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## Piracy and Due Process

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# PIRACY AND DUE PROCESS

*Andrew Kent*\*

## INTRODUCTION

A skiff piloted across the Indian Ocean at night by Somalia pirates mistakenly attacked a U.S. naval vessel, and the hapless pirates were soon in U.S. government custody.<sup>1</sup> Did the Constitution require that they receive *Miranda* warnings before being questioned, or other protections that implement constitutional due process? Or are constitutional protections inapplicable for some reason—because of the context, territorial location, or non-U.S. citizenship?

Questions like this arise frequently. In addition to international piracy prosecutions, recent cases include Due Process and Fourth Amendment claims by the parents of a Mexican teenager killed in Mexico by a U.S. border patrol agent shooting from the U.S. side of the border;<sup>2</sup> a Due Process and Fourth Amendment challenge to the drone killing in Yemen of a U.S. citizen leader of Al Qaeda in the Arabian Peninsula;<sup>3</sup> a series of habeas corpus, Due Process, and other challenges to detention, treatment, and military commission trials of noncitizens designated as enemy combatants and held at the U.S. navy base in Guantanamo Bay, Cuba;<sup>4</sup> and Fifth Amendment challenges to interrogation by U.S. law enforcement officials of foreign nationals held by Kenyan authorities.<sup>5</sup>

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\* Professor, Fordham Law School. Thanks to Christopher Borgen, Nathan Chapman, Thomas Lee, Ethan Leib, and Peggy McGuinness for helpful comments on earlier versions of this article, and to John Langbein and Gregory Durston for expert consultation. This article benefited from presentation at the International Law Colloquium at St. John's Law School.

1. *See* *United States v. Dire*, 680 F.3d 446, 470–75, 473 & n.19 (4th Cir. 2012).
2. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).
3. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 71–74 (D.D.C. 2014).
4. *See, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008) (evaluating a habeas Suspension Clause challenge to a statute stripping jurisdiction over habeas claims); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (analyzing statutory and separation of powers challenges to military commission); *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (evaluating an Ex Post Facto Clause challenge to military commission); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (analyzing a damages suit against the Secretary of Defense and others concerning military detention and alleged mistreatment).
5. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 103–05, 108, 115 (2d Cir. 2008). For other examples, see *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010) (examining habeas challenges to detention of noncitizen enemy combatants by the U.S. military at Bagram Airfield, Afghanistan); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (evaluating a Fifth Amendment Takings Clause claim by a Sudanese corporation hit by a cruise missile fired in retaliation for Al Qaeda's bombing of U.S. embassies in Africa).

Extraterritorial U.S. government action tends to involve national security and foreign affairs considerations and often is directed at non-U.S. persons. These cases thus raise sensitive issues about both the legal limits on the national security and foreign affairs powers of the U.S. government and the role of the judiciary versus the political branches in articulating and enforcing those limits. The cases also raise the question of whether U.S. citizenship, or lack of it, should be a primary consideration in defining the limits of U.S. government power when deployed abroad.<sup>6</sup>

Since the mid-twentieth century, U.S. Supreme Court case law and government practice have coalesced around the view that U.S. citizens carry their constitutional rights with them globally.<sup>7</sup> But with regard to noncitizens, the law and practice are very different. The Supreme Court did not start opining on this issue until the latter part of the nineteenth century, but once it did, the Court repeatedly stated that noncitizens abroad were outside the protection of the Constitution.<sup>8</sup>

Before the late nineteenth century, direct statements about whether non-U.S. citizens possessed constitutional rights extraterritorially were few. Still, they pointed the same way—against extraterritorial rights for noncitizens.<sup>9</sup> But the lack of evidence of direct discussions of the issue during the Founding and antebellum periods, combined with the fact that most rights-bearing provisions of the Constitution are, by their text, not limited to citizens,<sup>10</sup> led some judges, scholars, and litigants to make originalist arguments in favor of viewing constitutional rights as operative abroad to protect noncitizens. Thus Louis Henkin, the leading foreign relations scholar of the second half

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6. Some other countries' legal systems are confronting the same type of questions. See Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 81–108 (2011) (documenting debates about legal extraterritoriality in Canada and the United Kingdom).

7. See KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?* 25 (2009); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 474–75, 478 & n.86 (2007) [hereinafter Kent, *Global Constitution*]; Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115, 2120–21 (2014) [hereinafter Kent, *Citizenship*].

8. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–75 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 771, 784 (1950); *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893).

9. See, e.g., *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 399 (1863); 33 ANNALS OF CONG. 693, 1042 (1819) (providing statements of Rep. Henry Baldwin and Rep. Alexander Smyth); REPORT OF VIRGINIA HOUSE OF DELEGATES REGARDING THE ALIEN AND SEDITION ACTS (1800), reprinted in 17 THE PAPERS OF JAMES MADISON 303, 320–21 (David. B. Mattern et al. eds., 1991). On the meaning of this Virginia report, authored by James Madison, see Kent, *Global Constitution*, *supra* note 7, at 530–31. During the late 1790s, a time of conflict with France, there were frequent statements by Federalists that no noncitizen, whether in the United States or abroad, possessed constitutional rights. See *id.* at 529–30 (collecting sources).

10. See, e.g., U.S. CONST. amend. IV (“The right of the people . . .”); *id.* amend. V (“No person shall be held . . .”); *id.* amend. VI (“In all criminal prosecutions . . .”).

of the twentieth century, asserted that the Founders intended the Bill of Rights to be a “universal human rights ideology.”<sup>11</sup> Henkin’s view was accepted by some other scholars and by Justice Ruth Bader Ginsburg.<sup>12</sup>

But these kinds of originalist arguments fail to persuade most scholars and judges. When the Court in *Boumediene v. Bush* extended the Constitution to noncitizens at a U.S. military base in foreign territory—protecting noncitizens outside the United States for the first time—it did not rely on originalist arguments, finding them inconclusive.<sup>13</sup> Likewise, scholarship has rebutted originalist arguments in favor of extraterritorial constitutional rights for noncitizens. As I explained elsewhere, the best textual and originalist reading of the Constitution is that relations with foreign nations and noncitizens abroad would be conducted pursuant to international law, sub-constitutional domestic law (e.g., statutes and common law), and diplomacy, rather than via extraterritorial application of the Constitution.<sup>14</sup>

A new article, *Due Process Abroad* by Professor Nathan Chapman,<sup>15</sup> seeks to defend an originalist view of a global Constitution for noncitizens through a focus on the law governing English and then early American responses to piracy. Chapman’s vision of global due process for all has both great territorial reach and great power. First, he claims that the Due Process Clause was intended and understood by the founding generation to be global, benefitting both citizens and noncitizens “anywhere in the world.”<sup>16</sup> Due process, according to Chapman, meant that, outside of the context of “war,” the U.S. government could not deprive any person, anywhere, of life, liberty, or property except according to standing law, including the Constitution,

11. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 99–100 (1990); see also Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985).

12. See *United States v. Balsys*, 524 U.S. 666, 701–02 (1998) (Ginsburg, J., dissenting); *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 307–08 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part); Jordan J. Paust, *Boumediene and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351, 354–55 (2009); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8 (2003); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT’L L. 871, 875–76 (1989).

Other scholars have made more specific claims, for instance that the habeas corpus right embodied in the Constitution’s Suspension Clause was originally understood to protect noncitizens abroad. See Brief for Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae Supporting Petitioners at 5–25, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195).

13. *Boumediene*, 553 U.S. at 746.

14. Kent, *Global Constitution*, supra note 7; Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1036–37 (2015) [hereinafter Kent, *Black Holes*].

15. Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377 (2017).

16. *Id.* at 377.

its jury rights, and other applicable law.<sup>17</sup> Although Chapman never makes clear how to distinguish “war” from other uses of force, he maintains that there was such a well-understood line in English and early American law. Where due process applied, Chapman asserts that use of the jury was “the *sine qua non* of traditional due process.”<sup>18</sup>

Second, Chapman appears to claim that this global Due Process Clause was understood to be a substantive limit on the way the U.S. government could respond to perceived threats. According to Chapman, anyone, anywhere who was “suspected” of engaging in conduct which violated U.S. civil or criminal laws could “only” be proceeded against by the U.S. government via judicial due process.<sup>19</sup> Since U.S. statutes have always criminalized violent group-based misconduct that might in theory demand a military response—for instance, treason and piracy since 1790, international slave trading since 1808, and, today, the use of a weapon of mass destruction and provision of material support to terrorist organizations<sup>20</sup>—Chapman’s version of global due process would severely restrict the range of policy responses that the U.S. government could pursue.<sup>21</sup>

17. *Id.* at 377, 381.

18. *Id.* at 381.

19. *Id.* (“To comply with due process, the federal government could deprive someone of rights only in compliance with the Constitution, statutes, treaties, court procedures, and general law, including the common law and the law of nations.”); *id.* at 389 (“[T]he historical evidence strongly suggests that Americans understood all those suspected of violating U.S. law—anywhere—to be entitled to due process of law before the government could deprive them of ‘life, liberty, or property.’”); *id.* at 405 (“Due process required the ordinary constitutional, statutory, and common law criminal procedures before the punishment of any suspect captured outside U.S. territory.”).

20. *See, e.g.*, Act of Apr. 30, 1790, ch. 9, §§ 1, 8, 1 Stat. 112, 113–14 (treason and piracy); Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (international slave trade); 18 U.S.C. § 2332a (2012) (use of weapon of mass destruction); 18 U.S.C. §§ 2339A, 2339B (2012) (material support to terrorist organizations).

21. But in post-publication communications with me, Chapman describes his article as claiming, instead, that the government did have the option of pursuing militarily as enemies, without due process, persons who engaged in conduct contrary to domestic law, rather than always treating them as suspected criminals with due process. In this version, due process does not limit the choice of means by the government, but merely requires that, *once the means of law enforcement have been chosen*, due process procedures are mandatory, even if the government is acting abroad against noncitizens. By the seventeenth century in England, as also in colonial and early American law, due process required the use of the traditionally-applicable common law procedures such as the jury in a legal proceeding at which life, liberty, or property were at issue, held in a properly constituted tribunal, and charging a violation of a known offense. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–98, 472–73 (4th ed. 2002); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664–1776, at 385 (1970); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012). Under this definition, little if any government conduct implicating due process would actually take place against pirates abroad or on the high seas; the relevant state action would occur rather in English or American territory, once the suspected pirate, apprehended extraterritorially, was brought there and proceeded against judicially.

Chapman grounds his claims about the U.S. Constitution in an extended discussion of English law, which concludes that England also viewed due process as global and as imposing a substantive restraint in favor of a criminal justice approach to piracy suppression starting in the sixteenth century.

*Due Process Abroad*, and its originalist view of global constitutionalism, is already receiving favorable attention from some legal scholars<sup>22</sup> and litigants.<sup>23</sup> Many legal scholars have long had sympathy for arguments in favor of constitutional rights extending globally to noncitizens,<sup>24</sup> even as originalist arguments to that effect have seemed weakly-sourced. A critical examination of the evidence presented in his new article would seem useful at this time. Perhaps the recent academic coalescence around the view that the Constitution was not understood to provide extraterritorial protections during the founding era and early Republic, at least with regard to noncitizens,<sup>25</sup> needs to be re-examined.

A focus on piracy is both apt and timely. Piracy took place primarily on the high seas, therefore inherently raising questions about extraterritorial application of fundamental rights. Citizens and subjects of many nations engaged in piracy, and frequently intermingled as crew, thus raising questions

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Chapman seems to concede this. *See, e.g.*, Chapman, *supra* note 15, at 382 (“Federal officers who captured suspects on the high seas, in foreign territorial waters, and even on foreign soil transported them back to the United States, where those suspects received the same due process protections as any other federal defendant.”); *id.* at 382–83 (stating that a federal official who punished a suspected pirate extrajudicially on the high seas would be “personally liable in a damages action for marine trespass”—not, apparently, found to have violated the Due Process Clause). Yet it is entirely uncontroversial that persons charged with domestic crimes and tried in England or America were entitled to due process there, no matter their citizenship or where apprehended. *See, e.g.*, Kent, *Global Constitution*, *supra* note 7, at 505, 516, 518–21; Kent, *Citizenship*, *supra* note 7, at 2118–19. So, if this is all Chapman is saying, one wonders why this uncontroversial thesis would be presented as “challeng[ing]” a supposedly contrary “consensus.” Chapman, *supra* note 15, at 377. It certainly feels odd to disagree with an author about what his paper says, but still I choose to address the bolder, substantive reading of *Due Process Abroad*, outlined in my main text above, rather than the minimal and uncontroversial thesis described in this footnote because I find the former more faithful to his written text.

22. *See, e.g.*, Brief of Amici Curiae Constitutional Law Scholars in Support of Respondents at 7, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965); Ilya Somin, *Does The Constitution Require Due Process Abroad?*, JOTWELL (July 12, 2017), <https://conlaw.jotwell.com/does-the-constitution-require-due-process-abroad/> (last visited Oct. 4, 2018).

23. Reply Brief of FBME Bank Ltd. and FBME Ltd. at 17, *FBME Ltd. v. Mnuchin*, 709 F. App'x 4 (D.C. Cir. 2017) (No. 17-5076), 2017 WL 3215091, at \*17 (citing the article favorably).

24. *See* Kent, *Global Constitution*, *supra* note 7, at 469.

25. *See, e.g.*, RAUSTIALA, *supra* note 7, at 38; GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 7 (1996); Kent, *Black Holes*, *supra* note 14, at 1036–39; *see also* Chapman, *supra* note 15, at 380 (“[S]cholars seem to uniformly agree that early American history supports the notion that due process stopped—especially for aliens—at the nation’s borders.”). *See generally* Kent, *Global Constitution*, *supra* note 7.

about the extent to which legal protection turned on nationality. And piracy was a phenomenon that blurred lines between war and crime, leading government piracy suppression operations to contain elements of both war fighting and law enforcement. It is thus an important test case for Founding era views about the reach of fundamental constitutional rights to places, persons, and contexts beyond the paradigm case of the Constitution's applicability—governance of U.S. citizens in the United States.

The study of piracy and piracy suppression in this article and Chapman's is part of a growing body of work on those subjects by legal scholars and historians. Recent historical work elevated piracy and piracy suppression to important places in debates about the drivers of central state formation in Europe,<sup>26</sup> the motives for English colonization of the new world,<sup>27</sup> the aims of European great power politics during the early modern era,<sup>28</sup> and the legal delimitation of the oceans.<sup>29</sup> Legal scholars focused on the role of piracy in the development of concepts of international torts and crimes,<sup>30</sup> international jurisdiction including universal jurisdiction,<sup>31</sup> and the international law cases of the U.S. federal courts sitting in their admiralty and maritime jurisdiction.<sup>32</sup> With the re-emergence of piracy as a live threat, especially off the east coast of Africa and in the waters around Indonesia and

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26. See, e.g., MIKKEL THORUP, *AN INTELLECTUAL HISTORY OF TERROR: WAR, VIOLENCE, AND THE STATE* (2010); JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1994).

27. See MARK G. HANNA, *PIRATE NESTS AND THE RISE OF THE BRITISH EMPIRE 1570–1740* (2015).

28. See, e.g., CARL BRIDENBAUGH & ROBERTA BRIDENBAUGH, *NO PEACE BEYOND THE LINE: THE ENGLISH IN THE CARIBBEAN 1624–1690* (1972).

29. See, e.g., Lauren Benton, *Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism*, 47 *COMP. STUD. SOC. & HIST.* 700 (2005).

30. See, e.g., Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 *CHI. J. INT'L L.* 197, 198 (2010); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 *NOTRE DAME L. REV.* 111 (2004).

31. See, e.g., M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 39, 47–49 (Stephen Macedo ed., 2004); Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 *AM. U. L. REV.* 1267 (2010); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 *HARV. INT'L L.J.* 183, 184 (2004) [hereinafter Kontorovich, *The Piracy Analogy*].

32. See, e.g., Joel H. Samuels, *How Piracy Has Shaped the Relationship Between American Law and International Law*, 59 *AM. U. L. REV.* 1231 (2010); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 *AM. J. LEGAL HIST.* 117 (1993); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 *AM. J. INT'L L.* 727 (1989).

Malaysia,<sup>33</sup> legal scholarship has also focused on modern rules and institutions of domestic and international law of piracy suppression.<sup>34</sup>

This article explores in depth the law of nations, English domestic law, and English government practice from the late medieval period through the eighteenth century, and the U.S. constitutional law and government practice during the Founding and antebellum periods. I conclude that Chapman's claims about due process and piracy suppression are incorrect. Both Parliament and the U.S. Congress; both the Crown and its counselors and U.S. Presidents and their advisers; both the Royal Navy and the U.S. Navy; and commentators both English and American believed that (1) pirates on the high seas could lawfully be subject to extrajudicial killing, but that (2) the criminal justice system was usually the preferred approach to dealing with pirates, and when tried for their crimes in English or American territory respectively, accused pirates were entitled to due process of law.

This article proceeds in five main parts. Section II discusses the law and government practice of England from the 1500s to 1800. Theorists of the emerging law of nations taught that pirates were unprotected by the law and could be slaughtered wherever found. English domestic law adopted this view, and the Royal Navy and colonial forces carried it out. This section disputes Chapman's reading of two anti-piracy statutes from the time of Henry VIII, showing that they did not instantiate a global vision of due process. It also questions Chapman's claim that a statute from William III's reign that allowed jury-less criminal trials of pirates was viewed as problematic or illegal. Section III explains why, despite the lawfulness of military force against pirates, under the law of nations and domestic law, the English government nevertheless preferred a law enforcement approach to piracy. Section IV turns to the post-independence law of the United States. It continued the English tradition, under which law enforcement was the first option, but military force was viewed as a lawful tool as well. The final part, Section V, addresses the problem of drawing lines between contexts in which only law enforcement methods may be used and those in which military force is also lawful. A brief Conclusion offers some thoughts about the persistence of originalist arguments for a global Constitution, despite the lack of evidence to support them.

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33. *IMB Piracy Reporting Centre*, ICC COMMERCIAL CRIME SERVS., <https://www.iccces.org/index.php/piracy-reporting-centre> (last visited Oct. 4, 2018).

34. See, e.g., Eugene Kontorovich, "*A Guantánamo on the Sea*": *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243 (2010); James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT'L L. 243 (2009); Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1 (2007).



## I. THE LAW OF ENGLAND

English law and practice are crucial to *Due Process Abroad* because the article claims that the new United States embodied in its Constitution a due process framework inherited from its mother country. Anglo-American fundamental law, according to Chapman, prohibited the government from using any means other than law enforcement and due process to confront any person, anywhere, whose conduct violated, or was suspected of violating, a criminal statute. The strong weight of the evidence refutes these claims.

*Due Process Abroad* presents a truncated version of the history of criminal process in England. According to Chapman, English fundamental law dating back to the medieval period required that no free person could be deprived of life, liberty, or property except according to the ordinary course of the common law.<sup>35</sup> He notes that common lawyers identified this principle with the “law of the land” clause of Magna Carta (1215) and the “due process” requirements of statutes dating from the fourteenth-century reign of King Edward III.<sup>36</sup> According to Chapman, “the *sine qua non* of traditional due process” was trial by jury.<sup>37</sup> He asserts that this understanding of due process “set sail”—i.e., came to cover all persons within its ambit of protection, even pirates found on the high seas—in two landmark statutes of Henry VIII (1535 and 1536).<sup>38</sup> These acts ordained that piracies and other crimes committed on the high seas should be tried according to the common law, with grand jury indictment and jury trial. *Due Process Abroad* reads them to be examples of a more general principle that the government was limited to common law procedures whenever it confronted any person, anywhere, who was suspected of engaging in conduct made civilly or criminally wrongful by statute or common law. The article portrays as an unfortunate deviation—which was reviled and quickly corrected by Americans after their revolution—a statute, enacted at the end of the seventeenth century during the reign of William III, which authorized trial of pirates captured on the high seas or in the English colonies in *ad hoc* admiralty courts sitting without a jury.

There are many problems with this account, both in its particulars and in its conclusion. First, the particulars: In the time before the American Revolution, English law never required that life, liberty, and property only be taken away through common law procedures. There were always courts that heard criminal cases under non-common law procedures, though these generally did not impose the death penalty. It did come to be considered an important part of traditional English liberty that capital cases—and piracy was a capital crime—be heard only according to common law procedure. But this was not the motivation for the statutes of Henry VIII. Those statutes

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35. See Chapman, *supra* note 15, at 381, 393–94.

36. See *id.* at 393–94.

37. *Id.* at 381.

38. *Id.* at 392–94.

were expressly intended to make it easier to convict and hang pirates. As for the statute of William III, *Due Process Abroad* assumes that it must have been widely seen as unlawful, but presents no evidence of this.

And, on the overall conclusion, it is clear that English law and policy approved the extrajudicial killing of pirates encountered on the high seas. There was no global due process for pirates. This English view emerged out of many intellectual sources, including writings on the law of nature and the law of nations. It was also driven by the practical reason that the oceans were vast, transport and communications slow, and the protective resources of the state minimal—meaning that self-help and summary violence were perceived to be necessary tools.

#### A. *The Legal Status of Pirates under the Emerging Law of Nations*

By the seventeenth century, a consensus emerged among jurists and theorists of the law of nations that pirates were outside the protection of the law and could be lawfully killed by anyone, whether government or private actors.

Several centuries earlier, up through the early Renaissance period, piracy was not a legal term, and acts of piracy were not seen as necessarily illegal on the international plane.<sup>39</sup> Individual polities applied their domestic law to combat robberies and violence at sea. For instance, starting in the late 1200s, surviving records show English civil court proceedings seeking compensation for acts of robbing and pillaging at sea.<sup>40</sup> Starting in the mid-1300s, there are records of English common law criminal proceedings for acts that would later be called piracy.<sup>41</sup> In the same period, diplomatic records show the English crown negotiating to pay compensation to foreign merchants who had been victimized by English sea raiders.<sup>42</sup>

Emerging out of both Christian scholastic and humanistic intellectual traditions during the Renaissance, writers in the 1500s began developing theories of lawful international behavior that eventually became a largely secular “law of nations”—what would later be called international law. These early theorists almost uniformly condemned piracy as illegal, viewed the lives and property of pirates as unprotected by law, and authorized the use of unrestrained violence against them. Pierino Belli (1502–75), a military commander and then councilor of state for the Duke of Savoy, wrote of pirates in his treatise *De Re Militari et Bello Tractatus* that “it should be permissible for anyone to attack them . . . even persons in private life may

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39. See THOMAS K. HEEBØLL-HOLM, PORTS, PIRACY AND MARITIME WAR: PIRACY IN THE ENGLISH CHANNEL AND THE ATLANTIC, c. 1280–c. 1330, at 13 (John Hudson ed., 2013).

