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COVERT WAR AND CONGRESSIONAL AUTHORITY: HIDDEN WAR AND FORGOTTEN POWER

JULES LOBEL[†]

Relying on private armies to achieve foreign policy goals is a practice of ancient origin. In the two centuries prior to the adoption of the United States Constitution, paramilitary groups were used extensively, particularly in naval warfare.¹ The newly independent American Republic also relied almost exclusively on private citizens to fight its battles at sea.² Not surprisingly, therefore, the Constitution contains a provision dealing specifically with the authorization of private individuals to commit acts of violence against foreign governments. Article I, section 8 of the Constitution grants Congress the power to issue commissions known in the eighteenth century as "letters of marque and reprisal,"³ which permit private individuals to use force against foreign nations.⁴ This power has lain dormant for over 150 years, and has not

[†] Assistant Professor of Law, University of Pittsburgh School of Law.

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¹ See *infra* text accompanying notes 39-47.

² See *infra* note 45 and accompanying text.

³ "The Congress shall have Power To . . . grant Letters of Marque and Reprisal . . ." U.S. CONST. art. 1, § 8, cl. 11.

⁴ Letters of marque and reprisal were issued by sovereign states either to individ-

been utilized since the War of 1812.⁵ As governmental control over warfare increased in the seventeenth through nineteenth centuries, the reliance on private armies and navies gradually diminished in both America and Europe.⁶

Since the delegation of war-making to private individuals now seems like a quaint custom from our colorful past, it is not surprising that the *marque* and *reprisal* clause has been largely ignored in the war powers debate of the last two decades.⁷ Ironically, however, the contemporary world has revived the methods of warfare prevalent before the Constitution was adopted. As they did in the medieval and early modern periods, governments now often rely on nongovernmental surrogate armies to fight their battles.⁸ Because of the recent reluctance of Congress to authorize and the public to accept direct use of American troops in military combat, the United States has turned to private insurgents to achieve the military overthrow of governments considered undesirable.⁹

uals who had been injured abroad authorizing them to use force to seize property from the wrongdoer state or its subjects, or to armed merchant or private warships authorizing them to capture ships and cargoes belonging to citizens of a third state. See F. GROB, *THE RELATIVITY OF WAR AND PEACE* 238-39 (1949).

⁵ See *id.*; A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 271 (1976).

⁶ See A. HINDMARSH, *FORCE IN PEACE* 52-54 (1933).

⁷ But see Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 680 n.28 (1972). Lofgren, who discusses the clause briefly in his article, is a notable exception. See *id.* at 692-96; see also W. REVELEY, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 63-64, 86, 102 (1981) (discussing the treatment of the *marque* and *reprisal* clause by the framers and ratifiers of the Constitution).

⁸ See Brownlie, *International Law and the Activities of Armed Bands*, 7 *INT'L & COMP. L.Q.* 712 (1958); Reisman, *Private Armies in a Global War System: Prologue to Decision*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 252, 259-60 (J. Moore ed. 1974).

⁹ On the development of the CIA's aid to the Nicaraguan *contras*, see Ignatius and Rogers, *How C.I.A.-Aided Raids In Nicaragua in '84 Led Congress to End Funds*, *Wall St. J.*, March 6, 1985, at 1, col. 1; Ignatius and Rogers, *Why the Covert War In Nicaragua Evolved and Hasn't Succeeded*, *Wall St. J.*, March 5, 1985, at 1, col. 1. On the policy of aiding Afghan guerrillas, see Girardet, *Arming Afghan Guerrillas: Perils, Secrecy*, *Christian Sci. Monitor*, Nov. 20, 1984, at 15, col. 2. On aid to the Cambodian insurgents, see Gortzman, *U.S. May Help 2 Rebel Groups of Cambodians*, *N.Y. Times*, April 10, 1985, at A1, col. 6.

In the last few years, the American military has revived special operations of both unconventional warfare and counterinsurgency that include "countering hostile insurgents, most often by training, organizing, and even leading indigenous units, as was done in the Montagnard hill tribes of Vietnam." Mohr, *Military After Vietnam: Stronger Force Emerges*, *N.Y. Times*, Apr. 15, 1985, at A1, col. 1, B6, col. 1. In a related area, in 1984, administration officials approved a policy whereby the CIA and military personnel began financing, training, sharing information, and supporting foreign groups in other nongovernmental ways in order to combat terrorism. See Taylor, *Lebanese Group Linked to C.I.A. is Tied to Car Bombing Fatal to 80*, *N.Y. Times*,

It is often argued that the intent of the Framers is not entitled to great weight in the foreign affairs area because of the major technological and political changes in the conduct of foreign policy and modern warfare in the last century.¹⁰ The escalation of the nuclear weapons race, however, has made direct armed confrontation between major powers potentially annihilating, and thus has led to a reversion to the forms of warfare prevalent two hundred years ago.¹¹ The views of the Framers, therefore, as to which branch of government should authorize private armies is particularly relevant today.

The use of private armies raises serious constitutional questions concerning the respective powers of Congress and the president in covert paramilitary warfare. The Central Intelligence Agency (CIA) and the administrations of several presidents have asserted that the executive has the power to authorize the use of covert paramilitary force,¹² an assertion supported by some commentators.¹³ The executive has fre-

May 13, 1985 at A1, col. 3. This policy came to light when people hired by a Lebanese counterterrorism unit that had been working with the CIA planted a car bomb in Beirut that killed more than 80 people. *See id.*

¹⁰ *See, e.g., U.S. Commitments to Foreign Powers: Hearings Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 80-81, 161 (1967); OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET NAM, reprinted in Legality of United States Participation in the Viet Nam Conflict, 75 YALE L.J. 1085, 1101 (1966).*

¹¹ *See A. JORDAN & W. TAYLOR, AMERICAN NATIONAL SECURITY: POLICY AND PROCESS 29, 35-37 (1981)* (stating that the threat of total annihilation resulting from nuclear war has diminished the importance of conventional forms of war on the international scene). International conflicts are thus currently resolved in decentralized, "low-intensity" battles, which typically arise in politically unstable third world nations. *See Taylor & Maaranen, Introduction, in THE FUTURE OF CONFLICT IN THE 1980S 4-6 (W. Taylor & S. Maaranen eds. 1982).* The means of engaging in these "low-intensity" conflicts—"coercive diplomacy, terrorism, subversion, revolutionary war, and limited military actions"—*id.* at 4, have some important features in common with the forms of warfare practiced in the two centuries prior to the adoption of the Constitution. *See A. JORDAN & W. TAYLOR, supra*, at 35-37.

¹² The Ford administration argued that covert action could be undertaken by the president because of the president's inherent constitutional power with respect to the conduct of foreign affairs. *See U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearings Before the House Select Comm. on Intelligence, 94th Cong., 1st Sess. 1729-34 (1975)* (statement of Mitchell Rogovin, Special Counsel to the Director of the CIA) [hereinafter *House Intelligence Hearings*].

The Carter administration opposed certain restraints as "excessive intrusion by the Congress into the President's exercise of his powers under the Constitution." S.2284: *Hearings Before the Senate Select Comm. on Intelligence, 96th Cong., 2d Sess. 15-19 (1980)* (prepared statement of Stansfield Turner, Director of the Central Intelligence Agency).

¹³ *See, e.g., Military Posture and H.R. 11500: Hearings Before the House Comm. on Armed Services, 94th Cong., 2d Sess. 1604 (1976)* (Letter from Eugene Rostow to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Sept. 29, 1975) [hereinafter *Military Hearings*]; Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and*

quently argued that, under modern cold war conditions, authority over covert activities is necessary to the effective and successful conduct of foreign relations and the protection of national security and is thus an inherent presidential power.¹⁴ Congress has not vigorously disputed these claims;¹⁵ in fact, it has enacted statutes that appear to permit

Paramilitary Operations, 19 HARV. J. ON LEGIS. 327, 374 (1982) (arguing for congressional oversight, but noting that paramilitary operations that pose a lesser risk of "full-scale war" could constitutionally be undertaken without the prior approval of Congress); Note, *The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities*, 72 GEO. L.J. 1855 (1984). A Wall Street Journal editorial recently argued that furnishing assistance to the Nicaraguan contras is an executive power that can be exercised irrespective of congressional authorization. See *Commander in Chief*, Wall St. J., Mar. 26, 1986, at A30, col. 1.

¹⁴ See Memorandum to Lawrence Houston, General Counsel to the Central Intelligence Agency, on the Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency, reprinted in *THE INTELLIGENCE COMMUNITY 714* (T. Fain, K. Plant & R. Milloy eds. 1977) [hereinafter Houston Memorandum].

¹⁵ Senator Eagleton, an original sponsor of the War Powers Resolution, proposed an amendment to the resolution that would have "restrict[ed] the practice of employing regular or irregular foreign forces to engage in 'proxy' wars to achieve policy objectives never specifically approved by Congress." 119 CONG. REC. 25,079 (1973) (statement of Senator Eagleton). Eagleton's amendment was opposed for procedural reasons. Several senators feared that its enactment might prevent the entire resolution from securing enough votes to override a presidential veto, and, more importantly, believed that it would be better presented as part of a separate bill on covert action. See *id.* at 25,081-82 (remarks of Senators Muskie, Javits, and Stennis). The amendment was rejected by the Senate. See *id.* at 25,092.

Congress has on occasion limited funding for particular covert operations. The Clark Amendment, enacted by Congress in 1976, prohibited any assistance to a group that has the effect or purpose of aiding military operations in Angola. See International Security Assistance and Arms Export Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58 (1976). The Clark Amendment was recently repealed by Congress and the Reagan administration is now supporting aid to the Angolan rebels. See *N.Y. Times*, Nov. 23, 1985, at A1, col. 2; Fyerbringes, *House Acts to Allow Angola Rebel Aid*, *N.Y. Times*, July 11, 1985, at A3, col. 4.

The Boland Amendment, which provided funds to the CIA, prohibited the use of those funds to furnish any military equipment, training, advice, or other military support to paramilitary groups whose purpose was the overthrow of the government of Nicaragua or the instigation of a military exchange between Nicaragua and Honduras. See Further Continuing Appropriations Act for 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982) [hereinafter cited as *Boland Amendment*]. The administration claimed that its aid to the contras was designed to interdict arms shipments from Nicaragua to El Salvador, a rationale that the House Intelligence Committee noted "strains credibility." H.R. REP. NO. 122, 98th Cong., 1st Sess. 11 (1983). The Committee, therefore, was not certain whether "the present program (of covert aid) meets [the law's] requirement." *Id.*

In 1983, after voting against aid, the House reached a compromise with the Senate, setting a \$24 million cap on spending for military and paramilitary action against the Sandinista government. Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983). President Reagan's 1986 request for \$100 million in aid to the Nicaraguan contras was narrowly rejected by the House of Representatives, but approved by the Senate. See O'Brien, *Contra Aid Approved in the Senate*, *Phila. Inquirer*, Mar. 28, 1986, at 1, col. 5. On April 15, 1986, the House approved a debating procedure that supporters of the contra aid said was designed to

executive authorization of covert operations without congressional approval, subject only to reporting requirements.¹⁶ Despite Congress's failure to assert power over paramilitary action against foreign governments, conflicts between the branches have arisen in the past, and the future portends even greater controversy. Just as the Vietnam War raised questions about the constitutional power to deploy United States troops abroad in the absence of declared war, reliance on proxy armies to fight wars that Americans do not want to fight themselves will inevitably lead to a constitutional struggle over who has the power to engage such forces.¹⁷

The use of private armies as an instrument of United States foreign policy also raises serious questions of international law. The rise of private armies has led the United Nations General Assembly to include within the definition of aggression the use of force by nongovernmental groups sent out or controlled by a foreign nation.¹⁸ In addition,

kill or delay the aid. See Fuerbringer, *Contras' Backers Lose A Close Vote on House Debate*, N.Y. Times, Apr. 16, 1986, at 1, col. 2. Under the procedure, the contra aid would be attached to a \$1.7 billion catchall spending bill that is opposed by the Reagan administration. See *id.*

¹⁶ See Hughes-Ryan Amendment, 22 U.S.C. § 2422(a) (1982); Intelligence Authorization Act for 1981, 50 U.S.C. § 413(a)(1) (1982); see also *infra* text accompanying notes 268-351 (discussing possible delegation problems raised by the Intelligence Authorization Act).

¹⁷ Indeed, congressional concern over executive control over covert paramilitary operations has recently been increasing. See Engleberg, *Rebel Aid Said to Strain Congress-CIA Ties*, N.Y. Times, April 22, 1986, at 4 (stating that Senator Leahy believes Senate should address issues of covert paramilitary action). The House Intelligence Committee has reported out a bill requiring that "any U.S. governmental support for military or paramilitary operations in Angola be openly acknowledged and publicly debated." H.R. REP. NO. 508, 99th Cong., 2d Sess. (1986). In 1983 the House Intelligence Committee held hearings on a bill that would have required congressional authorization for "any clandestine paramilitary or military activity." *Congressional Oversight of Covert Activities: Hearings Before the House Permanent Select Committee on Intelligence*, 98th Cong., 1st Sess. 4 (1983). The proposed bill was not enacted.

For the academic debate over constitutional war powers raised by the Vietnam War, see, e.g., 2 THE VIETNAM WAR AND INTERNATIONAL LAW 597-829 (R. Falk ed. 1969); Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Lofgren, *supra* note 7; Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194 (1971); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623 (1972).

¹⁸ See G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974); see also *Report of the Special Committee On the Question Of Defining Aggression*, 29 U.N. GAOR Supp. (No. 19) at 8, U.N. Doc. A/9619 (1974) (sending out armed bands qualifies as an act of aggression); G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 123, U.N. Doc. A/8028 (1970) (stating that every state has the duty to refrain from organizing or encouraging armed bands to violate the territory of any other state); M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 112-15 (1962) (stating that support to armed bands likely to make incursions into another state is an act of aggression for which states are internationally responsible); A. THOMAS & A.J. THOMAS,

the United Nations and other international bodies have turned their attention to the problem of mercenaries.¹⁹ The recent case brought by Nicaragua against the United States before the International Court of Justice has addressed questions of the legality under international law of private forces trained, organized, financed, or supplied by one state to attack another.²⁰

This Article argues that the *marque* and reprisal clause grants Congress sole authority to authorize private individuals to use force against another country or its citizens, whether in peacetime or during declared war.²¹ The power to authorize and regulate CIA paramilitary

THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 65-68 (1972) (distinguishing direct and indirect aggression and stating that armed force by third parties constitutes aggression); *cf.* Pan American Convention on the Rights and Duties of States in the Event of Civil Strife, Feb. 20, 1928, art. I, 46 Stat. 2749, T.S. 814 (parties to treaty agree to try to prevent individuals from leaving their territory to go to another in order to foment civil strife, and to disarm and intern rebel forces crossing their borders). *See generally* B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* (1975) (giving a documentary history of international efforts to define and limit armed incursions).

¹⁹ *See, e.g.*, Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 39 U.N. GAOR Supp. (No. 43), U.N. Doc. A/39/43 (1984); *see also* International Convention Against The Activities of Mercenaries, U.N. Doc. A/35/366/add. 1, at 10-16 (1980), *reprinted in* Note, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, 619-25 (1982) (United Nations convention outlawing mercenaries and calling for each nation to enact measures to punish mercenaries).

Similarly, the Organization of African Unity has requested "all States of the world to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and deterring their citizens from enlisting as mercenaries." O.A.U. Doc. AHG/Res. 49 (IV) (Sept. 1967), *reprinted in* Cesner and Brant, *Law of the Mercenary: An International Dilemma*, 6 CAP. U.L. REV. 339, 364-65 (1977). By 1977, the O.A.U. had adopted the O.A.U. Convention for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/817 (XXIX) Annex II Rev. 3 (1977). *See* Note, *supra*, at 601 n.68. For the text of the 1972 version of the Convention, *see id.* at 613-15. For a discussion of the recent increase of mercenary activity and the international response, *see* W. BURCHETT & D. ROEBUCK, *THE WHORES OF WAR: MERCENARIES TODAY* (1977).

²⁰ Nicaragua filed the action on April 9, 1984. On November 26, 1984, the International Court of Justice, over United States objections, held that it had jurisdiction over the case. *See* Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Decision on Jurisdiction of Nov. 26). Although the United States withdrew from the World Court proceedings in early 1985, the court has retained its jurisdiction. *See* Statement On The U.S. Withdrawal From The Proceedings Initiated By Nicaragua In The International Court Of Justice, Jan. 18, 1985, *reprinted in* 24 INT'L LEGAL MATERIALS 246 (1985). On June 27, 1986, the Court rendered a judgment against the United States, holding that the United States had violated customary international law in aiding the *contras*. *See* Case Concerning Military And Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.) (I.C.J. June 27, 1986) (Merits).

²¹ Both Lofgren and Reveley read the clause even more broadly, arguing that it gives Congress the power to initiate all hostilities abroad short of declared war. *See* W. REVELEY, *supra* note 7, at 63-64; Lofgren, *supra* note 7, at 699-700. Both authors

operations against foreign governments is, therefore, constitutionally assigned to Congress. By giving the president free reign to initiate covert paramilitary operations abroad, subject only to procedural oversight, Congress has abdicated its constitutional responsibilities. When such operations involve what amounts to full-scale war, the acquiescence of Congress in unilateral executive actions is a derogation of its responsibility pursuant to its power to declare war. Even if these covert operations using force constitute hostilities short of war, however, congressional authority over the granting of letters of marque and reprisal indicate a constitutional intent that such actions by private individuals be approved by Congress.

Part I of this Article describes the historical development of letters of marque and reprisal and explains why the Constitution should treat modern covert warfare as it treated private wars in the eighteenth century. Part II explores the historical, doctrinal, and policy rationales for placing the power over privately conducted warfare in the hands of Congress, and argues that the Framers' intent as well as important policy considerations dictate that a decision to engage in such operations must be made by Congress, not the executive. Part III discusses recent congressional efforts to gain oversight over covert operations and concludes that Congress may not delegate its authority over paramilitary operations to the executive. Unless they are read narrowly, recent statutory reforms designed to obtain congressional oversight over covert operations unconstitutionally delegate Congress's article I, section 8 authority to the president.

I. THE COVERT ACTION OF TODAY IS THE MARQUE AND REPRISAL OF YESTERDAY

A. *Private Wars and Letters of Marque and Reprisal*

In the middle ages, private wars flourished.²² Indeed, until the thirteenth century, warfare was often conducted by individuals or groups without any governmental control.²³ In the absence of strong central governments to defend their interests, private individuals injured by a foreign sovereign or its citizens commonly resorted to self-help in

view the power to issue letters of marque and reprisal as a restraint on the use of United States troops abroad.

²² See E. CASTREN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 12 (1954); 1 R. WARD, *AN ENQUIRY INTO THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE* 293-94 (1795); Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 *HARV. INT'L L.J.* 1, 7 (1983).

²³ See A. HINDMARSH, *supra* note 6, at 44.

order to avenge personal harms.²⁴ Unrestricted private battles and skirmishes led to incessant warfare.²⁵ In one case, an English sailor began a fight with a Norman seaman that touched off cross-retaliations wholly independent of any governmental authority. The result was a war in which two hundred Norman ships hunted down and hung all the English seamen they could find. In turn, a stronger English fleet destroyed most of the Norman ships and massacred 15,000 men. Finally, the respective governments got involved, and put an end to this private war.²⁶ Incidents like this made it apparent to all governments that state control over the use of martial force was necessary. By the sixteenth century, warfare conducted without governmental authorization was outlawed by international law,²⁷ and unrestrained use of force by individuals was gradually replaced by a requirement that formal sanction first be obtained from the sovereign.²⁸

The governmental license for the private use of force was termed a letter of marque and reprisal.²⁹ A letter of marque originally author-

²⁴ See 2 J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 182 (T. Nugent trans. 1823) ("if the prince takes no notice or refuses satisfaction, we may then take reprisals").

²⁵ See R. WARD, *supra* note 22, at 177-78, 293-94; Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 *CAMBRIDGE L.J.* 60, 61 (1924). Apart from loss of lives and the potential of involving nations in war, private warfare also severely inhibited trade. See A. HINDMARSH, *supra* note 6, at 43-44; 1 P. JESSUP & F. DEAK, *NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: THE ORIGINS 12-13* (1935). These incursions led merchants engaged in foreign trade to resort to self-help to protect their property and persons. See A. HINDMARSH, *supra* note 6, at 43-44. As Chief Justice Marshall noted in the case of *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), the practice of arming merchant vessels can "be traced back to the time when almost every merchantman was in a condition for self-defense, and the implements of war were so light and so cheap that scarcely any would sail without them." 13 U.S. (9 Cranch) at 426.

²⁶ See R. WARD, *supra* note 22, at 295-96.

²⁷ See H. GROTIUS, *THE RIGHTS OF WAR AND PEACE* 316 (A. Campbell trans. 1901) (1st ed. 1625) (stating that the power to wage lawful war lies in the sovereign); see also E. DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 292 (J. Chitty trans. 1839) (1st ed. 1758) (The right to wage war, "so dangerous in its exercise, no longer remains with private parties . . . [T]he sovereign power alone is possessed of authority to make war . . ."); 2 C. WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* § 613 (J. Drake trans. 1934) (1st ed. London 1749) (stating that the right of war belongs to nations).

²⁸ See A. HINDMARSH, *supra* note 6, at 44; E. ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES* 36-37 (1984); Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 *AM. J. INT'L L.* 694, 696 (1933). By requiring subjects to obtain authorization for hostile acts against another country, the king or prince could thereby examine the justice and strength of their claims as well as the political consequences of granting the request, while the subject, by virtue of the authorization, was protected against the charge of piracy. See Maccoby, *supra* note 25, at 61-62.

²⁹ See Clark, *supra* note 28, at 700-02. An early mention of the term "letters of marque" can be found in a 1293 proclamation of King Edward I of England. See *id.* at

ized the crossing of borders to obtain redress,³⁰ while a letter of reprisal sanctioned the use of force to secure compensation for an unlawful taking of property or goods.³¹ When issued in tandem,³² letters of marque and reprisal authorized injured parties to seize property, or, in extraordinary cases, foreign citizens³³ who had refused to provide redress for an injury they had inflicted.³⁴

As governmental control over warfare increased in the sixteenth and seventeenth centuries, the terms "letters of marque," "letters of reprisal," and "letters of marque and reprisal" began to take on new meanings, reflecting a gradual move away from "special" or "particular" letters, which authorized "particular persons" to seek recompense for specific wrongs, to "general letters," which had the effect of "war,

700. It is possible that some letters of marque were issued as early as the twelfth century. See Maccoby, *supra* note 25, at 60 n.1. By the fourteenth century, Italian merchants who appealed to local authorities were able to obtain "litterae" or "chartae," which enabled them to seize the goods or property of foreign debtors, see A. HINDMARSH, *supra* note 6, at 49, and medieval kings began to speak of granting letters of mark and reprisal, see Maccoby, *supra* note 26, at 60 n.1.

³⁰ See Hooper v. U.S., 22 Ct. Cl. 408, 429 (1887); A. HINDMARSH, *supra* note 6, at 51; H. TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC WAR 437 (1901). The term *marque* appears to be derived from the Latin "marca," the Norman "marco," the English "march," and the German "die Marken," all of which were associated with the right to pass across borders. See Clark, *supra* note 28, at 700-01.

³¹ See A. HINDMARSH, *supra* note 6, at 44-45; Clark, *supra* note 28, at 702-03.

³² A letter of reprisal authorized the holder to make seizures only within the territorial jurisdiction of the sovereign. In order to obtain the broadest means of redress, an injured party usually applied for both letters. Thus, in time, the practical distinction between the two began to fade so that a single "letter of marque and reprisal" came to be utilized. See A. HINDMARSH, *supra* note 6, at 51.

³³ See H. GROTIUS, *supra* note 27, at 312; 2 C. WOLFF, *supra* note 27, at § 591-595 (stating that "androlepsy is a certain sort of reprisal . . . that is allowable by the law of nature among nations").

During the English war with Holland in the 1660's, King Charles II of England authorized

general reprizall against the shippes goods and subjects of the States of the United Provinces, soe that as well *his Majestie's fleet and shippes*, as also all other shippes and vessels that shalbe commissioned by letters of marque or generall reprizalls . . . may lawfully seize and take all shippes, vessels, and goods belonging to the States of the United Provinces, or anie their subjects or *inhabitants* within anie the territories of the States of the United Provinces.

Clark, *supra* note 28, at 721. This letter demonstrates that not only goods, but also inhabitants of Holland were to be subject to general reprisals from private individuals as well as the English navy.

