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## On the Commander-In-Chief Power

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## ON THE COMMANDER IN CHIEF POWER

DAVID LUBAN\*

BRADBURY: *Obviously, the Hamdan decision, Senator, does implicitly recognize that we're in a war, that the President's war powers were triggered by the attacks on the country, and that [the] law of war paradigm applies. That's what the whole case was about.*

. . . .

LEAHY: *Was the President right or was he wrong?*

BRADBURY: *It's under the law of war that we . . .*

LEAHY: *Was the President right or was he wrong?*

BRADBURY: *. . . hold the President is always right, Senator.*

—exchange between a U.S. Senator and a Justice Department lawyer<sup>1</sup>

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\* University Professor and Professor of Law and Philosophy, Georgetown University. I owe thanks to John Partridge and Sebastian Kaplan-Sears for excellent research assistance; to Greg Reichberg, Bill Mengel, and Tim Sellers for clarifying several points of American, Roman, and military history; to Marty Lederman for innumerable helpful and critical conversations; and to Vicki Jackson, Paul Kahn, Larry Solum, and Amy Sepinwall for helpful comments on an earlier draft. Finally, I wish to thank Georgetown law students Mark Aziz, Matthew King, and Anna Melamud for research assistance on the final version.

1. *Justice Department Lawyer to Congress: 'The President Is Always Right'* (C-Span television broadcast July 11, 2006), available at <http://thinkprogress.org/2006/07/12/president-always-right> (showing exchange between Steve Bradbury, Acting Deputy Att'y Gen., Department of Justice Office of Legal Counsel, and Senator Patrick Leahy (D-VT) during hearing on detained enemy combatant rights before the U.S. Senate Judiciary Committee).

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*Let no man be so rash as to suppose that, in donning a general's uniform, he is forthwith competent to perform a general's function; as reasonably might he assume that in putting on the robes of a judge he was ready to decide any point of law.*

—Dennis Hart Mahan, Professor of Civil and Military Engineering at West Point from 1832–1871<sup>2</sup>

## I. INTRODUCTION: THE ILL-UNDERSTOOD COMMANDER IN CHIEF

### A. THE COMMANDER IN CHIEF IN THE GLOBAL WAR ON TERROR

Since the attacks of September 11, 2001, the Bush Administration has made frequent dramatic appeals to the president's commander in chief power, arguing that his decisions as military commander in chief in the global war on terror cannot and should not be second-guessed by the other branches of government. The "cannot" comes from Article 2 of the Constitution, which assigns the commander in chief authority solely to the president.<sup>3</sup> Presumably this is what Mr. Bradbury, quoted in the epigraph above, means when he asserts that under the law of war the president is always right. The "should not" comes from elementary common sense. It seems self-evident that legislators and judges lack institutional competence to kibitz commanders about military matters. Their meddling would invite disaster. In its strong "cannot" form, the argument holds that it would be unconstitutional to enforce otherwise-valid laws that constrain the commander in chief's pursuit of the war—a separation of powers argument for what has come to be known as the "commander in chief override" of other laws. In its weaker "should not" form, the argument holds that other branches of government, particularly courts, must adopt an extremely deferential stance toward the commander in chief's decisions. Lawyers and legislators simply do not backseat drive on the battlefield.

Perhaps the best-known example of the former argument appeared in the 2002 torture memo by the Justice Department's Office of Legal Counsel ("OLC"), leaked in 2004 just weeks after Abu Ghraib. In OLC's words:

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2. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 221 (1957) (quoting Dennis Hart Mahan).

3. U.S. CONST. art. II, § 2.

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.<sup>4</sup>

Thus, federal statutes making torture a felony would be unconstitutional if applied to interrogations authorized by the commander in chief.<sup>5</sup> Although the torture memo was withdrawn in the face of scandal,<sup>6</sup> the opinion OLC substituted for it carefully refrained from commenting on its override argument, neither endorsing it nor repudiating it.<sup>7</sup> But an earlier OLC opinion from September 25, 2001, which was never withdrawn, also asserts that the president has "plenary constitutional power to take such military actions as he deems necessary and appropriate . . ."<sup>8</sup> Commenting on the War Powers Resolution and Joint Resolution passed by Congress in the wake of 9/11, that OLC opinion added: "Neither statute, however, can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."<sup>9</sup> Thus, the commander in chief override argument still appears to be the Justice Department's official position even after withdrawing the torture memo. Its theory appears to underlie signing statements the president has attached to legislation, declaring that he will construe provisions consistent with his constitutional authority as commander in chief, by which he evidently means that he reserves the right to disregard restrictions that in his opinion impinge on his commander in chief authority.<sup>10</sup>

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4. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 207 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *TORTURE PAPERS*].

5. The statutes in question are 18 U.S.C. §§ 2340–2340A (2000 & Supp. V 2005).

6. See STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* 165, 225 (2006).

7. "Because the discussion in that memorandum concerning the President's Commander-in-Chief power . . . was—and remains—unnecessary, it has been eliminated from the analysis that follows." Memorandum from Daniel Levin to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), reprinted in *THE TORTURE DEBATE IN AMERICA* 361, 362 (Karen J. Greenberg ed., 2006).

8. Memorandum from John C. Yoo to Timothy Flanigan, Deputy Counsel to the President (Sept. 25, 2001), reprinted in *TORTURE PAPERS*, *supra* note 4, at 1, 23–24.

9. *Id.* at 24.

10. For example, the president attached such a signing statement to post-Abu Ghraib legislation requiring safeguards to the independence of military lawyers. George W. Bush, *Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, 40 WEEKLY COMP.

