

# Constitutional Covert Operations

## A Force Multiplier for Preemption

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*The first and best way to secure  
America's homeland is to attack the enemy  
where he hides and plans.*

—President George W. Bush<sup>1</sup>

**T**HE UNITED STATES is the most powerful nation on earth—the most powerful nation in the history of nations. From ancient Greece through Roman times to the age of Pax Britannica, no nation-state has influenced the world as greatly as the United States has.

Much of the power America possesses directly results from its military capabilities and its willingness to use them to protect its national interests. The United States won World Wars I and II, used the first atomic weapons, and stared down the Soviet Union's numerical superiority in conventional and nuclear weapons with high technology.

America continues to possess the largest and most technologically superior fighting force in history. At the tip of this powerful spear is a galaxy of satellites and sophisticated intelligence and information systems poised to deliver the latest in military, economic, and political intelligence.

The events of 11 September 2001 demonstrate that a new breed of enemy exists—sinister conspirators

who use asymmetric warfare to bring death, destruction, and terror to Americans at home and abroad. To defeat this new generation of foes, the United States must alter its geostrategy and relax its self-imposed constraints on the use of U.S. military, political, and social power. The United States can no longer rely on strategic nuclear deterrence, standing conventional armies, and fleets of carrier battle groups arrayed around the globe to ensure its citizens' safety and liberty. The international terrorist threat demands a proactive approach—preemptive action against terrorist groups and all nations that sustain and shelter them.

The U.S. Constitution contains an interesting dichotomy. Congress is responsible for raising an army, maintaining a navy, and declaring war, but the President, the Chief Executive of the United States, is the Commander-in-Chief who controls the actual deployment and use of military force. While Congress declares war's legal status and controls the funding of U.S. military forces, the President directs their conduct.

Congress and the President, in theory, share authority over the exercise of military power. In practice, war has not been “declared” by a U.S. Congress in more than 60 years. The President, as

A Special Forces soldier speaks with an ethnic Hizara in Northern Afghanistan.

Commander-in-Chief, can send U.S. troops anywhere in the world with only a perfunctory requirement to notify Congress. This presidential power is vital if the United States is to win the Global War on Terrorism. American forces must act swiftly and decisively, at a moment's notice, to preempt attacks by the international terrorists who have brought or who want to bring devastation and mass murder to our shores.

As Chief Executive and Commander-in-Chief, the President possesses the constitutional power to engage in "little wars," "secret wars," and actions short of war to protect the Nation. The President's constitutional power permits him to train, fund, and arm pro-U.S. indigenous forces in other nations or to deploy special operations forces anywhere in the world to fight the Global War on Terrorism. Although the United States is the most powerful nation on Earth, time, force structures, geography, and even alliances sometimes prevent direct military assaults that might quickly end a hostile threat.

### **The Constitutional Authority to Conduct Covert Actions**

The control of covert operations is at times a source of conflict between the President and Congress. Each proclaims power over the other to authorize and execute such operations, and each cites provisions in the Constitution to support its claim. The struggle between Congress and the President over the authority to execute covert operations involves three questions:

1. Does the Constitution require that the President notify Congress before every covert operation?
2. Must the President go beyond mere notification and actually consult with and seek the approval of Congress?
3. Must the President inform Congress and involve it in the operational details of every operation, once the President has authorized a covert action?<sup>2</sup>

Under the Constitution, Congress has the power "to provide for the common defense and general welfare of the United States."<sup>3</sup> Specifically, Congress has the power to "declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on land and water."<sup>4</sup> Congress is also charged, as part of its legislative and appropriations functions, "to raise and support Armies" and "to provide and maintain a Navy."<sup>5</sup> Another provision that influences how America conducts its covert operations is the Constitution's "necessary and proper" clause, which states that Congress shall "make all laws which shall be necessary and proper