³⁴ See H. GROTIUS, *supra* note 27, at 312 ("[R]eprisals are made upon the persons and property of the subjects, belonging to a power, who refuses to grant redress and reparation for injuries and aggressions."); A. HINDMARSH, *supra* note 6, at 49 ("The applicant was required to show that he had appealed in vain to the proper tribunals abroad."). The procedure and requirements for obtaining such letters are described in *id.* at 49-50.

yet is not . . . regular war."³⁵ The term "letters of marque" came to refer to the authorization both of armed trading vessels to attack ships of foreign nations during peace or war and of private vessels, outfitted with armaments and called privateers, to fight in place of or alongside public naval vessels.³⁶ The term "reprisals" came to refer to any utilization of force with the sovereign's consent in retaliation for an injury caused by the sovereign of another state or his subjects.³⁷ Thus, by the eighteenth century, letters of marque and reprisal referred primarily to sovereign utilization of private forces, and sometimes public forces, to injure another state.³⁸ Indeed, by that time "special" letters of marque and reprisal had fallen into disuse and "general" letters predominated.³⁹

In seventeenth and eighteenth century America, private individuals were commonly relied on to fight wars on land and sea. The French and Indian War was fought for several years as an undeclared war and depended on letters of marque and reprisal in addition to public naval reprisals.⁴⁰ Letters of marque were issued during the American Revolution,⁴¹ and privateering commissions were common in America throughout the colonial period.⁴² Lacking a strong navy, the Framers

³⁵ 1 M. HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN*, 162 (S. Emlyn ed. 1736) (1st ed. London 1680). Sir Matthew Hale, an English writer well-known to the colonists, divided war into two kinds, special and general. "[S]pecial kinds of war are that, which we usually call marque or reprisal." *Id.* These he divided into two sub-categories. "Particular" letters were granted to "some particular persons" to seek recompense for specific wrongs. General marque or reprisal had the effect of a war, yet not a regular war. The difference was that during wartime a person could not seize the goods of the adverse party absent a commission from the crown, and that hostilities under a general marque were limited, not general. *See id.*

³⁶ *See Instructions to the Collectors of Customs* (Aug. 4, 1793), reprinted in 1 AMERICAN STATE PAPERS, FOREIGN RELATIONS 140 (W. Lowrie & M. Clarke eds. 1883) (distinction drawn by Alexander Hamilton between "vessels armed for merchandise and war, . . . called. . . letters of marque," and privateers); F. GROB, *supra* note 4, at 238-39 (a privately owned, armed ship was usually called a "letter of marque" or a "privateer," while an armed trading vessel was called a "letter of marque and reprisal"); H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 292 n.151 (G. Wilson ed. 1936) (1st ed. R. Dana 1866) ("[T]he term 'letter of marque' seems to be confined to the authorization to private armed trading vessels to make captures of property on the enemy in war.").

³⁷ *See* 2 J. BURLAMAQUI, *supra* note 24, at 180; E. ZOLLER, *supra* note 28, at 37-38; Lofgren, *supra* note 7, at 693.

³⁸ *See infra* text accompanying notes 50-54.

³⁹ *See* F. GROB, *supra* note 4, at 238-39.

⁴⁰ *See* 8 ANNALS OF CONG. 1811 (1798) (Fifth Cong., 2d Sess.)

⁴¹ *See, e.g.,* ACTS AND RESOLVES OF RHODE ISLAND 5 (1776); *see also* Letter from Thomas Jefferson to S. Huntington (Oct. 16, 1779), reprinted in 3 THE PAPERS OF THOMAS JEFFERSON 107 (J. Boyd ed. 1951) (requesting blank letters of marque).

⁴² *See* J. JAMESON, *PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD: ILLUSTRATIVE DOCUMENTS* viii (1923); *see, e.g.,* Commission of Capt. Benjamin Norton

recognized that the United States had to continue to resort to private armed ships to conduct hostilities at sea,⁴³ and thus provided for the issuance of letters of marque and reprisal in both the Articles of Confederation⁴⁴ and the United States Constitution.⁴⁵ Letters of marque were issued in the quasi-war with France⁴⁶ and in the War of 1812.⁴⁷ Although the federal government has not issued letters of marque since the War of 1812, the Confederacy relied on them extensively throughout the Civil War.⁴⁸

In eighteenth century America, the term "letters of marque and reprisal" lost much of its technical meaning and came to signify any intermediate or low-intensity hostility short of declared war that utilized public *or* private forces, although the emphasis on the use of private forces remained. The term was used interchangeably with the terms reprisal, privateer, and commission, each of which had a somewhat different technical meaning.⁴⁹

as a Privateer (June 2, 1741), *reprinted in id.* at 378-81.

⁴³ See, e.g., 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW 547-48 (1906) (quoting from a paper by Thomas Jefferson advocating privateering).

⁴⁴ See ARTS. OF CONFEDERATION arts. VI and IX.

⁴⁵ See U.S. CONST. art. I, § 8, cl. 11.

⁴⁶ See *infra* text accompanying notes 117-43.

⁴⁷ See F. GROB, *supra* note 4, at 239.

⁴⁸ *Id.*

⁴⁹ For example, both Madison and Gerry spoke of the power to grant "letters of marque," although technically such letters may have had a different meaning than the term "letters of marque and reprisal" or commissions to privateers. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1797, at 326 (M. Farrand ed. 1911) [hereinafter FEDERAL CONVENTION RECORDS]; THE FEDERALIST No. 41, at 269 (J. Madison) (J. Cooke ed. 1961); *id.* No. 44, at 299 (J. Madison). "Letters of marque" were not generally thought to refer to the authorization of privateers. See *Instructions to the Collectors of Customs, reprinted in* 1 AMERICAN STATE PAPERS, *supra* note 36, at 140. Some writers differentiated letters of marque from letters of marque and reprisal on the basis of whether they were issued during times of war (marque) or times of peace (marque and reprisal). See, e.g., H. WHEATON, *supra* note 36, at § 292 n.151. Treaties entered into during this period did not address letters of marque, but outlawed the issuance of "any commission to any private armed vessels." See, e.g., Draft of A Model Treaty, art. 23 (Nov. 10, 1784), *reprinted in* 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 41, at 486.

Nor was a sharp division drawn between special letters of marque and reprisal and general reprisals. Many writers did not draw any distinction at all. See, e.g., 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 250-51 (1765). Others referred to special letters as well as general reprisals as "imperfect wars." See, e.g., J. KENT, COMMENTARIES ON AMERICAN LAW 71 (Holmes ed. 1873) (1st ed. 1826). Others who referred to "special" or "qualified" letters referred neither to the extent of the operations authorized nor to the existence of particular injuries to specific persons. See, e.g., Letter from Alexander Hamilton to James McHenry (Mar. 1797), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 574 (H. Syrett ed. 1974) (Congress should "[g]rant Qualified letters of marck to . . . Merchantmen to . . . defend themselves."); 8 ANNALS OF CONG., *supra* note 40, at 1803 (remarks of Rep. Sitgreaves) (Authorization given to merchant ships to attack French cruisers is "not a course of

When the Framers of the Articles of Confederation and the Constitution spoke of the power to issue letters of marque and reprisal, they referred to the power to authorize a broad spectrum of armed hostilities short of declared war.⁵⁰ For example, Thomas Jefferson included within the congressional power to issue letters of marque and reprisal the power to order general reprisals against a foreign nation using the public armed forces.⁵¹ Similarly, James McHenry, John Adams' Secretary of War, and Alexander Hamilton, a former Secretary of the Treasury, agreed that any executive exercise of American naval force beyond defending the nation's seacoast, American vessels, or commerce within American waters "come[s] within the sphere of reprisals and . . . require[s] the explicit sanction of the branch of government which is alone constitutionally authorised to grant letters of marque and reprisal."⁵² More generally, many statesmen of the period used *marque and reprisal* to refer to a state of "imperfect war,"⁵³ by which they meant any state of armed hostilities that did not rise to the level of declared war.⁵⁴ Since the Framers and other early statesmen did not adhere to the technical definition of such letters when they discussed them in the early years of the republic, it can be argued that in general, uses of force short of war, such as modern-day covert paramilitary war-

general reprisal, but of *special* reprisal," because of its defensive nature.).

⁵⁰ See *infra* notes 253-60 and accompanying text (statements by Framers and early statesmen categorizing the issuance of letters of marque and reprisal as a species of "imperfect war").

⁵¹ Jefferson noted that the "making of a reprisal on a nation was a serious thing [often leading to war, therefore,] the right of reprisal [is] expressly lodged with [Congress] by the Constitution and not with the Executive." Op. Sec'y of State (May 16, 1793) (Thomas Jefferson), *reprinted in* 7 J. MOORE, *supra* note 43, at 123 (emphasis added).

⁵² Letter from James McHenry to John Adams (May 18, 1798), *reprinted in* A. SOFAER, *supra* note 5, at 155. Hamilton had advised McHenry that the president's constitutional power went no further than the authority "to *repel* force by force Any thing beyond this must fall under the idea of *reprisals* and requires the sanction of that Department which is to declare or make war." Letter from Alexander Hamilton to James McHenry (May 17, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 461-62. Hamilton reiterated that the power to authorize any reprisals was a congressional power when he noted that the effect of the 1795 Jay Treaty with England was "to restrain the power and discretion of Congress to grant reprisals till there has been an unsuccessful demand for Justice." *The Defence No. XXXVII*, *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 17 (footnote omitted) (emphasis added).

⁵³ See J. KENT, *supra* note 49, at 71.

⁵⁴ See 8 ANNALS OF CONG., *supra* note 40, at 1511 (statement of Rep. Gallatin) (arguing that the grant of letters of marque generally preceded war, "when it has not been thought proper to come to open warfare at once"); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 218-19 (Boston 1833) (describing the grant of letters of marque and reprisals as a "hostile measure for unredressed grievances . . . most generally the precursor of an appeal to arms by general hostilities").

fare, comes within the sphere of the Framers' concern.

B. *Covert Operations and the Re-emergence of Private War*

The nineteenth and early twentieth centuries witnessed a dramatic reduction in the use of private forces to achieve national aims. With the increasing centralization of the state apparatus in western Europe and the United States, nations turned to public armies and navies to achieve their military goals.⁵⁵ In 1856, the nations of Europe signed the Declaration of Paris, which declared privateering to be unlawful.⁵⁶ By the middle 1800's, the laws of war no longer permitted governments to authorize "guerrilla parties, self-constituted sets of armed men . . . who form no integral part of the organized army."⁵⁷ In recent times, however, private armies have re-emerged as important military instruments in the international arena.⁵⁸

There are several reasons for the renewed emphasis on private warfare. The diminution of private warfare in the nineteenth century was a response to the rise of a strong, centralized state power; its reemergence can be attributed to the coexisting centrifugal and centripetal forces affecting national governments today. Since World War II, civil war—particularly in third world nations with weak central governments—has replaced war between nations as the principal form of armed conflict.⁵⁹ Civil warfare invariably involves nonstate actors and

⁵⁵ See M. ANDERSON, *EUROPE IN THE 18TH CENTURY* 1713-83, 142, 151 (1961); F. GROB, *supra* note 4, at 238; D. PENNINGTON, *17TH CENTURY EUROPE* 236-37 (1970).

⁵⁶ 7 See J. MOORE, *supra* note 43, at 561-62.

⁵⁷ See F. LIEBER, *GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR* 18-19 (New York 1862).

⁵⁸ See *supra* note 9.

⁵⁹ See Luard, *Civil Conflicts in Modern International Relations*, in *THE INTERNATIONAL REGULATION OF CIVIL WARS* 7-8 (E. Luard ed. 1972). Between 1945 and 1972 there were at least 30 significant civil wars, not including sporadic disturbances, unorganized guerrilla activity, and cases of coup d'etat. See *id.* at 7, 13. Between 1946 and 1959, over 1200 internal disturbances broke out that could be considered war. See Eckstein, *Toward the Theoretical Study of Internal War*, in *INTERNAL WAR: PROBLEMS AND APPROACHES* 3 (H. Eckstein ed. 1964). Internal hostilities are responsible for 80% of all victims of armed conflicts since 1945. See Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Conflicts*, 72 *AM. J. INT'L L.* 272 (1978).

The incidence of civil war appears to be increasing. While there were 23 ongoing prolonged insurgent movements worldwide in 1958, by 1966 there were 40. See R. McNAMARA, *THE ESSENCE OF SECURITY* 145 (1968). Thus, civil war has replaced war between nations as the principal form of warfare in the twentieth century. See Firmage, *International Law and the Response of the United States to 'Internal War'*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 89, 103 (R. Falk ed. 1969); Franck & Rodley, *Legitimacy and Legal Rights of Revolutionary Movements with Special Reference to the People's Revolutionary Government of South Viet Nam*, in 3 *THE*

may even degenerate into a multiplicity of private armies operating instead of, or alongside, the national military, as it has in Lebanon and El Salvador.⁶⁰ This breakdown of governmental authority at the periphery has been matched by a tremendous expansion of national military power at the center. The old nineteenth century balance of power has been reformed and consolidated into two competing blocs that seek to avoid direct military conflict with each other.⁶¹ Furthermore, the development of nuclear weapons has led the major powers to avoid direct armed confrontation, and to struggle for supremacy instead through proxy wars fought between different factions within the borders of a third nation.⁶² The vast destructive might of the modern industrialized superpowers has thus converged with the weakness of the governmental apparatus of developing nations so that warfare between nations is exercised primarily through involvement by external powers in internal civil wars.

The United States has often been one of the external powers involved in internal civil wars. Not only have American troops directly participated in foreign civil wars, as in Korea and Vietnam,⁶³ but the

VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 17, at 723, 724; King, *Revolutionary War, Guerrilla Warfare and International Law*, 4 CASE W. RES. J. INT'L L. 91, 101 (1972). Intervention by the major powers has internationalized many of these internal conflicts. See Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 218-19 (J. Rosenau ed. 1964); Kaplan, *Intervention in Internal War: Some Systemic Sources*, in *id.*, at 92.

⁶⁰ The recent civil strife in the Philippines during the last days of the Marcos regime provides an illustration of the development of private armies. To protect themselves against the leftist insurgency, close associates of President Ferdinand Marcos assembled large private armies that had thousands of members trained in special warfare tactics. See N.Y. Times, Nov. 22, 1985, at A1, col. 1. Such armies can become an important power base, threatening to supplant the existing state apparatus. See *id.* For the development of paramilitary organizations in Central American civil wars, see Flynn, *Central America, The Roots of Revolt*, in THE POLITICS OF INTERVENTION 29, 42-43 (R. Burbach & P. Flynn eds. 1984).

⁶¹ See A. JORDAN & W. TAYLOR, *supra* note 11, at 29-32 (discussing constraints on open use of force in the modern world).

⁶² According to Richard Falk,

Violent encounter of major rivals in world affairs has always been primarily a matter of warfare *between* states; now suddenly it is participation in warfare *within* states. . . . [W]arfare *between* states now most frequently takes place *within* a single national society. . . . Significant multinational participation transforms an internal war into a species of international war.

Falk, *Janus Tormented*, *supra* note 59, at 185, 218. Similarly, Luard has noted that "more than ever, the struggle between nations . . . [is] undertaken through local political movements and rebellions." Luard, *supra* note 59, at 9.

⁶³ See, e.g., J. GOULDEN, *KOREA: THE UNTOLD STORY OF THE WAR* (1982) (detailing the history of United States intervention in Korea in the 1940's and 1950's); Lacouture, *From Vietnam War to Indochina War*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 17, at 9-32 (discussing United States military in-

United States has also become involved in internal civil war through the use of private paramilitary forces working under the direction of officers or employees of the CIA.⁶⁴ The use of paramilitary forces is designed to carry out United States foreign policy without "the role of the U.S. government [being] discernable."⁶⁵ Paramilitary forces are only one aspect of the CIA's covert action program, which includes all international activities other than pure intelligence gathering.

Covert operations cover a wide range of activities in foreign countries and can include political advice to foreign persons or organizations, financial support and assistance to foreign political parties,⁶⁶ covert propaganda, and the direction of paramilitary operations designed to overthrow or support a foreign regime.⁶⁷ Although covert political and economic operations often violate the international norm against intervention in the internal affairs of other nations,⁶⁸ they are beyond the scope of the *marque* and reprisal clause, which can only be read to apply to actual uses of military force against foreign nations. Moreover, covert warfare is generally a far more serious threat to both the foreign country's security and world peace than other covert interferences in internal affairs.⁶⁹

volvement in spreading the Vietnam War into Cambodia and Laos).

⁶⁴ For discussions of CIA covert operations in Africa, Asia, and Latin America, see S. KUMAR, *CIA AND THE THIRD WORLD* (1981); V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 113-25 (1974). For a history of the CIA's organization of the Bay of Pigs operation, see P. WYDEN, *BAY OF PIGS: THE UNTOLD STORY* (1979).

⁶⁵ CENTER FOR NATIONAL SECURITY STUDIES, *COMPARISON OF PROPOSALS FOR REFORMING THE INTELLIGENCE AGENCIES, reprinted in National Intelligence Reorganization and Reform Act of 1978: Hearings on S. 2525 Before the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. 339 (1978); see also S. REP. NO. 755, 94th Cong., 2nd Sess. 131 (1977) [hereinafter *Church Committee Report*] (defining covert action as clandestine activity designed to influence foreign governments, events, organizations or persons in such a way that the involvement of the United States government is not apparent).

⁶⁶ See e.g., R. CLINE, *THE CIA UNDER REAGAN, BUSH & CASEY* 122-24 (describing CIA's role in providing aid and assistance to the Italian Christian Democrats).

⁶⁷ See, e.g., V. MARCHETTI & J. MARKS, *supra* note 64, at app. 387 (speech of Richard J. Bissell, Jr., before the Council on Foreign Relations' Discussion Group on Intelligence and Foreign Policy, Jan. 8, 1968).

⁶⁸ See Falk, *CIA Covert Operations and International Law*, in R. BOROSAGE & J. MARKS, *THE CIA FILE* 147 (1976).

⁶⁹ See Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 227 (1983) (distinguishing sending armies across boundaries from other, more minor forms of intervention). The distinction between intervention in an internal conflict and aggression across national borders has been criticized and is becoming increasingly blurred. See Hoffmann, *International Law and Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW* 21-46 (K. Deutsch & S. Hoffmann eds. 1968); Reisman, *supra* note 8, at 258. However, the maintenance of this distinction is vital to world peace and security. See Falk, *Janus Tormented*, *supra* note 59, at 221 n.55. It

The use of paramilitary troops to overthrow or support foreign regimes, which the United States government first relied upon heavily in the 1950's,⁷⁰ has been an important element of the American covert action program throughout the post-war period. In the late 1940's the CIA organized guerrilla operations against several eastern European countries,⁷¹ and between 1953 and 1973 the CIA used paramilitary troops in at least eight major efforts against foreign governments.⁷² Because of the post-Vietnam political and legal objections to using American troops to achieve foreign policy goals,⁷³ presidents have turned more and more to paramilitary operations to execute foreign policy. Under the Reagan administration covert support of major paramilitary actions has played a central role in carrying out United States foreign policy,⁷⁴ as is evident in our relations with Nicaragua, Afghanistan, Cambodia, and other countries.⁷⁵ The Reagan administration has recently adopted a broad policy, urged by the Heritage Foundation⁷⁶ and

would be a grave error to conflate the different, albeit related, concepts of aggression and intervention.

⁷⁰ See *Church Committee Report*, *supra* note 65, at 143; R. Grummet, *Reported Foreign and Domestic Covert Activities of the United States Central Intelligence Agency 1950-1974*, reprinted in *THE INTELLIGENCE COMMUNITY*, *supra* note 14, at 695-706. Covert action was not explicitly authorized in the legislation that established the CIA. See National Security Act of 1947, 50 U.S.C. §§ 401-412 (1976 & Supp. IV 1980); see also *Church Committee Report*, *supra* note 65, at 476-92 (discussing the question of whether the 1947 statute intended to authorize covert action). The act did authorize the performance of "functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. § 403(d)(5) (1976). By 1953 there were sizeable covert operations in 48 countries. See *Church Committee Report*, *supra* note 65, at 145.

⁷¹ See *Church Committee Report*, *supra* note 65, at 145. Paramilitary operations grew throughout the 1950's, reaching their peak in the mid and late 1960's. See *id.* at 148.

⁷² See Falk, *CIA, Covert Action and International Law*, SOCIETY, Mar.-Apr. 1975, at 39, 40-41.

⁷³ These objections led to the enactment of the War Powers Resolution, which limits executive use of United States troops. See 50 U.S.C. §§ 1541-1548 (1982). The constitutional validity of the Act's concurrent resolution provision, which enables Congress to terminate a presidential military deployment at any time, is in question because of its resemblance to the legislative veto declared unconstitutional in *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983). For a discussion of the current status of this section of the Act, see Note, *Congressional Control of Presidential Warmaking Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217 (1984).

⁷⁴ See Stone, *The Special Forces in Covert Action*, THE NATION, July 7-14, 1984, at 8; Rubin, *G.O.P., Party of International Revolution*, N.Y. Times, May 26, 1985, at E15, col. 1.

⁷⁵ See *supra* note 9.

⁷⁶ See *U.S. Aid to Rebels in Nine Countries Suggested by Conservative Group*, N.Y. Times, November 20, 1984, at A5, col. 3 (prediction by Richard V. Allen, President Reagan's former national security advisor and now a fellow at the Heritage Foundation, that the report "will have a very significant impact" on the Reagan administra-

other conservatives, of underwriting anti-Communist insurgency, including the use of paramilitary forces to overthrow the governments of nine countries that "threaten United States interests."⁷⁷

This covert use of paramilitary force to conduct American foreign policy abroad is the modern day analogy to the private wars for which letters of marque and reprisal were historically required. Both involve the use of private individuals rather than public armed forces to engage in hostilities against other nations. Both are primarily utilized when war has not been formally declared. Both are often precursors to full-scale war.⁷⁸ The central difference between the two is that while the private wars of earlier times were fought by *American* private citizens authorized by the American government, modern-day covert warfare is fought primarily by non-American private citizens under the direction of American CIA officers. Furthermore, these private citizens are not necessarily acting intentionally on behalf of the United States, but instead are being aided by the United States in the achievement of their own ends. These distinctions are not problematic for two reasons. First, while covert operations often involve foreign citizens, letters of marque were occasionally given to foreign nationals as well as Americans.⁷⁹ Second, regardless of their personal or national aims, the actions taken by foreign nationals acting in concert with CIA officers and with American military aid are often legally attributable to the United

tion); see also Shultz, *Low-Intensity Conflict*, in MANDATE FOR LEADERSHIP II 268 (S. Butler, M. Sanera, W. Weinrod eds. 1984). Included on the Heritage Foundation's list of countries where the United States should "employ paramilitary assets" are Cambodia, Laos, Vietnam, Angola, Ethiopia, Afghanistan, Nicaragua, Iran, and Libya. See *id.*

⁷⁷ See Klare, *Low Intensity Conflict: The New U.S. Strategic Doctrine*, THE NATION, Dec. 28, 1985-Jan. 4, 1986, at 697; Shultz, *New Realities and New Ways of Thinking*, 63 FOREIGN AFF. 705, 712-13 (1985).

⁷⁸ See 131 CONG. REC. H4134 (daily ed. June 12, 1985) (statement of Rep. Williams) (providing aid to the contras in Nicaragua is likely to lead to full-scale American involvement in Central American warfare); S. REP. NO. 220, 93rd Cong., 1st Sess. 27 (1973) (covert paramilitary action in Vietnam was first step in escalating ground combat involvement of the United States); see also *infra* text accompanying notes 255-60 (statements of Framers and early nineteenth century statesmen that privateering and other private hostilities almost inevitably lead to war).

⁷⁹ For example, during the Civil War, foreigners applied to the Confederate states for letters of marque and reprisal and were referred to commissioners in Europe. See W. ROBINSON, THE CONFEDERATE PRIVATEERS 239 (1928). Baltimore served as a port for the issuance of French privateering commissions during the 1790's and again for commissions for Latin American revolutionaries in the 1800's. See J. GARITEE, THE REPUBLIC'S PRIVATE NAVY 27-28, 224-28 (1977). Vattel, while disapproving of a nation issuing letters of marque to foreigners, noted that the English had done so. See E. DE VATTEL, *supra* note 27, at 285. James Kent noted that privateers "are sometimes manned and officered by foreigners, having no permanent connection with the country, or interest in its cause." 1 J. KENT, *supra* note 49, at 107.

States.

Under international law the United States can be held liable for the actions of its paramilitary operatives as if it had directly authorized their activities.⁸⁰ In an effort to ensure that national governments are answerable for any actions they take in the international arena, modern international law holds them liable for all actions for which they are functionally, not just formally, responsible.⁸¹ Similarly, letters of marque and reprisal were developed in response to the increasing need for state responsibility and control over warfare. The requirement that private parties obtain a letter of marque and reprisal was developed precisely to limit hostile acts that might plunge the nation into war.⁸² State authorization was the mechanism by which early modern governments sought to ensure state responsibility and control over the actions of private citizens.

Today armed hostilities abroad conducted by paramilitary groups with our support and under our direction make us vulnerable both to retaliations from other nations and liability under international law. They thus raise the same concerns of United States responsibility that motivated the Framers to require congressional authorization pursuant to the marque and reprisal clause. As James Madison noted in the Federalist Papers, the constitutional requirement that only Congress grant letters of marque was designed to ensure "immediate responsibility to the nation in all those for whose conduct that nation itself is to be responsible."⁸³ Where international law treats American support of paramilitary operations as functionally equivalent to the use of force against a foreign state by the United States, authorization of such paramilitary action is within the exclusive domain of Congress, which alone is capable of granting letters of marque and reprisal.⁸⁴

⁸⁰ See *infra* text accompanying notes 85-91.

⁸¹ See *id.*

⁸² During the congressional debates concerning whether letters of marque and reprisal should be issued during the quasi-war with France, see *infra* text accompanying notes 117-43, several congressmen were worried about United States liability for the actions of armed merchants, see 7 ANNALS OF CONG. 272 (1797) (Fifth Cong., 1st Sess.) (remarks of Rep. Nicholas) (if the Congress "authorized a practice which produced evil, it would be the same as if they authorized the evil"), while others recognized the need for strong congressional restrictions on the arming of private merchantmen to avoid possible abuses and resulting United States liability, see *id.* at 262-63 (remarks of Rep. Harper) (abuses were far easier and more dangerous at sea than on land and therefore stronger restrictions were necessary).

⁸³ THE FEDERALIST No. 44, *supra* note 49, at 318 (B. Wright ed. 1961).

