

# Let Privateers Marque Terrorism: A Proposal for a Reawakening

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## INTRODUCTION

In the aftermath of the terrorist attacks of September 11, the United States has repeatedly emphasized the asymmetry between traditional war and the War on Terror<sup>1</sup>—an unorthodox conflict centered on a term which has been continuously reworked and reinvented into its current conception as the “new terrorism.” In this rendition of terrorism, fantasy-based ideological agendas are severed from state sponsorship and supplemented with violence calculated to maximize casualties.<sup>2</sup> The administration of President George W. Bush reinforced and legitimized this characterization with sweeping demonstrations of policy revolution, comprehensive analysis of intelligence community failures,<sup>3</sup> and the enactment of broad legislation tailored both to rectify intelligence failures and provide the national security and law enforcement apparatus with the tools necessary to effectively prosecute the “new” war.<sup>4</sup> The United States also radically altered its traditional reactive stance on armed conflict by taking preemptive action against Iraq—an enemy it considered a gathering threat due to both state support of terrorism and malignant belligerency.<sup>5</sup>

While the United States has taken drastic measures to manage the new security threat through controversial legislative initiatives and foreign policy reformations,

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1. The term “War on Terrorism” has been villified as something of a misnomer. Some scholars have argued that referring to the fight against terrorism as a “war” implies that the rules of war apply. See, e.g., Hans Corell, *International Criminal Law—How Long Will Some Miss the Missing Link?*, 37 CASE W. RES. J. INT’L L. 11, 18 (2005). In presiding over the opening stages of the War on Terror, however, the Bush administration has refused to apply the laws of war to terrorists by, for example, creating “enemy combatant” status, which under current law makes it possible to withhold prisoner-of-war protections from individuals designated enemy combatants. See Neil A. Lewis, *Appeals Court is Urged to Let Guantanamo Trials Resume*, N.Y. TIMES, Apr. 8, 2005, at A21; Ken Silverstein, *U.S. Military Lawyers Felt ‘Shut Out’ of Prison Policy*, L.A. TIMES, May 14, 2004, at A10.

2. See generally LEE HARRIS, *CIVILIZATION AND ITS ENEMIES: THE NEXT STAGE OF HISTORY* (2004); WALTER LAQUEUR, *NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY* (2003); Lee Harris, *Al Qaeda’s Fantasy Ideology: War Without Clausewitz*, POL’Y REV., Aug.–Sept. 2002, at 19.

3. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* (Official Gov’t ed. 2004).

4. See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

5. See Howard Witt, *U.S. Reveals Evidence to U.N.*, CHI. TRIB., Feb. 6, 2003, at N1 (recounting Secretary of State Colin Powell’s presentation in support of war on Iraq to the United Nations).

some weapons remain untapped. Dormant for over a century, the power to issue letters of marque and reprisal—one of the oldest constitutional powers—could harvest one of America's greatest strengths, the entrepreneurial spirit of private enterprise.

Letters of marque and reprisal have endured exhaustive analysis. Scholars have approached the power from its role in the maintenance of separation of powers<sup>6</sup> to its status regarding the distinction between perfect and imperfect war.<sup>7</sup> However, the viability of their return to active duty for use as a legitimate war power has not been squarely addressed. One possible reason is that letters of marque, typically issued to privateers, were complicit in "privateering"—a practice wherein private enterprise engaged in war for commercial gain. Privateering as a vocation, despite its contribution to military victories, was outlawed as against the law of nations by the Declaration of Paris in 1856.<sup>8</sup> The United States, however, is not a signatory to this treaty, and Congress could revive letters of marque and reprisal at any time.<sup>9</sup>

The purpose of this Note is to propose a resurrection of privateering under letters of marque, despite its devolution into a relic of a past era. The goal is not political—this proposal is equally viable regardless of the winds of partisan control. This Note examines the possibility of reviving privateering for use in armed conflict with nonstate belligerents, offers a rationale for doing so, and concludes with a brief analysis of the feasibility of privateering in light of a plethora of legal and policy concerns. Part I provides a summary of the traditional application of letters of marque and highlights several key characteristics of letters of marque, including their inherent reliance on private conduct. Distinctions between the historical era in which letters of marque operated and today's world also receive emphasis, for they must be reconciled prior to reviving privateering. Part II presents the conceptual and historical parallels between terrorism and piracy. Part III applies privateering to terrorism through human capture, asset seizure, and communication disruption. Part IV notes recent proposals to revive letters of marque. Part V recognizes the need for supervision in privateering and advances congressional regulation and judicial review as sufficient methods for securing adequate oversight and accountability. Part VI presents the chief barriers to the return of letters of marque and furnishes possible solutions.

## I. TRADITIONAL UNDERSTANDING OF LETTERS OF MARQUE

In the nascent United States, when naval power was scarce, letters of marque and reprisal licensed private citizens to make war against the people or seagoing vessels of another nation.<sup>10</sup> Reprisals sanctioned minor armed action presumably conducted in retaliation for wrongs committed by another nation or its actors, agents, or proxies.<sup>11</sup>

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6. See, e.g., Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

7. See, e.g., Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972).

8. See THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 212–13 (5th ed. 1878).

9. See *id.* at 213; WILLIAM E. HALL, *A TREATISE ON INTERNATIONAL LAW* 526 (5th ed. 1904).

10. See WOOLSEY, *supra* note 8, at 209.

11. See Lofgren, *supra* note 7, at 692–93.

This mechanism was also occasionally deployed in times of peace to obtain redress for injuries.<sup>12</sup> Letters of marque served as valid international legal tools utilized by nations lacking sufficient naval forces to protect vulnerable interests braving the constant treachery inherent to the high seas.<sup>13</sup> These authorizations were issued to “privateers”<sup>14</sup>—private citizens who outfitted private ships, gathered crews, and harassed enemy shipping under the guise of the government’s often exceedingly broad commission.<sup>15</sup> Frequently staffed by “bold, lawless men,” such ships lacked supervision while at sea and therefore operated with considerable autonomy.<sup>16</sup> Government commissions encompassed objectives spanning broadly from protection of friendly merchant shipping, disruption of enemy shipping<sup>17</sup> to battling enemy piracy.<sup>18</sup> Common throughout the colonial age, privateering declined precipitously in the mid-to-late nineteenth-century.<sup>19</sup>

The Constitution bestows the power to issue letters of marque on Congress,<sup>20</sup> thereby authorizing it to commission privateers under its discretion. Though

12. See WOOLSEY, *supra* note 8, at 186–88.

13. See *id.* at 210.

14. The term “privateers” has been reinterpreted by recent scholarship and at times applied to a different phenomenon: private contractors employed by the United States to manage or accomplish war objectives. See Matthew J. Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489, 1501 (1998) (“Modern private military service contracting exhibits [the] same characteristics and is the functional equivalent of eighteenth-century privateering.”); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1009 (2004) (referring to military privatization and its errors as those of “privateers”).

“Privateer” and “letter of marque” historically referred to non-naval ships but meant different things, based on a vessel’s specific purpose as well as its size and maneuverability. Larry J. Sechrest, *Privateering and National Defense: Naval Warfare for Private Profit* 7–9 (Indep. Inst., Working Paper No. 41, 2001), available at [http://www.independent.org/pdf/working\\_papers/41\\_privateering.pdf](http://www.independent.org/pdf/working_papers/41_privateering.pdf) [hereinafter Sechrest, *Privateering*]. However, both ships conducted business under the authority of a “letter of marque and reprisal.” *Id.* at 7–8. This Note uses “letter of marque” as shorthand for “letter of marque and reprisal” to refer only to the actual commission, not to the ship.

15. See C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 975 (1997) (“A slightly less confining example is a successful petition for a commission ‘to cruise against the Enemies of these united States.’” (citing GARDNER WELD ALLEN, *MASSACHUSETTS PRIVATEERS OF THE REVOLUTION* 44–45 (1927))).

16. WOOLSEY, *supra* note 8, at 210 (“[Privateer crews] are made up of bold, lawless men, and [work] where no superior authority can watch or direct them.”).

17. Privateers were permitted to keep a large percentage of any booty captured from an enemy ship, which alleviated the necessity of payment and provided the nascent government a cheap source of military power. See *id.*

18. See *infra* Part II.

19. The United States has not issued letters of marque since the War of 1812. Marshall, *supra* note 15, at 954 (citing Lobel, *supra* note 6, at 1045). They have been banned by international treaty since 1856. *Id.*

20. U.S. CONST. art. I, § 8, cl. 11.

commentators have quibbled over the underlying purpose of the power,<sup>21</sup> its incorporation into the Constitution ensures that the power to enlist private assistance in military conflicts—which could allow the President to act militarily entirely without congressional participation or control—resides squarely with Congress.<sup>22</sup>

Congress has not issued letters of marque since the nineteenth century for several reasons. Privateers were rarely well-regulated, and though they could be held and punished—sometimes even as pirates themselves—for exceeding the parameters of their commission,<sup>23</sup> this was far from an effective deterrent against lawlessness and abuses both small and large were not uncommon.<sup>24</sup> Chaos characterized early activity on the high seas,<sup>25</sup> yet privateers remained only marginally liable for any misdeeds. As a prerequisite to obtaining a commission, privateers were required to post a bond subject to surrender upon violation of the laws of the sea or the human rights of those taken prisoner.<sup>26</sup> Despite concerns over privateers' broad autonomy and the absence of adequate safeguards to curtail abuses, commissioning a private naval force was an absolute right under international law.<sup>27</sup>

The early United States was the world's biggest proponent of privateering. Thomas Jefferson extolled its virtues, stating, "[E]very possible encouragement should be given to privateering in time of war . . . . Our national ships are too few . . . to . . . retaliate the acts of the enemy. But by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe . . . ."<sup>28</sup> Great confidence was placed in the

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21. Compare Lofgren, *supra* note 7, with Marshall, *supra* note 15. See also *supra* notes 6–7 and accompanying text.