US Army

***In situations where there is no declaration of war, such as introducing combat-equipped U.S. Armed Forces into areas of imminent or actual hostilities . . . , the War Powers Resolution requires the President to submit to . . . Congress a report setting forth the circumstances necessitating such action; the constitutional and legislative grounds for such deployment; and the estimated scope and duration of the involvement or hostilities.***

for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>6</sup> The Constitution provides for the Senate to approve all treaties and the appointment of ambassadors and executive officers.<sup>7</sup> Of its enumerated powers, Congress's two strongest arguments for requiring congressional authorization for covert operations are its power to declare war and the appropriations power, or "power of the purse."<sup>8</sup>

The Constitution gives sole power to “declare war” to Congress, yet in 200 years, U.S. presidents have ordered hundreds of overt and covert military deployments, seeking formal declarations of war from Congress on only 5 occasions.<sup>9</sup> Considerable

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***Training pro-U.S. rebel groups, supplied with U.S. weapons, is one option that the United States should consider to counter international asymmetric threats. Any discussion of covert military, political, and economic aid must focus on the CIA—the principal tool that presidents use in covert actions.***

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debate surrounds the framers of the Constitution’s intent concerning the control of U.S. covert operations. Proponents of congressional dominance cite earlier drafts of the Constitution that specified a congressional power to “make war” rather than “declare” it as proof that the framers’ intent was that Congress exercise control over all forms of warfare.<sup>10</sup> Clearly, the framers wanted some congressional control over the power of war rather than vesting it solely in one person.<sup>11</sup>

The debate over the power to wage war has not checked the President’s dominance in controlling covert operations, but Congress’s use of appropriations provisions has. In the past 20 years, the most effective method Congress has employed to rein in Presidential power over covert operations has been tailoring appropriations bills to prohibit certain acts by the President.<sup>12</sup> Two clear examples are the Hughes-Ryan Amendment and the Boland Amendment.<sup>13</sup>

The Hughes-Ryan Amendment to the Foreign Assistance Act of 1974 states that a President must issue a finding that an authorized activity is “important to the national security interests of the United States” before appropriated funds may be used.<sup>14</sup> The Boland Amendment and its subsequent editions proscribe the President’s actions in Nicaragua.<sup>15</sup>

In its first edition, the Boland Amendment to the Department of Defense Appropriation Act of 1983 prohibited the use of any funds to support any military or paramilitary group whose aim was to overthrow the Nicaraguan government.<sup>16</sup> Subsequent Boland amendments placed a cap of \$24 million in aid to the Contras in Nicaragua and prohibited any aid at all after February 1985.<sup>17</sup> The Boland Amendment led to the Iran-Contra scandal because operatives within President Ronald Reagan’s administration sought alternative sources of funds outside

congressional appropriations to continue funding covert resupply operations.<sup>18</sup>

Invoking the “war declaration” clause has been ineffective in checking executive dominance over covert operations; invoking the appropriations clauses has been an indirect check on presidential power. Congress can demand prior notification and has the power to stop all aid—overt and covert—to a region. Under this clause, congressional power is not really dominant; it is obstructionist.

