

Covert War and the Constitution

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Editors' Note: The *Journal of National Security Law & Policy* invited Jules Lobel and Robert F. Turner to debate the constitutionality of covert war for this special issue. Professor Lobel wrote his essay first, and it follows below. Professor Turner wrote a counterargument, and his essay follows Professor Lobel's. We then invited each to write rebuttals, included after these essays.

The question of whether the President has the constitutional power to authorize covert paramilitary actions or shadow wars against other nations or entities first surfaced at the beginnings of the American republic and continues to vex policymakers today. As early as 1806, in the case of *United States v. Smith*, two civilians being tried for attempting to launch a paramilitary expedition from the United States against Spanish America claimed that their covert activities had been secretly approved by President Jefferson and Secretary of State Madison.¹ Supreme Court Justice William Paterson, a delegate to the Constitutional Convention, who presided over the trial, held that the defense's proffered testimony was immaterial, because 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 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 reprisal²

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1. *United States v. Smith*, 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342); see Robert J. Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 311-312 (1975); see also Jules 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, 35-36 (1983).

2. *United States v. Smith*, 27 F. Cas. at 1229-1230.

Despite Justice Paterson's admonition, Presidents since World War II have relied extensively on CIA covert paramilitary activities in a wide range of countries to attempt to overthrow governments deemed hostile to United States interests.³ More recently, U.S. military Special Operations Forces have engaged in clandestine, anti-terrorist military activities in other countries,⁴ and the CIA has also waged a shadow war on several continents against terrorists.⁵

Modern Presidents have argued that the executive branch has the power to authorize the use of covert paramilitary force without the approval of Congress.⁶ Congress, has on occasion, limited or ended funding for particular covert paramilitary operations,⁷ but has not required the Executive to obtain congressional approval to engage in such actions.⁸ Congress has instead required merely executive reporting of anticipated covert actions to congressional committees.

Despite congressional acquiescence in covert unilateral Executive war-making, some commentators argue that covert paramilitary actions, which

3. JOHN PRADOS, *SAFE FOR DEMOCRACY: THE SECRET WARS OF THE CIA* (2006) (providing a history of these efforts).

4. Jennifer D. Kibbe, *Covert Action and the Pentagon*, 22 *INTELLIGENCE & NAT'L SECURITY* 57 (2007); Scott Shane, Mark Mazzetti & Robert F. Worth, *The Shadow War: Secret Assault on Terrorism Widens on Two Continents*, *N.Y. TIMES*, Aug. 15, 2010, at A1; Andrew Feickert & Thomas K. Livingston, *U.S. Special Operations Forces (SOF): Background and Issues for Congress* (Cong. Res. Service RS 21048), Dec. 3, 2010.

5. Shane, Mazzetti & Worth, *supra* note 4.

6. *See, e.g., U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearings Before the House Select Comm. on Intelligence*, 94th Cong. 1729-1734 (1975) (statement of Mitchell Rogovin, Special Counsel to the Director of the CIA) [hereinafter *House Intelligence Hearings*]; *see* Memorandum to Lawrence Houston, General Counsel to the CIA, 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).

7. 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 Control Act of 1976, Pub. L. No. 94-329, §404, 90 Stat. 729, 757-758 (1976). The Boland Amendment prohibited the use of CIA 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). In 1984, after the disclosure that the CIA had been involved in mining Nicaraguan harbors, Congress prohibited the use of any funds for paramilitary activities in Nicaragua for a year. Department of Defense Appropriation Act for Fiscal Year 1985, Pub. L. No. 98-473, §8066, 98 Stat. 1837, 1935-1936 (1984).

