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## A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal

William Young

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# A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal

William Young\*

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*Honor and shame from no condition arise,  
Act well your part, for there all the Honor lies.<sup>1</sup>*

### I. Introduction

Article I, Section 8 of the United States Constitution states that "Congress shall have the Power To . . . grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."<sup>2</sup> The power to grant letters of marque and reprisal gives Congress the sole authority to commission privateers. "The privateer, as understood at the outbreak of the war for American independence, was a ship armed and fitted out at private expense for the purpose of preying on the enemy's commerce to the profit of her owners, and bearing a commission, or letter of marque [and reprisal], authorizing her to do

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1. REUBEN ELMORE STIVERS, PRIVATEERS AND VOLUNTEERS: THE MEN AND WOMEN OF OUR RESERVE NAVAL FORCES: 1766 TO 1866, at 129 (1975) (quoting the logbook of the American privateer *Yankee*, written after the *Yankee's* "hazardous and costly initial cruise" in 1812). The passage from the logbook is a reference to two lines from Alexander Pope's *Essay on Man*. See ALEXANDER POPE, *ESSAY ON MAN* 64 (Mark Pattison ed., Clarendon Press 1871) (1743) (stating, "Honour and shame from no condition rise; Act well your part, there all the honour lies").

2. U.S. CONST. art. I, § 8, cl. 11.

so, from the Government."<sup>3</sup> Although the United States used privateers extensively from the period extending from the Revolutionary War through the War of 1812, Congress did not issue any letters of marque and reprisal after the War of 1812.<sup>4</sup>

After lying dormant for nearly two centuries, Vietnam War-era scholars, seeking to clarify the constitutional distribution of war powers between Congress and the President, resurrected the Marque and Reprisal Clause of the Constitution. Three early cases, *Bas v. Tingy*,<sup>5</sup> *Talbot v. Seeman*,<sup>6</sup> and *Little v. Barreme*,<sup>7</sup> collectively termed the Quasi War cases, played a central role in this revival.<sup>8</sup> These cases arose out of various controversial privateer actions that occurred during the Quasi War between the United States and France, which lasted from 1798 to 1800.<sup>9</sup> For a number of years, these cases had little importance in the overall jurisprudence of the Supreme Court.<sup>10</sup> When the courts cited these cases, it was merely to provide support for procedural questions; in general, the cases themselves and the subsequent citations shed little light on the question of congressional war powers.<sup>11</sup>

3. EDGAR STANTON MACLAY, *A HISTORY OF AMERICAN PRIVATEERS* 7 (1899).

4. See *infra* Part II.B (providing an overview of the history of letters of marque and reprisal in the United States).

5. See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39 (1800) (holding that the ongoing conflict between the United States and France was a war for the purposes of determining the applicable prize statute even though the United States had not officially declared war on France).

6. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 44–45 (1801) (holding that Talbot's recapture of the *Amelia* was lawful—despite the fact the *Amelia* was a neutral ship commanded by French sailors—and that Talbot was entitled to one-sixth of the amount of the cargo and value of the ship as a salvage award).

7. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (finding that an order given by the Secretary of the Navy directing captains to seize ships heading to and from French ports was unlawful given that Congress had only authorized the seizure of ships heading to French ports—the Supreme Court held that Little was liable to the owner of a Dutch ship captured by Little after leaving a French port).

8. See 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, 465–66 (2005) (describing scholars' use of the Quasi War cases to support a broader interpretation of Congress's authority over undeclared wars).

9. ALEXANDER DECONDE, *THE QUASI WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797–1801*, at 124 (1966) (relating an historical overview of privateer actions in the Quasi War).

10. See CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 156 (rev. ed. 1926) (mentioning only one of the Quasi War cases, *Bas*, and finding that it had only "slight historical importance").

11. See, e.g., *United States v. The Paquete Habana*, 189 U.S. 453, 465 (1903) (distinguishing *Little* by holding that the federal government could be liable for damages resulting from a wrongful capture); *Montoya v. United States*, 180 U.S. 261, 267 (1901) (using

In 2000, however, the D.C. Circuit addressed the Quasi War cases in *Campbell v. Clinton*,<sup>12</sup> a case that arose out of President Clinton's military action in Yugoslavia in the 1990s.<sup>13</sup> Although the D.C. Circuit dismissed the case for lack of standing,<sup>14</sup> the three concurring opinions provide a significant reinterpretation of the Quasi War cases.<sup>15</sup> Each concurrence found that one or more of the Quasi War cases involved the separation of powers.<sup>16</sup> The opinions gave serious weight to the idea that the Quasi War cases supported an interpretation of the Letters of Marque and Reprisal Clause that greatly enhanced Congress's authority over undeclared wars.<sup>17</sup>

As suggested earlier, *Campbell* did not arise in a vacuum, but was rather fairly consistent with several recent trends in scholarship regarding letters of marque and reprisal. In the midst of the political turmoil of the Vietnam War, Professor Charles Lofgren suggested that the grant of the power to issue letters of marque and reprisal meant that Congress had constitutional authority over all undeclared (or small) wars, in addition to declared wars.<sup>18</sup> Under this line of reasoning, Congress alone would have the authority to commence all armed conflicts under the Constitution.<sup>19</sup> Other scholars, such as J. Gregory Sidak, have dismissed this broad reading of the clause, arguing that historical and

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*Bas* to hold that the government would not compensate citizens for property taken by Indians at war with the United States); *United States v. King*, 48 U.S. (7 How.) 833, 865 (1849) (citing *Talbot* in its holding that the district court makes the findings of fact and those findings are followed as a part of the record).

12. See *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (holding that the plaintiff congressmen lacked standing to bring suit against President Clinton).

13. *Id.* at 20.

14. *Id.* at 24.

15. See Sidak, *supra* note 8, at 496–99 (demonstrating the ways in which each opinion reinterprets both precedent and constitutional law).

16. See *id.* at 498 (stating that "each [opinion] assumed that one or more of the Quasi War cases were constitutional decisions").

17. See *id.* at 496–99 (revealing how the concurring opinions suggested an expansion of legislative war powers while at the same time issuing a judgment that supported the President).

18. See Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 694 (1972) (stating "that knowledge of the theory and practice of war and reprisal would have helped convince a late-eighteenth century American that the Constitution vested Congress with control over the commencement of war, whether declared or undeclared").

19. See *id.* (arguing that the power to declare wars and issue letters of marque and reprisal give Congress the sole authority to initiate any type of armed conflict); see also John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1386 (1988) (suggesting that all wars, whatever size and whether declared or not, must be authorized by the legislature).

pragmatic evidence points to a much narrower understanding of the clause's purpose.<sup>20</sup>

Over the past several years, letters of marque and reprisal experienced a small political revival as a result of the September 11 terrorist attacks. In 2001, Congressman Ron Paul proposed that Congress grant the President the power to issue letters of marque and reprisal permitting privateering on the land, on the sea, or in the sky.<sup>21</sup> In 2007, the House introduced the Marque and Reprisal Act.<sup>22</sup> These bills have gained little traction politically because of the modern impediments to letters of marque and reprisal discussed in Part III.A.<sup>23</sup> Yet, while these bills show no signs of passing, they indicate that letters of marque and reprisal still carry at least some weight in Congress and have yet to be relegated to the political dustbin of forgotten constitutional provisions.

With this continued interest in letters of marque and reprisal and the fact that historical evidence seems not to support the sweeping generalizations of Lofgren, another approach needs to be taken if letters of marque and reprisal are to continue to have relevance in the twenty-first century. This Note proposes that letters of marque and reprisal provide an avenue for Congress to check a lack of presidential initiative in future military conflicts. Within certain constraints, Congress can issue letters of marque and reprisal to private contractors to accomplish military actions that the President refuses to support.<sup>24</sup> Part II of this Note provides the historical background and context of letters of marque and reprisal. Part III discusses the political and constitutional

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20. See, e.g., Sidak, *supra* note 8, at 467, 499 (arguing that the Quasi War cases and the Letters of Marque and Reprisal Clause do little or nothing to expand Congress's authority over undeclared wars).

21. H.R. 3074, 107th Cong. (2001).

22. H.R. 3216, 110th Cong. (2007). This bill provided in part that:

The President of the United States is authorized and requested to commission, under officially issued letters of marque and reprisal, so many of privately armed and equipped persons and entities as . . . the service may require, . . . to employ all means reasonably necessary to seize outside the geographic boundaries of the United States and its territories the person and property of Osama bin Laden . . .

*Id.* This follows the early practice in which Congress would issue letters of marque and reprisal and then provide that the letters actually be implemented by the executive branch. See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 318 (2008) ("[E]arly Congresses enacted statutes authorizing the President to issue letters of marque.").

23. It seems unlikely that Congress could issue a letter of marque or reprisal directly to the President; a foundational element of the letters is that they are issued to private citizens. See *infra* Part II (describing how the letters traditionally were issued to privately funded private citizens).

24. See *infra* Part III (discussing the domestic issues involved with a congressional issuance of a letter of marque and reprisal to a private contractor).

issues likely to be involved in a modern issuance of letters of marque and reprisal. Part IV analyzes the capabilities of private contractors and the risks associated with their use as modern day privateers. Part V discusses the myriad of international issues that may arise. Finally, Part VI provides an outline for drafting a modern letter of marque and reprisal.

## II. Historical Background

### A. European History

Privateering first came into common practice as the remnants of the Roman Empire faded away in Western Europe.<sup>25</sup> In large part, these privateers reflected a lack of centralized authority in feudal Europe and the resulting need for private redress and protection of commerce.<sup>26</sup> The more modern elements of letters of marque and reprisal developed in Italy in the mid-fourteenth century, spreading to the rest of Western Europe by the end of the fourteenth century.<sup>27</sup> Initially, there was a clear distinction between letters of marque and letters of reprisal. A sovereign issue of a letter of marque authorized seizures outside the sovereign's local jurisdiction.<sup>28</sup> Letters of reprisal issued by a sovereign only allowed privateers to capture property and ships within the immediate jurisdiction of the sovereign.<sup>29</sup> Because privateers typically would apply for each type of letter, the two forms became linked into one.<sup>30</sup> These letters usually specified a particular amount to be awarded to the captors and a date at which the authorization would expire.<sup>31</sup>

As Europe grew in both wealth and power and European empires spread across the globe, the need for private protection and reprisal diminished; the sovereign was able to protect the interests of its subjects without resort to

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25. See Sidak, *supra* note 8, at 472 (describing the effects of the disintegration of what had been the primary regional authority for hundreds of years).

26. See *id.* at 472–73 (explaining that the common citizen, without the protection of a strong nation-state, required private methods of enforcement and protection).

27. See *id.* at 473 (recounting the spread of the practice of issuing letters of marque and their origins in Italy).

28. *Id.*

29. *Id.*

30. *Id.*

31. See ALBERT E. HINDMARSH, FORCE IN PEACE: FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS 50 (1933) (describing the contents of typical letters of marque and reprisal).

private warfare.<sup>32</sup> By the eighteenth century, the concept of letters of marque and reprisal had evolved to reflect the changing circumstances.<sup>33</sup> Rather than simply authorizing one individual seeking to take compensation from another individual, the letters became actions taken by one state against another state.<sup>34</sup> Europe began to issue letters of marque and reprisal less frequently during the eighteenth century, with the last private letters issued in 1778 in France.<sup>35</sup>

In 1795, George Friedrich von Martens published a treatise on the international law of privateering.<sup>36</sup> Martens's work is significant because it is one of the few treatises on the international law of privateering and it provides a picture of the state of the international law of privateering at the end of the eighteenth century—about the time the Supreme Court decided the Quasi War cases, the Framers drafted the U.S. Constitution, and privateering was still very much a part of U.S. warfare. Martens's treatise sheds some light on the ability of privateers to attack foreign powers without necessarily having the objective of capturing a prize: Privateering was defined as "the expeditions of private individuals during war, who, being provided with a special permission from one of the belligerent powers, fit out at their own expense, one or more vessels with the principal design of *attacking the enemy*, and preventing neutral subjects or friends from carrying on commerce regarded as illicit."<sup>37</sup> If attacking the enemy can be an end of privateering and not just a means to some other end (harming enemy commerce for instance), then the constitutional hurdles Congress would face in issuing letters of marque for the destruction of enemy assets or individuals would be lowered.<sup>38</sup>

32. See *id.* at 53 (explaining the rise in wealth and power of the European nation-state).

33. See JOHN LEHMAN, *ON SEAS OF GLORY: HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY* 41 (2001) (noting that Europe did not begin using professional navies in the modern sense until the seventeenth century). Lehman also states that "[e]ven in the great battles of the Spanish Armada of 1588 most of the ships in both Spanish and English fleets were privately owned." *Id.*

34. See *id.* at 58 (noting that the letters did not signify a belligerent intent, but were a mechanism for redress of acts "which under international law constitute international delinquency").

35. See *id.* (detailing the end of letters of marque and reprisal in Europe).

36. See Sidak, *supra* note 8, at 471–72 (describing the usefulness of Martens's treatise in discovering the perception of privateers in the later eighteenth century).

37. *Id.* at 472 (quoting GEORG FRIEDRICH VON MARTENS, *AN ESSAY ON PRIVATEERS, CAPTURES, AND PARTICULARLY ON RECAPTURES, ACCORDING TO THE LAWS, TREATIES, AND USAGES OF THE MARITIME POWERS OF EUROPE* 1 (Thomas Hartwell Home trans., E. & R. Brooke 1801) (1795)).