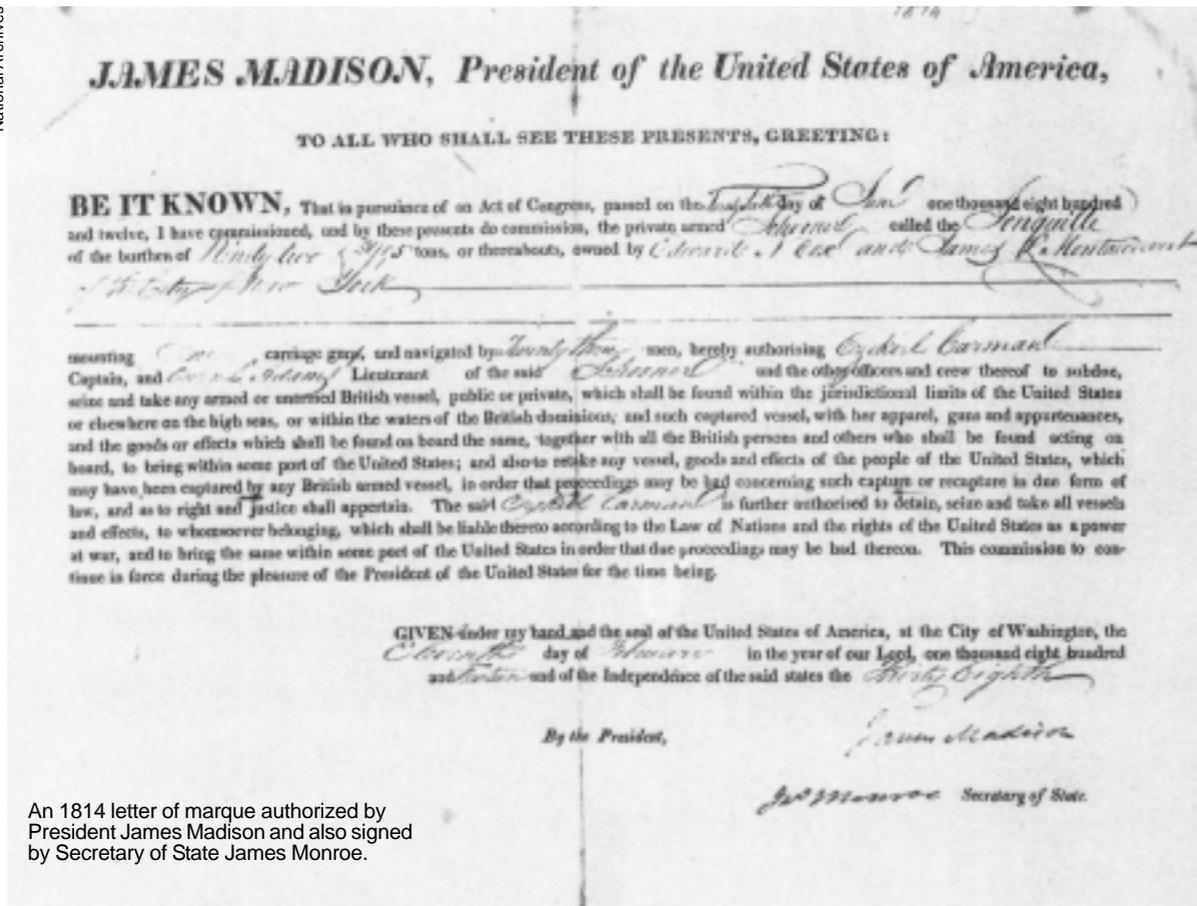
In theory, Congress has authority over covert operations through a reinterpretation of the Constitution’s “letters of marque and reprisal” clause. The origins of this clause and the framers’ intent appear to fit quite well with modern notions of irregular warfare and nations engaging third parties to fight for them.<sup>19</sup>

Historically, letters of marque and reprisal were authorizations to privateer sailors to fight the Nation’s enemies.<sup>20</sup> A letter of marque or reprisal is a license for a private individual to arm his vessel, destroy or capture enemy vessels, or seize foreign supplies and individuals.<sup>21</sup> Although this power has not been used since the War of 1812, these letters presumably apply to situations of incomplete, imperfect, or limited war; that is, in conflicts that are not quite full-scale wars against a foreign state.<sup>22</sup>

Resuscitating the letters of marque and reprisal clause and using it as the constitutional basis for Congress to assert sole authority over covert operations has never been adopted as official policy by the current Congress, or any other in more than 190 years.<sup>23</sup> Thus, in an environment in which Congress rarely exercises its enumerated war-making powers (preferring to use only its appropriations power), the President enjoys broad powers to conduct covert operations. Under current law, the President can authorize covert operations subject only to notification requirements imposed by Congress.