8. 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 Thomas F. Eagleton). The amendment was rejected by the Senate. *See id.* at 25,092.

cannot truly be kept secret for any length of time, must under the Constitution be debated and approved by Congress.⁹

This essay argues that covert paramilitary operations or shadow wars cannot be unilaterally undertaken by the President, but constitutionally require the authorization of Congress.¹⁰ First, the Constitution's text and early practice of the founding generation confirm that all wars that the United States engages in – whether little or big, whether fought by paramilitary forces, private mercenaries, contractors, or regular U.S. armed forces – require congressional approval. Second, the various utilitarian rationales proffered to justify executive covert or shadow wars, such as the argument that the need for secrecy precludes congressional debate and participation, do not withstand scrutiny.

I. THE FRAMERS AND PARAMILITARY OPERATIONS

While the Framers of the Constitution could not have anticipated the establishment of a Central Intelligence Agency that would undertake far flung covert paramilitary activities around the globe, they were quite familiar with governmental use of private armed forces operating with the authorization of the central government. Throughout the several centuries preceding the American Revolution, European governments had utilized and authorized private armed ships to conduct warfare.

In the seventeenth and eighteenth centuries, the governmental license for the private use of force was termed a letter of marque and reprisal.¹¹ As governmental control over warfare increased, 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

9. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (“The Constitution requires that ‘covert’ wars that aren’t in fact secret receive congressional authorization.”); Lori Fisler Damrosch, *Covert Operations*, 83 AM. J. INT’L L. 795, 799 (1989) (“There is considerable force to the view that when the nature or scale of the operation makes it impossible for secrecy to be preserved, the matter does not belong under the intelligence oversight procedure, but should be publicly debated in the same manner as any other important foreign policy issue”). LOUIS FISHER, *PRESIDENTIAL WAR POWER* 3,6-7, 236-238, 254 (2d ed. 2004) (arguing that President’s use of private persons to engage in covert paramilitary activities abroad usurps Congress’s exclusive power to issue letters of marque and reprisal); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 859 (1996).

10. This essay builds on a longer article I wrote years ago arguing that CIA covert paramilitary actions required congressional approval. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

11. Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT’L L. 694, 700-702 (1933).

recompense for specific wrongs, to “general letters,” which had the effect of “war, yet is not . . . regular war.”¹²

In seventeenth and eighteenth century America, private individuals were commonly relied on to fight wars. 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.¹³ Letters of marque were issued during the American Revolution,¹⁴ and privateering commissions were common in America throughout the colonial period.¹⁵ The Framers of the Constitution recognized that, lacking a strong navy, the United States would continue to resort to private armed ships to conduct hostilities at sea,¹⁶ and thus provided for the issuance of letters of marque and reprisal in both the Articles of Confederation¹⁷ and the United States Constitution.¹⁸

The Framers 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 receiving aid from the United States.

When the founding generation 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. 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.¹⁹ Similarly, James McHenry, John Adams’s 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 . . .

12. 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 162 (Sollom Emlyn ed., 1736) (1680).

13. See 8 *ANNALS OF CONG.* 1811 (1798).

14. 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 (Julian P. Boyd ed., 1951) (requesting blank letters of marque).

15. See J. FRANKLIN JAMESON, *PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD: ILLUSTRATIVE DOCUMENTS* viii (1923); see, e.g., Commission of Capt. Benjamin Norton as a Privateer (June 2, 1741), reprinted in *id.* at 378-381.

16. See, e.g., 7 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 547-548 (1906) (quoting from a paper by Thomas Jefferson advocating privateering).

17. See *ARTICLES OF CONFEDERATION* of 1781, arts. VI, IX.

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

19. 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 MOORE, *supra* note 16, at 123 (emphasis added).

require[s] the explicit sanction of the branch of government which is alone constitutionally authorised to grant letters of marque and reprisal.”²⁰ Albert Gallatin, a leader of the Republicans in Congress and later President Jefferson’s Treasury Secretary argued that the grant of letters of marque and reprisal was “an intermediate state between peace and war,”²¹ and often preceded war, “[w]hen it has not been thought proper to come to open war at once.”²²

