*, at 293.

102 Vattel, *supra* note 25; *see* Witt, *supra* note 31, at 16 (upon publication, Vattel's treatise "quickly became the most widely read authority in Europe and its colonies on questions relating to a body of rules known as the law of nations"); *see also* Peter Onuf & Nicholas Onuf, Federal Union, Modern World: The Law of Nations in an Age of

The law of nations was Janus-faced. While it governed a nation's external relations with others,[103] it also affected the nation's internal, or "municipal," law. By the late eighteenth century, the foundational principle of the law of nations was that sovereign nations are moral persons in a state of nature vis-à-vis one another.[104] Externally, nations were equal and complete in themselves; there was no independent human institution that could settle their disputes.[105] In this respect, the law of nations was not "law" in the sense of settled rules of decision applied by courts.[106] Nations settled disputes between themselves with diplomacy, economic sanctions, and force.

But the law of nations had another, inward-looking, face. Nations implemented some of their rights and duties with respect to other nations through their own law,[107] what jurists described as "municipal" law.[108] Such laws were binding on individuals and enforceable however the nation decided to enforce them, often through its courts.[109]

The law of retaliation illustrates this distinction.[110] One way an aggrieved nation could enforce its rights against another was to authorize one of its subjects to capture the goods of the other nation's subjects.[111] As Vattel put it, "[i]t is only between state and state that all the property of the individuals is considered as belonging to the nation."[112] Taking the foreigner's private property, therefore, as recompense for some wrongdoing by his sovereign, is justified.

REVOLUTIONS 1776–1814, at 11 (1993) ("Translated immediately into English, [Vattel] was unrivaled among such treatises in its influence on the American founders."); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 67 (1999) (explaining that in American judicial decisions, "in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel").

103 Vattel used "nation" and "sovereign state" interchangeably to refer to a "societ[y] of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength." VATTEL, *supra* note 25, preliminaries, § 1, at 67.

104 *See* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 9 (1999); VATTEL, *supra* note 25, preliminaries, § 6, at 68–69; *see also* 1 BLACKSTONE, *supra* note 53, at *43.

105 VATTEL, *supra* note 25, preliminaries, §§ 18–20, at 75.

106 This is the "voluntary" law of nations discussed *infra* in notes 126, 313.

107 See infra Part III (discussing the reception of the law of nations into the English law of the land).

108 1 BLACKSTONE, *supra* note 53, at *44 ("[M]unicipal [law is] the rule by which particular districts, communities, or nations, are governed . . . .").

109 *See* 4 BLACKSTONE, *supra* note 53, at *66–73 (discussing offenses against the law of nations); 2 RICHARD WOODDESON, *Lecture XXXIV*, *in* A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND *421, *421 (Dublin, E. Lynch et al. 1792) (1777) (discussing the rules governing captures at sea).

110 VATTEL, *supra* note 25, bk. II, § 339, at 458–59.

111 *Id.* bk. II, § 342, at 460, § 344, at 461 (noting that "the wealth of the citizens" is an appropriate object of reprisal).

112 *Id.* bk. II, § 346, at 462.

From an internal perspective, however, the law of nations, under its own terms, required both the reprising nation and the original wrongdoer to implement their rights and responsibilities through municipal law. To prevent disputes from spiraling out of control, only a sovereign could authorize a reprisal against another.[113] Private parties could not take matters into their own hands. Which institution had the authority to order, implement, and adjudicate a retaliation on behalf of a sovereign, and the procedures the sovereign was obligated to follow, were a matter of municipal law that differed according to a nation's constitution.[114] Municipal law therefore specified which municipal institution had authority to authorize a capture, which one had authority to condemn it, who was entitled to the proceeds, how they were to be divided, etc.[115] Such rules combined the law of nations, constitutional law, maritime law, and, in some cases, criminal law (for example, an unauthorized capture could be prosecuted as piracy).[116] A nation could choose to indemnify its subject whose property was the object of a reprisal, likewise according to municipal law.[117]

By the late eighteenth century, English and American common law jurists agreed that the bulk of the customary law of nations formed part of the common law, subject to change by legislation or treaty.

Blackstone explained that 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."[118] In a sense, the law of nations was even more fundamental than the law of England:

> [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 declara-

113 *Id.*

114 WHEATON, *supra* note 62, at 40 (citing VATTEL, *supra* note 25, bk. III, § 4, at 470).

115 *See, e.g.*, R.G. Marsden, *Introduction to* 2 DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA, at xii (R.G. Marsden ed., 1916); *see also* WHEATON, *supra* note 62, at 42 (discussing U.S. law).

116 2 WOODDESON, *supra* note 109, at *421 (discussing the law of captures at sea).

117 VATTEL, *supra* note 25, bk. II, § 345, at 461.

118 4 BLACKSTONE, *supra* note 53, at *67; *see also* Triquet v. Bath (1764) 97 Eng. Rep. 936, 938; 3 Burr. 1478, 1482 (quoting Barbuit's Case (1736) 25 Eng. Rep. 777, 778 n.1; 4 Burr. 2016) ("That the law of nations, in its full extent was part of the law of England."); 2 WOODDESON, *supra* note 109, at *421 ("[T]he law of nations is part of the laws of England."). While Blackstone's assertion that England had "adopted" the law of nations "in its full extent" seems absolute enough, elsewhere he displays a nuanced view of how the law of nations entered the law of the land, with the implication that not all of the law of nations had always been part of the law of the land—only the part that England had adopted. *See* 1 BLACKSTONE, *supra* note 53, at *256–57 (asserting that the doctrine of diplomatic immunity, first guaranteed in England by statute, was "now held to be part of the law of the land, and constantly allowed in the courts of [the] common law"); 4 BLACKSTONE, *supra* note 53, at *273 (explaining how the law merchant entered the law of the land through the common law).

> tory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilized world.[119]

Blackstone suggested that the law of nations should be seen as prior to the law of England in two ways. First, *chronologically*: by enacting laws enforcing the law of nations, Parliament merely "declar[ed] . . . the old fundamental constitutions of the kingdom."[120] Second, and perhaps more importantly, the law of nations was also prior to the law of England *logically*. This is why Blackstone asserted the myth that the law of nations was chronologically prior to the law of England—without the law of nations being part of the law of the land, the nation itself would "cease to be a part of the civilized world."[121]

How did the law of nations enter the law of the land? It depended on the law and the time. Treaties, of course, were part of the law of the land. Some rules, such as the principle of diplomatic immunity, entered English law through statute.[122] The law merchant, by contrast, entered at first by judicial ratification of custom.[123] By the early nineteenth century, however, jurists like Edward Christian, one of Blackstone's early editors, believed that the raw assertion that the law merchant was part of "the general law of the land" "has frequently led merchants to suppose, that all their new fashions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by the courts."[124] Accordingly, consistent with the positivism of the day, he suggested that any changes to the law should be by statute.[125]

Despite Blackstone's assertion that the law of nations was part of the law of England, scholars dispute the extent to which this was so.[126] These dis-

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119 4 BLACKSTONE, *supra* note 53, at *67.

120 *Id.*

121 *Id.*

122 Diplomatic Privileges Act 1708, 7 Ann. c. 12 (Gr. Brit.); 1 BLACKSTONE, *supra* note 53, at *256; *see, e.g.*, E.R. Adair, *The Law of Nations and the Common Law of England: A Study of 7 Anne Cap. 12*, 2 CAMBRIDGE HIST. J. 290, 294–95 (1928).

123 *See* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 7 (2017) (citing 4 BLACKSTONE, *supra* note 53, at *273); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 20–21 (2009).

124 1 WILLIAM BLACKSTONE, COMMENTARIES 75 n.8 (Edward Christian ed., 17th ed. London, Richard Taylor 1830).

125 *See id.*

126 *See, e.g.*, BELLIA & CLARK, *supra* note 123, at 7 (citing 4 BLACKSTONE, *supra* note 53, at *273) (discussing Blackstone's argument that the *lex mercatoria* originally entered the law of the land through the courts). American scholars dispute the degree to which, and the way in which, American law adopted the law of nations. *See, e.g.*, Bellia & Clark, *supra* note 123, at 14, 20–22 (arguing that Blackstone believed customary international law was subject to statute); William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1568 (2018) ("In describing the law of nations, however, Blackstone marks no difference in the obligatory force of the rules in each branch."); *id.* at 1569 (arguing that Americans followed Vattel's distinction between the voluntary law of nations (which was obligatory) and the customary law of nations (which was not)).

putes are largely about the extent to which a nation was understood, or ought to be understood, to enjoy the sovereignty to determine its own law.[127] At a minimum, it seems clear that the law of nations was part of the law of the land to the extent England had affirmatively adopted it as such by treaty, statute, or judicial decision. This was the case for many principles and rules of the law of war.

2. The Law of War

To mitigate the suffering of warfare, western jurists and statesmen developed a subset of the law of nations known as the law of war. This body of law consisted of principles that we would now call "just war theory"[128] and articulated those principles with specific rules.[129] As with the law of nations more generally, jurists and statesmen disputed the terms of those rules depending on their nation's geopolitical strengths and weaknesses.[130]

One principle was clear and uniformly observed: under the law of nations, war flipped a switch. A belligerent nation's rights and duties changed with respect to other nations, whether enemies or neutrals. Conduct that would have been unlawful during a time of peace was not only allowed but sometimes mandatory during war.[131] For instance, during peace, a nation had a right to trade with other nations. A U.S. public warship that prevented a French merchant from entering a Spanish port would make the United States liable both to Spain and to France. During a publicly declared war between the United States and Spain, however, France and its merchants, though neutral, would be obligated to respect a U.S. blockade of a Spanish port.[132]

War not only changed the rights of nations, it also changed the rights and duties of a belligerent nation with respect to the subjects of enemy and neutral nations. The subjects of an enemy nation became enemy aliens. The law of nations permitted a nation to deprive enemy aliens of rights without

127 *See, e.g.*, Amanda Perreau-Saussine, *A Case Study on Jurisprudence as a Source of International Law: Oppenheim's Influence*, *in* TIME, HISTORY AND INTERNATIONAL LAW 91 (Matthew Craven et al. eds., 2007) (focusing on the extent to which customary international law is inherently a part of British law).

128 *See generally* 2 GENTILI, *supra* note 101; 2 GROTIUS, *supra* note 101; MICHAEL WALZER, JUST AND UNJUST WARS (5th ed. 2015).

129 *See generally* 2 GROTIUS, *supra* note 101; 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 45–148 (New York, O. Halsted 1826) (lectures III–VIII; on law of nations in wartime); VATTEL, *supra* note 25, bk. III, §§ 1–296, at 469–649 (covering "Book III: Of War"); WHEATON, *supra* note 62.

130 For instance, at the turn of the nineteenth century, one of the key disagreements was whether a belligerent could capture and condemn enemy cargo shipped in a neutral vessel. *See* WHEATON, *supra* note 62, app. at 317–19.

131 *See* WITT, *supra* note 31, at 24–26 (discussing General Washington's insistence that the law of war required hanging British Major John André for espionage over Alexander Hamilton's calls for clemency).

132 *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635 (1863).

the ordinary legal protections and judicial procedures.[133] To a lesser extent, the law of war also authorized a belligerent nation to deprive neutral subjects of property without ordinary legal procedures.[134] In the example above, the French vessel and cargo, though the property of a neutral subject, would be liable to capture by a U.S. public warship and to condemnation by a U.S. federal court. Such a deprivation of property was perfectly consistent with the law of war, though it would violate the law of nations outside of war.

The law of war did not eliminate the rights of enemies and neutrals—it changed them, or made them subject to change, according to municipal law.[135] A belligerent state had the right to take the life of an enemy soldier on a battlefield.[136] When the enemy had surrendered, however, the belligerent state had no right to take the soldier's life or property.[137] The state could then deprive the soldier of liberty by making him a prisoner of war.[138] The rights of enemy soldiers and sailors were of course the most affected by the law of war. Enemy residents and neutrals enjoyed more robust rights, though war reduced those too.[139] For instance, Vattel maintained that a belligerent nation had a right to deprive an enemy of all property necessary for "the means of resistance."[140]

Like the law of nations, the law of war was dual faced, with external and internal applications. Externally, unlawful deprivations of the rights of enemy or neutral soldiers and sailors were violations of the rights of those soldiers' and sailors' sovereign. The aggrieved sovereign thus had a right to respond in kind with reprisals against the offending sovereign's soldiers and sailors.[141] A violation of the law of war could prompt a vicious cycle of reprisals that would increase, rather than mitigate, the suffering of war.[142] Given the stakes, the law of war carefully spelled out the what, when, who, where, and how of killings, detentions, and property takings during war because the specifics determined whether a deprivation authorized retaliation.[143] Inter-

133 VATTEL, *supra* note 25, bk. III, §§ 136–73, at 541–75.

134 *Id.* bk. III, §§ 111–17, at 528–33.

135 Brown v. United States, 12 U.S. (8 Cranch) 110, 125 (1814) ("It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy . . . .").

136 VATTEL, *supra* note 25, bk. III, § 139, at 543; *see id.* bk. III, § 155, at 557–62 (explaining enemy may not be lawfully assassinated or poisoned, but assassination is distinguished from "surprises").

137 *Id.* bk. III, § 140, at 543–44, § 149, at 552 (stating prisoners of war are generally not to be put to death).

138 *Id.* bk. III, § 148, at 551–52.

139 *See id.* bk. III, § 147, at 550–51 ("At present war is carried on by regular troops: the people, the peasants, the citizens, take no part in it, and generally have nothing to fear from the sword of the enemy.").

140 *Id.* bk. III, § 160, at 566–67.

141 *Id.* bk. III, § 142, at 545–46.

142 *See, e.g.*, WITT, *supra* note 31, at 13–48, 141–69.

143 *Id.* at 18 ("Vattel hoped to bring an end to the otherwise endless and destructive contests over which of the belligerents—if any—fought on the side of the angels. . . . Instead, Vattel's approach generated a dizzying array of rules."); *see also* VATTEL, *supra* note

nally, each nation implemented its authority under the law of nations to deprive enemies and neutrals of their individual rights according to its own municipal law. In many cases, courts reviewed deprivations of rights for compliance with the law of nations as implemented by municipal law. In this way, the law of war was part of the law of the land.[144]

The most common implementation of this conceptual framework in the late eighteenth century was the law and practice of prize courts.[145] Under the law of war, a belligerent state could capture an enemy (and in some cases a neutral) vessel on the high seas and confiscate the vessel and cargo.[146] The law of war also stipulated that captures had to be authorized by the belligerent state and confiscation had to follow condemnation proceedings according to the rules of admiralty before an authorized prize court.[147] The law of war did not, however, determine which of the belligerent state's governmental institutions had the authority to authorize a capture,[148] nor did it determine which of the sovereign's subjects had such authority.[149] Those were questions of municipal law that implicated the belligerent sovereign's rights of war.[150] Likewise, the law of war did not determine which municipal court had jurisdiction to condemn prizes,[151] the specific procedures that that court would use, or the method of appeal.[152] Those were likewise questions of municipal law.