⁸⁴ There is thus a relationship between international law and constitutional requirements. See *Church Committee Report*, *supra* note 65, at 33 (stating that the federal government has the constitutional authority to undertake foreign intelligence activity in accordance with applicable norms of international law); see also *Nielson v. Secretary of Treasury*, 424 F.2d 833, 845 (D.C. Cir. 1970) (whether a United States

International law holds nations liable in connection with the activities of private armies in several situations. First, if private individuals are hired, directed, or directly controlled by United States officials, international law treats them as United States agents and their action will be attributable to the United States.⁸⁵ Second, article 2(4) of the United Nations Charter and customary international law prohibit aggression against other nations, including sending out, or substantial participation in the use of, armed bands, mercenaries, or irregulars that commit substantial acts of armed force against another nation.⁸⁶ In response to the development of indirect or covert warfare to circumvent the Charter's prohibition on aggression, the General Assembly, with strong American support, adopted rules prohibiting "indirect aggression." These rules proscribe sending armed bands "by or on behalf of a State" and "substantial involvement" in the acts of armed groups.⁸⁷

foreign policy measure amounts to a taking must "take into account prevailing concepts of international law").

⁸⁵ See, for example, the opinion of the International Court of Justice, *Military And Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.)* (I.C.J. June 27, 1986) (Merits).

⁸⁶ See G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974); see also *supra* note 18. Many commentators have agreed that the definition of aggression should include the use of and reliance on private parties to engage in warfare. Judge Roberto Ago, former Special Rapporteur for the Third Report on State Responsibility to the International Law Commission, explained that international law will attribute responsibility to a national government for the acts of private individuals where "private persons may be secretly appointed to carry out particular missions or tasks to which the organs of the State prefer not to assign regular State officials; people may be sent as so-called 'volunteers' to help an insurrectional movement in a neighboring country—and many more examples could be given." Third Report on State Responsibility, [1971] 2 Y.B. INT'L L. COMM'N. 199, 263, U.N. Doc. A/CN. 4/246 & Add. 1-3. Brownlie supports the view that "a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an 'armed attack.'" I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279 (1963); see also *id.* at 361 (stating that armed force could mean giving "aid to groups of insurgents on the territory of another state").

The World Court has recently ruled that the definition of aggression in General Assembly Resolution 3314 "may be taken to reflect customary international law." *Military and Paramilitary Activities In and Against Nicaragua* § 195 (Nicar. v. U.S.) (I.C.J. June 27, 1986) (Merits); see also *id.* at §§ 154-171 (dissenting opinion of Judge Schwebel, the American judge) (concluding that the sending out or substantial participation in the acts of an armed band is aggression under customary international law).

⁸⁷ This formulation represented a compromise position between the western nations, led by the United States, and several third world countries. The American view was that a prohibition limited to "sending" armed groups was too narrow. See 2 B. FERENCZ, *supra* note 18, at 39. An earlier western draft would have condemned "[o]rganizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State." Report of the Special Committee on the Question of Defining Aggression, 25 U.N. GAOR Supp. (No. 19) at 60, U.N. Doc. A/8019 (1970). Similarly, in 1972 the United States proposed adding the following list

Third, as the World Court has recently recognized in the case involving Nicaragua and the United States, a nation will be found to have engaged in the use of force against another nation by "organizing or encouraging the organization of irregular forces . . . for incursion into the territory of another State," or "participating in acts of civil strife . . . in another State," when such acts of civil strife involve armed force.⁸⁸ Arming and training private armies appears to meet this

of examples to article 3(g) of the definition of aggression:

The organizing by a State, or encouragement of the organization of, or assistance to, irregular forces or armed bands or other groups, volunteers, or mercenaries, which participate in incursions into another State's territory or in the carrying out of acts involving the use of force in or against another State, or knowing acquiescence in organized activities within its own territory directed toward and resulting in the commission of such acts.

28 U.N. GAOR Supp. (No. 19) at 22-23, U.N. Doc. A/9019 (1973).

Many nations of the third world, in contrast, objected to such an expansive prohibition on aid to armed bands. They sought to limit the article 3(g) definition of aggression to the actual sending of armed groups against another state. See Report of the Sixth Committee, 28 U.N. GAOR C.6 at 11, U.N. Doc. A/9411 (1973); 2 B. FERENCZ, *supra* note 18, at 39-40. These nations feared that if article 3(g) was read too broadly it might condemn assistance to indigenous groups engaged in struggles for self-determination against colonial powers and allow strong nations an easy pretext to justify the use of force against weaker ones under a claim of collective self-defense. See *id.*; J. STONE, *CONFLICT THROUGH CONSENSUS* 81-82 (1977).

The final language of article 3(g) emerged as a compromise between these two positions. See 2 B. FERENCZ, *supra* note 18, at 40; J. STONE, *supra*, at 75. The definition starts by condemning the "sending" of armed groups. The United States language condemning "organizing, supporting, or directing" armed groups was dropped. Instead, the prohibition was extended to "substantial involvement" in the activities of the armed groups. See 2 B. FERENCZ, *supra* note 18, at 40.

The United States has been a consistent and forceful advocate for the development of international law rules prohibiting indirect aggression. For example, as early as 1947 United States Representative Austin stated to the Security Council that "Yugoslavia, Bulgaria and Albania, in supporting guerrillas in northern Greece, have been using force against the territorial integrity and political independence of Greece. They have in fact been committing acts of the very kind which the United Nations was designed to prevent . . ." 2 U.N. SCOR (147th mtg.) at 1120-1121 (1947). International Court of Justice Judge Stephen Schwebel, then United States Representative to the Special Committee on the Question of Defining Aggression, argued in 1972 that the U.N. Charter makes no distinction between direct and indirect uses of force and that the "most pervasive forms of modern aggression tend to be indirect ones." Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 RECUEIL DES COURS, 1972, II, at 411, 458. "The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative." *Id.* at 455-56 (quoting *Report of the Secretary General*, U.N. Doc. A/2211, at 72).

⁸⁸ Military and Paramilitary Activities In And Against Nicaragua § 228 (Nicar. v. U.S.) (I.C.J. June 27, 1986) (Merits); see also *id.* at §§ 191-238, 247, 292(4). The Declaration of Principle of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, art. 1, para. 9, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 123, U.N. Doc. A/8028 (1970), includes the following activities in connection with armed bands under the

standard although the mere supply of funds to such groups generally would not.⁸⁹ Violation of this principle does not rise to the level of an armed attack on the other state, and therefore the test is easier to meet: requiring not "sending out" or "substantial participation" but merely "organizing or encouraging the organization" or "participating" in the acts of armed private groups that commit acts of force against another State. Finally, nations must prohibit the organization or initiation of hostile military expeditions against a foreign state by persons within its territory. Where the appropriate diligence is not exercised, the government will be held internationally responsible for any damage that results.⁹⁰

All of these legal foundations for State liability for the utilization of private forces raise the core concern behind the letter of marque and reprisal clause. All involve (i) United States responsibility under international law for (ii) a use of force against another country (iii) arising out of the actions of private forces. Where the connection between the armed bands and the United States is extremely close and leads to an agency relationship, as for example occurs in the first two situations set forth above, the analogy to letters of marque and reprisal is particularly

principle barring the use of force between states:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when [such acts] involve a threat or use of force.

⁸⁹ Military and Paramilitary Activities In And Against Nicaragua § 228 (Nicar. v. U.S.) (I.C.J. June 27, 1986) (Merits).

⁹⁰ See E. CASTREN, *supra* note 22, at 442; M. GARCIA-MORA, *supra* note 18, at 49-53, 61-66; 3 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 2253-54 (2d ed. 1945); 2 L. OPPENHEIM, *INTERNATIONAL LAW, DISPUTES, WAR AND NEUTRALITY* § 332 (7th ed. 1952); Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955, 1957-60 (1982); 3 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 618, 630 (F. Wharton ed. 1886). The United States was a forceful advocate for the incorporation of such a rule into international law in the 19th century, see C. FENWICH, *THE NEUTRALITY LAWS OF THE UNITED STATES* 6 (1913); Lobel, *supra* note 22, at 19-20, and it was largely due to American efforts that this principle was incorporated into international law, see 1 UNITED STATES DEPARTMENT OF STATE, *PAPERS RELATING TO THE TREATY OF WASHINGTON* 11, 14, 47-88 (1872). In 1872 the United States succeeded in establishing British liability for actions in violation of this principle during the Civil War. See 4 UNITED STATES DEPARTMENT OF STATE, *PAPERS RELATING TO THE TREATY OF WASHINGTON* 49-54 (1873); see also Declaration of Principle of International Law Concerning Friendly Relations and Cooperation Among States, *supra* note 88 (State's acquiescing in organized activities within its territory directed towards the commission of civil strife in another States is unlawful use of force).

strong. Even when a direct agency relationship does not exist, if United States actions in support of armed bands are treated as a United States use of force under international law, as under the third and fourth standards of liability set forth above, the letter of marque and reprisal clause is implicated. That clause was clearly concerned with United States responsibility for private actions using armed force. The dividing line is therefore between covert actions that are treated as a United States use of force against another State and covert actions that are merely treated as intervention, albeit often unlawful intervention, in the internal affairs of a foreign State.

Any significant covert paramilitary expedition is likely to meet at least one of these standards. Many recent covert paramilitary operations involve either United States or foreign nationals hired or directly controlled by the CIA who participate in acts of violence against a foreign state.⁹¹ The actions of such agents will be directly attributable to the United States under the first standard above. Similarly, in the CIA-backed covert paramilitary operations in Nicaragua, Cuba, and Guatemala, the United States either sent out, substantially participated in, or helped organize acts of force committed by armed bands against a foreign government, for which it is liable under the General Assembly's standard.⁹² In general, whenever the United States provides extensive

⁹¹ Recently, the World Court found that while the Nicaraguan contras as a whole could not be said to be mere agents of the United States, certain activities undertaken by non-Nicaraguan Latin American nationals (referred to by the CIA as "Unilaterally Controlled Latino Assets" (UCLA's)) concerning the planning, direction, and support of United States nationals were directly attributable to the United States. See *Military and Paramilitary Activities In And Against Nicaragua* § 86 (I.C.J. June 27, 1986) (Merits). Moreover, the World Court's decision came prior to the recent passage of \$100 million in aid for the contras, and the announcement that the administration had given the CIA "day-to-day responsibility for managing rebels' military operations against the Nicaraguan Government." N.Y. Times, July 12, 1986, at A1. Similarly in China during 1951-1954, Indonesia in 1958, the Tibetan operation of 1958-1961, the Laotian operation of 1960-1973, the Congo in 1964, the CIA's Vietnam actions even prior to 1964, and Cuba in 1961, CIA agents participated in bombing runs or other missions and directed or controlled the activities of the foreign paramilitary group. See Wise, *Covert Operations Abroad: An Overview*, in THE CIA FILE, *supra* note 68, at 3, 20-24 (listing cases of CIA covert operations demonstrating either direct United States control or direct participation by United States agents); V. MARCHETTI & J. MARKS, *supra* note 64; Grummet, *Foreign and Domestic Covert Activities of the U.S. Central Intelligence Agency*, reprinted in THE INTELLIGENCE COMMUNITY, *supra* note 14, at 695.

⁹² See *Military and Paramilitary Activities In And Against Nicaragua* § 86 (I.C.J. June 27, 1986) (Merits); D. WISE & T. ROSS, THE INVISIBLE GOVERNMENT 165-84 (1964) (discussing "CIA's coup" in 1954 against the Guatemalan government); P. WYDEN, *supra* note 64, at 9-65 (stating that the Bay of Pigs operation was controlled by the CIA); see also affidavit of Edgar Chamorro filed with the International Court of Justice, Sept. 5, 1985, at 5 (on file with the *University of Pennsylvania Law Review*) (stating that the CIA organized and now directs contras attacking Nicaragua)

support to paramilitary groups in the form of arms, advisors, training, or logistical support, it should be held to be substantially involved, or at least participating, in the acts of the groups it is aiding.⁹³ Such activities, therefore, must be approved by Congress pursuant to the marque and reprisal clause.

Congress must authorize, pursuant to the marque and reprisal clause, the use of armed bands to achieve American foreign policy goals

[hereinafter Chamorro affidavit].

The World Court's decision in *Nicaragua v. United States* leaves somewhat unclear the exact difference between the second and third standards mentioned in the text discussing the United Nations's definition of aggression involving an armed attack compared to the somewhat less serious unlawful use of force. See text accompanying notes 88-90. What is clear is as follows: (1) mere monetary aid to insurgents will not normally be considered an unlawful use of force under either standard, but will at most be considered unlawful intervention; (2) arming and training guerrillas will meet the third standard of the unlawful use of force against another country; and (3) the provision of arms or logistical or other support to guerrillas, standing alone, does not meet the second and highest standard of aggression involving an armed attack on another country.

What remains unclear is what acts of a state will meet the United Nation standard of aggression involving an armed attack. That standard prohibits both the sending out and substantial participation in activities of armed bands activities against another state. While correctly finding against the United States claim that Nicaragua's provision of arms to El Salvador rebels constituted an armed attack, the court did not address Nicaragua's claim that the United States was "substantially participating" in the activities of the contras. The court instead rested its finding on the United States "participation" in acts of force involving the provision of arms and training. The court did find that the "contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military or paramilitary activities without the multi-faceted support of the United States," a finding the court termed "fundamental in the present case." *Military and Paramilitary Activities In And Against Nicaragua* § 111 (I.C.J. June 27, 1986) (Merits). One would think that such a finding would give rise not only to "participation" for the purposes of determining an unlawful use of force but also "substantial participation" in the contras' activities under the United Nations definition of aggression. In the absence of more guidance from the court on this issue, it would seem difficult to ascertain what would constitute substantial participation. While the court is correct that the supply of weapons and other logistical support ought not to meet that standard, certainly substantial control and direction over the insurgents' actions ought to. In any event, virtually all CIA paramilitary operations would appear to meet the court's standard requiring participation in the activities of armed bands. That standard was accepted by the United States, whose only difference with the court was that it wanted to treat such participation not only as a possible unlawful use of force but also as an armed attack and aggression giving rise to a right of collective self-defense.

⁹³ Most CIA paramilitary covert actions involve either direct control, or substantial support activity often secretly involving United States military forces. See Wise, *supra* note 91, at 3, 20-24 (listing inter alia CIA paramilitary operations demonstrating either substantial United States participation or control in addition to simply providing money); see also V. MARCHETTI & J. MARKS, *supra* note 64, at 27-30, 114-21; Grummet, *supra* note 91, at 695. For example, the overthrow of Premier Mohammed Mossadegh in Iran in 1953, the support of Indonesian rebels in 1958, the Tibetan operation of 1958-1961, and the Laotian operation during 1960-1973 all involved either the CIA organizing and directing the activity or both extensive financial aid and direct military actions such as the use of American planes in support of the activities.

before the executive may use this method. These paramilitary forces perform the same function that privateers and armed trading vessels did two hundred years ago: they represent United States interests in armed conflicts short of declared war against other sovereign nations.

Although some of the attributes of modern-day paramilitarism do not fit the eighteenth century paradigm exactly, the fact that the United States is internationally responsible for most acts of covert warfare in which it participates makes it clear that the application of the *marque* and *reprisal* clause to covert warfare is wholly consistent with the underlying concerns of the clause. Furthermore, since the Framers' view of the *marque* and *reprisal* clause embraced a broad range of hostilities beyond the activities for which letters of *marque* and *reprisal* had traditionally been issued, it is arguable that modern-day covert warfare falls within the constitutional understanding of the clause regardless of international liability. As demonstrated above, the constitutional *marque* and *reprisal* clause was not limited to the technical meaning of "letters of *marque* and *reprisal*," but was viewed more broadly as granting Congress power over all hostilities short of declared war, particularly those utilizing private forces. While the requirement for congressional authorization of covert warfare is well within the spirit of the *marque* and *reprisal* clause, it may be within its letter as well.

II. THE CASE FOR CONGRESSIONAL CONTROL

Part I of this Article argues that covert operations are the modern analogy to the private armies and military expeditions of an earlier time. If these two methods of "imperfect war" are functionally related then the Framers' decision to vest the power to issue letters of *marque* and *reprisal* in the legislative branch continues to be relevant and mandates that modern-day covert operations be authorized by Congress pursuant to the *marque* and *reprisal* clause. In Part II, I will explore the modern-day arguments against vesting authority over covert operations in Congress, and demonstrate the substantive inadequacy and vacuity of these arguments. This section also shows that modern covert war and early modern private military forays are not only functionally analogous but also raise many of the same policy and practical concerns. The section concludes that arguments against congressional control over covert war are unpersuasive, and, furthermore, that the concerns underlying the Framers' decision to place the power to issue letters of *marque* and *reprisal* in Congress are implicated by contemporary covert wars.

A. *Marque and Reprisal in the Early Republic*

1. The Articles of Confederation and the United States Constitution

Both the Articles of Confederation and the United States Constitution reflect the important role played by private armies and navies in early American military history. The Articles of Confederation contained two provisions regarding letters of marque and reprisal, which addressed two issues: the body possessing the authority to grant letters of marque and reprisal, and whether a formal declaration of war had any impact on that distribution of power. Article IX reserved to Congress the power "of granting letters of marque and reprisal in times of peace," while article VI allowed individual states to grant these letters and to commission warships once war had been declared by Congress.⁹⁴ The Continental Congress recognized that letters of marque and reprisal issued "in times of peace" could constitute state-authorized private warfare short of declared war. Consequently, article IX ensured that the initiation of all hostilities, not only declared war, would remain a congressional preserve not to be invaded by the states.⁹⁵ The conduct of congressionally authorized war, however, could be shared jointly by the central government and the individual states under article VI.

Whereas the drafters of the Articles of Confederation were primarily concerned with the division of power between the federal government and the states, the Framers of the Constitution were also concerned about the balance of congressional and executive power. The continuing struggle between the two branches for preeminence in the exercise of war powers was first manifest in the "make war" debates. Concluding that the many-headed Congress was too slow-moving a creature to determine the conduct of an ongoing war, while the initiation and declaration of war was too awesome a responsibility to vest in the executive alone, the Framers agreed that Congress should be granted the power to "declare" war, and that the president, as commander-in-chief, should direct the conduct of war once it was

⁹⁴ ARTS. OF CONFEDERATION arts. VI, IX. Thus, during the revolutionary war the states issued letters of marque pursuant to rules and regulations issued by the Continental Congress. *See, e.g.*, 4 JOURNALS OF THE CONTINENTAL CONGRESS 214, 229-33, 247, 251-53 (1776) (compiled by K. Harris and S. Tilley).

⁹⁵ The only exceptions were that individual states were permitted to repel an invasion, or threatened invasion, by an Indian nation where the danger was "so imminent as not to admit of a delay," or to issue letters of marque or reprisal to repel pirates, in the case where its waters were "infested by pirates." ARTS. OF CONFEDERATION art. VI.

declared.⁹⁶

The original drafts of the Constitution had not mentioned letters of marque and reprisal at all.⁹⁷ Immediately after the substitution of "declare war" for "make war,"⁹⁸ Elbridge Gerry recommended that something be "inserted concerning letters of marque," since "he thought [they were] not included in the power of war."⁹⁹ The timing of Gerry's amendment indicated that he and others probably believed that any possible narrowness implied by the authority to "declare war" made it necessary to include the use of force in time of peace among the enumerated congressional powers. Indeed, Joseph Story and others recognized that while the power to declare war would itself carry the incidental power to grant letters of marque and reprisal, the delegates to the Constitutional Convention may not have thought "the express power to grant letters of marque and reprisal unnecessary, because it is often a measure of peace, to prevent the necessity of a resort to war."¹⁰⁰ By including the marque and reprisal clause in article I, section 8, the Framers attempted to insure that Congress would always be the branch to authorize armed hostilities against foreign nations, even if those hos-

⁹⁶ See FEDERAL CONVENTION RECORDS, *supra* note 49, at 318-20. The Framers saw this balance between the executive and congressional war powers as a means for allowing the president to conduct war and "repeal sudden attacks," *id.* at 318, but not "to commence war," *id.*

⁹⁷ See generally, W. REVELEY, *supra* note 7, at 74-86 (marque and reprisal provisions were not discussed until fourth month of the Constitutional Convention, and were not part of earlier drafts of the Constitution).

⁹⁸ Significantly, Gerry made his motion on August 18, 1787, the day after the "make war" debate. See 2 FEDERAL CONVENTION RECORDS, *supra* note 49, at 318-29, 326.

⁹⁹ *Id.* at 326. The only significant mention of letters of marque and reprisal in the pre-convention and ratification debates is Madison's comments that while the Articles of Confederation granted Congress sole power over the grant of such licenses during peacetime only, the Constitution extended this authority to wartime as well. See THE FEDERALIST No. 44, *supra* note 49, at 299.

¹⁰⁰ 3 J. STORY, *supra* note 54, at 63. James Kent noted, "[R]eprisals by commissions, or letters of marque and reprisal . . . is another mode of redress for some specific injury, . . . which is considered compatible with a state of peace." J. KENT, *supra* note 49, at 61-62. Thomas Jefferson noted, "[G]eneral letters of marque and reprisal" may be preferred to a formal declaration of war, "because on a repeal of their edicts by the belligerent, a revocation of the letters of marque restores peace without the delay, difficulties and ceremonies of a treaty." Letter from President Jefferson to Mr. Lincoln (Nov. 13, 1808), 5 THE PAPERS OF THOMAS JEFFERSON, *supra* note 41, at 387.

Similarly, the justification for the modern resort to covert paramilitary action is often that such measures will prevent the necessity to resort to using United States troops. See, e.g., *Should the U.S. Fight Secret Wars?*, HARPER'S MAGAZINE, Sept. 1984, at 34 [hereinafter McFarlane statement] (statement of R. McFarlane, National Security Advisor, May 13, 1984); N.Y. Times, March 6, 1986, at A1, col. 1 (reporting request by President Reagan for \$100 million in aid to ensure that United States troops will never be sent to Nicaragua).

ilities were launched in time of peace.

2. The Neutrality Act

Within a decade of the Constitution's ratification, Congress enacted the Neutrality Act of 1794,¹⁰¹ which prohibits private citizens from engaging in armed hostilities against foreign nations at peace with the United States.¹⁰² Passage of this act was prompted by the difficulties of enforcing President Washington's 1793 proclamation forbidding United States citizens from engaging in acts of hostility against any of the participants in France's war against England and Holland.¹⁰³ Al-

¹⁰¹ See Neutrality Act, ch. 50, 1 Stat. 381-84 (1794) (codified as amended at 18 U.S.C. §§ 958-960, 962 (1976)).

¹⁰² The act's provisions make it a crime, within United States territory, to (a) accept a commission to serve a foreign state, colony or people in wars against another state or people with whom the United States is at peace, see 18 U.S.C. § 958 (1976); (b) enlist or recruit a person to serve a foreign government or foreign army, see 18 U.S.C. § 959 (1976); (c) begin a military or naval expedition against any foreign prince or state, see 18 U.S.C. § 960 (1976); (d) fit out or arm a vessel with the intent that such vessel either serve a foreign state or commit hostilities against the citizens or property of a foreign country, see 18 U.S.C. § 962 (1976).

¹⁰³ In order to ensure that private citizens would not threaten American neutrality in the war, Washington issued a proclamation forbidding United States citizens from engaging in acts of hostility against any of the countries at war. See 1 AMERICAN STATE PAPERS, *supra* note 36, at 140; 1 MESSAGES AND PAPERS OF THE PRESIDENTS 156-57 (J. Richardson ed. 1896). The president's efforts were not fully effective. For example, a jury failed to convict Gideon Henfield, a United States citizen who, because he had enlisted on a French privateer that had attacked British ships, was indicted by a federal grand jury. See *Henfield's Case*, 11 F. Cas. 1099, 1122 n.7 (C.C.D. Pa. 1793) (No. 6,360). While it was clear that Henfield had committed the acts charged, there was general suspicion and uneasiness, both among the general population and the legal community, as to whether violations of international law and a presidential proclamation could provide a basis for a common law federal offense in the absence of a statute. Although legal opinion was somewhat divided, the weight of opinion held that such a basis did exist. See C. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 172 (1931); Lobel, *supra* note 22, at 13-14 nn.74, 78. An account of the trial is given in F. WHARTON, STATE TRIALS DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49-89 (Philadelphia 1849) and in *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

President Washington called on Congress to provide a federal statutory basis for prosecuting violations of international law. In 1793, Washington asked Congress to "extend the legal code and the jurisdiction of the courts of the United States to many cases which, though dependent on principles already recognized, demand some further provisions." Congress responded by passing the Neutrality Act on June 5, 1794. See Neutrality Act, ch. 50, 1 Stat. 381, 383-84 (1794) (codified as amended at 18 U.S.C. §§ 958-960, 962 (1976)); President Washington's Annual Message to Congress (Dec. 3, 1793), *reprinted in* 1 AMERICAN STATE PAPERS, *supra* note 36, at 22.

For a general history of the Neutrality Act, see C. FENWICK, THE NEUTRALITY LAWS OF THE UNITED STATES (1913); C. HYNEMAN, THE FIRST AMERICAN NEUTRALITY (1974); C. THOMAS, *supra*; Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L L. 1, 240 (1914); Lobel, *supra* note 22.

though Congress did not specify its constitutional authority for enacting the Neutrality Act, it clearly felt that the article I, section 8 war powers were compromised when private individuals took aggressive action against other nations in the absence of declared war.¹⁰⁴ The legislative debates make no explicit reference to the *marque* and *reprisal* clause,¹⁰⁵ the Act itself and its subsequent history, however, demonstrate that early congresses were unwilling to authorize executive utilization of private armies or navies in times of peace. Unlike its English antecedents, the American statute did not grant the executive discretion to authorize enlistment or recruitment for a foreign state or to launch a hostile expedition against a foreign nation.¹⁰⁶ This express denial of executive discretion reflects the common understanding of both the executive¹⁰⁷ and the legislative branches that the president did not have

¹⁰⁴ See Lobel, *supra* note 22, at 24-25, 27-30; see also 4 ANNALS OF CONG. 743, 744, 746 (1794) (Fourth Cong., 1st Sess.) (remarks of Rep. Ames, Rep. Hillhouse, and Rep. Wadsworth) (expressing concern that actions of privateers were going to force the United States into war).