38. See *infra* Part IV.C (arguing that Congress could use Martens's work to support issuing letters of marque and reprisal for individual persons).



## B. Letters of Marque and Reprisal in the United States

### 1. The Revolutionary War

In stark contrast to the wealth and military power of Europe during the eighteenth century, America's thirteen colonies possessed little in the way of financial resources or naval might during the Revolutionary War.<sup>39</sup> The use of privateers allowed the fledgling nation to supplement its small navy and do a great deal of harm to British commerce.<sup>40</sup> During the Revolutionary War, America had just sixty-four ships in its official navy<sup>41</sup> and commissioned only twenty-two "men of war" during the conflict.<sup>42</sup> In contrast, the federal and state governments commissioned around 2,000 privateers during the War.<sup>43</sup> The tally of captured ships was likewise dominated by the privateering vessels: 3,087 ships captured by privateers compared to 200 ships captured by American government warships.<sup>44</sup> American privateers seized an estimated \$10 million in British property, which would amount to between \$100 and \$200 million in 2003 dollars.<sup>45</sup> Privateers also hindered already depressed British manpower reserves by capturing thousands of British seamen.<sup>46</sup> Finally, the loss of commerce coupled with reports of American privateers in British Waters—including the English Channel—depressed the morale of the British public.<sup>47</sup>

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39. See HARRY M. WARD, *THE AMERICAN REVOLUTION: NATIONHOOD ACHIEVED 1763–1788*, at 184 (1995) (detailing the sparse financial and military resources available to the young nation). Privateering first established itself in American waters in 1739 when the then-British colonies launched privateers to fight the Spanish in the War of Jenkins' Ear. See ANGUS KONSTAM, *SCOURGE OF THE SEAS: BUCCANEERS, PIRATES, AND PRIVATEERS 164* (2007) (relating the early history of privateering in the American colonies).

40. See KONSTAM, *supra* note 39, at 166–70 (describing the use of privateers by the American colonies during the Revolutionary War).

41. See Sidak, *supra* note 8, at 474 (listing America's naval resources during the Revolutionary War).

42. See WARD, *supra* note 39, at 184 (describing the commissioning of "men of war," also known as warships).

43. See *id.* (mentioning the vast number of private ships commissioned during the war to harm British commerce).

44. See *id.* (revealing the disproportionate losses suffered by British merchants at the hands of American privateers).

45. See Sidak, *supra* note 8, at 475 (using conversion statistics and inflation calculators to approximate the value of \$10 million in 1776 into 2003 dollars).

46. See KONSTAM, *supra* note 39, at 166 (placing the total number of captures between 2,000 and 16,000 British—by comparison, the British General Cornwallis's field army consisted of fewer than 2,000 men).

47. See DOROTHY DENNEEN VOLO & JAMES M. VOLO, *DAILY LIFE IN THE AGE OF SAIL* 234

The privateers of the American Revolution did not sail for private redress or to protect merchant lanes.<sup>48</sup> Instead, these privateers sailed for the profits they would receive by capturing and selling goods.<sup>49</sup> The profits in privateering were potentially enormous.<sup>50</sup> In addition to benefiting the privateers, the capture of British ships provided crucial aid to the struggling Continental Army by supplying it with weapons and ammunition captured by the privateers.<sup>51</sup> Privateering afforded benefits to the American public as well. Every time a privateer sold a captured ship's goods in America, the British blockade was in a sense broken by British goods.<sup>52</sup> Furthermore, rare goods not often seen in the colonies under normal circumstances were available for purchase by the public if captured in a British vessel.<sup>53</sup> These factors would often provide a boost to local economies weakened by isolation and blockades.<sup>54</sup>

While the commercial impact of the American privateers was substantial, there was only limited privateer involvement in traditional military operations—though this was likely a result of practical circumstances rather than legal design. Sailing for profit necessitated the targeting of ships that carried valuable cargo, and one could expect to find more cargo and fewer guns aboard a merchant vessel than a warship. Because the privateers outfitted their

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(2002) (stating that "British newspapers were filled with stories of the recurring appearance of American privateers in [British] waters").

48. See WARD, *supra* note 39, at 184 ("Privateers were privately owned vessels, which carried letters of marque and reprisal from Congress or state governments, allowing seizure and possession of enemy merchant ships.").

49. See Sidak, *supra* note 8, at 474–75 (noting the evolution of privateering from protection and redress to a purely profit-seeking activity). *But see* VOLO & VOLO, *supra* note 47, at 233 (noting that while privateering was a profit-driven enterprise, many Americans who served on privateers during the Revolutionary War had patriotic motives).

50. See LEHMAN, *supra* note 33, at 43 ("The Derby family of Salem, for instance, owned and operated a fishing fleet before the war and outfitted a total of eighty-five privateers during the course of the war. These ships successfully brought to port 144 [captured ships], making the Derbys the first millionaires in New England.").

51. See *id.* (detailing some of the benefits the ocean-going privateers provided to Washington's land army). Lehman states that the privateers' captures were the "principal source of armament in [the Continental Army's] first years of existence." *Id.*

52. The purpose of a blockade is to prevent goods from entering into enemy territory. With privateers capturing British goods and then re-selling them in America, the blockade was broken, at least with respect to those captured British goods.

53. See 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, 963–64 (1997) (describing the economic boom brought about by the influx of diverse goods into the colonies).

54. See *id.* at 964 (relating several of the economic benefits to the colonies from privateering).

ships with their own funds, they were usually outgunned by government financed warships.<sup>55</sup> Additionally, while the crew of a typical privateer may have consisted of experienced seamen, it would not have been the battle ready crew of trained sailors fielded on most warships.<sup>56</sup> Outmanned, outgunned, and with little reason to attack a warship in the first place, it is not surprising that privateers generally focused on limited engagements with merchant ships.<sup>57</sup> A lack of battle enthusiasm in the privateer ranks was also due to the fact that the livelihood of the privateers depended on their ships staying in good repair.<sup>58</sup> When a U.S. naval vessel entered battle and was damaged, the captain and crew lost nothing personally and would probably be reassigned to another ship. A privateer would be forced to pay the entire cost of repair out of pocket or buy a new ship altogether—taking a total loss on the expedition.<sup>59</sup>

The inherent military limitations of privateers during the Revolutionary War prevented the privateers from taking much of toll on the British Royal Navy.<sup>60</sup> Again, this is not to suggest that the U.S. government or navy would have objected to a more war-like role for the privateers had it been practical—in fact, the government and regular armed forces encouraged privateers to involve themselves in actual naval battles on a few occasions.<sup>61</sup> Predictably, however, the privateers met with, at best, very limited success.<sup>62</sup> The question is whether the privateers' role would have expanded beyond the merely commercial (as effective as it was) had they been more able and willing to

55. See VOLO & VOLO, *supra* note 47, at 233 (remarking that "[i]n a ship to ship engagement, a British man-of-war would simply blow most American privateers out of the water").

56. See MACLAY, *supra* note 3, at 7–8 (noting that most of a typical privateer's crew consisted of common sailors, with only a few experienced, educated, and well-trained (in arms at least) "gentlemen sailors" forming the marine guard of the ship).

57. See VOLO & VOLO, *supra* note 47, at 233 ("The usual plan [for a privateer] was to overtake and to attack unarmed or lightly armed merchant vessels, detach a few men as a prize crew, and make for a friendly American or foreign port, where both ship and cargo would be condemned as a prize.").

58. See STIVERS, *supra* note 1, at 113 (noting that the owners of privateers risked their entire investment—in the form of ship, cargo, and crew—if captured or destroyed by enemy forces).

59. *Id.*

60. See VOLO & VOLO, *supra* note 47, at 233 (noting that privateers generally tried to avoid encounters with British warships).

61. See Marshall, *supra* note 53, at 970 (describing the Penobscot Expedition of 1779 in which twelve to sixteen privateers took part in a combined land and sea attack on a British base in Maine).

62. See *id.* at 969 (stating that almost every attempt by privateers at traditional naval engagements failed).

compete militarily with the British.<sup>63</sup> One suspects the answer is that it would have, as the young nation was desperate for military force at the time, but the question cannot be answered definitively due to the historical circumstances that forced the privateers into a more limited commercial role. Despite their confinement to commercial capture, it is clear that the privateers played a key role in winning the struggle for American independence.<sup>64</sup>

## 2. Letters of Marque and Reprisal in the Constitution

Given the prominence of privateers in the Revolutionary War, it is not surprising that the Framers included a provision for letters of marque and reprisal in both the Articles of Confederation and the Constitution.<sup>65</sup> What is surprising is that there was almost no discussion of the clause during the Constitutional Convention.<sup>66</sup> Given the differing opinions on the proper amount of war powers to be given to the different branches, one would expect serious discussion of this clause if it truly was meant to grant Congress sole authority over all armed conflicts, as Lofgren and others have suggested.<sup>67</sup> Yet, the proposal passed through its committee unanimously and quietly made its way into the Constitution.<sup>68</sup> It is likely that the Framers simply felt that the power to issue letters of marque and reprisal was not implied clearly enough by the power to declare war and so elected to include explicitly both powers.<sup>69</sup>

Joseph Story, in his *Commentaries on the Constitution of the United States*, provides further insight into the reasons behind this Constitutional

63. For example, if entry costs had been lower and military quality ships and armaments had been cheap and readily available, privateers might have had a better chance at successfully defeating British warships and might have been more willing to engage those warships in battle.

64. See LEHMAN, *supra* note 33, at 42 ("Privateersmen weren't fighting for the history books but . . . to make money. While doing it, they won wars for America.").

65. See Sidak, *supra* note 8, at 477 (noting the inclusion of the clause in both documents).

66. See *id.* (discussing the circumstances surrounding the inclusion of the letters of marque and reprisal clause in the Constitution).

67. See *id.* at 477–78 (citing the lack of controversy over the clause during the formation of the Constitution as evidence that the clause's meaning is not as expansive as some have suggested).

68. See *id.* at 477 (mentioning the relative silence on letters of marque and reprisal both in committee and in the open floor).

69. See *id.* (describing how Elbridge Gerry of Massachusetts believed that the power to issue letters of marque and reprisal was not implied in Congress's power to declare war and should therefore be included separately); see also Marshall, *supra* note 53, at 979 (suggesting that the Framers included the Marque and Reprisal Clause in the Constitution in order to give Congress control over a military tool—privateers—that Congress could not control through its appropriation power).

provision. Story suggests that the power to declare war includes the power to issue letters of marque and reprisal.<sup>70</sup> It is possible that the clause was initially included in the Articles of Confederation because in that document "all powers, not *expressly* delegated, were prohibited, [so] this enumeration was particularly appropriate [in the Articles of Confederation]."<sup>71</sup> The later inclusion of the clause in the Constitution, which expressly contemplated incidental powers, may therefore have been simply redundant of Congress's power to declare war.<sup>72</sup> Story also suggests, however, that the clause might have been included because letters of marque and reprisal were not always accompanied by a declaration of war, and were sometimes issued "to prevent the necessity of a resort to war."<sup>73</sup> Story suggests that the letters provided a way for the sovereign to redress the injuries of its citizens when a declaration of war "may not be deemed either expedient or necessary."<sup>74</sup>

### 3. *Letters of Marque and Reprisal After the Constitution*

Winning the war against the British did not make America into a naval superpower overnight, so Congress had occasion to call on privateers in several conflicts after the Revolutionary War. One such conflict, the Quasi War with France from 1798 to 1800, has already been mentioned.<sup>75</sup> Privateering was

70. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 411 (Carolina Academic Press 1987) (1833) ("The power to declare war would of itself carry the incidental power to grant letters of marque and reprisal, and make rules concerning captures.").

71. *Id.*

72. See *id.* at 411–12 (stating that "the Constitution abounds with pleonasms and repetitions, sometimes introduced from caution, sometimes from inattention, and sometimes from the imperfections of language").

73. *Id.* at 412.

74. *Id.* But see Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 92–93 (2007). Wuerth states:

More likely, the framers thought that the phrase "make war" included the power to issue letters of marque and reprisal in both war- and peacetime but that the power to declare war did not. This is consistent with Rufus King's observation that the term "make war" could be understood as "conduct war," which was an executive function. Marque and reprisals could be understood as part of the power to conduct war, because this is how the power was used during the Revolution. The change to "Declare War," therefore, made necessary the specific allocation of marque and reprisals power to Congress.

*Id.* (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 319 (Max Farrand ed., 1937)).

75. See DECONDE, *supra* note 9, at 124 (discussing U.S. privateers in the Quasi War with France).

also prevalent during the War of 1812.<sup>76</sup> Preceding the War of 1812, the United States' deteriorating relationship with Europe—accompanied by import law, embargos, and blockades—had dampened the commercial opportunities of many merchants in the former colonies.<sup>77</sup> By the time war broke out, most viewed letters of marque and reprisal as both a vital part of America's war effort and a welcome boost to commerce.<sup>78</sup> Initially, the American privateers met with great success,<sup>79</sup> but from the end of 1813 until the conclusion of hostilities, privateering had been mostly eliminated.<sup>80</sup> Nonetheless, privateers "proved to be the only effective American offensive weapon" of a war in which few, if any, significant American war aims were accomplished.<sup>81</sup> When the War ended in 1815, American commerce and sea trade flourished with the lifting of war-time restrictions, and privateering once again faded into the background as the traditional gains of legitimate trade began to outweigh the risk-to-reward ratio of privateering.<sup>82</sup> Congress issued no more letters of marque and reprisal after the War of 1812, and the few privateers unwilling to give up the lifestyle and potential rewards of privateering began to offer their service as pirates to other nations, especially in Latin America.<sup>83</sup>

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76. See KONSTAM, *supra* note 39, at 170 (outlining the history of privateering during the War of 1812).