22. One of Congress's most potent war powers is the power of the purse, U.S. CONST. art I, § 8, cl. 1, which enables it to scale back military engagement by withholding necessary funding. Were letters of marque not exclusive to Congress, the President could enlist the services of private military firms without any Congressional oversight—for the government did not fund privateers—and Congress, therefore, could not check the President's power by withholding funding. See Marshall, *supra* note 15, at 979.

23. See WOOLSEY, *supra* note 8, at 216 ("These regulations . . . subject the owners and officers of privateers to heavy penalties in case of transgression."); Marshall, *supra* note 15, at 962.

24. See Marshall, *supra* note 15, at 971–72.

25. Despite the passage of time, little has changed. The oceans still represent the most lawless and often perilous territory on the planet. For an exposition on the lawlessness of today's oceans, see WILLIAM LANGEWIESCHE, *THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS AND CRIME* (2005).

26. See WOOLSEY, *supra* note 8, at 216; Marshall, *supra* note 15, at 961.

27. See WOOLSEY, *supra* note 8, at 210.

28. GOMER WILLIAMS, *HISTORY OF THE LIVERPOOL PRIVATEERS AND LETTERS OF MARQUE* 459 (1966). Perhaps ironically, given its current status as the world's only hyperpower, the United States supported privateering primarily because it preferred it to maintaining a standing military force. See HENRY SUMNER MAINE, *INTERNATIONAL LAW* 101–02 (1888).

The United States consider powerful navies and large standing armies as permanent establishments to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are in some degree a menace to peace among nations. A large force ever ready to be devoted to the purposes of war is a temptation to rush into it. The policy of the United States has ever been, and never more than now, adverse to such establishments, and they can never be brought to acquiesce in any change in

entrepreneurial spirit of private Americans, whose disruption of British shipping during the American Revolution proved integral to American victory.<sup>29</sup> The British House of Lords admitted that, as of February 1778, Britain had lost 559 ships to American raiders<sup>30</sup>—a significant sum in any era. Privateers were more than important to American triumph—they were the key cog in winning independence from the British.<sup>31</sup>

Given its tremendous impact, one is left to puzzle over privateering's departure from the modern arsenal of armed conflict. To answer this question, it is necessary to reemphasize that letters of marque were primarily the tool of nascent states that lacked large militaries.<sup>32</sup> As the United States grew in power and stature, it realized the necessity of control over its armed forces and recognized the desirability of maintaining a standing navy, which at times lost excellent recruits to the privateers' lure of immense profit.<sup>33</sup>

#### *A. Private Funding as Pivotal to Privateering*

The key to understanding privateering and traditional letters of marque is their independent financial nature. The government abstained from financially enabling privateering in any meaningful manner. Aside from printing the physical letters of marque, the government remained uninvolved, and privateering thrived. Even so, many modern discussions of letters of marque and privateering overlook privateers' financial independence.<sup>34</sup> Some scholars refer to modern military defense contractors as "privateers,"<sup>35</sup> despite the fact that these entities do not in fact function similarly. By and large, projects and operations of defense contractors are instead funded and regulated by the United States government, mostly through principles of contractual obligation.<sup>36</sup>

Proper understanding of letters of marque, then, requires that any proposal for their resurrection be undertaken in light of the assumption that privateers would be entirely self-sufficient financially, and only regulated—not funded—by the government. A

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International Law which may render it necessary for them to maintain a powerful navy or large standing army in time of peace. . . . [T]he surrender of the right to resort to privateers [for nations lacking naval power] would be attended with consequences most adverse to their commercial prosperity without any compensating advantages.

*Id.* (quoting United States Secretary of State William L. Marcy).

29. See Sechrest, *Privateering*, *supra* note 14, at 7–9.

30. *Id.* at 9; see also WILLIAMS, *supra* note 28, at 216.

31. See Sechrest, *Privateering*, *supra* note 14, at 7 ("Historian Faye M. Kert offers the judgment that 'without the presence of the American privateers in the Revolutionary War and the War of 1812, the United States would never have been able to hold off the British Navy.' It will surprise those who are enamored of the state monopoly of defense, but during the period of Western European history from 1600 to 1815 privateers 'probably contributed much more than warships to the actual harm done the enemy.'" (citations omitted)).

32. See WOOLSEY, *supra* note 8, at 210.

33. See Marshall, *supra* note 15, at 966.

34. Both Michaels, *supra* note 14, and Gaul, *supra* note 14, muddy the conceptual waters by referring to various actors in military privatization as "privateers."

35. Gaul, *supra* note 14; see also Michaels, *supra* note 14.

36. See generally Michaels, *supra* note 14.

proper analysis of the feasibility of letters of marque therefore requires an inquiry into the private sector's inclination and capability to perform the task.

### 1. Private Sector Inclination

First, private funding eliminates the government as a direct sponsor of privateering. Conceptually, insofar as privateers hunt rogue individuals to claim a bounty, bounty offers would require private subsidization. Though confining, this limitation does not place the return of letters of marque outside the realm of possibility. Funding is available from other sources. Just after September 11, a group of private investors pledged one billion dollars to any private citizen who apprehended Osama bin Laden—dead or alive.<sup>37</sup> This type of offer—requiring at base the employment of private citizens to conduct a military operation—is far from unprecedented. During the 1979 Iranian Revolution, billionaire H. Ross Perot funded a private military team in an operation to rescue two of his company's employees imprisoned in Iran.<sup>38</sup> More recently, prominent American actor Bruce Willis has offered million-dollar bounties for the capture of former Iraqi dictator Saddam Hussein,<sup>39</sup> as well as terrorist leaders Osama bin Laden, Abu Musab al-Zarqawi, and Ayman al-Zawahiri.<sup>40</sup> With the advent of formalized privateering, it is certainly plausible to infer that other offers would surface.

### 2. Private Sector Capability

Second, not only is the private sector willing to finance capture efforts, but, as Major Christopher M. Supernor has argued, it is also well-equipped to conduct the hunt.<sup>41</sup> In rejecting a licensing system for oversight of international bounty hunters, Supernor argues that private enterprise would likely achieve greater success without governmental involvement. According to Major Supernor, governmental regulations would (1) prohibit opportunistic captures<sup>42</sup> (thereby indirectly reducing the number of people engaged in the hunt), and (2) allow a host state to thwart bounty hunting efforts. Scenarios wherein a host state may deny entry or supply false information to a

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37. Larry J. Sechrest, *Let Privateers Troll for Bin Laden*, INDEP. INST., Sept. 30, 2001, <http://www.independent.org/newsroom/article.asp?id=119> [hereinafter Sechrest, *Bin Laden*]; see also Paul Bedard, *A Bounty Hunt for Bin Laden Yields Heads, Ears*, U.S. NEWS & WORLD REP., July 29, 2002, at 8.

38. Tom Morganthau, Jeff B. Copeland & John Walcott, *Perot's Mission Impossible*, NEWSWEEK, Mar. 5, 1979, at 47.

39. BBCNews.com, *Actor Willis' \$1m Saddam Bounty*, <http://news.bbc.co.uk/2/hi/entertainment/3141942.stm> (last visited Jan. 13, 2006).

40. Rita Cosby, *Willis Passionate About Iraq War*, MSNBC, <http://www.msnbc.msn.com/id/10005665/> (last visited Jan. 13, 2006) ("Willis publicly announced he would offer [a] \$1 million reward to a civilian if they turned in Zawahiri, bin Laden, or al-Zarqawi."). al-Zarqawi has since been dispatched by the U.S. military. John F. Burns, *After Long Hunt, U.S. Bombs Kill Al Qaeda Leader in Iraq*, N.Y. TIMES, June 9, 2006, at A1.

41. See Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 225–27 (2001).

42. See *id.* at 244 ("[M]any individuals who decide to forcefully capture [a fugitive] may do so only as the result of a one-time opportunity . . .").

privateer<sup>43</sup> are not difficult to envision. The magnitude of such concerns decreases appreciably when government is uninvolved.

In particular, private military defense firms such as Military Professional Resources, Inc. (MPRI) and Vinnell are highly competent and capable to accept such a challenge. Such firms are battle-tested and have stood in the midst of some of the most dangerous armed conflicts in world history: MPRI was a prominent player in the Balkan conflict, providing expertise and consulting services, while Vinnell was deeply embedded in secret intelligence operations during the Vietnam War.<sup>44</sup> Certainly these private outfits would be ready and willing to prosecute efficient and effective independent military action.

## II. PIRACY AND TERRORISM: NONSTATE BELLIGERENCY IN TWO ERAS

Despite its devolution, privateering remains a viable option for dealing with a nonstate enemy.<sup>45</sup> Of the diverse purposes privateering served, deployment of privateers to combat piracy is analogically the most applicable. Before establishing key parallels between piracy and terrorism, however, it is necessary to examine the early application of letters of marque.

Perhaps the most important characteristic of letters of marque was that they legitimized the actions of a privateer. In the absence of a valid letter of marque, privateers could be fairly tried, convicted, and punished for piracy. The effect, then, of a letter of marque was that it immunized its possessor from piracy prosecution by attaching state authorization to the actions of privateers.<sup>46</sup> Letters of marque could be so broad as to permit privateers to engage any enemy, which logically included pirates.<sup>47</sup>

Authorized privateers were no strangers to confronting pirates lacking valid letters of marque. Particularly where a fledgling state lacked naval strength, piracy placed

43. *See id.* at 244–45.

44. *See* Gaul, *supra* note 14, at 1493–97.

45. *See* Wendy McElroy, *Is the Constitution Antiquated?*, THE FREEMAN: IDEAS ON LIBERTY, Nov. 1999, available at <http://www.fee.org/publications/the-freeman/article.asp?aid=4997> (arguing that such congressional action is as appropriate today as it always was, when taken in historical context).