¹⁰⁵ Although Congress did not articulate the constitutional basis for its assertion of power over private warfare, the two possible grounds that have been asserted are the powers granted to Congress by article I, § 8 to declare war and to "define . . . offenses against the Law of Nations." See *United States v. Arjona*, 120 U.S. 479, 488 (1887); Lobel, *supra* note 22, at 15-16, 27-37; Note, *supra* note 90, at 1966 & n.71; Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), reprinted in 6 WRITINGS OF JAMES MADISON 313-14 (G. Hunt ed. 1906).

¹⁰⁶ The English statutes of 1713, 1736, and 1756 prohibited enlistment or recruitment within Great Britain or Ireland for service to a foreign state and were clearly the source of at least the first two sections of the Neutrality Act. See 12 Anne ch. 11 (1713); 9 Geo. 2, ch. 30 (1736); 29 Geo. 2, ch. 17 (1756); see also, Lobel, *supra* note 22, at 31-32 (stating that the American Neutrality Act clearly deviated from English antecedents because it no longer conditioned crime on the absence of "leave or license of his majesty").

¹⁰⁷ Many early presidents, including Adams, Jefferson, Van Buren, and Buchanan, clearly recognized that the power to authorize private military expeditions against a foreign country was a congressional and not an executive power. In his inaugural address, John Adams noted that the position of the United States was one of "neutrality and impartiality among the belligerent powers of Europe which has been adopted by this government and so solemnly sanctioned by both Houses of Congress and applauded by the legislatures of the States and the public opinion, until it shall be otherwise ordained by Congress." Inaugural Address of President John Adams (Mar. 4, 1797), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 103, at 228, 231. Martin Van Buren noted, with respect to private expeditions against Canada,

[W]hether the interest or the honor of the United States requires that they should be made a party to any such struggle, and by inevitable consequence to the war which is waged in its support, is a question which by our Constitution is wisely left to Congress alone to decide. It is by the laws already made criminal in our citizens to embarrass or anticipate that decision by unauthorized military operations on their part.

Second Annual Message to Congress of President Martin Van Buren (Dec. 3, 1838), reprinted in 3 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 487.

President James Buchanan also noted that such military expeditions were a "usur-

the broad constitutional power to authorize private hostilities against a nation with whom the United States was at peace.¹⁰⁸

The courts have also acknowledged the division of authority mandated by article I, section 8, and have recognized that the Neutrality Act reflected that constitutional framework. In *Henfield's case*,¹⁰⁹ which prompted the passage of the Neutrality Act, the Supreme Court noted that the Constitution allowed no one citizen, not even the president, to "lift up the sword of the United States. Congress alone have power to declare war and to 'grant letters of marque and reprisal.'" ¹¹⁰

Later, in the 1806 case of *United States v. Smith*,¹¹¹ the Court held that a president could neither constitutionally nor statutorily authorize a private military expedition against a foreign country except as a response to an actual invasion.¹¹² In *Smith*, two civilians were in-

pation of the war-making power, which belongs alone to Congress." CONG. GLOBE, 35th Cong., 1st Sess. 217 (1858).

¹⁰⁸ Those involved in the formation of American foreign policy in the 1790's considered the power to authorize private citizens to conduct hostilities abroad an exclusively congressional power. See Letter from Thomas Jefferson, Secretary of State, to Governor Morris, American Minister to France (Aug. 16, 1793), reprinted in 1 AMERICAN STATE PAPERS, *supra* note 36, at 167-72. In their famous debate over the authority of the president to issue the Proclamation of 1793, both Madison and Hamilton relied on the constitutional assumption that citizens could not commit hostilities until authorized by Congress. In support of the president's power to issue the Proclamation, Hamilton stated, "If the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared." Hamilton, *Pacificus No. 1*, reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 40. Madison did not agree that the president had the power to interpret the treaty with France or to declare neutrality, but he shared Hamilton's view that "the duty of the executive to preserve peace" until the legislature authorized war was enough to authorize the issuance of the Proclamation of 1793. See Madison, *Helvidius No. 5*, reprinted in 6 WRITINGS OF JAMES MADISON, *supra* note 105, at 180-82.

In this context, it is not surprising that Hamilton deleted the English provision giving the executive discretionary power to authorize private hostilities in his draft of the Neutrality Act. For Hamilton's role in drafting the statute, see Letter from Alexander Hamilton to John Jay (June 4, 1794), reprinted in 16 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 456-57. Such authority would have been inconsistent with an executive duty "to preserve peace till war is declared." Seventy years later historian George Bemis distinguished the United States Neutrality Act from the British Foreign Enlistment Act, which "left in the hands of the kings' ministers the power of precipitating the kingdom into war . . ." G. BEMIS, AMERICAN NEUTRALITY: ITS HONORABLE PAST, ITS EXPEDIENT FUTURE 84-85 (Boston 1866).

¹⁰⁹ 11 F. Cas. 1099, 1122 n.7 (C.C.D. Pa. 1793) (No. 6,360).

¹¹⁰ *Id.* at 1109; see also Letter from Thomas Jefferson, Secretary of State, to Governor Morris, American Minister to France, *supra* note 108, at 168 ("If one citizen has a right to go to war of his own authority, every citizen has the same . . . But this is not true . . . by our Constitution, which gives that power to Congress alone and not to the citizens individually.").

¹¹¹ 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

¹¹² The Reagan administration and its academic supporters seek to explain *Smith* as simply holding that the prior knowledge of the president, as distinct from his author-

dicted and tried for attempting to launch an expedition against Spanish America.¹¹³ As part of their defense, they asserted that their acts had been approved by President Jefferson.¹¹⁴ The Court ruled that even if the President had authorized the expedition, the Neutrality Act, "on which the indictment is founded, is expressed in general, unqualified terms; it contains no condition, no exception; it invests no dispensing power in any officer or person whatever."¹¹⁵ The Court determined that the Constitution,

[w]hich measures out the powers and defines the duties of the president, does not vest in him any authority to set on foot a military expedition against a nation with which the United States are at peace. . . . If then, the president knew and approved of the military expedition . . . it would not justify the defendant . . . because the president does not possess a dispensing power. Does he possess the power of making war? That power is exclusively vested in congress; for by

ization, was insufficient to shield the defendants from the Neutrality Act's proscriptions. See Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 91 n.194 (1986) (defendants in *Smith* sought to rely on imputed presidential knowledge of and silence concerning their actions rather than on presidential authorization of those actions).

This feeble attempt to distinguish *Smith* ignores the clear understanding of the principles involved in that case. Attorney General Breckenridge summarized the principle involved in *Smith*: the evidence sought by the defendants was "wholly irrelevant; for, the President having no power to arrest or dispense with the operation of [the Neutrality] Act, his assent, or even order, that it should be violated would not shield from its pains and penalties those offending against it." Op. Att'y Gen. (1806), cited in 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 284 n.1 (1922) (emphasis added). Similarly, the government's attorney at trial "contended that the president could not authorize any such measure [contravening the Neutrality Act]," 27 F. Cas. at 1221, and that "if he did so he would be guilty of crimes or misdemeanors." *Id.* at 1204. Justice Patterson therefore held that "still less can [the president] authorize a person to do what the law forbids." *Id.* at 1230-31 (emphasis added). Indeed, as recently as 1979, the Justice Department recognized that *Smith* stands for the proposition that the president cannot "authorize" paramilitary expeditions against friendly nations. See Memorandum for Philip B. Heymann, Assistant Attorney General, Regarding Applicability of the Neutrality Act to Activities of the Central Intelligence Agency 7 n.3 (Oct. 10, 1979) (on file with the *University of Pennsylvania Law Review*).

¹¹³ See Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 312 (1975).

¹¹⁴ Defendant Miranda met with both Secretary of State Madison and President Jefferson twice before beginning his expedition. Miranda told Smith that the administration had approved the adventure. *Id.* at 311.

At trial the defense offered an affidavit from Smith, stating that he expected to prove from the testimony of the cabinet members "that the expedition and enterprise to which the said indictment relates, was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States, and . . . of the secretary of the of the United States . . ." *United States v. Smith*, 27 F. Cas. at 1196.

¹¹⁵ 27 F. Cas. at 1229.

the eighth section of the 1st article of the constitution, it is ordained, that congress shall have power to declare war, [and] grant letters of marque and reprisal. . . .¹¹⁶

3. The Quasi-War with France

During the early years of the American Republic, letters of marque and reprisal were issued in accordance with the Framers' plan that Congress have sole responsibility over the authorization of private hostilities. The first test of American fidelity to that decision was the quasi-war with France, an undeclared war fought by public and private armed forces from 1798 to 1800.¹¹⁷ The Adams administration sought to curb French seizure of American vessels and to bankrupt the lucrative business enjoyed by many French privateers of raiding American commerce¹¹⁸—granting licenses to merchant ships to defend themselves.¹¹⁹ Assuming that only the legislature could license the arming of merchant ships,¹²⁰ the administration asked Congress to authorize

¹¹⁶ *Id.* at 1229-30.

¹¹⁷ See S. MORISON, H. COMMAGER & W. LEUCHTENBURG, 1 THE GROWTH OF THE AMERICAN REPUBLIC 321-23 (1980).

¹¹⁸ See A. SOFAER, *supra* note 5, at 139. On June 21, 1797, the Secretary of State reported to Congress that 316 American ships had been captured by the French since July, 1796. See 3 AMERICAN STATE PAPERS, *supra* note 36, at 169, 267-92. In addition to the raids on commerce, the United States was also distressed by French embargoes on American ships at Bordeaux, broken contracts with American shippers, and condemnation of American ships and cargoes in breach of French-American treaty obligations. Furthermore, in 1797 the French issued a decree revoking the principle that "free ships make free goods," thus allowing French warships to seize American merchant ships carrying English goods. See A. DE CONDE, THE QUASI WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801, at 17 (1966). The decree also declared enforceable a treaty provision that allowed ships not carrying a list of crew and passengers to be considered lawful prize, a requirement not met by most American merchant ships. Finally, in March of 1797 the French refused to receive and then expelled Charles Cotesworth Pickney, the American Ambassador to France. See *id.* at 16.

The French had substantial grievances of their own. See *Gray v. United States*, 21 Ct. Cl. 340, 360 (1886). For a complete history of what became known as "the French spoliations," see *Hooper v. United States*, 22 Ct. Cl. 408, 411-26 (1887); *Gray*, 21 Ct. Cl. at 345-67 (cases adjudicating, under a special act of Congress, the validity of the claims of American merchants against the French). The United States offered a narrow interpretation of the treaties of alliance and commerce with France—treaties that had greatly aided the country during the Revolutionary War—in order to avoid the obligations they imposed. See *id.* at 352-60. Moreover, the 1795 Jay Treaty granted concessions to Britain that conflicted with the provisions of the French-American treaties. See *id.* at 356-57.

¹¹⁹ See 7 ANNALS OF CONG., *supra* note 82, at 54-59; A. SOFAER, *supra* note 5, at 141.

¹²⁰ The Adams administration was careful to defer to Congress. See A. SOFAER, *supra* note 5, at 137-66. "Adams seldom acted without prior congressional approval." *Id.* at 164. "It remains for Congress to prescribe such regulations as will enable our

merchants to arm in self-defense—or, as Alexander Hamilton put it, to “Grant Qualified letters of marck,”¹²¹ or special letters of marque with authority to repel aggressions and capture assailants.¹²²

Throughout this period, the congressional authority to issue letters of marque and reprisal was strictly protected. Midway through the war, when President Adams lifted his executive order restricting the arming of merchant ships, he was criticized for violating separation of powers principles. James Madison and others thought it was beyond the president’s power even to revoke his own executive order.¹²³ Lifting the restriction was seen as granting the merchants an “indirect license to arm,”¹²⁴ an action that could only be taken by Congress. Despite the uproar, however, the administration generally agreed with Congress that any measure permitting merchant ships to use force would have to be authorized by Congress,¹²⁵ and Adams continued to abide by his promise to enforce the Neutrality Act to prevent American ships from attacking foreign vessels.¹²⁶

seafaring citizens to defend themselves against violations of the law of nations . . . ” 7 ANNALS OF CONG., *supra* note 82, at 57 (Presidential Message of John Adams). Hamilton wrote to McHenry in March, 1797, “[W]hen Congress meet, get them to lay an Embargo with liberty to the executive to grant licenses” to armed vessels. Letter from Alexander Hamilton to James McHenry (Mar. 1797), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 574; *see also* Letter from Oliver Wolcott, Jr. to Alexander Hamilton (Mar. 31, 1797), *reprinted in id.* at 571 (urging the president to recommend to Congress “the arming of our vessels for defence with the right of capturing the attacking force”).

¹²¹ Letter from Alexander Hamilton to James McHenry (March 1797), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 574.

¹²² Letter from Alexander Hamilton to T. Sedgwick (Jan. 20, 1797), *reprinted in id.* at 474.

¹²³ *See* Letter from James Madison to Thomas Jefferson, *reprinted in* 6 WRITINGS OF JAMES MADISON, *supra* note 105, at 313; *see also* 8 ANNALS OF CONG., *supra* note 40, at 1324 (remarks of Rep. Nicholas) (“[T]he Executive had taken measures which would lead to war . . . he had never heard it doubted that Congress had the power over the progress of what led to war, as well as the power of declaring war; but if the President could take the measures which he had taken, with respect to arming merchant vessels, he, and not Congress, had the power of making war.”). Madison’s views of the illegality of the president’s actions were based not on the constitutional war powers of Congress but on the president’s actions being either a violation of the law of nations, which was the “law of the land,” or a usurpation of the legislative power “to define the law of nations.” Letter from James Madison to Thomas Jefferson, *reprinted in* 6 WRITINGS OF JAMES MADISON, *supra* note 105, at 313.

¹²⁴ Letter from James Madison to Thomas Jefferson, *reprinted in* 6 WRITINGS OF JAMES MADISON, *supra* note 105, at 313.

¹²⁵ Secretary of State McHenry noted that the president would annul the circular letter prohibiting arming and “therefore submit[] it to Congress to prescribe such regulations and penalties in the case as may be thought proper and necessary.” Letter from James McHenry to John Adams (May 14, 1798), *reproduced in* ADAMS PAPERS Reel 387 (microfilm, completed in 1969).

¹²⁶ *See* Message to Congress of Mar. 19, 1798, *reprinted in* 8 ANNALS OF CONG., *supra* note 40, at 1271-72; *see also id.* at 1330-31 (remarks of Rep. Dana) (stating

The Adams administration approached Congress several times in the course of a year before the legislature would agree even to authorize merchant vessels to arm in self-defense. In June 1797 Congress refused to authorize the arming of merchant vessels to defend themselves.¹²⁷ Various Congressmen noted that the power to authorize merchants to arm in self-defense was a congressional, not an executive, power.¹²⁸ When the measure to authorize the arming of merchant ships was reintroduced, and once more defeated, in December, numerous Congressmen noted that "it was proper to regulate the arming of merchant ships by a Legislative provision instead of an Executive one."¹²⁹ In June of 1798, the House debated and finally passed a bill authorizing merchant ships to arm to defend themselves.¹³⁰ The measure was strictly limited to defensive reprisals. Section 3 of the bill prohibited merchant vessels from attacking ships of nations at peace with the United States.¹³¹ Furthermore, no authority was given to attack French warships that had not attacked an American ship,¹³² nor was "the President authorized to fit out privateers . . ." ¹³³ As Representative Harper explained, "[O]ur vessels will only have power to use their arms in repelling . . . and to make reprisals on the aggressors by capture."¹³⁴

that the arming of merchant ships was "for the purpose of defence merely, and not to cruise or plunder").

¹²⁷ See 7 ANNALS OF CONG., *supra* note 82, at 282.

¹²⁸ For example, Representative Dayton thought it unwise to "establish the principle, that merchant ships have a right to arm, without an act of the Legislature to sanction the practice." *Id.* at 282. Representative Nicholas noted that no one "would contend that the President had the power to [prohibit or authorize arming], according to his will." *Id.* at 271.

¹²⁹ *Id.* at 764 (remarks of Rep. Sewall); see also *id.* at 777 (remarks of Rep. Dana) (noting the necessity for congressional action).

¹³⁰ See 8 ANNALS OF CONG., *supra* note 40, at 1899-1917, 1926. On June 6, 1798, Representative Foster proposed authorizing the president to issue general letters of marque and reprisal against all French ships, unarmed as well as armed, until France revoked its decrees authorizing the capture of American ships. See *id.* at 1879. Representative Sitgreaves thought the issuance of general letters of marque and reprisal was tantamount to declaring war, a power that is "by the Constitution placed in this department of the Government [Congress]." *Id.* at 1884-85. Representative Gallatin argued that Foster's resolution was little different from one of Sitgreaves' own. See *id.* at 1881. Sitgreaves responded that his motion was for "special reprisal, in cases limited and defined; the present propositions are for letters of general marque and reprisal . . ." *Id.* at 1884. Deliberation on Foster's motions was postponed. See *id.* at 1890-91.

¹³¹ *Id.* at 1899.

¹³² *Id.* at 1902.

¹³³ *Id.* (statement of Rep. Sitgreaves).

¹³⁴ *Id.* at 1908 (statement of Rep. Harper); see also *id.* at 1915-16 (statement of Rep. Gallatin) (distinguishing this bill from an amendment proposed by Rep. Harper that would have allowed merchantmen to take or destroy any French ship that had captured an American ship, stating that he considered the amendment "the same as granting letters of marque and general reprisal"); *id.* at 1915-16 (statement of Rep.

Administration efforts to secure congressional authorization of offensive reprisals by merchant seamen also met with great resistance. In April, 1798, Congress debated a presidential request to allow, among other things, private vessels to attack French ships.¹³⁵ The executive's supporters in Congress¹³⁶ also introduced a resolution permitting public and private vessels to capture or destroy armed French vessels in certain limited circumstances.¹³⁷ Both sides of the debate agreed that the president could not instruct private or public vessels to attack and capture armed French vessels that had not attacked them first without congressional authorization.¹³⁸ Representative James Bayard, a Federalist

Sitgreaves) (responding to Gallatin that even with the proposed amendment the bill would still be "a part of that system of special reprisals already adopted . . . [it gives] a power to . . . merchant ships [only] to take such vessels . . . as have actually [taken our vessels]").

¹³⁵ See A. DE CONDE, *supra* note 118, at 70-71.

¹³⁶ See e.g., 8 ANNALS OF CONG., *supra* note 40, at 1820 (statement of Rep. Kittera) (arguing that commanders of United States vessels should be allowed to make reprisals when French privateers were within American ports).

¹³⁷ See *id.* at 1783; see also A. SOFAER, *supra* note 5, at 156. (The authorization for public armed vessels was broader than for private armed vessels. Private vessels could only capture and destroy a French vessel that had attacked them or had captured a United States vessel. Public vessels could capture and destroy a French vessel that was found attacking any United States vessel or was within a certain distance of the United States coast, or had been captured. This distinction reflected the perceived need for stricter control over the authorization of private forces.)

¹³⁸ Representative Gallatin noted that if "French privateers were committing depredations . . . within our jurisdiction . . . [even] without the bill, the President had full power to apply . . . any . . . force at his disposal, in repelling the outrage." 8 ANNALS OF CONG., *supra* note 40, at 1820. Gallatin's remarks, however, did not imply that the president could go beyond repelling attacks on commerce within United States jurisdictions without congressional authorization. As a spokesman for the Republican opposition to war measures, Gallatin argued that letters of marque "are given to private vessels alone; . . . [b]ut these resolutions are neither general nor specific letters of marque. They are instructions to our public vessels to make war." *Id.* at 1809.

The Federalists, on the other hand, believed that the issuance of letters of marque and reprisal was distinct from declaring war, especially when, as here, Congress would be utilizing that power to grant specific, limited, and defensive reprisals. While both Republicans and Federalists recognized that the authorization to private vessels to capture French armed vessels was a form of letters of marque and reprisal, their main source of disagreement was the effect of granting such letters. The Federalists viewed the authorization, which was limited to armed vessels located off the American coast, as a special reprisal, rather than as general letters of marque and reprisal that would authorize "indiscriminate attack on all vessels belonging to the French Republic." *Id.* at 1803 (statement of Rep. Sitgreaves). They concluded, therefore, that such measures did "not amount to a cause of war," because they were "measures of strict defense." *Id.* at 1803.

In contrast, Gallatin and other Republicans saw these measures as "neither more nor less than war." *Id.* at 1806 (statement of Rep. Venable); see also *id.* at 1814 (statement of Rep. Lyons) (describing the bill "as a declaration of war"); *id.* at 1816-17 (statement of Rep. McDowell) ("[A]s the bill now stood, it was tantamount to a declaration of war."); *id.* at 1826 (statement of Rep. Macon) (commenting that the bill could "be in effect a declaration of war"); *id.* at 1807 (statement of Rep. Williams)

supporter of strong military measures, stated, "He had no doubt, that when one nation infringes the rights of another," the wronged nation could take measure against the wrongdoer, but that "in this country, . . . the President has no power to act in the case. Congress only could authorize reprisals."¹³⁹ Representative Albert Gallatin, the leader of the Republican opposition to war measures, quickly agreed with Bayard: "[T]he President had not power to employ an armed force to make *reprisals* of vessels within our jurisdiction which may have taken vessels belonging to the United States [outside our seacoast]."¹⁴⁰

On July 9, 1798, Congress finally enacted legislation authorizing the president to commission private ships to attack and capture armed French vessels.¹⁴¹ Again, substantial debate took place as to whether the president should be authorized to commission private ships in this way,¹⁴² and again, the general assumption of all participants was that the authorization of such hostilities by private parties, even in self-defense, was a congressional power. That this measure was controlled by the *marque* and *reprisal* clause also appears in the debates.¹⁴³

B. *Covert Operations and Congressional Authority*

The constitutional understanding of the Framers and early leaders of the Republic outlined above would seem to bar the modern-day executive use and authorization of paramilitary troops, because the utiliza-

(noting that the resolutions were "nothing short of a declaration of war").

Political considerations were obviously strong factors in how one characterized these measures. The Federalists, perceiving a public reluctance to engage in war, chose to characterize the measures as specific reprisals for self-defense. The Republican view that the measures constituted war was an effort to sway public opinion against using more force. The salient point, however, is that both sides understood that measures beyond response to a direct attack required congressional authorization.

¹³⁹ *Id.* at 1828.

¹⁴⁰ *Id.* at 1831 (emphasis added); *see also id.* at 1832 (statement of Rep. Craik) (Absent congressional authorization the president "certainly could not employ [force] in the manner directed by this bill.").

News of the appearance of a French privateer off the Delaware coast led the House to approve the resolution late on Friday, May 25, 1798, instead of waiting until Monday. The reason for the urgency was the belief that to wait would leave the president without constitutional power to act over the weekend. *See* 8 ANNALS OF CONG., *supra* note 40, at 1831-34.

¹⁴¹ *See* Act of July 9, 1798, ch. XX, 1 Stat. 578 (1798).

¹⁴² *See* 8 ANNALS OF CONG., *supra* note 40, at 2067-82.

¹⁴³ Representative Dana noted that the granting of letters of *marque* and *reprisal* would be consistent with a state of peace and then stated that this measure is "less offensive than the granting [of] letters of *marque* and *reprisal* indiscriminately against French vessels; for it is restricted to capturing armed vessels, . . . it is of the nature of limited *reprisal*." *Id.* at 2075-76. Representative Smith agreed that letters of *marque* and *reprisal* "are not absolute war; but to authorize the fitting out of privateers against any Power is war direct." *Id.* at 2068.

tion of these forces is analogous to the use of private forces to conduct warfare in eighteenth century America.¹⁴⁴ Various rationales, however, have been marshalled to justify primary executive authority over covert action, the most important of which are the expansion of the executive foreign affairs power in the last century and the importance of secrecy in the conduct of covert operations. This section of the Article will show that when subjected to scrutiny these justifications do not support the claims of presidential power. Furthermore, it will explain how the policies underlying the decision to place the *marque* and reprisal power in the legislature—fears about the uniquely destructive potential of private armies and the desire to make entry into armed conflict of any kind difficult—are equally compelling in the context of covert paramilitary activities. Indeed, these similarities support, far more strongly than the foreign affairs argument undermines, the application of the *marque* and reprisal clause to covert operations.

1. The President as the Sole Organ of the Federal Government in Foreign Affairs

Numerous presidents and commentators have argued that presidents' plenary power over foreign affairs¹⁴⁵ justifies their command of CIA paramilitary operations,¹⁴⁶ and that any decision to rely on paramilitary force as an instrument of United States foreign policy is inherently executive.¹⁴⁷ According to these proponents of executive power there is no limitation on a president's or the CIA's power to authorize paramilitary actions against foreign governments apart from statutes mandating adherence to congressional oversight requirements.¹⁴⁸ Furthermore, the practical need of covert paramilitary opera-

¹⁴⁴ See *supra* notes 78-79 and accompanying text.

¹⁴⁵ In the absence of specific constitutional directives concerning the power to conduct foreign affairs, United States presidents have historically claimed possession of the power over foreign policymaking. Throughout history, Congress has, at varying levels of intensity, disputed these executive claims of power. See R. HOXIE, *COMMAND DECISION AND THE PRESIDENCY* 3-32 (1977); A. SOFAER, *supra* note 5, at 94-101, 137-61, 196-208 (discussing foreign affairs debates during the presidencies of Washington, Adams, and Jefferson). Presidents have normally been successful in advancing their constitutional interpretations to justify their actions. See R. PIOUS, *THE AMERICAN PRESIDENCY* 332 (1979). Executive dominance of foreign policymaking is also recognized and endorsed by many contemporary commentators. See, e.g., E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 255-56 (1984).

¹⁴⁶ See, e.g., Houston Memorandum, *supra* note 14, at 1-2; *Military Hearings*, *supra* note 13, at 1604.