77. See *id.* (explaining the negative effects of the Napoleonic Wars on trade).

78. See *id.* (describing the enthusiasm for privateering in America at the outset of the War of 1812).

79. See *id.* (stating that American privateers captured most of the 1,300 prizes in the first year of the war, and, as a result, merchant companies began refusing to insure ships heading to Nova Scotia and increased insurance rates for ships destined for other ports by 25%–50%); see also VOLO & VOLO, *supra* note 47, at 235 (noting that privateers captured nearly \$40 million in goods during the War of 1812).

80. See KONSTAM, *supra* note 39, at 171–72 (stating that, as 1813 drew to a close, the British finally managed to effectively blockade the United States—privateers effectively were prevented from sailing to any great extent, and the great American privateering ports faced financial collapse).

81. See VOLO & VOLO, *supra* note 47, at 235 (providing an overview of American privateering during the War of 1812).

82. See KONSTAM, *supra* note 39, at 172 (describing the conclusion of the War of 1812). Additionally, merchants had little choice but to abandon privateering when Congress stopped giving them permission to do so. *Id.*

83. See *id.* at 173–75 (detailing the decline of legitimate privateers and the rise of piracy in the Caribbean and South America). This did not quite mark the end of letters of marque and reprisal in American history however. See generally WILLIAM MORRISON ROBINSON, JR., *THE CONFEDERATE PRIVATEERS* (1928) (describing later uses of letters of marque and reprisal). Texas commissioned privately armed vessels in 1834 and 1835. *Id.* at xii. During the Civil War, the Confederate States issued letters of marque and reprisal as well. *Id.* at 17–20.

### III. *The Practical, the Political, and the Constitutional*

#### A. *The Modern Usefulness of Letters of Marque and Reprisal in Military Actions*

For military actions supported by the President and Congress, letters of marque and reprisal are no longer useful tools because the necessity for letters of marque and reprisal in executive-supported wars of the past was generated by historical limitations that no longer exist. One obvious outdated historical factor centers on the private funding of privateers. The colonial government of the United States could not have funded an entire fleet of privateers during the Revolutionary War even if it had wanted to do so.<sup>84</sup> Today, the United States government would have few problems funding large numbers of privateers.<sup>85</sup> Furthermore, the sheer size of the U.S. military budget indicates that it easily could fund a small-scale action supported by both the executive and legislative branches.<sup>86</sup> Because the United States can easily accomplish the funding of privateers in the present day, the nation no longer needs this particular financial benefit of letters of marque and reprisal.

The fact that the government did not have to fund the operations of privateers in the past was not the only financial justification for issuing letters of marque and reprisal; privateering also generated a substantial amount of commerce for the relative global backwater of the thirteen colonies and provided access to goods that would otherwise have been unavailable to the young nation.<sup>87</sup> Given the current state of globalization and transportation, however, markets in the United States are far from isolated,<sup>88</sup> and there is probably very little in the way of marketable goods to which Americans could

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84. See *supra* Part II.B (describing the paucity of financial resources available to the colonial government).

85. Evidence of this can be seen in the substantial number of private contractors employed by the U.S. government in Iraq. See T. Christian Miller, *Private Contractors Outnumber US Troops in Iraq*, L.A. TIMES, July 3, 2007, at A1 (stating that, as of July 2007, over 180,000 American, Iraqi, and other foreign civilians were working as private contractors in Iraq).

86. See White House, Budget of the United States Government, Fiscal Year 2006, <http://www.whitehouse.gov/omb/budget/fy2006/defense.html> (last visited Dec. 7, 2007) (stating that the Department of Defense had a 2006 discretionary budget authority of \$419.3 billion) (on file with the Washington and Lee Law Review).

87. See *infra* Part II (describing the boost in commerce, trade, and diversity of goods in the colonies brought about by privateering).

88. See U.S. BUREAU OF ECONOMIC ANALYSIS, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES, ANNUAL REVISION FOR 2006 1 (June 8, 2007) (showing that U.S. imports of goods measured \$1.8 trillion in 2006).

only gain access by "taking" foreign goods.<sup>89</sup> Blockades of the mainland United States are also not a concern of modern Americans.<sup>90</sup> As a result, one cannot justify the use of letters of marque and reprisal as a boost to commerce because the historical restraints on commerce overcome by the use of privateers in the past already have been largely brought down by globalization, technology, free trade, and U.S. naval power.

Just as the nascent state of the U.S. Navy created the need for letters of marque and reprisal during the Revolutionary War, so today the dominant power of the United States Armed Forces lessens the usefulness of these letters in an executive-supported conflict. It was unlikely that the fledgling U.S. Navy on its own could put much of a dent in British commerce during the Revolutionary War—hence the need that existed for private citizens to take part in the struggle.<sup>91</sup> In the early years of the United States, the President, faced with severe military limitations in terms of size, manpower, and technology, might not have been able to accomplish many of his commercial and military objectives without the use of privateers.<sup>92</sup> Today, in contrast, the President of the United States controls the most dominant military force on the planet.<sup>93</sup> For instance, the U.S. Navy can stop or destroy commerce anywhere it wishes.<sup>94</sup> The U.S. Army has substantial abilities to destroy armies and occupy countries as well as the special-forces capability to strike targets with a high degree of precision.<sup>95</sup> Certainly, this argument is not meant to suggest that the United States is invincible or that it will not face extraordinary military challenges. Rather, it suggests that the President does not lack any element of military force

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89. See *id.* at 9–10 (showing that the \$1.8 trillion in imports covers almost every imaginable category of good).

90. See United States Navy, Status of the Navy, [http://www.navy.mil/navydata/navy\\_legacy\\_hr.asp?id=146](http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146) (last visited Mar. 18, 2009) (showing 284 currently available battle force ships, over 3,700 operational aircraft, and 331,722 active duty personnel) (on file with the Washington and Lee Law Review). With this amount of firepower at its disposal, the U.S. Navy can readily ensure open shipping lanes to the continental United States.

91. See *supra* Part II (describing the shortage of official U.S. warships and the abundance of available privateers).

92. See KONSTAM, *supra* note 39, at 164–72 (explaining the limitations on American naval power and the benefits of privateers).

93. See *infra* Appendix I (showing, in chart form, the relative differences in military spending across the world, with the United States accounting for almost half of military spending world-wide).

94. See United States Navy, *supra* note 90 (describing the current operational status of the U.S. Navy).

95. See United States Army, 2008 Army Posture Statement, <http://www.army.mil/aps/08/index.html> (last visited Mar. 18, 2009) (showing nearly one million soldiers in the U.S. Army, with 600,000 on active duty and 250,000 deployed in eighty countries around the world) (on file with the Washington and Lee Law Review).



that would require the participation of private citizens to pick up the slack. It makes little sense, therefore, for letters of marque and reprisal to be issued in a conflict supported by the Executive Branch because the Executive Branch already has all the tools it needs to accomplish its objectives without involving private citizens.

The idea that the President and Congress can use the U.S. military to greater effect than they can use private contractors in military actions is not without controversy.<sup>96</sup> To be clear, there are instances—outside the military context—where letters of marque and reprisal could be useful even with executive and legislative cooperation.<sup>97</sup> To some, the lack of recent success in apprehending terrorists creates a strong argument that privateering should be reintroduced in the area of human capture.<sup>98</sup> Although some major terrorist figures remain at large (e.g., Osama bin Laden and Ayman al-Zawahiri),<sup>99</sup> in the last few years the U.S. government demonstrated a respectable level of competence in killing or capturing a large part of the al-Qaeda leadership behind the 9/11 terrorist attacks.<sup>100</sup> Further, one might ask what characteristics of private contractors make them more capable than the U.S. military at capturing terrorists, especially those at the highest levels. Some authors suggest that private contractors have a greater ability to make opportunistic captures

96. See Robert P. DeWitte, Note, *Let Privateers Marque Terrorism: A Proposal for Reawakening*, 82 IND. L.J. 131, 140 (2007) (suggesting that, at least for human captures in the bounty hunting context, current governmental measures could be improved with the addition of private contractors acting under letters of marque and reprisal).

97. The area of cyber warfare is one of the few areas in which private individuals might still be more effective than the government in certain cases—especially in disrupting enemy communications and funding. There are numerous anecdotal stories of private citizens hacking into secure terrorist networks, only to have the authorities bungle any ensuing investigation (though in most reports the authorities are relatively clueless about the importance of the information in the first place). See, e.g., D. Ian Hooper, *FBI Botched Al-Qaeda Site Hacking Offer*, N.Y. SUN, July 30, 2002, at A2 (detailing the infiltration of a private hacker into Al Qaeda's main sounding board and the FBI's subsequent failure to investigate or set up a sting operation); DeWitte, *supra* note 96, at 140–44 (detailing some the failings of governmental agencies in the areas of asset seizure and communication disruption and the ways in which private contractors could be used to bolster U.S. capabilities in these areas).

98. See DeWitte, *supra* note 96, at 140 ("The failure of current mechanisms for capturing rogue individuals, coupled with the need to encourage successful apprehension, obviates any need for further inquiry into the question [of whether privateers should be used for the capture of terrorists].").

99. See Global Security, *Al-Qaeda Leadership at 9-11*, [http://www.globalsecurity.org/security/profiles/al-qaeda\\_leadership\\_sept01.htm](http://www.globalsecurity.org/security/profiles/al-qaeda_leadership_sept01.htm) (last visited Mar. 4, 2009) (showing that bin Laden and al-Zawahiri are presumably still at large) (on file with the Washington and Lee Law Review).

100. See *id.* (showing that of the thirty-five highest ranking Al-Qaeda officers on 9/11, twenty-five have been killed or captured).

and are less likely to be hindered by host states.<sup>101</sup> The problem with this line of reasoning is that it suggests private contractors are structurally more adept at dealing with these issues because of the way private contractors are organized and operated—in other words, the argument does not suggest that the U.S. military lacks the proper tools to accomplish these objectives, but rather that the private companies are better suited structurally to carry them out.<sup>102</sup> Assuming for the moment that contractors do have structural advantages, it stands to reason that Congress and the President could work together to resolve the structural issues that might hamper official government military action. For instance, if the government wishes to increase the likelihood of opportunistic captures, it can simply alter the procedural rules of capture placed on the military instead of replacing the military with private contractors.

*B. Conflict Between the Executive and Legislative Branches: Letters of Marque and Reprisal as a Check on a Lack of Presidential Initiative*

Given the fact that few of the historical conditions necessitating the use of letters of marque and reprisal apply today, can this clause still be relevant in the twenty-first century? One instance in which letters of marque and reprisal can still be useful is when conflicts arise between the President and Congress about the proper application of military force. Consider Congress's options if it wishes to begin military operations against a target against the will of the President. Congress could declare war,<sup>103</sup> but presumably the President would veto the declaration of war. Even if Congress had enough votes to override the veto, the President (as Commander in Chief) still has control over the armed forces,<sup>104</sup> making the declaration a hollow pronouncement.

Congress might instead issue a letter of marque and reprisal to a private military contractor authorizing it to take the action the President refuses to take.<sup>105</sup> Faced with a congressional threat to use private forces to do what he

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101. See Christopher M. Supenor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 225–27 (2001) (arguing that nonmilitary personnel would face fewer domestic and international restrictions in capturing individual persons).

102. *Id.*

103. U.S. CONST. art. I, § 8, cl. 11.

104. U.S. CONST. art. II, § 2.

105. When privateers were a necessary part of American conflict, Congress would typically issue letters of marque and reprisal but grant the President the authority to commission the privateers and provide rules for their actions. Prakash, *supra* note 22, at 318. While this practice was sensible in that it let the President direct the actions of privateers (as much as privateers could be directed) within the larger war effort, it obviously would not be applicable in

refuses to do with the military, the President may elect to sign off on the letters—in essence balking to political pressure at the last moment. In such a situation, Congress might not wish to go through with the issuance of the letters, as the Executive Branch could more effectively accomplish the desired objective. On the other hand, the President could maintain his or her opposition and veto the letter of marque and reprisal.<sup>106</sup> Unlike a vetoed declaration of war, if Congress can override the veto of the letter of marque and reprisal it does not need the Executive Branch to carry out the military action. The Executive might argue that Congress does not have the power to issue letters of marque to private contractors at all. The President also likely would argue that he is still the Commander in Chief of the U.S. Armed Forces, and Congress should not be able to outsource military matters to private individuals.<sup>107</sup>

Any legal challenge to the issuance brought by the President might simply be dismissed as a political question.<sup>108</sup> With this in mind, the first question likely to be addressed by the courts is whether Congress still has the power to issue letters of marque and reprisal. Even though Congress has not exercised this power in almost two hundred years and the Declaration of Paris declared the practice unlawful in 1856,<sup>109</sup> the courts will likely find that Congress has this power—the clause is, after all, still in the Constitution.<sup>110</sup> The narrower, and closer, question will probably be whether Congress can issue these letters to private military contractors. The following five historical characteristics of

a situation where the President was against the use of any military force.