Furthermore, adhering to a strict-constructionist approach with regard to letters of marque and reprisal is untenable. Gaul has argued that the application of the concept of letters of marque and reprisal is not limited solely to the high seas, nor is it antiquated past the point of utility. In discussing a new form of privateer—private American military services contractors—he asserts that any sort of privately financed military operation conducted under the authority of the United States is the functional equivalent of a letter of marque. Gaul, *supra* note 14, at 1501.

46. *See* Talbot v. Janson, 3 U.S. (3 Dall.) 133, 165 (1795) (observing that a privateer obtained a commission of dubious integrity because he believed it would “excuse him from the guilt of piracy”); 1 WILLIAM BLACKSTONE, COMMENTARIES 251 (Univ. Chi. Press 1979) (noting that letters of marque allow privateers to “attack and seize” property “without hazard of being condemned as a robber or pirate”); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 214 (2004); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1615 (2002) (“With sovereign authorization, a person engaged in reprisals would not . . . be treated like a pirate.”).

47. *See supra* notes 17–18 and accompanying text.

critical colonial commerce in jeopardy and constituted a formidable menace. Nascent nations so situated empowered their governments to commission privateers when “infested by pirates” for the duration of the danger.<sup>48</sup> The fact that legislative drafters considered the danger of piracy worthy of inclusion in the Constitution speaks to the prevalence of privateering in early battles with piracy.<sup>49</sup> Commissions authorizing privateers to confront pirates functioned just as normal letters of marque: they authorized their carrier to confront and capture pirates as prize.<sup>50</sup>

### *A. Piracy and Terrorism: Similarities*

The traditional international pirate organization<sup>51</sup> contained persons organized with malicious intent engaging in acts disruptive of civilized nations.<sup>52</sup> Pirate outfits were not considered a legitimate body politic.<sup>53</sup> Moreover, piracy constituted a crime against the law of nations.<sup>54</sup>

Likewise, modern terrorist organizations often incorporate persons operating with malicious intent and engaging in violent acts designed to disrupt civilization.<sup>55</sup> Terrorist groups in this sense are not considered legitimate political bodies.<sup>56</sup> As with piracy, terrorism can be considered a crime against the law of nations. Terrorism, however, has proven difficult to define, a dilemma recently generating abundant derision in international circles.<sup>57</sup> Domestically, even the federal government cannot

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48. ALFRED P. RUBIN, *THE LAW OF PIRACY* 122–23 (1988) (quoting ARTICLES OF CONFEDERATION art. IV § 5).

49. For a discussion of the enactment of commissions to hunt pirates, see *id.* at 80. Rubin presents one French commission granting a privateer the authority not only to hunt ships of a specific nation but also to engage pirates. *Id.* at 116 n.42. Furthermore, during the American Civil War, the United States reserved the right to commission privateers only if necessary to “suppress the piracy of European gunboats . . . .” HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 453 n.173 (Richard Henry Dana, Jr. ed., 8th ed. 1866).

50. While commissions could authorize privateers to capture pirates, no law indicates that a seaman was required to have a valid commission to lawfully fight pirates. RUBIN, *supra* note 48, at 128.

51. Rubin differentiates between two usages of the term “piracy”: that which refers to the law of nations and that which refers to traitors of a sovereign hunted by that sovereign. Commissions were granted for both purposes, but the consequences varied based on which classification was used. That is, where a sovereign hunted its own treasonous subjects, no international legal issues arose. See *id.* at 79–81.

52. See WOOLSEY, *supra* note 8, at 242.

53. *Id.* One common ground of confusion arises when considering the Barbary pirates. While these roving bandits behaved much like pirates, they actually followed orders from North African leaders, who had sufficient political organization and economic importance to make it prudent to withhold the classification of “pirate” from those acting on behalf of the Barbary states. See RUBIN, *supra* note 48, at 83.

54. See WOOLSEY, *supra* note 8, at 242.

55. See generally HARRIS, *supra* note 2.

56. Here there is arguably a comparison to the Barbary pirates, as some Middle Eastern political entities may be considered terrorist groups masquerading as political parties, such as the Palestinian Authority, Lebanon’s Hezbollah, and Iran’s Hamas.

57. See Report of the Ad Hoc Committee on International Terrorism, U.N. GAOR, 28th Sess., Supp. No. 28 at 6–7, U.N. Doc. A/9028 (1973). Recently, the United Nations’ 2005



unite on one definition of terrorism.<sup>58</sup> Regardless, the fact that courts have applied international law to five general situations, one of which is “the punishment of piracy and terrorism,”<sup>59</sup> speaks to a normative practice of equivalent treatment of piracy and terrorism in international law.

Piracy and terrorism share basic conceptual similarities—in fact, many terrorist organizations integrate piracy as a weapon in their arsenal.<sup>60</sup> First, both are forms of nonstate belligerency. Second, their classification as nonstate actors is buttressed by the nature of their hostility: complicity in acts of malice perpetrated by individuals acting without the official, recognized sanction of any particular nation. Third, the problems each engenders frequently afflicts multiple nations. Fourth, the damage done by each includes either physical or financial injury—if not both—to citizens of a particular state

Furthermore, twenty-first-century terrorism has a more fundamental similarity to historical piracy. Terrorists populate closely knit groups that share a unifying goal: attacking Western civilization—in particular, the United States—and thereby threatening basic American values of life, liberty, property, and the pursuit of happiness. Pirates acted in kind, differing from terrorism only in their focus on financial gain.<sup>61</sup> Recently, prominent terrorist groups have instead sought to implement an ideological and political agenda anathema to the United States.

### *B. Where Piracy and Terrorism Diverge*

Though the affinity between piracy and terrorism is fundamentally intuitive, several material distinctions complicate the comparison. Because piracy operated almost exclusively on the high seas, where no sovereign exercises territorial jurisdiction, it was predominantly a “legal conception relevant only when no territorial jurisdiction applied.”<sup>62</sup> Despite the doctrine of universal jurisdiction, which permitted the prosecution of a pirate in violation of the law of nations before any tribunal,<sup>63</sup> this ethereal jurisdictional component presents an analogical dilemma—terrorist activity is primarily terrestrial, which dictates that some sovereign state exercises unquestionable territorial jurisdiction.<sup>64</sup>

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World Summit failed to agree on a clear definition of terrorism. See Kofi Annan, *A Glass at Least Half-Full*, WALL ST. J., Sept. 19, 2005, at A16. For its part, the United States criminalizes terrorism outside its borders. 18 U.S.C. § 2332b (2000).

58. For a discussion and comparison of numerous federal legal definitions of terrorism, see Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249 (2004).

59. THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 111 (2d ed. 1993).

60. See Gal Luft & Anne Korin, *Terrorism Goes to Sea*, FOREIGN AFF., Nov.–Dec. 2004, at 61 (providing an examination of the convergence of terrorism and piracy).

61. See *id.*

62. RUBIN, *supra* note 48, at 129.

63. *Id.* at 149 (“Where an act has been denounced as crime by the universal law of nations, . . . where the offence is one that all mankind concur in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts.” (quoting *U.S. v. Darnaud*, Wallace 143, 160–63 (3d Cir. 1855))).

64. See *infra* Part VI.C for a discussion of this dichotomy.

The nonstate character of piracy and terrorism also confounds the United States' national security apparatus. The ability of nonstate belligerents to operate without the encumbrance of occupying specific territory, coupled with the absence of a legitimate government with which to confer, undermines America's ability to respond via conventional warfare. Traditionally, a cognizable attack emanating from a sovereign state equipped with a legitimate government provoked a predictable, rational response: war upon the aggressor, and if necessary, its allies.<sup>65</sup> This option is inherently unavailable for dealing with nonstate actors. The absence of an established outlet for military retaliation necessitates the development—or redevelopment—of different tools to engage the enemy.

During the era of piracy, both military vessels and privateers exercised force on behalf of the United States. The military demonstrated reluctance to rely on privateers in military engagements because the interrelationship between privateers and military vessels was sometimes characterized by discord, and many privateers made decidedly lackluster warriors.<sup>66</sup> These deficiencies, however, were relatively minor. A comprehensive war effort requires more than military might, and privateers, evidenced by the credit given to them by American Revolution historians,<sup>67</sup> provided a useful service.

### III. APPLYING PRIVATEERING TO TERRORISM

Privateers could play an equally indispensable role in the War on Terror. While they cannot supplant the military in terms of operational expertise and firepower, privateers could nevertheless provide a tremendous additional resource. Conceptually, to maximize its effectiveness in the fight, privateering under letters of marque is applicable to the new terrorism in three domains: human capture, asset seizure, and communication disruption.

#### *A. Human Capture*

In considering the application of letters of marque to human capture, it is imperative to evaluate the necessity of any proposed measure. The failure of current mechanisms for capturing rogue individuals, coupled with the need to encourage successful terrorist apprehension, obviates any need for further inquiry into the question. Currently, extradition and international abduction are the dominant methods for apprehending

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65. For instance, the United States responded to the bombing of Pearl Harbor prior to American involvement in World War II with raids on the Japanese. While this is possible with terrorism where the terrorist base is apparent, as it was in Afghanistan after 9/11, incriminating evidence is not always manifest.

66. See Marshall, *supra* note 15, at 970. Marshall describes privateer ineptitude in battle during the Penobscot Expedition in 1779, which was conducted against a British base on the Penobscot River in Maine. Upon commencement of hostilities, privateers first urged their naval compatriots to stall, and then “fled like stampeded cattle.” *Id.* (quoting ALLEN, *supra* note 15, at 52). For a modern instance of alleged cooperation between private quasi-military individuals engaged in human capture and the United States government, see Carlotta Gall, *3 from U.S. in Afghan Court, Accused of Running a Jail*, N.Y. TIMES, July 19, 2004, at A3.