More generally, many statesmen and scholars of the period used the term *marque and reprisal* to refer to a state of “imperfect war,” by which they meant any state of armed hostilities or low-intensity warfare that did not rise to the level of declared war. For example, Sir Matthew Hale, a well known legal scholar in the seventeenth century familiar to the Framers, wrote: “Special kinds of wars are that which we usually call *marque and reprisal*.”²³ James Kent, in his authoritative *Commentaries on American Law*, referred to special letters of *marque and reprisal* as “imperfect war[s],”²⁴ which are “compatible with a state of peace.”²⁵ William Blackstone notes that the “prerogative of granting [letters of *marque and reprisal*] . . . is nearly related to . . . making war; this being indeed only an incomplete state of hostilities.”²⁶ Joseph Story, citing Blackstone, 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.²⁷

20. Letter from James McHenry to John Adams (May 18, 1798), *reprinted in* ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 155 (1976). 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 461-462 (Harold C. Syrett ed., 1974). 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, *id.* at 17 (footnote omitted) (emphasis added).

21. 8 ANNALS OF CONG. 1511 (1798) (statement of Rep. Gallatin).

22. *Id.*

23. HALE, *supra* note 12.

24. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 62 (Oliver Wendell Holmes, Jr. ed., 1873) (1826).

25. *Id.* at 61.

26. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 258 (Garland Publishing, photo. reprint 1978) (1765).

27. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 64 (1833).

The original drafts of the Constitution contained no mention of letters of marque and reprisal.²⁸ Immediately after the substitution of “declare war” for “make war” in the Clause giving Congress the power to declare war,²⁹ Elbridge Gerry recommended that something be “inserted concerning letters of marque,” since “he thought [they were] not included in the power of war.”³⁰ 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, 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.”³¹ 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 hostilities involved private parties acting under the auspices or direction of the United States.

The new nation’s early history also confirms that the initiation of war-making that could be attributable to the United States was under congressional, not executive, control. Within a decade of the Constitution’s ratification, Congress enacted the Neutrality Act of 1794, which prohibits persons in the United States from engaging in a military expedition, enterprise or armed hostilities against another nation which with we are at peace.³² Importantly, unlike its English antecedents, the American statute omitted the executive discretion to authorize enlistment or recruitment for a foreign state or to launch a hostile expedition against a foreign nation.³³

28. *See generally* W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS 74-86 (1981).

29. Significantly, Gerry made his motion on August 18, 1787, the day after the “make war” debate. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318-329, 326 (1911).

30. *Id.* at 326. The only significant mention of letters of marque and reprisal in the pre-convention and ratification debates is Madison’s comment 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, at 299 (James Madison) (Jacob E. Cooke ed., 1961).

31. STORY, *supra* note 27, at 63.

32. *See* Neutrality Act, ch. 50, 1 Stat. 381-384 (1794) (codified as amended at 18 U.S.C. §§958-960, 962 (2006)).

33. 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 Ann. ch. 11 (1713); 9 Geo. 2, ch. 30 (1736); 29 Geo. 2, ch. 17 (1756). Those English statutes, however, provided that enlisting or recruiting constituted crimes only when done “without leave or license of his Majesty.” *See* 9 Geo. 2, ch. 30 (1736). That provision was deleted from the American Neutrality Act. *See*

This intentional statutory denial of executive discretion to approve private military expeditions contained in a statute strongly supported by Treasury Secretary Alexander Hamilton,³⁴ reflects the common understanding of both the executive³⁵ and the legislative branches that the President did not have that constitutional power.