These are arguments about the president and the Congress.<sup>11</sup> What about the president and the judiciary? Here, claims about the commander in chief's power characteristically assume a different form. They are claims that courts lack competence to second-guess military commanders, and therefore courts should defer to wartime decisions by the commander in chief. In this form, the argument played a role in several decisions early in the war on terror, in which U.S. citizens who had been captured, then classified by the executive branch as enemy combatants, sought to challenge their detention. The district court in *Padilla v. Bush*, like the circuit court and Supreme Court in *Hamdi*, deferred to the executive branch determination that Jose Padilla and Yaser Hamdi were unlawful enemy combatants, because (in the Supreme Court's words), "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned . . . for making them."<sup>12</sup> In the same way, the U.S. District Judge determining that John Walker Lindh (a U.S. national who belonged to the Taliban) was unprotected by the Geneva Conventions wrote: "It is important to recognize that the deference . . . is appropriately accorded . . . to the President's application of the treaty to the facts in issue. Again, this is warranted given the President's special competency in, and constitutional responsibility for . . . the conduct of overseas military

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PRES. DOC. 2673 (Nov. 1, 2004), available at <http://www.coherentbabble.com/signingstatements/Statements/SShr4200.pdf>. The same was true with the McCain Amendment, which forbids cruel, inhuman, or degrading treatment of foreign detainees. George W. Bush, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. On President Bush's expansive use of signing statements, see Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

11. The most exhaustive and definitive discussion of the commander in chief override, and more generally the question of whether Congress can constrain the president in his warmaking capacity, is David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) [hereinafter, Barron & Lederman, *Framing the Problem*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *Constitutional History*]. My own views are largely in line with those developed in Barron and Lederman's two-part article, although our arguments and approaches are different. Very similar to Barron and Lederman is Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War* (Univ. of Pittsburgh Sch. of Law Working Paper Series, Paper No. 74, 2007).

12. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004). See *Padilla v. Bush*, 233 F. Supp. 2d 564, 606–08 (S.D.N.Y. 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). Although the *Hamdi* Court does find that Hamdi must be afforded process to challenge his detention, he gets a reduced process that "would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." 542 U.S. at 534. Shifting the burden of proof in this way would provide "due regard to the Executive." *Id.*

operations.”<sup>13</sup>

And not just overseas military operations, because the Global War on Terror (“GWOT”) is unlike other wars. We fight it wherever the terrorists are, and the terrorists might be anywhere. They pick the battlefield, so the battlefield potentially encompasses the entire Earth. It follows that the commander in chief power, and the nearly unreviewable authority it encompasses, knows no geographical limits. For example, Padilla was arrested in a Chicago airport, yet the government subsequently asserted that this was not an ordinary criminal arrest of a U.S. citizen in the United States governed by constitutional criminal procedure.<sup>14</sup> It was a wartime capture of an unlawful enemy combatant who could be held incommunicado for years in order to interrogate him and render him militarily harmless. What made it a battlefield capture was a determination by the commander in chief that Padilla, although a U.S. citizen, was also an enemy combatant on a military mission.<sup>15</sup> Combining the authority of a battlefield commander with the expansive definition of the battlefield in the GWOT creates a vast scope of plenary power for the president. All of this purportedly follows from the constitutional designation of the president as commander in chief, combined with the bitter realities of the GWOT.

Furthermore, the president’s decisions can fall under the commander in chief power even if they do not look like military decisions. Padilla, for example, was arrested by law enforcement officials, not captured by the military, and the conclusion about his enemy combatant status was drawn by civilian officials in the Pentagon.<sup>16</sup> Determining what legal category applies to Padilla looks like a judicial job, not a military job. However, Judge Mukasey wrote in *Padilla v. Bush* that deference to the commander in chief

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13. *United States v. Lindh*, 212 F. Supp. 2d 541, 556 (E.D. Va. 2002).

14. *See Padilla*, 233 F. Supp. 2d at 564, 573–74.

15. *Id.* at 596–97.

16. *See id.* at 569. The evidence the government submitted consisted of an affidavit by a civilian official, Michael Mobbs, who was not made available for cross-examination. *See id.* at 572. A Mobbs affidavit was likewise the sole evidence the government presented against Hamdi. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002). Mobbs (a political appointee and former law partner of then-Under Secretary of Defense for Policy Douglas Feith) has no military experience and had not been in Afghanistan; his expertise was Russia, and his chief Pentagon responsibilities were planning on how to deal with oil-well fires in Iraq. *See* RAJIV CHANDRASEKARAN, *IMPERIAL LIFE IN THE EMERALD CITY: INSIDE IRAQ’S GREEN ZONE 35* (2006) (noting that Mobbs had not visited the Middle East); *Bio: Michael H. Mobbs*, FOXNEWS.COM, at <http://www.foxnews.com/story/0,2933,84942,00.html> (last visited Mar. 20, 2008) (noting that Mobbs is a Russia and Eastern Europe expert). Thus, the connection between the courtroom evidence and military expertise or “the battlefield” was nil.

is due not because judges are not personally able to decide whether facts have been established by competent evidence, or whether those facts are sufficient to warrant a particular conclusion by a preponderance of evidence, or by clear and convincing evidence, or beyond a reasonable doubt. Indeed, if there is any task suited to what should be the job skills of judges, deciding such issues is it. Rather, deference is due because of a principle captured in another “statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence.”<sup>17</sup>

It is not the court’s commission to decide independently whether a captive U.S. citizen is indeed an unlawful enemy combatant, nor—more remarkably—whether the president “was in fact exercising a power vouchsafed to him by the Constitution and the laws.”<sup>18</sup> Apparently, the commander in chief power includes the power to decide when presidential actions fall under the commander in chief power. If challenged in court, the executive needs to provide only “some evidence,” the lowest burden of proof;<sup>19</sup> and this deferential stance toward the executive is actually less deferential than the government’s initial post-9/11 position that courts have no mandate at all to review assertions made under the commander in chief power.<sup>20</sup>

#### B. FUSED DOMINION

Whether claims such as these arguments for judicial deference, or the commander in chief override, succeed depends on how extensive the commander in chief authority really is, and this Article aims to shed light on that question. The broader the commander in chief’s authority, the more plausible become the arguments for a commander in chief override and judicial deference to the president’s legal determinations about captives. The narrower the authority, the less likely it is that it can prevail over otherwise-legitimate actions by the legislative and judicial branches. One way of posing the question is to ask whether the commander in chief power includes the entire realm of national security decisions—that would, perhaps, be the broadest definition of the power—or nothing more than a narrow power of military command. Without an answer to this question,

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17. *Padilla*, 233 F. Supp. 2d at 607–08 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981)).

