

## Covert War and the Constitution: A Response

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### INTRODUCTION

Words are imperfect instruments for conveying ideas, and interpreting the intended meaning of words is often a challenge, especially when more than two centuries have passed since the words were written and their meanings have evolved over the years.<sup>1</sup>

For example, the terms “executive power” and “declare war” had widely understood meanings when the Constitution was written. In his classic 1922 study, *The Control of American Foreign Relations*, Quincy Wright explained that “when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto.”<sup>2</sup> Wright referred to the writings of Locke,<sup>3</sup> Montesquieu,<sup>4</sup> and Blackstone<sup>5</sup> as “the political Bibles of the constitutional fathers,”<sup>6</sup> adding: “In foreign affairs . . . the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the President, checked only by the veto of the Senate or Congress upon completed proposals.”<sup>7</sup>

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1. This point was brought home to me many years ago when I was working on my doctoral dissertation, “National Security and the Constitution,” and I came across a letter from one of the signers of the Constitution describing it to a friend as being “awful.” It made no sense, as I knew with certainty he was an enthusiastic champion of the document. I ultimately discovered that, in the late eighteenth century, the primary meaning of “awful” was “inspiring awe,” or “deeply respectful or reverential” (MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/awful>) – what we might today call “awesome!” Without understanding that meaning, the letter would only confuse modern scholars seeking to understand the writer’s view of the Constitution.

2. QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 147 (1922). Professor Wright’s distinguished career included service as president of the American Society of International Law, the American Political Science Association, and the International Political Science Association.

3. *See, e.g.*, JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* §147 (1690).

4. *See, e.g.*, 1 MONTESQUIEU, *SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., rev. ed. 1900).

5. *See, e.g.*, 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 242-250 (1765).

6. WRIGHT, *supra* note 2, at 363.

7. *Id.* at 149-150.

Similarly, Louis Henkin observed in his 1972 volume, *Foreign Affairs and the Constitution*, “The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone.”<sup>8</sup> Edward S. Corwin added: “Blackstone, Locke, and Montesquieu were all in agreement in treating the direction of foreign relations as a branch of ‘executive’ . . . power.”<sup>9</sup> Yet few Americans understand this today.

#### I. BREAKING THE CODE: THE GRANT OF “EXECUTIVE POWER” TO THE PRESIDENT

The constitutional text does not mention “foreign affairs” or “national security,” and modern scholars have often struggled in vain to identify the constitutional basis for the separation of powers in the foreign affairs realm. But this was not always such a problem. In the early days of our nation there was a broad consensus, among Federalists and Republicans alike, both upon where those powers were vested and by what constitutional authority.

As Thomas Jefferson explained in an April 1790 memorandum to President Washington:

The Constitution . . . has declared that ‘the Executive powers shall be vested in the President,’ submitting only special articles of it to a negative by the Senate. . . .

The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.<sup>10</sup>

Three days later, Washington recorded in his diary that he had discussed Jefferson’s memorandum with Representative James Madison and Chief Justice John Jay, and both agreed with Jefferson that the Senate “ha[d] no constitutional right to interfere” with matters of diplomacy save for their expressed powers over treaties and “an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution.”<sup>11</sup>

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8. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 43 (1972).

9. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 462 (4th ed. 1957). This is not to say that the Framers totally embraced the British system. They improved upon the theories of Locke and Blackstone by vesting broad discretionary authorities in the President while vesting in Congress and the Senate important “checks” or “negatives” over certain major decisions like treaty ratification and initiating offensive war. Congress was also given total control over treasury funds and other important powers as well.

10. 16 PAPERS OF THOMAS JEFFERSON 378-379 (Julian P. Boyd ed., 1961) (emphasis in original).

11. 4 DIARIES OF GEORGE WASHINGTON 122 (Regents’ ed., 1925).

Three years later, Alexander Hamilton, Jefferson's political rival (and, along with Madison and Jay, the third author of the *Federalist Papers*), made precisely the same argument, this time with a specific reference to the power of Congress to "declare war":

The general doctrine . . . of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument. . . . With these exceptions the EXECUTIVE POWER of the Union is completely lodged in the President. . . .

It deserves to be remarked, that as the participation of the [S]enate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly – and ought to be extended no further than is essential to their execution.

While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War – it belongs to the "Executive Power," to do whatever else the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the U[nited] States with foreign Powers.<sup>12</sup>

This shared understanding of executive power is easily confirmed by examining early legislation enacted by Congress. While the bill creating the Department of the Treasury required the Secretary to appear before Congress on demand and to make his annual report to Congress, the bill introduced by Madison to establish the Department of Foreign Affairs (later re-named as Department of State) was short and to the point:

Be it enacted . . . That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary . . . , who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution . . . ; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President . . . shall from time to time order or instruct.<sup>13</sup>

Dr. Charles Thach, in one of the classic academic studies on the origins of presidential power, observed:

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12. 15 PAPERS OF ALEXANDER HAMILTON 39, 40, 42 (Harold C. Syrett ed., 1969) (emphasis in original).