It was commonplace that prize courts decided cases according to the law of nations. They applied (and developed) a variety of rules articulated by

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25, bk. III, §§ 136–173, at 541–75 (discussing the various rules for treatment of the enemy in wartime).

144 *See* WHEATON, *supra* note 62, at 209 ("In a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, the two nations, and all their citizens or subjects, are enemies of each other. The consequence of this state of hostility is, that all intercourse and communication between them is unlawful. This principle of public law forms a part of the municipal jurisprudence of every country.").

145 Probably the most influential statement of the law of prize for American jurists was a memorandum drafted on January 18, 1753 by four of the leading English jurists of the day, including Dudley Ryder and William Murray (who later became Lord Mansfield). *See id.* at app. 317–340.

146 WHEATON, *supra* note 62, at 41.

147 *Id.* app. at 319.

148 *See* WHEATON, *supra* note 62, at 40 ("[A]s the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited according to the national will, it is in the municipal constitution of each particular state that we are to seek the power of making war.").

149 *See id.* at 41.

150 *Id.* at 280 ("Independent of such a municipal prohibition, there is nothing to limit the right of capture, or the jurisdiction of courts of prize, to property found on the high seas or water borne.").

151 *Id.* at 273; *id.* app. at 319 (referencing the Ryder and Murray Memorandum).

152 *Id.* at 320 ("[T]here is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal . . . .").

treaty, treatise writers, and foreign prize courts. It was in this sense that the American international law scholar and jurist Henry Wheaton could write that "the prize court is a court of the law of nations" that "belongs to other nations as well as to its own," and "foreigners have a right to demand from it . . . the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from the municipal jurisprudence."[153] But a prize court could not determine the lawfulness of a capture, or adjudicate a prize, without likewise ensuring that the entire proceedings, from commission to capture to condemnation to appeal, accorded with the municipal law that implemented the nation's right to take prizes.[154] The two inquiries were interwoven.

English jurists recognized that the law governing prize cases was "part of the laws of England."[155] As discussed above, Blackstone maintained that the law of nations, insofar as English courts were bound to apply it, was part of the "law of the land."[156] Blackstone's successor at Oxford, Richard Wooddeson, gave more attention to the relationship of English law and the law of nations. In a 1777 Vinerian Lecture on the law "of captures at sea," Wooddeson began by noting that "[t]he law of nations is adopted and appealed to by civilized states, as the criterion for adjusting all controversies proper to be so decided."[157]

> In such case[s] neither the customs of the British admiralty, nor British acts of parliament, can, *as such*, be of sufficient authority and avail. But the law of nations is part of the laws of England. And the following observations will be built, not only on the credit of civilians and writers on general jurisprudence, but also on books familiar to the English lawyer, and the decisions of municipal courts of justice.[158]

The reader familiar with Blackstone understands that the reason the law of nations was part of the laws of England is because, and insofar as, England had "adopted" it. As Wooddeson stated elsewhere:

> [T]he Law of Nations is [a] constituent part of British jurisprudence, and has always been most liberally adopted and attended to by our municipal tribunals, in matters where that rule of decision was proper to be resorted to, as questions respecting the privileges of [a]mbassadors, and the property in maritime captures and prizes.[159]

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153 *Id.* at 226.

154 2 WOODDESON, *supra* note 109, at *421; *see* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 24 (1801), *superseded by* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).

155 *Bas*, 4 U.S. (4 Dall.) at 43.

156 4 BLACKSTONE, *supra* note 53, at *67.

157 2 WOODDESON, *supra* note 109, at *421.

158 *Id.* (emphasis added).

159 RICHARD WOODDESON, ELEMENTS OF JURISPRUDENCE TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAWS OF ENGLAND 158 (Dublin, H. Fitzpatrick 1792) (1783).

There were practical reasons the law of prize had to be part of municipal law. The line between piracy and the capture of a prize was crucial; the same conduct that amounted to a crime was an act of war when sponsored by a sovereign. But the principles under the law of nations that governed the distinction between piracy and prize were vague. Each sovereign therefore defined piracy, and thereby circumscribed the terms of lawful prize through its own municipal law. For instance, Vattel held that a subject of a belligerent sovereign who captured an enemy merchant vessel without authorization should be punished as a pirate.[160] Wooddeson noted that English law and practice were different.[161] "[I]n our municipal law books it is generally and indiscriminately asserted, that piracy cannot be committed by the subjects of states at enmity."[162] Therefore "the law of nations is in this country understood to tolerate at least the seizure and capture of enemy's ships and goods in time of open hostilities, without the sanction of a *special* commission."[163] England neither punished noncommissioned privateers nor encouraged them; a noncommissioned privateer would not share in the proceeds of the sale of the condemned vessel and goods.[164] Municipal law defined the edges of the law of nations, and sometimes departed strategically from it.

Writing after the War of 1812, Henry Wheaton came to much the same conclusion as Wooddeson, that the law of war was inextricably related to municipal law for purposes of authorizing the deprivation of enemy rights. After stating that only the sovereign power of a state has "authority to make war,"[165] Wheaton cited Vattel for the proposition that "as the different rights which constitute this power, originally resident in the body of the nation, may be separated or limited according to the national will, it is in the municipal constitution of each particular state that we are to seek the power of making war."[166] "Thus," he concluded, "in the United States the Congress are invested with this power."[167]

Wheaton emphasized that "[t]he conduct of public vessels of war, or of private armed vessels commissioned as letters of marque, is regulated by instructions from the sovereign, or supreme executive power of the state."[168] He explained that though the law of war gives belligerent sovereigns the right to capture enemy property, that right is "entirely derived from the law: It is not an absolute vested right which cannot be taken away or modified by law: It is a limited right, which is subject to all the restraints that the legislature imposes, and is to be exercised in the manner its wisdom prescribes."[169]

160 2 WOODDESON, *supra* note 109, at *433; *see* VATTEL, *supra* note 25, bk. III, § 174, at 575–76, § 223, at 612, § 226, at 612–13.

161 *See* 2 WOODDESON, *supra* note 109, at *432.

162 *Id.*

163 *Id.*

164 *See id.* at 433.

165 WHEATON, *supra* note 62, at 40.

166 *Id.* (citing VATTEL, *supra* note 25, bk. III, § 4, at 470).

167 *Id.* (citing U.S. CONST. art. I, § 8, cl. 10).

168 *Id.* at 47–48; *see id.* at 41.

169 *Id.* at 49.

Wheaton noted that privateers who overstep their lawful bounds should be held liable and, after surveying the various ways that France, England, and the United States had limited the liability of privateers, maintained that such limits "must depend upon the positive provisions of municipal law."[170] Throughout his treatise, Wheaton referred to the cases in which the U.S. Supreme Court decided the lawfulness of U.S. captures and condemnations of prize by reference not only to the law of nations but also to U.S. municipal law.[171]

In short, Wooddeson and Wheaton, writing on either side of the American War of Independence and the War of 1812, both articulate the internal-facing aspect of the law of war. Both explain that belligerent rights were part of, and subject to, municipal law. The law of war, insofar as it was incorporated into municipal law, was part of the law of the land.

B. The Two Faces of "Martial Law"

Another part of English law that bore on the scope of individual rights during war was martial law. Though Matthew Hale and William Blackstone derided martial law as antithetical to the rule of law, by the late eighteenth century a number of jurists had responded to these criticisms with forceful accounts of martial law as part of the law of the land.

The common lawyers' criticism of martial law appears to stem from a misunderstanding of the fundamental difference between the two bodies of law that traveled under the term "martial law." Both originated in the medieval court martial,[172] but by the late eighteenth century they were on different constitutional footing. The first was the government of a military dictator over civilians during crisis. The second was the law governing members of the navy and army. By the late eighteenth century, both were in fact subject to the law of the land, though in different ways.

Blackstone, citing Hale, referred to martial law as "in truth and reality no law, but something indulged rather than allowed as a law."[173] Blackstone admitted that military law was authorized by statute, but he emphasized that the annually passed Mutiny Act gave the Crown wide latitude to specify military offenses and punishments for the army, which he called "an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb!"[174]

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170 *Id.* at 44.

171 *See id.* at 23–29 (discussing Brown v. United States, 12 U.S. (8 Cranch) 110, 125 (1814)); *id.* at 48 (discussing The Mary, 12 U.S. (8 Cranch) 388 (1814), and The Frances, 12 U.S. (8 Cranch) 358 (1814)); *id.* at 50 (discussing The Thomas Gibbons, 12 U.S. (8 Cranch) 421 (1814)).

172 For an account of the evolution of martial law through the seventeenth century, see JOHN M. COLLINS, MARTIAL LAW AND ENGLISH LAWS, c.1500–c.1700 (2016).

173 1 BLACKSTONE, *supra* note 53, at *413 (paraphrasing HALE'S PREROGATIVES, *supra* note 52, at 42); *see also* S. PAYNE ADYE, A TREATISE ON COURTS MARTIAL 50 (8th ed. London, Vernor et al. 1810); 4 BLACKSTONE, *supra* note 53 at *437.

174 1 BLACKSTONE, *supra* note 53, at *415.

Subsequent English and American commentators took issue with this characterization of military law, emphasizing that the law governing the military was based on statute.[175] The Scottish jurist Alexander Tytler bemoaned Blackstone's ill-informed account of modern military law, taking it upon himself "to correct this palpable misrepresentation, and to exhibit the Military Law as it truly is, a part of the laws of the land, enacted by the same authority, enforced by the same power, and resting on the same foundation of justice, good policy, and humanity."[176] By a series of enactments, Parliament had provided "express rules, articles, and orders" that specified "almost every possible offence . . . and the punishment annexed."[177] Moreover, the annual Mutiny Act, which authorized the Crown to publish articles of war for the regulation of the army, spelled out those offenses punishable by death.[178] Some institutional aspects of military justice, such as the use of a court of inquiry for bringing charges, were the product of "precedents and customs long established."[179]

Importantly, the common-law courts ensured that courts martial acted within the discretion afforded them by law. Isaac Maltby, an American writing in 1813, summarized the relationship between the common-law courts and courts martial like this: "The military is subject to the civil power; and all those who act in a military capacity, are individually responsible before the civil courts, for any illegal act."[180] As individuals, "members of [a] court martial are responsible, in an action of damages" and as a court "their proceedings are cognizable by a *civil court* . . . [b]y proceedings in the nature of a review[,] and by an application for a prohibition."[181] An action for damages lay against a member of a court martial for illegal punishment or illegal proceedings of the court.[182] It is unsurprising, therefore, that Maltby would begin the first chapter of his treatise by describing a court martial as "a legally organized body, to investigate, deliberate, decide, adjudge, and award sentence, concerning offences committed against military law" that "is regulated

175 *See* Adye, *supra* note 173, at 12–13; Isaac Maltby, A Treatise on Courts Martial and Military Law (Boston, Thomas B. Wait & Co. 1813); John M'Arthur, A Treatise of The Principles and Practice of Naval Courts-Martial 21–22 (London, Whieldon & Butterworth 1792); Alexander Fraser Tytler, An Essay on Military Law, and the Practice of Courts Martial, at vi–vii (2d ed. London, T. Egerton 1806). *See generally* Richard Joseph Sulivan, Thoughts on Martial Law (2d ed. London, T. Becket 1784) (on the mechanics of a court martial).

176 Tytler, *supra* note 175, at vii. Blackstone's earliest editors made the same point. *See* 1 Blackstone, *supra* note 53, at *413 n.5.

177 M'Arthur, *supra* note 175, at 21.

178 *Id.* at 21–22.

179 *Id.* at 44.

180 Maltby, *supra* note 175, at 149.

181 *Id.* at 150.

182 *Id.*; *see id.* at 151 ("Many instances of such prosecutions are referred to, by writers on military law."); M'Arthur, *supra* note 175, at 22.

and governed in its proceedings and deliberations, in its judgment and sentence, '*by the laws of the land*.'"[183]

Charles I had claimed the power to impose martial law upon ordinary subjects during time of peace, which Parliament declared to be unlawful in the Petition of Right.[184] Upon the Glorious Revolution, the Declaration of Rights forbade the Crown from suspending laws and from suspending habeas corpus without Parliament's approval.[185] Commentators recognized that these powers, authorized solely by Parliament, were tied to the power to institute "Martial law, and the mode of summary trial by Courts-Martial" "in times of actual rebellion" "for a limited time, either over a part or the whole of the kingdom where such rebellion may exist."[186] The military could regulate, prosecute, and punish civilians only pursuant to legislative authority. Tytler notes that in 1798 Parliament authorized punishment of Irish rebels by martial law and courts martial notwithstanding that the common-law courts (or at least some of them) were still open.[187] Martial law was indeed a departure from the ordinary law of the land, but it was, somewhat ironically, permissible only by law.[188]

Military law was part of the law of the land. Courts martial proceeded according to established judicial procedures and were subject to review by the courts at Westminster. In the parlance of this Article, deprivations of rights by courts martial were subject to the rule of law and to the judicial procedure requirements of due process.[189] Martial law, by contrast, was an alternative to the law of the land. Though martial law was lawful only when authorized by the legislature, it subjected civilians and members of the armed forces to governance without recourse to the common-law courts. Insofar as it was authorized by law, it was subject to the law of the land, but it was not subject to judicial procedures.

C. The Judicial Procedures for Enforcing the Law of the Land During War

We are now in a position to summarize how deprivations of rights during war were subject to the law of the land under English law. This formed the backdrop for the American understanding of due process during war.

A state of war changed the rights and duties not only of belligerent sovereigns under the law of nations; it also changed the rights and duties of those sovereigns' subjects, enemies, and neutrals according to the nation's municipal law. England had largely incorporated the law of war into the law

183 MALTBY, *supra* note 175, at 1.

184 *See* 3 Car. 1 (1627) (Eng.); 31 Car. 2, c.1 (1679) (Eng.); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (6th ed. London, Henry Butterworth 1820) (1739).

185 *See* TYTLER, *supra* note 175, at 367–68.

186 *Id.* at 368.

187 *Id.* at 154.

188 *See id.* at 376–78 (template for statute authorizing martial law); *id.* at 402–10 (reprinting an act passed in 1798 authorizing martial law over Ireland).