18. *Id.* at 608.

19. *Id.*

20. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) (describing the government’s position).

assertions like Judge Mukasey's about the president's "commission" necessarily beg the crucial question of what that commission includes.<sup>21</sup>

The Commander in Chief Clause itself gives away remarkably little. It reads:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . .<sup>22</sup>

That is all. On its face, the clause tells us where the commander in chief authority is located: in the president. But the clause tells us nothing about what the commander in chief power encompasses. It names and assigns an office without specifying its functions.<sup>23</sup> Nor does it tell us, directly or indirectly, what the political theory underlying the Commander in Chief Clause is or should be. The Commander in Chief Clause is a sphinx, and specifying its powers and the theory generating them is its riddle.

All we learn from the words of the Constitution is that the highest military authority belongs to the highest civilian office: the chief executive and head of state is also the first general and first admiral. Let me call such combinations of military and civilian supremacy "fused dominion." Historically, there is nothing exceptional about fused dominion. Quite the contrary: states throughout history combined political and military dominion in a single person. But, precisely because fused dominion appears everywhere, across wildly different forms of government and society, to say that the highest military authority belongs to the highest civilian office is to say very little. The meaning of fused dominion varies dramatically when we move from one system of government to another. Fused dominion characterizes the hero-rulers of epic poetry, ancient warrior-kings and warlords, feudal monarchs, and modern military dictators. Throughout humanity's long and bloody history, political dominion went hand in hand with military prowess. In all such societies, fused dominion represented a consolidation of powers in a single individual. Whether consolidation meant that military prowess was the legitimacy condition for monarchy—the ancient model—or that civil

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21. *Padilla*, 233 F. Supp. 2d at 608.

22. U.S. CONST. art. II, § 2, cl. 1.

23. The torture memo asserts that "[t]he Framers understood the Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander." Memorandum from Jay S. Bybee to Alberto R. Gonzales, *supra* note 4, at 205. As we shall see, that is a deeply debatable assertion, and, in any case, it begs the question of what the fullest range of power understood at the time of the ratification actually includes.



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authority was absorbed into military command—the modern military dictatorship invoking emergency powers or martial law—the *consolidationist* concept of fused dominion (as I shall call it) enhances the powers of one office by rolling in the powers of the other.

But fused dominion also includes forms of government where civilian leaders whose own powers are limited control and check the military without functionally fusing with the military: the very arrangement that military dictatorships overthrow. Civilian control of the military grows out of a far different political theory than from consolidationism. The theory rests not on the need for a warrior-king but on the danger of military coup and military rule that an autonomous military might pose. Civilian control of the military goes together with other aspects of separation of powers, all of which are designed to use departments of government to check the power of other departments. It is, I will say, a *separationist* rather than a consolidationist theory.

The U.S. Constitution is separationist in its conception of fused dominion, as I propose to demonstrate. It assigns the commander in chief power to a civilian office—the highest civilian office, to be sure, but a civilian office nonetheless. Military prowess is neither a formal nor an informal requirement of the presidency. Thus, if we ask whether assigning the commander in chief power to the president rests on an institutional competence argument, the answer is no. In fact, the separationist theory is in a crucial sense the *opposite* of an institutional competence argument. The purpose is to ensure civilian control of the military, and thus to wrench the commander in chief power out of the hands of the competent professionals (the generals) and put it into the hands of amateurs (the civilians). Conceivably, under some circumstances this arrangement might impede military effectiveness—whether it does is debatable—but a democratic republic may well think this a rational trade-off of military effectiveness for whatever political goods civilian government secures.

This Article will examine the separationist and consolidationist theories, both theoretically and historically, to argue that in a democratic republic the most defensible version of commander in chief authority is a separationist conception that is far narrower than the Bush Administration believes. It was understood as a limited authority at the time of the constitutional framing, and the subsequent evolution of the U.S. military has not broadened it.

The commander in chief authority is narrow in at least three ways. First, the Constitution hives off some key military powers, and assigns

them either to Congress or the states—clear structural evidence that its conception of civilian control is separationist. Second, the commander in chief power is assigned to a rule of law official, one who is charged by the Constitution to “take care that the laws be faithfully executed.”<sup>24</sup> Third, the unformalized understanding of civilian-military relations from the founding era to the present has always been that the president should respect military professionalism. Civilian leaders should not micromanage military decisions. They need to monitor the military, for otherwise civilian control means nothing. But they should interfere only in circumstances when military strategy and tactics carry significant political consequences—for example, when President Truman overruled MacArthur’s aggressive strategy in the Korean War for fear that attacks on Chinese targets would bring the USSR into the war and escalate it into World War III.<sup>25</sup>

This unformalized understanding of the president’s restricted military role is the most important interpretive guide to the cryptic Commander in Chief Clause. The consolidationist image of a civilian commander in chief is that of a hands-on, operational military strategist—a fighting president. If the point of the Clause is to endow a fighting president, the commander in chief power might well be taken as shorthand for a large and uncircumscribed set of executive war powers, the tools of the trade necessary for the commander to pursue a war design. That is implicit in Mr. Bradbury’s explanation that “the President’s war powers were triggered by the attacks on the country . . . .”<sup>26</sup>

But the separationist image of the civilian commander in chief is totally different. For separationists, the point of the Commander in Chief Clause was never to install a civilian as master strategist. It was to ensure civilian control of the military as part of a system of checks and balances. No “war powers” beyond the narrow power of military command are implicit in the Commander in Chief Clause; the phrase “commander in chief” is not a synecdoche for anything beyond what it says.<sup>27</sup> If anything,

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24. U.S. CONST. art. II, § 3.

25. See STANLEY WEINTRAUB, *15 STARS: EISENHOWER, MACARTHUR, MARSHALL: THREE GENERALS WHO SAVED THE AMERICAN CENTURY 447–54* (2007).