13. 1 STAT. 28 (1789).

The sole purpose of that organization [the Department of Foreign Affairs] was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the “presidential” departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done. . . . Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.<sup>14</sup>

As a Federalist Member of Congress in 1800, John Marshall played a key role in the debate over the Jonathan Robbins affair. At issue was whether President Adams had acted wrongfully in surrendering an accused British deserter found in Charleston, South Carolina, to British military authorities pursuant to the extradition provision of the Jay Treaty without involving the judiciary. Showing the typical deference to the President’s executive power over foreign affairs, Marshall reasoned:

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations . . . . He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. . . . The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. . . . The department which is entrusted with the whole foreign intercourse of the nation . . . seems the proper department to be entrusted with the execution of a national contract [the Jay Treaty] like that under consideration. . . .

It is then demonstrated, that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department. . . . In this respect, the President expresses constitutionally the will of the nation . . . . This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a Constitutional power.<sup>15</sup>

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14. CHARLES C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789*, at 160 (1922).

15. 10 *ANNALS OF CONG.* 613-615 (1800).

Marshall's speech persuaded even Albert Gallatin, the Republican leader who had been scheduled to respond to his arguments, who told his colleagues: "Answer it yourself. For my part I think it unanswerable."<sup>16</sup> The resolution to censure Adams was soundly defeated. In 1936, the Supreme Court praised Marshall's reasoning while embracing the oft-repeated language that the President is "the sole organ of the nation in its external relations . . . ."<sup>17</sup>

Three years after his defense of Adams as a Representative, Marshall was America's third Chief Justice. In perhaps the most famous of all Supreme Court cases, *Marbury v. Madison*, he was called upon to examine the discretionary constitutional powers of his bitter political rival, President Thomas Jefferson. Those who believe that there can be no "unchecked" executive powers in a republican form of government presumably studied constitutional law using one of the several casebooks that omit this important language from Marshall's decision in that case:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. *They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.* The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the [D]epartment of [F]oreign [A]ffairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. . . . The acts of such an officer, as an officer, can never be examinable by the courts.<sup>18</sup>

Presidential supremacy in the foreign affairs realm – subject to some very important negatives vested in the Senate or Congress – was widely recognized by all three branches prior to the Vietnam War. For example, speaking at Cornell Law School in 1959, Chairman of the Senate Committee on Foreign Relations J. William Fulbright explained:

The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear

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16. *Quoted in* 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 474-475 (1919).

17. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803) (emphasis added).

terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone – the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.<sup>19</sup>

## II. UNDERSTANDING THE POWER TO “DECLARE WAR”

It is important to keep in mind that when James Madison moved on August 17, 1787, to reduce the power to be given to Congress in the new Constitution from “make war” to “declare war,”<sup>20</sup> he chose a term of art from the law of nations that had a well-understood meaning. Declarations of war were associated with large-scale *perfect* wars in which “one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other”<sup>21</sup>; and formal declarations were only considered necessary for all-out “offensive” (what we would today call *aggressive*) wars.<sup>22</sup>

Things were different in that era. Sovereign states had a recognized right to resort to armed force for any purpose – to acquire territory or conquer a neighbor, or perhaps just to impose “justice” or obtain satisfaction for a perceived wrong. States were not expected to declare war when they were acting defensively or when their goals were more limited – i.e., when they were engaging in “self-help” measures or other uses of “force short of war.”

In 1620, Hugo Grotius (often described as the father of modern international law) wrote: “To repel force, or to punish a delinquent, the law of nature requires no declaration.”<sup>23</sup> Similarly, Alberico Gentili explained: “[W]hen war is undertaken for the purpose of necessary defence, the declaration is not at all required.”<sup>24</sup> In 1866, James Kent wrote that such declarations were required for “offensive war.”<sup>25</sup> He described the purpose of declaring war as enabling States to “authorize their *aggression*.”<sup>26</sup>

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19. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3 (1961) (emphasis in original).

20. 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-319 (1966).

21. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800).

22. See generally Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT’L L. 903 (1994).

23. HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. III, ch. 3. (A. C. Campbell trans., 1814).

24. 2 ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 136 (1620) (John C. Rolfe trans., 1933 ed.).

25. JAMES KENT, COMMENTARIES ON INTERNATIONAL LAW 188 (J. T. Abdy ed., 1866).

26. JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 66 (1991) (emphasis added).

During the twentieth century, the world community outlawed the use of force as an instrument of national policy – first, in theory, by the 1928 Kellogg-Briand Treaty, and later with an (admittedly imperfect) enforcement mechanism, when the U.N. Charter entered into force in 1945. Article 2(4) of the Charter clearly prohibits any use of force that previously, under the law of nations when the Constitution was ratified, might arguably have required a declaration of war, and no nation has issued such a declaration since the Charter was ratified.