The Constitution gives the President broad unenumerated powers to conduct foreign affairs.<sup>24</sup> If a particular foreign affairs power is considered an executive function, and no provision in the Constitution has assigned it to Congress or prohibited it to the President, the power belongs to the President.<sup>25</sup> Presumably, this power includes the power to authorize covert operations. The daily decision-making required in conducting covert operations means that, in practical terms, such actions cannot be accomplished when governed solely by an entity such as Congress. The Constitution, moreover, must not be interpreted in a way that is inconsistent with the Presidential foreign affairs power.<sup>26</sup>

National Archives



An 1814 letter of marque authorized by President James Madison and also signed by Secretary of State James Monroe.

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An analysis of the President’s enumerated powers in the Constitution reveals no specific grant of authority in the area of covert actions. The Constitution states that “executive Power shall be vested in a President of the United States of America.”<sup>27</sup> In addition, “the President shall be Commander-in-Chief of the Army and Navy and of the militia of the several states when called into the actual service of the United States.”<sup>28</sup> Among the Chief Executive’s responsibilities are that he make treaties—with the “advice and consent of the Senate.”<sup>29</sup> The Constitution also says that he “shall take care that the Laws be faithfully executed.”<sup>30</sup> All these powers are sources of the President’s authority to conduct covert operations.

The U.S. Supreme Court has provided valuable guidance when the President’s exercise of power conflicts with congressional legislation or prohibitions. In the *United States v. Curtiss-Wright Export*

*Corp.*, the U.S. Supreme Court ruled that to successfully exercise his constitutional powers in the field of international relations, a president must often be accorded a degree of freedom from statutory restriction that would not be admissible if domestic affairs alone were involved.<sup>31</sup> According to the Court, the President, “not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries . . . , especially in time of war.”<sup>32</sup> The Court’s opinion provides strong support to the position that the President alone should decide when to authorize a covert operation against a foreign power because Congress lacks the constitutional authority to decide such issues.<sup>33</sup>

While Congress has the direct, enumerated authority to declare and conduct war and can punish a President who fails to heed its instructions, it lacks clear, exclusive control over the power of conducting foreign affairs.<sup>34</sup> The Constitution gives the

The aft superstructure of the destroyer *Arron Ward* shredded by multiple kamikaze strikes off Okinawa in the closing days of World War II.

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President significant powers that he can exercise independently in the field of foreign affairs—powers both enumerated in the Constitution and attributed to him through interpretation of the Constitution.<sup>35</sup> The President is within his power to deploy troops and ships, which Congress provides, into situations that might be just short of or leading into war without exceeding his constitutional authority.<sup>36</sup>

As it did during covert operations in Nicaragua, Congress can pass legislation to regulate the funding of covert operations, and the President must comply with it.<sup>37</sup> Also, Congress receives notification of

military and covert actions by the President through the War Powers Resolution and the Hughes-Ryan amendments, which require, respectively, that the President either brief Congress or authorize actions through a finding.<sup>38</sup>