189 *See* MALTBY, *supra* note 175, at 1 (describing military law as part of the "laws of the land").

of the land. Virtually all deprivations of rights during war were thus subject to the law of the land in the sense of being subject to the rule of law.

Some deprivations of rights during war, though subject to law, were not subject to judicial procedures. Military conduct on the battlefield was not subject to judicial review, though it was subject to the law of nations, enforceable through political mechanisms. As discussed below, POWs were not entitled to habeas, but those detained as POWs within the jurisdiction of the courts of Westminster could use habeas to challenge their status. As discussed above, deprivations pursuant to a statutory authorization of military dictatorship were not subject to judicial procedures.

Yet many deprivations of rights during war were subject to the judicial procedure requirement of Chapter 29 and its statutory and common-law offspring. English courts used a variety of judicial procedures to enforce the law of the land during war. Among them were habeas corpus, civil-law procedure in prize cases, and suits against officers.

1. Habeas Corpus

By the late eighteenth century, the courts at Westminster issued writs of habeas corpus to review the lawfulness of detention. The writ was available at common law and by statute (the Habeas Corpus Act). [190] Parliament could, and did, suspend the statutory writ during periods of insurrection, rebellion, and war by authorizing detentions notwithstanding laws to the contrary.[191] The Crown could not unilaterally suspend the writ, even during war. And even during war, the courts at Westminster continued to issue the writ at common law.[192]

Absent a parliamentary suspension of the writ, habeas did not change during war. Subjects and friendly aliens were certainly entitled to the writ during war. Scholars dispute whether peaceful resident enemy aliens were entitled to the writ. Philip Hamburger has argued that the presumption was that a resident enemy alien was outside the protection of the law. Only an express royal license would have entitled a resident enemy alien to the writ.[193]

Paul Halliday, who has performed the most extensive research to date on habeas corpus from 1500 to 1800, argues that there is little to no evidence that alienage of any kind made any difference to the writ's availability.[194] According to Halliday, absent suspension (or martial law), the writ was available to anyone detained by the King's officers.[195] As a prerogative writ, Crown courts issued it to supervise the King's agents. This rationale would have applied with equal force to detentions of resident enemy aliens. As we shall

190 HALLIDAY, *supra* note 54, at 240. The Habeas Corpus Act applied only to imprisonment for felony or treason. *Id.* at 242.

191 *Id.* at 247–56.

192 *Id.* at 249–50.

193 *See supra* subsection I.B.2.

194 HALLIDAY, *supra* note 54, at 206.

195 *Id.*

see, American jurists during the early republic appeared to believe that enemy aliens were entitled to habeas corpus to challenge the lawfulness of their detention (though they could be lawfully detained or removed according to statute).[196]

The only category of people who were not entitled to habeas corpus were POWs. Those held as POWs could, however, use the writ to show that they were not really prisoners of war, and therefore entitled to release.[197] Upon a petitioner's affidavit claiming miscategorization, the court would require the government to provide a reason for the detention. So even those held as prisoners of war were entitled to some judicial procedures to challenge their status even though POWs were not entitled to the writ.

2. Prize Cases

As discussed above, prize cases were one of the most common and thorough examples of the provision of not only law but judicial process for alien enemies and neutrals during war. A state of war authorized a sovereign to capture enemy vessels and cargo on the high seas, to capture neutral vessels and cargo that violated the laws of neutrality, and to condemn them according to the law of nations. Each nation had its own admiralty court that proceeded according to civil law procedures and applied settled rules of capture under the law of nations. England's admiralty courts were separate from the common-law courts at Westminster and they had exclusive jurisdiction over prize cases. Yet according to English jurists, the law those courts applied was the law of the land. Moreover, like all other civilized nations, England had unique rules of capture. The courts would evaluate the lawfulness of captures, condemn enemy property, and divide prize awards according to the rules of English admiralty law, rules that may differ from the rules of other nations. Captures and condemnations without lawful authority were unlawful, had no effect on title to the property, and were subject to suit for maritime trespass. In other words, deprivations of the property rights of unarmed enemies and neutrals on the high seas were subject not only to the rule of law but also to an elaborate and well-known set of judicial procedures.[198]

3. Suits Against Officers

As a general matter, royal officials were subject to the same common-law rules of trespass, false imprisonment, and implied contract as any other person.[199] Officials sued for trespass could defend themselves by showing that the deprivation of rights was authorized by law. Without such a special

196 *See infra* Section V.C.

197 HALLIDAY, *supra* note 54, at 168–75.

198 *See supra* subsection III.A.2.

199 *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114–15 (1982).

defense, however, the official was held liable for damages.[200] As we have seen, this rule extended to military officers and courts martial.[201] It also extended to governors outside the realm who derived their authority from the Crown.[202] Many common lawyers believed these suits enforced Chapter 29 and its progeny.[203]

Though I am not aware of cases arising during war, the right to sue officers apparently did not automatically disappear during war. In some cases, resident enemy aliens were held to lose the right to sue (anyone) during war unless the Crown had expressly granted them license to do so. By the end of the eighteenth century, the common-law courts frowned on defendants claiming the enemy alien disability as a bar to suit.[204] Yet there was no common-law bar on one who had been subject to the enemy alien disability suing an officer after war for the defendant's conduct during war. Just so, the courts provided process of law as a deterrent to unlawful deprivations of rights during war.[205]

When Parliament authorized detentions notwithstanding the Habeas Corpus Act, it sometimes also indemnified officers (and sometimes laymen).[206] Both provisions—the authorization of detention and the elimination of personal liability—would have been necessary to eliminate the full scope of judicial procedure rights under the law of the land. By implication, where Parliament did not indemnify officers during war, they would be personally liable for unlawful deprivations of rights. As we shall see, U.S. courts likewise held military officers liable for unlawful deprivations of rights arising on the high seas and in foreign territory during periods of quasi war and declared war.[207]

IV. The U.S. Constitution

Americans inherited the English understanding of the relationship between the law of war, martial law, and the law of the land. They also inherited the English notion of the law of the land requirement of Chapter 29,

200 *See generally* James E. Pfander, Constitutional Torts and the War on Terror 4–5 (2017).

201 Glynn v. Houston (1841) 133 Eng. Rep. 775; 2 Man. & G. 337 (upholding award against governor of Gibraltar for false imprisonment of a civilian); Mostyn v. Fabrigas (1774) 98 Eng. Rep. 1021, 1026, 1029; 1 Cowp. 160, 169 (discussing *Comyn v. Sabine*, upholding an award against the governor of Gibraltar for unlawful punishment pursuant to court martial).

202 *See* Fabrigas v. Mostyn (1773) 20 Howell's State Trials 81, 228 (Eng.) (opinion by Lord Mansfield) (affirming judgment against military governor of Minorca for unlawful detention and banishment of native Minorcan); *see also* Cooke v. Maxwell (1817) 171 Eng. Rep. 614; 2 Stark. 183 (holding the governor of Sierra Leone liable for unlawful arrest of an American subject outside of the colony of Sierra Leone).

203 *See supra* Section II.B.

204 Halliday, *supra* note 54, at 207.

205 *See* Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8488).

206 Halliday, *supra* note 54, at 254.

207 *See infra* Section V.D.

which in the vast majority of cases merged a rule of law and a judicial procedure requirement. The American approach to these issues during the War of Independence showed that Americans were sensitive to the requirements of the law of nations even as they were still sorting out the details of their new state and federal constitutional regimes.

Upon adopting the U.S. Constitution, Americans did not abandon the English commitments to the rule of law and judicial procedure during war. In fact, they doubled down on them. Unlike the English Constitution, which lodged the bulk of the responsibility for determining war and peace with the monarch, the U.S. Constitution made it clear that the government's wartime activities would be governed by law. The Constitution also expressly provided conditions upon which the government could suspend the writ of habeas corpus and authorize soldiers to occupy private property during war. In light of the English history and the constitutional text it is clear that the Due Process Clause enshrined the right of judicial procedure for a wide number of deprivations of rights during war. As Part III shows, a number of debates, practices, and judicial decisions in the early republic confirm this understanding.

A. The American War of Independence

Writing in 1826, Chancellor James Kent began his lectures on the law of the United States by situating the nation's origin within the law of nations. "When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law."[208]

The Declaration of Independence had been an appeal to the law of nations,[209] the Continental Congress committed itself to operating according to the law of nations,[210] and General George Washington took care to abide by that law throughout the war.[211] The Americans' experience during and after the war demonstrates their acceptance of the basic contours of the English legal framework.

In 1776, Congress declared that the "united Colonies" were an independent state and therefore "have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[212] The power to make war entailed all the rights of war, and the corresponding diminution of individual rights, under the law of war. As each of the new states were sovereign within

208 1 KENT, *supra* note 129, at 1.

209 *See* DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 28–29 (2007).

210 *See* 1 KENT, *supra* note 129, at 1.

211 *See generally* WITT, *supra* note 31, at 15–27 (describing Washington's conduct of the war).

212 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

their own territory, they each exercised the rights of war, as did the confederacy of states through Congress.[213]

Many state assemblies authorized their executives to enforce martial law in some or all of the state for some portion of the war.[214] This is unsurprising since, besides the high seas, the bulk of the fighting during the war occurred within the states. State assemblies variously suspended habeas corpus and authorized the trial of some civilians (especially those who were close to the military front) by court martial.[215] Consistent with English tradition, and according to each state's constitutional structure, all of this was authorized by legislative act.[216]

State assemblies also confiscated, sequestered, or otherwise impaired the property rights of those who remained loyal to Britain. These laws sought to implement the states' perceived rights under the law of nations by diminishing the property rights of enemies.[217] The Treaty of Paris, which ended the war, recognized the rights of British creditors and forbade future confiscations.[218] The states' failure to recognize those rights gave rise to numerous legal disputes.[219]

Although state assemblies and executives were in many cases at the front lines of managing the legal repercussions of the war, the Confederation Congress took the lead in implementing the states' rights and responsibilities under the laws of war. The Articles of Confederation delegated authority to Congress to manage most of the Confederation's "external sovereignty."[220] Article IX granted the power to determine peace and war, to exchange ambassadors, to enter into treaties and alliances, to establish rules for deciding cases of capture and prize on land or water, to grant letters of marque and reprisal in times of peace, and to appoint courts for the trial of pirates and courts of appeals in all cases of capture.[221]

It is apparent from Congress and General Washington's conduct during the war that they understood these powers to authorize the Confederation forces to deprive persons—enemies, neutrals, and subjects alike—of rights consistent with the law of war, and according to municipal law. Indeed, Congress exercised more control over military law and martial law than Parliament traditionally had done. Unlike Parliament, Congress itself enacted articles of war that governed the Continental Army and subjected soldiers to

213 *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 221, 231 (1796) (opinion of Chase, J.) (discussing the rights of war exercised by the states and the confederacy).

214 Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1351–67 (2015).

215 *Id.* at 1352.

216 *See id.*

217 *Ware*, 3 U.S. (3 Dall.) at 221, 231 (opinion of Chase, J.).

218 Definitive Treaty of Peace, U.S.-Gr. Brit., arts. IV, VI, Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace].

219 *Ware*, 3 U.S. (3 Dall.) at 199; *see* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 741–49 (1971).

220 Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 91 (1795).

221 *See* ARTICLES OF CONFEDERATION OF 1777, art. IX.

the jurisdiction of courts martial.[222] The Articles also applied to "suttlers and retailers to a camp" and anyone "serving with the continental army in the field."[223] During the course of the war, Congress specifically authorized courts martial to punish spies lurking around or in military camps,[224] those who supplied intelligence or other aid to the enemy,[225] the inhabitants of particular British-occupied towns who aided the enemy,[226] and those who kidnapped Americans within seventy miles of Continental or state armies.[227] Congress also specifically authorized General Washington to confiscate certain personal property at the front.[228] By today's standards, Congress's legislative control over the army's authority to deprive persons, even enemies, of rights would be considered micromanagement.

General Washington took it for granted that the army's authority came from congressional delegation and that its conduct was governed by the law of nations.[229] When he needed more discretion, he asked for it, and Congress usually accommodated him.[230] He did not hesitate to exercise this delegated power in ways that were necessary to win the war, including having civilians tried and punished (according to law) by court martial.[231] Yet he "generally favored" trial by civilian courts, when possible, "over the use of military courts."[232] Washington was diligent to observe the limits of Congress's delegated authority, and in the absence of municipal restrictions, the limits imposed by the law of nations.[233]

Much of the nation's war effort occurred on the high seas. Congress authorized a navy and commissioned privateers to capture enemy and neutral vessels as prize. Privateering was popular and, in some cases, lucrative. By one estimate in the House of Lords, American privateers "capture[d] or destroyed" over 700 ships with cargoes "worth over ten million dollars,"[234] or well over three times the number of ships taken by the Continental navy.[235] Congress established rules of capture and prize for the navy[236] and pri-

222 2 J. CONT'L CONG. 116 (1775).

223 *Id.*

224 5 J. CONT'L CONG. 693 (1776).

225 *Id.* at 799.

226 9 J. CONT'L CONG. 784 (1777).

227 10 J. CONT'L CONG. 204–05 (1778).

228 8 J. CONT'L CONG. 752 (1777) (for sixty days and within seventy miles of headquarters).

229 WITT, *supra* note 31, at 15–27.

230 *See* Prakash, *supra* note 214, at 1362–63.

231 *Id.* at 1362.

232 *Id.*

233 WITT, *supra* note 31, at 15–27.

234 EDGAR STANTON MACLAY, A HISTORY OF AMERICAN PRIVATEERS, at xiii (New York, D. Appleton & Co. 1899).

235 ROBERT H. PATTON, PATRIOT PIRATES: THE PRIVATEER WAR FOR FREEDOM AND FORTUNE IN THE AMERICAN REVOLUTION 110–12 (2008); Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 BUFF. L. REV. 477, 487–88 (2015).

236 *See* 3 J. CONT'L CONG. 381 (1775).

vateers.[237] Congress urged states to give prize jurisdiction to their own courts[238] and exercised increasing authority over them with a special committee that heard appeals,[239] effectively the nation's first federal court.[240] As with Congress's regulation of the war on land, its regulation of captures at sea was a model of exercising the nation's rights under the law of war according to its own municipal law.