67. See *supra* sources cited notes 31–33 and accompanying text.

wanted persons.<sup>68</sup> This Subpart establishes that the geopolitical, humanitarian, and policy costs of maintaining the status quo outweigh its utility and accordingly further fortifies the argument for the use of letters of marque.

### 1. Extradition

Extradition is a process whereby one state asks another to surrender an individual within its territory or control.<sup>69</sup> This cooperation is typically secured through treaty or customary international law.<sup>70</sup> Treaties need not create binding obligations on signatories,<sup>71</sup> and states have discretion to refuse an extradition request. Indeed, the United States itself does not view its own extradition treaties as creating an obligation to extradite.<sup>72</sup> This view is sometimes based on a state's right to guard its sovereignty and the argument that a state's concurrent right to grant asylum overrides an extradition treaty.<sup>73</sup> In the absence of an extradition treaty, principles of reciprocity and comity under customary international law provide another avenue for securing an individual's extradition.<sup>74</sup> Reciprocity allows states to exchange fugitives, while comity refers to a state demonstration of courtesy or goodwill in voluntarily extraditing a requested individual.<sup>75</sup>

As a method for capture of wanted fugitives, extradition is imperfect. Because states are often incapable or unwilling to apprehend wanted individuals, international criminals may view nations recalcitrant in this regard as secure oases in which to hide from punishment for misdeeds or atrocities.<sup>76</sup> The shortcomings of extradition as a tool for bringing terrorists to justice are best illustrated by the prevalence and toleration of the other dominant method of human apprehension: international abduction.<sup>77</sup>

### 2. State-Sponsored Kidnapping

International abduction is a popular but controversial solution for a state faced with a rejected extradition request. Such abduction is in character related to rendition, a process recently criticized in the international news media, by which terror suspects are forcibly abducted and delivered for interrogation to nations which condone or practice torture as a method of interrogation.<sup>78</sup> "International abduction" is merely a euphemism

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68. See Supenor, *supra* note 41, at 224–25.

69. BLACK'S LAW DICTIONARY 623 (8th ed. 2004).

70. See Supenor, *supra* note 41, at 224.

71. *Id.* (citing Extradition Treaty Between the United States of America and the Mexican States, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 225.

76. See *id.*

77. See *id.*

78. See, e.g., Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, Mar. 13, 2005, at A1 ("Italian authorities suspect the Egyptian was the target of a CIA-sponsored operation known as rendition, in which terrorism suspects are forcibly taken for interrogation to countries where torture is practiced.").

for state-sponsored kidnapping, which violates international legal principles of state sovereignty and territorial integrity.<sup>79</sup> Abductions also violate the United Nations' Charter, prohibiting use of force against another state unless conducted under the guise of self-defense.<sup>80</sup> Despite such an ominous stigma against the practice, states routinely engage in international abduction following failed diplomatic efforts.<sup>81</sup>

It is of course manifest that American extradition requests may be met with reticence by—for example—Middle Eastern nations known to harbor terrorists. Major Supernor uses the specter of rampant illegal abduction as an argument favoring the advent of a legal system for international bounty hunters to track war criminals and bring them to justice.<sup>82</sup> This logic is easily transferred to terrorist capture. The current controversy over the definition of “terrorist” and “terrorism” (which could, given its present ambiguity, potentially expose any American classified by another nation as a “terrorist” to similar abduction) suggests that lawless abductions of foreign nationals “arbitrarily” classified as terrorists would be dangerous both to American citizens traveling abroad and to any war effort because it would jeopardize international approval and further undermine American moral legitimacy.<sup>83</sup> Given that American civilians are already commonly targeted by kidnappers in fractured Middle Eastern nations,<sup>84</sup> a legal framework for conducting such operations is vastly preferable.

Regardless of these admittedly staunch admonitions, the degree of risk facing Americans in anarchic nations is already so great that it would not significantly increase with the revival of privateering. In addition, strict regulation would continue to provide a modicum of international and domestic legitimacy and—perhaps more importantly—credibility.<sup>85</sup>

### *B. Terrorist Asset Seizure*

Privateering need not be limited to human capture. Traditional privateers disrupted the enemy by crippling its economic standing,<sup>86</sup> an objective which is equally applicable and vital to the War on Terror. Economic interruption of terrorist networks could today be accomplished by privateers through seizure of terrorist assets.

To thrive, terrorism requires financial support, a fact which policymakers recognized and moved to thwart with section 106 of the USA PATRIOT Act. Section 106 enables the President, upon declaration of a national emergency and subject to proper jurisdiction, to seize property “of any foreign person, foreign organization, or

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79. See Supernor, *supra* note 41, at 225–26.

80. *Id.* at 226.

81. See *id.* (describing Israeli, Egyptian, and American attempts at international abduction).

82. See *id.* at 216 n.8.

83. See *supra* note 78 and accompanying text (discussing alleged CIA abductions of terrorism suspects in Italy).

84. See, e.g., Joe Hayden, *Journalist Abducted in Iraq*, SUNDAY TRIB. (Dublin), Jan. 8, 2006, at N17 (“On 8 December, the Islamic Army in Iraq claimed to have killed US [sic] electrician Ronald Schulz. Other groups are holding a French engineer and four Christian humanitarian workers—two Canadians, a Briton and an American.”); Bob Herbert, *Kindness’s Cruel Reward*, N.Y. TIMES, Sept. 26, 2003, at A25.

85. See *infra* Part V.

86. See *supra* notes 29–30 and accompanying text.

foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States.”<sup>87</sup> International legal bodies have also leapt into the fray with the International Convention for the Suppression of the Financing of Terrorism enacted ostensibly to deter and punish terrorist financiers by prohibiting willful facilitation of financial support of terrorism.<sup>88</sup>

Seizure of assets to disrupt enemy action is hardly novel, even as it extends to modern terrorism. The United States government has specifically empowered itself to do so for almost a century.<sup>89</sup> However, absent governmental authority, private citizens have not been expressly permitted to disrupt enemy action independently, and have instead been deterred by threat of civil actions for damages or criminal penalties. Letters of marque could be used specifically to enable private citizens to take action against terrorists’ financial infrastructures while immunizing those citizens from legal consequence.<sup>90</sup>

### C. Communication Disruption

Technological aptitude is a hallmark of modern terrorist networks,<sup>91</sup> providing the underpinnings necessary for operational and organizational expertise as well as an uncomplicated mode of concealing financial resources and laundering money.<sup>92</sup> Thus,

87. USA PATRIOT Act of 2001 § 106(1)(D), 50 U.S.C. § 1702(a)(1)(C) (Supp. III 2003). This permits the President to take action domestically. Letters of marque would expand the sphere of operations to permit privateers to act internationally under the color of American commission.

88. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th plen. mtg., Annex at 3, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

89. This was accomplished under the Trading With the Enemy Act (TWEA) of 1917, 12 U.S.C. § 95a (2000), until 1977, when Congress enacted the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–07, to temper the possibility of presidential abuse and to provide Congress with oversight. Charles A. Flint, Comment, *Challenging the Legality of Section 106 of the USA PATRIOT Act*, 67 ALB. L. REV. 1183, 1201–02 (2003). Presidents have successfully deployed the IEEPA against terrorism: President Carter first used it during the Iranian Hostage Crisis, President Reagan used it against Libya, and President Clinton then used it to combat groups attempting to disrupt the Middle East Peace Process. *Id.* at 1202–03. To frustrate the efforts of terrorism supporters, President George W. Bush employed the IEEPA via executive order on September 23, 2001. *Id.* at 1201 (citing Exec. Order No. 13,224, 3 C.F.R. 786 (2001)).

90. See *infra* Part VI for potential pitfalls.

91. See David Johnston & David E. Sanger, *New Leaders are Emerging for Al Qaeda*, N.Y. TIMES, Aug. 10, 2004, at A1 (“The new evidence suggests that [a]l Qaeda has retained some elements of its previous centralized command and communications structure, using computer experts like Mr. Khan to relay encrypted messages and directions from leaders to subordinates in countries like Britain, Turkey and Nigeria.”); Husain Haqqani, *Subcontracting the Hunt for Bin Laden*, SALON.COM, Aug. 17, 2004, [http://www.salon.com/news/feature/2004/08/17/pakistan\\_terrorism/index\\_np.html](http://www.salon.com/news/feature/2004/08/17/pakistan_terrorism/index_np.html) (describing a captured al Qaeda operative as a “computer wizard”).

92. For a discussion of the ease with which money laundering can be accomplished via the Internet, see Wendy J. Weimer, Comment, *Cyberlaundering: An International Cache for Microchip Money*, 13 DEPAUL BUS. L.J. 199, 222 (2001).

while human capture and asset seizure are both valuable and viable foci for privateering, privateers could arguably have the greatest impact through disruption of electronic terrorist networks and communications. Aside from utilizing cyberspace to coordinate attacks, terrorists also engage in cyberterrorism, a mechanism by which terrorists inflict damage and incite mayhem without direct violence.<sup>93</sup> Cyberterrorism is low cost, relatively simple, operates without territorial boundaries, and could easily wreak havoc on an unsuspecting nation.<sup>94</sup> Engaging privateers to combat this strain of techno-terror would substantially hinder the operational capacity of terrorism.

Moreover, the government finds disruption of terrorist cyber-activities somewhat difficult. In perhaps the most famous recent hack of a terrorist Web site, a private citizen gained control of al Qaeda's chief sounding board, [www.alneda.com](http://www.alneda.com), but found only frustration upon offering the opportunity to the FBI, which failed to locate anyone with sufficient technical expertise to set up an effective sting operation, thus forfeiting a golden counterterrorism opportunity.<sup>95</sup> This example alone illustrates the vast untapped potential of the private sector in fighting terrorism in cyberspace.