Put simply, the power of Congress to declare war is as much an anachronism today as the power conveyed in the same sentence to “grant letters of marque and reprisal,” which will be discussed below. This most definitely does *not* mean that Congress no longer has any role in decisions to send military forces into major hostilities, as the Commander in Chief has no army or navy to *command* unless it is first raised or provided by Congress and cannot spend a dollar from the treasury without appropriations made by law. And, of course, if a President actually decided to launch a major aggressive war, Congress would still possess its constitutional negative over the decision.

### III. LETTERS OF MARQUE AND REPRISAL

Jules Lobel, my learned adversary in this exchange, would have us believe that the power vested in Congress to declare war was but a portion of a grant of a legislative negative over *all* presidential uses of military force. To this end, he interprets the constitutional vesting in Congress of the power to “grant letters of marque and reprisal” as proof that the Framers intended to vest all decisions to use military force in Congress:

The Framers of the Constitution provided that Congress should not only have the power to Declare War, but also to issue Letters of Marque or Reprisal. They did so to ensure that decisions to initiate warfare would be made by Congress, whether the war was declared or undeclared, large or small, or involving regular U.S. troops or private citizens, mercenaries, or armed expeditions we aided.<sup>27</sup>

To make his case, Professor Lobel cites Sir Matthew Hale, James Kent, William Blackstone, and other highly respected authorities for the proposition that letters of marque created “special kinds of wars” or “imperfect” war. From this, he concludes: “The timing of Gerry’s amendment [giving Congress the power to “grant letters of marque and reprisal”] indicated that he and others probably believed that any possible

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27. Jules Lobel, *Covert War and the Constitution* 5 J. NAT’L SECURITY L. & POL’Y 393, 396 (2012).

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.”<sup>28</sup>

This is flawed logic. To say that letters of marque and reprisal are one means of imperfect war, ergo, *all* imperfect wars are regulated by letters of marque and reprisal is an obvious non sequitur. While admittedly creative and clever, the fallacy of this argument becomes clear from a brief review of the history of letters of marque and reprisal.

In the second volume of *De Jure Belli Ac Pacis*, in 1625, Grotius wrote of the various means of self-help to which individual subjects of a state had recourse throughout history, explaining:

Another form of enforcement of right by violence is “seizure of goods” or “the taking of pledges between different peoples”. This is called by the more modern jurists the right of reprisals; . . . and by the French, among whom such seizure is ordinarily authorized by the king, “letters of marque.”<sup>29</sup>

Initially, in the absence of strong central governments, the crossing of borders (from which the term “marque,” or “movement” stems) to privately redress wrongs was widely practiced throughout Europe without higher authority. But, as Grotius and other publicists declared that only the king or prince could *authorize* acts of war – and “private war,” without sovereign sanction was unlawful – the practice of issuing “letters of marque and reprisal” began. Just as public war was the ultimate remedy when one sovereign was unable to obtain redress for a perceived wrong committed by another (or the other’s subjects), the issuance of letters of marque and reprisal became the legal remedy by which *private individuals* could be authorized “to obtain compensation for injuries or hostile acts, done by aliens who could not be brought to justice.”<sup>30</sup> M. H. Keen notes that:

They could be levied on account of any injury to the right of an individual; to obtain compensation for spoliation or because he had been taken prisoner, or even to recover a debt. In particular they were often granted on account of breaches of a truce, which were too minor to justify repudiation of the truce itself, but as a result of which individuals had suffered loss. They thus enabled these men to obtain compensation by force, without breaking the truce and plunging all and sundry into the horrors of general war. They licensed a sort of limited war, to recover goods, chattels, or persons to the value of the loss originally sustained. . . .

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28. *Id.* at 398.

29. 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. III, ch. 2, at 626-627 (Francis W. Kelsey trans., 1925).

30. *Id.* at 627.

Reprisals were a very important remedy in an age when pillage and piracy were common.<sup>31</sup>

Reprisals were governed by the same set of international laws that regulated other forms of war, but they were also commonly regulated by statute. As early as 1417, Henry V of England granted his subjects the *right* to receive letters of marque, and in consequence thereof Parliament enacted a statute establishing a detailed process by which an individual could submit a claim. If his cause was found meritorious, a letter was issued under the Privy Seal demanding justice from the overlord of the man accused of the injury. If no satisfaction followed, the Chancellor would issue a letter of marque under the Great Seal. Although issued in the name of the King, letters of marque were considered a royal *duty* rather than a discretionary prerogative – a matter of *individual rights*.<sup>32</sup>