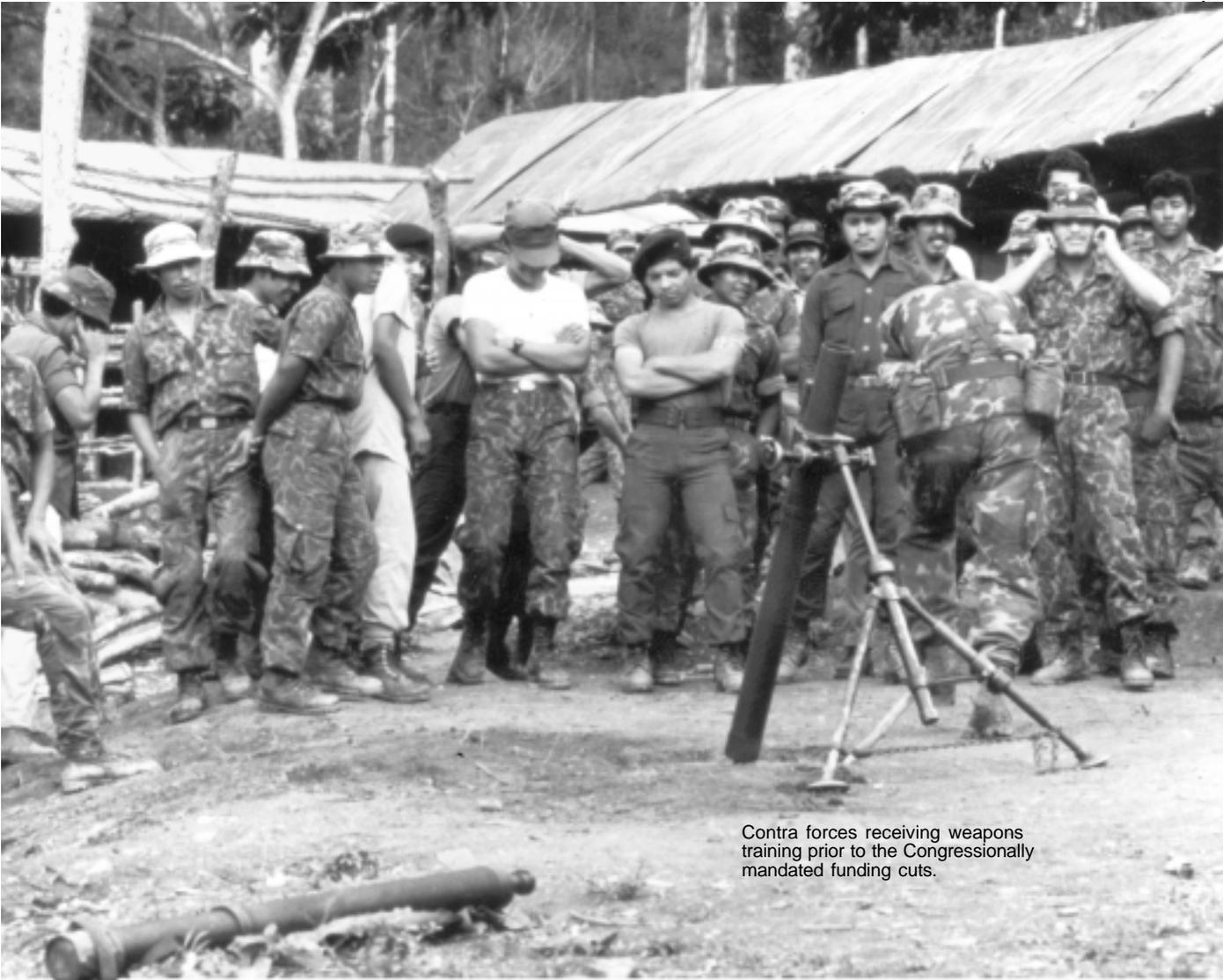
The President, however, is not acting outside his authority when he conducts a covert operation without the specific authorization of Congress.<sup>39</sup> Through the Constitution, the American people have entrusted their President, as Commander-in-Chief and Chief Executive, with the conduct of foreign policy and the use of military forces; he must answer to them for his every action or failure to act; there is no avoiding blame.<sup>40</sup>

The Constitution defines little in the area of covert operations. These operations occur in the constitutional shadows cast by the President and Congress. While the President and Congress claim dominant authority over covert operations because of their enumerated constitutional powers, the actual practice is quite different.

### **Covert Operations and Indigenous Movements**

Containment is no longer an option in protecting U.S. citizens from international terrorism. In an address to the U.S. Military Academy in 2002, President George W. Bush observed: "Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies. . . . Different circumstances require different methods, but not different moralities. Moral truth is the same in every culture, in every time and in every place. . . . There can be no neutrality between justice and cruelty, between the innocent and the guilty. We are in a conflict between good and evil, and America will call evil by its name."<sup>41</sup>

Because of multiple threats to U.S. national security interests around the globe, America should consider eliminating certain targets without involv-



Contra forces receiving weapons training prior to the Congressionally mandated funding cuts.