A major shortcoming of the Articles of Confederation was that Congress lacked the authority necessary to exercise the nation's external sovereignty effectively.[241] Congress had to rely entirely on the states to raise money and armies[242] and had no authority to prevent the states from interfering in foreign affairs.[243] In particular, Congress had no way to chastise states that appropriated British creditors in violation of the Treaty of Peace.[244] A key motivation for a new Constitution was the need for a government with the internal power necessary to make war and to secure peace.[245]

B. Rereading the U.S. Constitution

The U.S. Constitution sought to remedy these problems by giving the federal government power to affect personal rights and duties sufficient to meet the nation's responsibilities under the law of nations. Other scholars have ably provided a more comprehensive account of the drafting and ratifying history bearing on the original understanding of the war powers.[246] This Section situates the key drafting debates and constitutional text in light of the English and revolutionary understanding of the relationship of the law of war and the law of the land. From that standpoint, the evidence strongly supports the view that the Constitution gave the nation's power to initiate a state

237 *Id.* at 371; *see also* 4 J. CONT'L CONG. 230–32, 251–53 (1776) (authorizing privateers to capture private, as well as public, British vessels).

238 *See* 1 GOEBEL, *supra* note 219, at 148.

239 *See generally* 17 J. CONT'L CONG. 458–59 (1780); 131 J.C. BANCROFT DAVIS, *Federal Courts Prior to the Adoption of the Constitution*, *in* CASES ADJUDGED IN THE SUPREME COURT AT OCTOBER TERM, 1888, at xix, xxiii (New York, Banks & Bros. 1889); 1 GOEBEL, *supra* note 219, at 150–69; William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 513–14 (1976).

240 HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT 90–91 (1977).

241 *See* THE FEDERALIST NOS. 3, 4 (John Jay). *See generally* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 101–14 (2003).

242 *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 143–83 (1985).

243 21 J. CONT'L CONG. 1136–37 (1781) (recommending that the states improve their prosecution and punishment of crimes against the law of nations); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 16 (1976).

244 *See generally* Treaty of Peace, *supra* note 218.

245 EDLING, *supra* note 241, at 101–14.

246 *See, e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 218–56 (2007); SOFAER, *supra* note 243, at 25–60; Michael W. McConnell, The President Who Would Not Be King 22–28, 128–39 (unpublished manuscript) (on file with author).

of war or limited hostilities that changed the rights of individuals to Congress. The Constitution gave the duty to enforce the law of war, as adopted and elaborated by Congress, or as triggered by the initiation of a juridical state of war against the United States, to the President. And it gave the power to review the lawfulness of many deprivations during war to the federal courts. The Due Process Clause summarized this constitutional division of power over war and subjected many deprivations during war to ordinary judicial procedures.

1. Congress Versus the President

The most widely debated question about the war powers is the extent to which the President can engage the nation's military in hostilities without express congressional authority. The question arises in part from textual ambiguity. The Constitution appears to split the war powers between Congress and the President. It gives Congress the power to "declare [w]ar"[247] and to make various laws governing hostilities short of a declaration of war,[248] and it gives the President "the executive [p]ower" and the office of the Commander in Chief of the armed forces.[249] But this enumeration of powers does not expressly address several recurring situations: What is the President's authority to use the military defensively in the absence of congressional approval? What is Congress's power to prescriptively cabin the President's exercise of force, such as with the War Powers Resolution? These questions about the war powers have dominated disputes during the Cold War, the Vietnam conflict, and the war on terrorism.[250]

One strategy for resolving these questions is to treat the Vesting Clause of Article II as a watershed. It gives "the executive [p]ower," seemingly all of it, to the President. In English constitutional theory, the Crown had the power to declare war, manage the military forces, and negotiate peace.[251] Thus, a sensible strategy for interpreting the Constitution's allocation of

247 U.S. CONST. art. I, § 8, cl. 11.

248 *See id.* cl. 12 (the Marque and Reprisal Clause); *id.* cl. 13 (the Captures Clause); *id.* cl. 14 (the Army Clause); *id.* cl. 15 (the Navy Clause); *id.* cl. 16 (the Military Regulations Clause); *id.* cl. 17 (the Militia Clause); *id.* cl. 18 (the Organizing the Militia Clause); *id.* cl. 19 (the Enclave Clause"); *id.* cl. 20 (the Military Installations Clause).

249 *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

250 Philip Bobbitt, Essay, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath, 92 MICH. L. REV. 1364, 1373 (1994) (explaining that "virtually all commentary on this subject falls into one of two positions," whether "Congress has the exclusive power to determine whether to introduce forces into war, though in emergencies the President may act" or not); *see* Robert J. Delahunty & John Yoo, Response, *Making War*, 93 CORNELL L. REV. 123 (2007); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008); Michael D. Ramsey, Response, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169 (2007).

251 *See, e.g.*, WOODDESON, *supra* note 159, at 94–95.

power to make war is to ascertain the meaning of "executive power," to subtract the executive powers expressly given to Congress, and to assign the rest to the President.[252]

The problem with this approach is that, as we have seen, making war was not a purely executive function. This was so in two senses. The Crown's power to declare war and conclude peace had important legislative implications, changing not only the nation's rights vis-à-vis other sovereigns, but also the rights of enemies, neutrals, and subjects under the law of England.[253]

Furthermore, by the late eighteenth century Parliament had a significant role to play in British war making. Parliament controlled the purse,[254] authorized the buildup of troops, enacted or authorized military law and courts martial, and, at the beginning of every war, enacted a law authorizing captures on the high seas and allocating the proceeds of prize awards.[255] All of this was done as an exercise of *legislative* power so far as it was done by making law. Courts martial and prize courts applied law that was either written or expressly authorized by Parliament, and common-law courts policed the jurisdiction of those courts with writs of habeas corpus and damages awards. The entire war-making function of the British Constitution was circumscribed by, and subject to, the law of the land.

The members of the Philadelphia Convention were intimately aware of these implications of the law of nations and how the English Constitution addressed them. Upon the proposal that the executive power be placed into the hands of a single magistrate, James Wilson agreed, but stipulated that the example of "the Prerogatives of the British Monarch" "was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it."[256] According to James Madison's notes, Wilson explained that "[s]ome of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the Legislature."[257]

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252 *See, e.g.*, Alexander Hamilton, *Pacificus No. 1*, *reprinted in* ALEXANDER HAMILTON ET AL., THE FEDERALIST, ON THE NEW CONSTITUTION, WRITTEN IN 1788, at 405 (Hallowell, Masters, Smith & Co. 1852); *see* RAMSEY, *supra* note 246, at 219; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253–54 (2001); McConnell, *supra* note 246, at 130 (explaining that the debate over the war powers illustrated Corwin's theory of "reciprocally limiting" powers); *see also* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957 (4th rev. ed. 1957).

253 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65–66 (Max Farrand ed., rev. ed. 1966) [hereinafter FEDERAL CONVENTION] (James Wilson arguing that the Crown's prerogatives of war and peace were legislative in nature).

254 SOFAER, *supra* note 243, at 9. The Crown could and sometimes did borrow money when Parliament was not forthcoming. *See id.* at 10.

255 *See supra* Part II.

256 1 FEDERAL CONVENTION, *supra* note 253, at 65–66.

257 *Id.*

Some scholars have suggested that by placing the prerogatives of war and peace "[a]mong others," he was designating them as neither legislative nor "strictly executive."[258] Others have maintained that Wilson meant that the powers of war and peace were among other *legislative* powers.[259] Many, including Wilson, probably would have understood the powers of war and peace to entail both legislative and executive functions aimed at the nation's external affairs, or to be "federative," in the words of John Locke.[260]

Nevertheless, the best view of the debate is that Wilson was emphasizing the importance of placing a republic's power of "determining on peace and war," as the Articles of Confederation put it, in the hands of the legislature.[261] Wilson and the other Framers knew that war changed the law—not only the law between belligerent states, but the municipal law as well. Together with Madison's notes, the other accounts of the debate confirm this understanding.[262] Pierce wrote that Wilson argued that "[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."[263] King wrote that Madison agreed with Wilson "in his difinition [sic] of executive powers—executive powers ex vi termini [out of the force of the boundary, or by definition], do not include the Rights of war & peace &c."[264] Note that, according to King, Madison referred not to the powers of war and peace, but the "Rights of war & peace," which is to put the matter in the terms of the law of nations. And so King's notes suggest that Madison and Wilson agreed that the nation's power or right to enter into war and peace was legislative, not executive. The reason was likely because entering into war and peace changes the law.

This understanding also sheds light on the implications of the Framers' later debate over whether to give Congress the power to make war or to merely declare it. According to Blackstone, the powers to make and to declare war were not the same thing. To "make war" was broader, and it meant to engage in war. To "declare war" meant to formally "make a war completely effectual."[265] While a declaration of war was sufficient to create a

258 *See* McConnell, *supra* note 246, at 24 (internal quotation marks omitted).

259 David Gray Adler, *The President's War-Making Power*, *in* INVENTING THE AMERICAN PRESIDENCY 119, 131 (Thomas E. Cronin ed., 1989); Thomas E. Cronin, *The President's Executive Power*, *in* INVENTING THE AMERICAN PRESIDENCY, *supra*, 180, 184; Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 576 (1974).

260 *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 76–77 (C.B. Macpherson ed., 1980) (1690); McConnell, *supra* note 246, at 24.

261 ARTICLES OF CONFEDERATION OF 1781, art. IX.

262 Scholars have emphasized that Madison edited his notes for publication in light of subsequent events, including a political career. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015). This makes the other notes of the debates, though less thorough than Madison's, all the more useful for reconstructing the arguments.

263 1 FEDERAL CONVENTION, *supra* note 253, at 73–74.

264 *Id.* at 70.

265 1 BLACKSTONE, *supra* note 53, at *258.

juridical state of war, it was not necessary: a nation could enter into war by initiating (or suffering) hostilities. As discussed above, in England, both making and declaring war were prerogatives of the Crown. The Articles of Confederation, by contrast, gave "the sole and exclusive right and power of *determining on* peace and war" to Congress. [266] The New Jersey Plan had recommended this language.

The Committee of Detail returned a draft of the Constitution that would have given Congress the power to make war. Upon the joint motion of Madison and Gerry, and after some debate, the Framers decided to change the provision to the power to "declare" war.[267] The reasons given were that giving the power to "make" war to Congress might restrict the President from "repel[ling] sudden attacks" or be construed to give Congress the power to "conduct" war, which was an executive function.[268] Some scholars have argued that restricting Congress's power to declaring war left the power to make war, including the power to begin hostilities, with the President through the clause vesting him with the executive power.[269] In light of the law of nations, which clearly influenced earlier discussion about the nature of the war powers, however, it seems unlikely that the Framers believed the power to initiate a war was a strictly executive function. Beginning a war changed the law. War's law-changing character strongly suggests that the Framers intended to give all of the power to begin a war to Congress. This makes sense of the reasons the delegates gave for changing "make" to "declare": repelling sudden attacks and conducting war do not change the law, they simply require the Commander in Chief to act according to an existing state of war.[270] In other words, those functions are consistent with simply executing the law, rather than changing it. Under this account, the "Declare War" Clause gives Congress more than the power to simply initiate a war through a formal declaration.[271] Congress also has the power to begin a war by authorizing hostilities that amount to the initiation of a state of war

266 ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1 (emphasis added). The New Jersey Plan had recommended the same language as the Articles of Confederation. *See* 1 FEDERAL CONVENTION, *supra* note 253, at 243. Hamilton's proposal at the constitutional convention would have given the Senate "the sole power of declaring war" and the executive "the direction of war when authorized or begun." *Id.* at 292.

267 The convention rejected proposals to lodge the power to make war exclusively in the Senate or the President. 2 FEDERAL CONVENTION, *supra* note 253, at 318–19.

268 *Id.*

269 *See* John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1666–67 (2002).

270 This explains the difference between Congress's power to declare war and the provision that the states may not "make" war. *See* U.S. CONST. art. 1, § 10. Unlike the federal government, the states may neither plunge the nation into war nor conduct warfare when the nation is in a state of war. *See id.*

271 *See* RAMSEY, *supra* note 246, at 222–37; Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 89 (2008) ("Whenever Congress authorizes or commands a war, it has issued a declaration of war, regardless of whether Congress uses the phrase 'declare war.'").

under the law of nations, thus changing the law. As discussed in more detail below, this is exactly how early commentators interpreted the Constitution's division of war powers.

2. Congress

The Constitution's other assignments of power regarding the nation's "rights of war" further confirm that the nation's exercise of those rights, and therefore its authority to deprive persons of individual rights, are subject to municipal law.

Article I, Section 8 gives Congress a number of specific powers related to war. Altogether these provisions give Congress all the power necessary to control every policy decision regarding the prosecution of war, and to do so by legislation that implements the nation's rights of war by changing individual rights under municipal law. Besides the power to declare war, Congress has the power to call forth the militia to enforce federal law and defend against rebellion or invasion.[272] The powers to tax and spend "for the common Defence,"[273] "[t]o raise and support Armies,"[274] and "[t]o provide and maintain a Navy"[275] give Congress the authority not only to control the size of the nation's military establishment, but also, tacitly, to end a war or other conflict. All Congress must do is to stop appropriating federal funds for military use.

The maritime provisions of Section 8 are easy to overlook for their antiquated language, but in the eighteenth century they were central to the power to control individual rights during war. The power to make rules for captures on land and sea was the power to determine whose property would be subject to capture, upon what conditions, according to what procedures, and by whom.[276] Similarly, the power to grant letters of marque and reprisal gave Congress the authority to authorize attacks on other nations that would not necessarily constitute a declaration of war under the law of nations.[277] For a maritime nation, these provisions amounted to absolute congressional control over the nation's degree of belligerence toward enemy sovereigns and its degree of tolerance toward neutral sovereigns.[278] These powers also gave Congress control over the individual rights of property of enemy and neutral subjects,[279] and probably included the authority to authorize the punishment of citizens for trading with the enemy.

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272 U.S. CONST. art. 1, § 8, cl. 15.

273 *Id.* cl. 1.

274 *Id.* cl. 12.

275 *Id.* cl. 13.

276 *Id.* cl. 11. *See generally* Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009).

277 *See* RAMSEY, *supra* note 246, at 231.

278 See Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–78 (1804); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).

279 U.S. CONST. art. I, § 8, cl. 11.

The power to make rules for the government of the armed forces,[280] the militia when in federal service,[281] and federal military installations, such as forts, arsenals, and dockyards, ensured that the Commander in Chief's management of the military would be subject to law.[282]

Together with the Declare War Clause and the Necessary and Proper Clause, these provisions of Article I should be understood to give Congress the authority to change the nation's rights and responsibilities under the law of nations from the rights of peace to the rights of war. As an incident of this power, Congress has the authority to change the rights and responsibilities of enemies, neutrals, and citizens during war.[283]

3. The President

Article II of the Constitution gives the executive power and various other powers and duties to the President. The above discussion suggests that the residual war powers delegated to the President principally consist of executing the law during war and commanding the armed forces. The latter responsibility likely includes the power, perhaps even the duty, to respond to attacks with force. What Article II does not give the President is the power to *change* the law, including the law governing individual rights and duties during war. Instituting hostilities that would amount to the declaration of war—to changing the municipal law from a code of peace to one of war—is beyond the President's purview.