40. See Reginald G. Marsden, *Introduction* to 1 SELECT PLEAS IN THE COURT OF ADMIRALTY, at xi, xvii–xxxiv (Reginald G. Marsden ed., 1894).

41. GREGORY DURSTON, THE ADMIRALTY SESSIONS, 1536–1834: MARITIME CRIME AND THE SILVER OAR 4 (2017).

42. *Id.*; Marsden, *supra* note 40, at xvii–xxxv.

assault such outlaws—and to the point of killing them.”<sup>43</sup> Balthazar Ayala (1548–84), an influential jurist from the Spanish Netherlands, taught that pirates cannot receive any protection from the laws of war.<sup>44</sup> Jean Bodin (1530–96), an important French law professor, politician, and political theorist, taught that pirates and brigands were not “just and lawful enemies” and so are “excluded from all the benefit of the law of Armes.”<sup>45</sup>

One of the most influential figures in conceptualizing a secular law of nations and defining rules regarding piracy is Alberico Gentili (1552–1608), a Protestant refugee from an Italian state who settled in England and served more than two decades as the Regius Professor of Civil Law at Oxford University. Gentili wrote that the law of nations and its subpart, the laws of war, apply to conflicts between organized sovereign states, but not to conflicts with or between private individuals or groups.<sup>46</sup> By definition, a lawful “state of war cannot exist with pirates and robbers.”<sup>47</sup> “Neither brigands nor pirates are entitled to the privileges of international law, since they themselves have utterly spurned all intercourse with their fellowmen and, so far as in them lies, endeavor to drag the world back to the savagery of primitive times.”<sup>48</sup> “With pirates and brigands, who violate all laws, no laws remain in force.”<sup>49</sup> “[N]o rights will be due to these men who have broken all human and divine laws . . . .”<sup>50</sup>

According to Gentili, the lack of any protection of the law for pirates meant that unlimited violence could lawfully be used to suppress them. In general, private war—organized violence not carried on by a sovereign state—was illegal and could “be punished with death[.]”<sup>51</sup> This was even more so with pirates. Quoting Cicero, Gentili referred to pirates as “the common enemies of all mankind . . . .”<sup>52</sup> “It is right to make war upon pirates . . . .”<sup>53</sup> Gentili then states that all nations may participate in “the slaying of pirates[.]” for they are “common enemies, and they are attacked with

43. PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1563), quoted in Harry D. Gould, *Cicero's Ghost: Rethinking the Social Construction of Piracy*, in *MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE* 23, 30 (Michael J. Struett et al. eds., 2012).

44. *Id.* at 31.

45. JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* 1 (Kenneth Douglas McRae ed., Richard Knolles trans., 1962) (1606).

46. *See* 2 ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* 15, 20, 25 (John C. Rolfe trans., 1933) (1612) [hereinafter GENTILI, *DE JURE BELLI*]; *see id.*

47. *Id.* at 22.

48. ALBERICO GENTILI, *DE LEGATIONIBUS LIBRI TRES* 79 (Gordon J. Laing trans., photo. reprint 1924) (1594).

49. GENTILI, *DE JURE BELLI*, *supra* note 46, at 24.

50. *Id.* at 124.

51. *Id.* at 20 (quoting Plato).

52. *Id.* at 22.

53. *Id.* at 124.

impunity by all, because they are without the pale of the law.”<sup>54</sup> “They ought to be crushed[,]” and states should “everywhere . . . shatter the lairs of pirates.”<sup>55</sup> Gentili even compared pirates to dangerous beasts: “To pirates and wild beasts no territory offer safety. Pirates are the enemies of all men and are attacked by all men with impunity, etc. Similarly the hunting of wild beasts is unrestricted.”<sup>56</sup> In sum, pirates may be “put to death . . .”<sup>57</sup>

Along with Gentili, the Dutch jurist Hugo Grotius (1583–1645) is recognized as the other major founder of international law. Grotius used the concept of the state of nature and an analogy between individuals and states to inform his work on standards of international behavior. Individuals in the state of nature, prior to government and thus prior to any sovereign-created law, had certain rights and duties to each other according to the law of nature. These core rights included self-defense and the right to punish wrongdoers with violence. Just as man had a natural right to kill “a Serpent,” “Foxes; and noxious Reptiles,” and other “Beasts . . . [which] do, or attempt to do, us hurt,” so also could he kill “a Robber, or a Thief,” or other “Malefactor.”<sup>58</sup> Grotius—and later, John Locke—taught that, when humans entered into social relations and created governments, the natural right of self-defense and punishment was partially transferred to the sovereign.<sup>59</sup> But on the international plane, there was no sovereign who stood above states. Grotius therefore theorized states to stand in relation to each other as did individuals in the state of nature: possessed of no common sovereign, and accordingly allowed to deploy their natural right to use lethal force in self-defense.<sup>60</sup>

According to Grotius, sovereigns possessed the right to use violence to protect and prevent injuries to their subjects and polities and also to punish persons, groups, or states which did not directly injure them but committed “grievous Violations of the Law of Nature of Nations,” including cannibals and “those who practice piracy” and therefore are “cut . . . off from human Society.”<sup>61</sup> Thus, any sovereign could lawfully make war against pirates (and, as noted, private individuals could use violent self-help against pirates

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54. *Id.* at 423.

55. *Id.* at 423–24.

56. 2 ALBERICO GENTILI, *HISPANICAE ADVOCATIONIS LIBRI DUO* 18 (Frank Frost Abbott trans., Oxford Univ. Press 1921) (1613).

57. GENTILI, *DE JURE BELLI*, *supra* note 46, at 22.

58. 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 973–74 (Richard Tuck ed., Jean Barbeyrac trans., Liberty Fund 2005) (1625).

59. *Id.* at 1021–24; *see also* RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 81–82 (1999) (discussing the parallel development of this concept in the thought of Grotius and Locke).

60. *See* TUCK, *supra* note 59, at 8–9, 95–96, 129, 140, 186, 188; J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 *TEX. L. REV.* 843, 887–88 (2007).

61. GROTIUS, *supra* note 58, at 1021–24.

on the high seas). “[T]he justest War is that which is undertaken against wild rapacious Beasts, and next to it is that against Men who are like Beasts.”<sup>62</sup> On the high seas, where no sovereign ruled, private persons, as well as governments, continued to have a natural right to use violent self-help against those who would injure them.<sup>63</sup> Thus private individuals could also lawfully slay pirates.

The core teachings of Gentili, Grotius, and others on the right to destroy pirates were carried forward through the centuries. This idea was often encapsulated in the Ciceronian phrase *hostis humani generis*—that pirates were the common enemies of all mankind.<sup>64</sup> This concept had a secondary meaning as well, applicable in domestic judicial systems. One example is in the work of the famed English jurist Edward Coke (1552–1634), who served as Solicitor General of England, Attorney General of England, Chief Justice of the Common Pleas, and then Chief Justice of the King’s Bench. When Coke discussed pirates’ status as “*hostis humani generis*,”<sup>65</sup> he meant the war against all nations and laws waged by pirates, and their locus on the high seas where all nations had a common right of self-defense, allowed any state to exercise jurisdiction to punish a captured pirate in its domestic legal system, no matter the nationality of the offender or the nationality of the victims.<sup>66</sup>

These two related meanings of *hostis humani generis* were accepted by English legal authorities. By the seventeenth century, writers on international law agreed that “pirates were considered to be an evil to be eradicated.”<sup>67</sup> For instance, Richard Zouche (1590–1661), who, like Gentili, held the Regius chair in Civil Law at Oxford, and also served as judge of England’s High Court of Admiralty, wrote in a 1650 treatise that “the laws of war do not apply” to “pirates” and “brigands,” and so it is “lawful to offend and destroy [them] utterly.”<sup>68</sup> Francis Bacon (1561–1626), Attorney General and

62. *Id.* at 1024.

63. *Id.* at 970 (“Yet the ancient Liberty, which the Law of Nature at first gave us, remains still in Force where there are no Courts of Justice, as upon the Sea.”).

64. This term was first used by Roman authors to describe tyrants like Nero and Commodus, and later during the Dark Ages by Christian theologians to describe the devil. *See* DAN EDELSTEIN, *THE TERROR OF NATURAL RIGHT: REPUBLICANISM, THE CULT OF NATURE, AND THE FRENCH REVOLUTION* 30–34 (2009).

65. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 113 (London, M. Flesher 1644).

66. *See* Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 165–66 (2009); Kontorovich, *The Piracy Analogy*, *supra* note 31, at 190–92.

67. HEEBØLL-HOLM, *supra* note 39, at 13. *See also* Kontorovich, *The Piracy Analogy*, *supra* note 31, at 190 (“The law of nations also permitted any nation that caught a pirate to summarily execute him at sea.”).

68. 2 RICHARD ZOUCHÉ, *AN EXPOSITION OF FEJAL LAW AND PROCEDURE, OR OF LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME* 37–38 (Thomas Erskine Holland ed., J.L. Brierly trans., Carnegie Inst. of Wash. 1911) (1650).

Lord High Chancellor of England under James I, wrote that “[i]t was never doubted but a war upon pirates may be lawfully made by any nation, though not infested or violated by them[,]” because “pirates are communes humani generis hostes[.]”<sup>69</sup> Bacon also approved of preventive war against any states that engaged in piracy: “Beasts are not less savage because they have dens.”<sup>70</sup>

Charles Molloy (1640–1690), a barrister whose popular treatise on international maritime law went through at least ten editions, summed up the conventional wisdom of centuries of writers on the law of nations by holding that “[a]gainst Pirates and such as live by Robbery at Sea, any Prince hath power to make War,”<sup>71</sup> in other words, to use military force. Molloy continued that anyone who captures pirates on the ocean, including private persons, “may execute such Beasts of Prey immediately, without any Solemnity of Condemnation.”<sup>72</sup> And according to Molloy, if captors did bring pirates to port to stand trial, but “the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss,” the pirates may, by the “Law of Nature,” be “executed by the Captors.”<sup>73</sup>

Matthew Tindal (1657–1733), a philosopher and influential Admiralty lawyer, agreed with the consensus that pirates and others who engage in private, non-state sanctioned violence have “no Right by the Law of Nations to be treated as [a lawful] Enemy,” but rather may be “put[ ] . . . to Death.”<sup>74</sup>

In the eighteenth century, William Blackstone (1723–80), member of Parliament and then Justice of King’s Bench and Common Pleas, summarized in his magisterial treatise the view of pirates taken by natural law and law of nations theorists. He wrote that pirates have reduced themselves “to the savage state of nature, by declaring war against all mankind,” and so “all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do.”<sup>75</sup> As discussed above, in the state of nature, the putative state of humankind prior to social organization and government, people were said to have a natural liberty to use lethal force in self-defense and as a deterrent to

69. FRANCIS BACON, ADVERTISEMENT TOUCHING A HOLY WAR (1622), *reprinted in* 1 THE WORKS OF LORD BACON 521, 528 (London, Henry G. Bohn 1854).

70. *Id.*

71. CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI: OR, A TREATISE OF AFFAIRES MARITIME, AND OF COMMERCE 55 (7th ed., London, John Walthoe, Jr., 1722).

72. *Id.* at 61.

73. *Id.*

74. MAT[THEW] TINDALL, AN ESSAY CONCERNING THE LAWS OF NATIONS AND THE RIGHTS OF SOVEREIGNS 20, 24–25 (London, Richard Baldwin, 1694).

75. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*71.

others.<sup>76</sup> John Locke, in expounding the right of every person in the state of nature “to kill a murderer,” taught that those who “hath, by unjust violence and slaughter . . . declared war against all mankind, [may] therefore be destroyed as a lion or a tyger, one of those wild beasts.”<sup>77</sup> Since international relations between states, and relations between individuals on the high seas, were also said to occur in a state of nature, Blackstone was referencing the well-established view that governments and private individuals could lawfully kill pirates, the enemies of all mankind, and outside the protection of the law.

### B. *English Domestic Law on Piracy*

Although the law of nations was quite clear that pirates could be targeted with military force or summarily executed upon capture, English domestic law, in theory, might have limited or abolished that rule with respect to the conduct of the English government and private English actors. In other words, domestic law might have provided pirates with an entitlement to be treated as an accused criminal subject to due process rather than an unlawful combatant or wild beast subject to summary violence. This, in effect, is Chapman’s argument, though he ignores the voluminous evidence (summarized above) about the legality of summary violence against pirates under the law of nations.<sup>78</sup>

Chapman reads a passage in Blackstone to state that suspected pirates had the right to be proceeded against only by due process and the law of the land, no matter their nationality and no matter where they were seized. Here is the relevant passage in Blackstone:

Formerly [piracy] was only cognizable by the admiralty courts, which proceed by the rules of the civil law. But it being inconsistent with the liberties of the nation that any man’s life should be taken away, unless by the judgment of his peers or the common law of the land, the statute 28 Hen. 8 c. 15 established a new jurisdiction for this purpose, which proceeds according to the course of the common law . . . .<sup>79</sup>

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76. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 6–11 (C.B. Macpherson ed., Hackett Publ’g 1980) (1690); THOMAS HOBBS, LEVIATHAN 183–91 (C.B. Macpherson ed., Penguin Books 1985) (1651).

77. LOCKE, *supra* note 76, § 11.

78. Chapman does not discuss the work of Grotius, Gentili, Zouche, Molloy, or other influential theorists who wrote that pirates are unprotected by the law of nations and could lawfully be killed.

79. Chapman, *supra* note 15, at 394 (quoting BLACKSTONE, *supra* note 75).

According to Chapman, Blackstone meant that “the Acts of 1535 and 1536 effectively extended Magna Carta’s ‘law of the land’ protection to those accused of crimes on the high seas. Due process had set sail.”<sup>80</sup>

It is uncontroversial that pirates present in England and charged with a domestic law crime would be entitled to protection of the courts and law, including due process of law. But, as noted above, Chapman appears to be making two stronger claims. First, he asserts that due process always required full common law procedural protections, including the jury. Second, he views the English anti-piracy statutes as evidencing a supposed rule that the government could not address suspected piracy—even on the high seas and when committed by non-Englishmen—with anything other than law enforcement methods following all of the usual procedural protections of the common law. The evidence for these claims is lacking. My discussion is divided into two subparts. First, I show that the two statutes from Henry VIII’s time had a very different purpose and meaning than what Chapman claims. Second, I show that “due process” in English law was never understood to require that all criminal proceedings proceed under full common law procedures.

### 1. Understanding the Statutes of 1535 and 1536

Two anti-piracy statutes enacted by Henry VIII and Parliament in 1535 and 1536 did not extend “due process abroad” to pirates—or anyone else—on the high seas or in foreign lands. The statutes were enacted to strip away procedural protections that had made it too difficult to convict pirates and other malefactors. There is no evidence that they were intended or understood to grant global due process to suspected pirates.

Before the two Henrican statutes, English admiralty courts trying piracies proceeded according to the course of the civil law, using a Roman-canon law criminal procedure in which judges served as fact-finders.<sup>81</sup> The civil law character of these proceedings, with judges serving in inquisitorial and fact-finding roles, in addition to determining the law, can be seen on the face of commissions issued concerning piracy. For example, a 1531 commission from Henry VIII appointed Arthur Viscount Lisle, the vice-admiral of England, and several other men, including a civilian (“John Fewter, LL.D.”) “as justices to make inquisitions concerning pirates and piracies, and to hear and determine all such cases.”<sup>82</sup>

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80. *Id.* at 393–94.

81. DURSTON, *supra* note 41, at 8; 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 546, 550 (3d ed. 1922). This dated at least from Edward III’s Statute of Treasons. See BLACKSTONE, *supra* note 75. On the earlier history of criminal trials for piracy in England, see DURSTON, *supra* note 41, at 7–8; Marsden, *supra* note 40, at xxxvi.

82. 5 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII 14 (James Gairdner ed., London, HM’s Stationery Office 1885) (entry 35). A “civilian” is a lawyer trained in the civil law. On the training and practice of English civilians, see Charles S. Cumming, *The English High Court of Admiralty*, 17 TUL. MARITIME L.J. 209, 226–29 (1993).



The preambles to the statutes of 1535 and 1536 state that pirates, robbers, murderers, and others who committed crimes upon the high seas “many tymes escape unpunysshed [unpunished]” because the proceedings occurred under the civil law, which requires before the judgment of death be imposed that “either they [the accused] must playnly confess their offences (which they will never doo without torture or paynes),” or there must be testimony from indifferent witnesses who saw the offence committed, which is very difficult to acquire because the crimes occur on the seas and perpetrators “many tymes murder or kill” any possible witnesses.<sup>83</sup>

The problem was that the civil law had very high standards of proof compared to the common law, as the statutes recite. An English common law jury could “convict on whatever evidence persuaded it,” including solely circumstantial evidence.<sup>84</sup> In the common law system, now-canonical rules and practices like the beyond-a-reasonable-doubt standard and judicial review of the sufficiency of evidence were centuries in the future. After the Fourth Lateran Council ended trial by ordeal in 1215,<sup>85</sup> the civil law moved in a very different direction than the English common law, which delegated fact-finding to a lay jury that could convict based on whatever evidence it found persuasive. By contrast, the Roman-canon law of proof that governed civil law criminal procedure required that inquisitorial judges find guilt to be certain,<sup>86</sup> and accept as proof only two eyewitnesses or the confession of the accused, as the preambles to the two Henrican statutes accurately recount.<sup>87</sup> Circumstantial evidence could not be the sole basis for a conviction.<sup>88</sup> As a result of these exacting proof requirements, civil law systems turned to torture to extract the needed confession.<sup>89</sup> Except in certain unusual cases, in which the crown ordered it and immunized those administering it, torture was not used to extract evidence of guilt in English criminal procedure.<sup>90</sup> This does not reflect a superior public morality on the part of the

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83. An Acte for punysshement of Pyrotes and Robbers of the See (Offenses at Sea Act), 28 Hen. 8 c. 15, § 1 (1536); *see also* An Acte Conc[er]nyng Pyrottes and Robbers of the See, 27 Hen. 8 c. 4, § 1 (1535). Two “almost identical acts passed in consecutive years appears to have been a consequence of the first not specifying treason as being within its scope, something that was corrected by the second statute. After 1536 this [second statute] was the only act normally referred to.” DURSTON, *supra* note 41, at 11–12.

84. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 78, 138 (2006 ed.). To convict, a common law jury required “not certainty, but only persuasion. Well into the eighteenth century there were no firm rules establishing minimum standards of evidence for conviction” at common law. *Id.* at 80.

85. *Id.* at 6; THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 3 (1985).

86. LANGBEIN, *supra* note 84, at 6–7.

87. *Id.* at 4; DURSTON, *supra* note 41, at 8–9.

88. LANGBEIN, *supra* note 84, at 4; DURSTON, *supra* note 41, at 9.

89. LANGBEIN, *supra* note 84, at 4–5.

90. *Id.* at 81–139; DURSTON, *supra* note 41, at 9. Sometimes extrajudicial torture was used on pirates during interrogations held for intelligence purposes—to elicit the names of

English, but simply the fact that their common law proof system did not require confessions.

Expressly in order to make conviction easier—not out of a concern for individual rights such as jury trial—the statutes of Henry VIII moved the trial of piracies from civil law procedure to trial by the common law, or “after the comon course of the lawes of this Lande.”<sup>91</sup> Trial of piracies would still occur under the auspices of the Admiralty. The statutes provided that the king would send out a commission under the great seal to the Lord Admiral or his deputies, who would assemble as an ad hoc court with “three or foure such other substanciall p[er]sons” named by the Lord Chancellor.<sup>92</sup> In practice, the other substantial persons named were frequently common law judges, who joined the civilian judges of admiralty to hear the cases of piracy and other serious admiralty crimes.<sup>93</sup> Grand juries and petit juries were assembled from the shires and places in the realm specified in the king’s commission.<sup>94</sup> These courts proceedings became known as the Admiralty Sessions.<sup>95</sup>

This move to common law procedure facilitated convictions for piracy because circumstantial evidence alone was now legally sufficient,<sup>96</sup> and a much looser burden of proof was employed by the lay factfinders. In addition, pirates who refused to plead guilty or not guilty—one or the other was required in order to manifest the necessary consent to a jury trial—could now be subject to “pressing” or, in medieval Latin, *peine forte et dure*.<sup>97</sup> As John Langbein explains, pressing entailed the defendant being “laid over with weights that would crush him to death unless he relented” by entering a plea and thereby consenting to jury trial.<sup>98</sup> Civil liberties were far from the

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confederates. See CLAIRE JOWITT, *THE CULTURE OF PIRACY, 1580–1630: ENGLISH LITERATURE AND SEABORNE CRIME* 21 (2010) (describing an interrogation of pirates at the Tower of London in 1583 employing torture).

91. Offenses at Sea Act 1536, 28 Hen. 8 c. 15, § 1; see also 27 Hen. 8 c. 4, § 1 (1535).

92. 28 Hen. 8 c. 15, § 1.

93. See DURSTON, *supra* note 41, at 53; A.T. CARTER, *OUTLINES OF ENGLISH LEGAL HISTORY* 139 (London, Butterworth & Co. 1899).

94. 28 Hen. 8 c. 15, §§ 1–2.

95. DURSTON, *supra* note 41, at 1, 12–13.

96. See HANNA, *supra* note 27, at 30–31 (noting that pirates could be convicted based solely on circumstantial evidence).

97. See COKE, *supra* note 65, at 111–12 (London, E. & R. Brooke 1797); MOLLOY, *supra* note 71, at 70–71; 2 EDWARD HYDE EAST, *A TREATISE OF THE PLEAS OF THE CROWN* 812 (Philadelphia, P. Byrne, 1806).

98. LANGBEIN, *supra* note 84, at 76. Langbein explains that wealthy defendants often chose death in this manner rather than consenting to jury trial in which they might be convicted, because conviction of a felony would bring forfeiture of one’s estate. Pre-conviction death by pressing meant that one’s estate could descend to heirs. See *id.* at 75; see also BRYCE LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 637 (2d ed. 1980) (explaining the same point as Langbein).

mind of Henry VIII and Parliament when they enacted these anti-piracy statutes.

## 2. The Uncertain and Evolving Meaning of Due Process

Due process, at the time of the Henrican statutes and for centuries afterwards, did not have the purity that Chapman posits—a requirement of the jury, for anyone, anywhere, formally charged with a crime by the English government. Since this lesser claim by Chapman is incorrect, a fortiori his stronger claim—that anyone who was suspected of engaging in conduct that violated criminal or civil statutes could only be proceeded against by full common law judicial procedure—also fails.

