The Constitutionality of Covert War: Rebuttals

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Editors' Note: The *Journal of National Security Law & Policy* invited Jules Lobel and Robert F. Turner to write brief rebuttals to each other's essays included in this issue, and these follow below.

I. PROFESSOR LOBEL

Professor Turner argues that Congress's power to "declare war" and issue letters of marque and reprisal is an irrelevant "anachronism" in today's world,[1] and was virtually irrelevant even in 1787. According to Turner, the Declare War Clause only prevents the President from launching "a major aggressive war."[2] In his view, the President has the power to launch "minor" aggressive wars and even initiate "major" warfare ("major" is not defined) when such warfare can broadly be termed "defensive," a vague term also not defined by Turner. Of course, no sane President would openly claim to launch an "aggressive" (or in eighteenth century parlance, an unjust war). For example, President George W. Bush asserted that the 2003 invasion of Iraq was "defensive" although Iraq had neither attacked us nor was imminently threatening to do so, and the invasion was widely viewed by the world community as violative of the U.N. Charter. Turner's interpretation of the Declare War Clause, of which James Madison wrote, "in no part of the Constitution is more wisdom to be found," reduces this important provision to a virtual nullity, easily evaded by the executive's claim that a war is either "defensive," or not "major."

Turner cites not a single Framer of the Constitution in support of this bold interpretation of the Declare War Clause. He ignores the reasons the Framers amended the Article I, Section 8, War Powers Clause, which originally read "make" war. The language was changed to "declare war" to clarify – as the notes of Madison, the amendment's author, make clear – that the President had the power to "repel sudden attacks."[3] In addition, as

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1. Robert Turner, *Covert War and the Constitution: A Response* 5 J. NAT'L SECURITY L. & POL'Y 409, 415 (2012) [hereinafter *Response*].

2. *Id.*, at 415, 426.

3. Madison "moved to insert 'declare,' striking out 'make war' leaving to the Executive the power to repel sudden attacks." 2 MAX FARRAND, RECORDS OF THE FEDERAL

other delegates argued, the change from "make" to "declare" war ensured that the President had the authority as Commander-in-Chief to *conduct* (or make) war that Congress had authorized.[4] Neither reason for the change supports broad presidential power to initiate hostilities unilaterally.

Moreover, Turner's claim that Congress's war power only applied to declaring "large scale *perfect* wars" was explicitly rejected by the Supreme Court in a series of cases between 1800 and 1804 that made clear that congressional power extended to the authorization not only of large scale "perfect wars," but lesser "imperfect" wars, where "those who are authorized to commit hostilities . . . can go no further than to the extent of their commission."[5] As Justice Samuel Chase pointed out in *Bas v. Tingy*, "Congress is empowered to declare a general war, or Congress may wage a limited war: limited in place, in objects, and in time . . . ."[6]

Professor Turner similarly ignores the Framers' intent that the President lacked the authority to authorize paramilitary attacks on other nations. Thus, for example, he fails to respond to the 1806 case of *United States v. Smith*, which I cited in my essay. In that case, Supreme Court Justice Paterson held that the President had no authority to approve of a covert paramilitary expedition against Spanish America, because the President has no "power of making war," which "is exclusively vested in congress."[7] Since Justice Paterson was a delegate to the Constitutional Convention, he presumably had some knowledge of the Framers' intent.

Turner asserts that there is "no serious evidence, that the Framers" viewed the Marque and Reprisal Clause broadly to provide congressional power over lesser hostilities than full scale war, claiming that the clause only provides Congress power to authorize private ship owners to use force on the high seas. Yet Turner fails to even acknowledge or respond to the statements of prominent leaders of the new Republic, including Thomas Jefferson and Alexander Hamilton, that Congress was expressly given the power to order "reprisals" by either private or *public* naval forces short of war against others nations.[8] Turner ignores the advice given by Hamilton

CONVENTION OF 1787, at 297 (1911-1937).

4. *Id*. at 318-319 (remarks of Rufus King). *See also* ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 31-32 (1976) (noting that the change from make to declare war was "intended by Madison and Gerry to enable the President to respond to 'sudden attacks' without a declaration of war, and by King and others to leave the conduct of war in executive hands.").