¹⁴⁷ See *supra* note 13 and accompanying text.

¹⁴⁸ See, e.g., *House Intelligence Hearings*, *supra* note 12, at 1756, 1760 (testimony of Mitchell Rogovin, Special Counsel to the Director of the Central Intelligence Agency).

tions for discretion, speed, and secrecy mandate a uniform, focused control that only the executive branch can provide.¹⁴⁹

This defense of executive supremacy, however, is inadequate for practical as well as legal reasons. First, the foreign affairs power of the president is limited by two external sources: the congressional war power and international law. Second, secrecy in the conduct of covert warfare is impossible as a practical matter, and the pretense of secrecy is necessary only where covert activities violate international law—the very source from which the foreign affairs power derives its legitimacy.

a. *The Legal Rationale for Executive Control over Covert War*

As the Supreme Court has observed, the foreign affairs power stems not from any affirmative constitutional grant, but rather from the powers attributed to sovereignty by international law.¹⁵⁰ Deriving the executive's foreign affairs power from international law suggests a concomitant limitation on that power.¹⁵¹ Both James Madison¹⁵² and Al-

¹⁴⁹ See *infra* notes 190-204 and accompanying text.

¹⁵⁰ See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936); see also *In re Neagle*, 135 U.S. 1, 64 (1890) (The president's duty to enforce the law is not limited to execution of statutes, but includes the enforcement of the "rights, duties and obligations growing out of . . . our international relations.").

¹⁵¹ For discussions of how the inherent powers derived from international law must be limited by that law, see *The Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 44 (1890); G. SUTHERLAND, *CONSTITUTIONAL POWERS AND WORLD AFFAIRS* 94, 141 (1919); Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1114-30 (1985); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 968 (1982).

¹⁵² See Madison, *Helvidius No. II*, in 2 WRITINGS OF JAMES MADISON, *supra* note 105, at 159-60 (stating that the executive is bound to execute international law as law of the land).

Five years later Madison again argued that the executive could not act in derogation of international law. During the quasi-war with France, see *supra* text accompanying notes 117-43, President Adams revoked an executive order he had issued prohibiting the arming of American merchant ships in U.S. ports as a violation of neutrality. See *supra* notes 123-24 and accompanying text. Madison, among others, claimed Adams had granted the merchants "an indirect license to arm." Letter from James Madison to Thomas Jefferson, *reprinted in* 6 WRITINGS OF JAMES MADISON, *supra* note 105, at 313. Madison complained that the executive had no power to grant such an indirect license:

The first instructions were no otherwise legal than as they were in pursuance of the law of nations, and, consequently in execution of the law of the land. The revocation of the instructions is a virtual change of the law, and consequently a usurpation by the Executive of a legislative power.

Id. During the ensuing debate over Franco-American relations, various Congressmen noted, without contradiction, that the president could use the nation's armed forces only in a "manner authorized by the law of nations." 8 ANNALS OF CONG., *supra* note 40, at 1807 (statement of Rep. Williams); *accord id.* at 1806 (statement of Rep. Venable).

exander Hamilton¹⁵³ recognized that the executive was constitutionally required to follow international law in the conduct of foreign policy. In *Brown v. United States*,¹⁵⁴ the majority,¹⁵⁵ the dissent,¹⁵⁶ and the Justice Department¹⁵⁷ all recognized that the scope of executive war powers must be construed consistently with international law. This position has been followed by other attorneys general,¹⁵⁸ commentators,¹⁵⁹ and courts.¹⁶⁰ This conclusion flows logically from the well-recognized prin-

¹⁵³ See Hamilton, *Pacificus No. 1*, reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 49, at 40, 43 (executive bound to execute international law of neutrality "to avoid giving a cause of war to foreign powers").

¹⁵⁴ 12 U.S. (8 Cranch) 110 (1814).

¹⁵⁵ Chief Justice Marshall wrote for the majority, "[A] construction [of the Constitution] ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere." *Id.* at 124-25. Marshall thus drew on international law to interpret the president's constitutional powers.

¹⁵⁶ *Id.* at 129, 153 (Story, J., dissenting).

¹⁵⁷ The Government argued that the "executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnatio[n] of that property which, according to modern usage, ought not to be confiscated." *Id.* at 128.

¹⁵⁸ Attorney General William Wirt concluded in an 1822 opinion that the obligation of the president as executive officer to enforce the laws of the country extended to the "general laws of nations." 1 Op. Att'y Gen. 566, 570 (1822). Attorney General James Speed wrote that the laws of war,

[l]ike the other laws of nations[,] . . . are of binding force upon the departments and citizens of the Government, though not defined by a law of Congress [U]nder the Constitution of the United States no license can be given by any department of the Government to take human life in war, except according to the law and usages of war.

11 Op. Att'y Gen. 297, 299-301 (1865).

¹⁵⁹ See Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 169 (1922) ("Courts have held that the President's power in conducting war is limited by international law and any action he may authorize contrary to that law is void."); Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Re-examined*, 9 HASTINGS CONST. L.Q. 719, 726-27 (1982) ("[D]uring the conduct of 'military operations,' the President . . . is . . . bound by international law"); Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 VA. J. INT'L L. 43, 49 (1969) (suggesting a requirement of congressional approval if "purpose of hostility is in violation of international law"). *But see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 171 (1972) (stating that the president can override international law and treaty obligations); RESTATEMENT OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES (REVISED) § 135 reporter's note 3 (Tent. Draft No. 6, 1985) (same).

¹⁶⁰ In *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870), the dissenting justices wrote that the president had no power to violate international law, because even Congress lacked such power. *Id.* at 315-16 (Field, J., dissenting). The majority assumed a lack of presidential authority to act at all without congressional action. *Id.* at 304-14; *see also* *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) ("International law is a part of the laws of the United States. . . ."), *aff'd on other grounds sub nom.* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981). *But see* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (dicta suggesting that executive authorization can override international law). Just recently the Eleventh Cir-

ciple that international law is an integral part of the law of the land.¹⁶¹ The president is constitutionally obliged to execute the law of the land, whatever its source, and any derogation of international law requires the express approval of Congress.¹⁶² Thus, even assuming that the executive branch has the authority to undertake foreign intelligence activities, such power can only be exercised "in accordance with applicable norms of international law."¹⁶³

The limits placed on the exercise of executive power by international treaty obligations are similar to the restraints imposed by international law. Because the Supreme Court has held that the Constitution accords treaties the same status as statutes under domestic law,¹⁶⁴ the president should be required to adhere to the law laid down by those treaties just as he is obliged to obey statutory law.¹⁶⁵ The Supreme Court held in *Cook v. United States*¹⁶⁶ that executive power is limited by treaty,¹⁶⁷ a position supported by the statements of early

cuit held that the actions of a Cabinet official override international law in domestic courts. See *Garcia-Mir v. Meese*, 788 F.2d 1146 (11th Cir. 1986).

¹⁶¹ See *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815); 1 Op. Att'y Gen. 26, 27 (1792); Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1 & 2), 101 U. PA. L. REV. 26 (1952), 101 U. PA. L. REV. 792 (1953); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 (Tent. Draft No. 6, 1985).

¹⁶² In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson noted, "[W]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.* at 637 (Jackson, J., concurring). The well-established rule that "an act of Congress ought never to be construed to violate the law of nations, if any other construction remains," *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64, 117-18 (1804), reflects a presumption that Congress will keep the rules of international law in force. Thus, presidential violations of international law are contrary to the implied will of Congress, and therefore, under Jackson's analysis, the executive power is at its lowest ebb. See also Q. WRIGHT, *supra* note 159, at 298 ("The President has no power to direct the capture of private property without express authorization of statute, treaty or international law."). See also Lobel, *supra* note 151, at 1114-21 (discussion of the argument that the executive's foreign affairs powers are limited by international law).

¹⁶³ See *Church Committee Report*, *supra* note 65, at 33.

¹⁶⁴ See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U. S. 580, 590 (1884).

¹⁶⁵ See Lobel, *supra* note 151, at 1071, 1121-29. Indeed, various courts have asserted the power to adjudicate whether executive regulations are in conformity with a treaty. See, e.g., *Collins v. Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir. 1983); *United States v. Decher*, 600 F.2d 733, 737 (9th Cir. 1979).

¹⁶⁶ 288 U.S. 102 (1933).

¹⁶⁷ The defendants in *Cook* were Coast Guard officers who had seized a British liquor-smuggling ship outside the boundary set for such seizures by an Anglo-American treaty. The government argued that the executive had ratified the seizure so that the ship should be held forfeit despite the treaty violation. The Supreme Court disagreed:

The objections to the seizure is not that it was wrongful merely be-

congressional leaders and statesmen¹⁶⁸ as well as modern commentators.¹⁶⁹ The Supreme Court has permitted Congress to enact statutes in derogation of treaties and customary law,¹⁷⁰ but such derogation power has never been extended to unilateral executive actions. Decisions to breach treaty obligations or customary law have the potential to create international strains and repercussions far more serious than routine foreign policy decisions. Separation of powers concerns dictate that if such actions must be taken they should be subject to the greater scrutiny provided by a decisionmaking process involving both houses of Congress as well as the president.

An international law limitation on the president's foreign affairs power, however, does not indicate who is to determine whether a par-

cause made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. . . . Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

Id. at 121-22.

¹⁶⁸ Jefferson noted that although a subsequent law may override a treaty "the Legislature is the only power which can control a treaty." Letter from Thomas Jefferson to James Madison (May 31, 1798), reprinted in 10 WRITINGS OF THOMAS JEFFERSON 41 (A. Lipscomb ed. 1903). The 1798 debates in Congress on rescinding American treaties with France generally recognized that, until a declaration is made by Congress annulling the treaties, "they are binding upon all the departments of the Government, as law of the land." 8 ANNALS OF CONG., *supra* note 40, at 1901-02 (remarks of Rep. Sitgreaves); see also *id.* at 1902 (remarks of Rep. Sitgreaves) (absent contrary authorization from Congress, "the treaty is the rule of conduct for the departments of Government, and for our citizens generally"); *id.* at 2120 (remarks of Rep. Sewall) (only Congress has the power to suspend a treaty).

Although Jefferson believed that only the legislature had the constitutional power to breach treaties, he apparently saw executive treaty violations as political questions not cognizable in the courts. When asked by the French ambassador what redress existed if the president declines to observe a treaty, Jefferson responded, "[T]he Constitution had made the President the last appeal." 4 J. MOORE, *supra* note 43, at 681. Since Jefferson also argued, "[T]he Legislature is the only power which can control a treaty," Letter from Thomas Jefferson to James Madison (May 31, 1798), reprinted in 10 WRITINGS OF THOMAS JEFFERSON, *supra*, at 41, "[or] declare [it] infringed and rescinded," JEFFERSON'S MANUAL OF SENATE PROCEDURE, reprinted in SENATE MANUAL, S. DOC. NO. 1, 94th Cong., 1st Sess. 668 (1975), his comments to the French ambassador should be understood as a statement about judicial review rather than as a determination that the executive need not observe treaty obligations.

¹⁶⁹ See Moore, *The Justiciability of Challenges to the Use of Military Forces Abroad*, 10 VA. J. INT'L L. 85, 102-03 (1969).

¹⁷⁰ See *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); *The Head Money Cases*, 112 U.S. 580 (1884). Lower federal courts have consistently followed the Supreme Court cases. See, e.g., *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); *Schroeder v. Bissell*, 5 F.2d 838 (D. Conn. 1925).

ticular paramilitary operation is in violation of international law. Whether a use of force is defensive or aggressive;¹⁷¹ whether an emergency situation exists which justifies the use of executive authority exists;¹⁷² whether another nation's conduct justifies an executive determination that a treaty obligation with the United States has been breached;¹⁷³ whether the United States is "directing" or "substantially participating" in the activities of private armed bands;¹⁷⁴ or whether United States troops have been placed in a situation "where imminent involvement in hostilities is clearly indicated by the circumstances"¹⁷⁵—all require an initial factual determination on which any separation of powers analysis must turn.

If the president is allowed to make the initial factual determination, she will invariably find that the facts permit the exercise of executive power. The president will always claim that she is using force defensively, that the other nation breached the treaty first, that an emergency situation exists, and that United States troops are not in imminent danger of being involved in hostilities.¹⁷⁶ The limitation placed on executive foreign affairs power by international law, however, precludes executive action without congressional approval in certain situations. Actions that presumptively raise serious international law concerns, or are likely to violate international law, must be initially reviewed by Congress. Where an activity is inherently suspect under international law, the president should not be allowed to determine

¹⁷¹ Compare U.N. CHARTER art. 2, para. 4, prohibiting aggression, with *id.* art. 51, permitting self-defense.

¹⁷² There are standards for determining whether an emergency situation exists in other contexts. See, e.g., International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1982) (defining conditions under which the president can act in an economic emergency).

¹⁷³ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, 80 I.L.M. 679, 701, reprinted in 63 AM. J. INT'L L. 875, 893-94 (1969) (setting forth the standard for determining when there has been such a substantial breach of a treaty that the other parties to the treaty no longer need abide by it).

¹⁷⁴ See United Nations General Assembly Definition of Aggression, *supra* note 87 and accompanying text.

¹⁷⁵ War Powers Resolution, 50 U.S.C. § 1543 (1) (1982).

¹⁷⁶ For example, despite congressional attempts to set standards defining when the executive may use the armed forces and when she may declare economic embargoes against other countries, see, e.g., *id.* at §§ 1541-1548; The International Economic Emergencies Power Act, 50 U.S.C. §§ 1701-1706 (1982) (permitting executive action in situations presenting an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States"), presidents have managed to avoid those requirements by claiming that they have, in fact, met the standard in each situation. For executive evasions of these standards, see Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L. REV. 715, 742-50 (1984); J. Bingham, N.Y. Times, May 3, 1985, at E22, col. 3 (letter to the editor describing evasion of the standards for declaring an embargo).

unilaterally whether it falls within a proscribed category; preliminary congressional examination and approval are required.

Paramilitary operations backed by the United States raise precisely these concerns. Covert paramilitary operations constitute resorts to force that are, at worst, in violation of international law, and, at best, of doubtful legality. Indeed, United States aid to the contras in Nicaragua,¹⁷⁷ the Bay of Pigs invasion of Cuba, and the overthrow of the Guatemalan government in 1954 were all in violation of the United Nations charter's proscription on the use of force.¹⁷⁸ None of these acts involved an American response to an armed attack against the United States or any other nation.¹⁷⁹ Because paramilitary operations are likely to raise serious international legal questions, there must be checks on their use by the executive. Where Congress determines that a particular operation is in conformity with international requirements, it can authorize overt assistance and publicly defend the United States position. If, however, a proposed paramilitary program violates international law, that program may be authorized, if at all, only with the concurrence of both the executive and legislative branches of our government.¹⁸⁰

¹⁷⁷ See, e.g., *Military And Paramilitary Activities In And Against Nicaragua* (Nicar. v. U.S.) (I.C.J. June 27, 1986) (Merits); Memorandum of the National Emergency Civil Liberties Committee on the United States, Nicaragua and The World Court (1985) reprinted in 131 CONG. REC. H4138-39 (daily ed. June 12, 1985); Joyner & Grimaldi, *The United States & Nicaragua: Reflections on the Lawfulness of Contemporary Interventions*, 25 VA. J. INT'L L. 621, 680-82 (1985). But cf. *id.* at 680 (quoting Professor John N. Moore's views that United States actions are legal on self-defense grounds, according to the Monroe Doctrine's definition of self-defense).

¹⁷⁸ See Rowles, *The United States, The OAS & The Dilemma of the Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385, 396, 399-404 (1983) (stating that paramilitary operations against Cuba, Guatemala, and Nicaragua violate the charters of the United Nations and Organization of American States); see also Falk, *supra* note 68, at 146-47 (describing CIA covert activities carried on without the consent of the foreign governments in Chile, Vietnam, Iran, Guatemala, Indonesia, Cuba, Greece, and Cambodia).

¹⁷⁹ The United States government contends that its actions against Nicaragua have been taken in legitimate self-defense, in response to Cuban and Nicaraguan aggression against El Salvador in the form of military aid to the anti-government rebels. See U.S. DEP'T OF STATE, SPECIAL REPORT NO. 132, *REVOLUTION BEYOND OUR BORDERS: SANDINISTA INTERVENTION IN CENTRAL AMERICA* 1-2 (1985). If Nicaragua has been aiding the El Salvadoran rebels, such aid does not, in and of itself, constitute an armed attack, and thus does not justify acts taken in self-defense. See I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE* 370 (1963). Actual incursions by rebels controlled by or acting as an instrumentality of another state are necessary to constitute an armed attack. See Meeker, *Vietnam and the International Law of Self-Defense*, 56 DEP'T ST. BULL. 54, 59 (1967). The United States claim has been rejected by the World Court, which held that no armed attack by Nicaragua has taken place. See *Military And Paramilitary Activities In And Against Nicaragua* (Nicar. v. U.S.) §§ 211, 229-230 (I.C.J. June 27, 1986) (Merits).

¹⁸⁰ See Wright, *The Power of the Executive to Use Military Force Abroad*, 10 VA.

In addition to the limitations imposed by international law, the president's foreign affairs power is also limited by the congressional war power. As Justice Sutherland wrote in *United States v. Curtiss-Wright*, any executive foreign affairs power derived from international law "must be exercised in subordination to the applicable provisions of the Constitution."¹⁸¹ Article I, section 8 of the Constitution requires that opportunities for unilateral executive action utilizing force abroad be narrowly circumscribed.¹⁸² Since the decision to use armed force is explicitly given to Congress, any exception to this rule deriving from international law must be limited to those categories of hostilities that are clearly permissible under international norms. In dubious or questionable cases, it is for Congress to determine whether or not national security or our international obligations require us to resort to arms.¹⁸³

The precedents upholding executive authority to use force to protect American citizens¹⁸⁴ and repel armed attack¹⁸⁵ are consistent with these principles. Article 51 of the United Nations charter clearly permits a nation to use force in self-defense to repel armed attack.¹⁸⁶ Some commentators have argued that the concept of self-defense should be expanded to include any significant threat to United States national security,¹⁸⁷ but these arguments have been rejected by most international law scholars.¹⁸⁸ Indeed, the World Court has recently rejected by a wide margin the United States argument that it was entitled to aid the Nicaraguan contras under the rubric of collective self-defense, holding that collective self-defense is applicable only to respond to an armed attack and not to lesser forms of possible international delicts posing security threats.¹⁸⁹ The right to self-defense beyond responding to an

J. INT'L L. 43, 49 (stating that congressional approval necessary where hostilities are "in violation of international law").

¹⁸¹ 299 U.S. 304, 320 (1936).

¹⁸² See *infra* notes 246-62 and accompanying text.

¹⁸³ See *supra* note 162.

¹⁸⁴ See *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

¹⁸⁵ See *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

¹⁸⁶ See U.N. CHARTER, art. 51, reprinted in INTERNATIONAL COURT OF JUSTICE, CHARTER OF THE UNITED NATIONS, STATUTE AND RULES OF COURT 16 (1947) ("Nothing in the . . . charter shall impair the inherent right of . . . self-defense if an armed attack occurs against a member of the United Nations."); D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 87-90 (1958); L. HENKIN, HOW NATIONS BEHAVE 141-45 (2d ed. 1979); see also Moore, *Grenada and The International Double Standard*, 78 AM. J. INT'L L. 145, 153-54 (1984) (stating that the use of force to protect citizens is lawful).

¹⁸⁷ See, e.g., Rostow, *Law is Not a Suicide Pact*, N.Y. Times, Nov. 15, 1983, at 35, col. 3.

¹⁸⁸ See, e.g., L. HENKIN, *supra* note 159, at 141-45; P. JESSUP, A MODERN LAW OF NATIONS 165-6 (1948); 2 L. OPPENHEIM, *supra* note 90, at 156.

¹⁸⁹ See *Military And Paramilitary Activities In And Against Nicaragua* (Nicar. v.

armed attack, therefore, is certainly not a settled international law standard.¹⁹⁰ Such expansive claims would eviscerate both constitutional and international limitations on executive uses of force abroad, because the president can always claim that the actions of other nations threaten national security and must be defended against with arms.

b. *The Secrecy Rationale for Executive Power*

The importance of secrecy and discretion in high level exchanges among national leaders has always been a cornerstone of the argument for the executive's plenary foreign affairs power. Open debate and public acknowledgment of paramilitary operations are admittedly in fundamental conflict with this perceived need for secrecy. The constitutional framework, however, strikes a careful balance between the requirements of secrecy in foreign policy and the need for democratic decision-making.¹⁹¹ Where secrecy was seen as paramount, the Framers provided the executive with ample authority. For example, as John Jay pointed out in the Federalist Papers, the negotiation of treaties often requires absolute secrecy and immediate dispatch.¹⁹² The president, therefore, was vested with the power to negotiate treaties, while the House was excluded entirely from the treaty ratification process.¹⁹³ Similarly, in conducting "military operations . . . secrecy was necessary sometimes"¹⁹⁴ and thus the president was made commander-in-chief of the armed forces.¹⁹⁵

Decisions whether to use force, however, were made the exclusive preserve of Congress. The Framers gave the power to declare war and to issue letters of marque and reprisal to Congress to ensure that hostilities using private or public forces would not be initiated without public debate. As James Madison noted, if American interests require a resort to force, armed hostilities should be undertaken " 'not in an underhand

U.S.) §§ 211, 229-230 (I.C.J. June 27, 1986) (Merits). *But see id.* at §§ 172-173 (Schwebel, J., dissenting).

¹⁹⁰ Compare Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 559-63 (1963); L. HENKIN, *supra* note 186, at 141-45, 295-96 (stating that Article 51 of the United Nation's Charter permits the use of force in self-defense only when there has been an actual armed attack) with MacChesney, *Some Comments on the Quarantine of Cuba*, 57 AM. J. INT'L L. 592, 596-97 (1963); McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, in *id.* at 597, 599-601 (1963) (justifying United States action toward Cuba as anticipatory self-defense).

¹⁹¹ See generally D. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981).

¹⁹² See THE FEDERALIST No. 64 (J. Jay).

¹⁹³ See D. HOFFMAN, *supra* note 191, at 32-33.

¹⁹⁴ 3 FEDERAL CONVENTION RECORDS, *supra* note 49, at 326 (remarks of George Mason).

¹⁹⁵ See U.S. CONST. art. II, § 2.

and illicit way, but in a way consistent with the laws of war and becoming our national character.’”¹⁹⁶ Moreover, as current members of the House have recognized, executive initiation of covert war “commit[s] us to a specific foreign policy that has never been openly defended and supported, and whose outcome cannot be guided by our own democratic institutions.”¹⁹⁷ Thus, reliance on covert action offers a secret shortcut around democratic decisionmaking¹⁹⁸ that distorts the democratic process¹⁹⁹ and is fundamentally incompatible with the demands of our constitutional system.²⁰⁰

Supporters of executive power often argue that Congress’s funding power adequately serves the need for democratic decisionmaking in the area of covert activities because the press and the public learn of covert operations when Congress debates whether to continue funding the operations.²⁰¹ This argument must fail—only when Congress is involved in the decision of whether to launch these operations from the start is the democratic process truly served. The Framers provided a constitutional framework that requires Congress to *initiate* hostilities, not simply act to override unilateral executive action through the use of the funding power.²⁰² Once hostilities are initiated, thousands of lives may be lost and millions of dollars of economic damage may be incurred

¹⁹⁶ ROBERTSON, FRANCISCO DE MIRANDA AND THE REVOLUTIONIZING OF SPANISH AMERICA, H.R. DOC. NO. 1282, 60th Cong., 2d Sess. 364 (1909) (quoting James Madison).

¹⁹⁷ 128 CONG. REC. H9158 (daily ed. Dec. 8, 1982) (remarks of Rep. Bonoir).

¹⁹⁸ See *Church Committee Report*, *supra* note 65, at 16; see also *Should the U.S. Fight Secret Wars?*, *supra* note 100, at 36 (remarks of Angelo Codevilla, staff member of the Senate Select Committee on Intelligence) (stating that the initiation of covert action obfuscates the real issues and acts as a substitute for the formulation of a coherent foreign policy); *id.* at 37 (remarks of Morton Halperin) (covert action commits the United States to warfare without public debate).

¹⁹⁹ See Halperin & Stone, *Secrecy and Covert Intelligence Collection and Operations*, in GOVERNMENT SECRECY IN AMERICA, NONE OF YOUR BUSINESS 110-22 (N. Dorsen & S. Gillers eds. 1974).

²⁰⁰ See *Church Committee Report*, *supra* note 65, at 156; Borosage, *The Central Intelligence Agency: The King’s Men and the Constitutional Order*, in R. BOROSAGE & J. MARKS, *supra* note 68, at 125; Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 FOREIGN AFF. 1, 15 (1973).

²⁰¹ See *Congressional Oversight of Covert Activities: Hearings Before the House Permanent Select Comm. on Intelligence*, 98th Cong., 1st Sess. 7-8, 34-35 (1983) (testimony of William Colby, former Director of the CIA) [hereinafter *Oversight Hearings*]; *id.* at 75-76 (testimony of Admiral Stansfield Turner, former Director of the Central Intelligence Agency).

²⁰² The War Powers Resolution specifically recognizes this framework and rejects the executive’s use of force except pursuant to congressional authorization or in response to an attack upon the United States, its territories, or its armed forces. See 50 U.S.C. § 1541(c) (1982). If the War Powers resolution is read to permit the executive to use force without congressional authorization, for a period not to exceed 60 days, whenever she determines it to be necessary, the statute would be unconstitutional. See *id.* § 1544(b).

before Congress decides to cut off funds, which is precisely what the constitutional requirement of congressional approval prior to initiation of warfare was designed to prevent. Moreover, warfare, particularly secret warfare, is difficult to end once initiated.²⁰³ Thus, even though the legitimacy of the covert action may become a matter of public debate when funding decisions are made, therefore seeming to satisfy the concern that these decisions be subject to the democratic decisionmaking process, as a practical matter it may be very hard for Congress to end them.²⁰⁴ Finally, the use of congressional funding power as an oversight mechanism undercuts the secrecy rationale that is used to support the argument for executive control in this area. Since it is conceded that these types of operations will eventually become public anyway, there seems to be no logical reason for not allowing Congress to make the initial decision, thereby truly serving the interests of democratic decisionmaking.