The courts early on recognized that the Neutrality Act reflected the Constitution's division of power. In *Hensfield's Case*,³⁶ which prompted the passage of the Neutrality Act, Supreme Court Justice James Wilson, an important Framers of the Constitution, argued 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.'"³⁷ And as already noted, in the 1806 case of *United States v. Smith*, the court held that a President could not authorize a covert, private military expedition against a foreign country except in response to an actual invasion.³⁸

Similarly, during the Quasi War with France the Adams administration recognized that only the legislature could license the arming of private merchant ships and therefore asked Congress to authorize merchants to arm in self-defense and grant letters of marque.³⁹ Administration efforts to secure congressional authorization to authorize merchant vessels to arm in self-defense and eventually to engage in offensive reprisals against the French met great resistance in Congress, although eventually Congress did

Lobel, *supra* note 1, at 31-32.

34. See Letter from Alexander Hamilton to John Jay (June 4, 1794), *reprinted in* 16 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 456-457. 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." GEORGE BEMIS, AMERICAN NEUTRALITY: ITS HONORABLE PAST, ITS EXPEDIENT FUTURE 84-85 (1866).

35. Early Presidents recognized that the power to authorize private military expeditions against a foreign country was a congressional, not an executive power. 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.

Second Annual Message to Congress of President Martin Van Buren (Dec. 3, 1838), *reprinted in* 3 MESSAGES AND PAPERS OF THE PRESIDENTS 487 (James D. Richardson, ed., 1899). President James Buchanan also understood that such military expeditions were a "usurpation of the war-making power, which belongs alone to Congress." CONG. GLOBE, 35th Cong., 1st Sess. 217 (1858).

36. *Hensfield's Case*, 11 F. Cas. 1099, 1122 n.7 (C.C.D. Pa. 1793) (No. 6,360).

37. *Id.* at 1109.

38. *United States v. Smith*, 27 F. Cas. at 1192.

39. Letter from Alexander Hamilton to James McHenry (Mar. 1797), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 20, at 574. Letter from Alexander Hamilton to Theodore Sedgwick (Jan. 20, 1797), *reprinted in id.* at 474.

enact these measures. The assumption of both Federalist and Republican members of Congress, as well as the Administration, was that the authorization of such lesser forms of hostilities by private parties was a congressional power.⁴⁰

Some recent commentators argue that the Marque and Reprisal Clause could not have meant to apply to a broad array of low intensity warfare, including covert paramilitary or shadow warfare.⁴¹ For example, John Yoo argues that at the time the Constitution was drafted, letters of marque and reprisal referred only to a “fairly technical form of international reprisal” – and not a panoply of low intensity warfare, including covert paramilitary actions.⁴² Yet Yoo ignores the continued reference to the Marque and Reprisal Clause by Hamilton and other early leaders as prohibiting a broader range of warfare than just one specific, technical, and now outmoded form of private warfare.⁴³

Yoo, relying on a student law review comment, also claims that during the American Revolution, letters of marque and reprisal authorized a “rather narrow form of commercial warfare that was conducted for profit,” and therefore different in nature than warfare fought for “purely military and political goals.”⁴⁴ While eighteenth century privateers undoubtedly had commercial motivations, the reason that the Continental Congress and the U.S. Congress authorized such action was clearly political and related to foreign policy and war aims. The reason the Constitution grants Congress the power to authorize letters of marque and reprisal was not to allow Congress to regulate commercial warfare (as sort of a corollary to Congress’s power to regulate international commerce), but because such letters represented an important form of hostilities short of full scale war that fell within congressional war authority. The motivations of the private actors – whether religious, political, commercial, egotistical, or something else – are irrelevant to U.S. foreign policy aims. When the U.S. government utilizes private, non-official U.S. military personnel to fight wars in support of perceived U.S. interests, the reasons the private actors are fighting are superfluous to the constitutional interests involved. It should not make a difference whether the CIA hires mercenaries to fight for profit, or deploys paramilitary forces who fight for religious reasons or because they want to overthrow the government. Moreover, Yoo and Marshall’s argument does not account for the early Neutrality Act and the

40. Lobel, *supra* note 10, at 1066-1069.

41. JOHN YOO, *THE POWERS OF WAR AND PEACE* 147-148 (2005); C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953 (1997); J. Gregory Sidak, *The Quasi War Cases – And Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465, 468 (2005).