The Vesting Clause of Article II gives the President "the executive Power."[284] The core of this power was understood to be the authority to execute the law.[285] It should be read in tandem with the President's duty under the Take Care Clause to "take Care that the Laws be faithfully executed."[286] The latter duty also tacitly authorizes the President to *carefully* delegate authority to execute the laws to subordinate officers. In light of the above framework, these provisions must be understood to empower and obligate the President to follow the law during war, including the law of war to the extent that it has been adopted into the law of the land.[287] When Congress changes the law, including during war, the President must see that it is faithfully executed. Whether, and how, war may change the law in the absence of an express congressional act, for instance, upon an enemy's declaration of war against the United States, is a crucial question that the Constitution does not clearly address. Unsurprisingly, early statesmen and jurists

280 *Id.* cl. 14.
281 *Id.* cl. 16.
282 *Id.* cl. 17.
283 6 THE WRITINGS OF JAMES MADISON 1790–1802 (Gaillard Hunt ed., 1906) [hereinafter Madison].
284 U.S. CONST. art. II, § 1, cl. 1.
285 *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570–81 (1994).
286 U.S. CONST. art. II, § 3.
287 *See* Dodge, *supra* note 126.

debated it. As discussed below, though they disagreed on some of the particulars, they all agreed that war changes the law, the President is bound by that law, and that Congress is ultimately supreme in its authority to determine the law during war, and thus to direct the President's authority to execute the law.[288]

The Commander-in-Chief Clause gives the President the authority to command the armed forces—the U.S. Army and Navy and the state militias "when called into the actual Service of the United States."[289] The power was based on the Crown's prerogative to command troops, but the power given to the President was a shell of the power exercised by the Crown. Article I of the Constitution assigned many of the powers incidental to the exercise of the commander-in-chief power to Congress: the power to raise the army and navy, to create rules and regulations for them, to purchased real estate for them, etc.[290] The principal purpose of the clause was to make it clear that the President, and no one else, would be the highest officer in the military chain of command. The armed forces would be directed by a civilian elected for a limited term through the Constitution's prescribed electoral process. As Michael McConnell has put it, "[t]he Commander-in-Chief Clause establishes a chain of command, with the President constitutionally entrenched on top, but the scope of powers available to the military are essentially legislatively rather than constitutionally determined."[291] There is no textual or historical reason to think that the Commander-in-Chief Clause gives the President discretion to ignore the law during war.[292]

4. The Federal Courts

We have seen the ways in which the U.S. Constitution ensures that the definition and deprivation of rights during war would be subject to law. To see how many of those deprivations would also be subject to judicial procedure requirements, consider the Constitution's delegation of power to the federal courts. Article III allocates "the judicial Power of the United States" to "one supreme Court" and to lower courts as Congress may provide.[293] That power includes cases arising under the "Constitution, the Laws of the United States, and Treaties," as well as "admiralty and maritime Jurisdiction."[294] Vesting these powers in the same court effectively merged the English common-law courts and the court of admiralty. In England, there was an ancient rivalry between the admiralty courts and the courts of common law. By the late eighteenth century, the common-law courts maintained

288 *See infra* Section V.A (discussing Alexander Hamilton and James Madison's debate during the neutrality controversy); *see also* Dodge, *supra* note 126, at 1564–66.

289 U.S. CONST. art. II, § 2, cl. 1.

290 *Id.* art. I, § 8, cl. 12–14, 16–17.

291 McConnell, *supra* note 246, at 157–58.

292 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

293 U.S. CONST. art. III, § 1.

294 *Id.* § 2.

their supremacy by issuing writs of prohibition when the courts of admiralty overstepped their jurisdiction.[295] But common-law courts did not correct admiralty courts for error. In prize cases, appeals lay to a special commission composed principally of the Privy Council.[296] Prize condemnations and distributions were therefore under the Crown's purview.

By giving Congress the power to make rules governing captures and federal courts the power to adjudicate cases arising under those rules, the Constitution more fully integrated the law of prize into the law of the land. In cases involving captures at sea, including prize cases, the federal courts would be responsible to enforce the separation of powers. Because Article I vested the power to govern captures in Congress, each U.S. capture would have to stem from statutory authority, and courts would have the power to condemn enemy property only when the capture accorded with U.S. municipal law that implemented the nation's rights under the law of nations. Officers exceeding their statutory authority would be subject to personal liability.[297] As discussed more fully below, prize cases were one of the most common examples of the provision of the judicial procedure requirements of due process to enemies and neutrals during war.

5. Constitutional Limits with Exceptions for War

a. The Suspension Clause

Even without the Bill of Rights, the Constitution seems to presume that the deprivation of rights during war would be subject to the law of the land. The Suspension Clause of Article I provides: "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." [298] The Constitution nowhere expressly guarantees the privilege of the writ of habeas corpus and it nowhere vests the power in the federal government to suspend it. Yet the Suspension Clause is a condition on its suspension. Clearly the Framers assumed that the writ would be available (either at common law, by statute, or by constitutional implication) and that the government would have the authority to suspend it.[299] The Suspension Clause prohibits a suspension unless the public safety requires it, and only in cases of rebellion or invasion,

295 *See* 1 WOODDESON, *supra* note 109, at *143.

296 *Id.*

297 *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–78 (1804); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).

298 U.S. CONST. art. I, § 9, cl. 2; *see* TYLER, *supra* note 64, at 124–38 (survey of drafting and ratification).

299 *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82; *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94–95 (1807) (Marshall, C.J.) (suggesting that a statute was necessary to authorize the federal courts to issue the writ). *But see* Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the Suspension Clause creates a right to habeas). The drafting and ratifying history strongly suggests that the founding generation believed that the Constitution created a right to habeas, though the Framers were unclear about which provision of the Constitution did so. *See* TYLER, *supra* note, 64 at 124–35.

i.e., during a domestic war.[300] By implication, then, the government *does* have the power to suspend the writ during a domestic war. Where does that power come from?

Most scholars who have studied the history agree that only Congress may suspend habeas corpus.[301] Yet Presidents have claimed the authority as an incident of the executive power or the commander-in-chief power.[302] The foregoing argument that Congress has the exclusive power to change rights during war adds fresh support for the view that Congress alone has authority to suspend habeas corpus during war. But what constitutional provision provides that power?

Saikrishna Prakash has argued that the Necessary and Proper Clause, applied to all of Congress's constitutional powers to govern ordinary life within the territory of the United States, gives Congress "sweeping" powers over domestic war, including the power to temporarily suspend habeas corpus and set up a military dictatorship.[303] Whether those powers are sweeping or not, the Constitution appears to give Congress ample power during war, in conjunction with the Necessary and Proper Clause, to authorize detentions notwithstanding the statutory or common-law protections of habeas.

By preserving habeas corpus, subject to constitutionally valid suspension, the Suspension Clause goes a long way toward guaranteeing Chapter 29's judicial procedure requirement during war. It guaranteed habeas as a mechanism to contest the lawfulness of a detention. The only exceptions it may be understood to incorporate are the traditional exceptions to the scope of the writ. As we shall see, American courts understood the writ to extend to resident enemy aliens. The Due Process Clause would confirm and broaden these judicial procedure requirements.

b. The Third Amendment

The Third Amendment reinforces the view that the Constitution presumes that the government will deprive persons of rights during war only by law and, ordinarily, subject to judicial review. Now largely an answer to a trivia question, the Third Amendment provides that "[n]o 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."[304] The Amendment is not an affirmative grant of power; rather it assumes that the government has the power during war to quarter soldiers in a private house. The Third Amendment prohibits the nation from exercising that power except (1) during "time of war" and (2) according to "a manner prescribed by

300 *See* Prakash, *supra* note 214.

301 TYLER, *supra* note 64, at 137–38; Prakash, *supra* note 214, at 1341.

302 Chief Justice Taney and President Lincoln famously tussled over the issue. *See, e.g.*, *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); Seth Barrett Tillman, Ex Parte Merryman*: Myth, History, and Scholarship*, 224 MIL. L. REV. 481 (2016).

303 Prakash, *supra* note 214, at 1341.

304 U.S. CONST. amend. III.

law."[305] The Third Amendment thus presumes that the nation has a right to deprive residents of certain property during war, but that such deprivations must be authorized by law, i.e., by Congress. This implicitly confirms a general rule that the government ordinarily may not deprive persons of property—in this case, the enjoyment of their own house—even by law.

The Third Amendment probably also makes the quartering of soldiers subject to judicial review. The President could only quarter soldiers in a "manner prescribed by law."[306] A case arising under that law would be within the jurisdiction of the federal courts. Through such review, federal courts would provide the judicial procedure requirements of due process.

6. The Constitution and the Customary Law of Nations

The Constitution also affected the relationship between the law of nations and other sources of municipal law, though it did not spell out the details of that relationship. Article VI declares that the Constitution, "the Laws of the United States which shall be made in Pursuance thereof" and "all Treaties . . . shall be the supreme Law of the Land."[307] The point of the Supremacy Clause was to make it clear that federal positive law would control contrary state law. It did not clarify the relationship between federal positive law and unwritten law such as the customary law of nations. Indeed, the provision "seems to preclude a textual argument that the Supremacy Clause's reference to the laws of the United States includes customary international law."[308]

The relationship between these laws is important. When the nation is in a state of war, does the law of war automatically change the rights and duties of enemies, neutrals, and citizens? Or must Congress change those rights and duties pursuant to its enumerated powers? Does it make a difference if Congress declared war or another nation declared war on the United States? When the President is defending against an attack and Congress has not yet had time to declare war or specify rights, what law governs the rights of enemies, neutrals, and citizens? Put differently, perhaps, is the law of war part of the general law applied by federal courts?

As we shall see, American statesmen and federal courts addressed all of these questions, either directly or indirectly, in the early years of the republic. Generally, they concluded that when the nation was in a state of war, the customary law of war governed the rights of enemies and neutrals unless Congress had enacted a law to the contrary. The customary law of war was thus part of federal law, though it was subordinate to the Constitution, federal statutes, and treaties—the "supreme Law of the Land."[309]

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305 *Id.*

306 *Id.*

307 *Id.* art. VI, cl. 2.

308 Dodge, *supra* note 126, at 1566 (citing RAMSEY, *supra* note 246, at 348–50).

309 U.S. CONST. art. VI, cl. 2.

Another important question is whether the law of war was a limit on the federal government's constitutional power. Here we must distinguish between the external and internal application of the law of war.

Externally, the law of war bound every sovereign equally. Were Congress and the President to depart from that law, the nation would be responsible for violating its duties under the law of war and any aggrieved sovereign would have rights of retaliation or reimbursement. They would prosecute these rights through politics, diplomacy, or military retaliation.[310]

Internally, however, the answer is different. By providing that the Constitution and laws are the supreme law of the land, the President would be obligated to execute the Constitution and statutes, and the courts would be obligated to apply them, even when doing so would violate a duty owed to another nation under the customary law of nations.

The Supreme Court's opinion in *Murray v. Schooner Charming Betsy*,[311] which gave rise to the *Charming Betsy* canon,[312] captures this view of the internal relationship between federal positive law and the law of nations. The Constitution gives Congress the power to enact law that is contrary to the law of nations, but the courts should interpret congressional acts to comply with that law unless those acts manifest a clear intent to depart from it. This approach accounts for the incorporation of at least some of the law of nations into the general law, the supremacy of federal positive law enshrined in the Supremacy Clause, and the supremacy of Congress over federal lawmaking enshrined in Article I.[313]

C. The Due Process Clause

Drawing on Locke, Montesquieu, and Blackstone, the Framers believed that a constitution that properly combined and separated the legislative, executive, and judicial powers would be the best security for political liberty and individual rights.[314] The so-called Antifederalists were less sanguine;

310 *See, e.g.*, Hamburger, *supra* note 7, at 1951–55.

311 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

312 *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 685 (2000).

313 William Dodge has recently argued that Americans in the late eighteenth century, following Vattel, would have understood that the nation was bound absolutely by the "voluntary" law of nations, which arose from the natural law, but that it could deliberately depart from the "customary" law of nations. Dodge, *supra* note 126. See *id.* at 1569, for a discussion of the "voluntary law" of nations. While there is some evidence that Americans may have believed the nation to be absolutely bound by the voluntary law of nations, it is unclear what implications this would have had for the law governing the deprivation of individual rights during war. The "principles" Vattel listed as flowing from the voluntary law of nations were pitched at a high level of abstraction and had to do with ensuring equality of states and determining whether another nation's conduct, on the whole, was consistent with the law of nations—not with distinguishing between lawful and unlawful deprivations of specific rights during war. *See* VATTEL, *supra* note 25, bk. III, §§ 120–23, at 534–36.

314 *See* SOFAER, *supra* note 243, at 43–44; THE FEDERALIST NO. 51 (James Madison).

they insisted on a Bill of Rights. Enacted by the First Congress, under James Madison's leadership, the Bill of Rights included a provision that restated what had come to be understood in the English tradition as the central constitutional guarantee of individual rights: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[315]

As Michael McConnell and I have argued, American jurists understood due process of law to require deprivations of rights only according to law, including the separation of powers. The vast majority of deprivations had to be according to a general law enforced by the executive and applied by the courts.[316] Courts enforced due process through a variety of common-law and statutory remedies. Blackstone closely associated habeas and damages actions against government officials with the right of due process.[317]

American constitutionalism involved two innovations on the English tradition of due process: the separation of powers, and the elevation of due process above the reach of the legislature. Neither the President nor Congress could satisfy due process unilaterally. The Due Process Clause prohibited Congress from enacting insufficiently general and prospective laws that deprived specific persons of rights because such laws operated as judgments rather than legislation.[318]

A constitutional due process provision also placed limits on a legislature's authority to authorize deprivations without the safeguards of well-established judicial procedures.[319] The Supreme Court first implemented this notion of due process in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[320] but state courts had applied it numerous times, especially when state legislatures purported to authorize common-law proceedings without a jury trial.[321] Judicial procedures that complied with longstanding tradition were consistent with due process of law.[322] Accordingly, by 1820, Congress provided that an in rem proceeding to condemn a pirate vessel would amount to "due process and trial."[323] Due process, as a requirement of judicial procedure, summarized the traditional procedural protections of a court of law.