Although the secrecy argument may be persuasive in the context of intelligence activities or treaty negotiations, it is less so in the realm of covert paramilitary operations.²⁰⁵ The secrecy rationale admittedly may

²⁰³ Once a paramilitary operation is underway, "it is almost impossible to stop. There is no real check or balance or after-thought a year after the operation has begun." *Oversight Hearings*, *supra* note 201, at 23 (statement of Rep. Fowler); *see also id.* at 139 (statement of Prof. William Miller, Former Staff Director of the Senate Select Comm. on Intelligence) (stating that it is hard to end paramilitary operations "once they start, even if there is a majority sentiment to do so").

²⁰⁴ Passage of appropriations bills cannot be characterized as congressional approval for a particular paramilitary or military action. *See War Powers Resolution*, 50 U.S.C. § 1577 (a)(1); *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973). *But see Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (finding that appropriation did constitute congressional ratification). The War Powers Resolution was designed to explicitly overturn the *Orlando* decision. *See S. REP. NO. 220*, 93d Cong., 1st Sess. 25 (1973).

The nature of the appropriations process makes it difficult for Congress to cut off funding for a particular operation, especially if there is disagreement between the Senate and the House. For example, in October of 1983 the House of Representatives passed legislation which prohibited United States support for military or paramilitary operations in Nicaragua. *See H.R. 2968*, 98th Cong., 2d Sess., 129 CONG. REC. H8431 (daily ed. Oct. 20, 1983). The Senate, however, passed a bill which permitted the executive to spend \$29 million for paramilitary operations in Nicaragua. *See S. 1230*, 98th Cong., 2d Sess., 129 CONG. REC. S15,277 (daily ed. Nov. 3, 1983). Because of the nature of the appropriations process, had the House stood firm at conference, the contras would have received \$50 million under the terms of a continuing resolution. *See 129 CONG. REC. H10,492* (daily ed. Nov. 18, 1983) (remarks of Rep. Miller). Even Representatives who firmly opposed any aide to the contras were, therefore, forced to agree to the Senate bill. *See id.* at H10,478; *see also Oversight Hearings*, *supra* note 201, at 139 (testimony of Professor W. Miller, Former Staff Director of the Senate Select Comm. on Intelligence) (stating that it required four years of successive legislative fund cutoffs before the Vietnam War could be ended).

²⁰⁵ The examples from early American history usually given to support executive power over covert activities relate to intelligence gathering or executive diplomatic initiatives—not paramilitary warfare. *See, e.g.*, President Polk's Message to Congress

support executive control over the distribution of covert propaganda, and does seem to mandate primary executive control over intelligence gathering. Spying by its very nature must be kept secret—for an intelligence mission to be successful, the foreign nation cannot be apprised of the fact that there are spies in its midst.²⁰⁶ Covert paramilitary warfare, on the other hand, does not and cannot strive for invisibility. The nations of the world cannot be kept ignorant of the fact their neighbors are at war.²⁰⁷ Perhaps it is the American role in a covert war that can be concealed.²⁰⁸ But this claim also fails to persuade: it is generally conceded that United States participation in secret wars does not and cannot remain hidden.²⁰⁹ The United States role was not kept secret in any of the paramilitary cases studied by the Senate Select Committee on Intelligence Activities in 1976.²¹⁰ Indeed, our handiwork has been easily recognized in the 1954 overthrow of the Aibenez government of Guatemala,²¹¹ the Bay of Pigs invasion of Cuba in 1961,²¹² and the current contra attacks against the Sandinista government.²¹³

Some commentators and administration officials have argued that even if the activities of the United States are generally known, they must still be officially denied, since the world community would not sanction the American role and open acknowledgement would strain relations with the Soviet Union or other nations.²¹⁴ But United States

(Apr. 20, 1846), *reprinted in* 4 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 103, at 435 (discussing need for secrecy in employing individuals to obtain information or aid in the negotiation of a treaty).

²⁰⁶ The executive branch has often relied on spies and private agents to conduct United States foreign policy. *See* H. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 693-744 (1929).

²⁰⁷ *See* Pratt, *Counterintelligence: Organization and Operational Security in the 1980's*, in 3 INTELLIGENCE REQUIREMENTS FOR THE 1980'S: COUNTERINTELLIGENCE 230-31 (R. Godson ed. 1980); *see also* *Should the U.S. Fight Secret Wars?*, *supra* note 100, at 35 (statement of Sen. Daniel Patrick Moynihan) (noting that there is no such thing as a secret war); *id.* at 39 (statement of Ray Cline) (commenting that military operations are simply impossible to fight secretly).

²⁰⁸ *See* *Should the U.S. Fight Secret Wars?*, *supra* note 100, at 39 (statement of Ray Cline).

²⁰⁹ *See* *Church Committee Report*, *supra* note 65, at 525 ("In the present situation, large-scale operations, such as the support of guerrilla forces, which can neither be kept secret nor plausibly denied should not be undertaken covertly.").

²¹⁰ *See* *Church Committee Report*, *supra* note 65, at 155.

²¹¹ *See id.* at 111.

²¹² *See id.* at 120; *see also* P. WYDEN, *supra* note 64 (discussing the planning and implementation of the Bay of Pigs operation by the CIA).

²¹³ United States support of the Nicaraguan contras is not only recognized by the Reagan administration, but has become a critical part of the president's agenda. *See* *The Contra Crusade*, NEWSWEEK, March 17, 1986, at 20.

²¹⁴ *See* *Should the U.S. Fight Secret Wars?*, *supra* note 100, at 39 (statement of Ray Cline) (noting that the question is whether we "officially admit our responsibility"); *id.* at 45 (statement of Leslie Gelb) (noting that open aid to Afghan rebels would

involvement in major paramilitary operations cannot be plausibly denied,²¹⁵ and it is not clear how official acknowledgement of such adventures would seriously damage our dealings with other countries, once our role has been revealed to them.²¹⁶ It is unlikely that a public announcement of American aid to the Nicaraguan contras, or the Afghan, Angolan, or Cambodian rebels, would make the Nicaraguan, Soviet, Angolan, or Vietnamese governments unwilling to deal with us diplomatically. In fact, these nations all seek diplomatic negotiations with us, despite the de facto open and public aid we have given to the rebels opposing their central governments.²¹⁷ Even if the plausible deniability argument possessed logical force, it does not support unchecked executive authority, since Congress can and has authorized paramilitary activity without officially publishing or announcing its authorization.²¹⁸

strain relations with Soviet Union).

²¹⁵ See Pratt, *supra* note 207, at 231 (stating that paramilitary operations sponsored by the United States are quickly attributed to us).

²¹⁶ Since, for example, the Soviets openly aided one side in the Angolan war, our reluctance to officially admit that we provide aid to certain groups is hard to understand. See H. ROSITZKE, *THE CIA'S SECRET OPERATION: ESPIONAGE, COUNTERESPIONAGE AND COVERT ACTION* 182 (1977). Some argue that it is important to be able to deny covert operations plausibly because it creates less friction with the countries affected. For example, one purported reason that aid to the Afghan guerrillas must be covert is that the government of Pakistan, which sympathizes with the guerrillas, objects to accepting aid overtly. See *Should the U.S. Fight Secret Wars?*, *supra* note 100, at 45 (statement of Leslie Gelb). However, the precise means by which we aid the Afghan rebels can still be denied, without our own role being entirely hidden, thereby protecting Pakistan's secrecy interest.

Lee Hamilton, Chairman of the House Intelligence Committee, has scoffed at the arguments that public denial of United States involvement in the Angolan civil war serves United States interests. "We are playing games with ourselves. It is a contradiction in terms. The president has talked about this, the press writes about it. To say that we can deny we are doing it is a gross deception, it does not fool anybody." N.Y. Times, Apr. 1, 1986, at 3, col. 4. A similar argument could be applied to virtually every significant "covert" paramilitary operation, such as the Nicaraguan, Afghanistani, or Cambodian programs. Hamilton has introduced legislation that "would require that any United States government support for military or paramilitary operations in Angola be the openly acknowledged and publicly debated policy of the United States," and that "any such assistance should not proceed unless the President publicly requests such assistance and the Congress votes to provide assistance." H.R. Rep. No. 508, 99th Cong., 2d Sess. (1986). Hamilton stated that he did not "think it wise to proceed on these highly controversial policy decisions without the support of the Congress. This is not covert action in the ordinary sense of the term, this is a war." N.Y. Times, *supra*.

²¹⁷ See N.Y. Times, June 19, 1985, at 16, col. 3 (Soviet and Afghan governments willing to negotiate with the United States on the Afghan conflict); Crossette, *Hanoi Seems Split On Links With U.S.*, N.Y. Times, May 2, 1985, at 7, col. 1 (statements of Le Duc Tho, Vietnamese Politburo member and Le Mai, Vietnamese Assistant Minister for Foreign Affairs) (stating that the Vietnamese government is willing to talk about Cambodia); N.Y. Times, Apr. 9, 1985, at 7, col. 1 (statement of Daniel Ortega, President of Nicaragua) (stating that he is "'always' ready to talk with Washington").

²¹⁸ For example, Congress secretly authorized the use of military force in the Floridas in 1811 and 1813. See Acts of Jan. 15, 1811, and Feb. 12, 1812, 3 Stat. 471,

Because what is at issue is not secrecy, but official diplomatic deniability, Congress could authorize the activity without publicly announcing or publishing its authorization, just as the executive does.

Covert paramilitary operations approved solely by the executive are unwise, even if it were possible to keep them secret. If the use of force is in conformity with international law, it should be openly undertaken and publicly defended. Official denial of our involvement in covert operations perpetuates the gap between stated norms and actual practice, which renders international norms ineffective.²¹⁹ Given our nation's widely publicized asserted interest in closing that gap in the areas of human rights and terrorism,²²⁰ denial of our involvement in paramilitary operations abroad can only be counterproductive.

Resort to the "plausible deniability" argument is based fundamentally on the suspicion that our covert activities may violate international law and that they would be difficult to defend against international and domestic protest. Some commentators remain unperturbed by the probability of international law violations, and argue that, at times, certain activities must be undertaken even if they are illegal.²²¹ This argument fails for several reasons. First, as already noted, where United States interests are so strong as to require a breach of international law,

472 (1818). Those statutes were not officially reported or promulgated until 1818, after the crisis with Spain regarding the Floridas had past. See Act of March 3, 1811, 3 U.S. Stat. 472 (1818) (prohibiting normal publication of the statute authorizing use of military force in the Floridas).

While in today's world such a congressional vote could not be kept secret, it could be officially denied in the same manner that the president "officially" denies covert operations known to all. Cf. N.Y. Times, Nov. 23, 1985, at A1, col. 2 (reporting President Reagan's public announcement of United States "covert" aid to the Nicaraguan contras and administration approval of "covert" aid to the Angolan rebels).

²¹⁹ See D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AM. J. INT'L LAW 657 (1985) (discussing widening gap between stated reasons for actions and actual reasons).

²²⁰ President Reagan has vehemently criticized terrorist activity and has called for legislation setting up "a better domestic and international legal framework for dealing with terrorism." *Fighting Terrorism: Reagan Asks Lawyers to Help*, 71 A.B.A. J. 17, 17 (Sept. 1985).

²²¹ See *Church Committee Report*, *supra* note 65, at 9 ("We are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply.") (quoting 1954 Hoover commission on government organization); M. COPELAND, *THE GAME OF NATIONS* 10, 12 (1970) ("When we choose to violate any of our policies, from being truthful in our diplomacy to refraining from interfering in the internal affairs of a sovereign nation, we find means outside the normal machinery of government. Our government . . . is able to define a problem, to release forces which, largely on their own power, can effect a solution, and to disclaim any responsibility."); Braden, *I'm Glad the CIA Is Immoral*, *THE SATURDAY EVENING POST*, May 20, 1967, at 10-14 (arguing that the CIA's financial support of student and labor organizations abroad in the 1950's was necessary to prevent the KGB from gaining ideological control of those groups).

Congress, not the president alone, should make that determination. Second, there are certain international norms that the nation should not be able to breach even with congressional approval. Although United States foreign policy needs may sometimes require breaking ordinary or minor norms of international law, they can never necessitate the violation of international principles so fundamental as to constitute international crimes,²²² such as genocide²²³ or aggression.²²⁴ Nevertheless, certain American paramilitary operations, such as those in Guatemala, Cuba, and Nicaragua, do violate the core proscriptions of Article 2(4) of the United Nations charter.²²⁵

Moreover, the argument that resort to unlawful means internationally is necessary to protect our freedom at home presumes that domestic liberty can be insulated from international lawlessness. Reliance on unlawful means abroad requires the government to justify such activities as necessary to combat "the enemy," usually seen as world communism. Many United States government officials also perceive a tremendous threat from the "enemy within," variously defined as Communists, leftists, anarchists, peace demonstrators, student radicals, civil rights activists, whole communities such as Latinos or blacks, or sometimes, as in Watergate, politicians of the opposing party. Once unlawful means are considered justified to combat enemies abroad, it is but a short psychological and political step to argue that the government should take any steps necessary, even unlawful ones, to fight against perceived enemies within. In sum, the perceived need to take unlawful action to defend against a threat does not stop at the border. Abiding by international law is thus inextricably connected to protecting domestic liberties.²²⁶

²²² See Lobel, *supra* note 151, at 1134-38.

²²³ See Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, adopted by the General Assembly of the United Nations, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (1951) ("[G]enocide, whether committed in time of peace or in time of war, is a crime under international law . . .").

²²⁴ See 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171 (1947) (charging defendants with waging a war of aggression, and thus committing a crime against peace); Charter of the International Military Tribunal, art. 6(a), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 50 Stat. 1544, 1547, E.A.S. No. 472, at 14, 82 U.N.T.S. 279, 288 ("planning, preparation, initiation or waging of 'a war of aggression' is a crime against peace"); J. APPELMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 22-28 (1954) (wars of aggression violate international law); Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 61 (1947) ("[T]he law of war . . . appl[ies] to interventions, invasions, aggressions, and other uses of armed force in foreign territory even when there is no state of war.").

²²⁵ See G.A. Res. 3314, 29 U.N. GAOR Supp., (No. 31) at 142, U.N. Doc. A/9631 (1974); *supra* notes 177-78.

²²⁶ Falk, *supra* note 68, at 142-54 (neither possible nor desirable to separate for-

Finally, modern international law is not a straitjacket. It is sufficiently flexible to permit self-defense and a strong foreign policy that can protect United States interests. Reliance on illegal methods in pursuit of our foreign policy undermines the very ends we are purportedly trying to achieve.²²⁷ Recognizing that questionable means are being utilized to realize our foreign policy goals should trigger a re-evaluation of the ends actually being sought. If force and human rights violations are deemed necessary to impose "democratic governments" on other countries, perhaps the aim of the policy is not democracy at all. If covert activities, when uncovered, lead to widespread popular disapproval domestically and internationally, we should not conceal them, but abandon them.

2. Private Armies and United States Troops

The argument for independent executive authority over the conduct of covert war relies, in part, on the historical expansion of executive power to commit United States troops abroad in the absence of a declaration of war.²²⁸ Eugene Rostow has argued that "if it was permissible . . . for President Wilson to send troops into Mexico in order to capture Pancho Villa—and it was—it is a fortiori legal for the United States to . . . engage in foreign covert actions."²²⁹ The debate over executive power to introduce United States troops into combat is far from over. It is likely that the rationale supporting the president's inherent right to introduce troops to defend United States national security interests distorts our constitutional framework.²³⁰ If Rostow's arguments were to prevail, the congressional power to declare war would

eign affairs from domestic society when it comes to the rule of law).

²²⁷ See Falk, *supra* note 68, at 142, 155-56 (stating that compliance with international law furthers United States goals).

²²⁸ See *House Intelligence Hearings*, *supra* note 12, at 1732 (statement of Mitchell Rogovin, Special Counsel to the Director of the Central Intelligence Agency) (stating that because the president has the power to use military force short of war, it follows that he has power to send civilian personnel to foreign countries to engage in covert action).

²²⁹ Letter from Eugene Rostow to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Sept. 29, 1975), *reprinted in Military Hearings*, *supra* note 13, at 160.

²³⁰ If the president can introduce troops into hostilities overseas, the difficulties of withdrawing those troops as the situation becomes more intense can easily lead to a circumvention of the congressional power to declare war. This is how we became involved in the Vietnam War. See S. REP. NO. 220, 93rd Cong., 1st Sess. 27 (1973). To regain its control over the involvement of American armed forces in foreign conflict, Congress enacted the War Powers Resolution, which reiterated that the constitutional authority to declare war rests with Congress rather than the president. See 50 U.S.C. §§ 1541-1548 (1982). Congress explicitly addressed the separation of powers doctrine in describing the purposes of the War Powers Resolution. See *id.* at § 1541(a)-(c).

become meaningless, because the executive can always assert some vague national security interest to justify the commitment of American troops. In any case, whatever the ultimate resolution of the president's power to send United States troops into combat abroad, the utilization of covert private armies presents a different constitutional problem.

First, the logical connection between executive authority over United States troops and executive authority over covert paramilitary operations is historically attenuated. Unilateral executive authority over the use of American troops is premised on the gradual expansion of that authority during the nineteenth and twentieth centuries.²³¹ During that same period, however, private armies were outlawed and fell into disuse in Europe and the United States.²³² Thus, the expansion of executive control over United States troops does not mean that "it is a fortiori legal for the United States to . . . engage in foreign covert actions,"²³³ because the use of public and private armies followed critically different historical paths.

The reason that private armies fell into disuse illustrates a second historical flaw in Rostow's argument. The multilateral nineteenth century prohibition against the use of private armies was a response to the extreme difficulty governments had experienced in bringing private armed forces under state control, and the tendency of those forces to commit egregious violations of the laws of war and human rights. The historical experience, therefore, demonstrates that the use of public armies does not provide a model for the use of paramilitary troops, but rather that the use of private armies involves dangers other than those attendant upon the use of regular troops. Thus, assuming arguendo that executive authority over the commitment of United States troops abroad is constitutional, the potential for destruction and rampage by private troops nevertheless requires that congressional authorization be required for their use.

American diplomats and politicians from the time of the American revolution recognized that private armed forces were an evil, necessary only because of the weakness of the United States Navy and the unwillingness of European nations to agree to strong protections for neutral vessels.²³⁴ The American and European experience with letters of mar-

²³¹ See Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 69-74 (1971); Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19, 26-27 (1970).

²³² See *supra* notes 55-57 and accompanying text.

²³³ Letter from Eugene Rostow to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Sept. 29, 1975), *reprinted in Military Hearings, supra* note 13, at 160.

²³⁴ As Benjamin Franklin wrote in 1785:

The United States, though better situated than any other nation to profit

que and reprisal and privateers proved "that such forces, howsoever commissioned, wrought grievous harm so long as they remained unchecked by public control."²³⁵ The tendency of private bands to plunder and massacre civilians led early presidents to deny aid even to private groups whose aims conformed to United States foreign policy. For example, although President Buchanan supported the aims of a private expedition to take over Nicaragua in the 1850's, he nevertheless urged that no aid be given:

It would be far better . . . for the Government itself to get up such expeditions than to allow them to proceed under the command of irresponsible adventurers. We could then, at least, exercise some control over our own agents, and prevent them from burning down cities and committing other acts of enormity of which we have read.²³⁶

While partisan units attached to the regular army and under its direct control were considered lawful in the mid-1800's, "guerrilla parties, self-constituted sets of armed men . . . who form no integral part of the organized army," were considered unlawful because of their tendency to plunder and massacre.²³⁷ This was true even when such guerrilla units were authorized by the government.²³⁸

Recent history confirms the apprehensions of the eighteenth and nineteenth centuries. Covert paramilitary actions have often involved serious human rights abuses committed by our surrogates.²³⁹ Although

by privateering, are so far as in them lies, endeavoring to abolish the practice by offering, in all their treaties with other powers, an article engaging solemnly, that in case of a future war, no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyages unmolested.

Letter from Benjamin Franklin to B. Vaughan, Esq., *reprinted in* H. WHEATON, *HISTORY OF THE LAW OF NATIONS* 309 (Senior ed. 1973).

²³⁵ 3 C. HYDE, *supra* note 90, at 390; *see also* J. KENT *supra* note 49, at 98 (stating that privateering is very liable to abuse); 7 J. MOORE, *supra* note 43, at 547 (stating that "privateering is attended with very great evils").

²³⁶ CONG. GLOBE, 35th Cong., 1st Sess. 217 (1858) (Message of President Buchanan to Congress).

²³⁷ *See* F. LIEBER, *supra* note 57, at 18-19.

²³⁸ Lieber implicitly assumed that the guerrilla bands to which he referred may have been covertly authorized or even paid by the government when he stated that these bands "do not stand on the regular payroll of the army." *Id.*

²³⁹ *See* V. MARCHETTI & J. MARKS, *supra* note 64, at 245-46 (discussing the abuses of the Phoenix program in Vietnam); Chamorro affidavit, *supra* note 92, at 20-21 (stating that it is standard contra practice to kill prisoners and suspected Sandinista collaborators); Banfman, *The President's Secret Army: A Case Study—The CIA in Laos 1962-1972*, in R. BOROSAGE AND J. MARKS, *supra* note 68, at 46, 59; *Church Committee Report*, *supra* note 65, at 255-84 (discussing various CIA assassination plots).

United States troops have also been accused of war crimes,²⁴⁰ Congress has prescribed rules for the trial and conviction of soldiers who commit such violations.²⁴¹ The CIA and its paramilitary surrogates, however, operate in the hazy underworld of international affairs. While Congress has some control over the United States army, there is no American political institution that can control the abuses of foreign guerrillas working for agents operating covertly.

The lack of United States control over surrogate armies also renders their operations exceedingly difficult to terminate, thereby exacerbating the dangers inherent in their use. The rationale behind the War Powers Act is that American troops can be recalled after sixty days if Congress does not approve of their use.²⁴² Paramilitary forces, once in the field, cannot be recalled as readily, because they are not subject to direct United States governmental control.²⁴³

Covert paramilitary action is often justified as a less dangerous and less costly alternative to the use of United States troops.²⁴⁴ While it is certainly true that covert paramilitary actions initially do not result in sizeable American casualties, they are similar to the dispatch of American military advisors or small troop detachments in that they

²⁴⁰ See, e.g., *United States v. Calley*, 22 U.S.C.M.A. 534; 48 C.M.R. 19 (1973).

²⁴¹ See *Calley*, 22 U.S.C.M.A. at 541-44. War crimes such as murder of noncombatants or prisoners may be prosecuted under the Uniform Code of Military Justice. See 10 U.S.C. §§ 801-935 (1982). Although the Uniform Code does not refer specifically to war crimes, it provides for court-martial jurisdiction over crimes such as murder, mayhem, and arson. See, e.g., *id.* at §§ 918-928; see also J. BISHOP, *JUSTICE UNDER FIRE* 262 (1974) (pointing out that William Calley's case was not tried as a war crime, but rather under the Uniform Code's premeditated murder provisions).

²⁴² The War Powers Resolution provides that no later than 60 days after the president has, pursuant to the statute, reported to Congress the deployment of U.S. armed forces abroad, "the President shall terminate any use of United States Armed Forces with respect to which such report was submitted," unless Congress specifically authorizes the operation to continue or "is physically unable to meet as a result of an armed attack upon the United States." 50 U.S.C. § 1544(b) (1982).

²⁴³ According to former Secretary of State Cyrus Vance:

Paramilitary operations are perhaps unique in that it is more difficult to withdraw from them, once started, than covert operations. This is well illustrated by the case of the Congo, where a decision was taken to withdraw in early 1966, and it took about a year and a half before the operation was terminated. Once a paramilitary operation is commenced, the recipient of the paramilitary aid tends to become dependent upon it and inevitably advances the argument that to cut back or terminate the aid would do the recipient great damage. This makes it especially difficult to disengage.

Hearings Before the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities, 99th Cong., 1st Sess. 85 n.1 (1975).

²⁴⁴ DeWine, *Instead Be Covert*, N.Y. Times, April 23, 1986, at A23, col 2; McFarlane statement, *supra* note 100 (stating that covert action is desirable as an intermediate option between war and doing nothing).

have a strong tendency to escalate into a larger American role involving United States troops.²⁴⁵ In addition, the extent, withdrawal, and aims and methods of conducting paramilitary operations utilizing private forces are extremely difficult to control. Thus, the lack of congressional control over the actions of paramilitary forces underscores the need for congressional control over the initiation of such operations.

3. Curbing the Dogs of War

Some critics have argued that a requirement that any resort to paramilitary activity be congressionally authorized would render paramilitary activities extremely difficult to achieve.²⁴⁶ These critics are exactly right: the Framers purposely constructed the Constitution in such a way that it would be extremely difficult for the United States to undertake armed conflict. The constitutional commitment of the power to declare war to Congress was not premised solely on the perceived value of democratic decisionmaking and open debate that the legislature alone could provide; it also represented a substantive judgment on the part of the Framers that entry into war should be difficult.²⁴⁷ James Madison spoke of war as "among the greatest of national calamities,"²⁴⁸ Thomas Jefferson desired an "effectual check to the Dog of War,"²⁴⁹ and James Wilson argued that the Constitution was designed not to "hurry us into war."²⁵⁰ The constitutional framework thus con-

²⁴⁵ See *Oversight Hearings*, *supra* note 201, at 39, 42 (remarks of Reps. Fowler and Boland); see also *infra* note 263 and accompanying text.