5. Bas v. Tingy, 4 U.S. (4 Dall. 37, 40) (1800) (J. Washington). *See also* Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804) and Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Chief Justice John Marshall wrote in *Talbot* for a unanimous Court that "[t]he whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body alone can be resorted to as our guide…").

6. *Id*. at 43.

7. United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.N.Y 1806) (No. 16,342).

8. In his rebuttal, *infra* Part II of this essay, Professor Turner admits, as he must, that Hamilton and Jefferson's statements viewed the Marque and Reprisal Clause as a restraint

and Secretary of War James McHenry in 1798 to President John Adams that the use of *public* military vessels, to take any action other than to repel force by force comes within the sphere of reprisals which requires the consent of Congress which is "constitutionally authorized to grant letters of marque and reprisal."[9] Certainly, these views are "serious evidence" of the Framers' intent, cited not only in my essay,[10] but also recognized by many serious scholars,[11] yet inexplicably ignored by Turner.

Rather than address the founding generation's interpretation of the Marque and Reprisal and Declare War Clauses, Professor Turner devotes considerable energy to understanding what medieval scholars, such as Hugo Grotius writing in 1625, meant by the terms marque or reprisal.[12] While Turner's medieval exegesis is interesting and uncontroversial, it does not contradict the assertion that two centuries later, the term Marque and Reprisal had taken on a considerably broader meaning to include general "defensive" reprisals, ordered by the government in response to hostile acts committed by other nations.

Moreover, Turner's overly general approach leads him to make broad assertions and utilize examples that are irrelevant to the question of which branch has the power to initiate covert warfare against another nation.

For example, Turner reports on a covert paramilitary operation undertaken by U.S. "Navy agent" William Eaton, supplied with $40,000 from the U.S. Treasury in 1804-1805 to assemble a ragtag mercenary army

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on the President's ability to use U.S. naval forces to engage in military force apart from repelling attacks, yet now seeks to distinguish congressional power over "naval" versus "land based" military operations. Yet Turner suggests no logical reason that the Constitution would accord Congress such broad power over naval warfare, but refuse to grant Congress similar power over "land based" warfare.

9. *See* SOFAER, *supra* note 4, at 154-156 (explaining that McHenry and Hamilton's advice came in the context of executive use of newly commissioned U.S. naval vessels).

10. Jules Lobel, *Covert War and the Constitution*, 5 J. NAT'L SECURITY L. & POL'Y 393, 398-400 (2012).

11. *See* ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 66-67 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER 3, 236-38 (2d ed. 2004) (arguing that Congress's exclusive power to issue letters of marque and reprisal is relevant to modern day covert actions); EDWARD KEYNES, UNDECLARED WAR 37 (1982) (arguing that Framers intended the Marque and Reprisal and Declare War Clauses to vest both general and limited war-making power in Congress, not in the President); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS 63-65 (1981) (arguing that Framers' grant to Congress of power to issue letters of marque and reprisal and to declare war was intended to convey legislative control over all uses of American force in combat, except when in response to a sudden attack); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 17-22 (1986) (arguing that the Marque and Reprisal and Declare War Clauses limit the President's authority to use offensive force to instances of hostile invasion and congressionally declared wars); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679-80, 695-97, 699-700 (1971-1972).

12. Turner, *Response*, *supra* note 1, at 416.

to attack Tripoli and overthrow its government. However, as Turner obliquely acknowledges in a footnote, this operation was undertaken at a time when Congress had already explicitly authorized warfare against Tripoli, including all "acts of precaution or hostility as the state of war will justify."[13] Neither this author, nor any other scholar questions the President's constitutional authority to undertake a covert military operation as a part of warfare authorized by Congress. Rather, the ongoing debate is over whether the President can constitutionally launch such operations against a nation where Congress has *not* authorized warfare. The Eaton incident is simply irrelevant to answering that question.

So too, Turner's reliance on President Jefferson's decision to send a naval squadron to the Mediterranean with instructions to attack the Barbary powers, *if they declared war against the United States* or committed hostilities against us, presents the interesting question of whether another country's declaration of war authorizes the President to use American forces against that nation,[14] but provides no authority for presidential paramilitary secret wars against countries which have neither declared war against us or attacked us.