42. YOO, *supra* note 41, at 147.

43. See *supra* text accompanying notes 19-21.

44. YOO, *supra* note 41, at 148; Marshall, *supra* note 41, at 974-981.

cases interpreting that statute, which clearly rejected presidential power to authorize private military expeditions against another nation.

So too Professor J. Gregory Sidak's argument that the Marque and Reprisal Clause is premised not on the separation of war-making powers between Congress and the President, but rather on "the right of a sovereign nation" to control private warfare fails to account for why the Constitution granted the power to Congress, *not* the President.⁴⁵ While ensuring centralized, national control over private warfare was clearly a motivating factor for providing that letters of marque and reprisal could only be issued by the national government and not the states, according the President as Commander in Chief that power would have addressed that concern, and would have also been consistent with the British practice under which the King issued letters of marque and reprisal to private citizens.⁴⁶ That the power of issuing letters of marque and reprisal was not given to the Executive but rather to Congress reflects the Framers' view that the initiation of hostilities not taken in response to a sudden attack against us – whether by private individuals or by regular U.S. troops, or by means of a covert paramilitary expedition against a foreign country – was to be authorized by Congress.

Today, armed hostilities abroad conducted by paramilitary groups or private contractors with our support and under our direction make us vulnerable to liability under international law and thus raise similar concerns of U.S. responsibility to those 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."⁴⁷ Where international law treats American support of paramilitary operations or the use of private contractors as a U.S. use of force against a foreign state, authorization of such paramilitary action is within the exclusive domain of Congress, which alone is capable of granting letters of marque and reprisal. Arming, training, directing, sending out, or providing extensive logistical support for guerilla groups, armed bands, mercenaries, or irregulars engaging in combat in another country is considered a use of force by the country providing the support, although mere funding would not be.⁴⁸

45. Sidak, *supra* note 41.

46. Clark, *supra* note 11, at 721 (letters of reprisal issued by Charles II in 1664).

47. THE FEDERALIST NO. 44, *supra* note 30, at 318.

48. *See, e.g.*, Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits); *id.* at §228, §§191-238, 247, 292(4); *see also* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (1974); the Declaration of Principle of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations, art. 1,

In general, whenever the United States provides extensive support to paramilitary groups in the form of arms, advisors, training, or logistical support, it can be held responsible internationally for the warfare of the groups it aids. These paramilitary forces perform a similar function that privateers or private paramilitary expeditions known as filibustering expeditions did two hundred years ago. They represent U.S. interests in armed conflicts short of declared war against other sovereign nations. Such activities, therefore, must be approved by Congress pursuant to the Marque and Reprisal and Declare War Clauses.

II. THE MODERN ARGUMENT FOR EXECUTIVE COVERT WARFARE

The main argument for executive discretion to engage in covert or shadow wars in the contemporary world context focuses on the need for secrecy in the conduct of foreign policy. Open debate and public acknowledgment of paramilitary operations are admittedly in fundamental conflict with this perceived need for secrecy. Yet the constitutional framework strikes a careful balance between the requirements of secrecy in foreign policy and the need for democratic decisionmaking.⁴⁹ 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.⁵⁰ The President, therefore, was vested with the power to negotiate treaties, while the House was excluded entirely from the treaty ratification process.⁵¹ Similarly, in conducting “military operations . . . secrecy was necessary sometimes”⁵² and thus the President was made Commander in Chief of the armed forces.⁵³ But while tactical decisions as to how to fight wars could be made by the Commander in Chief alone, the decision to initiate warfare was not given to one person, but rather required the collective judgment of Congress and the President.

Decisions whether to use force against other nations or foreign organizations were not to be made secretly. Initiating wars should not be secret, although particular military operations in an authorized war need not be disclosed. Executive initiation of covert war commits us to wars that are not openly defended and supported, and whose outcome cannot be guided by our democratic institutions.⁵⁴ Thus, reliance on covert action offers a

para. 9, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121, 123 (1970).