²⁴⁶ See, e.g., *id.* at 30 (testimony of William Colby, Director of the Central Intelligence Agency and General Larkin, President of the Association of Former Intelligence Officers) (arguing that legislation requiring congressional approval of paramilitary operations creates too many impediments for the administration or the CIA to overcome).

The need for speedy decisionmaking is another justification for executive authorization of paramilitary activities. See *id.* at 31 (testimony of William Colby, Director of the Central Intelligence Agency). Paramilitary action does not generally require rapid decisionmaking, however. The many difficulties inherent in either organizing or simply aiding a paramilitary operation dictates long-range planning, not immediate emergency action. According to one of the original members of the House Permanent Select Committee on Intelligence, "these things have long fuses." *Id.* (remarks of Rep. Fowler).

²⁴⁷ See Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 36, 82 (1972) (stating that the Framers' aversion to war influenced their decision to split war-making powers); Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S L. REV. 213, 218-20 (1983) (stating that Framers' attitude toward war manifests an unequivocal revulsion); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1284 (1969) (stating that Constitution represents scheme in which war would be entered only after measured deliberation).

²⁴⁸ 1 FEDERAL CONVENTION RECORDS, *supra* note 49, at 316.

²⁴⁹ 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 41, at 397.

²⁵⁰ 2 FEDERAL CONVENTION RECORDS, *supra* note 49, at 528; see also *id.* at 319 (statement of Rep. Ellsworth) (arguing that "it should be more easy [sic] to get out of

tains a structural mechanism to ensure that force be used only to counter serious threats to national security.²⁵¹ That substantive judgment is equally compelling in today's world, in which war is far more destructive and calamitous than it was in 1787.

The desire to curb the "dogs of war" is also reflected in the Framers' explicit assignment of the authority to issue letters of marque and reprisal to Congress. While recognizing that a letter of marque or reprisal could be used as a peacekeeping device,²⁵² the Framers followed the approach of English and Continental writers who saw that the issuance of such letters was often a form of "imperfect," or limited, warfare that either took the place of or led to declared war.²⁵³ Some legislators hesitated to authorize them precisely because "the peace of the country would be placed at [the] disposal [of armed merchants]."²⁵⁴

Joseph Story noted that the power to issue letters of marque and reprisal was "plainly derived from that of making war," being "an incomplete state of hostilities," often ultimately leading to a formal declaration of war.²⁵⁵ Albert Gallatin argued that the grant of letters of marque were "an intermediate state between peace and war,"²⁵⁶ and generally preceded war, "[w]hen it has not been thought proper to come to open war at once."²⁵⁷ Henry Clay observed, "[R]eprisals do

war, than into it"); *id.* at 319 (statement of Rep. Mason) (stating that Congress should be "clogging rather than facilitating war").

²⁵¹ James Wilson, a participant at the Constitutional Convention, noted:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . . [F]rom this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

Id.

²⁵² 3 J. STORY, *supra* note 54, at 63.

²⁵³ Blackstone noted that the "prerogative of granting [letters of marque and reprisal] is nearly related to, and plainly derived from, that other of making war: this being indeed only an incomplete state of hostilities, and generally ending in a formal declaration of war." W. BLACKSTONE, *supra* note 49, at 250.

²⁵⁴ 7 ANNALS OF CONG., *supra* note 82, at 254 (remarks of Rep. Livingston); *see also id.* at 255 (remarks of Rep. Swanwick) (stating that "it would be very difficult to regulate a power of this kind, since private interest were set to work to evade the law"). Albert Gallatin, the leader of the House Republicans, argued that the modern practice of nations was for governments to fight wars, not private parties, and that the granting of "letters of marque and reprisal," which generally led to war, was the only exception. *Id.* at 256.

²⁵⁵ 3 J. STORY, *supra* note 54, at 64. Similarly, Kent stated that "general reprisals are equivalent to open war, but special letters of marque and reprisal, are a species of hostility; and imperfect war, and usually a prelude to open hostilities." J. KENT, *supra* note 49, at 62.

²⁵⁶ 8 ANNALS OF CONG., *supra* note 40, at 1511.

²⁵⁷ *Id.* Similarly, in 1835, Gallatin wrote, "[A]t present, general letters of marque

not themselves produce a state of public war; but they are not unfrequently the immediate precursor of it."²⁵⁸ Because reprisals, even if they are not public war, "partake of the character of war . . . the Framers of our Constitution . . . associat[ed] it in the same clause with grants to Congress of the power to declare war"²⁵⁹ Thomas Jefferson noted, "The making [of] a reprisal on a nation [was] a very serious thing," often leading to war; therefore, "the right of reprisal [is] expressly lodged with [Congress] by the Constitution and not with the Executive."²⁶⁰

The Framers knew that if they did not give the power to issue letters of marque and reprisal to Congress, congressional control over the initiation of war could be easily eviscerated by executive-controlled paramilitary exercises leading ultimately to war.²⁶¹ Today, through unilateral use of covert paramilitary operations, the president can easily reverse the constitutional presumption, thereby facilitating our involvement in actual (or de facto) war. The first step toward our involvement in Vietnam was the secret dispatch of United States advisors to accompany foreign armed forces.²⁶² Similarly, many view our current support of the Nicaraguan contras as a prelude to the introduction of United States armed forces and ultimately to war. Without directly violating the letter of the congressional power to declare war or the War Powers Act, the president can independently involve the nation in large-scale military engagements contrary to its will through the use of paramilitary operatives. If the marque and reprisal clause is recognized as a check on the authority of the president to involve the nation in covert war, however, the Constitution does provide an effective obstacle to this type of executive adventurism.

Throughout the late eighteenth and early nineteenth centuries, Congress, the judiciary, and the executive agreed that the responsibility for the initiation of private warfare was a congressional power. Contemporary arguments against congressional control—the president's foreign affairs power and the need for secrecy—are too tenuous and unpersuasive to justify reworking the Framers' original scheme. The

and reprisal are war to all intents and purposes; that they are never granted but in consequence of an existing war, or as a way of making war without a formal declaration." Letter from Mr. Gallatin to Mr. Everett (Jan. 5, 1835), *reprinted in* J. MOORE, *supra* note 43, at 122.

²⁵⁸ See S. DOC. NO. 40, 23d Cong., 2d Sess. 40 (1835), *reprinted in* 7 J. MOORE, *supra* note 43, at 126 (Report of Henry Clay, Committee on Foreign Relations).

²⁵⁹ *Id.* at 127.

²⁶⁰ Op. Sec'y of State (May 16, 1793) (Thomas Jefferson), *reprinted in id.* at 123 (emphasis added).

²⁶¹ See *supra* notes 250-52 and accompanying text.

²⁶² See S. REP. NO. 220, 93rd Cong., 1st Sess. 27 (1973).

policies that informed the Framers' decision two hundred years ago—the desire to avoid warfare and to minimize the plunder and devastation of which private parties are uniquely capable—are equally compelling today and buttress the historical and doctrinal justifications for restricting the authorization of covert war to Congress.

The Framers' decision to grant authority over the use of force to the congressional branch, therefore, represents not only a concern with democratic process, but also a substantive judgment that any national resort to force should be difficult to achieve. This constitutional judgment is consistent with the United Nations charter, which rejects the unilateral use of force by one nation except in very limited circumstances.²⁶³ Although in many cases humanitarian, democratic, or other compelling concerns might justify resort to force, international law recognizes that such needs are outweighed by the dangers of unilateral decisionmaking.²⁶⁴ Fears of pretextual or nonessential uses of force led both the Framers of the Constitution and the drafters of the United Nations charter to choose collective over individual decisionmaking whenever armed force was involved. With the breakdown of the United Nations' collective decisionmaking process, the necessity for upholding our own structural safeguards becomes even more urgent.

Of course, exceptional cases, in which secrecy needs, humanitarian concerns, and our national interest are so strong that unilateral presidential decisionmaking is required, may arise. For example, one can posit a situation in which United States intelligence agencies are informed that the leader of a foreign country is planning to commit genocide against a portion of that nation's citizens, and that a powerful opposition leader in that country is willing to initiate an armed coup if American covert aid is provided, *but only if that aid is provided secretly*.

Any reworking of the constitutional framework to allow for unchecked emergency powers in the executive is unwise, however, because it would inevitably lead to vast assertions of executive power unjustified by actual emergencies. As Justice Jackson noted, "[E]mergency powers . . . tend to kindle emergencies."²⁶⁵ Instead, the president must be

²⁶³ U.N. CHARTER art. 2, para. 4.

²⁶⁴ See Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 219 (J. Moore ed. 1974); R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* 339 (1968); Schachter, *The Legality of Pro-Democratic Invasion*, 78 *AM. J. INT'L L.* 645, 649 (1984). *But see* Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR*, *supra*, at 230 (arguing that the "abject inability" of the United Nations to stop human rights violations necessitates unilateral humanitarian intervention by individual countries).

²⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson,

obliged to react to emergency situations in a manner that complies with existing constitutional constraints. These constraints are not seriously respected by the imposition of vague requirements that the president act in the "national interest," or even that the situation be important or even essential to national security.²⁶⁶ Rather, the president must make any decision that violates the Constitution with the knowledge that by acting unilaterally she is acting unconstitutionally. Then, only the most extreme humanitarian and national security concerns could possibly provide justification for unconstitutional actions.

The recognition that such an unconstitutional action would render the executive vulnerable to impeachment proceedings should Congress or the public disapprove of her actions would assure that the president would act in violation of the Constitution only if the situation were extreme.²⁶⁷ Of course, such a rule might lead a risk-averse president to

J., concurring).

²⁶⁶ Attempts to curtail presidential abuse of power by requiring that a high, but ill-defined, standard be met before certain authority may be invoked have generally failed. For example, the International Economic Emergencies Power Act (IEEPA) limits presidential power to situations presenting an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701 (1982). Despite that strong language, the Reagan administration has continued to use IEEPA power not to meet "unusual and extraordinary threats," but as simply another tool of American foreign policy. *See, e.g.*, Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985) (declaring trade embargo against Nicaragua). The sponsor and main driving force behind IEEPA, Representative Jonathan Bingham, has noted that nobody drafting the statute "dreamed a President would so distort the meaning of the words 'national emergency' and 'threat to national security' as to apply them to the . . . situation in Nicaragua today." *N.Y. Times*, May 12, 1985, at 22, col. 3 (letter to the editor). Furthermore, this order is probably not subject to judicial review because the courts have held that whether the president has met the statutory standard for invoking emergency powers presents a nonjusticiable political question. *See Beacon Products v. Reagan*, No. 85-2335-G, slip op. at 7 (D. Mass. Apr. 28, 1986).

²⁶⁷ As President Lincoln noted when he claimed unprecedented emergency power during the Civil War, "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation." 10 COMPLETE WORKS OF ABRAHAM LINCOLN 65-66 (J. Nicolay & J. Harp eds. 1894). Lincoln then submitted his actions to Congress for ratification. *See* President Lincoln's Message to Congress in Special Session, July 14, 1861, reprinted in 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 103, at 20-31 (J. Richardson ed. 1898). Covert paramilitary action, undertaken because of an asserted emergency, would not—unlike Lincoln's actions—generally be submitted to Congress for ratification. The lack of effective congressional oversight for genuine emergency actions requiring secrecy underscores the problem with creating a "national security" or emergency exception to the constitutional principle.

The Church Committee, in proposing an absolute ban in the case of assassination, recognized the argument that there might be a truly national emergency, such as a threat posed by Adolf Hitler, where assassination might not be absolutely ruled out. Yet the committee recognized also that it would be better to rule out assassinations entirely, bringing any presidential authorization of such action into conflict with the law, thereby ensuring that only where such an action represented an "indispensable necessity" to the life of the nation would the president take such action. *See* THE IN-

forego a course of action actually in the national interest. The dangers of excess caution, however, are far outweighed by the dangers of precipitous entry into public or private warfare. Balancing the risks, the Framers wisely chose the former.

III. THE CONSTITUTIONALITY OF CONGRESSIONAL OVERSIGHT EFFORTS: PARAMILITARY ACTIONS AND THE NONDELEGATION DOCTRINE

This Article has argued that the Constitution requires that paramilitary activities abroad be undertaken only with congressional authorization pursuant to the *marque* and *reprisal* clause. The Intelligence Authorization Act of 1981,²⁶⁸ however, seems to permit the executive to conduct covert operations without congressional approval.²⁶⁹ Under the Act, the director of the Central Intelligence Agency (CIA) is required to give the Senate and House Select Committees on Intelligence prior notice of significant intelligence operations abroad, including CIA covert operations.²⁷⁰ In extraordinary circumstances, however, the president may dispense with this prior notice requirement, although she must make a subsequent report to the leadership of each committee and explain why prior notice was not given.²⁷¹

On its face, the Act seems to delegate congressional authority over paramilitary operations to the president. The Act, however, should not be read this broadly, but should be understood as a supplement to pre-existing statutory or constitutional limits on the executive use of covert operations. The purpose of the statute was to provide procedural limitations on the exercise of executive power in order to augment the substantive restraints that already existed. The statute states that its procedural mechanism applies only "to the extent consistent with all

TELIGENCE COMMUNITY, *supra* note 14, at 810.

²⁶⁸ 50 U.S.C. § 413 (1982).

²⁶⁹ While the National Security Act of 1947, Pub. L. No. 80-253, ch. 343, 61 Stat. 495 (1947) (codified as amended in scattered sections of 5, 10, and 50 U.S.C.), which established the CIA, was seen as authorizing covert action, doubt persisted until the passage of the Hughes-Ryan Amendment (the predecessor of the Intelligence Authorization Act of 1981), which clearly authorized covert operations. *See* 22 U.S.C. § 2422 (a) (1982).

²⁷⁰ *See* 50 U.S.C. § 413(a)(1) (1982) (the committees must be kept "fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of . . . the United States"); *see also* S. REP. NO. 730, 96th Cong., 2nd Sess. 4 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4194-95 (requiring that each CIA covert operation be classified as a "significant anticipated intelligence activity" and be reported in advance to both the Senate and House intelligence committees).

²⁷¹ *See* 50 U.S.C. § 413(a)-(b) (1982).

applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government."²⁷² The Senate report indicated clearly that the notice procedures were not "intended to expand or to contract or to define whatever may be the applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative branches."²⁷³ Thus, Congress, in passing this statute, intended neither to repeal the Neutrality Act's limitations on executive actions,²⁷⁴ nor to transfer its own constitutional war powers to the president.²⁷⁵ More generally, the Act did not create any new power in the president, but merely created procedures by which preexisting executive power could be more effectively and openly exercised.

If the Act does authorize the president to initiate covert paramilitary operations without congressional approval, it is an unconstitutional delegation of congressional power.²⁷⁶ Authorizing the president to undertake paramilitary operations any time she determines that they are "important to the national security of the United States,"²⁷⁷ without any kind of meaningful oversight, would be a wholesale transfer to the president of the congressional authority to issue letters of marque and reprisal. Congress can no more delegate its marque and reprisal power than it can enact a statute permitting the president to declare war on a foreign country whenever she deems it in the national interest to do so.²⁷⁸ In the words of Justice Cardozo, this would be "delegation running riot."²⁷⁹ Although the Supreme Court has not invalidated a statute

²⁷² *Id.* at § 413(a).

²⁷³ S. REP. NO. 659, 96th Cong., 2d Sess. 6 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4182, 4196.

²⁷⁴ *See* Lobel, *supra* note 22, at 59-60.

²⁷⁵ *See supra* notes 272-73 and accompanying text.

²⁷⁶ The potential delegation of powers problem is in one sense quite obvious: on its face, the Constitution vests in Congress alone the power to declare war. *See* Highsmith, *supra* note 13, at 327. As Professor Berger argued: "That the face of the Constitution clearly evidences a severely limited allocation of war power to the President seems to me beyond dispute; it shuts off the President from waging a war not 'begun' or 'authorized' by Congress." Berger, *War, Foreign Affairs, and Executive Secrecy*, 72 *Nw. U.L. REV.* 309, 320 (1977).

²⁷⁷ 22 U.S.C. § 2422 (1982). The CIA may expend no funds for operations abroad beyond pure intelligence gathering unless the president finds such an operation to be important to the national security of the United States. *Id.*

²⁷⁸ *See* M. FORKOSCH, *CONSTITUTIONAL LAW* 191 (2d ed. 1969) ("[I]t would be unthinkable for someone other than Congress . . . to be able to plunge the nation into a declared war.").

²⁷⁹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935).

One indication of just how broad a delegation of the marque and reprisal clause could be is illustrated by the debate that surrounded the Johnson administration's interpretation of the Gulf of Tonkin Resolution. *See* L. VELVEL, *UNDECLARED WAR AND CIVIL DISOBEDIENCE* 75-89 (1970) (stating that the Johnson administration's claim

on the ground of improper delegation in fifty years,²⁸⁰ and some scholars and judges believe the nondelegation doctrine to be moribund,²⁸¹ the Court has recently read Acts of Congress narrowly in order to avoid delegation problems, thus suggesting a possible revitalization of the doctrine.²⁸²

Notwithstanding a renewed judicial sensitivity to problems of congressional delegation, it is clear that many congressional powers may be confidently delegated.²⁸³ A means of distinguishing the powers that can

that the Resolution authorized the introduction of troops into Vietnam would mean that it was an unconstitutional delegation to the president of the power to declare war); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 691-99 (1972) (arguing that the Resolution did not give the president the right to land troops "in a zone of war so that he might repel armed attack against them"); Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-[KENT L. REV. 131, 137-38 (1971) (stating that in passing the Resolution "Congress intended to approve presidential reactions commensurate with [the Gulf of Tonkin] incident . . . and not necessarily an undertaking the magnitude of the Vietnam . . . war"). That Resolution limited the president to "tak[ing] all necessary steps, including the use of armed force, to assist any . . . member of the Southeast Asia Collective Defense Treaty requesting assistance." Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384, 384 (1964). The president was therefore limited to using force only in a particular region, and only under circumstances where another state had requested aid.

In contrast, the Intelligence Authorization Act, read broadly, authorizes the president to undertake paramilitary operations any time she determines that they are "important to the national security of the United States." 22 U.S.C. § 2422. This broad delegation is even more dangerous than the arguably unconstitutional delegation in the Gulf of Tonkin Resolution, and should therefore be more vigorously contested.

²⁸⁰ The last and only such cases were *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²⁸¹ See, e.g., *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 353 (1974) (Marshall, J., concurring) (stating that the nondelegation doctrine "is surely as moribund as the substantive due process approach of the same era"); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.01 (1958).

²⁸² See *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *Kent v. Dulles*, 357 U.S. 116, 129 (1958). As Justice Rehnquist points out, "[A] number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators." *Industrial Union Dep't.*, 448 U.S. at 686 (Rehnquist, J., concurring). While decisions of the Court have not yet resurrected the nondelegation doctrine from the doctrinal graveyard, in the past decade the Court has "gone out of its way to indicate that the old law on delegation may not be entirely passe." B. SCHWARTZ, *ADMINISTRATIVE LAW* § 2.11 (2d ed. 1984).

Few would call for a rehabilitation of broad nondelegation formulations such as that in *Field v. Clark*, 143 U.S. 649, 692 (1892) ("[T]hat congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."). Several recent commentators, however, advocate revitalizing more limited nondelegation principles. See, e.g., S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 11-51 (1975); Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257, 282-86 (1982); Wright, Book Review, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972).

²⁸³ See K. DAVIS, *supra* note 281, § 3.1-3. Davis maintains that, despite renewed

be delegated from those that cannot must be found. In 1825, Chief Justice Marshall argued, "[T]hose important subjects, which must be entirely regulated by the legislature itself, [are to be distinguished] from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."²⁸⁴

Although Marshall recognized that the line between "important subjects" and those of "less interest" could not be precisely drawn, it is clear that delegating decisions to go to war or engage in paramilitary hostilities are qualitatively different from congressional delegations concerning particular OSHA standards,²⁸⁵ tariff duties,²⁸⁶ or acceptable levels of air pollution.²⁸⁷ Congress may not have the time, technical expertise, or desire to make the myriad administrative decisions necessary in the contemporary administrative state, but Congress can and should decide whether to go to war or authorize war-making by others for whom we are responsible under international law.²⁸⁸ The concerns raised by the delegation of important policy determinations to administrative agencies in the enforcement of regulatory statutes pale in comparison to those raised by broad delegations of congressional power over war and peace.

A more useful method for separating those congressional powers that may be constitutionally delegated from those that may not is to focus on two interrelated fundamental principles that underlie the nondelegation doctrine. First, important issues of public policy should be decided by a broadly representative deliberative body.²⁸⁹ Second, the

interest in the nondelegation doctrine, the view that "Congress may delegate legislative power to agencies as it chooses . . . is likely to continue as the central" view of courts and lawmakers. *Id. See, e.g., Federal Power Comm'n*, 415 U.S. at 353; *Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.").

²⁸⁴ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

²⁸⁵ *See, e.g., Industrial Union Dep't*, 448 U.S. 607 (testing the validity of a statute allowing the Secretary of Labor to promulgate health standards after making a finding that significant risks are present).

²⁸⁶ *See, e.g., J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928) (upholding a delegation to the president to establish and adjust customs duties on imported merchandise because of the difficulty of gathering data).

²⁸⁷ *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (upholding statute giving broad discretion to the EPA to implement policies of the Clean Air Act).

²⁸⁸ *See L. VELVEL, supra note 279, at 83-84.*

²⁸⁹ *See A. BICKEL, THE LEAST DANGEROUS BRANCH* 160-61 (1962); J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 80 (1978); Wright, *supra note 282, at 585; see also Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (arguing that the nondelegation doctrine insures that important decisions are

constitutional framework can only be changed by the amendment process, not by a single legislative act;²⁹⁰ statutes that delegate constitutionally assigned congressional power to another branch of government substitute a particular legislature's will for that of the Framers and thus rework the constitutional arrangement.²⁹¹ If the function of the nondelegation doctrine is to ensure constitutional supremacy and democratic decisionmaking, any application of the doctrine must determine whether the power to be delegated was specifically given to Congress to prevent the executive from making independent decisions in that area.²⁹²

The key inquiry, therefore, is not the importance of the power, or whether it is a "core legislative function,"²⁹³ but whether the power was granted to the legislative branch because of the Framers' fear or distrust of nondemocratic decisionmaking by another branch. By delegating a decision of this kind, Congress would be giving another branch

made by "the branch of our Government most responsive to the popular will"); *United States v. Robel*, 389 U.S. 258, 277 (1967) (Brennan, J., concurring) (stating that improper delegation transfers policymaking function to agencies not responsive in same degree to the people); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting) (stating that nondelegation doctrine ensures that "fundamental policy decisions . . . will be made not by an appointed official but by the body immediately responsible to the people").

²⁹⁰ See S. BARBER, *supra* note 282, at 36-38; Freedman, Book Review, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 315-16 (1976).

²⁹¹ See S. BARBER, *supra* note 282, at 37. Other scholars and courts locate the values implicit in the nondelegation doctrine in due process or separation of powers concepts or in the need to allow the courts to exercise judicial review properly. For separation of powers rationales, see *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 405-06 (1928); W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 50-52 (7th ed. 1979). For due process arguments, see K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 3.15 (1976); Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 32-33 (1938). Arguments based on the need for judicial review are expressed in *Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring).

While these other values are certainly furthered by the nondelegation doctrine, they are not the most important justifications for the doctrine. See S. BARBER, *supra* note 282, at 36-37. Barber suggests that the fundamental rationale for the doctrine lies in the principle of constitutional supremacy. Moreover, the values of due process and judicial review are relevant to administrative law concerns, but not to the delegation of authority over foreign affairs.

²⁹² Professor Freedman has suggested a similar test, arguing that the Court ought to determine "whether a particular legislative power is one that Congress may not delegate." Freedman, *supra* note 290, at 326. That inquiry must address "the nature of the particular power involved and the intended relationship of that power to the structure of our constitutional scheme." *Id.* Freedman concludes that where "the Framers regarded the proper exercise of a specific legislative power as closely dependent upon the unique institutional competence of Congress, the nondelegation doctrine would prohibit Congress from delegating that power to another." *Id.* at 336.

²⁹³ For a rejection of the "core function" analysis, see *Synar v. United States*, 626 F. Supp. 1374, 1385-86 (D.D.C. 1986).

of government power that the Framers had specifically determined that branch must not have. Although most delegations would be upheld under this standard, there are certain congressional powers that are nondelegable.²⁹⁴ Broad delegation of the powers to declare war or issue letters of marque and reprisal would alter the original constitutional balance of power, and provide the executive with power the Framers feared and sought to deny. Delegating authority over the use of paramilitary forces thus highlights the concerns of many scholars who urge a revitalization of the nondelegation doctrine.²⁹⁵

The Supreme Court seemed to follow the suggested approach in *National Cable Television Association v. United States*.²⁹⁶ The *National Cable* Court construed the fee-setting authority of federal agencies narrowly in order to avoid a finding of an unconstitutional delegation of the taxing power.²⁹⁷ Since the statutory standards involved in *National Cable* were not qualitatively different from those that the Court had upheld without much difficulty in prior cases,²⁹⁸ the alleged vice of the statute must have been its possible intrusion on the taxing power. The Court's reference to Chief Justice Marshall's famous observation that the power to tax is the power to destroy²⁹⁹ suggests that the *National Cable* Court viewed the taxing power as particularly susceptible to oppressive application and abuse. Writing for the majority, Justice Douglas noted, "Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes . . ." ³⁰⁰ The Framers recognized the taxing power's importance and potential for abuse, and thus entrusted it to the House of Representatives, the most broadly representative branch of government. For similar structural reasons, one commentator has argued that the impeachment power should be non-

²⁹⁴ See M. FORKOSCH, *supra* note 278, at 191 (differentiating certain "particularized inabilities to delegate" from the general nondelegation doctrine); Freedman, *supra* note 290, at 336 (suggesting that the traditional nondelegation doctrine should be reconstructed to reflect the nature of the particular power being delegated and the character of the institution chosen to exercise it).