Magna Carta's seemingly broad provisions in favor of liberty were interpreted quite narrowly through the medieval period.<sup>99</sup> Non-jury forms of criminal process were thought to be entirely legal well into the seventeenth century. Trial by battle, for example, was an available alternative to jury trial for centuries, although little used.<sup>100</sup> Throughout the Tudor period, the king's council exercised criminal powers, disregarding contrary statutes of Parliament, though according to the historian Frederic Maitland, "the council seems always to have shrunk from pronouncing the penalty of death."<sup>101</sup> The Court of Star Chamber, which used civil-inquisitorial procedure, exercised a "very comprehensive criminal jurisdiction," though also stopping short of inflicting the death penalty, from the late fifteenth to the mid-seventeenth century.<sup>102</sup> Maitland thinks it beyond doubt that Star Chamber and its procedure "was regarded as perfectly legal" through the reign of James I (1603-25).<sup>103</sup> During the troubled reign of Charles I (1625-49), Star Chamber became overtly political and aggressively prosecuted political and religious dissent. Its legality was then attacked by common lawyers like Edward Coke, and Parliament eventually abolished it.<sup>104</sup> Until the Long Parliament overthrew Charles I and moved against prerogative courts, the Court of High Commission, an ecclesiastical court using canon-civil law procedure, had also exercised a criminal jurisdiction over the laity.<sup>105</sup>

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99. See J.H. Baker, *Personal Liberty Under the Common Law of England, 1200-1600*, in *THE ORIGINS OF MODERN FREEDOM IN THE WEST* 178, 191 (R.W. Davis ed., 1995). On the feudal context and meaning of Magna Carta, see G.O. SAYLES, *THE MEDIEVAL FOUNDATIONS OF ENGLAND* 399-408 (1950).

100. See F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 212 (1919).

101. *Id.* at 217-19.

102. *Id.* at 219-21, 261-63; see also BAKER, *supra* note 21, at 119; LYON, *supra* note 98, at 616; Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 *AM. J. LEG. HIST.* 221, 227-31 (1962).

103. MAITLAND, *supra* note 100, at 262.

104. BAKER, *supra* note 21, at 472-74.

105. MAITLAND, *supra* note 100, at 264-66.

Criminal procedure that departed from the common lawyers' ideal was also used in distant, difficult to govern parts of the realm. For instance, after a Catholic revolt, Henry VIII created the Council of the North, a non-statutory administrative and judicial body for York and other rebellious northern counties.<sup>106</sup> The council exercised a criminal jurisdiction, according to the king's commission, "to hear and determine [criminal cases] according to the laws and customs of our Realm of England, or otherwise according to your sound discretion."<sup>107</sup>

The common lawyers did largely triumph during the battles of the seventeenth century—well over one hundred years after the anti-piracy statutes of Henry VIII. To a great extent, the criminal jurisdiction of courts which did not follow full common law procedure was removed—Star Chamber, the Court of High Commission, the Council of the North, and an analogous conciliar court for Wales and the Welsh March were abolished by Parliament in 1641.<sup>108</sup> At the same time, Parliament re-enacted the "law of the land" provision of Magna Carta and the "due process of law" clauses of statutes from the time of Edward III—suggesting that common law procedure was the process that was due in criminal cases.<sup>109</sup> During the crises of the seventeenth century, common lawyers and their Parliamentary allies pressed hard the idea that fundamental English liberties, such as jury trial, could never lawfully be withheld from a criminal defendant.<sup>110</sup>

The common law of criminal procedure continued its advance even after the Restoration of the monarchy in 1660. But it did not fully vanquish all competitors. Both as a matter of theory and practice, common law criminal procedure with its jury trial never attained the supremacy and universality that Chapman claims. First, as a matter of theory, parliamentary supremacy and the absence of American-style judicial review meant that claims of fundamental, non-derogable rights to certain legal procedures were tenuous, especially after the enormous assertion of parliamentary power represented by the Glorious Revolution of 1688.<sup>111</sup> By Blackstone's time, the supremacy

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106. *Id.* at 263–64.

107. R.R. REID, *THE KING'S COUNCIL IN THE NORTH* 282 (1921) (emphasis added).

108. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 193 (Liberty Fund 2010) (1929); PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 224–25 (2010); *see also* An Act for the Regulating of the Privy Council and for taking away the Court commonly called the Star-Chamber (Habeas Corpus Act), 16 Car. c. 10, § 1 (1640). The Petition of Right of 1628 had also re-enacted those clauses. *See* Petition of Right, 3 Car. c. 1, §§ 3–4 (1628) (reaffirming "law of the land" and "due process of law" provisions).

109. The Petition of Right of 1628 had also re-enacted those clauses. *See* Petition of Right, 3 Car. c. 1, §§ 3–4 (1628) (reaffirming "law of the land" and "due process of law" provisions).

110. *See* J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 123 (1955).

111. *See* BAKER, *supra* note 21, at 208–11; PLUCKNETT, *supra* note 108, at 336–37.

of Parliament was orthodoxy in England.<sup>112</sup> Parliament could change procedure, and this could become the new “law of the land” and new “due process.” Common lawyers might object, and these objections would have the weight of arguments about violation of the “ancient constitution” to buttress them.<sup>113</sup> But Parliament’s expressed will would still control.

In addition, there were geographical limits to the reach of English liberties, especially for aliens (as those who were not English subjects were called). Englishmen residing abroad in the colonies and other English possessions were understood to carry with them most of their traditional, fundamental liberties, though there were of course disputes about the precise content.<sup>114</sup> Englishmen who encountered English governmental power in other locations could likely also draw on their English liberties. The rules were different, however, for those who were not English subjects. At common law, protection of the laws was understood to stand in a reciprocal relationship with allegiance to the government.<sup>115</sup> Only persons owing allegiance to the government were under the protection of the government and its laws and courts. Only persons within protection because of their allegiance had standing to invoke the protection of the courts and were shielded by rights under domestic law. Subjects paradigmatically owed allegiance and were within protection.<sup>116</sup> Non-subjects, when peacefully visiting or residing in England, owed a local or temporary allegiance to the government, and so they temporarily had corresponding protection.<sup>117</sup> That protection

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112. See 1 BLACKSTONE, *supra* note 75, at \*156, \*178. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 260–61 (1998); John Phillip Reid, “*In Our Contracted Sphere*”: *The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution*, 76 COLUM. L. REV. 21, 42–43 (1976).

113. See generally J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND FEUDAL LAW* (1987) (showing how Coke and other common lawyers ahistorically argued that common law procedures had existed from time immemorial).

114. See, e.g., Eliga H. Gould, *Liberty and Modernity: The American Revolution and the Marking of Parliament’s Imperial History*, in *EXCLUSIONARY EMPIRE: ENGLISH LIBERTY OVERSEAS, 1600–1900*, at 112, 113 (Jack P. Greene ed., 2010); Daniel J. Hulsebosch, *English Liberties Outside England: Floors, Doors, Windows, and Ceilings in the Legal Architecture of Empire*, in *THE OXFORD HANDBOOK OF ENGLISH LAW AND LITERATURE, 1500–1700*, at 747, 747–49 (Lorna Hutson ed., 2017).

115. This paragraph is based on Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 *passim* (2009); Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 176–96 (2013) [hereinafter Kent, *Enemy Fighters*]; Kent, *Global Constitution*, *supra* note 7, at 502–05.

116. See 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF PLEAS OF THE CROWN* 59 (The Savoy, E. & R. Nutt, & R. Gosling 1736); 1 BLACKSTONE, *supra* note 75, at \*354; see also Kent, *Enemy Fighters*, *supra* note 115, at 177.

117. See 1 BLACKSTONE, *supra* note 75, at \*358; M[ICHAEL] FOSTER, *A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GAOL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES* 183 (Oxford, Clarendon Press 1762); see also Hamburger, *supra* note 115, at

disappeared, however, when the obligation of allegiance did—in other words, when the foreigner left the country. As Blackstone put it, “as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire.”<sup>118</sup> This fundamental legal framework structured how the government evaluated the entitlement of different persons and different places to protection of domestic law and courts. As we will see, the English government and legal commentators referred to this framework and incorporated its premises when thinking about the law of piracy suppression.

In practice, even after the common lawyers largely triumphed in the seventeenth century, not all crimes were adjudicated with full common law procedure. For instance, justices of the peace had long had authority to hear crimes of a lesser grade than felony without a jury, and this was expanded greatly after the Restoration.<sup>119</sup>

And then there was the case of piracy and related crimes committed on the high seas. As discussed, since 1535–36, these crimes were tried at Admiralty Sessions using common law criminal procedure, including a grand jury and petit jury. But as we have seen, the change to common law procedure was not motivated by a belief that there was fundamental legal entitlement to such procedure. Blackstone, the great partisan for the common law, was grossly embellishing when he claimed that the Henrican anti-piracy statutes were motivated by a concern for individual rights under the common law.<sup>120</sup> Chapman appears to uncritically accept Blackstone’s error.<sup>121</sup> Blackstone is correct, however, that after upheaval of the seventeenth century, the common lawyers’ long-held view that an English court should not inflict the death penalty except via common law procedures prevailed, and the argument that these procedures should be extended to non-petty but non-capital crimes was gaining force.

### 3. The Anti-Piracy Statute of William III

Chapman presents as an unfortunate deviation from a supposed common law norm the decision of Parliament near the turn of the eighteenth century to allow piracies to be tried without a jury in specially-constituted

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1847, 1898–1901; Kent, *Enemy Fighters*, *supra* note 115, at 177; Kent, *Global Constitution*, *supra* note 7, at 503.

118. 1 BLACKSTONE, *supra* note 75, at \*370.

119. PLUCKNETT, *supra* note 108, at 438–39.

120. See *supra* Blackstone quotation accompanying note 79; see also BLACKSTONE, *supra* note 75, at \*265 (stating that the exercise of admiralty jurisdiction under civil law procedures “was contrary to the genius of the law of England; inasmuch as a man might there be deprived of his life by the opinion of a single judge, without the judgment of his peers.”).

121. Chapman, *supra* note 15, at 394.

admiralty courts located in English colonies or on shipboard.<sup>122</sup> For Chapman, this statute was an “exception” for pirates “from common law protections . . . for the sake of expediency.”<sup>123</sup> But he presents no evidence suggesting that either colonists in the Americas or Englishmen back home viewed these courts as illegal.

To be sure, American colonists did complain about Britain’s novel uses of vice-admiralty courts in the colonies. The courts, which sat without juries and followed civil law procedure, were specifically enumerated in formal accounts of the colonial Americans’ reasons for dissatisfaction with the British government and, eventually, the need for revolution. For instance, the Declaration of the so-called Stamp Act Congress in 1765 stated that “trial by jury is the inherent and invaluable right of every British subject in these colonies,” and that the Stamp Act “and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.”<sup>124</sup> The Declaration of the Causes and Necessity for Taking Up Arms, adopted by the Continental Congress on July 6, 1775, stated:

[S]tatutes have been passed for extending the Jurisdiction of Courts of Admiralty and Vice-Admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable Privilege of Trial by Jury in Cases affecting both Life and Property.<sup>125</sup>

And one year later, the Declaration of Independence admonished King George III “[f]or depriving us in many cases, of the benefit of Trial by Jury.”<sup>126</sup>

Chapman links these grievances<sup>127</sup> to the statute of William III’s time, *An Act for the More Effectual Suppression of Piracies*, which allowed piracies and related high-seas felonies to be tried without a jury in specially-constituted admiralty courts located in English colonies or on shipboard.<sup>128</sup>

122. See *An Act for the More Effectual Suppression of Piracy*, 11 Will. 3 c. 7, § 4 (1698) (stating that the courts will hear cases “according to the civil law and the methods and rules of the Admiralty”).

123. Chapman, *supra* note 15, at 394–95.

124. An Act for granting and applying certain Stamp Duties and other Duties in the British Colonies and Plantations in America (the Stamp Act), 5 Geo. 3 c. 12 (1765). In June 1765, soon after the passage of the act, the Massachusetts legislature sent a circular inviting all the colonies to send delegates to a congress at New York in October, 1765 to develop a joint protest against the Stamp Act and other imperial trade regulations. Representatives from Massachusetts, New York, New Jersey, Pennsylvania, Connecticut, Rhode Island, Delaware, Maryland, and South Carolina attended.

125. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775), reprinted in SOURCES OF OUR LIBERTIES 295, 295 (Richard L. Perry ed., rev. ed. 1978).

126. THE DECLARATION OF INDEPENDENCE para. 20 (1776).

127. Chapman, *supra* note 15, at 381, 389, 397.

128. See *An Act for the More Effectual Suppression of Piracy*, 11 Will. 3, c. 7, § 4 (1698) (stating that the courts will hear cases “according to the civil law and the methods and

His suggestion appears to be that American colonists were also objecting to jury-less trials of pirates when they protested the Stamp Act and other trade regulations that allowed revenue cases to be heard, at the option of the government, either in vice-admiralty courts without a jury or in common law courts with one. But Chapman presents no evidence of any linkage in the minds of American colonists, and I have found none.

First of all, the colonial vice-admiralty courts that Americans protested against were legally and institutionally distinct from the courts in which piracies could be tried without a jury. Just as piracies in England were tried not in the standing High Court Admiralty but in ad hoc Admiralty Sessions convened periodically under a commission issued by the crown,<sup>129</sup> trials of pirates held in the colonies or on shipboard under the new statute of William III occurred not in standing colonial vice-admiralty courts but in ad hoc courts created for the occasion.<sup>130</sup> The judge of the standing colonial vice-admiralty court was often appointed to be a member of the bench of the ad hoc sessions, and so these court sessions for trying piracies outside of England were sometimes referred to as sittings of the vice-admiralty court.<sup>131</sup> But that was not strictly accurate. The regularly-constituted colonial vice-admiralty courts did not and could not try piracies or other felonies on the high seas.<sup>132</sup>

It is unclear if many piracy trials in the colonies actually took place without a jury, even though that option was legally available.<sup>133</sup> And Chap-

rules of the Admiralty"). By the same statute, admiralty sessions for trial of piracies could also be convened in the colonies under the statute of the Offenses at Seas Act of 1536, *see id.* § 14, something that had been determined in 1684 was not allowed under then-existing law. *See* JOEL H. BAER, *PIRATES OF THE BRITISH ISLES* 25 (2005).

129. Offenses at Sea Act of 1536, 28 Hen. 8 c. 15, § 1.

130. *See* DAVID R. OWEN & MICHAEL C. TOLLEY, *COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE, 1634–1776*, at 5–6 (1995); CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 17 n.18 (1960); Charles M. Andrews, *Introduction to RECORDS OF THE VICE-ADMIRALTY COURTS OF RHODE ISLAND: 1716–1752*, at 1, 3–4 (Dorothy S. Towle ed., 1936).

131. Andrews, *supra* note 130, at 4 n.1.

132. OWEN & TOLLEY, *supra* note 130, at 5–6; UBBELOHDE, *supra* note 130, at 17 n.18; Andrews, *supra* note 130, at 3.

133. The piracy act of William III allowed piracy trials in the colonies to occur in either vice-admiralty or under the statute of 28 Hen. 8 c. 15, which would mean using a jury. *See An Act for the More Effectual Suppression of Piracy*, 11 Will. 3 c. 7, § 14(1698). That act expired after seven years plus the term of Parliament then sitting, *see id.* § 13, but it was renewed several times, then made permanent in 1719. *See* 6 Geo. c. 19 (1719). And before then, in 1717, Parliament provided again that persons to be tried under 11 Will. 3 c. 7 “may be” instead tried according to the procedures of 28 Hen. 8 c. 15. 4 Geo. c. 11, § 7 (1717). Reports of piracy trials in the colonies reveal that juries were sometimes used and sometimes not. *See, e.g., The Trials of Major Stede Bonnet and Thirty Three Others, at the Court of Vice-Admiralty at Charles-Town in South Carolina, for Piracy, Octob. 30, &c. 1718*, in 6 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE END OF THE REIGN OF KING GEORGE I 156 (2d ed., London, 1730) (jury trial) [hereinafter *Stede Bonnet*



man has not established that there was any major current of opinion that viewed jury-less trials of pirates as unlawful. American colonial lawyers were well aware that the move to common law procedure in the statutes of Henry VIII was motivated by a desire to make it easier to convict, rather than a view that accused pirates were entitled to a jury. We know this indirectly because many printed authorities available to Americans recounted the true reasons for the statutory change.<sup>134</sup> And we see direct evidence of this knowledge in legal arguments by, for instance, John Adams, in a 1769 piracy case before an admiralty court in Boston,<sup>135</sup> and in statements by other American colonial lawyers.<sup>136</sup> Since it was known that common law procedure in piracy cases was not motivated by civil liberties concerns, it is not clear that the absence of a jury would have been viewed with much disfavor.

Further evidence of an apparent lack of concern about jury-less trials of pirates during the colonial period comes from a post-independence document produced by John Jay, while serving as the Secretary for Foreign Affairs to the Continental Congress in 1785. In discussing what powers his government had under the Articles of Confederation with regard to trial of piracy, Jay described the anti-piracy act of William III in a positive light. He wrote that the statute “rendered more extensive and effectual” the crown’s powers to prosecute piracy and enacted “many useful Things on this Subject.”<sup>137</sup>

In any event, American colonial-era protests about vice-admiralty courts were clearly directed at a very different phenomenon than piracy tri-

*Trial*]; *The Trial and Condemnation of Captain John Quelch and Others of his Company, &c. for Sundry Piracies, Robberies, and Murder, Committed upon the Subjects of the King of Portugal, Her Majesty’s Ally, on the coast of Brazil, &c., at the Court-House in Boston, in 14 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1067, 1073–74* (London, T.C. Hansard 1812) (bench trial) [hereinafter *John Quelch Trial*].

134. See, e.g., COKE, *supra* note 65, at 111–12 (describing the “mischief” which motivated the Offenses at Sea Act of 1536, 28 Hen. 8 c. 15, as set out in the preamble); A DISCOURSE OF THE LAWS RELATING TO PIRATES AND PIRACIES, AND THE MARINE AFFAIRS OF GREAT BRITAIN 7–8 (London, W. Wilkins 1726) (setting out the preamble of 28 Hen. 8 c. 15); WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 98 (The Savoy, Eliz. Nutt 1716) (stating that the Henrican statutes were enacted because proving piracy and other crimes under civil law procedures was “very inconvenient, because by that Law no Offender shall have Judgment of Death, without his own Confession, or direct proof by Eye-Witnesses[.]”). For later post-Revolutionary works published in the United States, see 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 311 (1st American ed., Philadelphia, Phillip H. Nicklin 1813) (1768); 7 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 91 (Boston, Cummings, Hilliard & Co. 1824).

135. 2 THE WORKS OF JOHN ADAMS 526–28 (Charles Francis Adams ed., Boston, Charles C Little & James Brown 1850).

136. See *John Quelch Trial*, *supra* note 133, at 1074, 1086 (statements of Queen’s Advocate and Attorney General Paul Dudley).

137. 29 JOURNALS OF THE CONTINENTAL CONGRESS 797 (John C. Fitzpatrick ed., 1933).

als—which, as noted above, did not occur in the ordinary vice-admiralty courts. Americans protested navigation and trade laws like the Stamp and Sugar Acts of 1764 and 1765<sup>138</sup> because of taxation without representation in Parliament, in violation of their claimed rights as Englishmen,<sup>139</sup> and because the statutes allowed the bypassing of colonial juries in the common law courts when crown officials chose to seek forfeitures of property or fines and penalties via vice-admiralty courts.<sup>140</sup> It was these complaints, not any concern about jury-less trial of pirates, that appeared in the Declaration of Independence, the Declaration of the Causes and Necessity for Taking Up Arms, and countless other, lesser-known American colonial complaints about courts and juries.

### C. *English Government Practice*

#### 1. Pirates on the Seas Were Outside the Protection of English Law

English government practice was inconsistent with Chapman's claim that anyone, anywhere, who was suspected of violating English criminal statutes could only be dealt with by the English government via the criminal justice system (using common law procedures). There is abundant evidence that the English and, after the 1706–07 Acts of Union, British government did not believe that it was compelled by domestic law—common law due process rights of individuals—to treat all pirates it encountered as putative criminal defendants who could only be proceeded against by the ordinary course of law. Both the Royal Navy and colonial forces in the Americas

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138. Sugar Act, 4 Geo. 3 c. 15 (1764); Stamp Act, 5 Geo. 3 c. 12 (1765). On these acts and the American reaction, see, for example, EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (3d ed. 1995). See generally LAWRENCE A. HARPER, *THE ENGLISH NAVIGATION LAWS* (1939).

139. See, e.g., The Virginia Resolves (1765), reprinted in *PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766*, at 47, 47–48 (Edmund S. Morgan ed., 1959); The Rhode Island Resolves (1765), reprinted in *PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766*, supra, at 50, 50–51. For a thorough review of the American and British legal perspectives, see JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* (1987).

140. See, e.g., The Pennsylvania Resolves (1765), reprinted in *PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766*, supra note 139, at 51, 51–52; The Maryland Resolves (1765), reprinted in *PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766*, supra note 139, at 52, 52–53. On the American reaction, see 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 85–87 (1971); OWEN & TOLLEY, supra note 130, at 5; Matthew P. Harrington, *The Legacy of Colonial Vice-Admiralty Courts (Part 1)*, 26 *J. MARITIME L. & COMMERCE* 581, 594 (1995); David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776*, 16 *WM. & MARY Q.* 459, 461–62 (1959).

killed large numbers of pirates in combat actions,<sup>141</sup> and also summarily executed captured pirates.<sup>142</sup> Although it may often be true that actions speak louder than words, in this context the opposite is the case. During the heat of confrontation with a hated enemy, military and law enforcement officials sometimes get carried away by emotion or passion. Merely observing the infliction of, say, summary executions or failing to give quarter does not tell us definitely that those actions comported with legal understandings. In this context, the better evidence is what statutes, royal proclamations, commissions, and other official pronouncements of the law stated, as well as what lawyers, jurists, and other commentators said about the law. There we see voluminous evidence against Chapman's thesis.

