Written by **Joe Wolverton, II, J.D.** on October 10, 2013

Missing the Marque: The Usefulness of a Forgotten Constitutional Clause

A group of Americans associated with a larger, global terrorist network have set up training camps in remote areas of California and Washington. Reliable intelligence indicates that they are planning to carry out another deadly assault on targets in Muslim countries. Should they be successful, the attacks would undoubtedly result in the deaths of Muslim civilians.

Rather than wait for these marauders to murder their countrymen, the government of one of the intended targets sends special forces units to conduct a night raid on the hideouts of the suspected terrorists.

One Saturday, under the cover of darkness, two separate commando teams land in the United States, one in California and one in Washington.

Although the special operations team targeting Washington left without killing or capturing the alleged American terrorists, the unit sent to California seized the American they were sent to retrieve and headed back to the Middle East to try him on charges of committing brutal atrocities against citizens of that nation.

Of course, readers realize that the events depicted above are fictitious.

They also recognize that by simply changing the locations of the terrorists' camps from California and Washington to Libya and Somalia (respectively) and changing the country deploying special forces troops from an unnamed Middle Eastern nation to the United States, this account describes exactly what happened last Saturday.

President Obama's decision to send military forces — albeit small, highly trained special operations units — into the sovereign territory of a country with whom the United States is not at war is itself an act of war.

In fact, the action violates hundreds of years of settled international laws regarding the respect due to the sanctity of national borders.

Admittedly, sending troops into a nation to kill or capture alleged al-Qaeda operatives is morally preferable to lighting up whole villages with Hellfire missiles launched from Predator drones.

That said, choosing the lesser of two evils is still choosing evil, and that is not the route that the United States should elect to travel if we are sincerely committed to protecting ourselves from the retribution and blowback that have been the bountiful harvest of the seeds sown in the so-called War on Terror.

The question, then, posed by neocons and others who champion the "kill them all and let Allah sort them out" gambit, is how can we bring to justice those individuals reasonably suspected of having planned or participated in the massacre or attempted massacre of American citizens?

First, violating the Constitution is never an answer; neither is carrying out acts of war against non-belligerent nations who are — whether willingly or not — harboring those public enemies.

Just as no one in this country would sit idly by and accept the reality of the fictional events described at the opening of this article, we should not expect to be able to get away with flouting international law simply because we have the world's most fearsome military.

Fortunately, there is a means of exposing suspected terrorists to justice, even when they are hiding out in nations that refuse to extradite them to the United States for that purpose.

Article I, Section 8, Clause 11 of the Constitution authorizes Congress to "grant Letters of Marque and Reprisal."

This is a power that is rarely discussed and almost never exercised.

Before applying this constitutional grant of power to the waging of the "War on Terror," I'll start with a bit of history of this unfamiliar provision of the Constitution.

In the 13th century, King Henry III of England began issuing what were then known as privateering commissions. According to Dutch jurist and natural rights philosopher Hugo Grotius, letters of marque and reprisal were similar to a declaration of a "private war." By issuing such a letter, the sovereign of one nation commissioned a private individual or individuals to enter territory governed by a foreign prince and exact retribution against person or persons believed to have committed a great wrong against the subjects of the authorizing monarch.

The American concept of letters of marque and reprisal was substantially informed by the *Commentaries on the Laws of England* published in 1765 by English jurist William Blackstone. In Section I, page 249 of his influential work, Blackstone wrote:

> These letters are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words in themselves synonymous and signifying a taking in return) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. Indeed this custom of reprisals seems dictated by nature herself; and accordingly we find in the most ancient times very notable instances of it.

American founder and legal practitioner St. George Tucker summarized Blackstone, writing that letters of marque and reprisal were justified "where individuals of one nation are oppressed or injured by those of another, and justice is denied by the state to which the author of such oppression or injury belongs."

In April 1781, during the War for American Independence, the Continental Congress passed a resolution giving to "captains or commanders of private armed vessels commissioned by letters of marque or general reprisals" the following instructions and guidelines:

> You may by force of arms attack, subdue, and seize all ships, vessels and goods, belonging to the King or Crown of Great Britain, or to his subjects, or others inhabiting within any of the territories or possessions of the aforesaid King of Great Britain, on the high seas, or between high-water and low-water marks. And you may also annoy the enemy by all means in your power, by land as well as by water, taking care not to infringe or violate the laws of nations, or laws of neutrality.