²⁹⁵ See, e.g., S. BARBER, *supra* note 282, at 1-6; Freedman *supra* note 290, at 335-36.

²⁹⁶ 415 U.S. 336 (1974).

²⁹⁷ See *id.* at 340-43. The taxing power is entrusted to Congress by U.S. CONST. art. I, § 8, cl. 1.

²⁹⁸ See, e.g., *Lichter v. United States*, 334 U.S. 742, 787 (1948) (upholding Renegotiation Act as constitutional delegation of congressional authority); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (upholding a delegation pursuant to the Emergency Price Control Act of 1942 as constitutional because the standards set "are sufficiently definite and precise").

²⁹⁹ 415 U.S. at 341 n.4 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

³⁰⁰ *Id.* at 340.

delegable.³⁰¹ According to Alexander Hamilton, the power to impeach was assigned to Congress because the drastic public consequences of the impeachment of public officers "forbid[] the commitment of the trust to a small number of persons."³⁰²

The powers over the initiation of war or the authorization of private persons to engage in warfare under letters of marque and reprisal raise the same structural concerns as the taxing power. Even more clearly than the taxing power, the war power is the power to destroy, and the constitutional grant of the war power to Congress reflects the Framers' recognition of that destructive power. As Joseph Story recognized, the "nature and effects" of war are "so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation."³⁰³ The Framers wanted to keep the power to initiate hostilities away from the president, because they believed that the executive was more likely to involve the country in the calamity of war than was Congress.³⁰⁴ As James Madison noted, "War is in fact the true nurse of executive aggrandizement."³⁰⁵ Abraham Lincoln

³⁰¹ See Freedman, *supra* note 290, at 326-27.

³⁰² THE FEDERALIST No. 65, at 335 (M. Beloff ed. 1948).

³⁰³ 2 J. STORY, *supra* note 54, at 60; see also L. VELVEL, *supra* note 279, at 11-12 (quoting Story with approval).

³⁰⁴ In the Federalist Papers, Hamilton related that, with respect to the power to make treaties, history

does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a president of the United States.

THE FEDERALIST No. 75, at 383-84 (M. Beloff ed. 1948); see also A. SOFAER, *supra* note 5, at 51-52 (emphasizing Congress's role in checking executive command of the army and navy).

³⁰⁵ Madison, *Helvidius No. 4*, in 6 WRITINGS OF JAMES MADISON, *supra* note 105, at 174. Madison wrote:

In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous power, the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.

later argued that the constitutional "convention understood [war] to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power for bringing this oppression upon us."³⁰⁶

Because the power to declare war and issue letters of marque and reprisal are important subjects,³⁰⁷ and were placed in the hands of Congress specifically to ensure democratic decisionmaking and preclude the independent exertion of executive power in the area of martial conflict, it appears that Congress cannot constitutionally delegate its power to issue letters of marque and reprisal to the president. The reason that the Framers granted Congress the power to declare war and issue letters of marque and reprisal was to make it difficult for the United States to engage in war through the use of regular troops or private citizens. The purpose of delegation is to make government run more efficiently and to facilitate decisionmaking. Where the Framers determined that a decision should not be facilitated, but rather slowed down so that the federal government would find it difficult to undertake certain activities, any congressional delegation in that area must be closely scrutinized. If the Intelligence Authorization Act of 1981 is read to allow the president to authorize paramilitary adventures without congressional check, it is unconstitutional.

The Supreme Court seemed to hold otherwise in *United States v. Curtiss-Wright Export Corporation*,³⁰⁸ when it found that Congress "must often accord to the President a degree of discretion and freedom from statutory restriction [in foreign affairs] which would not be admissible were domestic affairs alone involved."³⁰⁹ The opinion affirms broad congressional delegation in foreign policy matters,³¹⁰ and suggests that virtually any congressional delegation in matters of foreign affairs will be held constitutional. Although *Curtiss-Wright* may seem to sanction a congressional delegation to the president of the marque and reprisal powers through the Intelligence Authorization Act, closer examination reveals that *Curtiss-Wright* is consistent with the position that such a delegation would be impermissible.

Id.

³⁰⁶ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 497 n.7 (5th rev. ed. 1984) (quoting Abraham Lincoln).

³⁰⁷ See *supra* note 284 and accompanying text.

³⁰⁸ 299 U.S. 304 (1936).

³⁰⁹ *Id.* at 320.

³¹⁰ See Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 5 n.25 (1973) (listing commentators who argue that this is the only relevant holding of *Curtiss-Wright*, and that the opinion's language going beyond foreign affairs delegation is dicta).

The *Curtiss-Wright* delegation was upheld precisely because of the executive's residual authority over the transactions involved in that case.³¹¹ Justice Sutherland's dicta stating that the president is the "sole organ of the federal government in the field of international relations,"³¹² reflected his view that the president had some concurrent authority with Congress over the subject sought to be regulated.³¹³ Justice Sutherland viewed one branch's authority as dependent on the nature of the power exercised by the other branch of government. Under his view, when the president has some authority in an area, Congress has a greater ability to delegate because it is merely expanding that already existing authority. Thus, although in *Curtiss-Wright* the president's general foreign affairs power would not have been sufficient to authorize him to act independently of congressional authorization,³¹⁴ because he had some power Congress was able to delegate broad authority in a manner that would have been impermissible if he had had no power over the area. Following this interpretation of *Curtiss-Wright*, subsequent broad delegations of authority to the president in foreign affairs have been upheld, "because of the delegatee's residual authority over particular subjects of regulation."³¹⁵ Where, however, the president is explicitly precluded from exercising authority over particular areas, Congress cannot delegate that broad authority to her. Unlike general foreign policy determinations, decisions to go to war, to issue letters of marque or reprisal, or to authorize private invasions of another country are not decisions over which the executive has concurrent authority with Congress. Even under Justice Sutherland's analysis, therefore, Congress cannot delegate these powers to the president.³¹⁶

³¹¹ See *Industrial Union Dep't v. American Petroleum*, 448 U.S. 607, 684 (1981) (Rehnquist, J., concurring).

³¹² 299 U.S. at 320.

³¹³ This interpretation of *Curtiss-Wright* rejects the polar positions that Sutherland's statements as to executive power over foreign affairs are either irrelevant dicta or a grant of plenary power over various foreign affairs decisions to the president. See Lofgren, *supra* note 310, at 1, 3-4, 5 n.25. Read properly, Sutherland's view affirms broad congressional delegations of authority where the executive has some independent authority.

³¹⁴ See L. HENKIN, *supra* note 159, at 340 n.9 (stating that the president could not have prosecuted violators of the arms embargo at issue in *Curtiss-Wright* absent statutory authority).

³¹⁵ *Industrial Union Dep't*, 448 U.S. at 684 (Rehnquist, J., concurring); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 422 (1935) (describing delegation of authority to president as "congnate to the conduct by him of the foreign relations of the Government"); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.").

³¹⁶ The *Curtiss-Wright* Court's treatment of the validity of the congressional dele-

A distinction analogous to that discussed in the text has been recognized in the treaty context. While Congress has the power to regulate foreign commerce or dispose of United States property, such congressional power does not preclude self-executing treaties addressing the same subjects.³¹⁷ Many commercial treaties with other nations are self-executing.³¹⁸ A treaty may delegate to the president powers she might not otherwise have, such as the power to extradite a citizen to a foreign country.³¹⁹

Despite agreement that the treaty power may authorize the president to act in areas which are normally the preserve of Congress, several exceptions are generally recognized. In particular, it is widely believed that "an international agreement cannot itself bring the United States into a state of war."³²⁰ Yet the "power of Congress to declare war is not characterized or designated in any way that would distin-

gation to the president of part of its foreign affairs power is consistent with Justice Jackson's famous analysis of presidential power vis-a-vis the power of Congress in the *Steel Seizure Case*. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring). "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Justice Jackson identified three kinds of executive actions:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate 2.
- When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain In this area, any actual test of power is likely to depend on the imperatives of events
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb

Id. at 635-37.

As did Justices Jackson and Frankfurter in *Youngstown*, Justice Sutherland viewed one branch's authority as dependent on the nature of the power exercised by the other branch of government. Viewed this way the two strands of *Curtiss-Wright* were both necessary to the opinion, although perhaps overstated, and the decision is in a sense a corollary to the concurrences in *Youngstown*. Where Justices Jackson and Frankfurter looked at the nature of congressional action in determining executive power, Sutherland would analyze the nature of the presidential power in determining the limits of permissible congressional delegation. Both perspectives rely on a common view that one branch's power must often be determined not standing alone, but in relationship to the authority or actions of another branch of government.

³¹⁷ See L. HENKIN, *supra* note 159, at 149; 2 RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(b) (Tent. Draft No. 6, 1985).

³¹⁸ See, e.g., *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161 (1940) ("[The General Inter-American Convention for Trademark and Commercial Protection] on ratification became a part of our law. No special legislation . . . was necessary to make it effective."); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) ("[The treaty with Japan of April 5, 1911] operates itself without the aid of any legislation, state or national.").

³¹⁹ See L. HENKIN, *supra* note 159, at 165.

³²⁰ 1 RESTATEMENT, *supra* note 317, at § 131 comment i.

guish it from . . . the power to regulate commerce with foreign nations."³²¹ The distinction between the war powers and the other powers delegated to Congress, therefore, must be rooted in the critical importance and special need for broad democratic discussion in any decision to utilize force.

The District of Columbia Court of Appeals, in upholding the 1975 treaty conveying the Panama Canal to the Republic of Panama, distinguished between the article IV, section 3 power of Congress "to dispose of . . . Property belonging to the United States" and the article I, section 8 power to declare war.³²² While the constitutional grant of power to Congress to dispose of United States property did not limit the exercise of the treaty power, the court suggested that the article I, section 8 grant of power to Congress might: "The *sui generis* nature of a declaration of war and the unique history indicating the Framers' desire to have both Houses of Congress concur in such a declaration, may place it apart from the other congressional powers enumerated in Art. I, § 8 and in Art. IV, § 3, cl. 2."³²³

Just as article I must be read to require that two-thirds of the Senate cannot authorize the president to fight a war without the concurrence of the House of Representatives, so too one Congress may not delegate the war power of a later Congress to the president. The principle in both cases is the same: despite the general tendency to permit the expansion of either a delegated or a treaty power, some areas, such as the offensive use of force against another nation, are seen, both historically and currently, as requiring more democratic decisionmaking. Such decisions must be made by Congress rather than by the executive.

The historical catalogue that Justice Sutherland presented in *Curtiss-Wright* to demonstrate the long-standing congressional practice of delegating foreign affairs powers to the executive also supports the reading of the opinion set out above.³²⁴ Although Congress has delegated broad authority to the executive in a variety of foreign affairs matters, the early leaders of the republic refused to delegate the power to declare war or issue letters of marque and reprisal.³²⁵ In fact, none

³²¹ *Id.* at reporter's note 6.

³²² See *Edwards v. Carter*, 580 F.2d 1055, 1057-59 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

³²³ *Id.* at 1058 n.7.

³²⁴ See 299 U.S. at 322-29.

³²⁵ Proposed delegations to the executive of broad power to use force or raise armies were generally defeated. See, e.g., 19 ANNALS OF CONG. 1523-31 (1809) (Tenth Cong., 2d Sess.) (defeating broad proposals authorizing the use of force); *id.* at 2279-80 (1808) (defeating effort to empower the president to expel British warships from American harbors); *id.* at 1857-60 (defeating proposal giving president discretion to increase army on grounds that the bill contradicted constitutional mandate that Congress shall

of the examples cited by Justice Sutherland involve decisions to launch armed attacks against another country.³²⁶ Many of his examples involve successful legislative delegations of foreign affairs power to the executive in the early and mid-eighteenth century.³²⁷ During the same period, there were also several proposals made in Congress to authorize the executive to commission private vessels or grant letters of marque and reprisal against a nation with which the United States was at peace.³²⁸ On each occasion Congress rejected the attempt, refusing to delegate broad discretion to the president to engage in hostilities that could easily lead to full-scale war. These examples support the nondelegation of the marque and reprisal power as powerfully as Justice Sutherland's catalogue supports delegation of residual foreign affairs powers.

The first effort to delegate the marque and reprisal power to the executive grew out of President Jefferson's attempt to deal with an incipient war between the United States and the Barbary Powers. In 1801 President Jefferson, unaware of Tripoli's declaration of war,³²⁹

raise armies); 17 ANNALS OF CONG. 33-35 (1807) (Tenth Cong., 1st Sess.) (defeating amendment to give president discretion in the application of a statute to suppress piracy).

Other proposals were considerably narrowed to conform to executive authority to defend the country from invasion or enforce congressional statutes. For example, a proposal to authorize the president to raise a substantial army when he deemed it necessary was objected to as an unconstitutional delegation of the war power and defeated. See 8 ANNALS OF CONG., *supra* note 40, at 1526-27 (remarks of Rep. Gallatin). Instead, Congress authorized the president, "till the next meeting of Congress," to raise troops only "in the event of a declaration of war against the United States or of an actual invasion . . . or of imminent danger of such invasion discovered, in his opinion to exist." 1 Stat. 5581, *reprinted in id.* at 1631, 1661-62. In 1792, a proposal was made in the Senate to permit the president broad power to call out the militia. That delegation was objected to and narrowed to providing power to call out the militia "whenever the laws of the United States shall be opposed, or the execution thereof be obstructed . . ." Other limiting conditions were also added. See 3 ANNALS OF CONG. 552-57, 574-76 (1792) (Second Cong., 1st Sess.); see Act of May 2, 1792, § 2, 1 Stat. 264 (president authorized to call in the militia whenever laws are opposed by combinations too powerful to be controlled by the judiciary).

For more examples of narrowing proposed legislative delegations to grant the executive only such authority as would be necessary to defend the country from invasion or enforce congressional statutes, see Act of Sept. 29, 1789, ch. 27, 1 Stat. 95, 96 (permitting president to call up militia when he judges such action necessary to protect frontier from hostile incursions by Indians); Act of June 5, 1794, ch. 50, 1 Stat. 384, (authorizing the president to use force to prevent violation of Neutrality Act).

³²⁶ See 299 U.S. at 322-29.

³²⁷ See *id.*

³²⁸ For example, in 1810 Congress permitted the president to revive the embargo against either Britain or France upon the occurrence of certain events, a delegation later upheld by the Supreme Court. See 11 U.S. (7 Cranch) 382 (1813). The very same Congress, however, refused to authorize a virtually identical delegation to issue letters of marque and reprisal. See *infra* notes 338-45 and accompanying text.

³²⁹ See A. SOFAER, *supra* note 5, at 209.

ordered a naval squadron to sail to Gibraltar to determine whether any of the Barbary States had declared war on the United States,³³⁰ and to destroy the ships and control the ports of any of them that had.³³¹ Later, after the squadron's tender vessel had engaged and defeated a Tripolitan cruiser,³³² Representative Samuel Smith introduced a resolution in Congress that would enable the president to "more effectually . . . protect the commerce of the United States against the Barbary powers."³³³ The bill authorized the president "to commission private vessels, with power to capture vessels of Tripoli."³³⁴ Representative James Bayard sought to amend the resolution to authorize the president to issue letters of marque and reprisal against Tunis and Algiers, although these nations, unlike Tripoli, were not at war with the United States.³³⁵ Congressman Samuel Dana objected that such an amendment appeared to invite war.³³⁶ Despite Bayard's plea that broad discretion should be granted the president to act offensively against "uncivilized" nations, Congress refused to grant such broad discretion.³³⁷ Thus, while private ships could be commissioned in the context of a declared war, Congress refused to allow the executive broad discretion to use private ships to engage nations that had not declared war against the United States.

In 1809 Congress again contemplated authorizing President Jefferson to issue letters of marque and reprisal, this time against the British and French. Shortly before the termination of the Jeffersonian embargo of 1807-1809, legislation was introduced in Congress to authorize the president to issue letters of marque and reprisal against either France or England, if either nation continued to enforce its edicts

³³⁰ See 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WAR WITH THE BARBARY POWERS 465-69 (1939).

³³¹ See E. CHANNING, THE JEFFERSONIAN SYSTEM 39-40, VOL. 12 THE AMERICAN NATION: A HISTORY 1906; A. SOFAER, *supra* note 5, at 210.

³³² This engagement prompted Jefferson's well known statement that the Tripolitan cruiser was freed after the battle because the squadron was "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 103, at 327. Sofaer has cast doubt on whether Jefferson's statement was made in good faith, or was merely a ploy to obtain explicit congressional approval of military actions against Tripoli. See A. SOFAER, *supra* note 5, at 212-14. Since war had been declared against the United States by Tripoli, it seems clear that the president already had the authority to take offensive actions against that nation. See *id.* at 213-14.

³³³ A. SOFAER, *supra* note 5, at 214 (quoting Rep. Samuel Smith).

³³⁴ 11 ANNALS OF CONG. 406 (1802) (Seventh Cong., 1st Sess.).

³³⁵ See *id.* at 432-33.

³³⁶ See *id.* at 432.

³³⁷ See *id.* at 432-33; see also A. SOFAER, *supra* note 5, at 215-16 (stating that the House of Representatives was "unwilling to delegate such authority even with respect to 'uncivilized' nations").

violating the neutral commerce of the United States after the other had repealed such edicts.³³⁸ The bill was agreed to by the Senate over the objection of Senator James Hillhouse, who argued:

The Constitution says, "The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water." The exercise of this authority, given by this section to the President, to grant letters of marque and reprisal, is to rest on the revocation or modification of the edicts of France or Great Britain, so as not to violate the neutral commerce of the United States. And this complicated question is left to the judgment and unlimited discretion of the President. His individual opinion on the nature of a variety of edicts not specified, and which will admit of various constructions, is to govern. If the condition on which such a power was to be exercised, were some specified event, certain and precise in point of fact, which is not this case, it might be questioned whether the Constitution would, even then, warrant Congress in delegating to the President the power of declaring war, or of granting letters of marque and reprisal.³³⁹

In the House of Representatives, the bill was objected to as an unconstitutional delegation of the congressional war powers to the president.³⁴⁰ Representative William Milnor noted "that the Constitution of the United States provided that Congress alone should have the power to declare war, and this bill, by giving the President a discretion to judge when that war should commence, transferred the power to

³³⁸ See 19 ANNALS OF CONG., *supra* note 325, at 425 (remarks of Sen. Hillhouse) (quoting Section 11 of An Act to Interdict the Commercial Intercourse Between the United States and Great Britain and France and Their Dependencies and for Other Purposes. Section 11 authorized the president "in case either France or Great Britain shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation; and thereupon cause to be issued letters of marque and reprisal against the nation thereafter continuing in force its unlawful edicts."). *Id.*

³³⁹ *Id.* On February 20, 1809, Senator Reed had moved to delete from the bill language granting the president power to issue letters of marque and reprisal, a motion that failed by a vote of 14 to 11. *See id.* at 413. The bill then passed on February 21 by a vote of 21 to 12. *See id.* at 436. When the House voted to delete the marque and reprisal language from the bill, however, the Senate reversed its position. *See id.* at 451; *infra* text accompanying notes 341-42. Prior to the vote, Hillhouse had remarked, "This bill is covert war, and not only gives to the President of the United States the power, but seems to lay him under a necessity of commencing active war; which by the Constitution is confided only to Congress." *Id.* at 435.

³⁴⁰ *See, e.g., id.* at 1504 (statement of Rep. Livermore).

him."³⁴¹ Representative Edward Livermore agreed, noting, "The bill did not contemplate a legislative act for issuing letters of marque or reprisal against a particular enemy, but gave a power to the President to choose with which of the belligerents . . . he would declare war."³⁴² Although he thought the measure inexpedient, "that was a minor consideration when put in competition with its unconstitutionality."³⁴³ The House, by a wide margin, deleted the section,³⁴⁴ a change agreed to by the Senate.³⁴⁵

Legislation to issue letters of marque and reprisal in time of formal peace was last introduced during the administration of Andrew Jackson.³⁴⁶ Again, Congress refused to delegate this power to the executive. In his annual December message in 1834, President Jackson recommended that reprisals be undertaken if France did not comply with a treaty it had entered into with the United States in 1831³⁴⁷ and urged

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* Representative Lyon agreed with Livermore and Milnor, *see id.* at 1504-05, as did Representative Dana, who "objected to the bill because it transferred to the President a legislative power, by making the issuing letters of marque dependent on the events which in the opinion of the President should render the commerce of the United States sufficiently safe . . ." *Id.* at 1507-08. Dana also argued against the section because "it authorized the employment of private force in a case in which the public force was not to be employed, which is a novelty; it contemplated not actual war but invited individual enterprise." *Id.* Representative Holland, however, defended the constitutionality of the section, arguing that it "neither was a declaration of war, nor a discretion to the President to make it. . . [Moreover,] [i]t conferred no legislative power on the Executive. The event was fixed on the happening of which being made known to the President, he should forthwith issue letters of marque and reprisal." *Id.* at 1505.

³⁴⁴ *See id.* at 1517. The vote was 74 to 33 in favor of striking the language. Many of those who voted in the majority may have done so because they were opposed to warlike measures against Great Britain or because they viewed this measure as half-hearted and unwise, rather than because they thought it was unconstitutional. *See, e.g., id.* at 1510 (statement of Rep. Eppes); *id.* (statement of Rep. Williams); *id.* at 1508-09 (statement of Rep. Randolph). It is clear, however, that substantial, if not majority, support existed for the view that the marque and reprisal section was unconstitutional, and that its unconstitutionality was its fatal flaw. A delegation of power to the president to use the public and private armed forces against the British or French, should either refuse to revoke its edicts, was defeated on similar grounds. *See, e.g., id.* at 1526 (statement of Rep. Gardener that the bill was an unconstitutional delegation of the war power).

³⁴⁵ *See id.* at 451. Two years later, there was some discussion of the vote denying the president the power to issue letters of marque and reprisal against a nation that refused to revoke its edicts. Representative Anderson noted that while President Jefferson wanted the authority, Congress should avoid taking such a measure, since "the correctness of such a course might well be doubted, upon Constitutional grounds." 23 ANNALS OF CONG. 66 (1811) (Twelfth Cong., 1st Sess.).

³⁴⁶ These were the last letters authorized during the War of 1812, in which American privateers played an important part. *See A. SOFAER, supra* note 5, at 270-71.

³⁴⁷ *See* 7 J. MOORE, *supra* note 43, at 123-24; 3 A DIGEST OF INTERNATIONAL

Congress to issue letters of marque and reprisal against France if it did not take steps to comply.³⁴⁸ As in the embargo context, the president would determine when the triggering event had taken place.³⁴⁹ The Senate unanimously refused to enact any legislation authorizing reprisals against France.³⁵⁰ Senator Henry Clay noted:

[T]he authority to grant letters of marque and reprisal being specially delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them under all the circumstances existing at the time when they are proposed to be actually issued. *The committee are not satisfied that Congress can, constitutionally, delegate this right.*³⁵¹

The Intelligence Authorization Act, by treating all covert action under one statute, has thus failed to distinguish between two types of covert action containing different constitutional consequences. Most covert operations merely implicate the general foreign affairs powers of Congress and the president; covert paramilitary actions intrude upon congressional war powers, powers that Congress may not delegate.³⁵²

The historical evidence demonstrates that the marque and reprisal power cannot be constitutionally delegated to the president by Congress. Although the Supreme Court has upheld broad congressional delegations in the foreign affairs area, these delegations have involved areas where the executive had "residual" foreign affairs powers, and provide no support for the delegation of Congress's powers to declare war and issue letters of marque and reprisal. Although the necessities of government in the modern administrative state have wrought great changes in the nondelegation doctrine, gravely important powers that

LAW OF THE UNITED STATES, *supra* note 90, at 88.

³⁴⁸ See S. DOC. NO. 40, 23d Cong., 2d Sess. 40 (1835), *reprinted in* 7 J. MOORE, *supra* note 43, at 126-27 (report of Mr. Clay, Committee on Foreign Relations).

³⁴⁹ See 7 J. MOORE, *supra* note 43, at 127.

³⁵⁰ See *id.* at 124.

³⁵¹ *Id.* at 126-27 (emphasis added).

³⁵² Some members of Congress have begun to recognize that a distinction must be made between paramilitary operations and other forms of covert action such as covert propaganda, influence buying, and so forth. In 1983, Congressman Fowler introduced a bill, H.R. 3872, that required "explicit [congressional] authorization for any clandestine paramilitary or military activity." *Oversight Hearings, supra* note 201, at 4. The bill sought to separate out the "most questionable category of covert aid, namely paramilitary or military activities [and subject them] to a more rigorous congressional authorization process." *Id.* Hearings were held on the measure although it was never enacted. Fowler's efforts and the recent Hamilton bill with respect to Angola, *see supra* note 216, indicate a growing understanding in Congress that paramilitary operations present a different problem than the other forms of covert action.

the Framers placed in the legislative branch with the specific intent that executive power in those areas be either restrained or denied entirely cannot be constitutionally delegated.

CONCLUSION

The increasing use of covert paramilitary operations as an instrument of United States foreign policy raises substantial constitutional questions about which branch of government has the power to authorize such activity. Thus far the answer has been to assume executive authority. The intent of the Framers, however, was different. By granting Congress the power to issue letters of marque and reprisal, the Constitution recognizes that the use of private forces to conduct hostilities should be carefully circumscribed and not left to executive discretion. That constitutional judgment is even more important in today's world, in which private armies have reemerged as an important destructive force, serving as important actors in many of the world's most dangerous problems: terrorism, the Middle East crisis, and Central America. Congress can and must assert its authority over such private warfare. To refuse to do so is to abdicate its constitutional responsibility.