Following the well-settled rule of the law of nations,<sup>143</sup> English law treated pirates encountered on the seas as persons outside of the protection of the laws. Queen Elizabeth in 1569 proclaimed "all pyrats and rovers upon

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141. See, e.g., CHRISTOPHER L. PASTORE, *BETWEEN LAND AND SEA: THE ATLANTIC COAST AND THE TRANSFORMATION OF NEW ENGLAND* 165 (2014) (describing 1723 battle in which a Royal Navy warship killed and captured pirates off Long Island); Letter from Captain Ogle, Commander of HM's Ship Swallow, to the Admiralty Office (Apr. 5, 1722), in *A FULL AND EXACT ACCOUNT, OF THE TRYAL OF ALL THE PYRATES, LATELY TAKEN BY CAPTAIN OGLE, ON BOARD THE SWALLOW MAN OF WAR, ON THE COAST OF GUINEA*, at iv-vi (London, J. Roberts 1723) (recounting two ship-to-ship actions in which at least 27 pirates were killed or wounded off Africa); *CALENDAR OF TREASURY PAPERS, 1714-1719*, at 467 (Joseph Redington ed., London, Longmans & Co. 1883) ("As to the claims of Capt. Gordon, of H.M. ship 'Pearl,' and Capt. Brand, of H.M. ship the 'Lyme,' the Lieut.-Governor of Virginia (Spotswood) certifies that two ships were hired and furnished with pilots at his expense, and armed by Gordon and Brand, and were sent to North Carolina to apprehend and destroy Edward Thatch, a notorious pirate, and his crew. Ten pirates were killed on Thatch's sloop, and eight more taken prisoner. Four other pirates . . . were taken by Capt. Gordon, and convicted before the Court of Admiralty."); *CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, 1661-1668*, at 284 (W. Noel Sainsbury ed., London, HM's Stationery Office 1880) (describing combat action in which an English naval vessel off Jamaica killed a pirate captain and "many of his men," bringing in twelve prisoners) (entry 950).

142. See, e.g., C.H. HARING, *THE BUCCANEERS IN THE WEST INDIES IN THE XVII CENTURY* 254 (1910) ("Captain Spragge [commanding HMS Ruby in 1687] sailed into Port Royal with the buccaneer and three of his companions hanging at the yard-arms, 'a spectacle of great satisfaction to all good people.'") (citation omitted); *CALENDAR OF TREASURY PAPERS, 1714-1719*, *supra* note 141, at 467 ("The Governor of South Carolina (Robert Johnson, Esq.), appointed Col. Wm. Rhett to be commander of two sloops fitted out to take certain pirates which infested the coast, and the Col. at Cape Fear River, took a pirate sloop called the 'Revenge,' . . . and the commander and crew, consisting of 35 men, were executed. Petitioner Rhett prayed an order for payment to him of 890l. for the captors."); see also 1 J. FENIMORE COOPER, *THE HISTORY OF THE NAVY OF THE UNITED STATES OF AMERICA* 21 (Philadelphia, Lea & Blanchard 1839) (discussing the Col. Rhett attack and stating that "a desperate encounter took place, in which, it would seem, it was the intention not to give quarter, as nearly all in the [pirate] sloop were killed" and the remainder tried).

143. *Supra* Section II.A.

the seas to be out of her protection” and “public enemies[.]”<sup>144</sup> David Lewes, a judge of the Admiralty, reiterated in about 1579 that the queen’s proclamation meant that “all pyrats and rovers upon the seas” may be “lawfully . . . by any person taken, punished, and suppressed with extremity.”<sup>145</sup> Sir Leoline Jenkins, another judge of the Admiralty, instructed a jury in 1668 that “all Pirates and Searovers . . . are outlaw’d, as I may say, by the Law of all Nations; that is, out of the Protection of all Princes and all Laws whatsoever. Every Body is commissioned, and is to be armed against them, as against Rebels and Traytors, to subdue and to root them out.”<sup>146</sup> King James I in 1603 proclaimed that “Pirats and Rovers upon the Seas” were outside the protection of the king and his laws and “lawfully [may] bee by any person taken, punished, and suppressed with extremitie.”<sup>147</sup>

International law—when it deemed pirates outside the protection of the law—was treating the high seas as a state of nature where the inherent right to lethal self-defense was always available. Domestically, when monarchs and their Admiralty judges stated that pirates were outside the law, even if the pirates were English subjects, they were referencing the ancient judgment of outlawry. Outlawry, “one of the oldest weapons of the Common Law,” meant that the person against who such judgment was entered—for evading legal process after indictment for treason or felony—was “entirely beyond the protection of the law in every sense.”<sup>148</sup> An outlaw “was said to have *caput lupinum*, in other words to be like a wolf, a hateful beast which it was the duty of every man to exterminate.”<sup>149</sup> In the thirteenth century, the medieval jurist Henry de Bracton reported that it was lawful to kill outright an outlaw within the realm only in essentially lawless regions, like the

144. 1 DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA 224 (R. G. Marsden ed., 1915) (referring to the proclamation); see also ALFRED P. RUBIN, THE LAW OF PIRACY 59 (2d ed. 1998) (dating the proclamation).

145. DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA, *supra* note 144, at 224.

146. 1 WILLIAM WYNNE, THE LIFE OF SIR LEOLINE JENKINS, at xxxvi (London, 1724), reprinted in 3 EDWIN DEWITT DICKINSON, A SELECTION OF CASES AND OTHER READINGS ON THE LAW OF NATIONS 518, 518 (1929).

147. King James I, A Proclamation to Represse all Piracies and Depredations upon the Sea (Sept. 30, 1603), in STUART ROYAL PROCLAMATIONS: ROYAL PROCLAMATIONS OF KING JAMES I, 1603–1625, at 53, 55 (James F. Larkin & Paul L. Hughes eds., 1973); see also King James I, A Proclamation with Certaine Ordinances to be Observed by his Majesties Subjects Toward the King of Spain (July 6, 1605), in STUART ROYAL PROCLAMATIONS: ROYAL PROCLAMATIONS OF KING JAMES I, 1603–1625, *supra*, at 114, 116. The 1603 proclamation also had a law enforcement directive, ordering that pirate cases be “summarily heard” by the Admiralty so that punishment may be inflicted “with such severities, as the example thereof shall terrifie all others from committing any so odious crimes.” King James I, A Proclamation to Represse all Piracies and Depredations upon the Sea (Sept. 30, 1603) at 53, 54.

148. H. Erle Richards, *Is Outlawry Obsolete?*, 18 L.Q. REV. 297, 298 (1902).

149. *Id.*; accord 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 502 (Liberty Fund 2010) (1895).

Welsh March.<sup>150</sup> The law of outlawry again softened during the reign of Edward III (1327–77), so that only a crown officer with a judicial warrant could kill the outlaw on sight.<sup>151</sup> But even so, if caught, the outlaw was hung without trial.<sup>152</sup> Although additional judicial and royal means to lessen the harshness of outlawry were introduced over time, the basic concept persisted for centuries.<sup>153</sup>

It was thus a profound statement of pirates' lack of protection from the laws to state that they could be treated as ancient outlaws. Pirates were frequently described as beasts—a shorthand way of linking their fate to that of outlaws. Charles Molloy, the seventeenth century barrister and maritime law treatise writer, wrote that anyone who captures pirates on the ocean “may execute such Beasts of Prey immediately, without any Solemnity of Condemnation.”<sup>154</sup> And further, if captors did bring pirates to port to stand trial, but “the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss,” the pirates may, by the “Law of Nature,” be “executed by the Captors.”<sup>155</sup> A writer of another popular marine law treatise declared in the early eighteenth century that it was “the duty of all Princes, Potentates and People whatsoever, to do what is in their Power for the total Extirpation of” pirates, which he called “ravenous Beasts,”<sup>156</sup> thus invoking the language of the ancient law of outlawry.

Calling pirates “ravenous beasts” or “beasts of prey,” in addition to referencing outlawry and the right of self-defense in the state of nature, may also have been an invocation by analogy of the old common law rule that allowed anyone to kill dangerous beasts, even on another person's private land, “because the destroying of such creatures is a public advantage.”<sup>157</sup> Linking pirates to ravenous beasts thus triply marked them as fair game—by the law of nations, the common law of outlawry, and the common law of game hunting—as long as pirates were encountered on the high seas and not near a place where common law trial could be had.

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150. POLLOCK & MAITLAND, *supra* note 149, at 503.

151. See 3 HOLDSWORTH, *supra* note 81, at 605 & n.2; GILES JACOB, *THE MODERN JUSTICE* 166 (London, 1716); 3 BACON, *supra* note 134, at 746 (London, W. Strahan & M. Woodhall 1778).

152. 3 HOLDSWORTH, *supra* note 81, at 605; see also GREEN, *supra* note 85, at 79–81.

153. 3 HOLDSWORTH, *supra* note 81, 605–06.

154. MOLLOY, *supra* note 71, at 61.

155. *Id.*

156. ALEXANDER JUSTICE, *A GENERAL TREATISE OF THE DOMINION OF THE SEA* 475 (2d ed., London, D. Leach 1709).

157. 2 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 75 (Windham, John Byrne 1795); accord 2 BLACKSTONE, *supra* note 75, at \*416; 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 52 (6th ed., London, Henry Lintot Law Printer 1758); *THE GAME LAW* 45–46 (2d ed., London, Richard & Edward Atkyns 1707).

Thus in 1718, Nicholas Trott, Chief Justice of the Province of South Carolina and a judge of vice-admiralty, told a grand jury that “in our law,” pirates “are termed ‘Brutes’ and ‘Beasts of Prey’: and that it is lawful for any one that takes them, if they cannot with Safety to themselves bring them under some Government to be tried, to put them to Death.”<sup>158</sup> In 1704, during the trial of the pirate Captain John Quelch, the Attorney General for the Massachusetts Bay colony and her Majesty’s advocate for the court of admiralty, Paul Dudley, told the court and jurors:

[P]irates are not entitled to law . . . [f]or which reason it is said, if piracy be committed upon the ocean, and the pirates in the attempt happen to be overcome, the captors are not obliged to bring them to any port, but may expose them immediately to punishment, by hanging them at the main-yard; a sign of it being of a very different and worse nature than any crime committed upon the land; for robbers and murderers, and even traitors themselves, may not be put to death without passing a formal trial.<sup>159</sup>

James Smith, the King’s Advocate General argued to an admiralty court in very similar terms at a piracy trial in Massachusetts Bay colony in 1717:

[T]he Law of all Nations, that have settled into regular Governments, define & declare a Pirate to be an Enemy of Mankind. And therefore he can claim the Protection of no Prince, the privilege of no Country, the benefit of no Law; He is denied common humanity . . . nor is he to be otherwise dealt with, than a wild & savage Beast, which every Man may lawfully destroy.<sup>160</sup>

Sir David Dalrymple, Her Majesty’s Solicitor, argued at a 1705 piracy trial that “pirates are worse than ravenous beasts,” because they are in “perpetual War with every Individual.”<sup>161</sup> A law compilation published in 1767 in Britain for use of the Admiralty agreed: “Captors are not oblig’d to bring the Pirates they take on the Ocean to any Port, but may punish them immediately, by hanging them up at the Main-Yard End.”<sup>162</sup>

158. *Stede Bonnet Trial*, *supra* note 133, at 156, 158.

159. *John Quelch Trial*, *supra* note 133, at 1073–74.

160. THE TRIALS OF EIGHT PERSONS INDITED FOR PIRACY 6 (Boston, B. Green 1718), *microformed on Early American Imprints*, Series I No. 2003 (Readex).

161. THE TRYAL OF CAPTAIN THOMAS GREEN AND HIS CREW 47–48 (Edinburgh, Andrew Anderson 1705).

162. 1 THE LAWS, ORDINANCES AND INSTITUTIONS OF THE ADMIRALTY OF GREAT BRITAIN, CIVIL AND MILITARY 225 (London, 1746).

An unusually lenient, minority view on piracy and summary violence was issued in 1676 by Richard Lloyd, judge of admiralty in England, in a legal opinion for the Lords of Trades and Plantations concerning the trial of a pirate in Jamaica. In the course of discussing the jurisdiction of colonial admiralty courts, Lloyd wrote: “True it is that pirates and sea-rovers are, in the eye of the law, *hostes humani generis*; they are *diffidati* outlawed, as I may say, and out

In addition to legal officials of the crown, “[m]ost legal commentators . . . thought that summary justice, in the form of immediate hanging from the yardarm, could be meted out quite legally to pirates caught red-handed, if there was no legal forum readily available to try them.”<sup>163</sup> According to Charles Viner, the lawyer who endowed the chair at Oxford later held by Blackstone, wrote, in a paraphrase of Molloy:

If piracy be committed on the ocean, and the pirates in the attempt there happen to [be] overcome, the captors are not obliged to bring them to any port, but may expose them immediately to punishment, and hang them up at the main-yard end . . . for the old natural liberty remains in places where there are no judgment.<sup>164</sup>

Many other legal authorities made the same points,<sup>165</sup> as did lay authors.<sup>166</sup>

of the protection of the law of nations; every man is commissioned to seize and slay them, if they make opposition; but if they yield, or be taken, they are to be tried criminally according to the prescribed form, and the practice in such cases.” WILLIAM FORSYTH, *CASES AND OPINIONS ON CONSTITUTIONAL LAW, AND VARIOUS POINTS OF ENGLISH JURISPRUDENCE* 111, 112 (London, Stevens & Haynes 1869) (quoting Sir Richard Lloyd). The fact that this was an opinion for the Lords of Trades and Plantations is shown in *CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, 1675–1676*, at 432 (W. Noel Sainsbury ed., London, HM’s Stationery Office 1893) (entry 993). The opinion in the *Calendar of State Papers* is a condensed summary and contains a typographical mistake (“stay” for “slay”). Lloyd’s reference to pirates being “*diffidati* outlawed” is obscure. Treating pirates as ancient outlaws was discussed above. See *supra* text accompanying notes 148–153. Lloyd’s use of *diffidati* may have come from a medieval legal treatise by Bartolus de Saxoferrato (1313–1357), which discussed piracy and used *diffidati* to state that pirates had “renounced” the law and thus were outside the protection of the law. See HEEBØLL-HOLM, *supra* note 39, at 13 (quoting the text of Bartolus).

163. DURSTON, *supra* note 41, at 25; see also MARGARETTE LINCOLN, *BRITISH PIRATES AND SOCIETY, 1680–1730*, at 65 (2014) (“Those [pirates] captured on the open sea, remote from any port that could sustain due legal process, could, according to marine law, be immediately put to death by hanging at the captor’s main yard.”).

164. 16 CHARLES VINER, *A GENERAL ABRIDGMENT OF LAW AND EQUITY* 346 (2d ed., London, 1793) (italicization and capitalization in original omitted).

165. See, e.g., JUSTICE, *supra* note 156, at 477 (“Captors are not obliged to bring the Pirates they take on the Ocean to any Port, but may Punish them immediately, by hanging them up at the Main-Yard end.”); *A DISCOURSE OF THE LAWS RELATING TO PIRATES AND PIRACIES AND THE MARINE AFFAIRS OF GREAT BRITAIN*, *supra* note 134, at 4–5 (“[I]n our Law Books they [pirates] are term’d Brutes and Beasts of Prey; and it is allowed to be lawful for those who take them, to put them to Death, if they cannot, with Safety to themselves, bring them under some Government to be try’d.”); 2 *A GENERAL TREATISE OF NAVAL TRADE AND COMMERCE, AS FOUNDED ON THE LAWS AND STATUTES OF THE REALM* 255 (The Savoy, E. & R. Nutt, & R. Gosling 1739) (“If Piracy be attempted on the Ocean, and the Pirates are vanquished, the Captors may in such Case immediately inflict a Punishment, by hanging them up at the Main-Yard End, and they are not obliged to bring them to any Port; but this understood only on Places where no legal Judgment can be obtained.”); GILES JACOB, *LEX MERCATORIA* 188 (2d ed., The Savoy, E. & R. Nutt, & R. Gosling 1729) (same) [hereinafter *LEX MERCATORIA*]; GILES JACOB, *A NEW LAW-DICTIONARY* [hereinafter *JACOB, DICTIONARY*] (8th ed., London, H. Woodfall & H. Strahan 1762) (“Piracy”: “If Piracy attempted on the

Molloy's canonical views on summary execution of pirates were quoted and endorsed in a House of Commons debate in 1699, concerning the propriety of a royal commission granting the right to take property from suspected pirates without a judicial finding of guilt. To help show that judicial condemnation was not needed for pirates' property to pass by the king's grant, Sir William Cowper, member of Parliament and king's counsel, argued: "Question, who may take, and destroy a pirate. Any one, tho not commissioned by the prince and may hang him at the yard arm, says the booke *de jure maritime et navali*" by Molloy.<sup>167</sup> If death could be imposed without trial, so could property transfer. Sir Edward Harley reiterated the same point, paraphrasing Molloy.<sup>168</sup> No speaker disagreed, and the motion to condemn as illegal the king's commission failed.<sup>169</sup>

The analogy to ancient outlawry is instructive on the policy reasons for the rule that pirates could be summarily killed on the high seas. Outlawry was needed at a time when the modern state did not exist and law enforcement resources were almost nonexistent.<sup>170</sup> A powerful tool was needed to prod accused offenders to voluntarily submit to the judicial system. The threat of execution on sight (if outlawed) was that tool. Even as the English state developed in size and capacity on land, and the rules about outlawry were reformed, the high seas remained a vast, unpoliced, and essentially lawless place. The allowance of military assault on suspected pirates and summary execution of captured pirates were the blunt but effective tools that the law deployed in that domain. In addition, we must remember that, in

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Ocean, if the Pirates are overcome, the Takers may immediately inflict a Punishment, by hanging them up at the Main-yard End; though this is understood where no legal Judgment may be maintained."); 1 ANDREW MACDOWELL BANKTON, AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS 528 (Edinburgh, R. Fleming 1751) ("Where piracy is committed in the ocean, and the pirates, in the attempt, happen to be overcome, the captors are not obliged to bring those beasts of prey to any port, but may expose them immediately to punishment, by hanging them up at the main yard end; for the natural liberty remains in places where there are no judicatures.").

166. See, e.g., COTTON MATHER, INSTRUCTIONS TO THE LIVING, FROM THE CONDITION OF THE DEAD 17 (Boston, John Allen 1717) (delivering a funeral oration about hanged pirates and stating "[a]ll Nations agree, to treat your Tribe, as the Common Enemies of Mankind, and Extirpate them out of the World"); NEWS FROM THE SEA OR, THE TAKING OF THE CRUEL PIRATE 1 (London, 1674) ("[I]n all Ages they [pirates] have been esteemed, *Humani Generis hostes*, Publique Enemies to Mankind whom every one was obliged to oppose and destroy, as we do Common vermine that Infest and trouble us.").

167. 2 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA, 1689–1702, at 327 (Leo Francis Stock ed., 1927) (statement of William Cowper on Dec. 6, 1699).

168. *Id.* at 331 ("A pirate is *hostis humani generis*. By the law of nations every man, without a commission from any prince is impowered to take and destroy him; and may hang him at the yard arm. He may execute such beasts of prey immediately without any solemnity of condemnation.") (statement of Edward Harley on Dec. 6, 1699).

169. See *id.* at 316 (motion), 336 (vote).

170. POLLOCK & MAITLAND, *supra* note 149, at 502.



the age of sail, a seaborne journey could last many months. It would be extremely dangerous to keep captured pirates on board a vessel for that length of time. And a ship's limited stores of water and food could be depleted if it operated for a lengthy period as a floating jail for a captured pirate crew. Understanding this context helps explain legal rules that might otherwise seem barbaric.

## 2. Legal Authorization for Killing Pirates

Consistent with the view that pirates on the seas were men outside the protection of international and domestic law, and therefore could and should be extirpated like wild beasts, a myriad of legal authorities—statutes of Parliament, colonial charters, royal proclamations, royal commissions, patents, and other instructions directed to naval and other executive officials—directly or indirectly authorized the extrajudicial killing of pirates.

A statute of Parliament creating articles of war to govern the Royal Navy made it a capital crime, triable by court martial, for a naval captain or officer in “any fight or engagement” with “the Enemy Pirate or Rebels” to fail to “do his utmost to take fire[,] kill[,] and endamage” the opponents.<sup>171</sup>

Formal crown instructions to naval officers and other commanders further evidence the direction of lethal force against pirates and the lack of legal concern with killing them—though it was also frequently noted that captured pirates should be brought to trial. A commission issued by Henry VIII in 1511 instructed the captain to use warships “to seize and subdue all and singular such spoilers, pirates, exiles, and outlaws, wheresoever they shall from time to time be found; and, if they cannot otherwise be seized, to destroy them,” with the prisoners delivered to commissioners of the Admiralty.<sup>172</sup> Elizabeth I in 1572 authorized the Lord High Admiral to seize pirates infesting the “seas or rivers of this jurisdiction of the Admiraltye” so they could be “tried and proved by justice and lawe,” but notes that “by fightinge with them any one or mo[r]e of them maye happen to be maymed, hurte, or slaine for their resistance.”<sup>173</sup> In 1577, Elizabeth issued a warrant to the warden of the Cinque Ports noting the problem of “pyrats and sea rovers haunt-

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171. 13 Car. 2 c. 9, § 12 (1661). These articles were based on an interregnum statute that had been drafted by the judges of Admiralty, and amended only slightly by Parliament, and so reflected expert opinion about the state of the law. See Reginald Acland, *The Naval Articles of War*, 3 J. COMP. LEG. & INT'L L. 190, 195–98 (1921). The 1661 articles quoted above were in force until 1749, when the entire set of articles were amended and re-enacted by Parliament. See *id.* at 198–200 (noting the substantive amendments between 1661 and 1749). The specific references to fighting and killing pirates, enemies, and rebels were replaced by directions that an officer must do his “utmost to take or destroy every Ship which it shall be his Duty to engage.” 18 Geo. 2 c. 33, § 12 (1744). Pirates were mentioned in two articles, requiring naval officers to chase them vigorously and refrain from cowardly surrender to them. *Id.* §§ 13, 15.

172. DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA, *supra* note 144, at 146, 147 (appointing John Hopton to command a squadron against pirates).