106. See DeWitte, *supra* note 96, at 157 (mentioning the possibility of domestic constitutional deadlock over a vetoed letter of marque and reprisal).

107. The political and legal battle itself may be a means by which the President can thwart Congress's intentions. Especially if the targets for the contractors are fairly specific, and those targets are likely to be managed by individuals with access to CNN, a highly publicized fight within the U.S. government may jeopardize the operation by removing the element of surprise. For instance, if Congress writes a letter directing a contractor to attack a certain shipment of weapons, at a certain place, at a certain time, the publication of the letter in the media will almost certainly doom the operation to failure.

108. See DeWitte, *supra* note 96, at 157 (noting that "the courts . . . would likely evade the issue by declaring it a political question"). DeWitte concludes that the viability of a letter of marque and reprisal is dependent on presidential and congressional agreement. *Id.* This Note suggests utility even in the absence of executive and legislative agreement. See also *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000) (dismissing the complaint for a lack of standing). In the context under discussion, the courts may choose to dismiss a complaint made by the President because he or she lacks standing.

109. See *id.* at 132 (discussing the international obligations of the United States concerning letters of marque and reprisal). Significantly, the United States is not a signatory to the Declaration of Paris. *Id.*

110. U.S. CONST. art. I, § 8, cl. 11.

privateering are relevant to a modern day issuance of letters of marque and reprisal.<sup>111</sup> If Congress governs its relationship with private contractors within these historical standards, it is likely that the constitutionality of the letters will be upheld by the courts.

First, privateers were private citizens—though it seems to be an obvious point, it should be stressed that letters of marque and reprisal cannot be issued to government officials or active duty members of the military. Second, privateers were privately funded; equipment, crews, provisions, and so on must all be purchased with private funds.<sup>112</sup> Third, while privateers usually were limited to commercial action, this characteristic was not a requirement but rather a result of practical circumstances.<sup>113</sup> The traditional limitations on the military abilities of privateers should not suggest that privateers are prohibited from taking military action. Fourth, privateers were unsupervised for the most part—the letter of marque and reprisal merely specified a number of limitations on the privateer's conduct and it was understood that the privateer should obey the limitations of custom and common law.<sup>114</sup> Thus, unlike the strict operational chain of command of the military, privateers were given a general task and told to accomplish it within certain guidelines.<sup>115</sup> Finally, prize courts controlled the income of privateers through the power to grant title to captured ships and goods.<sup>116</sup> The key element to a successful congressional argument in favor of an issuance of a letter of marque and reprisal will be a showing that Congress is using private contractors in a way very similar to the use of privateers in the eighteenth and nineteenth centuries.<sup>117</sup>

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111. See *supra* Part II (discussing the historical characteristics of privateers in more detail).

112. See MACLAY, *supra* note 3, at 7 (stating that privateers had to be "fitted out at private expense").

113. See *supra* Part II.B (describing how the practical limitations on the military capabilities of privateers resulted in their confinement to commercial actions).

114. See Marshall, *supra* note 53, at 975 (indicating that privateers did not have free reign to accomplish the objectives of letters of marque and reprisal by any means they chose). For instance, privateers could not take actions that would be termed war crimes today. In seizing a ship, the privateers could not simply throw the opposing crew overboard after the ship was captured. *Id.* at 975–76.

115. See *id.* at 974 (noting the sparse requirements and conditions imposed on privateers).

116. See *id.* at 975–76 (describing the control the prize courts had over the income of privateers).

117. For a discussion about how private contractors can be conformed to the proper historical standard, see *infra* Part IV (describing a number of ways in which modern day contractors can be tailored to the historical role of the privateer). For an example of how Congress could draft certain sections of the letter, see *infra* Part VI (showing an abbreviated draft of a sample issuance of a letter of marque and reprisal).

### C. Two-Thirds Majorities and Reasons for Conflict

Much of this analysis assumes that there are enough votes in both houses of Congress to override a presidential veto, so some attention needs to be given to the realism of that assumption. Through the 106th Congress, there were 106 presidential vetoes overridden by a two-thirds majority of both houses of Congress.<sup>118</sup> In reviewing the list of overridden vetoes, one tends to find clusters around certain Presidents.<sup>119</sup> In fact, the President who faced the most congressional overrides, Andrew Johnson, saw more than half of his twenty-nine vetoes overturned by Congress.<sup>120</sup> This illustrates that controversial figures or issues can create substantial bi-partisan opposition in Congress.<sup>121</sup>

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118. See OFFICE OF THE SECRETARY OF THE SENATE, PRESIDENTIAL VETOS: 1989–2000, S. PUB. 107–10, at ix (2001) (listing the number and type of vetoes for each President and the number of vetoes overridden by Congress).

119. See *id.* at viii–ix (showing that Andrew Johnson led all Presidents with fifteen overrides; Harry Truman and Gerald Ford tied for second with twelve overrides each; Franklin Roosevelt and Ronald Reagan round out the top five with nine overridden vetoes each).

120. See *id.* (showing that of Johnson's twenty-nine vetoes, Congress overrode fifteen).

121. The events surrounding the administration of Andrew Johnson provide an excellent example of how far congressional opinion can shift against a particularly despised executive. In Johnson's case, his presidency was embroiled in the controversy surrounding the reconstruction of the South after the Civil War. MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON I* (1999). Many Northern Republicans opposed his lenient treatment of continuing racism and oppression and fought hard to enact legislation, such as the Civil Rights Act of 1866, in the face of Johnson's vetoes. See *id.* at 14 (noting Congress's course of action). Johnson further harmed his reputation with appalling statements such as: "This is a country for white men, and by God, as long as I am President, it shall be a government for white men." See GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 24 (2006) (providing this statement by Andrew Johnson quoted in a Missouri newspaper). While the tension in this case was not caused directly by a president failing to take military action, Congress certainly showed its willingness to force action on the civil rights issue. Evidence of the conflict between Congress and the President survives to this day. The White House Biography of President Johnson begins: "With the Assassination of Lincoln, the Presidency fell upon an old-fashioned southern Jacksonian Democrat of pronounced states' rights views. . . . Andrew Johnson was one of the most unfortunate of Presidents. Arrayed against him were the Radical Republicans in Congress, brilliantly led and ruthless in their tactics." The White House, Biography of Andrew Johnson, <http://www.whitehouse.gov/history/presidents/aj17.html> (last visited Sept. 27, 2008) (on file with the Washington and Lee Law Review). A Senate biography, on the other hand, begins with a quote from Senator Zachariah Chandler on the inauguration of President Lincoln: "The inauguration went off very well except that the Vice President Elect [Johnson] was too drunk to perform his duties & disgraced himself & the Senate by making a drunken foolish speech." United States Senate, Andrew Johnson, 16th Vice President, [http://www.senate.gov/artandhistory/history/common/generic/VP\\_Andrew\\_Johnson.htm](http://www.senate.gov/artandhistory/history/common/generic/VP_Andrew_Johnson.htm) (last visited Sept. 28, 2008) (on file with the Washington and Lee Law Review).

The rift between the executive and legislative branches may be simply a result of a fundamental disagreement between the President and members of Congress as to whether the military forces of the United States are capable of dealing with a certain threat. For example, a President may believe that the military is incapable of effectively eliminating a specific terrorist threat, while Congress fears that delaying military action will result in catastrophic injury to the United States. Alternatively, Congress may wish to target militarily the perpetrators behind a successful terrorist attack, while the President feels such action is unwarranted or impossible to carry out.

A second cause of this political rift might be misconduct on the part of the President. This scenario assumes that the political party opposing the President does not need a two-thirds majority on its own.<sup>122</sup> Instead, the two-thirds majority will be made up of members of Congress who are so outraged at the President's conduct that to override a veto they will vote against the President no matter what their party affiliation happens to be.<sup>123</sup> This type of presidential misconduct could come in two forms. One form is simply blatant misconduct, such as refusing to target an organization or individual the President desires to do personal business with, has received campaign contributions from, etc. Impeachment might be an option for Congress in such a situation, but the process can be lengthy and Congress has no guarantee that the Vice President or anyone else in the administration will govern much differently than the President himself.<sup>124</sup>

The second form of misconduct is less nefarious and has more to do with personal beliefs than corruption. A President may feel compelled spiritually or ethically never to instigate any aggressive military acts. As such, he will refuse to commit U.S. forces to any military action he views as aggressive, even if the justifications for that action might be defensive in nature. Whatever the President's reasons, many in Congress may not share his pacifistic leanings. If,

122. By contrast, a significant mid-term shift in the make-up of Congress could lead to a sharply divided government. See Free Republic, Mid-Term Elections, <http://www.freerepublic.com/focus/f-news/1738236/posts> (last visited Mar. 4, 2009) (showing that wartime mid-term elections since World War I usually result in the sitting President's party losing a substantial number of seats in both the House and Senate) (on file with the Washington and Lee Law Review).

123. See *supra* note 121 (describing the overwhelming opposition to President Johnson's reconstruction policies).

124. See Joseph Isenbergh, *Impeachment and Presidential Immunity to Judicial Process*, 18 YALE L. & POL'Y REV. 53, 56 (1999) (stating that "[t]he closer we get to the original understanding of the Constitution, however, the more likely it seems that a sitting President is not subject to compulsory judicial process, but only to impeachment"). Isenbergh also mentions that only two Presidents have ever been impeached, Bill Clinton and Andrew Johnson. *Id.* at 53.

for example, a terrorist organization is demonstrably trying to carry out an attack against the United States, the President probably will have a very difficult time trying to convince Congress that no action should be taken against the organization. Congress may feel that it has no other choice than to try to act on its own, through private contractors, to stop the imminent threat.<sup>125</sup> If Congress can overcome the political and constitutional hurdles involved in issuing letters of marque and reprisal, it will then have to consider the character and makeup of private contractors it elects to utilize.

#### IV. *Private Contractors*

There are a wide variety of organizations and companies that might be referred to as private contractors. This Note refers specifically to those contractors who possess a significant ability and competence to conduct small-scale military operations. As a practical matter, this ability will exist mainly in those companies who employ former members of the military. The reason for requiring military aptitude is not to do away with the commercial nature of the contractors, but rather to stress that any privateering-type action taken in the twenty-first century (especially against terrorist targets) will potentially require a skilled use of force.

##### A. *Capabilities of Modern Day Private Contractors*

One key area of difference between privateers and private contractors has to do with the level of military power and capability that private contractors bring to the table. Executive Outcomes (EO), a privatized military firm that operated primarily in Africa during the late 1980s and 1990s,<sup>126</sup> provides an example of a private firm with impressive military capability.<sup>127</sup> The backbone of EO's operational ability was its staff of former elite soldiers of the South African Defense Force (SADF).<sup>128</sup> EO first demonstrated its true power in

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125. The President's feelings on this issue may not have been apparent to the public beforehand. A candidate may keep his or her personal feelings hidden or may come into the office from a (sometimes) less scrutinized position, such as the Vice President. Andrew Johnson, for example, the most overridden President in history, only became President after Lincoln was assassinated.

126. See P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 101–18 (2003) (noting that EO was a firm for hire that was often used to protect its own larger corporate interests and those of various African governments—for the right price).

127. See *id.* (detailing the structure and abilities of EO during the late 1980s and 1990s).

128. See *id.* at 101 (describing how EO's success was due primarily to its special forces

1993 during the Angolan Civil War.<sup>129</sup> At the time, the National Union for the Total Independence of Angola (UNITA), backed by the United States and South Africa, had pushed back the communist government forces throughout the country and had seized control of valuable oil installations.<sup>130</sup> The Angolan Army and other interested investors first hired EO to recapture the town of Soyo and its oil assets.<sup>131</sup> After intense fighting, a small force of eighty EO commandos seized the town of Soyo and the surrounding oil installations from the UNITA rebels.<sup>132</sup> Encouraged by this success, the Angolans hired EO to train a new brigade of 5,000 government troops.<sup>133</sup> Five hundred EO operatives, and various elements of EO's air assets, led the newly trained government forces in a counteroffensive against the UNITA rebels, retaking all the major Angolan cities and most of the resource areas.<sup>134</sup>

EO again proved its operational prowess during the conflict in Sierra Leone. By 1995, the Revolutionary United Front (RUF) controlled much of Sierra Leone and was close to capturing the capital of Freetown.<sup>135</sup> The government originally hired EO to establish control over the economically productive parts of the country.<sup>136</sup> It took 120 EO operatives and several Mi-24 attack helicopters (owned by partner company Ibis) only nine days to push the

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make-up along with its larger, non-military, corporate structure). EO's partnership with Ibis Air—technically a separate firm from EO though it was used as the air support element of EO's operations—provided the necessary air power element. *Id.* at 106. Ibis Air's assets, deployed on behalf of EO, included "two or three used 727 passenger jets . . . a number of Russian Mi-17 armed transport helicopters, Mi-8 cargo helicopters, Mi-24 attack helicopters, a squadron of Swiss-made Pileuas training aircraft converted to fire air-to-ground rockets, and Mig-23 advanced jet fighter-bombers." *Id.*

129. *See id.* at 108–09 (outlining the events surrounding EO's involvement in the Angolan Civil War).