Unlike the Suspension Clause and the Third Amendment, the Due Process Clause gives no indication that Congress may suspend it during war. Its text is universal. Yet the meaning of "due process of law" had always been based on tradition and context. The process of law due before a deprivation

315 U.S. CONST. amend. V; *see* Chapman & McConnell, *supra* note 75, at 1682–92. Like Coke and Blackstone, Americans seemed to think that the "law of the land" formula of Magna Carta and the "due process of law" formula of the U.S. Constitution were synonyms. *Id.*

316 Chapman & McConnell, *supra* note 75, at 1721–26.

317 *See supra* Part II.

318 Chapman & McConnell, *supra* note 75, at 1755.

319 *Id.* at 1773–77.

320 59 U.S. (18 How.) 272 (1856).

321 Chapman & McConnell, *supra* note 75, at 1773–77.

322 *See Murray's Lessee*, 59 U.S. (18 How.) at 277.

323 An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 4, 3 Stat. 510, 513 (1819); *see* Chapman, *supra* note 49, at 409–13.

of life for a felony was different from the process of law due before a deprivation of property in the Court of Exchequer. As we have seen, the same is true during war. The process of law due before the Crown could detain a POW was different than the process of law due before the Crown could deprive an enemy alien of property rights in a vessel and cargo captured on the high seas.

In light of the English background and the U.S. Constitution's allocation and limitations of powers, we are in a position to summarize the contours of what American jurists may have understood the Due Process Clause to require during war. First, all governmental deprivations of rights during war were subject to the law of the land. This is the "rule of law" requirement inherent in the "law of the land" provision of Chapter 29. Whether understood as a requirement of the Due Process Clause, as an implication of the constitutional separation of powers, or both, the principle derives from the English tradition and makes sense of many early American disputes about the scope of rights during war. As we shall see, early American jurists frequently referred to such deprivations as being subject to the law of the land, even when they did not mean to suggest that they were subject to judicial procedures.

The Constitution implemented this principle by giving Congress charge of determining the rights of individuals during war. Congress had wide latitude to determine the rights of resident enemy aliens. Based on the English history, there was a question about whether those aliens were presumptively entitled to the protection of the law. This was bound up with a question about whether the customary law of nations was a part of the general common law, subject to change by Congress. As we shall see, American jurists debated these issues in the early republic. Congress could even constitutionally suspend certain rights of citizens and resident friendly aliens during a domestic war.

Second, the Due Process Clause, in connection with the various allocations of power in Articles I through III of the Constitution, required that many deprivations of rights during war be subject to traditional judicial procedures. For such deprivations of rights, the Due Process Clause combined the "rule of law" and "judicial procedure" requirements of the common-law understanding of Chapter 29. In particular, the government's authority to deprive enemies and neutrals of rights on the high seas would be subject to congressional authorization and review by an Article III court. Congress would set the rules for the military and, presumably, Article III courts would have authority to ensure that courts martial followed the law. The deprivation of rights on the battlefield, or pursuant to a lawful declaration of martial law, however, would not be subject to judicial procedure requirements. POWs would of course not be entitled to release, but those held as POWs could use habeas to challenge their status.

As Part V argues, early public debates and judicial decisions show that Americans conceived of the relationship between the government's power and the rights of individuals during war in precisely these terms, relying heav-

ily on the notion that the rights of individuals during war were subject to the law of the land. They rarely, however, expressly distinguished between the rule of law and judicial procedure requirements of the law of the land, and they rarely attributed these requirements to the Due Process Clause. It is only in light of the foregoing understanding of the English history and due process of law that we can fully understand the implications of their language.

V. Early Implementation

Early American legal thinkers consistently operated with the foregoing framework as a conceptual backdrop. This Part explores a handful of the most important early cases that illustrate the framework's application and development.

A. The Neutrality Controversy of 1793–94

The neutrality controversy of 1793 illustrates that American statesmen and jurists accepted the above framework of rights during war. They were just beginning to explore its implications in light of the Constitution's separation powers. While they agreed that war changed rights, they disagreed about which institution had the power to recognize those changes.

In 1793, France and England were at war. Americans split over whether the United States had a treaty obligation to help France. In April, President George Washington issued an order declaring that the United States would "adopt and pursue a conduct friendly and impartial toward the belligerent Powers."[324] The order urged U.S. citizens to conduct their affairs accordingly. It warned citizens that the government would not protect them from liability to the belligerent nations for violating neutrality.[325] In fact it went further, declaring that the President had instructed U.S. prosecutors "to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war."[326]

On its face, the Proclamation of Neutrality appears to assume that the President had constitutional authority to determine whether other nations were at war and whether the United States had any obligations under the law of nations to one of the belligerents. As we shall see, members of Congress would contest this authority. The proclamation also appears to assume that during war the law of war was part of the law of the land. Citizens prosecuted and convicted of violations would be criminally liable. It assumes, therefore, that a state of war—even a war in which the United States was neutral—changed individual rights under municipal law, but that those rights would continue to be subject to due process.

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324 Proclamation of Neutrality (1793), *reprinted in* 1 American State Papers 140 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833).

325 *Id.*

326 *Id.*

As to *how* the law of war would become the law of the land, however, the proclamation is ambiguous. The President's instructions to U.S. prosecutors could be read as (1) assuming that the law of nations was inherently part of the general federal law and therefore "within the cognizance of the courts of the United States";[327] (2) violations of neutrality were within those courts' "cognizance" to the extent they chose to adopt the law of nations; (3) such "cognizance" depended upon a statutory grant of jurisdiction and definition of crime; or (4) some combination of the above. What the "cognizance of the courts" qualification seems to foreclose is the idea that the President, through his prosecutors, would have the authority to decide which crimes under the law of nations would be cognizable in federal courts.[328]

Alexander Hamilton and James Madison famously debated the President's authority to issue the proclamation. Their constitutional dispute was narrow. As framed by Hamilton, the question was whether the President's executive power entails the power to determine that the nation has a treaty obligation to maintain neutrality in the absence of a congressional declaration of war.[329] Madison argued that the Declare War Clause gave Congress sole authority to determine on war or peace.[330] Framed this way, Hamilton's claim for presidential power was imminently practical and, by modern standards, modest.

The standard analysis of their debate overlooks Hamilton and Madison's shared presumption of the foregoing legal framework. Madison's argument proceeds from the basic legal implications of war discussed above. Declaring war, he argues:

> [H]as the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war; and of *enacting*, as a *rule for the executive, a new code* adapted to the relation between the society and its foreign enemy. In like manner, a conclusion of peace *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace.[331]

From this premise, he concludes that the power of declaring war, and, by implication, to determine peace, is a legislative, i.e., lawmaking power, and therefore cannot be considered an "executive" power vested in the President.[332]

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327 *Id.*

328 Congress would enact legislation defining these crimes. *See* Neutrality Act of 1794, ch. 50, 1 Stat. 381.

329 Hamilton, *supra* note 252, at 405–06.

330 Madison, *supra* note 283, at 151.

331 Madison, *supra* note 283, at 145; *see id.* at 146 ("These remarks will be strengthened by adding, that treaties, particularly treaties of peace, have sometimes the effect of changing not only the external laws of the society, but operate also on the internal code, which is purely municipal, and to which the legislative authority of the country is of itself competent and complete.").

332 *Id.* at 151; *see also* James Madison, *Helvidius No. 2*, *reprinted in* Madison, *supra* note 283, at 151–60.

Hamilton seems to agree that war changes the law. This point is crucial to his argument. The President, as executive, has a duty to see that the laws be faithfully executed—"all laws, the laws of nations, as well as the municipal law which recognizes and adopts those laws."[333] Because of this duty, the President is bound to execute "the laws of neutrality when the country is in a neutral position."[334] Even more:

> Our treaties, and the laws of nations, form a part of the law of the land. He, who is to execute the laws, must first judge for himself of their meaning. In order to the observance of that conduct which the laws of nations, combined with our treaties, prescribed to this country, in reference to the present war in Europe, it was necessary for the president to judge for himself, whether there was any thing in our treaties, incompatible with an adherence to neutrality.[335]

The President thus had a duty to interpret the existing laws—including the treaty with France—to ascertain the scope of his duty to execute the law of the land. Far from changing the law of the land, Hamilton asserts, the proclamation simply informed the citizens that the laws of neutrality that had been "previously established . . . will be put in execution against the infractors of them."[336] Here Hamilton suggests that the proclamation threatened only the prosecution of laws of neutrality that had already been adopted into the law of the land, either by statute or judicial decision.

Given the existence of the treaty as part of the law of the land, the President's duty to enforce it, and Congress's silence up to that point, Hamilton's modest claim of presidential authority stemming from the duty to execute the law seems impeccable. But what is most remarkable about the arguments marshalled by both Hamilton and Madison is that they presume that a state of war or neutrality changed not only the law between nations, but the law of the land. War did not place this law outside the ordinary constitutional separation of powers or unmoor it from the requirements of due process. Indeed, Hamilton's tacit acknowledgment that citizens would be liable only for crimes that had been previously established by law seems to agree with Madison's major premise that persons could be punished only according to the law of the land—even when that law had changed due to a change in the nation's status of war and peace.

B. Ware v. Hylton

In 1796, the Supreme Court decided *Ware v. Hylton*,[337] a case Justice Iredell called "the greatest Cause which ever came before a Judicial Court in

333 Madison, *supra* note 283, at 157.

334 Hamilton, *supra* note 252, at 408.

335 *Id.* at 410.

336 *Id.*

337 3 U.S. (3 Dall.) 199 (1796).

the World."[338] The question was whether a Virginia statute had eliminated the debt owed by Americans to British creditors, and if so, whether the Treaty of Paris had nullified that law.[339] The Justices agreed that it had.[340] The case illustrates how early American jurists reasoned about rights during war based on the relationship between the law of nations and America's new constitutional system. The deprivation of enemy rights during war would be subject to U.S. law, and, given the separation of the judicial branch from the legislative and executive powers, the lawfulness of those deprivations would be subject to judicial review.

The case presented two principal questions.[341] The first was whether the Virginia Sequestration Act of 1777, which purported to sequester, or confiscate, debts owed to enemy aliens, had been lawful when Virginia enacted it.[342] The Justices' conclusion—that the Virginia Sequestration Act was lawful when enacted—is less important for our purposes than the Justices' train of logic. The first issue to resolve was whether a sovereign has a right under the law of war to confiscate the debt of enemy aliens. Justices Chase and Iredell cited many authorities to support their conclusion that a sovereign has a right to confiscate enemy property (including debt) during war.[343] They also cited a 1699 case from the Court of Exchequer holding that the Crown had a right to confiscate the property of enemy aliens, but only by an inquest that reached a judgment before the peace.[344] Justice Wilson, though, argued that the recent practice of European nations was against confiscation of enemy debt,[345] and that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[346]

The next question was whether the Commonwealth of Virginia had the right to confiscate enemy property. Chase maintained that Virginia had the exclusive right to confiscate British property within its territory,[347] at least before it vested such authority in the Confederation Congress.[348] He then

338 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 203 (Maeva Marcus ed., 2003) [hereinafter DHSC] (emphasis omitted) (quoting remarks from Jeremiah Smith made to William Plumer (Feb 7, 1795)).

339 *Ware*, 3 U.S. (3 Dall.) at 199–200; *see* 7 DHSC, *supra* note 338, at 203; *see also* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794) (resolving a dispute over British debts sequestered but not confiscated by Georgia).

340 *Ware*, 3 U.S. (3 Dall.) at 284–85 (opinion of Cushing, J.).

341 *Id.* at 208.

342 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 337 (William W. Hening ed., Richmond, J & G Cochran Printers 1821).

343 *Ware*, 3 U.S. (3 Dall.) at 225–29 (opinion of Chase, J.); *id.* at 262 (opinion of Iredell, J.).

344 *Id.* at 227–28 (opinion of Chase, J.); *id.* at 263–64 (opinion of Iredell, J.).

345 *See id.* at 281 (opinion of Wilson, J.).

346 *Id.* (emphasis omitted).

347 *Id.* at 231 (opinion of Chase, J.).

348 *See id.* (suggesting that the states retained at least some of the powers of war under the law of nations).

distinguished between the internal and external aspects of the law of nations. In implementing the law of nations through its own municipal law, the state was subject to its "[c]onstitution[al], or fundamental law."[349] Chase was not clear about what this law might require. But he concluded that the Virginia Sequestration Act did not violate it.[350] From an external viewpoint, if the law were understood to violate the law of nations, Virginia "was answerable in her political capacity to the British nation, whose subjects have been injured in consequence of that law."[351] For both Chase and Iredell, this was an important point: even if the statute was a violation of the law of nations, insofar as the Virginia Sequestration Act was consistent with municipal law, it was still the law of the land.[352] Recourse for municipal laws contrary to the law of nations was to diplomacy, not to the courts of law.

The foregoing dispute among the Justices was over how the law of nations had been adopted into U.S. law. Which American institution, at least at the time the debtor had paid the Commonwealth of Virginia, had the constitutional authority under the law of nations to confiscate enemy property? About twenty years later the same question would reemerge in a case about the separation of national powers.[353]

The "great question" in *Ware*, however, was not about Virginia's original authority under the law of nations, but whether the Treaty of Paris nullified the Virginia statute.[354] All of the Justices agreed that it did.[355] According to the U.S. Constitution, the Treaty of Paris was part of the "supreme Law of the Land"[356] and therefore governed disputes over private rights, overriding "all State laws upon the subject, to all intents and purposes."[357] The Justices agreed that Article IV of the Treaty of Paris could not have been more clearly on point: "Creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."[358] As Chief Justice John Jay had written in his circuit court opinion, if the Virginia Sequestration Act were not "[a] lawful impediment to [plaintiff's] recovery of the full value"[359] of the debt, "I cannot conceive why

349 *Id.* at 223 (opinion of Chase, J.) (emphasis omitted).

350 *See id.* Chief Justice Jay believed that the law of nations limited Virginia's constitutional power to affect the rights of "the subject of foreign powers residing *out of their jurisdiction* in foreign parts." 7 DHSC, *supra* note 338, at 304 (emphasis added).

351 *Ware*, 3 U.S. (3 Dall.) at 224 (opinion of Chase, J.) (emphasis omitted).

352 *Id.*; *see also id.* at 265 (opinion of Iredell, J.).

353 *See* Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); *infra* Section V.D.

354 *Ware*, 3 U.S. (3 Dall.) at 282 (opinion of Cushing, J.).

355 *Id.* at 284–85. Justice Iredell believed the Sequestration Act transferred the debtor's obligation to the state; the Treaty of Paris protected the creditor's rights, but those rights were now against the state. *See Ware*, 3 U.S. (3 Dall.) at 278–79 (opinion of Iredell, J.).