173. *Id.* at 191, 194–95.

ing . . . the narrow seas and streames thereof,” and directing him to “arme and sett fourth . . . shippes furnished with maryners, souldiers, gonners, and other persons . . . to purge and clear the sea coasts of such evill persons.”<sup>174</sup> James I in 1609 authorized the High Admiral to issue commissions of admiralty to masters and commanders of armed vessels to seize “pyraticall ships,” their men being “committed to safe custodie . . . [to] suffer the payne of our lawes for their pyracie,” but noted that it may “soe fall out that by fighting with them any one or more of them may be maymed, hurte, or slayne.”<sup>175</sup>

In 1684, Charles II authorized a captain sailing for the Royal African Company to “seize and destroy all such pyrates, freebooters, and sea rovers, which he shall meet” within the geographic limits of the company’s charter.<sup>176</sup> That same year, Charles II wrote to the governor and magistrates of Massachusetts Bay colony, stating:

In consequence of the ravages of pirates in the territory of the King of Spain, we have thought it fit, for the encouragement of the amity that exists between us and his Spanish Majesty, to give orders for the suppression of pirates, and that you give no succour nor assistance to any, and especially not to one called Thomas Pain, who, with five vessels under the command of Captain Breha, has lately sailed to Florida. Such pirates you will exterminate, so far as in you lies, as a race of evildoers and enemies of mankind.<sup>177</sup>

In 1686, the lieutenant governor of the colony of Jamaica issued written orders to a Royal Navy captain to cruise to “the Gulf of Samana . . . where Banister, the pirate may be expected to be found, and search all likely places for him, destroying all pirates.”<sup>178</sup> Similar directions were given to other naval captains based at that colony.<sup>179</sup> In 1688, James II proclaimed that pirates who surrendered would receive a pardon for past crimes but those who do not “shall be pursued with the utmost Severity, and with the greatest Rigour that may be, until they and every of them be utterly Suppressed and De-

174. *Id.* at 216, 216–17. The Cinque Ports were seacoast towns in Kent and Sussex.

175. *Id.* at 377, 377–78.

176. *Id.* at 112–13.

177. CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, 1681–85, at 617–18 (J.W. Fortescue ed., London, Eyre & Spottiswood 1898) (entry 1634).

178. CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, 1685–88, at 186 (J.W. Fortescue ed., London, HM’s Stationery Office 1899) (entry 661).

179. *See id.* at 160 (directing the captain to take two Royal Naval vessels to find a pirate “and endeavour to take or destroy him”) (entry 598); *id.* at 419 (“Ordering him to sail to Providence to take the pirate Woollerly, and thence to Havanna to demand the surrender of the pirate Bear, or failing that, to seek him out and destroy him.”) (entry 1405).

stroyed.”<sup>180</sup> He previously authorized Robert Holmes, in command of a naval fleet, to suppress piracy in the Americas either “by force” or by offering individual pardons.<sup>181</sup>

In 1698, the Council of Trades and Plantations (later the Board of Trade) advised the Privy Council that a Captain Warren, leading a naval squadron to the East Indies, should be granted power “to seize on the persons, ships and goods of the pirates, and in case of resistance to pursue and destroy or take them by land or sea . . . . Any pirates who will not voluntarily submit must be attacked by land or sea, their persons, ships, etc., and their fortifications and refuges destroyed.”<sup>182</sup> Later in 1698, the governor of the Bahamas commissioned the captain of an armed vessel to apprehend and deliver up “the notorious pirate Kelly,” “or in any ways to destroy him.”<sup>183</sup>

Authorization to kill pirates on sight continued to issue into the eighteenth century. In 1700, the Council of Virginia offered a reward “for the apprehension or killing of any pirate.”<sup>184</sup> In 1701, the new governor of the Bahamas commissioned a fighting ship to “seize and destroy all pirates.”<sup>185</sup> Admiralty instructions to Royal Navy captains early in the century directed them to “use your best endeavours to take, burn, sink, or otherwise destroy” pirate vessels.<sup>186</sup> And in 1753, the Admiralty instructed a Royal Navy captain dispatched to Africa that he should seek out pirates and use his “utmost endeavours to take or destroy them.”<sup>187</sup>

Colonial charters for American settlements offer additional evidence that pirates could lawfully be exterminated. A number of colonial charters, such as the 1663 charter for the colony of Carolina (granted by Charles II), contained a clause authorizing the proprietor, in order to protect against “sa[v]ages . . . other enemies, pirates, and robbers,” to

make war and pursue the enemies and robbers aforesaid, as well by sea as by land, yea, even without the limits of the said province, and by God’s assistance to vanquish and take them, and being tak-

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180. King James II, A Proclamation for the More Effectual Reducing and Suppressing of Pirates and Privateers in America (Jan. 20, 1688), in *BRITISH ROYAL PROCLAMATIONS RELATING TO AMERICA, 1603–1783*, at 140, 142 (Clarence S. Brigham ed., 1911).

181. *Id.* at 140–41.

182. *CALENDAR OF STATE PAPERS: COLONIAL, AMERICA AND WEST INDIES, 27 OCTOBER 1697–31 DECEMBER 1698*, at 410–11 (J.W. Fortescue ed., 1905) (entry 788).

183. *CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, 1699*, at 53 (Cecil Headlam ed., 1908) (entry 82-I).

184. *CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, 1700*, at 239 (Cecil Headlam ed., 1910) (entry 405).

185. *CALENDAR OF STATE PAPERS: COLONIAL SERIES, AMERICA AND WEST INDIES, JAN.–DEC. 1, 1701*, at 17 (Cecil Headlam ed., 1912) (entry 25 vi).

186. PETER EARLE, *THE PIRATE WARS 185–86* (2003).

187. *THE BARRINGTON PAPERS 99–109* (D. Bonner-Smith ed., 1937).

en, to put them to death by the law of war, or to save them at their pleasure.<sup>188</sup>

Other colonial charters for the Americas did not list pirates specifically, but authorized the government to

encounter, expulse, expell and resist, by force of armes, as well by sea as by lande, and also to kill, slay and destroy, by all fitting wayes . . . all and every such person and persons as shall, at any tyme hereafter, attempt or enterprize the destruction, invasion, detrimment or annoyance of the said inhabitants.<sup>189</sup>

Another common provision in charters stated that those committing robberies and other acts of hostility on sea or land would be given a chance to make restitution and, if they did not, declared “out of our [the king’s] Allegiance and Protection; And that it shall be lawful and free, for all Princes, and others to pursue with hostility the said offender.”<sup>190</sup>

Colonial officers received instructions regarding pirates that were similar to the message of the 1661 articles of war governing the Royal Navy. For instance, a 1693 act of the province of New York directed government officers who learned of the presence of “pyrates” to raise “well Armed Men” to seize and jail the pirates, “and in case of any Resistance, or refusal to yield Obedience to their Majesties Authority, it shall be lawful to Kill or Destroy such Person or Persons.”<sup>191</sup>

In sum, the law of nations and English domestic law allowed the English government and private persons to summarily kill pirates encountered on the high seas, and the Crown and Parliament deployed that legal authority by repeatedly ordering or authorizing the killing of pirates. But many legal authorities suggested that criminal process—rather than extrajudicial killing—was required if pirates were seized on or near English shores, within easy reach of due process. In practice, the English government did frequently try rather than summarily kill captured pirates. In those trials, a jury was used if the trial occurred under the statutes of Henry VIII, while a bench trial only was available if trial occurred on shipboard or in the colonies under the statute of William III. Both modes of proceeding were considered lawful.

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188. KING CHARLES II, CHARTER OF CAROLINA para. 15 (1663); *accord* KING CHARLES I, CHARTER OF MARYLAND para. 12 (1632); KING CHARLES II, CHARTER OF PENNSYLVANIA para. 14 (1681).

189. KING CHARLES II, CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATION para. 8 (1663).

190. KING JAMES I, CHARTER OF VIRGINIA para. 16 (1606); *accord* KING CHARLES II, CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATION para. 9 (1663); KING CHARLES II, CHARTER OF CONNECTICUT para. 7 (1662).

191. PROVINCE OF NEW-YORK, AN ACT FOR RESTRAINING AND PUNISHING PRIVATEERS AND PYRATES 3 (1693), *microformed on* Early American Imprints, Series I No. 834 (Readex).

## II. EXPLAINING ENGLAND'S WIDESPREAD USE OF CRIMINAL TRIALS FOR PIRATES

Notwithstanding the clarity with which the law of nations and English domestic law allowed the killing of pirates encountered on the high seas—as well as those who resisted apprehension, wherever located—in practice, many pirates were captured and transported to criminal trial, either at Admiralty Sessions in England or in specially-constituted colonial vice-admiralty courts. What explains this observed practice, if not a view of global due process?

Although some factors favoring a criminal justice approach to piracy were always present, other factors depended on the historical era. Generally speaking, in earlier English history, the state was weak and the English government did not always view piracy negatively. In fact, important government officials, including, at times, the monarch, supported pirates in some circumstances as a source of revenue and a cost-effective way to harass enemies. As the central English state matured, it came to view piracy as an unmitigated evil. Protection of lawful commerce, under the aegis of a globe-spanning Royal Navy, demanded the extirpation of piracy. Colonials in the Americas took a long time to fall into line. It was only when London was able to exert effective control over colonial government that official toleration of piracy by some colonial officials was finally stamped out. There is no bright line in time between these two eras. I have made a rough division according to the monarchical houses that sat on the English throne.

### A. *The Tudor and Stuart Eras (circa 1485 to 1688)*

There were a myriad of factors supporting a primarily law enforcement approach to piracy suppression. Domestic law played a role, but a narrower one than Chapman suggests. Many suspected pirates were captured on land.<sup>192</sup> In the pre-modern era, the English navy was not large, except during wartime. But in wartime, the navy was busy with its military enemies. The geographic area over which pirates operated was vast, making it inherently difficult to find and detain pirates on the high seas.<sup>193</sup> So naval captures on the high seas could not have been a large percentage of total captures of pirates. And, of course, English law understood that alleged criminals captured on land in England or in English colonies were entitled to trial with due process according to the standing laws of the land. This obvious and uncontroversial rule explains many piracy trials.

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192. See, e.g., ROBERT C. RITCHIE, CAPTAIN KIDD AND THE WAR AGAINST THE PIRATES 181–82 (1986) (capturing Captain William Kidd on land); DURSTON, *supra* note 41, at 203 (arresting pirate Philip Roche on land); 2 BRITISH PIRACY IN THE GOLDEN AGE: HISTORY AND INTERPRETATION, 1660–1730, at 289–90 (Joel Baer ed., 2007) [hereinafter BRITISH PIRACY] (catching seven pirates on land); *id.* at 1–2 (capturing pirate Charles Vane captured on land).

193. EARLE, *supra* note 186, at 183–84.

Moreover, English pirates often worked just off the coast, rather than ranging more widely afield.<sup>194</sup> If a suspected pirate or other criminal was captured near the seacoast of England or an English colony, and thus within easy reach of the criminal justice system, a number of authorities held that the law required disposition via criminal trial.<sup>195</sup> English monarchs claimed territorial jurisdiction over the surrounding “British Seas,”<sup>196</sup> and so criminal trials for pirates captured on the waters around England could likely be viewed as “domestic.” Disposition of these accused pirates via the criminal justice system<sup>197</sup> thus would not provide evidence for Chapman’s claim that due process was understood to be truly global.

But many pirates captured on the high seas were also processed through criminal courts rather than being killed in combat or summarily executed after capture. One modern commentator offers that it was “very rare” for captured English pirates to be summarily executed by the government.<sup>198</sup> That seems correct based on my research. The intentional killing of pirates in combat actions, when capture might well have been possible if different tactics were used, seems, however, to have been common.

We must ask why the legal right of summary execution was so rarely exercised and why the English government used the criminal justice system as a first-order tool for dealing with captured pirates. There were many reasons sounding in policy, culture, morality, and law why the government preferred the criminal justice system to handle suspected pirates. Chapman’s global due process view was not among those reasons, however. As a general matter, it is not sound to assume that a sense of legal compulsion must have been the cause when we observe the government treating persons with fairness or mercy. There are many non-legal reasons to treat other human beings with fairness and mercy. Piracy suppression by the English government provides a useful example of this.

For hundreds of years, there was a complex and ambivalent relationship between pirates and the English state. Coming out of the medieval period, the seas were still a largely lawless place, and it was unclear whether robbing foreigners on the high seas was actually illegal.<sup>199</sup> Even after the English state matured and began to define piracy against foreigners (and Eng-

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194. See, e.g., N.A.M. RODGER, *THE SAFEGUARD OF THE SEA: A NAVAL HISTORY OF BRITAIN, 660–1649*, at 348 (1997); DAVID CHILDS, *TUDOR SEA POWER: FOUNDATION OF GREATNESS* 184 (2009).

195. See sources cited *supra* notes 163–165.

196. RUBIN, *supra* note 144, at 96, 103; THOMAS WEMYSS FULTON, *THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS* 18–20 (1911).

197. DURSTON, *supra* note 41, at 200 (“In the first century or so of the [Admiralty] sessions’ existence most cases [of piracy] originated in waters immediately around the British Isles.”).

198. *Id.* at 25.

199. See RODGER, *supra* note 194, at 79, 115–16.

lishmen) as a crime, it was still openly practiced by the English, especially against foreign victims who were not co-religionists, and often with either the tacit permission or active support of English government officials.<sup>200</sup> Francis Drake's blatant and extraordinarily lucrative piracy against the Spanish, for example, was supported by Queen Elizabeth and some highly-placed officials.<sup>201</sup> Throughout the sixteenth and early seventeenth centuries, members of the Privy Council, judges of the Admiralty court, and many other officials in England invested in and otherwise profited from piracy. Government officials in the overseas colonies, using distance to their advantage, supported pirates to a greater degree, even into the eighteenth century when the main English state turned decisively against it.<sup>202</sup> Piracy against English targets was frowned upon, however, and often harshly punished by the government.<sup>203</sup>

There was also a fine line between piracy and privateering.<sup>204</sup> The latter was the practice, during war, of the government giving commissions to private parties to outfit men-of-war to prey on the seaborne commerce of the enemy.<sup>205</sup> This was piracy if there were no government license. Privateers often exceeded their commissions, however, by seizing neutral or friendly shipping too.<sup>206</sup> And the English often took the controversial position that peace in Europe did not apply "beyond the line" in the Spanish West Indies, allegedly making privateering lawful there at all times. In addition to licensing this private sea raiding, England extensively used pirates and privateers to supplement its naval fleets during wartime.<sup>207</sup> Private armed ships were pivotal to the repulse of the Spanish Armada in 1588.<sup>208</sup>

Thus, "pirates" were not a unified category of men, and were certainly not all considered the "enemies of the human race," as described by legal commentators. In fact, many individuals who committed acts that modern minds would consider barbaric, brute piracy were among the richest and most respected English gentlemen in their communities.<sup>209</sup>

200. See HANNA, *supra* note 27, at 10–11; RODGER, *supra* note 194, at 147–48, 182, 195, 199–200, 343–45.

201. See HANNA, *supra* note 27, at 40–44; RODGER, *supra* note 194, at 243–45.

202. See, e.g., HANNA, *supra* note 27, at 40, 55, 65–66, 145–57, 217–20, 237–39; RITCHIE, *supra* note 192, at 12–14, 38; RODGER, *supra* note 194, at 347–49.

203. See HANNA, *supra* note 27, at 48–49.

204. See, e.g., Benton, *supra* note 29, at 706–13.

205. DURSTON, *supra* note 41, at 204–05; RODGER, *supra* note 194, at 199–200.

206. DURSTON, *supra* note 41, at 206–07; RODGER, *supra* note 194, at 199; Benton, *supra* note 29, at 706–13.

207. See, e.g., JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783*, at 10–11 (1988); HANNA, *supra* note 27, at 40, 112–16, 123, 214, 225, 245; RITCHIE, *supra* note 192, at 16, 29–30.

208. See HANNA, *supra* note 27, at 40.

209. See RODGER, *supra* note 194, at 343–45.

Given the ambivalent views about pirates held by the government and population for hundreds of years, it made sense to process captured pirates through the criminal justice system rather than slaughtering them outright at the point of capture. Piracy was a capital crime, without the benefit of clergy.<sup>210</sup> It was mostly Englishmen who were tried for piracy in English courts, so these were co-nationals at least, and sometimes even friends and neighbors of the magistrates, judges, and jurors. Public opinion would have wanted guilt to be fairly determined before the ultimate penalty of death was imposed. Using the criminal justice system also allowed exercises of discretion in favor of mercy for those pirates whose actions were considered perhaps technically illegal but not wrongful by the government or the local population. Juries could, and often did, refuse to convict.<sup>211</sup> Judges could release an accused for a variety of legal reasons. The crown could pardon. If pirates were summarily destroyed by their captors, none of this discretion would have been possible.

When foreign nationals committed piracies, diplomatic considerations came to the fore. For reasons of state, English monarchs often preferred to treat foreign pirates mildly—using a catch and release policy, with notice to the foreign sovereign so as to reap diplomatic benefits.<sup>212</sup> If punishment of the foreign pirate was deemed necessary, word could be sent to his home government that he would be treated fairly, and niceties arranged for the detainee, such as bail under the care of his sovereign's diplomat in England.<sup>213</sup> None of this centralized policy calibration would have been possible if pirates were summarily executed in lieu of capture.

In addition, pirates were tough and skilled mariners and thus very useful men. A historian dubbed English piracy based in the West Country “the School of English Seamen.”<sup>214</sup> Oftentimes, pirates had formerly sailed on behalf of England, either in the naval service, as privateers during wartime, or against foreign pirates, and might do so again. Thus the crown could give royal pardons to pirates on the condition, or at least with the hope, that they would choose to serve the state.<sup>215</sup> This could only happen if accused pirates

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210. Offenses at Sea Act of 1536, 28 Hen. 8 c. 15, § 3; *see also* DURSTON, *supra* note 41, at 15–19 (discussing this fact).

211. DURSTON, *supra* note 41, at 113–15.

212. *See, e.g.*, Letter from Henry VIII to Stephen Gardiner (Oct. 5, 1537), in [12 Part 2] LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII, *supra* note 82, at 292, 293 (1891) (entry 832).

213. *See, e.g.*, [12 Part 1] LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII, *supra* note 82, at 390 (entry 866).

214. *See* HANNA, *supra* note 27, at 49.

215. *See id.* at 16, 45, 49, 54 n.58, 126, 158. For an example of a monarch seeking to turn pirates into sailors of the Royal Navy, *see* King Edward VI, Ordering Arrest of Irish Pirates (Jan. 1549), in 1 TUDOR ROYAL PROCLAMATIONS 437, 437 (Paul L. Hughes & James Francis Larkin eds., 1964) (stating that “the honest mariners, soldiers, and others” who served as pirate crews would be pardoned if they turned themselves in to the Admiral or the Lord



were proceeded against via the criminal justice system rather than killed extrajudicially on the high seas.

Financial incentives might also have provided some motivation for crown officials to prefer a criminal justice approach to piracy. Convicted pirates suffered death with no benefit of clergy, and their lands and goods were forfeit.<sup>216</sup> The Lord High Admiral received as personal income these forfeitures and any fines from criminal convictions of pirates.<sup>217</sup> At first the admiral, and then later the crown, received convicted pirates' property, as well as any property stolen by pirates that was not claimed by victims.<sup>218</sup>

Treaties provided another reason to resort to courts of law to punish non-English pirates captured on the seas. In a 1654 treaty, for instance, England and Sweden promised that neither "the subjects of either state," nor "their ships or effects" would be arrested except "according to due form of law."<sup>219</sup> This appeared in treaties with other countries as well.<sup>220</sup> Treaties promised that subjects of each nation would have access to the courts of the other, and that justice under law would be done to them.<sup>221</sup> In bilateral treaties, England also promised to bring its nationals who engaged in piracy to justice.<sup>222</sup> Other English treaties promised that naval commanders "will not molest or injure the subjects" of the other nation, and "if they shall do otherwise, they shall be liable to answer for it in their persons and estates, and shall therein stand bound until just satisfaction and compensation shall be made."<sup>223</sup>

Deputy of Ireland, and "as many of them as be willing to serve shall be received into wages and serve in his highness' ships.").

216. See *VINER*, *supra* note 164, at 352; *HALE*, *supra* note 116, at 354; *AN ABRIDGMENT OF SEVERAL ACTS AND CLAUSES OF ACTS OF PARLIAMENT, RELATING TO THE TRADE AND NAVIGATION OF GREAT BRITAIN* 22, 24 (London, John Baskett 1739).

217. See *DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA*, *supra* note 144, at 370, 444-45; *1 THE POPULAR ENCYCLOPEDIA* 35 (Glasgow, Blackie & Son 1841).

218. *VINER*, *supra* note 164, at 349.

219. Treaty of Peace and Amity, Eng.-Swed., art. 5, Apr. 11, 1654, 3 Consol. T.S. 257.

220. Treaty of Peace and Commerce, Eng.-Den., art. 26, July 11, 1670, 11 Consol. T.S. 1670.

221. Treaty of Peace and Friendship, Eng.-Spain, arts. 1, 23, May 13, 1667, 10 Consol. T.S. 63. To the same effect, see Treaty of Commerce, Eng.-Neth., art. 15, Feb. 17, 1668, 10 Consol. T.S. 441. The 1667 treaty with Spain was applied to Sicily in 1713. Convention Respecting the Commerce of Sicily and Great Britain, Gr. Brit.-Savoy, para. 3, Mar. 8, 1713, 27 Consol. T.S. 397. And the 1667 treaty was reaffirmed in 1715. See Treaty of Peace and Commerce, Gr. Brit.-Spain, art. 5, Dec. 14, 1715, 29 Consol. T.S. 369.

222. Treaty of Peace, Alliance, and Commerce, Eng.-Den., art. 19, Feb. 13, 1661, 6 Consol. T.S. 233 (promising that each party "shall use means that the foresaid pirates and robbers, and their partners and abettors, may be apprehended, and suffer condign punishment"). To the same effect, see Treaty of Peace and Commerce, *supra* note 220, art. 29; Treaty of Peace and Friendship, *supra* note 221, art. 4; Treaty of Peace, Good Correspondence and Neutrality in America, Eng.-Fr., art. 14, Nov. 6, 1686, 18 Consol. T.S. 83.

223. Treaty of Peace and Commerce, *supra* note 220, art. 35. To the same effect, see Treaty of Commerce, *supra* note 221, art. 22; Treaty of Peace and Alliance, Eng.-Neth., art. 3,

Although these treaty promises were embodied in specific bilateral agreements, they also extended to England's relations with other non-signatory nations because of "most favored nation" clauses. An example of a typical most favored nation clause, in a bilateral treaty with Spain, promised that the subjects of each country would "enjoy . . . in all places whatsoever, the same privileges, securities, liberties, and immunities, whether they concern their persons or trade, with all the beneficial clauses and circumstances which have been granted, or shall hereafter be granted" by either monarch in other treaties.<sup>224</sup> Thus England was bound to treat Spanish nationals according to the highest level of liberties and immunities it had promised to the subjects of any other nation.

This web of treaty promises by England meant that international law and diplomatic considerations favored the use of criminal process for accused pirates in many instances, just as domestic policy considerations did also.