130. *Id.* at 108.

131. *Id.* at 109.

132. *See id.* (noting that once the EO operatives vacated the town and facilities and left them to the control of the government army, they were retaken quickly by UNITA).

133. *See id.* (relating the fact that UNITA was in a dominant position over the nearly defeated government forces at the time).

134. *See id.* (stating that the effectiveness of the counteroffensive forced UNITA to agree to a peace accord by the end of 1994).

135. *See id.* at 110–11 (describing the dire straits of the government of Sierra Leone in the mid-1990s). *See generally* LANSANA GBERIE, *A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE* (2006) (providing a more detailed description of the conflict in Sierra Leone, the RUF, and the horrific human rights violations that occurred).

136. *See* SINGER, *supra* note 126, at 112 (noting that the government was unable to pay the start-up fee, so a private firm paid the fee in exchange for rights to diamond mines then controlled by the RUF).



RUF back 126 kilometers.<sup>137</sup> Observers estimated that hundreds of rebels were killed, and well over 1,000 deserted—EO suffered only twenty casualties, many due to accidents and illness.<sup>138</sup> Unfortunately, when the government terminated EO's contract early due to international pressure and the expected arrival of a U.N. peacekeeping force, instability quickly returned.<sup>139</sup> As a result, the RUF that was quickly and decisively swept aside by EO returned to kill nearly 10,000 civilians when the EO-provided stability deteriorated.<sup>140</sup>

Although EO no longer operates, there are several firms that either have significant operational capabilities or could put them together in short order. Military Professional Resources Incorporated (MPRI), for example, is a well-known military consulting firm that is well-equipped to morph into an action-based firm should the need arise.<sup>141</sup> Currently, one of the main differences between EO and MPRI is that MPRI is made up of former senior members of the U.S. military who would not be involved in direct combat even if they were still in military service.<sup>142</sup> The description of EO's success makes it clear that private firms can play pivotal roles in regional conflicts. In a situation involving letters of marque and reprisal, it seems plausible that Congress could militarily engage enemies far beyond individual captures or isolated weapons seizures. It is reasonable to infer that private firms could be used to great success in regional fields of conflict as well.

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137. *See id.* at 113 (describing EO's successful efforts to drive the RUF into the border regions of the country).

138. *Id.* at 114.

139. *See id.* at 114–15 (detailing the succession of coups, revolutions, riots, and the RUF resurgence that plagued Sierra Leone after EO's departure).

140. *See id.* at 115 (describing the aftermath of EO's withdrawal from Sierra Leone). Not surprisingly, there were a variety of reactions to EO's involvement in Sierra Leone. "At the very same time that EO was accused of being 'a mercenary army of racist killers,' humanitarian groups, such as the 'Children Associated with the War' organization in Sierra Leone, were formally thanking it [EO] for its work." *Id.* at 101 (citations omitted). Much of EO's negative reputation had its roots in the backgrounds of its members. Many were from apartheid South Africa—some were from military units accused of committing war crimes or from police units accused of torture and murder. *Id.*

141. *See id.* at 119 (noting that one State Department official said "[t]he only difference [between EO and MPRI] is that MPRI hasn't pulled the trigger—yet").

142. *See id.* (detailing the advisory nature of MPRI's operations).

*B. The Risks of Private Contractors—Experiences of the Executive Branch with the Private Sector*

Using private contractors as military stand-ins entails a number of risks, often similar to those associated with privateers in early American history. In some respects, these risks are even greater today. For instance, if Congress authorized private contractors to operate on land, the risk of collateral civilian casualties is almost certainly greater than the risk on the open sea.<sup>143</sup> The use of private contractors by the executive branch has shown that private contractors do not possess the strict command and control structure of the regular armed forces and lack anything like the military system of justice.<sup>144</sup> Furthermore, even those contractors supposedly under the supervision and control of the Executive Branch are not without their share of controversy.<sup>145</sup> As recent events in Iraq suggest, the risk of civilian casualties will increase as the area of operations expands to include locations with greater population densities.<sup>146</sup> In fact, private firms that engage in military action at the behest of the Executive Branch usually have been very difficult to control.<sup>147</sup>

Notably, the risks associated with letters of marque and reprisal are likely greater than those associated with the Executive Branch's use of private contractors. At least the Executive Branch possesses some operational control over the contractors. In the case of letters of marque and reprisal, Congress would unleash the private firms on the outside world with no supervision (apart from the guidelines given in the letter). The letters provide judicial supervision

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143. The legal consequences of operating on foreign territory as opposed to the open ocean are discussed further in Part V.

144. Despite several highly publicized incidents (such as Abu Ghraib and Haditha), U.S. soldiers typically are less inclined to violence than might otherwise be expected. See Ralph Peters, *Op-Ed., Troops & Crimes*, N.Y. POST, Aug. 3, 2007 (finding that the fifty-nine court-martials among the 140,000 troops in nineteen months from 2006–2007 yielded a much lower criminal rate than the 3,758 offenses—which would be classified as court-martial offenses—among the 113,000 people in Ann Arbor, Michigan).

145. See, e.g., Ned Parker, *The Conflict in Iraq: Security Contractor Criticized*, L.A. TIMES, Sept. 18, 2007, at A1 (describing a shooting in Iraq involving the private security firm Blackwater that left eight Iraqis dead and thirteen wounded).

146. See *id.* (detailing some of the problems associated with heavily armed private body guards working in the urban neighborhoods of Baghdad).

147. See SINGER, *supra* note 126, at 213 (describing how the private contractor Aviation Development Corporation, contracted by the CIA to do counter narcotics operations in Peru, mistakenly shot down a plane full of missionaries). Singer also suggests that in-country members of DynCorp, a private contractor ostensibly providing pilot training and technical support to the Colombian government, have been "too willing" to become involved in firefights and combat missions. *Id.* at 208.

only as an afterthought, in that the courts only review the actions of the contractors after the fact.

There are two complementary ways to approach this problem of unsupervised behavior. The first involves oversight by the private contractor itself.<sup>148</sup> Congress might hope for a contractor that polices its own members to ensure compliance with humanitarian standards, but Congress must be wary that mere encouragement of virtue might be disregarded by the rank and file membership of the private contractor. A more efficient internal system might make payment contingent on conforming to an accepted standard of conduct. Second, Congress could also act in such a way as to encourage proper conduct among the contractors. Indeed, the U.S. government did just that in order to elevate the reputation of its privateering above the near-piracy practiced by a number of ships sailing under letters of marque and reprisal issued by European powers.<sup>149</sup> In addition to establishing procedures for naval court-martials for those who violated the terms set out by the government,<sup>150</sup> the government also required the owners of privateers to put up a bond to guarantee that the privateer would operate under the established rules.<sup>151</sup>

### *C. Rectifying the Differences Between Private Contractors and Privateers*

#### *1. Private Funding and Unmarketable Goods*

Twenty-first century private contractors differ from the privateers of the eighteenth century in a number of ways, but not to such a degree that the differences are irreconcilable. The first issue that must be addressed is the source of funding for private contractors. It is important to note that, for these

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148. See STIVERS, *supra* note 1, at 120 (providing the instructions one owner gave to his crew during the Revolutionary War to "pay due respect to the law of nations, not suffering any insult or plunder by your people, when, boarding vessels at sea . . . be possessed of the principles of benevolence and humanity . . . for the sake of those who may fall into your hands").

149. See *id.* at 121 (quoting then U.S. Secretary of State James Monroe as stating during the War of 1812, "You are to pay the strictest regard to the rights of neutrals and the usages of civilized nations"). Monroe's statements had the force of law, and the penalty for defiance was a naval court-martial. *Id.*

150. See *id.* (describing the U.S. government's institution of official courts-martial for offending privateers).

151. See *id.* at 113–14 (showing the varied ways in which the federal and state governments would set up their bond systems for privateers). For an example of the way Congress could enact these protections within the letter of marque and reprisal, see *infra* Part VI. For a discussion of the repercussions private contractors might face under international law, see *infra* Part V.

contractors to pass constitutional muster as privateers, they will need to be privately funded.<sup>152</sup> There are two possible solutions for nongovernmental funding.<sup>153</sup> The first is a traditional approach.<sup>154</sup> In cases when the target is actually some marketable good, prize courts could be reinstated and the traditional method of distributing the capture could be followed.<sup>155</sup> In the case of goods that cannot be resold, another approach is needed. It appears that many of the possible types of captures will require funding not through a post-capture sale, but through a system based on private bounties.<sup>156</sup> For example, in cases when an unmarketable good (such as a weapon of mass destruction or a stockpile of assault rifles and explosives) is captured, the good should obviously be destroyed, not sold.<sup>157</sup> How then would the contractor sell it for profit? Private groups or foundations might offer compensation for every pound of explosive destroyed, every rifle melted down, every canister of mustard gas disposed of, and so forth. Similarly, if the captured good happens to be a person, the private contractor could not auction off the individual, so a bounty arrangement would be more applicable.<sup>158</sup>

The fact that many of the seized assets, goods, or individuals of modern day privateers cannot be auctioned off through a prize court creates another issue Congress must address. Namely, how will Congress practically set up the initial funding for private contractors and ensure successful operations are properly rewarded? Obviously, Congress cannot pay the private firms.<sup>159</sup> At the same time, however, Congress probably does not want to issue a letter of

152. See *supra* Part III.B (suggesting that a key requirement for modern day privateers will be that they are privately funded). While the Constitution does not explicitly require that privateers receive private funding, the historical context of letters of marque and reprisal indicates that private funding is an integral part of what a letter of marque and reprisal actually is. *Supra* Part II.B.

153. It should be recognized that the funding required for these operations is less than one might expect. For instance, EO's contract with Sierra Leone—during which EO drove the RUF out of the country with both ground personnel and air support—amounted to only \$35 million. SINGER, *supra* note 126, at 114.

154. See *supra* Part II (describing the traditional method of using prize courts).

155. In effect, this would be no different than the privateer captures of old. Congress issues a letter of marque to the firm, the firm goes out and captures the enemy goods, returns to the United States, and a prize court sanctions the capture and allows for the auctioning of the goods.

156. See DeWitte, *supra* note 96, at 136 (showing the practicality of a private bounty system).

157. It is hard to imagine a U.S. court offering assault rifles and chemical weapons at auction for the general public.

158. See *infra* Part IV.C (discussing the bounty issues in more detail).

159. See *supra* Part II (explaining that a key characteristic of privateers used in letters of marque and reprisal was that the federal government did not fund the privateers).

marque and then wait for a firm to search for start-up capital before any action is taken. The private military firms also likely would want a system that would ensure reward, payment, or both when its objectives were demonstrably completed. The firms, investors, and Congress would all probably desire some system by which claims could be verified and acted upon in an orderly and efficient manner. A solution can be found in a modified modern day prize court acting both as a central location for private investors to pool their resources and as an official to resolve the disputes that may arise.

## 2. Rewards for Justice

Rewards for Justice, administered by the U.S. State Department, provides a model for such a funding and monitoring system.<sup>160</sup> Under the program, a U.S. agency or embassy must nominate an individual for a reward.<sup>161</sup> An interagency committee then evaluates the claim and makes a nonbinding recommendation to the Secretary of State who has the final say in granting the reward.<sup>162</sup> For questions involving criminal jurisdiction issues, the Secretary of State may consult with the Attorney General.<sup>163</sup> Congress could create a prize court that operates in much the same way. Nominations for rewards would be created *de facto* when a letter of marque and reprisal is issued to a private contractor and the contractor later claims completion of the stated objectives. The prize court would be in a good position to evaluate legal or jurisdictional questions as well as whether the contractor had in fact accomplished its objectives and merited the funds.

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160. See Rewards for Justice, Seeking Information Against International Terrorism, <http://www.rewardsforjustice.net> (last visited Mar. 4, 2009) (describing the Rewards for Justice program) (on file with the Washington and Lee Law Review). Rewards for Justice, established in 1984, authorizes the State Department to issue rewards for catching terrorists. *Id.* The rewards are monetary—usually ranging from \$1 million to \$25 million—with the largest single reward payout being \$30 million for the deaths of Uday and Qusay Hussein. *Id.* The program does not require the individual to actually participate in the action, only to provide key information to the appropriate authorities. *Id.* Originally, the federal government entirely funded the program. *Id.*

161. See Rewards for Justice, Frequently Asked Questions, <http://www.rewardsforjustice.net/index.cfm?page=faq&language=English> (last visited Mar. 4, 2009) (stating that "[e]ither a U.S. investigating agency, such as the Department of Defense or the FBI, or a U.S. embassy abroad, must first nominate a person for a reward") (on file with the Washington and Lee Law Review).

162. See *id.* (explaining that the Secretary of State can elect to grant or deny the reward and even change its amount).

163. See *id.* (noting that if there is a question of federal criminal jurisdiction, the Secretary requests the concurrence of the Attorney General).