26. See *supra* note 1 and accompanying text.

27. On this point, I may be in disagreement with Barron and Lederman, who believe “that the Commander in Chief Clause does confer broad substantive war powers on the President.” Barron & Lederman, *Framing the Problem*, *supra* note 11, at 770. They do acknowledge that the scope of these war powers is unclear from the text, and so the extent of our disagreement is uncertain. See *id.* Their term for what the commander in chief does is *superintendence* of the military. *E.g.*, *id.* at 767. I agree with the connotations of this word, but it seems to me that superintending the military need not include broad substantive war powers. It does, no doubt, include powers to arrange logistics and training, as

it means less than what it says, because of the unformalized understanding that a military amateur should not make a habit of telling the professionals how to do their job, even if the amateur has the constitutional authority to do so. That is the well-taken point of the second epigraph quoted above, Dennis Hart Mahan's warning: "Let no man be so rash as to suppose that, in donning a general's uniform, he is forthwith competent to perform a general's function."<sup>28</sup> As we will see, the warrior-king notion of fused dominion was already dying a century before the U.S. Constitution, as rulers gradually ceased being generals and generals abandoned their fighting role on the battlefield.

One obvious reply is that looking only to the president's personal competence in military matters takes the Commander in Chief Clause too literally. Plainly, presidents do not go it alone. Their military competence consists of the collective wisdom of the entire national security apparatus, which of course is formidable.

This response does not relieve the difficulty, though. It will certainly not mollify separationists concerned about executive overreaching to be told that the commander in chief power requires deference to the president because he makes his decisions by consulting a large, secretive bureaucracy. Furthermore, nothing guarantees that the president's decisions reflect the collective wisdom of expert advisors, because nothing obligates the commander in chief to heed anyone else. This point is by no means hypothetical, because there is substantial evidence (which I discuss later in this Article) that in both the run-up to the Vietnam War and in the current Iraq war crucial decisions were made by Presidents Kennedy, Johnson, and Bush in conjunction with a small handful of civilian counselors, deliberately holding expert military advice at arm's length.<sup>29</sup> To cite an extreme case, journalist Bob Woodward reports that President George W. Bush asked for the opinions of only two people before deciding to go to war with Iraq.<sup>30</sup> In any event, the less a president's decisions pertain to core military functions, the less it matters that he is surrounded by military experts. As Judge Mukasey noticed, placing Padilla in a legal category based on evidence is not a uniquely military task, and there is no reason to

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well as the ministerial functions needed to run an army. But in my view, these belong to the narrow power of military command.

28. See *supra* note 2 and accompanying text.

29. See *infra* notes 266–78 and accompanying text.

30. BOB WOODWARD, *STATE OF DENIAL* 389 (2006). One of the two people was then-National Security Advisor Condoleezza Rice; Woodward does not name the other. *Id.*

suppose that generals are better at it than judges.<sup>31</sup>

Finally, there is an important sense in which we must take the Commander in Chief Clause literally. The two things it unarguably does are, first, ensure that the military will have only one commander in chief rather than a collective commander in chief, and second, designate the president, personally, as the individual who holds that office. It is not an office that can be subdivided, and the question of whether it rests on institutional competence is ultimately a question about the individuals who hold it.

Misunderstanding the theory behind civilian control of the military leads to legal mistakes, such as the commander in chief override, or the courts' deference to the president on nonmilitary decisions, such as whether to classify U.S. citizens as enemy combatants, simply because the president is the commander in chief. But misunderstanding the theory may lead to a larger deformation in our political culture: an erosion of popular commitment to the rule of law in favor of militarism and militarist fantasy.<sup>32</sup> After all, if a president struts and frets his hour upon the stage wrapped in the guise of a warrior, and represents his political decisions as military choices, he implicitly invites citizens to regard life as war and force as the first resort. He likewise invites them to tender the president the unquestioned deference due to battlefield commanders, and to redefine political opposition as subversion or disloyalty.

But under our separationist conception, the American president is a politician supervising a professional military, nothing more. It is dangerous anachronism to invest this politician with the attributes of Alexander the Great or Cincinnatus. As Justice Jackson warned in *Youngstown Sheet & Tube Co. v. Sawyer*, it might lead us to mistake the commander in chief of the army and navy for the "Commander in Chief of the country, its industries and its inhabitants."<sup>33</sup> (Consider Marilyn Monroe's nutty but culturally revealing explanation to her therapist of why she had an affair with President Kennedy: "Marilyn Monroe is a soldier. Her commander in chief is the greatest and most powerful man in the world. The first duty of a soldier is to obey her commander in chief. He says, 'Do this.' You do this.

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31. See *Padilla v. Bush*, 233 F. Supp. 2d 564, 607–08 (S.D.N.Y. 2002).

32. For a masterful book on this theme, see ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005).

33. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring).

He says, 'Do that.' You do that."<sup>34</sup>)

My focus is the commander in chief power, not executive power more generally. I do not propose to examine the president's authority to conduct foreign affairs, even though it might be thought to subsume the commander in chief authority. Nor do I examine the much-debated theory of the unitary executive, which likewise might be thought to entail a broad commander in chief power because of the unitary executive's supposed authority over all executive-branch agencies including the Defense Department. I ignore these broader questions because the commander in chief authority raises unique issues about civilian-military relations that cannot be settled by more abstract arguments about the scope of executive power. It would beg the question to derive conclusions about this uniquely problematic presidential power formalistically, by treating them as mere corollaries of grand unified-field theories of executive power. After all, it would be equally plausible to treat the president's military powers as exceptions or limitations to theories largely tailored with other governmental functions in mind. The theology of the Vesting Clause holds no clues to the riddle of the Commander in Chief Clause.

Understanding the commander in chief power will require a detailed historical inquiry—one that includes not only the question of what the founding generation thought a commander in chief does, but also broader questions about military history and the history of political ideas. For the notion of a civilian commander in chief is a political idea as well as a military one. The nature of military command has changed over time, and so has its connection with political leadership. Ultimately, though, the idea of civilian command grows from perennial questions about the relationship between a society and its warriors, and we must begin by framing those questions.