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ing U.S. Armed Forces at all. Training pro-U.S. rebel groups, supplied with U.S. weapons, is one option that the United States should consider to counter international asymmetric threats. Any discussion of covert military, political, and economic aid must focus on the CIA—the principal tool that presidents use in covert actions.

The Hughes-Ryan Amendment of 1974 requires the CIA to conduct covert operations only after a president has expressly authorized them.<sup>42</sup> For a president to authorize such actions, and to receive funds from Congress for them, a president must find that such operations are necessary to U.S. national security.<sup>43</sup> The Hughes-Ryan Amendment makes a president accountable for all covert operations the CIA or other agencies or forces under his control conduct. The amendment also imposes a duty on the director of the CIA to report these actions to

congressional intelligence committees before they are implemented.<sup>44</sup> There are, however, exceptions.

A president can limit notification to just the intelligence committees' senior members and the majority and minority leaders of Congress if he feels it necessary to limit disclosure for national security reasons.<sup>45</sup> If the President prefers not to provide prior notice to the intelligence committees, he must inform congressional oversight committees of the action in a timely fashion and provide a statement of his reasons for not giving prior notice.<sup>46</sup> As the law now reads, the President must notify the intelligence committees in advance of all covert operations, save for these exceptions.<sup>47</sup>

The laws that regulate the conduct of those covert operations that do not directly involve deployments of U.S. forces give considerable discretion and authority to the President. If the President so

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chooses, he could covertly supply weapons and aid to forces fighting terrorist regimes while only notifying select members of Congress. He would not need prior congressional approval. Covert operations supported by full written presidential findings are constitutionally acceptable.<sup>48</sup>

### **Direct Covert Operations Against Hostile Targets**

In response to the Global War on Terrorism, the President has articulated the doctrine of preemption as America's main battle plan: "We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants. . . . If we wait for threats to fully materialize, we will have waited too long. . . . The war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action. And this nation will act."<sup>49</sup>

This concept in action, however, demands that America be willing to act swiftly and decisively to assault its enemies anywhere in the world. During World War II, bringing the fight to the Japanese homeland devastated the enemy's morale, precluded the need for an invasion, and led to the surrender of a foe that shared the same fanatical, suicidal dedication to its cause as our present enemies do. Historian Victor Davis Hanson noted, "Advocacy for a savage militarism from the rear . . . dissipates when one's house [is] in flames. . . . [Enemy] soldiers who kill, rape, and torture do so less confidently when their own families are at risk at home."<sup>50</sup>

Direct action by the U.S. military or by CIA paramilitary forces involves the use of the President's war powers and chief executive powers, but such operations are rare. They have two basic goals: to deal directly with a threat to U.S. national security, and to deal with it in ways that will not directly im-

plicate the United States as the party responsible for the action. Going beyond merely providing aid to forces battling terrorism and regimes that support terrorism raises the question of whether this is an act of war. If so, what role does (or should) Congress play?

Deploying special military units such as Navy SEALs, Green Berets, or Marines for limited periods against a foreign power might be considered a "small war." Small wars are operations conducted under the President's authority that involve a combination of military force and diplomatic pressure placed on the internal or external affairs of another state whose government might be unstable, inadequate, or unsatisfactory. The action is generally taken to promote or protect U.S. interests.<sup>51</sup> If the deployment of U.S. forces in covert situations is an act of war, then whether the President must consult Congress under the War Powers Resolution might be one issue that arises.