49. See generally DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS (1981).

50. See THE FEDERALIST NO. 64 (John Jay), *supra* note 30.

51. HOFFMAN, *supra* note 49, at 32-33.

52. FARRAND, *supra* note 29, at 326 (remarks of George Mason).

53. See U.S. CONST. art. II, §2.

54. See S. REP. NO. 94-755, at 16 (1977) [hereinafter CHURCH COMMITTEE REPORT];

secret shortcut around democratic decisionmaking that distorts the democratic process and is fundamentally incompatible with the demands of our constitutional system.⁵⁵

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.⁵⁶ The secrecy rationale admittedly may support executive control over the distribution of covert propaganda, other forms of covert activities as well as intelligence gathering, although even with respect to intelligence gathering, Congress can constitutionally set broad policy as it has in Foreign Intelligence Surveillance Act. 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.⁵⁷

Covert paramilitary warfare, on the other hand, does not and cannot strive for invisibility. Nations cannot be kept ignorant of a war being waged either against them or their neighbors.⁵⁸ Nor can American involvement in a covert war remain secret for any length of time. As Senator Patrick Moynihan once remarked, “My first comment about so called secret wars must be that there is no such thing. The preparations for war can be kept secret, but once a war commences, whatever its avowed nature, it becomes a public event.”⁵⁹

see also Should the U.S. Fight Secret Wars?, HARPER’S MAGAZINE, Sept. 1984, 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 coherent foreign policy); *id.* at 37 (remarks of Morton Halperin) (covert action commits the United States to warfare without public debate).

55. *See* CHURCH COMMITTEE REPORT, *supra* note 54, at 156; Robert L. Borosage, *The Central Intelligence Agency: The King’s Men and the Constitutional Order*, in ROBERT L. BOROSAGE & JOHN MARKS, *THE CIA FILE 125* (1976); Nicholas deB. Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 FOREIGN AFF. 1, 15 (1973).

56. 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 (Apr. 20, 1846), *reprinted in* 4 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 35, at 435 (discussing need for secrecy in employing individuals to obtain information or aid in the negotiation of a treaty).

57. The executive branch has often relied on spies and private agents to conduct U.S. foreign policy. *See* HENRY M. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 693-744 (1929).

58. *See* Donovan Pratt, *Counterintelligence: Organization and Operational Security in the 1980’s*, in 3 INTELLIGENCE REQUIREMENTS FOR THE 1980’S: COUNTERINTELLIGENCE 230-231 (Roy Godson ed., 1980).

59. *Should the U.S. Fight Secret Wars?*, *supra* note 54, at 35 (statement of Sen. Daniel Patrick Moynihan) (noting that there is no such thing as a secret war); *see id.* at 39 (statement of Ray Cline) (commenting that military operations are simply impossible to fight secretly).

Moreover, it is generally conceded that U.S. participation in secret wars does not and cannot remain hidden.⁶⁰ The U.S. role was not kept secret in any of the paramilitary cases studied by the Senate Select Committee on Intelligence Activities in 1976.⁶¹ Thus, very quickly covert paramilitary actions such as the CIA's support for the Nicaraguan *Contras*, the Afghan insurgents fighting the Soviet Union, the paramilitary effort to support Iraqi military officers and Kurdish nationalist groups seeking to overthrow Saddam Hussein in the 1990s, or the current "secret wars" being waged in Pakistan, Yemen, and other nations became public knowledge.⁶²