In Part II.A I lay out the basic political theory behind civilian control of the military, and in Part II.B I survey some of the history (intellectual, political, and military) behind fused dominion. Part II.C examines the centuries-long process by which the roles of the ruler and the warrior separated from each other. One important conclusion is that this process had nearly run its course by the time of American Revolution, so that the consolidationist model of the warrior-ruler was already anachronistic. Part III demonstrates that the framers and ratifiers of the American Constitution were fully engaged with the problem of civilian control of the military, and

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34. 'I Have Control—Control of My Life,' L.A. TIMES, Aug. 5, 2005, at A20.

accepted all the components of the separationist argument.

In Part IV, I turn to the contemporary theory of civilian control of the military. Part IV.A argues that the three preoccupations of the framers and ratifiers—the dangers of military powermongering, the dangers of presidential abuse of military powers, and the dangers of military adventurism—remain today. Part IV.B demonstrates that the argument for separationism as the solution to these problems is likewise just as strong today. In Part IV.C, I consider the arguments of modern theorists of civilian-military relations. The starting point is Samuel Huntington's famous reformulation of the issue in *The Soldier and the State*, as the problem of determining "the relation of the expert to the politician," and his proposed solution, that civilian control requires "the maximizing of military professionalism."<sup>35</sup> Notably, Huntington criticizes the framers' version of separationism. Nevertheless, Huntington's approach insists on strong separation of the political and military functions, and that makes it fully consistent with separationism's deflated, anti-heroic conception of the civilian commander in chief.

In recent years, students of civil-military relations have criticized Huntington, and it will be necessary to examine their criticisms. Eliot Cohen, in particular, has defended a much more activist role for the civilian commander in chief—one closer to the Bush administration's conception—and in Parts IV.D and IV.E I examine Cohen's more consolidationist argument. I argue that the historical evidence Cohen offers justifies only a modest version of his thesis, namely, that civilian leaders should be active rather than passive interlocutors with their generals. That is entirely compatible with Huntington's separation of political and military functions, as well as the proposition that the civilian commander in chief has no special military competence to which other institutions must defer. I conclude in Part V by returning to the dangers of militarism that arise when we invest the commander in chief's role with overblown authority based on competencies the civilian leader does not possess.

## II. THE IDEA OF CIVILIAN CONTROL

### A. GUARDING THE GUARDIANS

War goes back deep into human prehistory. Nine thousand years ago, Jericho already had elaborate defensive fortifications, and cave art shows

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35. HUNTINGTON, *supra* note 2, at 20, 83.

bowmen fighting each other.<sup>36</sup> Oetzi the Iceman, the Copper Age hunter whose freeze-dried mummy was discovered in 1991 in an Austrian glacier, died violently 5300 years ago, shot from behind with an arrow, wounded deeply on his hand, and bearing the blood of four other people on his clothes and weapons.<sup>37</sup> Thus the oldest preserved European corpse was likewise the oldest preserved European casualty. Thomas Hobbes's vision of the state of nature as a war of all against all may be historical fantasy,<sup>38</sup> but since history began to be recorded, war has always been one of the chief threats confronting every human society, and warmaking one of the chief occupations of young men in every era.<sup>39</sup> Warriors pose the ultimate threat, but they also provide the necessary defense against that threat, and few societies have ever tried to do without them. Language itself reflects this necessity: as the classicist Arthur Adkins shows, the earliest recorded Greek usages of moral words such as "good," "bad," and "virtue" referred to success and failure at war.<sup>40</sup> No human community could survive without its warriors, its guardians, and it is hardly surprising when military and community leadership fused.

But who guards the guardians? Who is to stop them from tyrannizing their fellows, or ruining them through reckless military adventures and the pursuit of martial glory? That is the basic problem that civilian control of the military is meant to solve. We can see the importance of civilian control of the military by noting the ubiquity worldwide of military coups and military dictatorships. Of course, the framers of the U.S. Constitution did not know about modern-style military dictatorships. But, as we shall see, they understood the problems of military mutiny, dictatorship, and adventurism very well, and thought about them deeply.

The narrowly formal point of vesting the commander in chief power in the civilian government is to insert civilians at the top of the chain of command, so that a soldier confronting orders from a mutinous general knows clearly that the civilian leader outranks the general in the *military* hierarchy. By itself, of course, this formality is a pretty flimsy bulwark

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36. JOHN KEEGAN, *A HISTORY OF WARFARE* 119, 124 (1993) [hereinafter KEEGAN, *HISTORY OF WARFARE*].

37. Ben MacIntyre, *We Know Oetzi Had Fleas, His Last Supper Was Steak And . . . He Died 5,300 Years Ago*, *TIMES* (London), Nov. 1, 2003, at 30.

38. THOMAS HOBBS, *LEVIATHAN* (Marshall Missner ed., Pearson Longman 2008) (1651).

39. On the early history of warfare, see KEEGAN, *HISTORY OF WARFARE*, *supra* note 36, at 115–36.

40. See ARTHUR W. H. ADKINS, *MERIT AND RESPONSIBILITY: A STUDY IN GREEK VALUES* 31–34 (1960).

against coups. Much more importantly, the constitutional vesting of the commander in chief power aims to establish a politico-military culture in which military coups become unthinkable, as they have been for the United States.

But once the offices of civilian head of government and military commander in chief are fused (what I have called “fused dominion”), a complementary danger to military coups arises, namely that the leader will himself use the military to seize or abuse power or, just as importantly, launch military adventures. As I hope to show, the constitutional framers were acutely aware of these dangers, and in response they created a strongly separationist constitutional conception of the commander in chief. Justice Jackson got it right when he wrote in his famous *Youngstown* concurrence, “The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office.”<sup>41</sup>

In brief, the basic theory behind civilian control of the military is to use a civilian commander in chief to check the military, and then set up civilian powers to check the commander in chief. Constraining the military and constraining the civilian commander are two distinct problems, strophe and antistrophe, and together their solutions generate the political theory of the commander in chief authority.

#### B. THE GILGAMESH PROBLEM: DOMESTICATING THE WARRIOR

In heroic societies, “risk-taking validated rule.”<sup>42</sup> This is military historian John Keegan’s explanation of why Alexander the Great always insisted on placing himself at the front of his armies, in the deadliest danger.