Some of the funding for Rewards for Justice comes from private sources through the Rewards for Justice Fund.<sup>164</sup> The fund is "a non-governmental, non-profit . . . charitable organization whose sole affiliation with the U.S. Department of State's Rewards for Justice Program is for the purpose of raising and providing private contributions for its use in the identification and apprehension of terrorists operating within the United States and abroad."<sup>165</sup> In the letters of marque and reprisal context, the entirety of the funding for a program like Rewards for Justice must come from a fund or funds like the Rewards for Justice Fund.<sup>166</sup> Private citizens could donate money into the fund where it would be managed and distributed at the discretion of the prize court. Historically, prize courts operated in a similar manner, determining the legitimacy of a capture and then approving the auctioning of the goods.<sup>167</sup> The ability of such a program to provide adequate start-up capital and liquidity will likely be proportional to the public demand for action, which in this case should be quite significant. Additionally, foreign parties should also be able to contribute funds to the private contractors, as discussed below.

### 3. Foreign Funding

A key point of letters of marque is that the privateers do not have to be funded directly by citizens of the nation that issues the letters.<sup>168</sup> This point provides two potential benefits to Congress. First, it opens the door to citizens of other countries who wish to see certain individuals or terrorist groups captured or dismantled. If funding were limited to a bounty system consisting solely of U.S. investors, Congress could realistically only hope to issue letters for individuals or organizations about which people within the United States felt very strongly. With an open system, Congress could attempt to issue letters for groups or individuals who generate great hostility in other areas of the world but who are not well-known in the United States.<sup>169</sup>

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164. *See id.* (describing the creation of the fund shortly after September 11, 2001, for the purpose of allowing private individuals to contribute into the program).

165. *Id.*

166. The court itself could be funded by the government, but any payments made directly to the contractors must come from private funding.

167. *See supra* Part II (describing the historical role of prize courts).

168. *See supra* Part II (describing how privateers were responsible for their own funding and costs—Congress never placed any restrictions on where that funding could originate).

169. Before the 9/11 terrorist attacks, it would have been difficult to find a great deal of funding for the capture of Osama bin Laden. That type of situation, when a terrorist plans, but has not yet committed a terrorist act, is one in which a legislative/executive disconnect could

Second, the lack of funding requirements (other than the limitation that the U.S. government cannot fund the privateers) might give Congress greater operational latitude in issuing letters of marque and reprisal. As noted in the discussion of EO, private firms are capable of altering the military landscape on a regional level.<sup>170</sup> One could envision a scenario in which Congress, against the President's wishes, feels that a large scale military action is necessary. For instance, an extremist organization seizes control of a U.S. ally's oil fields in the Middle East. Congress and the allied nation would presumably want the ally to have control of those assets, yet it might be difficult for a private contractor to find enough funding domestically in the U.S. to support a major operation against the extremists. Funding might be easier to come by if, reminiscent of EO's initial funding in Sierra Leone, the initial investors have a guarantee of a percentage share of the captured oil assets if they are returned successfully to the allied nation's control by the private contractor.<sup>171</sup>

One might question why the United States should become involved at all in this scenario. If a private investor makes a deal with a foreign government to fund a private contractor, why should Congress bother to issue a letter of marque and reprisal when the transaction could go forward without any U.S. authorization? There are two reasons Congress might want to issue a letter of marque and reprisal in such a case. First, authorization by the U.S. Congress gives the contractor greater international legitimacy and clout.<sup>172</sup> Many of the problems in Sierra Leone following EO's premature departure could have been avoided if international pressure did not force the government of Sierra Leone to cancel the contract.<sup>173</sup> If backed by the U.S. Congress, it is unlikely that a contractor would, even if not embraced internationally, be forced out before some measure of lasting stability took hold. A second, related reason is that many contractors likely would feel more comfortable operating in foreign territory with the endorsement of the U.S. Congress and likely would be more eager for the opportunity as both the known and unknown risks would be substantially diminished, or at least made more recognizable.<sup>174</sup>

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occur. If Congress believes that immediate action is required, but the President refuses to move until a terrorist act has been committed, Congress might welcome more "concerned" foreign funding to sponsor a letter of marque and reprisal for a target with whom the American public is not yet familiar.

170. See *infra* Part IV.A (discussing EO's success in large regional conflicts in Africa).

171. See SINGER, *supra* note 126, at 112 (describing the initial financing arrangements of EO's operations in Sierra Leone).

172. See *infra* Part V (discussing the questions of international relations in greater depth).

173. See SINGER, *supra* note 126, at 114–15 (describing the disastrous consequences of EO's withdrawal from Sierra Leone).

174. See *infra* Part V.E (discussing the risks faced by private contractors in the

#### 4. Bounty Hunting

One of the reasons for Congress to issue a letter of marque at the present time would be to kill or capture an individual terrorist. The current U.S. War on Terror is based largely on eliminating the networks and command structure of al Qaeda and related terrorist groups.<sup>175</sup> The justification for this strategy is that it will stop terrorist attacks before they occur.<sup>176</sup> The strategy has also been justified implicitly on the grounds that the individuals responsible for terrorist attacks on the United States should be killed or captured.<sup>177</sup> This is also the area in which private funding might be the easiest to obtain; for example, after the 9/11 terrorist attacks, several private investors offered a one billion dollar bounty on Osama bin Laden.<sup>178</sup>

The problem, at least historically speaking, is that the United States never issued a letter of marque and reprisal for the purpose of capturing an individual person or an individual ship.<sup>179</sup> The United States did distribute bounties for prisoners brought into port by privateers, so there is a precedent for privateers receiving bounties.<sup>180</sup> For the capture of individuals, Congress could also reference Martens's treatise to support the idea that a letter of marque and

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international arena).

175. See The White House, The Agenda: Homeland Security, [http://www.whitehouse.gov/agenda/homeland\\_security/](http://www.whitehouse.gov/agenda/homeland_security/) (last visited Mar. 18, 2009) (listing "Defeat Terrorism Worldwide" first under Homeland Security's strategic agenda, and "Find, Disrupt, and Destroy Al Qaeda" as the first element of defeating terrorism) (on file with the Washington and Lee Law Review); see also President George W. Bush, Address at the Ronald Reagan Building and International Trade Center (Oct. 6, 2005) [hereinafter Bush Address] (outlining the Bush administration's strategy for the War on Terror).

176. See Bush Address, *supra* note 175 ("First, we're determined to prevent the attacks of terrorist networks before they occur . . . We're acting, along with the governments from many countries, to destroy the terrorist networks and incapacitate their leaders.").

177. See *id.* ("Together, we've killed or captured nearly all of those directly responsible for the September the 11th attacks; as well as some of bin Laden's most senior deputies; al Qaeda managers and operatives in more than 24 countries; the mastermind of the USS Cole bombing . . .").

178. See DeWitte, *supra* note 96, at 136 (showing the willingness of many private individuals to provide bounties for high-profile terrorists).

179. See *supra* Part II.B (showing that the government never issued letters of marque and reprisal even for individual ships, much less individual persons).

180. See MACLAY, *supra* note 3, at 11 (noting that a bounty of twenty dollars per prisoner was given by the government to privateers bringing prisoners into port along with the captured ships). Practically, this bounty rarely was distributed because privateers preferred to offload prisoners as soon as possible (often in foreign ports)—it was risky to keep enemy sailors around as they could rise up against their captors, who were often stretched thinly to crew two ships at once. *Id.*



reprisal could historically be issued for the purpose of "attacking the enemy,"<sup>181</sup> and certainly capturing a terrorist would qualify as attacking the enemy. It should also be noted that the reason for nonspecific letters in the past was that neither the government nor the privateers had any way of knowing exactly which ships the privateers might happen across while cruising under letters of marque and reprisal.<sup>182</sup> For an issuance after a terrorist attack, Congress might argue that under Joseph Story's interpretation of the Letters of Marque and Reprisal Clause, the letters could be issued to provide citizens with an avenue of redress short of a declaration of war.<sup>183</sup> The argument could be made that U.S. citizens suffered both financial and physical harm in the attack and that Congress merely is providing a method of redress—by capturing a terrorist for a bounty, the injured party would obtain at least some monetary compensation.<sup>184</sup> Overall, it appears that the disconnect between the privateer of the eighteenth century and the private contractor of the twenty-first century is not that large: The private contractors are still privately funded citizens capturing something from a foreign power for personal gain and with congressional approval.

#### V. *International Concerns*

Throughout the history of privateering in Europe and America, privateers faced danger not only from battles and harsh weather, but also in skirting the boundaries of international law.<sup>185</sup> In reality, there was very little difference between the actions of a privateer and those of a pirate.<sup>186</sup> In fact, "[t]he fundamental difference between a privateer and a pirate was that the former

181. *Supra* note 37 and accompanying text.

182. *See supra* Part II (noting that the government stated the authorization to capture enemy ships and goods in general terms).

183. *See supra* Part II.B (discussing Joseph Story's *Commentaries on the Constitution of the United States*).

184. This argument would be strengthened if the private contractor in question had some financial interest negatively impacted by the terrorist attack. Alternatively, the contractor might be able to offer a certain percentage of the bounty to injured parties and stay within Story's conception of letters of marque and reprisal. *See* Aaron Donovan, *A Nation Challenged: Charity; Donations in Monthlong Campaign Total \$35 Million*, N.Y. TIMES, Oct. 11, 2001, at A1 (relating that *The New York Times* 9/11 charity fund raised \$35 million in the month following the 9/11 terrorist attacks). A private contractor giving a portion of its profits to a charity like this one could claim it was acting to redress the injuries of the terrorist attack.

185. *See* STIVERS, *supra* note 1, at 111 ("The danger inherent in privateering lay not only in combat at sea but also in entanglement in narrow legal technicalities of international law.").

186. *See id.* (describing the practical similarities between pirates and privateers).

possessed a piece of paper which purported to tell any interested party that she was at sea for a specific purpose under the authority of her own government, on a mission then fully recognized by international law—and that the latter had no such piece of paper, was bound by no law or restrictions whatsoever, not even that of common humanity."<sup>187</sup> It is not surprising, then, that a modern rebirth of privateering will have international law implications. This Part will examine some of those implications and discuss what impact they might have on a congressional decision to issue letters of marque and reprisal.

### A. *International Customary Law and the Declaration of Paris*

The Declaration of Paris, signed in 1856, declared privateering to be unlawful.<sup>188</sup> The United States has yet to sign the Declaration and is not bound by any express agreement that prohibits privateering.<sup>189</sup> However, the U.S. government has not issued letters of marque and reprisal for nearly two hundred years.<sup>190</sup> Foreign powers may argue that regardless of whether the United States is a formal part of any treaty that forbids privateering, two hundred years of practice should prevent the United States under customary international law from resurrecting privateers in the twenty-first century. After all, the United States used privateers in only thirty-nine out of its 233 years of existence, and those were the first thirty-nine years.<sup>191</sup> Practice, however, is only half the burden of demonstrating a rule of customary international law; one must also show the existence of *opinio juris*—a sense of legal obligation.<sup>192</sup>

The International Court of Justice (ICJ) stated in regards to *opinio juris* that

[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost

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187. *Id.*

188. DeWitte, *supra* note 96, at 132.

189. *Id.*

190. Exempting, of course, those issued by Texas in 1834–1835 and the letters issued by the Confederacy during the Civil War. ROBINSON, *supra* note 83, at 17–20.

191. There are 233 years between 1776 and 2009. Thirty-nine years elapsed between 1776 and 1815, totaling about seventeen percent of the existence of the United States.

192. See *North Sea Continental Shelf (F.R.G. v. Den.)*, 1969 I.C.J. 3, 41–44 (Feb. 20) (defining the elements required to show that a practice has become a part of customary international law).

invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.<sup>193</sup>

As discussed in Part III, the United States could show that, as it grew in terms of military power in the nineteenth century, the need for privateers to aid in warfare diminished in proportion to the strengthening of its armed forces.<sup>194</sup> It follows that the United States' decision to stop issuing letters of marque was due to practical circumstances and not to a sense of legal obligation.

Full consideration of the question of *opinio juris* requires some insight into the reasons why the United States ultimately abstained from the Declaration of Paris in the first place. Perhaps surprisingly, the United States did not withhold its consent because it objected to the first provision of the Declaration that stated "[p]rivateering is, and remains abolished."<sup>195</sup> Instead, the United States based its refusal on the rejection of a United States amendment to the Declaration that would have prohibited publicly armed vessels from capturing the private property of private citizens.<sup>196</sup> Therefore, rather than opposing an abolishment of privateering, the United States actually encouraged a prohibition of all confiscations of private property on the high seas, whether the property was captured by privateers or official government vessels.<sup>197</sup> Having argued at the time of the Declaration that private property needed protection from public vessels as well as privateers, the United States would have difficulty arguing today that there was never a sense of legal obligation regarding the prohibition of privateering.

The scope and duration of practice and *opinio juris* required to create customary international law remains nebulous. Given that the United States refrained from privateering for most of its existence and demonstrated, at least in the past, a clear sense of legal obligation to continue doing so, it appears that a congressional issuance of letters of marque and reprisal would be a violation of customary international law.<sup>198</sup> If Congress decides to issue

193. *Id.* at 44.

194. *See supra* Part III.A (discussing the reasons for the decline in U.S. privateering during the nineteenth century).

195. *See* 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 562 (1906) (quoting Section 1221 of the Declaration of Paris).

196. *See id.* at 565 (showing that the desired amendment would have read "[a]nd that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent").

197. *See id.* at 562–71 (describing the details of the U.S. opposition to the Declaration).