Disruption of terrorist cyberspace activity is the most cost-effective method of privateering and would likely garner the most interest, as well as the best results, given terrorists' substantial dependence on accurate, detailed information.<sup>96</sup> In this way, intrepid computer hackers, whose expertise can develop without formal training, provide the most attractive form of privateering. Even in terms of safety, hacker privateering represents the best option for privateers. Computer hacking generally leaves one insulated from bodily harm (aside from nonlethal repetitive strain maladies like carpal tunnel syndrome), thereby alleviating the deterrent effect of privateering's inherent physical risks. Of course, none of these options will be available without legislative action.

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93. For a discussion of the havoc even simple cyberterrorism could wreak, see generally Jason A. Cody, *Derailing the Digitally Depraved: An International Law & Economics Approach to Combating Cybercrime & Cyberterrorism*, 11 MICH. ST.U.-DETROIT C.L. J. INT'L L. 231 (2002). It should be noted that the broad conception of cyberterrorism does not confine itself to the formulation used at present, which refers primarily to Islamic terrorism. Cyberterrorism suffers from its own definitional crisis, similar to that of terrorism in general. See *supra* notes 57–58 and accompanying text. For a discussion of cyberterrorism, see generally Mohammad Iqbal, *Defining Cyberterrorism*, 22 J. MARSHALL J. COMPUTER & INFO. L. 397 (2004).

94. See Cody, *supra* note 93, at 240.

95. D. Ian Hopper, *FBI Botched Al-Qaeda Site Hacking Offer*, N.Y. SUN, July 30, 2002, at 2; Associated Press, *Man Hijacks Al Qaeda Site for FBI Use*, USA TODAY, July 30, 2002, available at [http://www.usatoday.com/tech/news/2002-07-30-al-qaeda-online\\_x.htm](http://www.usatoday.com/tech/news/2002-07-30-al-qaeda-online_x.htm).

96. Both human capture and asset seizure would likely involve considerable cost to privateers, much as traditional privateering required heavy investment in outfitting ships. See Sechrest, *Privateering*, *supra* note 14, at 9 ("Whatever the motivation in any specific case, privateering required a significant investment. In Baltimore during the War of 1812, the total cost of building a schooner of about 200 tons—the most common rig and size for privateers—outfitting her, arming her, and providing a crew was at least \$40,000 in 1813 prices." (citing JEROME R. GARITEE, *THE REPUBLIC'S PRIVATE NAVY: THE AMERICAN PRIVATEERING BUSINESS AS PRACTICED BY BALTIMORE DURING THE WAR OF 1812*, 125 (1977))).

## IV. RECENT LEGISLATIVE ACTION

Policymakers have not entirely ignored the possibility of resuscitating letters of marque and reprisal. The Air Piracy Reprisal and Capture Act of 2001,<sup>97</sup> authored by Congressman Ron Paul of Texas on the heels of September 11, proposed a modification of the United States' statutory approach to piracy via the application of traditional laws governing sea piracy to air piracy.<sup>98</sup> This legislative initiative proposed delegating to the President the power to issue letters of marque and reprisal to permit privateering on land, at sea, or in the skies. Such delegation would give the President the power to "subdue, seize, and take persons and property, using such force as may be necessary to defend the lives, liberties, and property of the citizens of the United States against piratical aggressions and degradations . . . ."<sup>99</sup>

Political commentators and researchers alike analogize early use of letters of marque and reprisal in eighteenth- and nineteenth-century warfare to fighting terrorism and assert that private enterprise can hunt terrorists and their assets more effectively than the United States military machine.<sup>100</sup> The evolution of early privateering provides a useful snapshot of the sort of progression possible if letters of marque were applied to terrorism. Early privateering advanced from a niche weapon to a "potent means of warfare,"<sup>101</sup> mobilizing self-interested privateers to swiftly hunt and capture as many enemy ships as possible—an adaptable resource capable of inflicting serious damage on the enemy.<sup>102</sup> It requires no stretch of the imagination to envision a similar impact on terrorism. Thus far, nothing of substance has come of Congressman Paul's proposal, but with relatively minor modifications, the resurrection of letters of marque remains viable.

## V. CONGRESSIONAL REGULATION

In addition to the power to issue letters of marque and reprisal, the Constitution empowers Congress to make rules concerning capture on land and water.<sup>103</sup> Thus, Congress can create a regulatory body and authorize it to draft a regulatory framework tailored to the maintenance of a system of letters of marque for use in combating terrorism. The promulgation of a carefully-crafted model for the regulation of privateers is imperative for the viability of both the system and American credibility in external national security matters. Many of the suggestions that follow resonate predominantly in the context of human capture, as it raises the most conspicuous potential violation of international law.

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

98. *Id.* § 5(b)(4)(B).

99. *Id.*

100. See Sechrest, *Privateering* *supra* note 14; Sechrest, *Bin Laden*, *supra* note 37.

101. See Sechrest, *Bin Laden*, *supra* note 37.

102. Privateering was once so effective that Lloyd's of London refused to offer maritime insurance to British shipping except at exorbitant premiums. Sechrest, *Privateering*, *supra* note 14, at 26 (citing WILLIAMS, *supra* note 28, at 433).

103. U.S. CONST. art. I, § 8, cl. 11.

*A. Pre-Privateering: Congressional Regulatory Scheme*

In devising a regulatory scheme, Congress could look to licensing systems applicable to bounty hunting and defense contracting as guidelines. Because bounty hunting is regulated as an occupation by states, no uniform licensing system currently exists. However, the system does permit extrapolation of some general guidelines. Since many of the requirements of state systems serve the same purpose, attention will be paid to only the criteria that best address the policy objective targeted by proposed oversight. Military services contractors face a federal licensing system. Portions of this system which are relevant to licensing privateers under letters of marque will also be discussed.

*1. Bounty-Hunting Licensing Systems as One Model*

State bounty-hunting<sup>104</sup> licensing bodies require that applicants be United States citizens; hold a high school diploma; exceed twenty-one years of age; pass a drug test, psychological examination, and written examination; and complete a training program.<sup>105</sup> Convicted felons are excluded, as are individuals convicted of lesser drug offenses and crimes of moral turpitude.<sup>106</sup> Many states mandate that bounty hunters notify local law enforcement before engaging in surveillance, apprehension, or capture.<sup>107</sup>

Though requirements of educational aptitude, psychological competence, and a modicum of moral rectitude are indispensable to the regulation of privateers, citizenship may be irrelevant. Though foreign citizens operating under letters of marque issued by another state were originally subject to charges of treason or treatment as pirates by their country of origin,<sup>108</sup> their exclusion today would detract from an effort focused primarily on foreign states, where knowledge of terrain,

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104. Most states use language referring to "bail enforcement officers" or "bail recovery agents." See sources cited *infra* note 105. Insofar as these titles refer to individuals who conduct similar operations—that is, hunting people—they apply to individuals classified under the popular conception of bounty hunters.

105. NEV. REV. STAT. ANN. § 697.173(1) (LexisNexis 2003). Other states have similar requirements, with some variations. See also ARK. CODE ANN. § 16-84-114 (2005) (requiring notification of local law enforcement before attempted apprehension); GA. CODE ANN. §§ 17-6-56 to -57 (2004) (requiring a valid firearm license, a minimum age of twenty-five, and notification of local authorities before engaging in surveillance, apprehension, or capture); IND. CODE ANN. § 27-10-3-5 (West 2003) (including a state residency requirement and a lower age limit (eighteen)); N.H. REV. STAT. ANN. § 597:7-b (2001) (requiring notification of local law enforcement before searching for a fugitive); TENN. CODE ANN. § 40-11-318 (2003) (requiring notification of local law enforcement prior to taking a person into custody); UTAH CODE ANN. § 53-11-109 (2004) (requiring 2000 hours of experience as a bail recovery agent or law enforcement officer).

106. *E.g.*, NEV. REV. STAT. ANN. § 697.173(1).

107. See sources cited *supra* note 105.

108. See WOOLSEY, *supra* note 8, at 216. But see HALL, *supra* note 9, at 599 ("The acceptance of letters of marque by neutral subjects from a belligerent is now prohibited by international common law, and is always forbidden by the neutral sovereign, although from several points of view the act is unobjectionable.") (footnote omitted).



language, and cultural norms is at a premium.<sup>109</sup> If the regulatory body attaches urgent importance to citizenship, perhaps particularly valuable privateers could be funneled through an expedited citizenship application process.<sup>110</sup> In addition, a background check deeper than a cursory criminal record search would be advisable.

Notification of law enforcement agencies, however, promises to significantly heighten the risk facing privateers. Since privateers would often operate in nations hostile to Americans and American war efforts—some of which may actively harbor, protect, and support terrorists—alerting allegiant law enforcement would interject an insurmountable obstacle into human capture, eliminating the element of surprise and enabling fugitives to escape.<sup>111</sup> Even more ominous, state authorities could conceivably attempt to capture and/or kill privateers. Therefore, Congress should not require human capture privateers to alert local law enforcement of their presence or objectives. Even so, Congress should not *prohibit* contact of local law enforcement either, as some nations may be receptive to aid requests and thus willing to assist a privateer in apprehending an undesirable individual hiding out within its borders.

## 2. Defense Contractor Licensing as Another Model

Congress need not start from scratch in privateer regulation. Some scholars—such as Matthew J. Gaul—have referred to private defense contractors as today’s “new privateers.”<sup>112</sup> The regulatory system governing such contractors may therefore provide an instructive template from which to model a satisfactory system. The Arms Export Control Act<sup>113</sup> requires private defense contractors to register with the State Department and obtain a license for each project.<sup>114</sup>

This can be applied to a regulatory system for modern privateering. However, where the Arms Export Control Act closely regulates the export of military equipment and expertise to foreign countries,<sup>115</sup> and is thus relatively narrow, regulation of letters of marque should be as broad as oversight will allow, especially in the realms of asset seizure and communication disruption. Since assets and communications are at times fluid, quickly shifting from one location to the next,<sup>116</sup> Congress should permit its regulatory body to provide a measure of flexibility appropriate for the pursuit of broad objectives.