Similarly, in France, requests for letters of marque were “judged in the Parliament,” and, if found just, “either letters would be sent to request justice, or the proctors of the nation involved would be summoned to show cause why reprisals should not be taken.” If ultimately found warranted, letters of marque were issued under the King’s seal.<sup>33</sup>

However, over time, a second meaning came to be associated with letters of marque and reprisal. Rather than authorizing a private citizen to engage in armed hostilities to avenge a private wrong (often referred to as “special” letters of marque and reprisal – which obviously are *irrelevant* to the current topic)<sup>34</sup> – kings began authorizing the owners of private ships (“privateers”) to plunder an enemy’s *maritime* commerce on behalf of the state through the issuance of “general” letters of marque and reprisal. The law of nations established elaborate procedures for this practice, involving taking a seized ship into harbor and appearing before a Prize Court to establish the rightfulness of the seizure. The king benefited by the harm done to his enemies, while privateers were rewarded with title to all lawfully seized “prize.” But it was a highly regulated regime centered on the *property rights of individuals* as determined by the *judiciary*, and it only applied to seizures on the *high seas*.

During the American Revolution, the United States commissioned privateers (by letters of marque issued by the Continental Congress). The

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31. M. H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 218 (1965) (emphasis added); see also Jules Lobel, *Covert War and Congressional Authority*, 134 U. PA. L. REV. 1035, 1041-1042 (1986).

32. KEEN, *supra* note 31, at 221.

33. *Id.*

34. I do not understand Professor Lobel to be complaining here about uses of armed force by private citizens to redress personal wrongs done to them by foreign states or their subjects, but rather about military or paramilitary activities authorized by Presidents for reasons of state.

privateers took 733 British vessels as prize between 1776 and 1778.<sup>35</sup> Both the Quasi War with France in 1798-1799, and the War of 1812, resulted in part from disagreements over the legal rules governing the taking of prize,<sup>36</sup> and the United States made extensive use of privateers in both conflicts. The U.S. government has not issued a letter of marque since 1812,<sup>37</sup> and the practice was outlawed by the 1856 Declaration of Paris, which provided that “[p]rivateering is, and remains, abolished.”<sup>38</sup>

It was these “general” letters of marque and reprisal, authorizing private ship owners to arm their vessels and seize the ships and subjects of an enemy state on the high seas, that Elbridge Gerry had in mind on August 18, 1787, when he moved that the powers given Congress include the power to grant letters of marque and reprisal – an apparently uncontroversial action that produced no record of a debate.<sup>39</sup> There is no serious evidence that the Framers intended by this clause to vest in Congress a negative over every use of force short of war, as letters of marque and reprisal were by 1787 a very specific type of authorization for private ship owners to engage in certain otherwise unlawful actions against specified targets *on the high seas*.

Even in those nations that conferred virtually all “war powers” on the King, the issuance of letters of marque and reprisal was reserved to the legislative branch. As Justice Samuel Nelson observed in the *Prize Cases*:

[A]lthough the power to make war existed exclusively in the [British] King, . . . no captures of the ships or cargo of the [American colonial] rebels as enemies’ property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament.<sup>40</sup>

At its core, Professor Lobel would have us believe that, without apparent debate, the members of the Philadelphia Convention decided to

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35. 2 FRANCIS WHARTON, *THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* 168 n. (1889).

36. For example, the United States argued that “free bottoms make free goods,” and that an American ship could carry goods from French possessions in the New World to Europe without risk so long as the ship first stopped off at an American port. Britain refused to accept either of these principles.

37. Lobel, *supra* note 31, at 1045.

38. *Reprinted in* 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* (Leon Friedman ed., 1972). The United States participated in the negotiations but in the end refused to agree to outlaw privateering – arguing that the entire right of capturing private property on the high seas should also be abolished – however, it thereafter abided by the terms of the agreement, abstaining from issuing letters of marque during the Spanish-American War and acknowledging that the practice was unlawful. F. E. SMITH, *INTERNATIONAL LAW* 124-125 (1911).

39. FARRAND, *supra* note 20, at 326, 328.

40. *The Amy Warwick*, 67 U.S. 635, 694 (1863) (Nelson, J., dissenting). *See also*, BLACKSTONE, *supra* note 5, at 250-251.

vest in Congress not merely the power to declare war but the far broader power to *make* war – or at least the power to veto every presidential decision involving the initiation of armed coercion. And Professor Lobel ironically seeks to justify this interpretation on the basis of “the timing of Gerry’s amendment . . . .”<sup>41</sup> I say “ironically” because the previous day the *same* Elbridge Gerry had seconded Madison’s motion that the power to be given Congress in the draft under consideration be *changed* from the power to make war to the *more limited* power to declare war, and, after some debate, that motion carried overwhelmingly with but a single dissenting vote.<sup>42</sup>

#### IV. FORCE SHORT OF WAR IN AMERICAN HISTORY

American Presidents have sent military forces into harm’s way without congressional authorization more than 200 times,<sup>43</sup> often engaging in hostilities, and in most cases without visible signs of significant congressional concern. As the Supreme Court noted in *United States v. Verdugo-Urquidez*: “The United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security.”<sup>44</sup>

During the Carter administration, the Justice Department’s Office of Legal Counsel observed:

Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislature under our constitutional scheme in situations calling for immediate action. Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.<sup>45</sup>

When the U.N. Charter was pending before the Senate, a question arose about whether the provisions of the treaty authorizing the Security Council to commit military forces provided by Member States under Article 43

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41. Lobel, *supra* note 27, at 398.