The notion that the Executive can engage in an armed attack or use of force against another nation either "covertly" or overtly that is not either authorized by Congress or in response to a sudden armed attack against us clearly is inconsistent with the mandate of our Constitution and a democratic society. There are occasions, of course, when one nation can gain at least a temporary advantage over another by launching a surprise attack against an unprepared enemy – the 1941 Japanese attack on Pearl Harbor or Hitler's 1941 attack on the Soviet Union are but two examples. But our Constitution takes that "advantage" away from the President for good reasons, mainly the Framers' fear that the Executive would be more likely to get us into costly and unwarranted warfare. Indeed the history of warfare, especially covert and secret wars, illustrates the grave dangers of allowing the Executive to launch preemptive strikes against other nations, either overtly or covertly.⁶³ Most are disastrous, as the history of the CIA's involvement in covert wars illustrates.⁶⁴

Since covert or shadow wars cannot remain secret and the American role cannot be hidden, some commentators and executive officials have argued that even if the activities of the United States are generally known,

60. See CHURCH COMMITTEE REPORT, *supra* note 54, 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.")

61. *Id.* at 155.

62. ELY, *supra* note 9, at 110-111; Bruce D. Berkowitz & Allan E. Goodman, *The Logic of Covert Action*, NAT'L INTEREST, Mar. 1, 1998 (discussing the public nature of the Clinton administration's "covert" arming of groups to overthrow Saddam Hussein); Jeremy Scahill, *The Secret U.S. War in Pakistan*, NATION, Nov. 23, 2009; Eric Schmitt & Robert F. Worth, *U.S. Widens Terror War to Yemen, A Qaeda Bastion*, N.Y. TIMES, Dec. 28, 2009, at A1; see also Kibbe, *supra* note 4; Shane, Mazzetti & Worth, *supra* note 4.

63. During the 1962 Cuban Missile Crisis, the Kennedy administration considered launching immediate air strikes against Cuba, the plan favored by the Joint Chiefs of Staff and many of Kennedy's civilian advisors. At one meeting, Attorney General Robert Kennedy passed a note to his brother saying that "I now know how Tojo felt when he was planning Pearl Harbor." At a later crucial meeting, Robert Kennedy made what historians view as the decisive intervention in the debate, making clear that the President rejected the air strike option, because "[f]or 175 years we had not been that kind of country." DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 184 (2007).

64. See generally PRADOS, *supra* note 3.

they must still be officially denied, since the world community would not sanction the American role, and open acknowledgment would strain relations with other nations.⁶⁵ For example, it was argued during the 1980s that even though the world knew that we were aiding the Afghan rebels, to officially acknowledge that we were doing so would force the Soviet Union to retaliate. The argument seems implausible. That the Soviet Union would take aggressive actions against us that they were not taking simply because the United States officially acknowledged what was publicly known strains credulity and no evidence exists that such was the case. As John Hart Ely pointed out, the plausible deniability doctrine seems like “yet another in the long list of excuses . . . for not seeking congressional authorization.”⁶⁶

A variant of the plausible deniability argument is that friendly countries will not support covert actions unless they are kept covert. For example, the Pakistani government was willing to serve as a conduit for U.S. arms to the Afghan rebels during the 1980s, but apparently did not want its relationship with the United States officially publicized. A similar argument is made that the Canadian government was willing to help a covert action to rescue six American hostages who had taken refuge in the Canadian Embassy in Iran, but only if the President did not tell Congress. And in today’s world, the Yemen and Pakistan governments seem willing to allow the United States to wage “covert warfare” against alleged terrorists in those countries, so long as their participation is not officially acknowledged.

None of these examples are convincing as arguments for paramilitary secret wars. Our aid to the Afghan rebels was public if not official, and the question of how that aid was getting to those rebels was a tactical question which Congress did not need to vote on or acknowledge. What Congress needed to openly debate and approve was our warfare against the Soviet Union in Afghanistan, arming, training, and directing the Afghan rebels. Pakistan could continue to officially deny any involvement, and neither Congress nor the President would have to disclose that involvement. So too, one constitutional issue surrounding the current secret wars in Yemen, Pakistan, Somalia, and other countries is whether Congress has authorized them; such congressional authorization does not have to publicly disclose whether Pakistan or any other country has officially permitted U.S. airstrikes in their territory. Finally, the Canadian example illustrates how many scholars and political leaders conflate covert action and covert

65. See *Should the U.S. Fight Secret Wars?*, *supra* note 54, 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 strain relations with Soviet Union).