In situations where there is no declaration of war, such as introducing combat-equipped U.S. Armed Forces into areas of imminent or actual hostilities or deploying them in numbers that substantially enlarge an existing military presence, the War Powers Resolution requires the President to submit to both houses of Congress a report setting forth the circumstances necessitating such action; the constitutional and legislative grounds for such deployment; and the estimated scope and duration of the involvement or hostilities.<sup>52</sup>

This provision of the War Powers Resolution might apply in covert operations where U.S. military units train with and lead irregular foreign operations. The War Powers Resolution also affects direct-covert actions through its termination provision. Under the resolution, the President must terminate the use of U.S. Armed Forces within 60 days of submitting a report, unless Congress declares war, extends the period for an additional 30 days, or cannot meet because of an armed attack against the United States.<sup>53</sup> In this way, Congress might apply the resolution to terminate an ongoing covert operation.

There are many difficulties, however, in applying the War Powers Resolution to covert actions. Unlike the Hughes-Ryan Act, the War Powers Resolution is just that, a resolution passed by Congress and not an act enforceable as law.<sup>54</sup> The resolution establishes a 60-day time limit—more than enough time for a quick covert strike. The resolu-

tion only applies to U.S. Armed Forces, and not to covert operations the CIA conducts. Using his Chief Executive power alone, the President could authorize CIA paramilitary forces to conduct a direct covert operation that would not involve the War Powers Resolution.<sup>55</sup> In fact, the War Powers Resolution does not mention the CIA or CIA paramilitary activities.<sup>56</sup>

The possibility that the President could skirt the fact that he might be conducting war using direct covert operations simply by using forces under his Chief Executive power raises a serious question: If direct-covert operations are not war, then what are they? Covert operations, conducted directly by U.S. forces to intercept or capture terrorists abroad are constitutional exercises of the President's war powers to protect the Nation, and of his Chief Executive powers.<sup>57</sup>

If the President employs active-duty U.S. military personnel, even Special Forces, he must report the employment under the War Powers Resolution; that is, if he chooses to abide by the resolution. The President might try another tactic—calling his action an “interdiction,” as when pursuing international terrorists or drug smugglers. If the President chooses to employ CIA paramilitary elements to perform the

task, he could probably do so under the Hughes-Ryan Act's far simpler notification requirements and simply tell Congress about the action afterward.

In the Global War on Terrorism, some nations allied with the United States might prove to be allies

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in name only. For all practical purposes, the United States cannot rely on allies who are unwilling to root out terrorist cells within their own borders. Nor can the United States rely on allies in countries where the will to fight terror is strong, but the capability is not. The United States should consider using direct-action covert raids as an option to put its preemption doctrine into effect. Where traditional military action is not possible or feasible, direct-action covert operations might be the only definitive way to preempt or prevent asymmetric attacks on the United States. **MR**