42. FARRAND, *supra* note 20, at 319 n\*.

43. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). Perhaps the most detailed compilation on this topic is found in RICHARD F. GRIMMETT, *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2010* (2011).

44. *United States v. Verdugo-Urquidez*, 494 U.S., at 273.

45. *Presidential Power To Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980).

agreements to hostilities (an arrangement that was never implemented) would infringe upon the constitutional power of Congress to declare war. The *unanimous* report of the Senate Foreign Relations Committee found to the contrary:

Preventative or enforcement action by these forces upon the order of the Security Council *would not be an act of war* but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, *the provisions of the Charter do not affect the exclusive power of the Congress to declare war.*

The committee feels that a reservation or other congressional action . . . would also violate the spirit of the United States Constitution under which *the President has well-established powers and obligations to use our armed forces without specific approval of Congress.*<sup>46</sup>

This language was quoted with favor in the similarly unanimous report of the House Foreign Affairs Committee recommending passage of the United National Participation Act (UNPA),<sup>47</sup> which also explained:

The basic decision of the Senate in advising and consenting to ratification of the Charter resulted in the undertaking by this country of various obligations which will actually be carried out by and under the authority of the President . . . . [T]he ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill the commitments assumed by the United States thereunder . . . .”<sup>48</sup>

The theory here is a simple one. Article II, Section 3, of the Constitution obligates and empowers the President to “take care that the laws be faithfully executed,” and Article VI declares, *inter alia*, that “all

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46. U.S. SENATE COMMITTEE ON FOREIGN RELATIONS, THE CHARTER OF THE UNITED NATIONS, 79th Cong., 1st Sess., EXEC. REP’T. No. 8 at 9. This issue is discussed in greater detail in Robert F. Turner, *Truman, Korea, and the Constitution*, 19 HARV. J.L. & PUB. POL’Y 533 (1996).

47. H.R. REP. NO. 79-1383, 79th Cong. 1st Sess. 8 (1945).

48. *Id.* at 4-5. Even if one *ignored* the clearly expressed intentions of the Founding Fathers that exceptions to the general grant of “executive power” were to be construed strictly, and interpreted the power “to declare War” broadly to include lesser uses of armed force, it does not follow that Congress has *exclusive* authority to authorize resort to armed force. The same section of Article I that gives Congress the power to “declare War” also gives it power to “regulate commerce with foreign nations,” to “establish post offices and post roads,” to “define and punish piracies and felonies committed on the high seas, and offenses against the law of nations,” and a range of other powers that are also regulated by international treaties.

treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .” Ergo, as Marshall observed during the Jonathan Robbins debate,<sup>49</sup> the executive branch is “the proper department to be entrusted with the execution of a national contract” like the Jay Treaty or the U.N. Charter.

When the UNPA was pending before the Senate, isolationist Senator Burton Wheeler introduced an amendment to require that the President obtain approval from Congress by joint resolution before committing U.S. forces to hostilities pursuant to a Security Council decision under Article 42 of the Charter. The Wheeler Amendment was denounced by the leaders of both parties as being inconsistent with our Charter obligations and was defeated by a margin of greater than seven-to-one.<sup>50</sup>

Space limitations will not permit a detailed discussion of all of the examples of presidential uses of force mentioned by my learned adversary, but I submit *none* of them was an appropriate case for a formal declaration of war. In Korea, President Truman had the State Department draft an Authorization for Use of Military Force (AUMF) and *repeatedly* asked to address a joint session of Congress. He was ultimately persuaded by congressional leaders that he did not *need* legislative sanction to implement a Security Council decision and should “stay away from Congress.”<sup>51</sup> The U.N. goal was entirely *defensive*, protecting South Korea from a North Korean invasion pursuant to Article 51 and formal Security Council authorization.