356 U.S. CONST. art. VI, cl. 2.

357 *Ware*, 3 U.S. (3 Dall.) at 282 (opinion Cushing, J.).

358 *Id.* (emphasis omitted) (internal quotes omitted); *see also id.* at 244 (opinion of Chase, J.); *id.* at 251 (opinion of Paterson, J.); *id.* at 281 (opinion Wilson, J.); 7 DHSC, *supra* note 338, at 306 (opinion of Jay, C.J.).

359 *Ware*, 3 U.S. (3 Dall.) at 239 (opinion of Chase, J.) (emphasis omitted).

it was pleaded [by defendant] as a bar" to the suit.[360] Allowing the debtor to avoid his obligation to the British creditor, therefore, would quite literally violate the "supreme law of the land."[361] The deprivation of the property rights of enemy aliens during war was subject to the law of the land and judicial review.

C. The Alien Acts of 1798

By 1798, the nation's relationship with France had greatly deteriorated. French vessels openly engaged in hostilities against U.S. vessels. Federalists and Democratic-Republicans hotly disputed the appropriate response to the crisis. To protect national security without the decisive step of declaring war, Federalists in Congress enacted the Alien Enemy Act of 1798, the Alien Friends Act, and the Sedition Act of 1798.[362] Americans made a wide range of constitutional arguments for and against these Acts, many of them based on inconsistent theories about the Constitution's protection of aliens and application during war.[363] The debates therefore reveal competing views of the Constitution's meaning during war. Yet many of these views, especially those of the Democratic-Republicans who virtually swept the next elections in the so-called "Revolution of 1800," are entirely consistent with the foregoing account of due process during war. Moreover, federal and state courts entertained habeas and damages suits to ensure that the detention of enemy aliens was lawful.

1. Congressional Debate over the Alien Enemy Act

The Alien Enemy Act provided that upon invasion or a declaration of war the President would have the power to arrest and remove alien enemies.[364] Congressional debate over the constitutionality of the Act was relatively narrow. Everyone appeared to believe that the nation could detain and remove enemy aliens during war and that the Constitution assigned the power to authorize such detention and removal to Congress.[365] This agreement was far from obvious or petty. Deprivations of rights of enemy noncombatants would be according to law, not executive fiat.

Democratic-Republicans defeated two early provisions of the bill on the strength of constitutional arguments advanced by Albert Gallatin based on the application of the Bill of Rights to the exercise of war powers. One provision would have authorized the detention of anyone who harbored an enemy

360 7 DHSC, *supra* note 338, at 308 (opinion of Jay, C.J.).

361 *Id.* at 294.

362 Sedition Act of 1798, ch. 74, 1 Stat. 596; Alien Enemy Act of 1798, ch. 66, 1 Stat. 577; Alien Friends Act of 1798, ch. 58, 1 Stat. 570, 570–71.

363 *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 256–58 (1997); Neuman, *supra* note 54, at 927–43.

364 Alien Enemy Act of 1798, ch. 66, 1 Stat. 577.

365 *See* 8 ANNALS OF CONG. 1790–91 (1798)*; see also id.* at 1790 (statement of Rep. Sewall).

alien subject to detention and removal. Gallatin argued that this would allow "certain persons [to] be deprived of their liberty without any process of law, or being guilty of any crime."[366] While Gallatin was here concerned for the rights of nonenemies, his argument shows that he believed the Bill of Rights to apply to the war powers.[367] He likewise argued that a provision authorizing the President to retaliate against enemy aliens for "unusual severities" committed by an enemy sovereign against U.S. citizens would "train our code of law in a manner expressly contrary to the spirit of our Constitution, which expressly declares no 'cruel and unusual punishments' shall be inflicted."[368]

These arguments were consistent with the foregoing legal framework. During war, Congress could implement the nation's rights under the law of nations to change the rights of resident enemy aliens, in particular to authorize their detention or removal without the ordinary requirements of due process. As we shall see, federal and state courts believed that the detention of enemy aliens was subject to judicial review. But Congress could not authorize the detention of nonenemy aliens without ordinary procedural protections.

2. Debates over the Alien Friends Act

The Alien Friends Act was another kettle of fish. Disagreements over its constitutionality were deep and broad. The Act was not a war measure, so the debates are not directly relevant to the understanding of due process during war. Some of the arguments against the Act seem to imply that *enemies* are not entitled to constitutional rights, yet as we shall see, these arguments square with the legal framework of due process during war presented above.

The Alien Friends Act authorized the President to identify, detain, and remove aliens "dangerous to the peace and safety of the United States" and those suspected of "treasonable or secret machinations against the government" whose sovereigns were *not* at war with the United States.[369] It was meant to authorize the President to detain and remove French subjects without a declaration of war against France, but it applied during war and peace to any nonenemy alien deemed by the President to be dangerous or suspected of disloyalty. Federalists defended the Act as an exercise of Congress's power over naturalization, the "sovereign authority of a nation" over

366 *Id.* at 1788–89 (statement of Rep. Gallatin).

367 *See id.* at 1980 (statement of Rep. Gallatin) ("Congress could dispose of the persons and property of alien enemies as it thinks fit, provided it be according to the laws of nations and to treaties."). Gallatin could be read as holding that Congress's power over enemy aliens was bound only by the law of nations and not by the Bill of Rights. This would conflict with his view, discussed above, that harsh retaliation against enemy aliens would violate at least the spirit of the Eighth Amendment. An equally plausible reading is that Gallatin believed that the law of nations provided the minimum process of law to which alien enemies were entitled.

368 *Id.* at 1794 (statement of Rep. Gallatin) (quoting U.S. CONST. amend. VIII).

369 Alien Friends Act of 1798, ch. 58, 1 Stat. 570, 570–71.

immigration,[370] and the federal government's authority over foreign affairs and war.[371]

Opponents of the bill had to distinguish it from the Alien Enemy Act, which they generally supported. To do so, they distinguished the constitutional status of alien friends and enemies. Their principal argument was that Congress had power over enemy aliens because of its power over war,[372] but had no power over the removal of alien friends.[373] They also argued that the bill gave the President too much legislative and judicial power over "dangerous" aliens,[374] and that it ran afoul of the Bill of Rights.[375]

Two notes: The Federalists could have argued that the Alien Friends Act was an exercise of the war powers and therefore was not subject to the Bill of Rights. They didn't. That argument would have been odd, since the Alien Friends Act was expressly about friends, rather than enemies, but some Federalists did appear to ground Congress's authority to enact the law in part on Congress's authority over war.[376] Had they believed that the belligerent-sovereign dichotomy placed the Alien Friends Act outside the Bill of Rights, they surely would have said so. Rather, Federalists tended to respond to charges that the Alien Friends Act violated the Due Process Clause by arguing that aliens do not enjoy any constitutional rights, or, more moderately, that the right to remain in the United States is not part of the "life, liberty, or property" subject to due process.[377]

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370 8 ANNALS OF CONG. 2018 (1798) (statement of Rep. Otis).

371 *Id.* at 2016 (statement of Rep. Kittera).

372 *See* H.D. Resolutions of Virginia of December 21st, 1798, the Debate and Vote Thereon (Va. 1798), *reprinted in* THE VIRGINIA REPORT OF 1799–1800, at 22, 39 (Richmond, J.W. Randolph 1850) [hereinafter Virginia Resolutions] (statement of Del. Ruffin); H.D. Report of 1799 (Va. 1799), *reprinted in* THE VIRGINIA REPORT OF 1799–1800, *supra*, at 189, 207 [hereinafter Report of 1799] ("[T]he removal of alien enemies is an incident to the power of war; . . . the removal of alien friends, is not an incident to the power of war.").

373 *See* H.R. Resolutions of Kentucky Legislature of 10th November (Ky. 1798), *reprinted in* THE VIRGINIA REPORT OF 1799–1800, *supra* note 372, at 162, 163–64 [hereinafter Kentucky Resolutions]; Virginia Resolutions, *supra* note 372, at 39.

374 *See* Kentucky Resolutions, *supra* note 373, at 163–64; Virginia Resolutions, *supra* note 372, at 23.

375 *See* Kentucky Resolutions, *supra* note 373, at 164; Virginia Resolutions, *supra* note 372, at 25 (Rep. Taylor) (noting that alien friends were entitled to life, liberty, and property, and trial by jury); *id.* at 88 (Rep. Daniel) (citing Vattel for the proposition that alien friends are entitled to the law of the land); *see also* 8 ANNALS OF CONG. 1956, 1981–82 (1798) (statement of Rep. Gallatin); *id.* at 1983 (noting that the bill permitted deprivation of "civil rights, the personal liberty, [and] the property of aliens . . . upon suspicion, and . . . at the will of one man"); *id.* at 2011–12; *id.* at 1995–96 (statement of Rep. Williams).

376 *See* 8 ANNALS OF CONG. 2018 (1798) (statement of Rep. Otis). *But see id.* at 2018–19 (statement of Rep. Otis) (arguing that aliens enjoy protection of the Constitution and laws).

377 U.S. CONST. amend. V; *see* 8 ANNALS OF CONG. 2018–19 (1798) (statement of Rep. Otis) (arguing that aliens enjoy protection of the Constitution and laws); Virginia Resolutions, *supra* note 372, at 30–31, 34; Neuman, *supra* note 54, at 927 (discussing James Madison and calling this the "mainstream" position).

Second, it would be tempting to read the Democratic-Republican case for the constitutional rights of alien friends to imply that alien *enemies* do not have constitutional rights. This would be putting words in their mouths. They certainly justified the Alien Enemy Act by noting that enemies are subject to the law of nations and can therefore be handled differently than alien friends, who are subject solely to the municipal law. Therefore "the removal of alien enemies, being conformable to the law of nations, is justified by the Constitution: and the 'act,' for the removal of alien friends, being repugnant to the constitutional principles of municipal law, is unjustifiable."[378] This can be read to accord with the foregoing account of due process during war: the process to which enemies were due was different because war changed their rights and duties.

3. Habeas Corpus for Enemy Aliens

During the War of 1812, the President exercised his authority under the Alien Enemy Act to require enemy aliens to register with a local marshal and to remove to a place more than forty miles from the tidewater.[379] Aliens who refused were subject to detention.[380] At least two sued for writs of habeas corpus to challenge the lawfulness of their detention. In both cases the courts issued the writs, and upon their return, considered the merits of the respective detainee's case.

In *Lockington's Case*, the Supreme Court of Pennsylvania concluded that the statute authorized the petitioner's detention.[381] Justice Brackenridge agreed with the result, but believed that the court lacked any authority to take cognizance over the detention of an alien enemy; he believed that the question of the lawfulness of the detention was only for the President.[382] Yet even he appeared to concede that the court could have ordered the release of a detainee who could show he was not in fact an enemy.[383] When Lockington separately sued the marshal for trespass and false imprisonment in federal court, Justice Bushrod Washington assumed that the plaintiff was entitled to a damages award if he could show that the detention had been unlawful.[384]

In an unreported case in the U.S. Circuit Court for the District of Virginia, Chief Justice John Marshall and District Judge St. George Tucker ordered Thomas Williams released from the custody of the federal mar-

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378 Report of 1799, *supra* note 372, at 206.

379 *See* Frederick C. Brightly, Reports of Cases Decided by the Judges of the Supreme Court of Pennsylvania, in the Court of Nisi Prius at Philadelphia, and also in the Supreme Court 271 (Philadelphia, James Kay, Jun. & Bros. 1851).

380 *Id.*

381 *Id.* at 280–82 (opinion of Tilghman, C.J.); *id.* at 290–91 (opinion of Yeates, J.).

382 *Id.* at 295–96 (opinion of Brackenridge, J.).

383 *See id.* at 298.

384 *See* Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8488); *see also* Neuman, *supra* note 54, at 994.

shal.[385] The reason is unclear. The court records reveal only that the court believed that "the regulations made by the President of the United States respecting alien enemies, do not authorize the confinement of the petitioner in this case."[386] A newspaper reported that Marshall ordered Williams released because the marshal had not assigned a place to which he should relocate.[387] At a minimum, it seems clear that the court based its judgment on something other than the jurisdictional fact that Williams was not an enemy alien. Rather, like the Pennsylvania court, the federal judges appear to have believed they had a duty to decide whether the law and executive order authorized the detention. This is a far cry from the view that enemies are not entitled to the protection of the laws.

Interestingly, some American judges, like Chancellor Kent in New York, interpreted the Alien Enemy Act to tacitly authorize resident enemy aliens to sue and be sued in U.S. courts until Congress or the President expressly removed that authorization.[388] Whatever the common law would have required (and Kent believed the enemy alien disability was all but a dead letter in England),[389] under the supreme law of the land, resident alien enemies had a defeasible right to sue and be sued.[390] While this does not directly support the notion that alien enemies were entitled to due process of law, it strongly suggests that they were not generally outside the protection of the laws. Rather, by the early republic, enemy aliens were entitled to the protection of the law, but the nation had the right under the law of nations to diminish their rights during war. When it did so, as the habeas cases show, it was bound to do so by law.

Moreover, courts also did not hesitate to order the release of U.S. citizens unlawfully detained by the military on allegations of treason or espionage,[391] or to award damages against the officers who unlawfully detained them.[392] The presidential powers to command the armed forces and prosecute a general war did not include the power to detain citizens on suspicion

385 *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 GREEN BAG 2D 39, 41–42 (2005).

386 *Id.* at 42.

387 *See id.* at 41–42. This was how Judge Brackenridge, in *Lockington's Case*, interpreted the reports he had read of Marshall's judgment. *See* BRIGHTLY, *supra* note 379, at 296–97. Thomas Williams's attorney reportedly argued that the court's duty was "constitutionally to interpret the Laws of the Land, and not to give too much power, into the hands of any ministerial officer where there was a judicial power." Neuman & Hobson, *supra* note 385, at 41 (emphasis omitted).

388 *See* Clarke v. Morey, 10 Johns. 69 (N.Y. 1813).

389 *Id.* at 70–72.

390 *See* Hutchinson v. Brock, 11 Mass. (10 Tyng) 119, 122 (1814) (distinguishing the rights of a resident and a nonresident enemy alien).

391 *See* Smith v. Shaw, 12 Johns. 257 (N.Y. Sup. Ct. 1815); *In re* Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813); Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1580–85 (2004).