### B. *After the Glorious Revolution of 1688-89*

Starting in the latter part of the seventeenth century, the English state grew in size, power, and expertise and came to understand that commerce rather than marauding was the key to national prosperity. Simultaneously, the central government started to clamp down on piracy and other kinds of privatized violence, even that directed against foreigners.<sup>225</sup> The English navy was greatly expanded at about the same time, and the government started to use it extensively to protect merchant shipping from pirates and foreign privateers.<sup>226</sup> Using the criminal justice system as the mainstay of anti-piracy efforts continued to make good sense under this new regime.

Piracy trials allowed the government to promote a deterrence objective by making an example of the convicted.<sup>227</sup> Pirates convicted in England were, by tradition, hanged on the mudflats at Wapping, situated on the Thames a mile down river from the Tower of London. Hanging occurred between the high and low water marks, an area within the jurisdiction of the Admiralty. After death, the bodies were chained to a stake until the tide covered them three times. The bodies of notorious pirates were often then removed, covered with pitch or sometimes wrapped in chains to preserve the form of the body for a time. These bodies would be displayed publicly

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¶ 37, July 31, 1667, 10 Consol. T.S. 231; Treaty of Peace and Friendship, *supra* note 221, art. 4; Treaty of Peace, Eng.-Fr., art. 16, Nov. 3, 1655, 4 Consol. T.S. 1; Treaty of Peace, Good Correspondence and Neutrality in America, *supra* note 222, arts. 11–12.

224. Treaty of Peace and Friendship, *supra* note 221, art. 38. To the same effect, see Treaty of Peace and Commerce, *supra* note 220, arts. 8, 40.

225. See, e.g., HANNA, *supra* note 27, at 222–50; RITCHIE, *supra* note 192, at 147–49.

226. See, e.g., RITCHIE, *supra* note 192, at 155–59.

227. See, e.g., HANNA, *supra* note 27, at 134 (noting English government awareness of the deterrent value of public executions of convicted pirates).

on gibbets at various places on the coast to warn sailors about the consequences of resorting to piracy.<sup>228</sup> This was more effective publicity in the service of deterrence than it would be if pirates were killed on the high seas far from public notice.

The central English government also saw criminal trials, which would publicize the brutality of piracy, as a way to harden public perceptions against it and so enlist support in the anti-piracy campaign.<sup>229</sup> Trials of pirates were extensively covered in the press, and many books and pamphlets based on the testimony were published.<sup>230</sup>

Bringing state power to bear through the criminal justice system was understood to be a powerful way to send a message to foreign governments with whom England desired to maintain peaceful relations. Diplomats representing foreign nations frequently complained to the English government about piratical attacks by Englishmen, and the Crown often responded by proclaiming that the perpetrators were pirates and directing vigorous efforts to try and execute them.<sup>231</sup> Failing to punish English pirates criminally who attacked friendly foreigners would have been considered a serious breach of England's duties under the law of nations.<sup>232</sup> Thus, criminal prosecution was a potent diplomatic message.

Colonial officials also sent messages via criminal trials of accused pirates. Once the central government began vigorously cracking down on colonial governmental support of piracy, it became important for colonial leaders to show that the message was received. Colonial governors sent captured pirates back to England for trial as a visible sign to their superiors that they were taking vigorous action against the problem,<sup>233</sup> or held and publicized trials in their colony for the same purpose.<sup>234</sup>

Thus, during both periods of England's relationship with piracy—an earlier period in which pirates were sometimes supported rather than proscribed, and a later period in which piracy was unequivocally treated by the state as an outrage to be strictly suppressed—there were multiple reasons for the government to prefer a criminal justice approach. There is no basis,

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228. The foregoing paragraph is based on JOWITT, *supra* note 90, at 21–22; LINCOLN, *supra* note 163, at 34–40; RITCHIE, *supra* note 192, at 1–2, 228.

229. See HANNA, *supra* note 27, at 11, 240–41.

230. *Id.* at 240–41. For examples of such pamphlets, books, and articles, see the documents reproduced in 1–4 BRITISH PIRACY, *supra* note 192.

231. See, e.g., HANNA, *supra* note 27, at 180, 239. For centuries, diplomatic correspondence by English officials and by foreign diplomats concerning England is littered with foreign government complaints about pirates and English promises to find and punish them. See, e.g., Letter from Eustace Chapuys to Charles V (Jan. 30, 1532), in LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII, *supra* note 82, at 362 (entry 762).

232. See generally Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 478–81 (2011).

233. See, e.g., RITCHIE, *supra* note 192, at 159.

234. See, e.g., HANNA, *supra* note 27, at 120, 134.

therefore, to assume that a view of global liberty under law must have been the causal driver for the observed phenomenon of widespread and preferential use of criminal law.

### III. THE LAW OF THE UNITED STATES

Chapman argues that Americans inherited a concept of global due process from England and embodied it in their Constitution, in the Due Process Clause of the Fifth Amendment. As discussed above, Chapman claims that English due process required that anyone, anywhere in the world, suspected of conduct that constituted a domestic crime must be proceeded only according to the course of the common law and other standing law of the land, including trial by jury. The only deviation, Chapman claims, was that trial before the bench (rather than jury) was authorized during the reign of William III in admiralty courts held in the American colonies or other overseas locations. But, according to Chapman, Americans rejected this and reverted to the original, strict view of due process.

The previous sections show that there was no such view of global due process held by the English, at home or in the North American colonies. Thus, post-independence Americans could not have inherited anything of that sort. Instead, Americans inherited the view, based in international law and English domestic law, that pirates on the high seas were outside the protection of the law and could lawfully be killed, either in battle or by summary execution after capture.

Chapman is correct that England had a practice of trying many pirates captured on the seas in regular criminal courts, rather than summarily killing them. He is also correct that Americans continued this practice. The Constitution authorized Congress to “define and punish piracies and felonies committed on the high seas,”<sup>235</sup> and from the 1790 Crimes Act onward, the United States had a federal statutory crime of piracy.<sup>236</sup> There were many federal court piracy prosecutions, of both American citizens and foreigners, during the Founding and Early Republic eras.<sup>237</sup>

But this observed practice, standing alone, is not evidence that Chapman’s view of due process existed. Americans, like the English, had many reasons based in policy, morality, expediency, international law, and international relations to use the criminal justice approach for pirates. We must see some direct evidence, then, showing that frequent resort to the criminal model was driven by legal understandings of due process of the type Chapman suggests. Chapman presents only one piece of evidence of this kind—

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235. U.S. CONST. art. I, § 8, cl. 10.

236. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14; *see also* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14.

237. *See, e.g.*, DWIGHT F. HENDERSON, CONGRESS, COURTS AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829 (1985).

an 1822 report of a House of Representatives committee. As discussed below, the report does not mean what Chapman thinks it does.

In theory, Americans might have accepted Chapman's view even though their mother country rejected it. Many Americans had come to believe over the long decades of revolutionary ferment and constitution-making that fundamental liberties, including the jury, should be inviolate. And there was an emerging notion in the founding era that governmental acts in violation of fundamental liberties were void, and might be declared so by the courts.<sup>238</sup> The Americans' written constitution guaranteed a jury in criminal cases, in Article III of the original, un-amended document.<sup>239</sup> And the Bill of Rights added additional protection for the criminal jury and new protection for the grand jury and civil jury.<sup>240</sup> But despite all this, the evidence discussed below shows that Americans did not think that their new and improved version of due process required that pirates on the high seas be suppressed only with criminal trials. The only change from English practice was that Americans insisted that the jury must be used if criminal trials for piracy were to occur.

#### A. Background Understandings

The United States was not, of course, a legal blank slate when it declared independence in 1776, much less in 1788, when the Constitution was adopted. New law was overlaid on the pre-existing British system, in which the new republic was nurtured. Thus, the English practice and law, discussed above, which treated pirates on the high seas as outside the protection of the law and subject to extrajudicial killing, was the system that the United States inherited. A lot of the piracy occurred in and around the Americas, and thus colonial administrators in what would become the United States were involved in creating many of the precedents about the lawful extermination of pirates that were described above.<sup>241</sup> Specific English legal authorities, which conveyed these legal understandings about pirates, were well known in America. Parliamentary statutes, royal proclamations, important decisions of the Privy Council, and other significant government documents were available in the United States. Legal treatises announcing the rule that pirates could be lawfully killed were also available to Americans. We know that Molloy's popular treatise, for example, was available because it was frequently cited in litigation in U.S. courts, including in the Supreme Court.<sup>242</sup> Blackstone was an indispensable resource for American

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238. See, e.g., William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

239. U.S. CONST. art. III, § 2, cl. 3.

240. *Id.* amends. V, VI, VII.

241. See, e.g., *supra* notes 158–160 and accompanying text.

242. See, e.g., *McDonough v. Dannery*, 3 U.S. (3 Dall.) 188, 198 (1796) (opinion of Cushing, J.); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 38 (1800) (argument of counsel); *Blaine v.*

lawyers. The works of Viner, Hawkins, Hale, and Jacob's law dictionary and *Lex Mercatoria*—all cited above—were also in wide use.<sup>243</sup>

Important indigenous American legal authorities reiterated the message that it was lawful to kill pirates on the high seas. For example, the influential treatises of James Kent and William Alexander Duer both stated that “[e]very nation has a right to attack and exterminate them [pirates] without any declaration of war.”<sup>244</sup> Kent also wrote that a pirate “is reputed to be out of the protection of all laws and privileges.”<sup>245</sup>

Foreign writers who had significant influence on American law likewise taught that it was lawful to summarily kill pirates. Emer de Vattel, the Swiss authority on the law of nations, wrote that “the depredations of pirates” are a kind of “illegitimate and informal war[,]” justifying a captor in summarily hanging them.<sup>246</sup> Jean Jacques Burlamaqui, another Swiss author who was widely consulted and cited in early America, wrote that pirates were an “enemy” whom anyone could “justly destroy.”<sup>247</sup> The German jurist Samuel Pufendorf, following Grotius, wrote that “Pirates are not . . . lawful Enemies, but should be look'd on as the common Adversaries of Mankind,” and since they operate in places (the high seas) “that are not subject to any determinate Court of Judicature,” not only may the government attack them under “the Right of War” but “every Man may draw his Sword against them.”<sup>248</sup>

Ship *Charles Carter*, 8 U.S. (4 Cranch) 328, 330 (1808) (argument of counsel); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 155 (1820) (argument of the U.S. Attorney General).

243. See, e.g., *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 481 (1827) (citing HAWKINS, *supra* note 134, and HALE, *supra* note 116); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 n.4, 161 n.6, 163 n.8 (1820) (citing HAWKINS, *supra* note 134, and VINER, *supra* note 164); *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 328 (1815) (citing VINER, *supra* note 164); *M'Ilvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280, 310 (1805) (argument of counsel citing HALE, *supra* note 116); *Wilson v. Lenox*, 5 U.S. (1 Cranch) 194, 210 (1803) (argument of counsel citing JACOB, *DICTIONARY*, *supra* note 165); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 160 (1795) (Iredell, J., citing *LEX MERCATORIA*, *supra* note 165).

244. 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 172 (New York, O. Halstead 1826); WILLIAM ALEXANDER DUER, *OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* 148 (New York, Collins & Hannay 1833).

245. KENT, *supra* note 244, at 174.

246. EMER DE VATTEL, *THE LAW OF NATIONS* 507–08 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758). On Vattel's influence in America, see Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1061–67 (2002); Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 548 (2012).

247. JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF POLITIC LAW* 274–75 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1751). On the influence of Burlamaqui in America, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27–29 (50th anniversary ed. 2017); RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM* 79–175 (1937).

248. SAMUEL VON PUFENDORF, *OF THE LAW OF NATURE AND NATIONS*, at bk. III p. 220, bk. VIII pp. 168–69 (Oxford, L. Lichfield ed., 1703) (1672). On the influence of Pufen-

In addition, the background understanding of a reciprocal link between allegiance and protection, and the way citizenship and territorial location interacted with that framework, was inherited in American law from England.<sup>249</sup> Thus, under U.S. law, noncitizens outside the country were presumptively outside the protections of domestic law, including the Constitution.<sup>250</sup>

### B. American Government Practice

After the United States built a small navy in the late 1790s and early 1800s,<sup>251</sup> it was used extensively against pirates with apparently no expressed concern about the putative constitutional due process rights of those attacked. Some of these anti-pirate military actions may best be understood as war, and Chapman, along with most other globalist legal commentators, concede that the Due Process Clause and other constitutional rights do not apply to foreign enemies during wartime.<sup>252</sup> But to sustain his ambitious thesis, Chapman needs to show that the Due Process Clause was understood to limit the U.S. government's choices—to prevent it from choosing to use violent measures such as military attack or summary execution on pirates, requiring instead that a criminal justice model be deployed. Chapman has not shown this, and the historical record does not support it. This subsection addresses American government practice. Section V, which follows, will take up directly the question of war versus law enforcement and whether funda-

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dorf on the American Founding generation, see MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776–1939*, at 24–25 (2010); BAILYN, *supra* note 247, at 27, 29, 43, 150.

249. See Hamburger, *supra* note 115, at 1844–47; Kent, *Global Constitution*, *supra* note 7, at 499–505; Kent, *Enemy Fighters*, *supra* note 115, at 177.

250. See Kent, *Global Constitution*, *supra* note 7, at 485–505; Kent, *Black Holes*, *supra* note 14, at 1036–37. This presumptive territoriality of fundamental legal protections co-existed, however, with an openness of American institutions to common law trespass recovery when legal rights of citizens or noncitizens were invaded on the high seas or abroad. See *Statutory Piracy*, 2 U.S. Op. Atty. Gen. 19, 21 (1825). A Marshall Court case cited by some commentators to supposedly show that either common law actions against U.S. government officials were allowed for extraterritorial misconduct, or that the Constitution's separation of powers framework operated extraterritorially, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), has been misread. The case concerned a kind of cross-claim allowed by the international law of prize when a captor prosecuting a libel suit in a prize court was found to have wrongfully detained a vessel. Application of the law of prize in federal courts occurred by implicit direction of the U.S. Constitution and statutes, not from a free-floating individual right under the common law or Constitution. On the proper reading of *Barreme*, see Kent, *Citizenship*, *supra* note 7, at 2119 n.14; Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1165 n.184, 1191 n.280 (2014).

251. On the creation of the U.S. Navy, see JONATHAN R. DULL, *AMERICAN NAVAL HISTORY, 1607–1865: OVERCOMING THE COLONIAL LEGACY* (2012); IAN W. TOLL, *SIX FRIGATES: THE EPIC HISTORY OF THE FOUNDING OF THE U.S. NAVY* (2006); STEPHEN HOWARTH, *TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY, 1775–1998* (1999).

252. See, e.g., NEUMAN, *supra* note 25, at 110–11; Chapman, *supra* note 15, at 377, 383–84.

mental law constrained the government's choice of which paradigm to employ.

### 1. Amelia Island, 1817

In 1817, the U.S. Navy cleared a “piratical establishment” from Amelia Island in Spanish Florida, because “numerous violations of our laws had been latterly committed by a combination of freebooters and smugglers of various nations.”<sup>253</sup> The United States was doing law enforcement via (potentially) lethal military force, something that Chapman claims was strictly prohibited by the Due Process Clause.<sup>254</sup> President Monroe stated that the denizens of Amelia Island had made it “a channel for the illicit introduction of slaves from Africa into the United States, an asylum for fugitive slaves from the neighboring States, and a port for smuggling of every kind”<sup>255</sup>—all in violation of U.S. criminal statutes. The executive authorized the military that, “if it should be found indispensably necessary, force must be used” to clear out the pirate nest.<sup>256</sup> The executive instructions and internal executive branch communications,<sup>257</sup> notes of cabinet deliberations,<sup>258</sup> and debates in Congress (primarily about the implications of the action at Amelia for U.S. relations with Spain and rebelling former-Spanish colonies)<sup>259</sup> reveal no concern that due process was implicated in any of this.

### 2. Pirates in the Caribbean and Gulf of Mexico, 1819-1828

Piracy plagued the Caribbean and Gulf of Mexico during the second and third decades of the nineteenth century. Spanish colonies in the new world revolted in the first decade, claiming to be independent nations. These revolutionary governments issued commissions to privateers, which immediately became a flimsy cover for piracy. Spain also licensed privateers in

253. H.R. COMM. ON FOREIGN RELATIONS, SUPPRESSION OF PIRATICAL ESTABLISHMENTS, H.R. REP. NO. 15-290 (1st Sess. 1818), *reprinted in* 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 132, 132–33 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834) (capitalization adjusted).

254. Chapman, *supra* note 15, at 381, 389, 405.

255. Message from President James Monroe to Congress (Dec. 2, 1817), *in* AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 130; *see also* Message from President James Monroe to Congress (Jan. 13, 1818), *in* AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 139 (stating that Amelia Island was the site of illegal smuggling and privateering); H.R. REP. NO. 15-290, at 132, 133–34 (finding that it was the “duty” of the United States to stop this activity in order to secure commerce, stop attacks on neutral shipping, and prevent violations of the United States’ “revenue and prohibitory laws.”).

256. AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 141; *see also id.* at 143 (authorizing the use of force to clear the pirates and smugglers from Amelia Island).

257. *See* AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 139–44.

258. *See* 4 MEMOIRS OF JOHN QUINCY ADAMS 14–16, 20–21, 28–29 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

259. 31 ANNALS OF CONG. 403–04, 409–16 (1817); *id.* at 646–50 (1818).



response. The breakdown of political and social order—both a cause and a further effect of the revolutions—created a power vacuum which many plain old pirates, not claiming any veneer of legality, exploited. After the United States annexed Florida from Spain,<sup>260</sup> the U.S. government became even more concerned than before about terminating the pirate threat. The fact that many U.S. citizens were engaging in either privateering-cum-piracy or straightforward piracy made the government's interest even stronger.<sup>261</sup>

Records of the Navy's response to this piracy show repeated instances where life and property were taken with no semblance of judicial due process. Given the openness with which this was all discussed, in official government documents, presidential statements, congressional debates, and newspapers, it seems inconceivable that any relevant actors subscribed to Chapman's due process thesis—i.e., that no person, including noncitizens on the high seas or in foreign countries, who engaged in conduct made criminal by an act of Congress could be proceeded against except via judicial process under the standing laws of the land.

Naval, congressional, and public attention were focused on the anti-piracy campaigns when Captain David Porter—who was given the title commodore, put in command of the U.S. Navy's West Indies squadron from 1823–25, and charged with suppressing piracy—was arraigned on charges of misconduct in 1825. Porter had insulted Spanish officials at Puerto Rico whom he thought were conniving with pirates and was recalled to the United States and court-martialed. A contemporaneous naval court of inquiry also examined his overall record in the West Indies. Despite the review and publication of voluminous documents and testimony showing the life, limb, and property of suspected pirates being taken without any due process, neither the civilian executive branch, the naval courts, Congress, nor the public seemed to have any legal qualms.

Anti-pirate naval actions began before Porter arrived on the scene. Apparently acting under the 1790 Crimes Act, which made piracy a federal crime, the U.S. Navy was attacking pirates in the Gulf of Mexico as early as 1814. A naval commandant wrote to the Secretary of the Navy of his duty,

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260. The treaty was signed in 1819 and effective in 1821. *See* Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

261. For the history summarized in the preceding paragraph, see CAITLIN FITZ, *OUR SISTER REPUBLICS: THE UNITED STATES IN AN AGE OF AMERICAN REVOLUTIONS* (2017); DAVID HEAD, *PRIVATEERS OF THE AMERICAS: SPANISH AMERICAN PRIVATEERING FROM THE UNITED STATES IN THE EARLY REPUBLIC* (2015); JOHN CHARLES CHASTEEN, *AMERICANOS: LATIN AMERICA'S STRUGGLE FOR INDEPENDENCE* (2009); ARTHUR P. WHITAKER, *THE UNITED STATES AND THE INDEPENDENCE OF LATIN AMERICA, 1800–1830* (1941); GARDNER W. ALLEN, *OUR NAVY AND THE WEST INDIAN PIRATES* (1929); FRANCIS B.C. BRADLEE, *PIRACY IN THE WEST INDIES AND ITS SUPPRESSION* (1923).

in reference to an attack on pirates on the Louisiana coast, to “destroy or make prisoners of them and their leaders.”<sup>262</sup>

In 1819, as piracy grew in scale and violence, Congress responded with a two-pronged statute. On the one hand, there was a judicial due process approach. The crime of piracy was expanded somewhat, and the Navy was authorized to seize and bring into port for condemnation via judicial process any vessels engaged in piracy.<sup>263</sup> On the other hand, military force would be used to destroy pirates and their vessels. The statute “authorized and requested” the president “to employ so many of the public armed vessels as, in his judgment, the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggression and depredations.”<sup>264</sup>

As discussed below, under this authorization—which was renewed and supplemented in subsequent years<sup>265</sup>—the Navy killed many pirates, destroyed many suspected pirate vessels, frequently destroyed what they believed to be pirate property on shore (including on Spanish soil), and brought large numbers of prisoners back to the United States for criminal trial. Since the Due Process Clause protects property as well as life and liberty, both extrajudicial property destructions as well as killings of pirates are evidence against Chapman’s view.

In fall 1819, it was reported that two U.S. revenue cutters<sup>266</sup> attacked pirates off Louisiana and “the pirates lost six men killed. The remainder of her crew, to the number of eighteen, were safely lodged in prison . . . .”<sup>267</sup> In November 1821, Lt. Lawrence Kearny, U.S. Navy, reported to the Secretary of the Navy that he, in command of U.S. Brig. *Enterprise* off Cape Antonio, Cuba, attacked pirates, captured one prisoner, and burned a captured “pirat-

262. Letter from Master Commandant Daniel T. Patterson to William Jones, Sec’y of the Navy (Sept. 10, 1814), as reprinted in JOSEPH GIBBS, ON THE ACCOUNT: PIRACY AND THE AMERICAS, 1766–1835, at 84, 86 (2012).

263. Act of Mar. 3, 1819, ch. 78, §§ 2, 5, 3 Stat. 510, 512–14.

264. *Id.* § 2.

265. See Act of May 15, 1820, ch. 113, § 1, 3 Stat. 600 (extending the Act of 1819 for two years and then further until the end of the next session of Congress); Act of Jan. 30, 1823, ch. 7, 3 Stat. 721 (making permanent the Act of 1819); see also Act of Dec. 20, 1822, ch. 1, 3 Stat. 720, §§ 1–2 (authorizing the president to fit out and deploy additional naval vessels “for the purpose of repressing piracy, and of affording effectual protection to the citizens and commerce of the United States in the Gulf of Mexico, and the seas and territories adjacent,” and appropriating money for that purpose).