Vietnam was similarly defensive in character, and since the war ended Hanoi has repeatedly acknowledged that the *Dang Lao Dong Viet Nam* [“Workers” or Communist Party] Politburo made a decision on May 19, 1959, to secretly send armed forces into South Vietnam to overthrow that country’s government by force.<sup>52</sup> The Indochina conflict was authorized by joint resolution of Congress implementing America’s commitments under the SEATO Treaty.<sup>53</sup>

Although widely misunderstood by both the International Court of Justice and much of the public, U.S. support for the Contras in Central America during the Reagan administration was in reality an act of collective self-defense pursuant to Article 51 of the U.N. Charter and a specific response to a request for assistance from the President of El Salvador.<sup>54</sup>

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49. See *supra* note 15 and accompanying text.

50. 91 CONG. REC. 11,392 (1945). The Wheeler Amendment is discussed in more detail in Turner, *supra* note 46, at 553-555.

51. Turner, *supra* note 46, at 566-576.

52. See, e.g., *The Legendary Ho Chi Minh Trail*, 20 (5) VIETNAM COURIER 9 (1984).

53. See, e.g., Robert F. Turner, *Luncheon Debate*, in *THE REAL LESSONS OF THE VIETNAM WAR* 115 (John Norton Moore & Robert F. Turner eds., 2002). The resolution passed by a margin of 99.6 percent.

54. As the senior White House lawyer charged specifically with overseeing the

Covertly working with other sovereign states against non-state terrorist organizations similarly has nothing to do with the power of Congress to declare war, which only applies to conflicts between states.

## V. COVERT ACTIVITIES IN AMERICAN HISTORY

In reality, a record of constitutional practice dating back to the earliest days of our nation and continuing more than two centuries clearly refutes this strange interpretation of the power to grant letters of marque and reprisal. Put simply, the Founding Fathers understood both the need for secrecy in the successful conduct of foreign intercourse and the reality that Congress could not be trusted to keep secrets.

The new nation's first major involvement with covert action was persuading the French government to provide a wide range of secret assistance to the American Revolution. In November 1775, the Continental Congress established a Committee of Secret Correspondence to manage the details of foreign affairs, and the Committee dispatched secret agents to various parts of Europe to gather information and influence the policies of foreign governments.

In October of the following year, Thomas Story returned from France via London with news the French government was willing to provide large-scale covert assistance to the United States using a proprietary "front" company and shipping weapons from Holland to the Dominican Republic. Delighted at the news, Benjamin Franklin and the other four members of the Committee nevertheless concluded *unanimously* that they could not share the news with others in Congress, writing in a secret memorandum: "We find by fatal experience that Congress consists of too many members to keep secrets."<sup>55</sup>

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legality of Intelligence Community activities at the time, I followed this program very closely between 1981 and 1984, authored the primary government legal memorandum on the program (endorsed by the Attorney General), and subsequently worked on the issue as a consultant to the Department of State Legal Adviser. During a visit to San Salvador in early May 1984 accompanying a presidential election observation delegation, I heard outgoing Salvadorian President Alvaro Magana acknowledge, in response to a question from Professor John Norton Moore, that El Salvador had formally requested American assistance under Article 51 of the U.N. Charter. Space will not permit a discussion of the details of the issue here. See generally ROBERT F. TURNER, *NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS* (1987); Robert F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSNAT'L. L. 53, 56-69 (1987); JOHN NORTON MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987).

55. 2 PAUL FORCE, *AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES*, 5th Series, 818-819 (1837-1853); see also Robert F. Turner, "Secret Funding and the 'Statement and Account' Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities," Prepared statement to the House Permanent Select Committee on Intelligence, February 4, 1994, available at [http://www.fas.org/irp/congress/1994\\_hr/turner.htm](http://www.fas.org/irp/congress/1994_hr/turner.htm).

Explaining the proposed Constitution to the American people in *The Federalist* No. 64, John Jay wrote that there would be important sources of foreign intelligence information “who would rely on the secrecy of the president, but who would not confide in that of the [S]enate, and still less in that of a large popular assembly” (like today’s Senate). Because of this concern, Jay explained, the new Constitution had left the president “able to manage the business of intelligence in such manner as prudence might suggest.”<sup>56</sup>

Jay’s interpretation was clearly shared by Congress. In language that would be repeated for many years thereafter, Congress in 1790 appropriated \$40,000 (soon raised to \$50,000, at which time it was fourteen percent of the federal budget) for foreign intercourse, with these instructions:

[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . .<sup>57</sup>

In an 1804 letter to Treasury Secretary Albert Gallatin, President Jefferson explained the original understanding of the role of Congress in appropriating funds for foreign intercourse:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations . . . .

From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.<sup>58</sup>

Speaking of Jefferson, at his very first cabinet meeting on March 15, 1801, a decision was made to send two-thirds of the new American Navy halfway around the known world with these instructions:

Should you find on your arrival at Gibraltar that . . . the Barbary Powers, have declared War against the United States, you will then

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56. THE FEDERALIST No. 64 435 (Jacob E. Cooke ed., 1961). In the initial draft of Jefferson’s 1790 memorandum to President Washington, he wrote “The Senate is not supposed by the Constitution to be acquainted with the secrets of the Executive department. It was not intended that these should be communicated to them.” In the final version “secrets” was broadened to “concerns.” 16 PAPERS OF THOMAS JEFFERSON, *supra* note 10, at 379, 382 n. 8.