Similarly, Professor Turner points out that the President is accorded the constitutional authority to engage in secret intelligence gathering and other covert activities in dealing with foreign affairs.[15] Those assertions are true and undisputed. But again, the question is not whether the President can engage in secret intelligence gathering, diplomacy or even covert propaganda efforts which might be illegal under international law – but whether he can unilaterally order secret *wars*. Warfare is practically and constitutionally different from intelligence gathering and non-coercive foreign policy activities.

Professor Turner also asserts that the President's Article II "executive power" provides the Office with broad powers in matters of foreign policy and national security. Again, that proposition is neither disputed nor particularly relevant to the question of whether the power to initiate covert, paramilitary warfare comes within the rubric of presidential foreign affairs power or rather congressional war power. Turner, however, then quotes from then-Representative John Marshall and the Supreme Court in *Curtiss-Wright* to the effect that the President is the sole organ of the nation in its external relations, thus suggesting that the President has *exclusive* power over almost all of foreign policy, with a few exceptions.

In so suggesting, Turner misuses the Marshall speech and *Curtiss-Wright* dicta by taking those quotes outside of their narrow context. He is

13. SOFAER, *supra* note 4, at 215, 218; 11 Annals of Congress at 1303; Turner, *Response*, *supra* note 1, at n.60.

14. Hamilton, probably Madison, and most of Jefferson's cabinet, believed that it did. SOFAER, *supra* note 4, at 209, 213-214.

15. Turner, *Response*, *supra* note 1, at 423-427.

clearly in error. The President does not have sole, conclusive, and unchecked power even in the realm of foreign affairs, as attested to by the many statutes, such as the Foreign Intelligence Surveillance Act, that cabin executive discretion in the foreign arena.

Professor Turner also argues that Congress has acquiesced in unilateral presidential warmaking, including the launching of covert paramilitary wars. At least since World War II – although not for the first one hundred and fifty years of the Republic – Turner is correct. As I pointed out in my essay, Congress has been content to allow the President to initiate covert wars subject only to *notification* of the relevant congressional committees.

The obvious answer to Turner is the one given by the Supreme Court on numerous occasions: Past violations of the Constitution cannot overturn its clear text and meaning.[16] Thus, in *Chadha*, the Court recognized that for five decades, the legislative veto had been enacted in nearly two hundred statutes, generally with executive acquiescence, yet nonetheless held the legislative veto unconstitutional.[17] The *Chadha* Court reaffirmed the principle articulated by the Court fifteen years earlier: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[18]

Moreover, even "if a systematic unbroken, executive practice" never questioned by Congress, could override the clear meaning of the Constitution – which, as Justice Felix Frankfurter noted in *Youngstown*, it cannot[19] – there has been no such practice. Indeed, as former Stanford Law School Dean John Hart Ely and other scholars, such as Louis Fisher, have noted, "the original constitutional understanding was quite consistently honored from the framing until 1950."[20]

Finally, Professor Turner argues that in some cases of covert warfare, such as that of "Pakistan in the current conflict with al Qaeda, permission for U.S. involvement may be contingent on secrecy . . . ."[21] This example illustrates the fallacy of the secrecy argument. U.S. drone attacks and other actions by Special Operations Forces and the CIA in Pakistan and Yemen are well known

16. ELY, *supra* note 11, at 9.

17. INS v. Chadha, 462 U.S. 919, 944-45 (1983); *id*. at 967-972 (J. White, dissenting).

18. Powell v. McCormack, 395 U.S. 486, 546-547 (1969).

19. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 610 (1952).

20. ELY, *supra* note 11, at 10; FISHER, *supra* note 11; *see also* S. REP. NO. 797, 90th Cong. 1st Sess. 23 (1967) ("[T]he practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances."). As other scholars have pointed out, on close analysis the supposed 200 instances of presidential use of force do not support any unilateral executive war making power apart from defending U.S. citizens, territory or property from attack. WORMUTH & FIRMAGE, *supra* note 10, at 135-151. Indeed, Turner's one example of supposedly unilateral paramilitary action against Tripoli was clearly authorized by Congress.