266. Revenue cutters were small sailing vessels designed for use near the coast to enforce U.S. revenue laws. See generally Greg Shelton, Note, *The United States Coast Guard’s Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers’ Blues or Boaters’ Nightmare?*, 34 WM. & MARY L. REV. 933, 939–41 (1993) (explaining the development of the revenue cutter service).

267. *A Pirate Taken*, HAMPDEN PATRIOT (Springfield, Mass.), Oct. 21, 1819, at 2, reprinted in GIBBS, *supra* note 262, at 102, 103.

ical Schooner[ . . . ]”<sup>268</sup> Two months later, Kearny was reported to have “captured a piratical boat off Cape Antonio, landed, and burnt their huts.”<sup>269</sup> Also in January 1822, Lt. Ramage, commanding the *Porpoise*, reported to his superiors that he landed soldiers on Cuba in search of reported pirates who engaged the pirates in battle: “We took possession and burnt and destroyed their fleet, consisting of five vessels . . . . We also took three prisoners; the others fled to the woods. In the affair just mentioned the officers of the expedition state that enemy’s loss to be severe.”<sup>270</sup> Later that spring, a U.S. Navy captain wrote that, from a station off Cuba, “I have taken and destroyed six piratical vessels, burnt two of their establishments, killed some of their people, and have now some prisoners on board.”<sup>271</sup> As discussed below,<sup>272</sup> many members of Congress expressed in floor statements that military force should be used to exterminate pirates, with no hint of hesitation based on domestic legal concerns.

Although pirates and privateers were based on Spanish-owned islands, including Cuba and Puerto Rico, and were understood to operate with the support of some local merchants and Spanish government officials, the United States was careful to respect Spanish sovereignty enough to avoid a war. After delaying making this move for several years, the executive in early 1823 authorized the Navy to enter Spanish territory to pursue pirates, but required naval commanders to announce to local authorities that their “sole object” was “aiding the local authorities” and “bring[ing] the offenders to justice.”<sup>273</sup> The Navy was instructed that, if it seized any pirates “on land,” i.e., in Spanish territory, it must “deliver them over to the proper authority to be dealt with according to law.”<sup>274</sup> Nothing was said about the disposition of pirates captured on the high seas, suggesting that the mandated use of the criminal justice system in this instance was driven by concerns about international law and international relations, rather than any notion that due process was global. The Navy’s general orders went further, though, directing officers who captured suspected pirates to deliver them to appropriate U.S. or Spanish authorities, without regard to where the capture took place.<sup>275</sup>

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268. Letter from Lt. Lawrence Kearny to Thompson, Sec’y of the Navy, (Nov. 12, 1821), reprinted in GIBBS, *supra* note 262, at 119.

269. News, REPUBLICAN CHRON. (Ithaca, N.Y.), Jan. 30, 1822, at 3.

270. BRADLEE, *supra* note 261, at 15, 16.

271. *Pirates and Piracy*, CITY GAZETTE & COM. DAILY ADVERT. (Charleston, S.C.), Apr. 3, 1822, at 2.

272. See *infra* Section V.C.

273. Instructions from Smith Thompson, Sec’y of the Navy, to Commodore David Porter (Feb. 1, 1823), in 5 AMERICAN STATE PAPERS: FOREIGN RELATIONS 502 (Ashbury Dickins & James C. Allen eds., Washington, Gales & Seaton 1858).

274. *Id.*

275. See *General Instructions for Officers Commanding Cruising Vessels*, Navy Department (c. 1823), IN MINUTES OF PROCEEDINGS OF THE COURT OF INQUIRY AND COURT

In practice, however, the Navy under Porter from 1823—25 was brutal. Porter testified to his understanding of the authority he had vis-à-vis pirates encountered by his squadron in language familiar from old English treatises and law dictionaries:

[P]irates are considered, by the laws of nations, the enemies of the human race; and this being the case, it is the duty of all nations to put them down . . . . [E]very pirate reduces himself to a state of nature, and defies all laws, and may be punished . . . . at discretion, without any regard to law. . . . I offer the following quotation from the *Lex Mercatoria* [at page] 184: ‘A piracy is attempted on the ocean; if the pirates are overcome, the takers may immediately inflict a punishment by hanging them up at the main yard end, though this is understood when no legal judgment may be obtained.’<sup>276</sup>

Similarly, U.S. Navy (“USN”) Master Commandant Alexander Dallas testified that “[t]he particular object of this cruise was the destruction of all the pirates, and piratical establishments, as well on the ocean as on shore, as we could meet with.”<sup>277</sup> And that is what happened.

In April 1823, Porter reported to the Secretary of the Navy that Lt. Stribling, commanding U.S. naval vessels off Cuba, “ran along side of her [the pirate vessel]” in a “sudden and effectual . . . attack,” and he “took possession of her, after a fire of ten minutes, in which time, all the [pirate] crew, except the Captain and three others, one of whom is taken, were killed—the pirate having time to fire his long gun only once.”<sup>278</sup> One month later, Porter wrote to the Secretary of the Navy quoting USN Captain Cassin, who was also operating off Cuba, reporting “the capture of a piratical schooner and a very fine felucca; the destruction of one on shore, the burning of three schoolers in the Rio Palmas, and about a dozen of their [pirates’] houses in the different establishments to leeward of Bahia Honda.”<sup>279</sup> Also in May 1823, USN Lt. Watson wrote to Porter, reporting that off Sig-

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MARTIAL IN RELATION TO CAPTAIN DAVID PORTER 183 (Washington, Davis & Force 1825) [hereinafter PORTER PROCEEDINGS] (“Whenever, therefore, you shall find any boats or vessels, the crews whereof have committed any actual violence, outrage, or depredation, upon any vessels of the United States, or the citizens thereof . . . you will consider yourself authorized to subdue, seize, and taken them; and, unless on such capture, you shall be satisfied that they were acting under some lawful authority, and not piratically, to send them in for adjudication.”).

276. 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 419, 423 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860). Porter published this document as a pamphlet in spring 1825. See *Commodore Porter’s Defence*, NILES’ WKLY. REG. (Baltimore, Md.), June 11, 1825, at 231.

277. PORTER PROCEEDINGS, *supra* note 275, at 54 (testimony of Alexander Dallas).

278. Letter from Commodore Porter to Sec’y of the Navy (April 16, 1823), in PORTER PROCEEDINGS, *supra* note 275, at 204.

279. Letter from Commodore Porter to Sec’y of the Navy (May 10, 1823), in PORTER PROCEEDINGS, *supra* note 275, at 206.

uapa, Cuba, “we pursued them [the pirates], and, after a short action, succeeded in taking both vessels, and effecting the almost total destruction of their crews, amounting, as nearly as could be ascertained at the time, to 50 or 60 men; but, as we are since informed, to seventy or eighty.”<sup>280</sup> The Porter court of inquiry later praised this “gallant action, peculiarly destructive to the pirates.”<sup>281</sup> Prisoners were taken, too. Some were delivered to Spanish authorities,<sup>282</sup> some returned to the United States for criminal trial,<sup>283</sup> and some were reportedly given to the British Navy’s anti-piracy squadron for summary execution.<sup>284</sup>

In June 1823, USN Lt. Thomas Newell wrote a report to his superiors lamenting that his efforts to kill pirates on a Cuban shore with grapeshot and canister from his vessel’s long gun were unsuccessful: “as for killing any of them, it was impossible, for, on the approach of the ‘Ferret’ [the navy schooner he commanded] they [the pirates] would completely secure themselves behind rocks and trees.”<sup>285</sup> A bit later, a U.S. officer wrote to his superior, Porter, noting a “brilliant achievement.”<sup>286</sup> He reported to Porter that the Navy attacked pirate vessels at sea near Matanzas, Cuba, and “commenced a destructive slaughter, killing them in the water and as they landed; so exasperated were our men, that it was impossible for their officers to restrain them, and many [pirates] were killed after orders were given to grant quarters. Twenty-seven dead were counted.”<sup>287</sup> This letter especially—even more than the other reports previously cited—is inconsistent with any notion that due process of law was applicable. At the end of 1823, fully aware of incidents like the above because of reports to Washington from naval of-

280. Letter from Lt. Commandant Watson to Commodore Porter (May 21, 1823), in PORTER PROCEEDINGS, *supra* note 275, at 302.

281. PORTER PROCEEDINGS, *supra* note 275, at 91.

282. See Letter from Lt. Francis H. Gregory to Sec’y of the Navy (n.d.), in PORTER PROCEEDINGS, *supra* note 275, at 143 (noting that the U.S. Navy placed 76 captured pirates “safely lodged in jail, committed for piracy” in Cuba).

283. See, e.g., United States v. Cartacho, 25 F. Cas. 312 (C.C.D. Va. 1823) (No. 14,738). Manuel Cartacho was captured by Lt. Stribling of Porter’s West Indies squadron and sailed into Norfolk, Virginia, to stand trial. See *Norfolk*, June 30, RICHMOND ENQUIRER, July 4, 1823, at 2.

284. See KENNETH J. HAGAN, THIS PEOPLE’S NAVY: THE MAKING OF AMERICAN SEA POWER 97 (1991). I have not been able to verify this claim by Hagan. If true, it seems to suggest a consciousness that summary execution of captured pirates by American officials would be wrongful.

285. BRADLEE, *supra* note 261, at 16; PORTER PROCEEDINGS, *supra* note 275, at 282–83.

286. *Destruction of Pirates*, EASTON GAZETTE (Easton, Md.), Aug. 2, 1823, at 3.

287. *Id.*; see also News, NEW-HAMPSHIRE SENTINEL (Keene, N.H.), Aug. 22, 1823, at 3 (reporting that the U.S. Navy engaged two pirate vessels, and “[t]he number of the pirates is stated at [from] 60 to 80, who, with the exception of nine, were either killed by our men, or drowned in attempting to swim on shore. Five were desperately wounded and taken prisoners, and have been sent by Com. Porter to the Gov. of Cuba for trial.”).

ficers of the West Indies Squadron, the Secretary of the Navy instructed Porter to “continue your exertions to repress piracy, and protect our commerce.”<sup>288</sup> Porter’s year-end report to the Secretary recounted that he burnt or otherwise destroyed all piratical vessels and land bases he encountered, and while “[s]ome severity has been exercised while the battle lasted . . . the result has been beneficial.”<sup>289</sup>

The West Indies squadron was back in U.S. waters for part of 1824, during which time Congress and the executive considered whether to blockade Puerto Rico or Cuba for anti-piracy purposes. No agreement could be reached.<sup>290</sup>

The year 1825 started with statements by Congress and President Monroe that are inconsistent with the due process thesis. The House Committee on Naval Affairs released a report hoping that local officials in Puerto Rico and Cuba will join “in earnest in the extirpation” of pirates, “these foes of the human race.”<sup>291</sup> The president, meanwhile, sent a message to Congress requesting legislative authorization to engage in “reprisal on the private property” of the inhabitants of Spanish islands that harbor pirates. To be clear, the president was suggesting that the United States take or destroy the private property of Spaniards—subjects of a country at peace with the United States—whose only offense was to reside on islands where pirates were harbored by some in their community.<sup>292</sup> This should have been seen as flagrantly illegal if a global due process view was held by anyone at that time.

Down in the Caribbean, in early spring 1825, the Navy attacked a “piratical sloop” and killed two or three pirates near Puerto Rico.<sup>293</sup> A bit later, a naval officer reported to the Secretary of the Navy that they pursued a suspected pirate vessel, “an action commenced,” and two pirates were killed and five or six wounded, with those escaping to shore in Puerto Rico being

288. ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 372 (1976).

289. Letter from Commodore Porter to Sec’y of the Navy (Nov. 19, 1823), in PORTER PROCEEDINGS, *supra* note 275, at 214.

290. SOFAER, *supra* note 288, at 372–73.

291. *Additional Naval Force for the Suppression of Piracy*, in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS 1050 (Walter Lowrie & Walter S. Franklin eds., Washington, Gale & Seaton 1834). Congress also reiterated its two-pronged strategy of military violence and criminal prosecution. See H. COMM. ON FOREIGN RELATIONS, PIRACY AND OUTRAGE ON THE COMMERCE OF THE UNITED STATES BY SPANISH PRIVATEERS, H.R. REP. NO. 18-398 (2d Sess. 1825), reprinted in 5 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 585 (noting that the United States was pursuing pirates in the Caribbean “by a vigorous exertion of the naval power” and “careful prosecution before competent tribunals of all the accused who were taken”).

292. President James Monroe, Address to the Senate of the United States (Jan. 13, 1825), in AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 490.

293. *Piracy*, N.Y. SPECTATOR, Apr. 19, 1825, at 3; see also *Domestic*, PORTLAND ADVERTISER (Portland, Me.), Apr. 6, 1825, at 2 (noting that the U.S. Navy engaged pirates off Puerto Rico and “5 of the pirates were killed”).

caught by Spanish soldiers.<sup>294</sup> Porter's June 1825 orders to a subordinate cruising off Cuba reveal a lack of concern with orderly legal process:

You will protect the honest and peaceable inhabitants, but whenever you find fishermen without their families, you will give them a rigid examination, and if you find them without license and with arms, you will destroy their establishment, and if there is good and sufficient reasons to believe that they have been engaged in acts of piracy, you will bring them off with you or deliver them to a Spanish civil or military officer.<sup>295</sup>

As noted above, Porter was recalled later in 1825 after offending Spanish authorities in Puerto Rico. By then, his work was mostly complete. There did continue to be some piracy and some U.S. naval actions in the West Indies, but both were far less frequent. In 1828, suspected pirates fired on U.S. naval vessels cruising the coast of Cuba. The Navy "discharged several broadsides" and then landed on shore, burned "[a] small hamlet, the pirates resided in," and "many [pirates] were supposed to have been killed from the fire of the [schooners] as well as from the men who landed."<sup>296</sup>

In sum, the Navy openly discussed exterminating pirates and destroying private property, without any semblance of concern about due process rights.

### C. *Views in Congress on the Extrajudicial Killing of Pirates*

A number of congressional debates in the early nineteenth century reveal that many members of Congress agreed with the legal commentators and the position evidenced by executive branch practice that pirates encountered on the high seas could be killed without judicial process. Chapman's sole piece of evidence that states directly—according to his reading of it—that U.S. constitutional rights required trial at common law for any pirates seized anywhere in the world by U.S. officials is a congressional document, a March 1822 report of the House of Representatives' Committee on Naval Affairs.<sup>297</sup> As discussed below, Chapman's reading of the report is almost certainly erroneous.

#### 1. Acrimony about Andrew Jackson's Seminole War

In 1818, General Andrew Jackson led a small army—made up of U.S. regulars, volunteers from Tennessee, and friendly Native American Indians—into Spanish-owned Florida. Notwithstanding a state of peace with Spain, Jackson was authorized to do this by the Monroe administration in

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294. *Official Papers*, BERKSHIRE STAR (Stockbridge, Mass.), May 5, 1825, at 2.

295. PORTER PROCEEDINGS, *supra* note 275, at 298.

296. *Defeat of Pirates*, E. FLA. HERALD (St. Augustine), Sept. 13, 1828.

297. Chapman, *supra* note 15, at 420–21, 437.

order to punish hostile Seminole Indians and runaway slaves who were using Florida as a haven for cross-border attacks.<sup>298</sup> Jackson quickly exceeded his orders by attacking and ousting Spanish authorities and, after hunting down his prey, ordering the execution of two British subjects who were allied with the Seminoles.<sup>299</sup> The executions came after highly irregular and perfunctory military trials.

Jackson was a national figure of growing appeal. A partisan debate ensued in Congress about the propriety of his actions. Regarding the executions, Jackson justified himself by saying, among other things, “It is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and a pirate.”<sup>300</sup> Jackson also contended that domestic U.S. law had nothing to say about the legality of the executions because they occurred in foreign territory.<sup>301</sup>

Congressional responses to his claims reveal something about attitudes toward execution of pirates encountered on the high seas. A report of the House Committee on Military Affairs did not deny that pirates might be summarily executed, but denied that the two British subjects should be considered to have the status of pirates.<sup>302</sup> A report of a Select Senate Committee did the same.<sup>303</sup> Henry Clay of Kentucky made ambiguous remarks in the House that perhaps asserted that the British subjects were denied constitutional rights; Clay unambiguously declared that if the men were pirates they “should have been turned over to the civil authority,” and that execution could only follow condemnation in a court of competent jurisdiction.<sup>304</sup> Jackson’s supporters disagreed. Henry Baldwin of Pennsylvania, later appointed to the U.S. Supreme Court, denied that the Constitution applied outside U.S. borders and sustained the legality of the executions, stating that the men were pirates and outlaws and thus “placed beyond the protection of civilized society.”<sup>305</sup> Representative Johnson of Kentucky argued that, “by analogy,” the British men “may be treated as pirates, and put to the sword.”<sup>306</sup> Alexander Smyth of Virginia contended that “banditti” and pirates could be lawfully killed, and that these men were properly treated as

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298. See Kent, *Global Constitution*, *supra* note 7, at 531–32.

299. *Id.* at 532.

300. 33 ANNALS OF CONG. 516–17 (1819).

301. 34 ANNALS OF CONG. 2308, 2319 (1819) (Memorial from Major General Andrew Jackson to the Senate).

302. 32 ANNALS OF CONG. 517 (1819).

303. *Id.* at 267.

304. 33 ANNALS OF CONG. 641–45. On the ambiguity in Clay’s comments and the reporting of them, see Kent, *Global Constitution*, *supra* note 7, at 533.

305. Kent, *Global Constitution*, *supra* note 7, at 526; 32 ANNALS OF CONG. 1042–44 (1819).

306. 33 ANNALS OF CONG. 655 (1819).



such.<sup>307</sup> He also disagreed with Clay on extraterritoriality, asserting that the U.S. Constitution and laws were not in force in Spanish Florida.<sup>308</sup> George Strother and Philip Pendleton Barbour, both of Virginia, agreed that U.S. domestic law did not govern these events in foreign territory.<sup>309</sup>

## 2. Debates about Caribbean Piracy

In December 1822, Representative Lewis Condict of New Jersey introduced a resolution asking that the Committee on Naval Affairs investigate and report on what measures are necessary “not only for the more efficient protection of our commerce in the West India seas from piracy, but for the entire extirpation of those freebooters, and the punishment of those who may be found to aid and abet them.”<sup>310</sup> Condict stated:

I have no idea of incurring the delay, or the hazard, of transporting them here, or of extending them a trial by jury, with all the delays incident to our courts of justice. They have placed themselves beyond the protection of the laws of civilized society; they have set at open defiance the laws of God and man; their hand is against every man, and every man’s hand should combine against them. And the most effectual restraint which you can impose upon their barbarities, is to furnish to them the spectacle of a few dozen of their leaders suspending by the halter, from the yard-arms of some of our public ships.<sup>311</sup>

A bill was pending to authorize the president to purchase or construct vessels “for the purpose of repressing piracy, and of affording effectual protection to the citizens and commerce of the United States in the Gulf of Mexico, and the seas and territories adjacent.”<sup>312</sup> Representative Taylor of New York wanted that bill to pass immediately so the executive could “promptly organize a force adequate to their [the pirates’] total extermination.”<sup>313</sup> Alexander Smyth of Virginia then introduced an amendment “[t]hat the President be, and he is hereby, authorized and required, to pursue the pirates by land on any of the West India islands to which they may resort, as well as on the ocean, until they are exterminated.”<sup>314</sup> This proposal implies, of course, that military extermination of pirates is lawful.

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307. *Id.* at 684–86.

308. *Id.* at 692–94; 32 ANNALS OF CONG. 693 (1819).

309. 33 ANNALS OF CONG. 845–46 (statements of Rep. Strother); 32 ANNALS OF CONG. 778 (1819) (statements of Rep. Barbour).

310. 40 ANNALS OF CONG. 348 (1822).

311. *Id.*

312. *Id.* at 371.

313. *Id.* at 374.

314. *Id.* at 377.

Louis McLane of Delaware—a former Navy midshipman and now chairman of the Committee on Naval Affairs—objected to the proposed amendment because, by the law of nations, no nation can enter another’s territory to pursue pirates unless that nation was unable or unwilling to prevent the piracies.<sup>315</sup> This was a concern about state sovereignty, not individual rights. Churchill Cambreleng, a merchant from New York and another Naval Committee member, opposed the amendment because he hoped the executive would pursue pirates across any “imaginary line” marking Spanish territory and thought that Congress should be willing to accept war if that was what resulted from necessary U.S. actions against pirates.<sup>316</sup> Thus, Cambreleng supported a military extermination of pirates.

Additional evidence of his lack of belief that the Due Process Clause required that all pirates be handled through a domestic criminal justice process is found in Cambreleng’s subsequent statement. He declared that he supported the pending bill to use the military because, when pirates have previously been captured, “they make their escape from a just fate through the sinuosities of the law.”<sup>317</sup> Philip Pendleton Barbour of Virginia, recently elected to be the Speaker of the House, spoke up to oppose the Smyth amendment because of concerns about violations of the law of nations if Congress authorized its naval forces to enter another country’s territory. He also referenced concerns about interfering with the president’s discretion to act as Commander-in-Chief.<sup>318</sup> The Speaker saw no legal impediment to extralegal summary punishment of pirates:

With regard to the idea of pirates being the enemies of human race, there could be no doubt of it, and on the great highway of nations [the high seas] we have a right to take them and deal with them as we please. But it was another question how far we have a right to pursue them on the territory of another and a friendly Power.<sup>319</sup>

No one is recorded expressing disagreement with the legal views of Johnston, Condict, Smyth, Cambreleng, or Barbour about military extermination of pirates. After three other representatives expressed concerns about the Smyth amendment on Spanish sovereignty grounds and two representatives suggested that an important bill to bolster the naval force against piracy should not be sidelined because of debatable questions about the law of nations, Smyth withdrew his amendment and the bill passed.<sup>320</sup>

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315. *Id.* at 377–78; *see generally* BIOGRAPHICAL DIRECTORY U.S. CONGRESS 1774–PRESENT, <http://bioguide.congress.gov> (last visited Oct. 4, 2018) (providing biographies of members of Congress).

316. 40 ANNALS OF CONG. 379 (1822).

317. *Id.*

318. *Id.* at 380.

319. *Id.*

320. *Id.* at 382–84.

In a brief Senate discussion, Senator James Barbour, brother of the Speaker of the House, referenced the House debates and stated that the United States can pursue pirates into a neutral country, and that all nations would “rejoice” in the “extermination” of pirates, who “deserved death at every man’s hand, and whom it was just and proper to exterminate wheresoever they could be found.”<sup>321</sup> As in the House, there was no disagreement with this legal position.