57. 1 STAT. 129 (1790).

58. 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed., 1903).

distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence – by *sinking, burning or destroying their ships & Vessels wherever you shall find them.*<sup>59</sup>

It is important to keep in mind there was no “sudden attack” or even reasonable likelihood that any Barbary state was considering attacking the United States – and no need for urgency (since the squadron did not leave for more than two months). Yet Congress was not even officially informed of the deployment for more than six months (although legislators certainly read about it in the newspapers), and when it was finally reported there were few if any complaints from Capitol Hill that the President had exceeded his constitutional authority. Sadly, Jefferson’s overly deferential (indeed, quite misleading) description of the deployment in his first State of the Union message has confused many scholars.<sup>60</sup> It is true that Congress (at Jefferson’s urging) in subsequent years enacted several statutes approving the use of force, but they were neither sought nor enacted until months after Jefferson had sent most of the U.S. Navy into harm’s way.

One of the most interesting aspects of the struggle against the Bey of Tripoli, Yusuf Bashaw, during the Barbary Wars was Jefferson’s use in 1805 of a rag-tag army composed of about 500 Greek and Arab mercenaries assembled by “Navy agent” William Eaton. Eaton was supplied with \$40,000 from the U.S. treasury and a small detachment of U.S. Marines, which was instructed to “disguise the true object” of their mission and pretend to be on leave. They went to Alexandria, Egypt, to track down the Bey’s elder brother, Hamet Pasha, whom they persuaded to lead the mercenary army across five hundred miles of desert to assert his “rightful claim” to power. After they captured the town of Derne, they planned to attack Tripoli with the support of offshore U.S. naval gunfire.<sup>61</sup>

Unfortunately, round-trip communications between the Mediterranean and Washington took months, as messages had to be sent by sailing ship. Unaware of Eaton’s great success, Jefferson authorized Tobias Lear, the U.S. Consul in Algiers, to sign a peace treaty with the Bey, and Eaton’s final attack was called off. The *Annals of Congress* do not reveal any serious expressions of concern about the constitutional propriety of this covert paramilitary operation after it became known to Congress – other than some criticism of reports that Hamet and his mercenaries were left to

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59. 1 OFFICE OF NAVAL RECORDS AND LIBRARY, NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465, 467 (GPO 1939) (emphasis added).

60. For a summary of the events that actually transpired, based largely upon original documents, see Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT’L L. 121 (2003). Alexander Hamilton was outraged that Jefferson’s report to Congress understated executive power in the situation. See 25 PAPERS OF ALEXANDER HAMILTON, *supra* note 12, at 453-457.

61. See generally Turner, *supra* note 60.

their own devices when the Marines and Eaton were withdrawn to an American warship.<sup>62</sup>

When Madison became President he engaged in a series of covert operations to gain control of Spanish Florida, repeatedly misleading the American public and occasionally promoting rebellion in Florida without the knowledge of Congress. On October 27, 1810, Madison issued a proclamation authorizing Orleans Territory Governor William C. C. Claiborne to send troops to occupy parts of West Florida claimed by Spain. (However, Congress did make secret appropriations at the requests of both Jefferson and Madison for the purpose of acquiring Florida.)<sup>63</sup>

Madison's biographer, Professor Irving Brandt, writes:

President Madison actually undertook, in a democratic republic with divided powers, to execute a policy that was appropriate only to an autocracy or a strong ministerial government like that of Great Britain. That had worked in the minor arena of West Florida, whose military occupation was carried out without the knowledge of Congress or the people. But in that case Spain's anarchic impotence confined the issue to North America, and American public opinion had been unified by past events.<sup>64</sup>

In 1818, a discussion occurred on the floor of the House of Representatives concerning newspaper reports that three Americans who had not been confirmed by the Senate to diplomatic appointments were in Latin America alleging to represent the president. During this discussion, the legendary Henry Clay observed:

There was a contingent fund of \$50,000 allowed to the President by law, which he was authorized to expend without rendering to Congress any account of it – it was confided to his discretion, and, if the compensation of the Commissioners had been made from that fund, . . . *it would not have been a proper subject for inquiry.*<sup>65</sup>

Representative John Forsyth added during the same debate: "It was true the President might have taken it out of the secret service fund, and no inquiry would have been made about it."<sup>66</sup>

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62. *Id.* at 137. However, this operation was probably consistent with prior statutes concerning Tripoli.

63. *See, e.g.,* FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 103-105 (1987).