21. Turner, *Response*, *supra* note 1, at 426.

to the public and discussed extensively by U.S. officials.[22] Yet the U.S. government refuses to publicly acknowledge that it engages in drone attacks over Pakistan or elsewhere. Congressional authorization of any covert or overt attacks against al Qaeda in Pakistan would not require the President to publicly disclose any details about any military operations in Pakistan, or even publicly admit that such operations are taking place. It would simply mean that to the extent that the President wanted to take such action, he was constitutionally permitted to do so. Moreover, Congress often authorizes actions for which operational details remain secret. Indeed, the U.S. military and paramilitary attacks against al Qaeda leaders in Pakistan were *authorized* by Congress under the Authorization for Use of Military Force (AUMF) – but that authorization has not prevented the Administration from refusing to officially disclose its drone attacks or any information about Pakistan's permission.

What has emerged as the practice in covert warfare is implausible deniability. Such official denial of what everyone knows is happening and is publicly – albeit not officially – discussed by executive officials has nothing to do with "secrecy," and is consistent with congressional authorization of the President's *power* to undertake such an operation.[23] Such Congressional authorization is necessary to comply with the framers mandate, still vitally important in today's world, that decisions to undertake warfare not be taken by one person alone, but be first subject to open debate and discussion among the people's representatives assembled in Congress.

II. PROFESSOR TURNER'S REBUTTAL

I certainly do not believe that the "declare War" clause was "irrelevant" in 1787, although I do believe (as Hamilton expressly observed) that it was

22. Craig Whitlock, *After Yemen Attack, Little Comment*, WASH. POST, Oct. 23, 2011, at A3 ("the CIA's covert armed drone program has come to be treated as an open secret in Washington not formally acknowledged, but defended and described in abundant detail by U.S. officials . . . ."); Karen DeYoung, *U.S. Air-Attacks in Yemen Intensify*, WASH. POST, Sept. 17, 2011, at A6 (White House counterterrorism adviser John O'Brennan put the number of key members of Al Qaeda in the Arabian peninsula who are on a list to be targeted at "a couple of dozen, maybe," and senior administration officials said, off the record, that in Pakistan the CIA has presidential authorization to launch drone strikes at will, but that in Yemen and Somalia, each U.S. drone attack requires White House approval); Scott Shane, *CIA Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A1 (American officials, who discuss the classified drone program on condition of anonymity, say it has killed more than 2,000 militants since 2001).

23. Turner, *Response*, *supra* note 1. Professor Turner states that my suggestion that Congress should have "declared war against the Soviet Union over Afghanistan is truly bizarre." Turner's statement is baffling. Searching through his *Response* and my original essay, I can find no suggestion that Congress should have declared war against the Soviet Union. What I did say in my original essay was that Congress should have openly debated and approved our arming, training, and directing the Afghan rebels waging warfare against the Soviet Union – which was never secret – a far cry from declaring war against the Soviet Union.

intended to be "construed strictly." As for citing Framers, Hamilton drafted much of Article II. "Repel sudden attacks" was an *example* of ways in which the President might need to use force defensively. Jefferson's cabinet unanimously agreed to send two-thirds of the U.S. Navy to the Mediterranean with instructions to sink and burn their ships if the Barbary Pirates had declared war against us, and Jefferson did not formally notify Congress for nearly nine months – at which time no one in Congress complained, and Hamilton argued that legislative sanction was "unnecessary" in that setting.[24] Jefferson was hardly responding to "sudden attacks."

Cases like *Talbot v. Seeman* and *Little v. Barreme* are often cited in these debates, but both involved statutes making "Rules concerning Captures on . . . Water," one of the expressed *exceptions* to the President's "executive Power" vested in Congress by Article I, Section 8. Similarly, *Brown v. United States* (also often cited) involved the confiscation of British property within the United States prior to the 1812 declaration of war. (The Fifth Amendment requires "due process of law" for deprivations of "property.") Speaking of the British, the "logical reason" for involving Congress in naval but not land warfare is that letters of marque were highly regulated instruments – involving property rights of individuals enforced through domestic prize courts – that were governed by legislation even in England and France when the Constitution was drafted.[25]

I did not mention *United States v. Smith* because of space limitations, but Justice Paterson's comment that Jefferson could not have authorized a military expedition supporting General Francisco de Miranda's revolution against Spain in a clearly *non-defensive* setting without legislative sanction was not unreasonable. However, his statement that "the power of making war . . . is exclusively vested in congress" is patently absurd given the clear record that the Framers replaced that precise language with the more limited power "to declare War."[26] (Interestingly, the jury found Smith "not guilty" after two hours of deliberation.)