198. *See* Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 146–51 (1987) (suggesting that international courts use a sliding scale of practice and *opinio juris* when considering questions of customary law). Unfortunately for the United States in this instance, Professor Kirgis's sliding scale is weighted down on both ends—both practice and *opinio juris*

the letter, it must do so despite the fact that it will result in a violation of international law.<sup>199</sup>

### B. Acts of Aggression

If Congress authorizes a private contractor to take hostile actions in a foreign territory, that territory may consider it an act of aggression by the United States. The contractors, after all, would be invading the sovereign soil of another country, even if the target of the raid was not a recognized element of that country (a terrorist cell for example). As a result, the invaded country could presumably react with hostility to the intrusion and claim that their actions were in self defense. Article 51 of the United Nations Charter states that there is an "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."<sup>200</sup> This right of self defense might also give the defending nation the right to declare war on the

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suggest that the prohibition of privateering was, and is, customary international law.

199. The consequences, however, could be more severe than it first appears. If a letter of marque and reprisal were considered a violation of international law, the letter might be seen as invalid. If that is the case, while operating on the high seas the privateers would not be private citizens acting under a letter of marque and reprisal, but pirates. Significantly, piracy is recognized as a basis for universal jurisdiction in international law. United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]. Thus, while piracy occurs outside the territorial jurisdiction of any state, international law gives any state the right to capture pirates and prosecute them under its own laws. See UNCLOS, *supra*, art. 105 ("The courts of the State which carried out the seizure [of the pirate] may decide upon the penalties to be imposed . . ."). Finally, while the United States has not ratified the UNCLOS, it has put in place policies concerning piracy that could be used by the President to threaten privateers. See Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 14–15 (2008) (describing U.S. piracy policy). The U.S. statute on piracy, for instance, provides a life sentence for anyone convicted of piracy in the United States (though it has not been used for over 100 years). *Id.* at 15.

This situation bodes ill for any private contractors captured on the high seas. There are, however, certain limitations in the definition of piracy in the UNCLOS that may provide some reprieve. First, piracy requires acts "committed for private ends by the crew or the passengers of a private ship or a private aircraft." UNCLOS, *supra*, art. 105. Private contractors could argue that their acts, while paid for by private contributions, were motivated by public ends (such as the capture of a terrorist, patriotism, etc.). Second, the acts must be committed on the high seas, outside the territorial jurisdiction of any state. *Id.* If the private contractors avoid committing "any illegal acts of violence or detention, or any act of depredation" on the high seas, they will avoid falling under the definition of piracy.

200. U.N. Charter art. 51.

United States directly if the defending nation believes that it is protecting itself not only against a private military firm, but against the United States as well.<sup>201</sup>

It follows that Congress must decide whether the risk of a declaration of war by a foreign power is worth the objective of the letter of marque and reprisal. Presumably, under the circumstances outlined earlier in this Note, if Congress wanted the President to act and turned to the letter of marque and reprisal only as a last resort, Congress would be prepared to accept the consequences of military action, whoever the U.S. actor happened to be. Additionally, as outlined in Part III, it is likely that Congress desired a declaration of war, but decided not to pursue one because of an executive refusal to act upon it.<sup>202</sup> It is also possible that Congress already would have passed a declaration of war overriding a presidential veto, though such a measure would be largely symbolic.<sup>203</sup>

### C. Geneva Conventions

In any military action, there is a possibility that the enemy will capture friendly soldiers; or, in this circumstance, private citizens acting as military contractors. Most relevant to the treatment of captured private contractors is the *Geneva Convention Relative to the Treatment of Prisoners of War*, adopted in 1949 and entered into force in 1950.<sup>204</sup> The most pressing issue for private contractors is not what protections the Geneva Conventions provide, but to whom the detaining country has to provide those protections.<sup>205</sup> Article 4 states in part:

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201. See Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325, 327 (2003) (discussing the right of self defense in the context of the United States defensive military action against Afghanistan because of the Taliban's link with al-Qaeda and the 9/11 terrorist attacks). In the case of a letter of marque and reprisal, the link between the government and the attacker is even more obvious, as Congress will have granted expressly the contractor permission to take military action.

202. See *supra* Part III (detailing the conflict between Congress and the President that could lead to the use of a letter of marque and reprisal).

203. See *supra* Part III (discussing the ineffectiveness of a declaration of war if the President refuses to engage the armed services). If Congress has the two-thirds majority needed to override a veto of a letter of marque and reprisal, then there are probably enough votes to override a veto on a declaration of war. Because the President still controls the armed forces, however, the declaration would have little impact. *Supra* Part III.

204. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

205. This issue arises frequently in the context of the Guantanamo Bay detainees and the classification of enemy combatants. See, e.g., John R. Pariseault, Note, *Applying the Rule of Law in the War on Terror: An Examination of Guantanamo Bay Through the Lens of the U.S.*

Prisoners of war . . . are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - a. That of being commanded by a person responsible for his subordinates;
  - b. That of having a fixed distinctive sign recognizable at a distance;
  - c. That of carrying arms openly;
  - d. That of conducting their operations in accordance with the laws and customs of war.<sup>206</sup>

Private Contractors obviously do not fall under section 1—the entire point of using the contractors is that they are not members of the armed services. It is certainly questionable whether contractors would be classified as militias or volunteer corps under part 2, but the more important point for private contractors is that for "those who are not the regular forces of their nation state, compliance with the four criteria [of Article 4.2] are required to receive the benefits of combatant status."<sup>207</sup> Even if they were classified as militias or volunteer corps, the additional provisions of section 2 are likely to disqualify them from POW status.<sup>208</sup>

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*Constitution and the Geneva Conventions*, 28 HASTINGS INT'L & COMP. L. REV. 481, 484–88 (2005) (discussing the application of the Geneva Conventions to persons held in Guantanamo Bay).

206. Geneva Convention, *supra* note 204, art. 4.

207. Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 222 (2005).

208. The United States has made a similar argument regarding fighters captured in Afghanistan. See Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POW*, 96 AM. J. INT'L L. 475, 479 (2002) (quoting officials from the Bush administration as stating that captured Taliban prisoners were not entitled to POW status because they were in

To begin with, private contractors engaged in military actions are not likely to meet the standards of part (b) that require a fixed sign recognizable at a distance.<sup>209</sup> In fact, the more specific the target, the more the contractors will have to rely upon stealth and surprise, making the requirements of part (b) detrimental to the accomplishment of the objective. Similarly, part (c) presents a problem in that the contractors may not find it advantageous to openly carry arms at all times.<sup>210</sup> Certainly, if they are attempting to capture an individual in hiding, the contractors will not want to advertise their intentions beforehand. Part (d) might also be problematic.<sup>211</sup> Presumably, Congress would want the contractors to conduct their operations in accordance with the laws of war, but Congress has no way of ensuring that happens.<sup>212</sup>

As a result, if Congress sends private citizens into foreign countries in this manner, they probably will not receive Geneva protections if they are captured.<sup>213</sup> There may still be some respite for the captured contractors, however, under other provisions of humanitarian law. The

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violation of the requirements of Section 2).

209. See Major William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 137 (2003) (arguing that U.S. special forces soldiers, operating in black jumpsuits, would qualify for POW status, while reconnaissance soldiers, dressed in civilian clothes, would not). Major Ferrell emphasizes that the true purpose of this provision is to provide clear battlefield distinctions between combatants and civilians. *Id.* at 102–04. Thus, black jumpsuits would suffice to distinguish the special operations soldiers from civilians, while obviously civilian clothes would not provide such a distinction. *Id.* at 137–40.

210. See *id.* at 137–38 (discussing the movement of a hypothetical surveillance team).

211. See *id.* at 137–40 (describing the ways in which special forces soldiers might violate the laws of war when dressed in civilian clothes).

212. See *supra* Part IV.B (describing some of the risks associated with the lack of immediate control over contractors). It should be noted that the initial use of force does not have to be lawful in order for the Geneva Conventions to apply—Part (d) refers to the conduct of operations, not whether the war itself is lawful or unlawful. Geneva Convention, *supra* note 204, art. 4. In the case of private contractors acting under letters of marque and reprisal, even if the issuance of the letters and subsequent military action of the contractors is considered to be a violation of international law, the contractors will still satisfy Part (d) if they conduct themselves in accordance with the laws and customs of war. *Id.*

213. While Congress might certainly be concerned about private contractors falling outside of the protections of the Geneva Conventions, this concern might be dampened by the fact that official U.S. soldiers are often not accorded the Geneva protections when captured. See, e.g., Jonathan Finer & Joshua Partlow, *Missing Soldiers Found Dead in Iraq: GIs Were Isolated in Insurgent Haven*, WASH. POST, June 21, 2006, at A1 (describing the torture, murder, and beheading of two captured U.S. soldiers in Iraq in 2006). Congress may feel that because the enemy will not afford Geneva protections to any combatant, no matter his or her status under the Geneva Conventions, the fact that private contractors do not technically qualify as POWs is not of any practical significance.

Universal Declaration of Human Rights,<sup>214</sup> the Convention Against Torture,<sup>215</sup> and the Standard Minimum Rules for the Treatment of Prisoners<sup>216</sup> all provide some protection for captured individuals whom the Geneva protections discussed above do not protect. Despite these further protections, neither Congress nor the private contractors will have any guarantee that a hostile party will abide by these standards in any case.<sup>217</sup> Therefore, if Congress issues a letter of marque and reprisal, both Congress and the contractor should be prepared for the contractor's employees to assume the risks of capture.

#### D. Bounty Hunters and Kidnapping

As suggested in Part IV, Congress may wish to issue letters of marque and reprisal in order to capture individual persons.<sup>218</sup> The fact that most of these individuals will be found within the borders of other sovereign nations poses problems particular to private contractors acting as bounty hunters. The problem of kidnapping has recently surfaced in the international discussion of the United States' extraordinary rendition policy.<sup>219</sup> This policy resulted in U.S. officials flying terrorist suspects captured in Europe and North America to other locations where interrogation laws and practices were governed by more relaxed standards.<sup>220</sup> Extraordinary rendition should not pose a great problem for private contractors, as they are likely to be moving suspects from the relaxed-approach areas to the United States.

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214. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

215. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113 (Dec. 10, 1984).

216. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611 (1957), Annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, U.N. Doc. E/3048, *amended* E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1, U.N. Doc. E/5988 (1977).

217. See Laura Parker, *What Exactly Happened That Day in Fallujah*, USA TODAY, June 11, 2007, at 13A (describing the lingering uncertainty regarding the events surrounding the death of four private contractors who were shot, burned, and hung from a bridge in Fallujah, Iraq in 2004).

218. See *supra* Part IV (explaining that the capture of an individual terrorist would be one of the simplest avenues for Congress to take when issuing a letter of marque and reprisal).

219. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 588–90 (2006) (describing the evolution of the purposes and procedures of extraordinary rendition).

220. See *id.* at 593 (stating that "[m]any former CIA officials concede that they were aware that renditions resulted in torture; some admit that a goal of rendition was to use interrogation techniques that were beyond the legal authority of U.S. questioners").



While the extraordinary rendition issues may not affect private contractors, simply having a letter of marque and reprisal from the U.S. Congress will not immunize them from a kidnapping prosecution in another country. The country where the kidnapping takes place might decide to charge the contractor regardless of whether it was authorized by the U.S. government.<sup>221</sup> Not only will Congressional authorization not protect the private contractors from kidnapping prosecutions, but the authorization might also render the United States responsible for a violation of the other country's sovereignty.<sup>222</sup>

### *E. War Crimes and Responsibility*

#### *1. The Private Contractor's Responsibility for War Crimes*

The lack of direct supervision over private contractors may create additional international problems for the private contractors and the U.S. government. If Congress issues a letter of marque and reprisal to a private contractor who then clearly engages in improper conduct in a foreign country—committing a war crime for example—it is possible that foreign domestic courts might attempt to hold the private contractor accountable.<sup>223</sup> As in the kidnapping context discussed above, letters of marque and reprisal will not provide private contractors with immunity from foreign domestic law.<sup>224</sup> If a private contractor commits an especially egregious crime in the territory of a foreign country, that country may decide to exercise jurisdiction over the matter domestically.<sup>225</sup>

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221. See Craig Whitlock, *Testimony Helps Detail CIA's Post-9/11 Reach; Europeans Told of Plans for Abductions*, WASH. POST, Dec. 16, 2006, at A1 (describing Italian prosecutors efforts to try CIA agents for their role in the alleged kidnapping of Hassan Mustafa Osama Nasr as a part of the CIA's post-9/11 rendition program).

222. See Case of the S.S. "Lotus" (Fr. v. Turk.), 1927, P.C.I.J. (ser. A), No. 10, at 14 (Sept. 7) ("[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."). The exception to this situation occurs when the other country acquiesces to the operation. *Id.*

223. See, e.g., Mark S. Ellis, *Coming to Terms with Its Past—Serbia's New Court for the Prosecution of War Crimes*, 22 BERKELEY J. INT'L L. 165, 166–73 (2004) (describing Serbia's domestic war crime statutes).

224. Presumably, the letter will not immunize the contractor from judicial action in the United States for war crimes or crimes against humanity either. See *supra* Part IV.B (explaining that Congress traditionally sought to control the actions of privateers and will likely seek to minimize their negative impact should letters of marque and reprisal be issued again).