### 3. The Report of the House Committee on Naval Affairs

Chapman’s sole piece of evidence—according to his reading of it—that states *directly* that U.S. constitutional rights required trial at common law for any pirates seized anywhere in the world by U.S. officials is a March 1822 report of the House of Representatives’ Committee on Naval Affairs.<sup>322</sup> This is the relevant section of the report, which was issued a few months before the House debate recounted above:

The committee are also of the opinion that it would be inexpedient ‘to authorize the destruction of persons and vessels found at sea, or in uninhabited places, making war upon the commerce of the United States without any regular commission,’ and that it would be inconsistent with public law or general usage, to give any authority to destroy pirates and piratical vessels found at sea or in uninhabited places. The committee are of the opinion that it would be dangerous, and productive of great evil, to vest in the commanders of our public vessels an authority to treat as pirates, and punish without trial, even such persons as above described. It is not necessary for the accomplishment of the object in view that such an authority should be given, and it is essentially due to the rights of all, and the principles of ‘public law and general usage,’ that the consequences and punishment of piracy should follow only a legal adjudication of the fact.<sup>323</sup>

The reasons given by the Committee for recommending against such legislation sound primarily in policy, not law: “inexpedient,” “not necessary,” and, “dangerous.” But Chapman reads the document as expressing the view that law and, specifically, due process of law under the Constitution, required that any alleged pirate confronted by U.S. officials be tried according to ordinary domestic law enforcement procedures.<sup>324</sup> He concedes that “general usage” “almost certainly referred exclusively to the practices

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321. *Id.* at 34.

322. Chapman, *supra* note 15, at 420–21, 437.

323. *Additional Number of Small Vessels to be Employed for the Suppression of Piracy: Hearing Before the H.R. Comm. on Naval Affairs*, 17th Cong., 1st Sess. (1822), reprinted in 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 291, at 787, 788.

324. Chapman, *supra* note 15, at 420–21, 437.

of other nations,” but asserts that the term “public law” “could have been understood” to mean the Constitution.<sup>325</sup> Chapman also states, “[i]t is unclear where the request originated, but it may well have been the Executive Department.”<sup>326</sup>

The request originated with Representative Josiah Stoddard Johnston of Louisiana, a lawyer and judge who represented a state containing a significant port (New Orleans), which handled a large oceanic trade. In February 1822, Johnston introduced a motion that:

[T]he Committee on Naval Affairs were instructed to inquire into the expediency of employing a greater number of public vessels in the suppression of the piracies carried on against the commerce of the United States, and whether it is necessary to employ, arm, and equip, private vessels for this purpose, and how many, and in what manner; and to report, generally, the measures deemed necessary to give entire and effectual protection to the persons and property of the citizens of the United States in the West Indies and Gulf of Mexico; and to inquire how far it may be expedient to authorize the destruction of persons and vessels found at sea, or in uninhabited places, making war upon the commerce of the United States without any regular commission; and how far, consistent with public law, a general usage or authority may be given to destroy pirates and piratical vessels found at sea or in uninhabited places.<sup>327</sup>

By suggesting that whether to adopt this policy was a matter of expediency and, as we shall see, perhaps international law, Johnston was taking an implicit legal position that the Constitution did not prohibit summary, extrajudicial killing of suspected pirates and destruction of their property.

The Committee that took up his resolution and prepared the report quoted above was chaired by Louis McLane, the lawyer and former Navy man.<sup>328</sup> Other committee members also had experience with law and maritime matters, including Timothy Fuller, a Martha’s Vineyard lawyer; Benjamin Hardin, a Kentucky lawyer who frequently appeared before the U.S. Supreme Court; George Gilmer, a Georgia lawyer; and Cambreleng, the New York merchant.<sup>329</sup>

In speaking of piracy on the high seas in the context of relations with Spain and its former colonies, now claiming to be independent states, what would men learned in law, government, and maritime affairs mean by the terms “public law and general usage”? There can be little doubt that the

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325. *Id.* at 420.

326. *Id.*

327. 38 ANNALS OF CONG. 911 (1822).

328. *Id.* at 1014–15.

329. See BIOGRAPHICAL DIRECTORY U.S. CONGRESS 1774–PRESENT, <http://bioguide.congress.gov> (last visited Oct. 4, 2018).

committee was referring to international law. Only a few years before the Committee on Naval Affairs wrote its report, Justice Joseph Story, a maritime law expert, wrote the opinion in a major Supreme Court decision concerning piracy called *United States v. Smith*. There, Story wrote that the rules of the law of nations concerning piracy “may be ascertained by consulting the works of jurists, writing professedly on *public law*; or by the *general usage* and practice of nations[.]”<sup>330</sup> House committee members would almost certainly have been familiar with this decision.

As noted, Chapman does concede that “general usage” in the context of the committee report must refer to the practices of nations. In the context of this House document, “public law,” especially when referenced together with the practices of nations, clearly refers to international law. In addition to *Smith*, numerous contemporaneous federal court decisions, important legal treatises and pamphlets, and debates in Congress can be cited to show that “public law” meant international law when used, as here, in the context of maritime affairs and/or relations with other nations.<sup>331</sup>

In case this evidence of linguistic usage is not enough to persuade, the nearly-contemporaneous congressional debate about piracy recounted above<sup>332</sup> shows that members of the Naval Committee and other members of Congress suggested without dissent that extrajudicial killing of pirates was lawful.

Insofar as the Committee report referenced law in addition to the primary concerns about policy and expediency, it was referring to international law. Chapman rejects that reading of the report because, he writes, “[i]t is doubtful” that the law of nations guaranteed legal adjudication for persons

330. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820) (emphasis added).

331. See, e.g., *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145–46 (1812); *The Nereide*, 13 U.S. (9 Cranch) 388, 418–19 (1815); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 348–49 (1822); *La Nereyda*, 21 U.S. (8 Wheat.) 108, 141, 148–49, 154–55 (1823); *The Gran Para*, 20 U.S. (7 Wheat.) 471, 484 (1822); *The Fortuna*, 15 U.S. (2 Wheat.) 161, 166 (1817); *The Antelope*, 23 U.S. (10 Wheat.) 66, 103 (1825); *The Julia*, 12 U.S. (8 Cranch) 181, 189 (1814); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551); *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 860–61, 863 (C.C.D.N.Y. 1814) (No. 7,417); *The Francis*, 9 F. Cas. 673, 673–74 (C.C.D.R.I. 1813) (No. 5,034), *aff’d*, 12 U.S. (8 Cranch) 363 (1814); *United States v. Jones*, 26 F. Cas. 653, 656 (C.C.D. Pa. 1813) (No. 15,494); 33 ANNALS OF CONG. 643, 655–57, 669, 746–48, 769, 779, 898, 939, 962–63, 971, 1093 (including statements on “public law” by Reps. Clay, Johnson, Barbour, Storrs, Mercer, Anderson, Poindexter, and Desha); CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR, at vi, 70, 175 (Peter Stephen Du Ponceau trans., Philadelphia, Farrand & Nicholas 1810); HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES, at iii, vii, 54, 94, 96, 171, 209, 214, 260 (New York, M’Dermut & D.D. Arden 1815); KENT, *supra* note 244, at 1, 3, 4, 9, 10, 12, 15, 16, 18, 21, 38, 39, 71, 78, 115, 144, 175, 182, 194; JAMES MADISON, AN EXAMINATION OF THE BRITISH DOCTRINE, WHICH SUBJECTS TO CAPTURE A NEUTRAL TRADE, NOT OPEN IN TIME OF PEACE 27, 46, 47, 85, 104 n.†, 154, 188 (Philadelphia, 1805).

332. See *infra* Section VI.C.2.

captured abroad suspected of piracy.<sup>333</sup> But Chapman is ignoring an important part of international law—treaties.

Recall that the context in which the Committee report was written was how to address pirates based on Spanish islands, primarily Cuba and Puerto Rico. And the United States had recently, in 1819, reaffirmed the core provisions of a 1795 treaty with Spain.<sup>334</sup> One of the reaffirmed 1795 provisions stated:

[T]hat the Subjects or Citizens of each of the contracting Parties, their Vessels, or effects shall not be liable to . . . detention on the part of the other for any military expedition or other public or private purpose whatever; and in all cases of seizure, detention, or arrest for . . . offences committed by any Citizen or Subject of the one Party within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceedings usual in such cases.<sup>335</sup>

The reaffirmed treaty also provided:

[T]hat the inhabitants of the territories of each Party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties . . . and for obtaining satisfaction for the damages which they may have sustained.<sup>336</sup>

These treaty provisions were an important part of the “public law” that governed relations between Spain and the United States at the time. Whether or not a strict reading of their terms makes them applicable to seizures of pirates of Spanish nationality on the high seas,<sup>337</sup> the Committee would certainly have been aware that Spanish-United States relations on these matters were fraught and that erring on the side of legal process was good policy.

In addition, the United States promised Spain in the 1795 treaty, and reaffirmed in 1819, that it would criminally “punish[ ] as a Pirate” any Spanish subject or U.S. citizen who sailed under a letter of marque or other commerce-raiding commission of a country at war with Spain.<sup>338</sup> As noted

333. Chapman, *supra* note 15, at 420; *see also* Chapman, *supra* note 15, at 434–36 (further arguing that the law of nations did not require any particular municipal arrangement for trying piracy, such as a jury trial).

334. Treaty of Amity, Settlement, and Limits, *supra* note 260. (“The treaty of limits and navigation, of 1795, remains confirmed in all and each one of its articles excepting the 2, 3, 4, 21, and the second clause of the 22d article.”). The treaty went into effect in early 1821.

335. Treaty of Friendship, Limits, and Navigation, U.S.-Spain, art. 7, Oct. 27, 1795, 8 Stat. 138.

336. *Id.* art. 20.

337. I think it is possible that the first quoted provision would not be, but the second would.

338. *Id.* art. 14.

above, many of the pirates in the Caribbean tried to legally justify their activities by means of real or feigned privateering commissions from breakaway Spanish colonies that were fighting for their independence. This third provision supplies yet another reason why the House Committee might write that the “public law” governing its relations with Spain concerning piracy should prioritize the use of law enforcement methods over brute force.

Other international law binding on the United States also counseled in favor of law enforcement methods when dealing with suspected pirates in the Caribbean and Gulf of Mexico. France and Great Britain both had many colonial possessions in that area, where the United States was acting against pirates, and thus had many subjects who made a living on the seas there, either legally or illegally. Bilateral treaties between the United States, on the one hand, and both Britain and France on the other, promised that each country would refuse to harbor or aid any pirates and would bring pirates to “condign punishment,”<sup>339</sup> almost certainly referring to a criminal conviction.<sup>340</sup> Only by ignoring these treaties can it be said that the House Committee on Naval Affairs had no reason to suggest that “public law” favored law enforcement methods rather than summary execution of pirates captured in the West Indies.

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Americans operating under their new Constitution continued to follow the essentials of English law and practice with regard to piracy. Criminal trials were used frequently for captured pirates. But the government also frequently engaged in extrajudicial killing of pirates, as well as destruction of their property. Members of Congress expressly argued that this was lawful. The only evidence Chapman presents suggesting directly that the Constitution required law enforcement methods for any pirates encountered anywhere in the world—the 1822 House committee report—is best read as saying no such thing.

#### IV. THE WAR-LAW ENFORCEMENT DIVIDE

An enduring problem—one that is particularly acute with the United States’ post-9/11 responses to international terrorism—is to distinguish situations in which the government may lawfully use military force against le-

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339. Convention of 1800, U.S.-Fr., art. 26, Sept. 30, 1800, 8 Stat. 178; *see* Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., art. 20, Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty].

340. This provision was present in another U.S. treaty, in a context in which it is clear that criminal punishment is meant. Jay Treaty, *supra* note 339 (“[T]he said Contracting Parties, shall not only refuse to receive any Pirates into any of their Ports, Havens, or Towns, or permit any of their inhabitants to receive, protect, harbour, conceal or assist them in any manner, but will bring to condign punishment all such Inhabitants as shall be guilty of such acts or offences.”).

thal non-state actors, instead of the default methods of ordinary law enforcement. The polar cases are clear. In state-to-state armed conflict, military force can lawfully be used and enemy combatants lack individual rights under domestic law, such as the Constitution. To address ordinary domestic crime committed by single persons or small groups, the criminal justice approach, with its attendant procedural protections, is mandatory. Piracy, which, like international terrorism, threatens mass-casualty attacks, transcends these neat polar categories and hence requires difficult line-drawing. The legal stakes are high: full due process or none.

Chapman, by contrast, seems to view the line-drawing problem as relatively straightforward. “[W]ar was an exceptional legal state. Americans understood that enemies were different than those suspected of violating municipal (i.e., domestic) law.”<sup>341</sup> And further: “Americans understood all those suspected of violating U.S. law—anywhere—to be entitled to due process of law.”<sup>342</sup> In other words, if individuals or groups of individuals were “suspected” of engaging in conduct that violated U.S. criminal or civil laws, then only the ordinary means of law enforcement, comporting with ordinary constitutional norms, could be used in response. And Chapman claims that the U.S. government and other actors “consistently distinguished” between law enforcement settings in which due process was applicable and “war,”<sup>343</sup> but provides no examples that expressly show this supposed distinction being made.

In fact, this supposedly bright-line rule was never the law in the United States. Within the United States, the constitutional tradition has always been to zealously guard citizens from military force. Fear of standing armies that would oppress the citizenry was one of the Anti-Federalists’ most potent arguments against the proposed constitution.<sup>344</sup> But some types of law-breaking and violence were too widespread and powerful to be handled solely by courts, juries, law enforcement, and due process. And outside the country, the clear lines that Chapman sees in domestic law have always been blurry, allowing the government great leeway to choose how it will respond to security threats.

The Constitution authorizes the suspension of habeas corpus—the suspension of judicial due process—“when in cases of rebellion or invasion the

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341. Chapman, *supra* note 15, at 383.

342. *Id.* at 389.

343. *Id.* at 413, 426–27.

344. See, e.g., 3 THE COMPLETE ANTI-FEDERALIST 164 (Herbert J. Storing ed., 1981) (statement by Pennsylvania minority) (“A standing army . . . may be made a fatal instrument to overturn the public liberties; it may be employed to enforce the collection of the most oppressive taxes, and to carry into execution the most arbitrary measures. An ambitious man who may have the army at his devotion, may step up into the throne, and seize upon absolute power.”); 3 THE COMPLETE ANTI-FEDERALIST 375 (Brutus II, New York Journal, Nov. 1, 1787) (“[A]s standing armies in time of peace are dangerous, they are not to be kept up.”).



public safety may require it.”<sup>345</sup> Likewise, the Constitution allows Congress to call forth the militia “to execute the laws of the union, suppress insurrections and repel invasions.”<sup>346</sup> But these authorizations and limitations appear by their text to apply only domestically—insurrections, rebellions, and invasions are events that happen within a country, not outside of it.<sup>347</sup> The Constitution did not provide protections against martial law outside the United States.

When widespread resistance to U.S. laws occurred within the country, Congress had already carefully hemmed in the president’s ability to respond with military force. The 1792 Militia Act (or Calling Forth Act), followed scrupulously by President Washington to put down the Whiskey Rebellion of 1794, required that: the state where the armed resistance was occurring petition for federal assistance; a federal judge certify that “the laws of the United States [had been] opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act;” and the president, “by proclamation, “ “command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.”<sup>348</sup> Even so, ordinary military could not be used, only militia from the state where the disturbance was occurring, unless other formalities were met.<sup>349</sup> These extensive safeguards were required domestically—the act applied only in “any state”<sup>350</sup>—before the U.S. executive could move to a military or “war” paradigm to address mass law-breaking. That domestic restriction on the reach of the statute was not accidental, but rather reflective of the view that fundamental rights restricted the U.S. government domestically when proceeding against people who were wholly or primarily citizens.

There was no corresponding statutory framework, or even informal tradition, with similar safeguards for extraterritorial uses of the military against

345. U.S. CONST. art. I, § 9, cl. 2.

346. U.S. CONST. art. I, § 8, cl. 15.

347. See Kent, *Global Constitution*, *supra* note 7, at 522–23. But see *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Habeas Suspension Clause “has full effect” at a U.S. military base in territory permanently leased from Cuba).

348. Militia Act of 1792, ch. 23, §§ 1–3, 1 Stat. 264. (amended 1795). As I and a co-author have elsewhere written, “[t]he intricacy of these checks was no accident. The proposal to allow the president to call out the militia to execute federal law was controversial and much debated. It passed only after the initial bill was amended to add precisely the procedural checks that [President] Washington later followed so carefully.” Andrew Kent & Julian Davis Mortenson, *Executive Power and National Security Power*, in *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* 261, 265 n.13 (Karen Orren & John W. Compton eds., 2018).

349. Militia Act of 1792, ch. 23, § 2, 1 Stat. 264. (amended 1795).

350. *Id.* When the 1792 Act expired via its sunset provision, Congress re-enacted it in essentially the same form in 1795. See Militia Act of 1795, ch. 36, 1 Stat. 424. (amended 1862).

groups that violated U.S. laws. Instead, American law and policy adopted a hybrid approach: both criminal justice measures and military force could be used against dangerous non-state actors, where considered appropriate by the executive, assuming that Congress authorized use of military force covered by its prerogative to declare war.

The Articles of Confederation evidence the hybridity of piracy and the flexibility the government had in determining how to respond. On the one hand, the Articles gave the central government the power of “appointing courts for the trial of piracies and felonies committed on the high seas.”<sup>351</sup> On the other, the Articles distinctly contemplated military force being used to suppress piracy, in the provision barring states from commissioning “any ships or vessels of war,” except if war is waged under the authority of the central government or “unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion.”<sup>352</sup> The fact that pirates could be treated as military enemies is apparent in the frequently repeated tropes that pirates declared “war” against all mankind<sup>353</sup> and were “hostis humani generi,” that is, military enemies of all mankind.<sup>354</sup>

We can see evidence of hybridity in the United States’ response to the “piratical establishment” at Amelia Island in Spanish Florida, discussed above.<sup>355</sup> As noted above, the executive and Congress both announced that the gang there was engaged in violations of U.S. law, such as the laws against piracy and the international slave trade.<sup>356</sup> For Chapman, this should mean that only law enforcement measures, consistent with constitutional due process, could be used. But the executive authorized a naval attack and, as noted above, no one was heard to complain that that was illegal.

Chapman responds that the Amelia Island incident is not evidence against his thesis because the armed group there was “quasi-sovereign.”<sup>357</sup> Thus, “[f]rom the United States’ standpoint, the enterprise amounted to an exercise of war power because it entailed military action against a group

351. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

352. *Id.* art. VI, para. 5.

353. See, e.g., BLACKSTONE, *supra* note 75, at \*71 (stating that the pirate “has reduced himself afresh to the savage state of nature, by declaring war against all mankind”); JOURNALS OF THE CONTINENTAL CONGRESS *supra* note 137, at 797 (John Jay, Secretary of Foreign Affairs, stating “Piracy is War against all mankind, which is the highest Violation of the Laws of Nations.”).

354. See, e.g., BLACKSTONE, *supra* note 75, at \*71 (quoting Coke).

355. See *supra* notes 253–259 and accompanying text.

356. H.R. COMM. ON FOREIGN RELATIONS, SUPPRESSION OF PIRITICAL ESTABLISHMENTS, H.R. REP. NO. 15-290 (1st Sess. 1818), *reprinted in* AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 132, 133; Message from President James Monroe to Congress (December 2, 1817), *in* AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 130; Message from President James Monroe to Congress (January 13, 1818), *in* AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 139.

357. Chapman, *supra* note 15, at 428.

with political pretensions.”<sup>358</sup> He does not explain why an unrealistic—actually absurd—pretension to international sovereignty on behalf of a small group of pirates and smugglers should determine the constitutionality of the United States’ responses to them. In any event, both President Monroe and Congress agreed that the criminals at Amelia Island were non-state actors,<sup>359</sup> yet nevertheless viewed naval attack on them as lawful.

Were this an isolated instance of the use of military force against non-state actors who violated U.S. criminal laws, we might dismiss it as exceptional. But in fact, the whole course of the U.S. government response to piracy in the Caribbean evidences the view that the government had the option of using either or both law enforcement and military force when confronting hybrid threats, outside a state of formal war.<sup>360</sup> Thus, I have not found support in the historical record concerning piracy for Chapman’s claim that due process was understood to limit the United States to using judicial process and law enforcement methods to deal with all nonstate actors who violated U.S. criminal laws.

#### CONCLUSION

The great weight of the evidence refutes the claim that either English or early American law viewed due process in the sense claimed by Chapman. But this fact proves far less than some might fear. Although the law allowed the use of military force and summary executions against pirates, Anglo-American practice was to use the criminal justice system extensively to try pirates captured on the high seas, according them full due process when doing so. This preference for due process in many circumstances was driven by a mix of factors, including concerns sounding in domestic policy, international relations, fairness to the accused, and the desire to leave open the possibility of mercy. International law also granted rights to persons encountered by the U.S. and English governments on the high seas. So the choice should not be viewed as a stark one, between the global extension of due process and barbarism. The preference for criminal process was always present, but may well have grown over time. This could be evidence of the gradual development of a kind of due process-consciousness, even with regard to persons outside national borders accused of heinous crimes. But I have found essentially no evidence for Chapman’s much stronger claim for an established understanding of global due process, first under the English common law and then under the original understanding of the U.S. Constitution.

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358. *Id.* (emphasis added).

359. *See* Message from President James Monroe to Congress (Jan. 13, 1818), in AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra* note 253, at 139; 31 ANNALS OF CONG. 646–48 (1818).

360. *See supra* Section IV.B.

Judicial oversight of extraterritorial security and foreign affairs actions via application of fundamental domestic law is not the only way to protect against abuse. In fact, until very recently, it played almost no role in either the British/English or U.S. traditions. Perhaps change is desirable; perhaps the U.S. Constitution should go global to protect noncitizens, even in hybrid, war-like contexts such as terrorism and piracy. But if that occurs, it should be because judges have accurately understood our legal history and decided affirmatively that change is desirable. Arguments for such a change in U.S. law should address whether extending constitutional protections would be consistent with the legitimate security needs of the United States, as well as with evolving norms of international and constitutional rights in related contexts. This contextual, incremental, policy-sensitive approach to developing legal change would be, in my view, preferable to sweeping originalist arguments that have little basis in our history, institutional practices, and legal traditions.