66. ELY, *supra* note 9, at 112.

warfare. The Canadians secretly acquired fake passports from the CIA and utilized other techniques which would make for a good Hollywood thriller. But Canada was not involved in armed hostilities. While much covert action presents serious international law issues and tensions with democratic governance and the rule of law, paramilitary or covert military action poses the issue of initiating warfare against another country, which the Framers correctly recognized was fraught with so much danger and potential for executive abuse as to require congressional approval.

The current shadow wars being waged by the U.S. government illustrate the constitutional principles discussed in this essay. To the extent that the United States “secret” war in Pakistan targets al Qaeda leaders or militants, it raises questions of international law, but those attacks would be constitutionally authorized by the Authorization for Use of Military Force (AUMF) enacted by Congress after the September 11 attacks. That authorization gave the President authority to use necessary force against those persons or organizations which planned, carried out, or aided the September 11 attacks or were harboring those who did. While that authorization was unfortunately vague and potentially unending, Congress nevertheless clearly rejected an effort by the Bush administration to authorize a general war against terrorist groups throughout the world.⁶⁷ The Bush administration took the unwarranted position that it had inherent executive power to wage such a war against terror; the Obama administration has interpreted its statutory authority to reach what may amount to essentially the same result. The U.S. covert military and paramilitary operations against terrorist groups around the world utilizing both Special Operations Forces of the U.S. military and CIA operations are engaging in warfare that goes far beyond the authorization provided by Congress. As former Legal Advisor to the State Department, John B. Bellinger has noted, many of the current strikes in “places outside of Afghanistan” are against people or organizations that had nothing to do with the 2001 attacks.⁶⁸ Moreover, while the Administration might argue that these individuals or groups are loosely affiliated with al Qaeda, the claim that the Executive can secretly target “affiliated” groups or individuals throughout the world essentially would allow the government to wage a secret war against Islamic extremists, which Congress pointedly refused to authorize in 2001.

67. See 147 Cong. Rec. S9950-51 (Oct. 1, 2001) (statement of Sen. Robert Byrd) (providing the text of the Administration’s proposal); *see also id.* at S9949 (“The use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.”).

68. Karen DeYoung & Greg Jaffe, *U.S. ‘Secret War’ Expands Globally as Special Operations Forces Take Larger Role*, WASH. POST, June 4, 2010, at A1.

For example, the U.S. government covertly supported Ethiopia's invasion of Somalia in 2007, with the Special Operations Forces initiating missions into Somalia from an airstrip in Ethiopia.⁶⁹ Since then, the Obama administration has expanded its drone war into Somalia, targeting the militant Islamic group, al-Shabab, which has links to al Qaeda, but did not organize, plan, or aid in the September 11 attacks.⁷⁰ This clandestine, but well publicized war, using U.S. military units does not therefore constitute simply secret tactical military operations within the power of the Commander in Chief, but the expansion of warfare beyond the authorization granted by Congress, and therefore constitutionally unauthorized.

CONCLUSION

The Framers wisely believed that the power to initiate warfare was not to be trusted to one person. As Madison noted: "The constitution supposes, what the History of all Governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature." That reasoning suggests that while the President can fight authorized wars without disclosing the tactics the military uses, he or she cannot initiate hostilities unilaterally and secretly. The notion that the CIA or Special Operations Forces can launch secret attacks against nations or groups that Congress has not authorized warfare against is forbidden by our Constitution and antithetical to a democratic society.

69. Mark Mazzetti & Eric Schmitt, *U.S. Expands Its Drone War into Somalia*, N.Y. TIMES, July 2, 2011, at A1.

70. *Id.*