225. American privateers faced a similar risk during the Revolutionary War—"the British held all captured American sailors under a bill of attainder, charging them with piracy and

The United States has yet to become a party to the International Criminal Court Statute, but that fact may not provide a great deal of cover for a contractor accused of a crime falling under the jurisdiction of the International Criminal Court (ICC).<sup>226</sup> While the United States' refusal keeps the ICC from claiming jurisdiction over the private contractor under part 2(b) of article 12,<sup>227</sup> it is likely that the Court will be able to assert jurisdiction based on either part 2(a) of article 12 or part (a) of article 13. If the alleged crime arises from conduct that occurred in the sovereign territory of a state that was a party to the ICC Statute, then the ICC may assert jurisdiction under part 2(a) of article 12.<sup>228</sup> If the alleged crime is referred to the ICC Prosecutor by a nation that is a party to the Statute, the ICC may assert jurisdiction based on that referral.<sup>229</sup> In general, it seems that private contractors would be well advised to avoid conduct that might be categorized as a crime under article 5 of the ICC Statute.<sup>230</sup> Only by refraining from the crimes the ICC claims jurisdiction over can the contractor be certain that the ICC will not attempt to try its operators or employees.

## 2. U.S. Accountability for War Crimes and Atrocities

Congressional authorization of a private contractor through a letter of marque and reprisal could make the United States responsible for atrocities committed by the private contractor while it acted under the letter. The most pressing issue for international courts in this instance would be finding a way to assert jurisdiction over the United States—the ICJ has jurisdiction over the United States only if the United States consents to such jurisdiction.<sup>231</sup>

treason." *VOLO & VOLO*, *supra* note 47, at 233.

226. The ICC claims jurisdiction over the following types of crimes: genocide, crimes against humanity, and war crimes. The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, art. 5, part 1 (July 17, 1998) [hereinafter ICC Statute].

227. *See id.* art. 12, part 2(b) (stating that "the Court may exercise its jurisdiction if . . . [t]he State of which the person accused of the crime is a national [is a Party to the Statute]").

228. *See id.* art. 12, part 2(a) (stating that "the Court may exercise its jurisdiction if . . . [t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft [is a Party to the Statute]").

229. *See id.* art. 13, part (a) (stating that "[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party").

230. *See supra* note 226 (stating the crimes over which the ICC claims jurisdiction).

231. Statute of the International Court of Justice, art. 36, 59 Stat. 1055, T.S. No. 993 (June

Currently, the United States grants or denies consent on a case by case basis, so it is likely that the United States would simply reject the jurisdiction of the ICJ in a case when the court desired jurisdiction to hold the United States accountable for the atrocities of its privateers.<sup>232</sup>

#### *F. Precedent and International Standing*

Since it appears that an issuance of a letter of marque and reprisal could violate customary international law and the sovereignty of a foreign power, not to mention appearing as an act of aggression, the international standing of the United States and its reputation as a law-abiding nation could be severely diminished. Congress, therefore, will need to carefully address these concerns when it issues a letter of marque and reprisal in order to minimize the damage to the United States internationally. For instance, Congress could remove concerns about violations of sovereignty and acts of aggression by getting the permission of the nations in which the contractors will operate.<sup>233</sup> A violation of customary international law will be more difficult to remedy. The government could attempt to argue against a violation before the ICJ, though the effort probably will fail.<sup>234</sup> Simply making the effort may be beneficial especially if the United States also submits to the ICJ's judgment—though this strategy would be most advantageous to Congress if it could be implemented after the contractor has substantially completed its goals.<sup>235</sup>

Furthermore, it may set an unpleasant precedent internationally if the United States allows its private citizens to, for all intents and purposes, attack foreign powers (or at least rogue elements in the territory of a foreign power).<sup>236</sup>

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26, 1945).

232. See RAY T. DONAHUE & MICHAEL H. PROSSER, *DIPLOMATIC DISCOURSE: INTERNATIONAL CONFLICT AT THE UNITED NATIONS* 241–42 (1997) (describing how the tensions between the United States, Nicaragua, and the ICJ in the 1980s led to the U.S. refusal to accept the compulsory jurisdiction of the ICJ and the U.S. decision to accept jurisdiction in the future only when it chose to do so).

233. See *Case of the S.S. "Lotus" (Fr. v. Turk)*, 1927 P.C.I.J. (ser. A) No. 10, at 14 (Sept. 7) (indicating that sovereignty concerns can be alleviated by receiving the permission of the other nation).

234. See *supra* Part V.A (discussing the obstacles to justifying privateering under customary international law).

235. Otherwise, the ICJ is likely to thwart the purpose of the letter of marque and reprisal by ordering the U.S. to remove the authorization of the private contractor. The reputational risk of this approach is also great, however, as an after-the-fact submission to jurisdiction and a refusal to abide by a subsequent decision against the United States would severely damage international standing.

236. See *supra* Part V.A (describing the problems associated with customary international

Just as some might argue that the United States is bound by custom not to use privateers, others might suggest that a revival of privateers by the United States makes the practice acceptable once again.<sup>237</sup> Congress, therefore, may want to consider the implications of a worldwide revival of privateering.<sup>238</sup>

One of Congress's principal concerns should be ensuring that the contractors operate humanely and within the laws of war. A gross violation or atrocity would severely damage the United States' reputation abroad, even if the perpetrators were subsequently brought to justice either internationally or domestically.<sup>239</sup> While this would apply to traditional military operations as well, there would probably be a greater decline in international goodwill with a letter of marque and reprisal than in the case of a traditional military authorization.<sup>240</sup> The fact that the letters may seem to lack full legitimacy—due to a lack of presidential approval—may lessen their appeal to the world community.<sup>241</sup>

## VI. Drafting the Letter

Because there are a number of practical, constitutional, and international issues implicated by the issuance of a letter of marque and reprisal in the

law).

237. This argument will be only partly customary in nature. The problem for most countries is that they are signatories to the Declaration of Paris. These nations would be in the position of arguing that recent actions of the United States negated 200 years of customary and treaty law—this argument will be even more difficult if the same nations are arguing that customary international law prohibits the United States from engaging in privateering in the first place. *Supra* Part V.A.

238. More cynical members of Congress might point out that some foreign powers are already supporting (though sometimes not explicitly) private military actors in the form of international terrorism. See U.S. Department of State, State Sponsors of Terrorism, <http://www.state.gov/s/ct/c14151.htm> (last visited Feb. 16, 2009) (showing "[c]ountries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism," currently including Cuba, Iran, Sudan, and Syria) (on file with the Washington and Lee Law Review).

239. See Global Security, Guantanamo: 'Notorious' Prison Causing 'Immense Damage' to U.S. Image, <http://www.globalsecurity.org/security/library/news/2005/06/wwwwh60521.htm> (last visited Mar. 18, 2009) (summarizing negative reactions in the world-wide press to the U.S. operation of the detention center at Guantanamo Bay and the abuses that occurred at Abu Ghraib prison under U.S. supervision) (on file with the Washington and Lee Law Review).

240. It is likely, though, that the risk of an atrocity is much greater under a letter of marque than under a traditional military operation. *Supra* Part IV.

241. An interesting question is whether a military action sponsored by a bare majority of Congress and the President would be seen as more legitimate than a military action supported by at least two-thirds of Congress without the consent of the President.

twenty-first century, Congress will need to carefully draft the letter. This Note sets out a brief example of a model letter seeking to address some of the issues described above. The model is based on the Letter of Marque and Reprisal Act of 2007, the most recent Congressional attempt to deal with letters of marque and reprisal.<sup>242</sup>

### **SECTION 1. Issuance of Letter of Marque and Reprisal**

The Congress of the United States authorizes and commissions, under an officially issued letter of marque and reprisal, the privately funded and privately equipped firm [insert firm name] to employ all means reasonably necessary to [seize/capture/destroy] outside the geographic boundaries of the United States and its territories the [person/property/equipment/weapons] of [insert name of targeted individual or group].

### **SECTION 2. Regulations Applicable to [insert firm name] While Acting Under This Letter of Marque and Reprisal**

- (1) [Insert firm name] shall conduct its operations in accordance with the principals of capture contained in the Army Field Manual 2-22.3.<sup>243</sup>
- (2) [Insert firm name] shall conduct its operations in accordance with the principals of war contained in Army Field Manual 27-10.<sup>244</sup>
- (3) Any and all offenses committed by individuals employed or utilized by [insert firm name] while acting under letter of marque and reprisal shall be tried and punished as like offenses are or may be tried and punished when committed by a person belonging to the armed forces of the United States.<sup>245</sup>

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242. H.R. 3216, 110th Cong. (2007). Portions of the suggested bill, such as the short title, sponsor, and so forth, have been omitted.

243. DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006). The purpose of this provision is to attempt to provide clear boundaries, especially for the private contractors embarking on missions involving human capture and possible interrogation. Among other things, the Field Manual explicitly prohibits the use of water-boarding, electrocution, sensory deprivation, inducing hypothermia, or depriving the subject of food, water, or medical care. *Id.* at 5-12, ¶ 5-75. The manual also specifies that the Geneva Conventions apply to all detainees and eliminates separate standards for the questioning of prisoners of war and enemy combatants. *Id.* at 5-6, ¶ 5-27.

244. DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 27-10, LAW OF LAND WARFARE (1956). This provision also attempts to provide boundaries for private contractors operating under letters of marque and reprisal, requiring the contractors to conduct their operations in accordance with the laws of war specified in the Army Field Manual.

245. See STIVERS, *supra* note 1, at 121–22 (recounting the congressional attempt to bring privateers under the authority of military courts-martial). Originally, Congress authorized the Secretary of the Navy to establish the courts responsible for trying privateers. In a case of

**SECTION 3. SECURITY BOND**

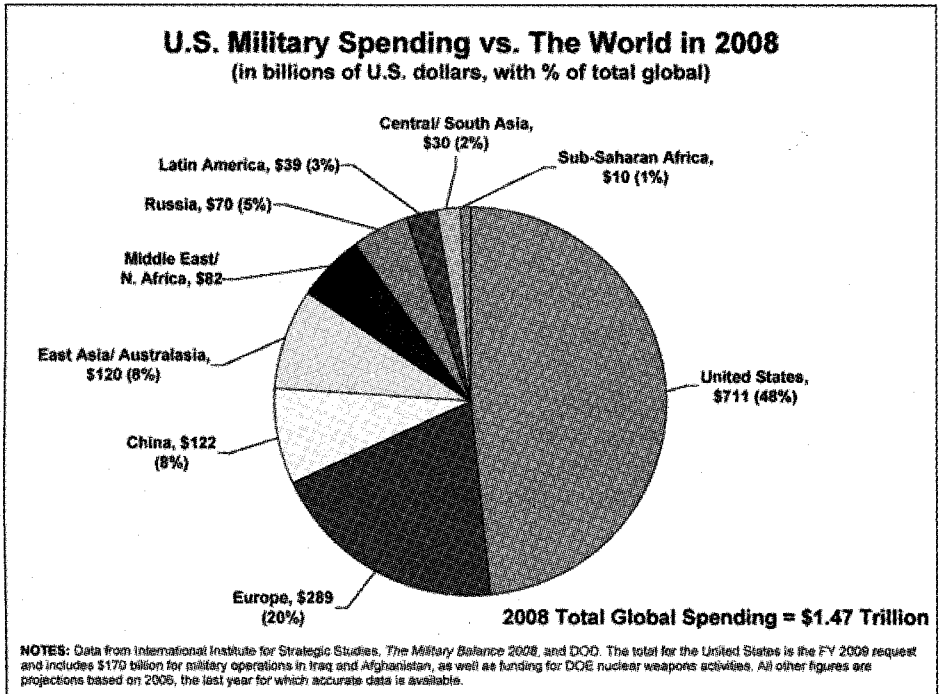
[Insert firm name] shall post a security bond in the amount of [insert amount] to ensure compliance with the conditions set forth in this letter. Failure to comply with the standards and requirements set forth in this letter will result in the forfeit of the security bond.

*VII. Conclusion*

Letters of marque and reprisal provide a method with which Congress can check a lack of presidential initiative in future military conflicts. Within certain constraints, the Constitution allows Congress to issue letters of marque and reprisal to private contractors, allowing Congress to enlist private contractors to accomplish military objectives that the President refuses to support. Congress's decision to issue letters of marque and reprisal against the will of the President, however, will be a balancing act of risk and reward. The risks are many, substantial, and unpredictable, and may involve great injury and serious consequences both domestically and internationally. The injury, or potential injury, to the United States must be so great that Congress feels it has no choice but to accept these risks in an attempt to prevent or redress that injury.

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legislative and executive conflict, however, Congress may not want to cede such authority to the executive branch as the President might attempt to use the Secretary's authority to hinder preemptively the privateer's efforts. In that instance, Congress might wish to establish courts by its own legislative action rather than rely on the executive branch to do so—as mentioned in the Sample, such courts could operate as military tribunals.

Appendix I<sup>246</sup>

246. The Center For Arms Control and Non-Proliferation, The Fiscal Year 2009 Pentagon Spending Request—Global Military Spending, [http://www.armscontrolcenter.org/policy/securityspending/articles/fy09\\_dod\\_request\\_global/](http://www.armscontrolcenter.org/policy/securityspending/articles/fy09_dod_request_global/) (last visited Mar. 18, 2009) (on file with the Washington and Lee Law Review).