For, however much his survival may seem to us necessary for the good government of the Kingdom of Macedon, a good but prudent king would have appeared both to him and to his followers a contradiction in terms. . . . [W]hat Macedonian worth the name would choose to be governed by a king who shirked risk in battle? The very means by which Macedonians endorsed the accession of a new king were military; his supporters put on their breastplates and ranked themselves at his side. When their number constituted a clear majority, the assembly signified acceptance of its will by clashing their spears on their shields. Military

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41. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

42. JOHN KEEGAN, *THE MASK OF COMMAND* 143 (1987) [hereinafter KEEGAN, MASK].



force thus validated his kingship; but he was thenceforth bound to validate his authority by an unrelenting display of military virtue.<sup>43</sup>

In a society governed by heroic values, the only legitimate dominion is fused dominion.

At the same time, though, fused dominion poses the oldest of all political problems: domesticating the warrior. In *Gilgamesh*, the earliest known story (2750 BCE), the eponymous hero, the king of Uruk, is both supreme warrior and supreme tyrant.<sup>44</sup> He is “violent, splendid, a wild bull of a man, unvanquished leader, hero in the front lines, beloved by his soldiers . . . .”<sup>45</sup> At the same time,

The city is his possession, he struts  
through it, arrogant, his head raised high,  
trampling its citizens like a wild bull.  
He is king, he does whatever he wants,  
takes the son from his father and crushes him,  
takes the girl from her mother and uses her,  
the warrior’s daughter, the young man’s bride,  
he uses her, no one dares to oppose him.<sup>46</sup>

The people of Uruk cry in distress to the gods, and in the remainder of the epic we witness the gradual taming and humanizing of Gilgamesh. At the end, filled with grief and defeated in his quest for immortality, Gilgamesh for the first time exhibits pride and pleasure in the city he rules. In the closing lines of the epic, Gilgamesh shows a visitor around his city, describing it in the identical loving, glowing words that the poet-narrator used to open the poem.<sup>47</sup>

This is a personal, existential solution to the problem of domesticating the warrior, not an institutional one. It recognizes one of the permanent truths of human society: that war would not exist without the surplus aggression of young men, which only time and experience tempers. It recognizes as well that the same qualities that make a good warrior—

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43. *Id.* at 123. “Alexander distinguished not at all between his role as ruler and his role as warrior. The two—in a world where states were held to be at war unless an agreement to observe peace specifically held otherwise, and in a kingdom whose court was also a headquarters—were identical.” *Id.* at 186.

44. STEPHEN MITCHELL, *GILGAMESH: A NEW ENGLISH VERSION* 69 (2004).

45. *Id.* at 71.

46. *Id.* at 72.

47. *Id.* at 198–99 (mirroring the description at 69–70).

violence, boldness, pride, charisma, love of glory—may make a bad king. But *Gilgamesh* gives no hint that the poet was thinking politically or institutionally about the problem.

Nor was Homer in the *Iliad*. A famous passage describes the decorative artwork on Achilles's shield, which depicts two contrasting urban scenes.<sup>48</sup> The first is a peaceful one, with dancing and a wedding celebration, where the only sign of discord is a legal argument in the agora. The second depicts war, ambush, and siege. In it, even the attacking army is torn apart by dissension. The point of the contrast, which mirrors the larger themes of the entire poem, seems to be the incompatibility of warriors' anger, pride, and violence with the peace and justice of civic life. In the *Iliad*, Achilles's anger is "doomed and ruinous"; it "caused the Akhaians loss on bitter loss and crowded brave souls into the undergloom, leaving so many dead men—carrion for dogs and birds."<sup>49</sup> But in the *Iliad*, the warrior's anger is a tragic inevitability: the passage I have just quoted concludes with the phrase "and the will of Zeus was done."<sup>50</sup> Homer starkly poses the problem of the undomesticated warrior, but he offers no solution beyond the *deus ex machina*, when Zeus commands Achilles to end his wrath and return Hector's corpse to his grieving father.<sup>51</sup>

Plato likewise offers no institutional solution to the problem. He recognizes that the qualities of a good warrior—a guardian—create a terrible problem for the political community:

[W]ith such natures, how will they not be savage to one another and the rest of the citizens? . . . Yet, they must be gentle to their own and cruel to enemies. . . . Where will we find a disposition at the same time gentle and great-spirited? Surely a gentle nature is opposed to a spirited one. . . . Yet, if a man lacks either of them, he can't become a good guardian.<sup>52</sup>

Plato's solution is rigid indoctrination, including the famous "noble lie"—a false set of beliefs designed to inculcate loyalty in the guardians by persuading them that, "as though the land they are in were a mother and nurse, they must plan for and defend it, if anyone attacks, and they must think of the other citizens as brothers and born of the earth."<sup>53</sup> Rather than building institutional structures to address the *Gilgamesh* problem, Plato

48. HOMER, *THE ILIAD* bk. 18, ll. 490–540 (Robert Fitzgerald trans., Anchor Press/Doubleday 1974) (n.d.).

49. *Id.* at bk. 1, ll. 1–6.

50. *Id.*

51. *Id.* at bk. 24, ll. 139–44.

52. PLATO, *THE REPUBLIC* 52 (Allan Bloom trans., Basic Books 1968) (n.d.).

53. *Id.* at 94.

aims to transform the warriors; but the dangers and difficulties of noble lies scarcely need to be pointed out.

For an early example of an institutional solution to the problem of domesticating the warrior, consider the rules of kingship set out in the biblical book of Deuteronomy:

If, after you have entered the land that the LORD your God has assigned to you, and taken possession of it and settled in it, you decide, "I will set a king over me, as do all the nations about me," you shall be free to set a king over yourself, one chosen by the LORD your God. . . . [H]e shall not keep many horses or send people back to Egypt to add to his horses . . . nor shall he amass silver and gold to excess. . . . Thus he will not act haughtily toward his fellows or deviate from the Instruction to the right or to the left . . .<sup>54</sup>

Commanding less cavalry and treasure, the king will have less capacity to conquer and tyrannize. As Moshe Halbertal and Avishai Margalit put it, "The biblical problem with a powerful person is how to prevent the tendency to self-deification. Therefore the rules concerning the king in Deuteronomy consist of conscious limitations on the concentration of power in his hands."<sup>55</sup> Here, the "constitution" of Israel builds in limitations on the king's power, knowing full well the dangers of a powerfully armed king-general.