392 *See* M'Connell v. Hampton, 12 Johns. 234 (N.Y. Sup. Ct. 1815); *see also* Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851) (holding that U.S. citizen had trespass action against U.S. officer for conduct in Mexico during the Mexican-American War).

of violating the purely municipal laws of treason and espionage, and courts would provide remedies when the President sought to assert martial law over those outside its jurisdiction.[393]

D. Prize Cases

The early federal court prize cases are an important example of the provision of due process of law to enemies and neutrals during war. U.S. jurists understood that the law of nations entered U.S. law through the Constitution, acts of Congress, and, residually, as part of the general law of the land.[394] Courts ensured that the executive deprived an enemy or neutral of property rights on the high seas only according to the law of the land. Importantly, courts interpreted the congressional authorization of captures and condemnations especially strictly when made during a *partial* war, rather than when the nation was engaged in a *general* war.

Scholars have given ample attention to the U.S. prize cases beginning with the quasi war with France and continuing through the U.S. Civil War,[395] but none, to my knowledge, have considered those cases to illustrate the application of due process.[396] This is understandable. Courts sometimes wrote as if the Due Process Clause was principally a criminal procedure protection.[397] The prize cases proceeded according to admiralty rules of procedure, and no one thought they should have proceeded according to ordinary criminal procedures.[398] Moreover, prize courts in all maritime nations emphasized that they sat as courts of the law of nations.[399] They applied the law of prize that was part of the customary law of war.[400] In broad strokes, at least, that law was understood to govern all captures on the high seas.

But prize courts were also municipal courts of justice applying municipal law.[401] U.S. courts in particular understood that the prize law they applied was subject to the Constitution,[402] and, because the Constitution assigned authority over prizes and captures on the high seas to Congress,[403] to legisla-

393 *See Mitchell*, 54 U.S. (13 How.) at 135; *see also infra* Section V.E.

394 *See* The Rapid, 12 U.S. (8 Cranch) 155, 162 (1814) (the law of prize "was the law of England before the revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this Court in pursuance of the constitution").

395 *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388 (1815); Thirty Hogshead of Sugar v. Boyle, 13 U.S. (9 Cranch) 191 (1815); The Sally, 12 U.S. (8 Cranch) 382 (1814); *The Rapid*, 12 U.S. (8 Cranch) 155.

396 *See* 2 George Lee Haskins & Herbert A. Johnson, Foundations of Power: John Marshall, 1801–15, at 407–53 (1981); Kent, *supra* note 13.

397 *See, e.g.*, Miller v. United States, 78 U.S. (11 Wall.) 268, 304–05 (1870).

398 *See, e.g.*, Joseph Story, Notes on the Principles and Practice of Prize Courts 29–31 (Frederic Thomas Pratt ed., London, William Benning & Co. 1854); Wheaton, *supra* note 62, at 319; *supra* Section II.C.

399 *See* Story, *supra* note 398, at 76; Wheaton, *supra* note 62, at 319.

400 *See* Wheaton, *supra* note 62, at 319.

401 *See supra* subsection II.C.2.

402 *See supra* subsection II.C.2.

403 *See* U.S. Const. art. I, § 8.

tion. Accordingly, the Supreme Court declined to condemn vessels and cargo that had been captured without congressional authority, and upheld awards of damages for maritime trespass against the naval officers who made unlawful captures on the high seas.[404]

Federal courts sometimes held executive officers to a narrow reading of the congressional act purporting to authorize a capture. During the undeclared war with France during the 1790s, the Supreme Court distinguished between a "partial war" and a "general war."[405] The latter, the Justices said, is when the nation is in a state of war against another sovereign under the law of nations.[406] Being in a state of war authorized the nation to exercise all the rights and duties of a belligerent.[407] The implication was that courts would interpret the President's constitutional authority broadly during a state of war to include the power to enforce the nation's rights and duties under the law of war, subject to congressional control.[408]

During a partial war, however, Congress exercised less than all of the nation's rights and duties under the law of war.[409] In that case, the law of war was not understood to be incorporated into U.S. law *in toto*.[410] Therefore, the President could enforce that law only insofar as Congress had authorized him to do so. During a partial war, then, the courts would read the President's authority to capture enemy and neutral vessels and cargo to be governed by a strict interpretation of the law authorizing the capture. In *Little v. Barreme*, for instance, a U.S. warship captured a neutral vessel (believing it to be an American merchant) sailing *from* a French port.[411] This was consistent with the President's instructions to the navy.[412] But those instructions were broader than the Non-Intercourse Act on which the President relied, which authorized captures only of vessels sailing *to* a French port.[413] The Court ordered the vessel and cargo to be returned to the owner and awarded damages against the officer.[414]

Even during a general war, the Court interpreted the President's authority under the law of nations narrowly when Congress had not unambiguously incorporated it into the law of the United States. In *Brown v. United States*,

404 *See, e.g.*, Maley v. Shattuck, 7 U.S. (3 Cranch) 458 (1806); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

405 *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.); *id.* at 43 (opinion of Chase, J.).

406 *Id.* at 40 (opinion of Washington, J.); *id.* at 43 (opinion of Chase, J.)

407 *See id.* at 43–44 (opinion of Chase, J.).

408 *See id.*

409 *See id.* at 40 (opinion of Washington, J.); *id.* at 43 (opinion of Chase, J.).

410 *Id.* at 40 (opinion of Washington, J.); *id.* at 43 (opinion of Chase, J.).

411 Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

412 *See id.* at 177.

413 *Id.* (citing An Act Further to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 2, § 5, 5 Stat. 613, 615 (1799)).

414 *Id.* at 179; *see also* SOFAER, *supra* note 243, at 155–60 (noting that the Adams administration largely agreed with the Court's interpretive approach).

the government libeled the property of a British merchant found in the United States shortly after the beginning of the war.[415] Chief Justice Marshall, writing for a majority, determined that the law of nations did not, of its own force, authorize the capture. "[M]odern usage," he wrote, "is a guide which the sovereign follows or abandons at his will."[416] Because the decision to capture enemy property within the territory is a question of policy, "[i]t is proper[ly] for the consideration of the legislature, not of the executive or judiciary."[417] Justice Story dissented, arguing that Congress's declaration of war authorized the President to exercise all of the nation's rights and duties under the law of war, subject to congressional exception. Since the law of nations authorized the capture of enemy property, he would have held the capture to be lawful.[418] The dispute between the Justices was how specifically Congress must speak before the law of war, at least with respect to the property of enemy noncombatants, became the law of the land. But none of them disputed the fact that such a deprivation was ultimately subject to the law of the land. And, of course, the Court's review was itself a provision of due process.

E. Martial Law in New Orleans

In late 1814, General Andrew Jackson was preparing to defend New Orleans from an imminent attack by the British. To quell desertion and other internal threats, he ordered martial law.[419] He had no statutory authority to do so. A Louisiana legislator criticized the decision in a newspaper article. Jackson ordered him arrested. When the federal district judge issued a writ of habeas corpus, Jackson ordered him arrested too. The U.S. attorney filed suit on the judge's behalf in the state court. Jackson arrested the U.S. attorney and the state judge detaining them until official news of peace arrived.[420]

Upon release, the federal judge ordered Jackson to show cause why he should not be held in contempt of court. As Jackson later argued to President Madison, "constitutional forms must be suspended, for the permanent preservation of constitutional rights."[421] The judge disagreed. He ordered Jackson to pay $1000, and Jackson did.[422]

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415 Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).

416 *Id.* at 128.

417 *Id.* at 129.

418 *Id.* at 153–54 (Story, J., dissenting).

419 *See* SOFAER, *supra* note 243, at 333–36.

420 *See id.* at 333; *see also* MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW 20–26 (2006).

421 Letter from Alexander J. Dallas, Acting Sec'y, Dep't of War, to Andrew Jackson, Major Gen. (July 1, 1815), *in* 2 CORRESPONDENCE OF ANDREW JACKSON 212 (John Spencer Bassett ed., 1927) [hereinafter Dallas Letter] (quoting remarks of Andrew Jackson).

422 *See* SOFAER, *supra* note 243, at 334.

President Madison also disagreed with Jackson. In a letter from Secretary of War Alexander Dallas, the administration laid out its position.[423] Madison's view was nuanced. On the one hand, he acknowledged that necessity was the only plausible argument for ignoring the law of the land. On the other, he maintained that Jackson's conduct was unlawful and clearly supported the judgment against him.[424]

> [T]he case of necessity which creates it's [sic] own Law, must not be confounded with the ordinary case of military service, prescribed and governed by the established law of the land. In the United States there exists no authority to declare and impose Martial law, beyond the positive sanction of the Acts of Congress. To enforce the discipline and to ensure the safety, of his garrison, or his camp, an American Commander possesses indeed, high and necessary powers; but all his powers are compatible with the rights of the citizens, and the independence of the judicial authority. If, therefore, he undertake to suspend the writ of Habeas Corpus, to restrain the liberty of the Press, to inflict military punishments, upon citizens who are not military men, and generally to supercede [sic] the functions of the civil Magistrate, he may be justified by the law of necessity, while he has the merit of saving his country, but he cannot resort to the established law of the land, for the means of vindication.[425]

Madison thus subjected John Locke's account of the executive's emergency power to the U.S. Constitution.[426] War may justify a departure from ordinary rights, but only Congress may authorize such a departure. When Congress has not authorized martial law, courts have a duty to provide due process to enforce the law of the land.

If the established law of the land would not vindicate Jackson, what would? The people. Decades later, when Jackson was penniless in retirement, Congress voted to refund his contempt payment.[427] Even the Democrats who championed the bill insisted that it should not be construed as a censure of the contempt order.[428] Jackson's defense of necessity had no place in the law of the land, but it could, and did, succeed in the court of public opinion.

VI. Principles for the War on Terrorism

The early history supports a framework for analyzing due process during war. The government's deprivation of life, liberty, and property during war is

423 Dallas Letter, *supra* note 421, at 212–13.

424 *See id.* at 212.

425 *Id.* at 212–13.

426 *See* Locke, *supra* note 260, at 80 ("[I]t is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, *viz.*, that as much as may be, all the members of the society are to be preserved.").

427 *See* Warshauer, *supra* note 420, at 78 (arguing that Jackson sought the refund in part to remove the "blight" of Hall's contempt order on his reputation).

428 *Id.* at 107, 109.

subject to the law of the land. Many but not all of those deprivations are subject to the Due Process Clause, which requires review by a court according to traditional judicial procedures to ensure that deprivations of rights comply with the law of the land. In particular, those held as POWs have a right to challenge their status, and resident enemy aliens are entitled to due process (though the government may change their underlying rights to liberty and property by law). Deprivations of rights on the battlefield, however, or under a lawful suspension of habeas corpus or declaration of martial law are not subject to due process.

This Article cannot analyze every deprivation of rights in the government's prosecution of the "war on terrorism," but the historical framework does suggest some principles. The first is that all such deprivations are subject to U.S. law, whether or not they are subject to the Due Process Clause. The executive department may deprive persons of life, liberty, or property only according to statute or treaty. The key source of such authority during the war on terrorism is the Authorization for Use of Military Force of 2001.[429] The statute provides the President with broad authority to engage in hostilities against Al Qaeda and its affiliates.[430]

Second, many—but not all—of the executive's deprivations of rights pursuant to statutory authority are subject to the Due Process Clause of the Fifth Amendment. Consider the government's targeted killing program. The DOJ emphasized a target's citizenship and location to determine whether due process applied, and to conclude that the executive branch's internal procedures were sufficient to satisfy the Fifth Amendment. The analysis under the foregoing framework is entirely different. Whether the killing is lawful depends on whether Congress authorized it. Whether it is subject to the Due Process Clause depends on whether it is akin to one that would have traditionally been subject to due process.

Historically, deprivations of rights on a battlefield were not subject to due process. One of the legal challenges posed by the war on terror is that there is no traditional battlefield and the enemy forces are not the regular troops of another sovereign. My own view is that the targeted killing of terrorists affiliated with groups committed to attacking U.S. civilians is best analogized to the killing of an enemy soldier on a battlefield. By planning attacks against citizens outside of the parameters of a regular armed conflict, a terrorist has put himself on a battlefield wherever he can be found. Targeted killings are therefore not subject to due process, though they are subject to law.

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429 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

430 *See id.* § 2 ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."). For an analysis of the statute, see generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

Yet because terrorists are not in a regular army there is a risk that the government will target the wrong person. Mistakes of fact on the battlefield have always been an especially tragic part of war. Yet the strategy of targeting specific people changes the moral significance of a mistake about the target's identity. Presumably, the government always has ample time to avoid such a mistake. Yet the chance remains. If POWs could traditionally use habeas to challenge their detention, why shouldn't targets be able to use judicial procedures to challenge being placed on a kill list?[431] Put differently, a targeted killing may not be subject to due process, but perhaps being put on a kill list is. There is simply no historical analogy for this. A complete legal and prudential analysis of such a holding is beyond this Article's scope. It is important to note, however, that targeted killings are subject to law, and there are ways besides judicial review to enforce the law and reduce errors. Congress can clarify the scope of statutory authority, eliminate funding for military programs, and reimburse those the government has unlawfully (or mistakenly) deprived of rights.

Third, many deprivations of rights in the war on terrorism are subject to the requirements of due process. In particular, detainees are entitled to some measure of judicial review to determine the lawfulness of their detention. Once again, the traditional categories break down when applied to the war on terrorism. Historically, a sovereign would detain enemy soldiers as POWs to exchange them for the sovereign's own soldiers detained as POWs by the enemy.[432] Terrorist enemy combatants have no sovereign seeking their exchange. This is one reason their detentions have proven to be indefinite. Yet the risk of error that animated judicial review of a POW detainee's status applies with equal force to those held as enemy combatants in the war on terrorism.

The Due Process Clause provides that those held within the jurisdiction of U.S. courts are entitled to some measure of judicial review to ensure the lawfulness of their detention. Upon a detainee's habeas petition, common-law courts traditionally had great discretion over the procedures they would use to determine the lawfulness of the detention of a POW. Congress and the President have little constitutional power to interfere with that judicial review absent a constitutionally valid suspension of habeas corpus. The foregoing analysis therefore provides a more coherent and historically sound doctrinal framework to support the plurality's decision in *Hamdi v. Rumsfeld*.[433]

431 *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (holding that al-Aulaqi's father was not entitled to enforce his son's rights and that the targeting of a terrorist is a political question).

432 *See* HALLIDAY, *supra* note 54, at 168.

433 542 U.S. 507 (2004).

Conclusion

In sum, the above historical analysis suggests that Americans at the Founding understood deprivations of rights to be subject to U.S. law. Many—but not all— of those deprivations were also subject to due process of law. Whether due process applied, and what it required, depended on the nature of the right and the context. The original understanding of due process during war suggests a useful framework for analyzing the deprivation of rights during the "war on terrorism" today.