The use of this constitutionally sound method for capturing and trying enemies of the state hiding out in less-than-friendly countries is not just a matter of history and theory, however.

In October 2001, then-Representative Ron Paul (R-Texas) sponsored H.R. 3074, the Air Piracy Reprisal and Capture Act of 2001, and H.R. 3076, September 11 Marque and Reprisal Act of 2001. Paul introduced a similar measure in 2007.

These bills would authorize the president of the United States:

> to commission, under officially issued letters of marque and reprisal, so many of privately armed and equipped persons and entities as, in his judgment, the service may require, with suitable instructions to the leaders thereof, to employ all means reasonably necessary to seize outside the geographic boundaries of the United States and its territories the person and property of Osama bin Laden, of any al Qaeda co-conspirator, and of any conspirator with Osama bin Laden and al Qaeda who are responsible for the air piratical aggressions and depredations perpetrated upon the United States of America on September 11, 2001, and for any planned future air piratical aggressions and depredations or other acts of war upon the United States of America and her people.

All these constitutionally sound bills died in committee and the "shock and awe" of the "War on Terror" waged on.

Imagine, for a moment, if the bills — any of them — had passed. Instead of spending billions and billions of dollars on an endless, undeclared, and unconstitutional war that has caused the needless deaths of thousands of innocent men, women, and children, as well as the deaths of thousands of American soldiers, sailors, marines, and airmen, the former public enemy number one — Osama bin Laden — could have been tracked and captured by any one of a number of private organizations with operatives trained to carry out these types of missions.

It is likely, that we would have exchanged all that death, destruction, and debt for a quick capture, trial, and execution of the man believed to have led the legion of terrorists who fly the flag of al-Qaeda.

Or, as retired Air Force lieutenant colonel and former congressional candidate Karen Kwiatkowski wrote in 2007 in the book *Ron Paul and the New Revolutionaries*, "Had Ron Paul's proposed legislation been acted upon in 2001, as a key part of the so-called 'War on Terror,' we would probably already have concluded the trial of Osama bin Laden and he would likely be sitting in a lonely cell in Florence, Colorado."

That, sadly, was not the way the story played out in real life.

Knowing now the manner in which bin Laden met his demise, the use of letters of marque and reprisal would have seemed the perfect plan. The operation could have been carried out under similar circumstances, only instead of sending SEAL Team Six and violating the Constitution and international law, the president, under authority from Congress, could have empowered a private army to do the job and kept this country on strong constitutional footing and prevented over a decade of blowback.

Consecutive presidents have explained that since 9/11 we face a "new kind of enemy." Isn't this type of supranational foe exactly the kind that could be best fought using the immense and elastic power of issuing letters of marque and reprisal?

Add to the mix the fact that because of the multi-million-dollar bounties offered for the capture of these public enemies, these "privateers" possessing letters of marque and reprisal would perform acts that are simultaneously selflessly patriotic and selfishly enriching.

Regardless of the rationality of this approach, the claque of neocons in Congress and without (not to

mention their billion-dollar benefactors in the military-industrial complex) would never embrace it. They deny the role of blowback in the ongoing terrorist activities aimed at Western concerns. Furthermore, the shrinking of markets through the reduction in enormous regional combat operations is unacceptable, regardless of the collateral damage, including that done to the rule of law and the Constitution.

The irrefutable fact remains, however, that the issuing of letters of marque and reprisal is an effective and available constitutional alternative to the launching of missiles from drones or "boots on the ground" inside the borders of foreign countries with whom we are not at war.

This tactic is commendable not only for the protection of constitutional limits on power, the respect for international law, and the protection of the American people from terrorists who think they can run from justice, but it would have already prevented the tragedy that is the loss of thousands of American fighting men and women and civilians. Not to mention, sadly, the lamentable and lasting psychological impact the waging of this war has had on those servicemen and -women who returned home.

Americans have the right and the obligation to demand that those elected to act in our name defend this nation, and that they do so in a moral and constitutional manner.

The issuing of letters of marque and reprisal would achieve all these important goals.

Photo is of Osama bin Laden's compound in Pakistan

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He is the host of The New American Review radio show that is simulcast on YouTube every Monday. Follow him on Twitter @TNAJoeWolverton and he can be reached at jwolverton@thenewamerican.com*