Roman law likewise employed institutional solutions. The most famous is the prohibition on Roman generals marching their armies into Italy—"crossing the Rubicon," the northern river establishing the boundary between Cisalpine Gaul and Italy.<sup>56</sup> Likewise, generals were required to

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54. *Deuteronomy* 17:14–20 (Jewish Publication Society).

55. MOSHE HALBERTAL & AVISHAI MARGALIT, *IDOLATRY* 220 (Naomi Goldblum trans., 1992).

The biblical version of the Gilgamesh problem is stated clearly in 1 Samuel:

Samuel reported all the words of the LORD to the people, who were asking him for a king. He said, "This will be the practice of the king who will rule over you: He will take your sons and appoint them as his charioteers and horsemen, and they will serve as outrunners for his chariots. He will appoint them as his chiefs of thousands and of fifties; or they will have to plow his fields, reap his harvest, and make his weapons and the equipment for his chariots. He will take your daughters as perfumers, cooks, and bakers. He will seize your choice fields, vineyards, and olive groves, and give them to his courtiers. He will take a tenth part of your grain and vintage and give it to his eunuchs and courtiers. He will take your male and female slaves, your choice young men, and your asses, and put them to work for him. He will take a tenth part of your flocks, and you shall become his slaves. The day will come when you cry out because of the king whom you yourselves have chosen; and the LORD will not answer you on that day."

1 *Samuel* 8:10–18 (Jewish Publication Society).

56. This law is the *lex cornelia majestatis*. See *Rubicon*, in BRITANNICA ONLINE ENCYCLOPEDIA, at <http://www.britannica.com/eb/article-9064321> (last visited Mar. 28, 2008); KARL LOEWENSTEIN, *THE GOVERNANCE OF ROME* 45–46 (1973).

resign their office (yielding up their power, their *imperium*) before entering the *pomerium*, the sacred city boundaries of Rome.<sup>57</sup> Roman republicans had no scruples about their officials exercising untrammelled violence to subdue Rome's conquered subjects. But they feared despotism within Rome itself, and used the law—indeed, an early form of separation of powers—to create a firewall against it.<sup>58</sup>

Fused dominion creates an additional problem besides military unrest and leaders' will to power. Military heroes also crave adventure and glory, and their adventurism may be disastrous for their people. Adventurism, too, features in *Gilgamesh*, when the king decides to abandon Uruk to hunt the monster Humbaba in a faraway forest, so "the whole world will know how mighty I am. I will make a lasting name for myself, I will stamp my fame on men's minds forever."<sup>59</sup> The city elders try to talk him out of it: "You are young, Sire, your heart beats high and runs away with you."<sup>60</sup> But neither the elders nor his friend Enkidu can dissuade Gilgamesh.<sup>61</sup>

In heroic cultures and medieval Europe, royal adventures frequently

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57. LOEWENSTEIN, *supra* note 56, at 46. See also 1 MARY BEARD, JOHN NORTH & SIMON PRICE, RELIGIONS OF ROME: A HISTORY 179 (1998); THE WORLD OF ROME: AN INTRODUCTION TO ROMAN CULTURE 86 (Peter Jones & Keith Sidwell eds., 1997); H.S. VERSNEL, TRIUMPHUS: AN INQUIRY INTO THE ORIGIN, DEVELOPMENT, AND MEANING OF THE ROMAN TRIUMPH 192 (1970).

58. Roman law limited *imperium* by granting Roman citizens the right of direct appeal to the people when magistrates imposed corporal punishment. The laws in question are the *leges Valeriae* and *lege Porciae*, described by Livy, Cicero, and Dionysius of Halicarnassus. See 1 TITUS LIVIUS, THE HISTORY OF ROME bk. 3, para. 8, at 187–89 (D. Spillan trans., American Book Co.) (n.d.), available at <http://etext.virginia.edu/etcbin/toccer-new2?id=Liv1His.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=133&division=div2> (last visited Mar. 28, 2008); 3 DIONYSIUS OF HALICARNASSUS, ROMAN ANTIQUITIES bk. 5, ch. 19, at 59–61 (Loeb Classical Library ed., Earnest Cary trans., Harvard Univ. Press 1940) (n.d.), available at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius\\_of\\_Halicarnassus/5A\\*.html#19.4](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius_of_Halicarnassus/5A*.html#19.4) (last visited Mar. 28, 2008); *id.* bk. 5, para. 70, at 211–15, available at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius\\_of\\_Halicarnassus/5D\\*.html#70.2](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Dionysius_of_Halicarnassus/5D*.html#70.2) (last visited Mar. 28, 2008). See also George Long, *Leges Valeriae*, in A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 700 (William Smith ed., London, Murray 1875), available at [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA\\*/Leges\\_Valeriae.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Leges_Valeriae.html) (last visited Mar. 28, 2008). The *leges Porciae* added sanctions to violations of the right of appeal. CICERO, ON THE COMMONWEALTH AND ON THE LAWS 50–51 (James E. G. Zetzel ed., Cambridge Univ. Press 1999) (n.d.); 1 LIVIUS, *supra*, bk. 10, para. 9, at 682–83, available at <http://etext.virginia.edu/etcbin/toccer-new2?id=Liv2His.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=176&division=div2> (last visited Mar. 28, 2008). But this protection applied only within a mile of the city. Outside this boundary consular *imperium*, including the power to punish, was unlimited. 1 LIVIUS, *supra*, bk. 3, para. 20, at 204–05, available at <http://etext.virginia.edu/etcbin/toccer-new2?id=Liv1His.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=145&division=div2> (last visited Mar. 28, 2008).

59. MITCHELL, *supra* note 44, at 94–95.

60. *Id.* at 96.

