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Legal Sidebar

Letters of Marque and Reprisal (Part 2): Drafting History and U.S. Practice

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Article I, Section 8, Clause 11 of the Constitution authorizes Congress to "grant letters of Marque and Reprisal[,]" which are instruments that permit private citizens to seize enemy vessels and their cargos and crew. This Legal Sidebar is the second installment in a two-part series that discusses Congress's power over letters of marque and reprisal. Part 1 provides an overview of letters of marque and reprisal and places the instruments in historical context. This installment examines the instruments' role in the drafting of the Constitution, discusses their rise and decline in U.S. practice, and outlines proposals to revive the instruments in modern contexts.

Letters of Marque and Reprisal and the Drafting of the Constitution

At the 1787 Constitutional Convention in Philadelphia, the Framers gave the legislative branch an unqualified power to grant letters of marque and reprisal while denying that power to states in all circumstances. This allocation of authority did not prompt significant debate during the Constitution's framing—possibly because the Framers had a successful experience with privateering during the Revolutionary War and the Articles of Confederation had also given the national government power to issue the instruments.

Although several delegates to the Convention, including George Washington, had made profitable investments in privateering enterprises during the revolutionary period, there was no recorded debate over letters of marque and reprisal during the first three months of the Convention. The Convention's Committee of Detail also did not include the power to issue letters of marque and reprisal as one of Congress's enumerated authorities in its first draft of the Constitution. It was not until the twelfth week of the Convention that a delegate, Elbridge Gerry of Massachusetts, made the first mention of the instruments. During a debate over the powers that the Committee of Detail's first draft assigned to the legislative branch, Gerry recommended inserting a clause giving Congress power to issue letters of marque and reprisal because he did not believe Congress's war powers, as drafted, provided that authority. Gerry moved to refer the issue to the Committee of Detail, and his motion passed unanimously and without debate.

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Gerry's proposal ultimately made its way to another committee, chaired by New Jersey delegate David Brearley, which was tasked with addressing unresolved matters. Brearley's committee recommended adding a clause empowering Congress to "grant letters of marque and reprisal" immediately after the Declare War Clause. The delegates unanimously agreed to the change, at which point the Marque and Reprisal Clause took its final substantive form in Article I, Section 8, Clause 11 of the Constitution.

Denial of State Power over Letters of Marque and Reprisal

As was the case under the Articles of Confederation, the Constitution both grants Congress power to issue letters of marque and reprisal and prohibits states from issuing them. This denial of state power appears to have been driven by concerns that the instruments could lead to war between the United States and the country targeted by state-authorized privateers. Rather than permit the states to authorize conduct that might lead to war, Article I, Section 10 of the Constitution prohibits states from issuing the instruments. The Articles of Confederation contained a similar prohibition, but, unlike the Constitution, the Articles authorized states to issue letters of marque and reprisal after Congress declared war.

Eliminating states' power to issue the instruments even in a war declared by Congress resulted in another textual distinction between the Articles of Confederation and the Constitution. Whereas the Articles of Confederation gave Congress exclusive power to issue the instruments "in times of peace[,]" but gave Congress and the states joint power to issue the instruments in times of war, the Constitution does not contain any such distinction. Instead, the Constitution grants Congress exclusive authority over the instruments in all scenarios. According to James Madison in *The Federalist No. 44*, these changes were intended to improve uniformity in the United States' foreign affairs and ensure that the national government had control over any hostile acts for which the country might be held responsible.

One early constitutional commentator who also served as a Supreme Court Justice, Joseph Story, questioned whether the Marque and Reprisal Clause was redundant because the power over the instruments was already subsumed under Congress's power to declare war. The Constitution's Framers likely included the Marque and Reprisal Clause out of "extreme solicitude" or caution, Story reasoned. Story also observed, however, that the clause may have served the independent purpose of creating a system to redress grievances against foreign nations that did not rise to the level of a war. Letters of marque and reprisal are "often a measure of peace, to prevent the necessity of going to war[,]" Story reasoned—a distinguishing feature that may have justified their own dedicated clause.

Letters of Marque and Reprisal in United States Practice

The United States regularly issued letters of marque and reprisal during the first few decades after the Constitution was adopted. Congress enacted its first statute authorizing privateering in 1798 during the Quasi War with France. The 1798 law authorized the President to issue "special commissions" to the "owners of private armed ships and vessels of the United States" permitting them capture or destroy armed French vessels and to recapture American vessels that had been seized by the French. Four years later, Congress authorized the President to issue special commissions to seize and claim the goods of pirates' vessels disrupting American commerce in the Bey of Tripoli in the Mediterranean Sea.

As part of its declaration of war against Great Britain in the War of 1812, Congress authorized President James Madison to issue letters of marque and reprisal "in such form as he shall think proper[.]" Eight days later, Congress passed a statute setting out the terms and conditions on which the President could issue the commissions. President Madison supplemented the statutory requirements with instructions on issues related to respecting neutral vessels' rights and acting with appropriate "justice and humanity"

when using armed force. Privateering was especially prominent and successful during the War of 1812 with commissioned private vessels capturing more than three times as many British ships than were captured by American naval vessels.

Congress next authorized commissions for privateering in 1815 against the Dey of Algiers to protect American shipping interests in the Mediterranean. Finally, in its last authorization for letters of marque and reprisal, Congress permitted the President to issue the instruments during the Civil War, but President Lincoln never exercised that authority. Although the Confederacy used privateers to attack vessels from Union states, the Lincoln Administration declined to act on its authority to issue commissions targeting Confederate vessels. This decision was based, in part, on strategic reasons: the Union Navy adopted a blockade-focused strategy that was better executed by coordinated government naval forces than by independently operating privateers.

The Decline of Privateering and Proposals for its Revival

By the latter half of the 19th century, the practice of privateering faded. Commissioning of private parties to use military force increasingly fell out of favor in international practice, and nearly all major European powers renounced the practice. In an 1856 international peace conference, a group of prominent maritime nations issued a declaration, known as the Declaration of Paris, providing that "privateering is and remains abolished." Critics of privateering cited its negative impact on global trade and humanitarian concerns with privateers' methods. As one 19th century American commentator on admiralty law stated, privateering was "liable to gross abuses" and "encourage[d] a spirit of lawless depredation" and plundering. Some U.S. officials also expressed these critiques, but President Franklin Pierce declined to sign the Declaration of Paris due to fears that abolishing privateering would provide a military advantage to European powers that had stronger navies and did not need to rely on private vessels to achieve maritime military goals.

Although the United States did not renounce its legal right to engage in the practice, privateering largely faded as a strategic option in the late 19th century as a result of technological and policy developments, including a U.S. program to build a significantly larger and more advanced naval force. Developments in international practice and law also cast doubt on whether privateering remains compatible with international law. At the beginning of the 20th century, Congress removed the financial incentive for privateering by abolishing prize money in U.S. domestic law. Observers and Members of Congress have sometimes called for revitalization of the practice by issuing letters of marque and reprisal designed to address contemporary problems, such as responding to international acts of aggression, apprehending terrorists overseas, combatting modern piracy, and responding to cyberattacks, but no legislation authorizing the instruments has been passed since the 1860s.

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