64. IRVING BRANDT, *JAMES MADISON: COMMANDER IN CHIEF 1812-1836*, at 20-21 (1961).

65. 32 *ANNALS OF CONG.* 1466 (1818) (emphasis added).

66. *Id.* at 1467.

Even at the height of the anti-executive period immediately following U.S. withdrawal from Vietnam, Congress rejected broad efforts to challenge the constitutional authority of the President to use the CIA to support paramilitary efforts around the world. Thus, in 1973, when the War Powers Resolution was being considered in the Senate, an amendment by Senator Thomas Eagleton to apply the statute to paramilitary activities conducted by the CIA was rejected.<sup>67</sup>

Some seem to think that the only reason to act covertly is because government officials believe their behavior is immoral or illegal. That is seldom the reality. Sometimes, as in Angola in the mid-1970s, we act covertly to dissuade adversaries like the Soviet Union from efforts to seize control of foreign territory by proxy – knowing that a public confrontation would make the task far more difficult by requiring the adversary to publicly “lose face” if it elected to back down. This was a particularly important consideration in Angola, as Moscow was engaged in a struggle for the allegiance of Third World revolutionary movements and could not afford to be seen as publicly giving in to American pressures.

In other cases, like Pakistan in the current conflict with al Qaeda, permission for U.S. involvement may be contingent upon secrecy because the leadership of the host state might pay a severe political price domestically if its consent to American military activities within its territory were made public. Foreign states sometimes condition cooperation with, or assistance to, the United States upon strict secrecy because they do not wish to offend other nations – as with France during the American Revolution and Canada during the rescue of American embassy employees from Tehran during the Carter administration. There is nothing about acting covertly that is inherently immoral or illegal.

#### CONCLUSION

By vesting the nation’s “executive Power” in the President, the Founding Fathers intended to convey the general control of the nation’s diplomatic, political, and military relations with the external world – subject to some very important “negatives” vested in the Senate or Congress. One of those negatives was that the President could not use whatever military forces Congress made available to initiate what today would be called a major aggressive war (a use of force subsequently outlawed by international

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67. 119 CONG. REC. 25,079 (1973). However, in 1976 Congress enacted the Clark Amendment prohibiting the use of funds to support military or paramilitary operations in Angola without congressional authorization. Pub. L. 94-329, §404; 22 U.S.C. 2293. I was serving at the time as national security adviser to Senator Robert P. Griffin, a member of the Foreign Relations Committee, and I drafted the “Griffin Amendment,” intended to weaken the Clark Amendment that led to a filibuster. I continue to have very serious doubts about the constitutionality of the Clark Amendment.

law). But as *exceptions* to the general grant of power to the President, these negatives were to be “construed strictly.”

Presidents have used “force short of war” both overtly and covertly hundreds of times since at least the days of Jefferson, and until recently Congress has seldom seriously complained. The President needs the approval of two-thirds of the Senate to make a treaty and a majority of both houses of Congress to raise and equip military forces or provide money for operations.

But the Founding Fathers did not believe Congress could be trusted to keep secrets, and thus they left the conduct of diplomacy,<sup>68</sup> the collection of intelligence (and efforts by spies to influence the behavior of other nations as well),<sup>69</sup> and the conduct of military operations<sup>70</sup> exclusively to the discretion of the president. They would have been shocked at the thought of “intelligence oversight” committees in Congress, and for the first decade or more didn’t even have a permanent Senate Committee on Foreign Relations.

Vietnam, Operation Desert Storm, Operation Iraqi Freedom, and the post-9/11 struggle against al Qaeda and its allies were formally authorized by AUMFs (joint resolutions or statutes) from Congress – a practice recognized as lawful by the Supreme Court for more than two centuries.<sup>71</sup> President Truman repeatedly asked to address a joint session of Congress about Korea and had the State Department draft an AUMF, but ultimately acquiesced when congressional leaders told him he had authority to act under the Constitution and the U.N. Charter and urged that he “stay away from Congress.” The lesser examples that have been cited, like covert assistance to the non-Communist factions in Angola and Nicaragua, do not come close to constituting situations in which a declaration of war would have been deemed appropriate when the Constitution was ratified and such

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68. “Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.*” *United States v. Curtiss-Wright Export Corp.*, 299 U.S., at 319 (emphasis added).

69. See, e.g., Turner, “Secret Funding and the ‘Statement and Account’ Clause,” *supra* note 55; and STEPHEN F. KNOTT, *SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY* (1996).

70. “[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . *Congress cannot direct the conduct of campaigns.*” *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-592 (2006) (Stevens, J., quoting with favor Chief Justice Chase’s 1866 opinion in *Ex parte Milligan*).

71. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37; *Talbot v. Seeman*, 5 U.S. 1 (1 Cranch) (1801) (Marshall, C.J.).

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instruments were in use. Specific covert wars may or may not be wise policy; but they are not unconstitutional.