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109. CIA Careers: Foreign Language at the CIA, [https://www.cia.gov/careers/lan\\_foreign.html](https://www.cia.gov/careers/lan_foreign.html) (last visited Aug. 21, 2006).

110. In the past, legislators have made appeals on behalf of outstanding foreign athletes seeking to gain citizenship and thereby represent the United States in international athletic competitions. Surely legislators would be equally amenable to granting citizenship to a demonstrably capable privateer. *See, e.g.*, Press Release: Sen. Schumer, Rep. Kelly Call on INS to Grant Citizenship to U.S. Olympic Hopeful (Nov. 6, 1999), [http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press\\_releases/PR00069.html](http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR00069.html).

111. *See* Supernor, *supra* note 41, at 242.

112. *E.g.*, Gaul, *supra* note 14, at 1500–01.

113. Arms Export Control Act (AECA), 22 U.S.C. § 2778 (2000).

114. *Id.* at § 2778(b).

115. *See id.*

116. *See supra* Part IV.B–C.

Congress may also require that privateers contribute a percentage of their reward to a fund in which all licensed, active privateers could share. This would provide a safety net for unsuccessful privateers, as well as encourage coordination between disparate privateering outfits.

*B. Post-Privateering: Judicial Review*

Judicial review would further enhance privateering oversight. In the era of piracy, upon capture, the law required privateers to present their booty at a neutral port for scrutiny by a duly-constituted prize court in order to determine the lawfulness of the seizure.<sup>117</sup> If deemed lawful, the seized goods were sold at auction, and privateers reaped a portion of the proceeds, some of which reverted to the government responsible for issuing the concordant letter of marque.<sup>118</sup>

Prize courts typically reviewed the legality of a capture before granting privateers title to it and were often the only substantive check on privateers.<sup>119</sup> While it is intellectually entertaining to consider the circus that could ensue were captured terrorists put up for auction—the consequence of a direct application of prize law to human capture—the system is not so alien as to render it immune to adaptation. Upon capture, pirates were set for trial in court, and property seized was distributed pursuant to prize law.<sup>120</sup> Where early prize courts reviewed a capture to determine whether privateers could claim valid title, a modern prize court could review a privateer's commission to ensure that the capture conformed to proper procedures (including, for human capture, that the privateer provided adequate care to prisoners). If the privateer violated the terms of the commission or other applicable law, the court could lawfully refuse to grant any reward tendered. A modern prize court could likewise include consequences for the violation of the rights of a neutral party, as original prize courts did,<sup>121</sup> and determine what portion of a reward each privateer could claim in the event of a joint operation.

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117. See MAINE, *supra* note 28, at 96; WHEATON, *supra* note 49, at 478–79.

118. See WOOLSEY, *supra* note 8, at 216 (“It is only the commission which gives an interest in a prize, since all captures vest originally in the state.”).

119. See Marshall, *supra* note 15, at 975.

120. See RUBIN, *supra* note 48, at 131–32.

121. The importance of this power might be especially key to preserving credibility in enacting modern application of letters of marque. Specifically in terms of human capture, where a private bounty calls for the capture of the subject—dead or alive—the stakes are especially high. Reports from Afghanistan indicate that the currency of bounty hunters is human ears and also that, in response to the government bounty's requirement of proof, the FBI has received severed heads which, after DNA checks, were found not to belong to those among the hunted. Bedard, *supra* note 37; see also Weekly Intelligence Notes, #29-02, Association of Former Intelligence Officers, July 22, 2002, <http://www.afio.com/sections/wins/2002/2002-29.html> (“One hunter recently claimed he had beheaded bin Laden aide, one Ayman Al-Zawahiri, and asked the Pentagon for the \$25 million reward. The Pentagon apparently asked for proof and they received the severed head—but the FBI found [it] wasn't Zawahiri's.”).

## VI. POTENTIAL RISKS: HAZARDS TO CONSIDER IN THE SECOND COMING OF LETTERS OF MARQUE

The return of letters of marque clearly requires some measure of legal and political adaptation. Domestically, letters of marque, if properly enacted and delegated, are constitutionally valid. Congress has the power to create and determine the jurisdiction of domestic tribunals under the Constitution<sup>122</sup> and is therefore free to reconstitute prize courts to govern privateering. Unless an international obligation (such as an executive agreement or treaty) has been properly consented to by Congress and ratified by the President, it does not bind the United States. Here, the United States is not bound by any specific international obligation against privateering, and domestic courts would thus be compelled to apply only domestic law which would not expressly militate against privateering. However, customary international law, which consists of commonly observed practices in international relations (and thus includes prohibition of privateering), provides a formidable barrier to international legitimacy.

Letters of marque stand on unsteady ground internationally due to the renunciation of privateering by the Declaration of Paris of 1856.<sup>123</sup> Thus, the United States must take action in international legal sectors to fortify the validity of letters of marque. The following Part analyzes legal and policy hazards associated with a return of letters of marque. Five tensions in particular present the most formidable barriers to the return of privateering: (1) problems with privatization of military functions, (2) state responsibility doctrine in relation to liability for the acts of privateers, (3) the analogical dilemma of violating sovereign jurisdiction, (4) potential discord in the regulatory scheme, and (5) constitutional deadlock between the President and Congress.

### *A. The Evils of Privatization of War*

Given that letters of marque are domestically valid, the most substantial barrier to the United States exhuming privateering from the dustbin of history is found in the admittedly vast range of conceivable adverse international consequences. Privatization of military functions has grown tremendously in the past century and generates significant risks, a topic on which commentator Jon D. Michaels has written an exhaustive critique.<sup>124</sup> While his argument against military privatization is both comprehensive and persuasive, it does not squarely address resuscitation of letters of marque. This is in part because Michaels is concerned about an issue not directly applicable to this proposal—the delegation of traditional governmental military functions to private enterprise.<sup>125</sup> Despite Michaels's concerns, private enterprise is the engine that drives letters of marque.

Letters of marque, therefore, do not fit within Michaels's conception of "core governmental responsibility over military engagement . . . delegated to privateers"<sup>126</sup> and are not subject to the same constraints. They are instead a valid legal mechanism

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122. U.S. CONST. art. I, § 8, cl. 9.

123. See *supra* note 8 and accompanying text.

124. See Michaels, *supra* note 14.

125. See *id.* at 1048.

126. *Id.*

that does not overtly upset the constitutional balance of power. Of the three chief concerns Michaels sees in the privatization of military functions, two are salient to the scope of this Note: (1) the possibility that reinstating letters of marque may diminish the effectiveness of the United States military, and (2) the possibility that reviving letters of marque may “undermine the already weak diplomatic and moral standing of the United States abroad.”<sup>127</sup>

### 1. Privateering May Undermine the United States Military

The Uniform Code of Military Justice (UCMJ) governs only members of the armed forces and therefore would not control privateers.<sup>128</sup> This is simultaneously a strength and a weakness of privateering in that it frees privateers to act outside general military guidelines, but also creates the danger of abuse. The lack of an applicable and stern justice system for violation of a commission presents the possibility that a system of regulation may not be taken as seriously as is warranted. Without recognizable penalties, the likelihood that the limits of a privateer’s commission will be either misunderstood or altogether abandoned—an ordinary occurrence in early privateering<sup>129</sup>—increases dramatically. Where military forces may hold fast in a battle or initiate a firefight in pursuit of a terrorist, private enterprise may, absent an affirmative obligation to remain, be more likely to retreat and protect its investment.<sup>130</sup>

While this would certainly present a host of issues if private forces *replaced* the American military—the premise of Michaels’s discourse—privateers acting under letters of marque would not be military replacements but instead supplemental resources. Though one can envision a situation in which privateers, perhaps unwittingly, interfere with or unintentionally sabotage a military operation, the sheer number of targets for privateers to pursue, contrasted with the constraints inherent in large-scale military efforts at human capture (e.g., lack of stealth, interference by members of a foreign state), makes such an occurrence likely to be exceedingly rare.

Perhaps a more salient uncertainty emerges from early privateering, where talented seamen eschewed military service in favor of enlisting in private outfits armed with the promise of lucrative returns and a more relaxed lifestyle.<sup>131</sup> This concern remains

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127. *Id.* Michaels’s third concern, the subversion of constitutional imperatives of limited and democratic government, is beyond the scope of this Note, for no constitutional change is necessary to revive letters of marque.

128. The Uniform Code of Military Justice covers all members of the military. *See* 10 U.S.C. § 802(a) (2000).

129. *See, e.g., supra* note 66.

130. *See* Michaels, *supra* note 14, at 1092–93 (describing occurrences where private contract personnel abandoned battles and noting Pentagon studies that found commercial contractors may have fled other theaters of battle, such as the Persian Gulf War, had hostilities intensified).