The key to statements attributed to Hamilton and Jefferson that Congress was "given the power to order 'reprisals' by either private or *public* naval forces short of war" is not the word "public" but rather "*naval*" – letters of marque and reprisal were by 1787 associated only with *maritime* operations. They are thus irrelevant to discussions of supporting land-based paramilitary activities short of war.

Using military force against non-governmental actors (e.g., al Qaeda terrorists) with the consent of the host state does not even arguably infringe

24. 25 THE PAPERS OF ALEXANDER HAMILTON 444, 455-456 (Harold C. Syrett ed., 1977).

25. *See* Turner, *Response*, *supra* note 1, at 418.

26. United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

upon any serious interpretation of the power to declare war. The AUMF authorized the President to use force against "those nations, organizations, or persons *he determines* planned, authorized, committed, or aided" the 9/11 terrorist attacks, and did not limit such attacks to any specified country. Individuals who joined al Qaeda after 9/11 are self-nominating targets under the AUMF.

The practice of Presidents sending troops into harm's way without legislative sanction to protect American lives or defend our interests has occurred more than two hundred times throughout our history, and did *not* begin in 1950. Virtually every situation Professor Lobel complains about since then was *defensive* in character, often carrying out commitments established by the U.N. Charter or other treaties. While there are often risks that such operations might escalate into major hostilities, a policy of weakness and vacillation might also lead to armed conflict (e.g., Munich in 1938). Providing covert training and military equipment to paramilitary forces in response to armed international aggression does not require a declaration of war, and Professor Lobel's suggestion[27] that Congress should have instead declared war against the Soviet Union over Afghanistan is truly bizarre.

Finally, Lobel's repeated reference to the Foreign Intelligence Surveillance Act (FISA) as evidence of legislative power to constrain presidential control over the collection of foreign intelligence requires a response. I worked in the Senate when FISA was enacted in 1978, and viewed it as one of several clearly unconstitutional usurpations of presidential power in the wake of Vietnam and Watergate. When Congress enacted the first wiretapping statute in 1968 it emphasized that the statute did not "limit the *constitutional power* of the President . . . to obtain foreign intelligence information,"[28] and every appellate court subsequently to decide the issue held the President has independent constitutional power to authorize warrantless foreign intelligence electronic surveillance (just as courts have upheld the reasonableness of warrantless searches of commercial airline passengers and their luggage). In both the *Katz* and *Keith* cases, the Supreme Court expressly excluded foreign intelligence wiretaps from its holdings requiring warrants; and by the 1980 *Truong* case, not a single justice voted to grant *certiorari*. Surely, if any justice had believed the government was trampling upon fundamental Bill of Rights protections he or she would have voted to hear the case.

In 2002, the Foreign Intelligence Surveillance Court of Review added its unanimous voice in support of presidential constitutional power to authorize warrantless electronic surveillance for foreign intelligence purposes, noting the holdings of earlier appellate courts and concluding:

27. Lobel, *supra* note 10, at 405.

28. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C §2511(3) (1970) (emphasis added).

"We take for granted that the President does have that authority and, assuming that is so, *FISA could not encroach on the President's constitutional power*."[29] I might add that these unconstitutional constraints kept our government from preventing the 9/11 attacks, but perhaps I should save that discussion for a future article.[30]

29. *In re Sealed Case*, 310 F.3d 717, 742 FOREIGN INT. SURV. CT. REV., Nov. 18, 2002 (No. 02-002, 02-001) (emphasis added).

30. For a detailed discussion of this issue, see Robert F. Turner, *Re: Opposition to Eliminating the 'Lone Wolf' Provision of FISA/PATRIOT Acts*, *Letter Submitted to the Subcommittee on the Constitution, House Judiciary Committee*, Sept. 21, 2009, at 3-18, 30-35, *available at* http://www.virginia.edu/cnsl/pdf/Turner-HJC-lone-wolf-9-09.pdf.