#### NOTES

1. President George W. Bush, national address, Washington, D.C., 6 June 2002.
2. Marshall Silverberg, “The Separation of Powers and Control of the CIA's Covert Operations,” *Texas Law Review* 68 (February 1990): 575, 576.
3. U.S. Constitution, art. 1, sec. 8, cl. 1. On-line at <www.house.gov/Constitution/constitution.html>.
4. *Ibid.*, art. 1, sec. 8, cl. 11.
5. *Ibid.*, art. 1, sec. 8, cl. 12; *Ibid.*, art. 1, sec. 8, cl. 13.
6. *Ibid.*, art. 1, sec. 8, cl. 18.
7. *Ibid.*, art. 2, sec. 2, cl. 2.
8. *Ibid.*, art. 1, sec. 9, cl. 7. See also Silverberg, 577, 581.
9. Silverberg, 578.
10. Abraham D. Sofaer, “War and Responsibility: A Symposium on Congress, The President, and the Authority to Initiate Hostilities: The Power Over War,” *University of Miami Law Review* 50 (1995): 33, 36-40. See also Silverberg, 577.
11. Silverberg, 578. See also John Ely, “Suppose Congress Wanted a War Powers Act that Worked,” *Columbia Law Review* 88 (November 1988): 1,379, 1,386.
12. *Ibid.*, 581.
13. *Ibid.*
14. Foreign Assistance Act of 1974, Public Law No. 93-559, See also 22 *U.S. Code*, (USC) sec. 2422 (1982).
15. Thomas W. Walker, *Reagan Versus the Sandinistas, The Undeclared War on Nicaragua* (Boulder, CO: Westview Press, 1987), 168.
16. Department of Defense Appropriations, 1983, Public Law No. 97-377, sec. 793, 96 stat. 1830, 1865 (1982).
17. Silverberg, 583.
18. Walker, 33-38.
19. Jules Lobel, “Little Wars’ and the Constitution,” in “War and Responsibility: A Symposium on Congress, The President, and the Authority to Initiate Hostilities,” *University of Miami Law Review* 50 (October 1995): 61, 66; Jules Lobel, “Covert War and Congressional Authority: Hidden War and Forgotten Power,” *University of Pennsylvania Law Review* 134 (June 1986): 1,035.
20. Lobel, “Little Wars,” 67.
21. Lobel, “Forgotten Power,” 1,043.
22. *Ibid.*, 67-69.
23. *Ibid.*, 1,040-41.
24. Silverberg, 591.
25. *Ibid.*
26. *Ibid.*
27. U.S. Constitution, art. 2, sec. 1, cl. 1.
28. *Ibid.*, art. 2, sec. 2, cl. 1.
29. *Ibid.*, art. 2, sec. 2, cl. 2.
30. *Ibid.*, art. 2, sec. 3.

31. 299 USC 304, 319 (1936).
32. *Ibid.*
33. Silverberg, 587.
34. Sofaer, 35.
35. *Ibid.*
36. *Ibid.*
37. *Ibid.*
38. *Ibid.* See also War Powers Resolution and Hughes-Ryan Act.
39. *Ibid.*, 53.
40. *Ibid.*
41. George W. Bush, graduation address, U.S. Military Academy, West Point, New York, June 2002.
42. Codified currently as 22 USC, sec. 2422 (1982). See Silverberg, 575, 596. See also W. Michael Reisman, “Covert Action,” *Yale Journal of International Law* 20, no. 2 (Summer 1995): 419, 420.
43. *Ibid.*, 419, 420, 597.
44. Silverberg, 598.
45. 50 USC, “War and National Defense,” sec. 413 (a) (1) (B) (1982). See also Silverberg, 599.
46. *Ibid.*
47. Lori Fisler Damrosch, remarks, *American Society of International Law Proceedings* 81 (1987): 239, 254.
48. *Ibid.*, 255.
49. Bush, graduation address.
50. Victor Davis Hanson, *The Soul of Battle* (New York: The Free Press, 1999), 2.
51. Mark T. Uyeda, “Presidential Prerogative under the Constitution to Deploy U.S. Forces in Low Intensity Conflict,” *Duke Law Journal* 44 (1994): 777. The definition here is from the U.S. Marine Corps’ *Small Wars Manual* (Washington, DC: U.S. Government Printing Office, 1940), 1.
52. 50 USC, sec. 1541 chap. 4, “The States,” as reprinted in Thomas M. Franck and Michael J. Glennon, *Foreign Relations and National Security Law* (Eagan, MN: West Publishing, 1993), 561.
53. 50 USC, sec. 1544 (b). See also Silverberg, 575, 588.
54. Franck and Glennon, 565.
55. Silverberg, 589.
56. *Ibid.*, 580. Silverberg notes that there were proposed amendments to bring CIA paramilitary actions under the War Powers Resolution. See also Newell L. Highsmith, “Policing Executive Adventurism,” *Harvard Journal on Legislation* 19 (Summer 1982): 327, 331, 353-54.
57. Thomas J. Jackamo III, “From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention,” *Virginia Journal of International Law* 32 (1991): 929, 938, 944.