131. *See* Marshall, *supra* note 15, at 973–74 (“Payment by private parties rather than the government was one of the allures of privateering, since it was more certain and more lucrative.”); Sechrest, *Privateering*, *supra* note 14, at 12 (“It should be no surprise that serving on a privateer was often much more popular than naval service. ‘Compared to the relatively free and easy life of privateering, life aboard a naval vessel must have seemed grim and oppressive.’” (quoting Faye Margaret Kert, *Prize and Prejudice: Privateering and Naval Prize in Atlantic Canada in the War of 1812*, RESEARCH IN MARITIME HISTORY NO. 11., 1997, at 121)).

ubiquitous, as rumors of current and former military personnel trying their hand at bounty hunting trickle out from the Middle East.<sup>132</sup> Such rumors are made more urgent in the letters-of-marque context by the possibility that discharged soldiers may join privateer outfits. Many retired military personnel already obtain postmilitary employment with defense contractors.<sup>133</sup> It is thus certainly plausible that young military personnel may be tempted to join up with privateers instead of the official military. The latent risk is that privateers may fill their ranks with soldiers discharged from the military for disciplinary reasons—soldiers who were perhaps less than observant of military standards—and subsequently jeopardize the American international image as a human-rights-conscious military. To alleviate this problem, Michaels argues that it may be possible to extend the UCMJ to privateers.<sup>134</sup> However, it is not clear that this is desirable, and it may in fact deter prospective privateers from engagement.<sup>135</sup> Another option, should strict discipline be desired, is for Congress to model certain aspects of its privateer regulatory code on the UCMJ.

## 2. Privateering May Undermine the United States' International Diplomatic Position

Michaels also details the potential damage that privatization of military functions may inflict in international legal and diplomatic spheres. Again, though reviving letters of marque and privateering would not represent a true “privatization” of military functions,<sup>136</sup> the impact private individuals engaging in quasi-military action could exert on the United States’ image in the international community dictates that the consequences Michaels suggests apply with the same resonance, and thereby threaten to undermine American foreign policy and credibility abroad. A policy in favor of privateering may also encourage reciprocal privateering measures by other nations, which may not be as capable of policing such a system.<sup>137</sup>

### a. Alienation of Allies

Engaging the services of privateers who cite profit as their overwhelming goal may insinuate that the United States has cast off the self-imposed historical restraint of stringent military disciplinary standards.<sup>138</sup> While this may serve to notify a barbaric

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132. See, e.g., Carlotta Gall, *Ex-G.I., Charged in Kabul, Says He Was on U.S. Mission*, N.Y. TIMES, July 22, 2004, at A3. Jonathan K. Idema, a former member of the U.S. Special Forces, was charged with running a private jail in Afghanistan. He claimed he operated with the blessing of the United States military, and was eventually convicted and sentenced to eight to ten years in prison. See Carlotta Gall, *Mercenaries in Afghan Case Get 8 to 10 Years in Prison*, N.Y. TIMES, Sept. 16, 2004, at A12.

133. See Michaels, *supra* note 14, at 1022 (listing a number of prominent former military officers employed by Military Professional Resources, Inc., an elite defense contractor).

134. *Id.* at 1123.

135. See *supra* notes 42–43 and accompanying text.

136. See *supra* notes 125–27 and accompanying text.

137. See Michaels, *supra* note 14, at 1111.

138. See *id.*

enemy that the United States is itself prepared to descend into barbarism,<sup>139</sup> it would also greatly discourage an international community already shaken by post-September 11 American unilateralism. Further alienation of traditionally Western nations<sup>140</sup> only widens the already gaping chasm of misunderstanding between these nations and the United States and intensifies mistrust, which may compound American difficulty in securing future allies. Furthermore, American allies may also infer that a mission delegated by the United States to privateers, instead of its military, may be outside core American interests.<sup>141</sup>

This concern—though rational—is without foundation. The United States has already engaged its armed forces exhaustively in human capture.<sup>142</sup> Instead, the willingness to permit private citizens to join the fray marks an escalation of both hostilities and American commitment. Also, because of the importance of secrecy to human capture, privateers are more likely to take appropriate precautions to remain clandestine. Moreover, the United States may find that the trouble created by skittish, reluctant allies outweighs any benefits and instead decide it is essentially on its own against terrorism, which renders any concern over ally alienation virtually moot.

#### b. Setting a Perilous Global Precedent

Assuming privateers take seriously their obligation to adhere to the regulatory scheme, the necessity of such adherence to claiming a reward suggests they will act with a high level of professionalism. Obligations laid out as prerequisites to cashing in captured prizes are likely to keep privateers in line, for violation of such tenets could realistically result in tremendous financial loss.<sup>143</sup>

Comparatively, private American defense contractors operate with a far greater modicum of integrity than foreign military firms.<sup>144</sup> This is perhaps due to the tendency of foreign firms to accept employment from despotic or oppressive governmental

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139. For an argument that this is the logical conclusion of descending even slightly into barbarism, and that barbarism is necessary to defeat the current enemy, see HARRIS, *supra* note 2.

140. For an illuminating discussion of the gradual shift away from Western societies in Europe propagated by demography, see Mark Steyn, *It's the Demography, Stupid*, THE NEW CRITERION, Jan. 2006, at 10, available at <http://www.opinionjournal.com/extra/?id=110007760>. Should the symptoms of a decline of Western nations begin to accelerate, as predicted in Steyn's argument, the United States may find itself without allies no matter its policies, in which case letters of marque may become vital.

141. Michaels, *supra* note 14, at 1111.

142. See Barton Gellman & Dafna Linzer, *Afghanistan, Iraq: Two Wars Collide*, WASH. POST, Oct. 22, 2004, at A1 (describing the expensive and fruitless efforts of the military to hunt bin Laden); James Risen & David Rohde, *A Hostile Land Foils the Quest for Bin Laden*, N.Y. TIMES, Dec. 13, 2004, at A1 (describing military pursuit of bin Laden as "sidetracked by the distractions of the Iraq War").

143. Again, this is likely true in terms of human capture, whereas the financial consequences for violation of regulatory obligations by privateers engaged in asset seizure and communication disruption are murkier.

144. See Michaels, *supra* note 14, at 1118.

regimes,<sup>145</sup> which for a host of reasons do not always operate under social norms akin to those of the United States.

Regardless, a grave predicament lurks. Should American approval of privateering induce other nations to follow suit, egregious international abuses may result. Foreign military defense firms have already tumbled down this slippery slope: several worked at various times on both sides of the Zaire-Congo conflict in the late 1990s.<sup>146</sup> A similar failure to adhere to a moral code by foreign privateers would likely engender expansive mercenary activity, a development that could be accompanied by obscene brutality. Should foreign privateering evolve into, for instance, indiscriminate kidnapping of Americans across the globe, the United States could find itself in even greater peril, a fact which only underscores the importance of careful regulation and United Nations Security Council (UNSC) participation to the maintenance of peace and stability.<sup>147</sup>

### *B. United States Liability for Privateering: The Law of State Responsibility*

Another unseen tension arising from the return of letters of marque is whether the United States could be held liable for the actions of privateers. The difficulty in answering such a question emanates from the nature of privateering, as it demands governmental authorization of private action against foreign actors for economic gain. Insofar as privateers act pursuant to their commission, the United States may face liability for the actions of carriers of letters of marque. Though at first glance it may appear that Congress could insulate itself from responsibility by shifting the burden of liability to the owners of privateering outfits, such a view improperly equates state responsibility with civil liability.

In times of piracy, states issuing letters of marque were held liable when a privateer behaved in a wanton or unnecessary manner. Upon such a determination, both the privateer and the issuing government could potentially be held responsible under international law.<sup>148</sup> While many of these principles are pursuant to the Declaration of Paris, a pact by which the United States is not bound, the problem is not so dexterously disposed.<sup>149</sup>

Basic customary international law does not squarely address United States liability for the actions of privateers under the doctrine of state responsibility.<sup>150</sup> Liability

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145. *Id.*

146. *Id.*; see also Philip Winslow, *Why Africa's Armies Open Arms to Elite Fighters From S. Africa*, CHRISTIAN SCI. MONITOR, Oct. 19, 1995, at 1 ("[T]oday they're there to defend you, tomorrow those forces will be there to overthrow you." (quoting South African Deputy Foreign Minister Aziz Pahad)).

147. See *infra* Part VI.B.

148. See WOOLSEY, *supra* note 8, at 251. This referred particularly to neutral parties, which at first glance makes it of little utility. However, in the absence of a declaration of war (or perhaps an authorization for use of military force), nearly all nations, regardless of complicity or involvement of their subjects in an attack, are technically neutral parties.

149. See *supra* note 9 and accompanying text.

150. For the most current enunciation of state responsibility law, see the Int'l Law Comm'n, *Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission*, at 43, U.N. Doc. A/56/10 (2001), available at

hinges on whether a state's involvement in action related to the acts of its citizens surpasses a certain threshold. State responsibility can be found for belligerent action not obviously attributable to or claimed by a government when (1) clear and convincing evidence of a state's involvement is discovered,<sup>151</sup> (2) it sends agents to act aggressively on its behalf,<sup>152</sup> and possibly when (3) the government exercises "effective control" over the belligerent groups.<sup>153</sup> In a recent state responsibility case, the International Criminal Tribunal for the Former Yugoslavia stated:

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>154</sup>

Whether or not the law of state responsibility could hold the United States liable for the acts of privateers depends largely on the structure of the system. State responsibility cases usually involve some form of covert action. Privateering under letters of marque may not necessarily be covert. The issuance of letters of marque would likely be a public governmental avowal of privateering, which may remove it from the realm of covert action. Also, regarding the three criteria above, the threshold of "involvement," the definition of "sending" (as opposed to "permitting") an agent, and the threshold for "effective control" leave the outcome of any adjudication against the United States involving American privateering enshrouded in an impenetrable fog.

Outside of state responsibility, however, privateers acting under their own discretion, absent governmental *instructions* and *funding*, would not violate pertinent applicable international law against intervention. For example, Article 2(4) of the United Nations Charter, which prohibits a state from using or threatening to use force against another, would not apply to privateers. Since a carrier of a letter of marque would remain a private party unsupported by government funding, privateers would not

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<http://untreaty.un.org/ilc/reports/2001/2001report.htm>.

151. See *id.* at 44–45.

152. See G.A. Res. 3314 (XXIX), art. 3, Annex, U.N. Doc. A/RES/3314 (Dec. 14, 1974) ("Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression: . . . (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.").

153. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 114–15 (June 27). The United States has been embroiled in this sort of controversy before. The International Court of Justice (ICJ) adjudicated a claim brought by Nicaragua against the United States. Nicaragua accused the United States of attacking oil pipelines, mining ports, and violating air space. *Id.* ¶ 15b. Nicaragua also alleged that the United States was complicit in training, arming, financing, and supplying internal paramilitary activities in opposition to the Nicaraguan government. *Id.* ¶ 15a. The United States for its part claimed that any action attributable to it was permissible within the doctrine of collective self-defense, which the ICJ ultimately rejected. The United States was not, however, held liable for the acts of the Contras, who were rebels allegedly supported by the United States' government, as the ICJ determined they did not exercise "effective control." *Id.* ¶¶ 114–15.

154. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, ¶ 137 (July 15, 1999).



fall within the scope of Article 2(4).<sup>155</sup> However, if privateers are considered “agents,” under general agency principles, they would then become state actors and violate Article 2(4).<sup>156</sup>

To guard against this danger, the United States may seek a UNSC Resolution permitting the return of letters of marque for the pursuit of terrorists. Since the UNSC has the power to authorize uses of force that otherwise violate Article 2(4), privateers, even if considered state agents, would be immunized from culpability, and the United States would be exempt from prosecution for state responsibility.<sup>157</sup>

The UNSC’s authority to permit such uses of force presumes that the authorized force is necessary to maintain international peace. Here, allowing targeted action against specific individuals may help maintain international peace by eliminating the urge to abide by an outdated mentality and prosecute a war on an entire country only to apprehend a small group of belligerents.

Finally, because President Bush has declared that any country which knowingly harbors or supports a terrorist is responsible for the terrorist’s acts,<sup>158</sup> any argument that the United States is *not* responsible for the acts of *its* private citizens risks severe diplomatic repercussions, if only out of other nations’ intolerance for facial hypocrisy.

### C. Jurisdictional Dilemma

The most problematic distinction between piracy and terrorism for purposes of applying letters of marque is jurisdictional. Pirates operated on the high seas, where no sovereign exercised exclusive jurisdiction, whereas terrorism in its most publicly-understood form operates primarily on land, where jurisdiction is normally clear. The establishment of the viability of letters of marque for use in fighting terrorism requires a solution to this dilemma.

The best answer may require procurement of a UNSC Resolution authorizing use of letters of marque to target certain groups or individuals. Deliberations over who or what should be appropriately subject to the wrath of privateers need not be kept secret. Higher publicity could lead to vital intelligence information and may increase success, which could both enhance the efficacy of letters of marque and reinforce the public stance of America on terrorism—that its war is chiefly with terrorists, not with their associated communities or religions.<sup>159</sup>

In addition, anonymity and legal protection for privateers should be secured. Without these protections, aspiring privateers face the risk of severe criminal penalties

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155. See Supenor, *supra* note 41, at 239.

156. See Military and Paramilitary Activities, 1986 I.C.J. 14, ¶¶ 114–15.

157. *Id.*; see also U.N. Charter arts. 41–42.

158. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (Sept. 17, 2002), <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>.

159. See *Threats and Responses; President Meets Muslim Leaders in Post-9/11 First*, N.Y. TIMES, Sept. 11, 2002, at A20 (“Three participants at the meeting, at the Afghan Embassy in Washington, said the [P]resident told the group that he was concerned about growing anti-American sentiment in Arab and other Muslim countries and that he wanted to repeat the message that he sent last fall that the United States was at war with terrorists, not with Islam.”).

under foreign legal systems,<sup>160</sup> are deterred from attempting to capture fugitives, and may find their efforts frustrated by uncooperative governments.<sup>161</sup>

In the spirit of the rugged individualist and the innovative origins of privateering, privateers should, however, be required to enter sovereign territory by their own legal and independent means,<sup>162</sup> with no unusual fast-tracking from the UNSC. Allowing privateers to cross borders postcapture without presenting their actual commission as a prerequisite to entry would open the system to abuse, as all manner of international miscreants could claim to be acting under a letter of marque.<sup>163</sup> Upon capture of the target, then, a privateer should inform its commissioning government of success (in order to ensure safe passage) and the UNSC should permit privateers to cross international borders and enter sovereign territory upon showing of a valid commission and custody of the individual.<sup>164</sup>

#### *D. Regulatory Suggestions: Risks, Hazards, and Solutions*

In developing a regulatory framework, Congress should ensure that the regulatory body overseeing letters of marque adequately screens prospective privateers. Legitimate applicants capable of meeting a threshold standard should include bounty hunters and American defense contractors, as well as foreign or international groups capable of demonstrating sufficient qualification and capability.

In times of piracy, a party of a neutral state was permitted to accept a commission from a belligerent in the absence of a prohibitory treaty.<sup>165</sup> This principle likely precludes neutrals who are signatories to the Declaration of Paris from eligibility to apply for American letters of marque today.<sup>166</sup> One also cannot overlook the nature of customary international law as international rules developed through general and consistent state practices that are recognized as binding by states. Given the 150-year prohibition on privateering, its ban surely qualifies as a norm of customary international law, and its resurrection may consequently represent a violation of customary international law.

To ensure that such potential holders of letters of marque adhere to international legal standards, any proposed licensing system requires strict governance. While privateers in earlier eras were highly autonomous, in light of the notorious Abu Ghraib prison scandal, which saw allegations of prisoner abuse by American and coalition

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160. See Supernor, *supra* note 41, at 235; see also Gall, *supra* note 132.

161. See Supernor, *supra* note 41, at 245.

162. See *id.* at 242.

163. See *id.*

164. See *id.* (arguing that a bounty hunter should be free to cross international borders if he presents himself at the border with a valid indictment and with the indicted individual in custody).

165. See HALL, *supra* note 9 at 599.

166. The Declaration of Paris abolished privateering, and signatory nations and their subjects are bound to its tenets. No Middle Eastern countries are signatories, though many European nations are. International Humanitarian Law—State Parties/Signatories, Declaration Respecting Maritime Law, Paris, 16 April 1856, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=105&ps=P> (last visited Aug. 26, 2006).

entities staffed by private enterprise,<sup>167</sup> the United States today would need to ensure that privateers strictly comply with all regulatory requirements, and, in the case of a violation of such requirements, endure punishment in full accordance with the law.

The regulatory body would also be wise to install precautions to ensure that privateers did not wastefully focus on an improper or irrelevant target. Here, a “good faith” standard may suffice. Reliance on a governmental compilation of sought terrorists, such as the FBI’s readily available wanted list<sup>168</sup> would satisfy this standard. It may also be prudent to establish a uniform remedy in the event of violation of the rights of an innocent by a privateer. More so than in early privateering, the threat of a civil action or criminal penalty may serve as an effective deterrent for such possible abuses.

#### *E. The Longshot: Domestic Constitutional Deadlock*

As a closing note, there is a slight chance that, even in the narrow construction of letters of marque presented here, constitutional deadlock could ensue. While this Note envisions a system of letters of marque in line with recent practice—in which Congress delegates war power to the President—Congress could enact letters of marque itself in the face of presidential dissent. The Constitutional showdown would transpire upon a presidential veto of letters of marque legislation. In order to reinstate letters of marque, Congress would then have to override the President’s veto. If Congress mustered the necessary support, the President may then argue that such congressional action interferes with the President’s commander-in-chief power by exercising military power in derogation of executive objectives. It is tempting to then refer this hypothetical dispute to the courts and to analyze the possible outcomes. In the event of any letter-of-marque litigation, the courts, however, would likely evade the issue by declaring it a political question to be settled by the political branches. The end result, therefore, is that the viability of privateering via letters of marque assumes presidential and congressional agreement on the utility of a privateering revival.

#### CONCLUSION

The United States’ War on Terror remains far from complete. While the military has achieved many great successes, such as nearly eradicating the Taliban in Afghanistan and dispatching various smaller terrorists and terrorist groups, it has thus far failed in smaller operations, such as the apprehension of key terrorist leaders.

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167. See Michaels, *supra* note 14, at 1033; Joel Brinkley, *U.S. Civilian Working at Abu Ghraib Disputes Army’s Version of His Role in Abuses*, N.Y. TIMES, May 26, 2004, at A11; Sewell Chan, *U.S. Official: Abuse Allegations Are ‘a Big Deal’; Charges Involving Army-Run Prison in Iraq Seen as Setback for Military; Britain Launches Inquiry*, WASH. POST, May 3, 2004, at A16; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

168. Federal Bureau of Investigation Most Wanted Terrorists, <http://www.fbi.gov/wanted/terrorists/fugitives.htm> (last visited Aug. 27, 2006). While the list currently displays only a handful of wanted terrorists, it could easily be augmented. Furthermore, given global satellite communications technology, the list would be easily accessible in many places a privateer operated.

Where overwhelming military might has failed, crack privateer outfits may succeed. In order to harness America's greatest strength—private enterprise—the United States should revive the aged but viable weapon of letters of marque and reprisal. Privateers operating under letters of marque were invaluable in early conflicts with piracy—that era's predominant mode of nonstate belligerency—and could exert an equally effective impact on terrorism, the modern equivalent of nonstate belligerency. Small, privately-funded teams of privateers would be most effective in human capture, asset seizure, and communication disruption. Private enterprise is willing and able to engage in such operations. The tools are available, as is the funding. Even so, privateers should not operate entirely without regulation. Concordant with letters-of-marque legislation, Congress should enact a regulatory system in order to maintain proper oversight. While there are a number of potential obstacles to the resuscitation of letters of marque, they are not incurable, and can in some cases be ameliorated through international diplomacy, diligent regulation, and meticulous legislative drafting. Triumph over an unorthodox foe demands examination of all possible weapons and deployment of every viable tool in the American arsenal. This Note offers a starting point.