61. See *id.* at 97, 104.

meant an absentee ruler, because the king led the troops. England's King Richard I spent four years away on the Third Crusade, and Alexander the Great—who consciously modeled his career after the Homeric heroes—abandoned Macedon for ten years of campaigning.<sup>62</sup> Adventurism has everything to do with personal ambition, and nothing to do with good government. As Keegan rightly observes about Alexander, “the perfection of his [military] performance should not blind us to the harshly limited nature of his achievement. He destroyed much and created little or nothing.”<sup>63</sup>

Even when kings no longer marched with their troops or led them to battle, the problem of adventurism persisted. Leaders in all times and places have launched wars to aggrandize their power and make their mark. Sometimes they needed the wars to provide political distractions from domestic difficulties; sometimes, to give their restive troops something to do or get potentially mutinous soldiers out of the country.<sup>64</sup> No matter what the reason for adventurism, wars have to be financed by the people, in taxes and the blood of their children; obviously, this is no less true today than it was in Alexander's time.

Immanuel Kant thought that checking adventurism was one of the most powerful arguments for republican government:

If, as is inevitably the case under this [republican] constitution, the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of the war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take upon themselves a burden of debt which will embitter peace itself and which can never be paid off on account of the constant threat of new wars. But under a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war. For the head of state is not a fellow citizen, but the owner of the state, and a war will not force him to make the slightest sacrifice so far as his banquets, hunts, pleasure palaces and

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62. See *Alexander the Great*, in BRITANNICA ONLINE ENCYCLOPEDIA, at <http://www.britannica.com/eb/article-9106078> (last visited Mar. 13, 2008); *Richard I*, in BRITANNICA ONLINE ENCYCLOPEDIA, at <http://www.britannica.com/eb/article-6167> (last visited Mar. 13, 2008).

63. KEEGAN, MASK, *supra* note 42, at 91.

64. See, e.g., JAMES DAVID MEERNIK, THE POLITICAL USE OF MILITARY FORCE IN US FOREIGN POLICY 162 (2004); P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 25 (2003) [hereinafter SINGER, CORPORATE WARRIORS].

court festivals are concerned. He can thus decide on war, without any significant reason, as a kind of amusement, and unconcernedly leave it to the diplomatic corps (who are always ready for such purposes) to justify the war for the sake of propriety.<sup>65</sup>

Perhaps Kant was thinking of his own ruler, Frederick the Great, who explained his unprovoked war against Austria thus:

At my father's death I found all Europe at peace. . . . Besides, I found myself with highly trained forces at my disposal, together with a well-filled exchequer, and I myself was possessed of a lively temperament. These were the reasons that prevailed upon me to wage war against Theresa of Austria, queen of Bohemia and Hungary.<sup>66</sup>

Sounding rather like Gilgamesh, Frederick added: "Ambition, advantage, my desire to make a name of myself—these swayed me, and war was resolved upon."<sup>67</sup> Throughout the middle ages, wars were fought as personal quarrels between rulers or other nobility, a pattern that did not begin to change until the devastating Thirty Years War and the peace of Westphalia.<sup>68</sup> By the beginning of the eighteenth century, the modern state had evolved to the point that wars were justified on impersonal rather than personal grounds, and rulers launching mere personal adventures began for the first time to be regarded as "little better than criminals."<sup>69</sup> Kant's argument grew out of this understanding.<sup>70</sup>

As befits a champion of enlightenment, however, Kant may have been too optimistic about the rationality of republican citizens. Compare his prediction that republican government will automatically curb adventurism with Hermann Goering's perceptively cynical remarks to a prison psychologist at Nuremberg:

Why, of course, the *people* don't want war . . . . Why would some poor slob on a farm want to risk his life in a war when the best that he can get out of it is to come back to his farm in one piece. Naturally, the common people don't want war; neither in Russia nor in England nor in

65. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 100 (Hans Reiss ed., H. B. Nisbet trans., 1970).

66. 1 GERHARD RITTER, *THE SWORD AND THE SCEPTER: THE PROBLEM OF MILITARISM IN GERMANY 18–19* (Heinz Norden trans., 1969) (internal quotation marks and citation omitted).

67. *Id.* at 19.

68. See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 91 (2005) (explaining how wars in the seventeenth and eighteenth centuries often arose out of personal disagreements among monarchs); MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 159–61 (1999) [hereinafter VAN CREVELD, *RISE AND DECLINE*].

69. VAN CREVELD, *RISE AND DECLINE*, *supra* note 68, at 159–61.

70. Kant, *supra* note 65, at 100.

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America, nor for that matter in Germany. That is understood. But, after all, it is the *leaders* of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy or a fascist dictatorship or a Parliament, or a Communist dictatorship.

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... [V]oice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same in any country.<sup>71</sup>

As we shall see, reckless adventurism was an important concern of Americans in the founding era. Hostile Congressmen charged that President James Madison launched the War of 1812 for political distraction (what we now call “wag-the-dog” reasons): “a weak and wicked Administration . . . finding the confidence of the people withdrawn, and their power about to pass into other hands, have nothing to do but to declare war, and instantly all opposition must cease.”<sup>72</sup> (Ironically, Madison himself wrote eloquently against military adventurism.<sup>73</sup>)

Fused dominion was not a characteristic only of archaic societies. It persisted in feudal Europe. In historian Marc Bloch’s influential account, feudal organization originated as a military arrangement to defend against the Vikings from the north, the Magyars from the east, and the Saracens from the south.<sup>74</sup> With the introduction of the stirrup in the eighth century, mounted shock combat became possible, and cavalry quickly emerged as the dominant military force.<sup>75</sup> Cavalry requires grazing land, and the characteristic feudal institutions of subordinated layers of nobility who offer vassal homage—military services—to their superiors in return for

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71. G. M. GILBERT, NUREMBERG DIARY 278–79 (1947).

72. 26 ANNALS OF CONG. 956 (1814) (statement of Congressman Miller of New York). For this and similar congressional utterances, see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 753–54 (1997).

73. See 15 JAMES MADISON, “*Helvidius*” No. 4, in THE PAPERS OF JAMES MADISON 106, 108 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., Virginia Univ. Press 1985). See *infra* text accompanying note 207.

74. 1 MARC BLOCH, FEUDAL SOCIETY 3–31 (L. A. Manyon trans., 1961) (discussing “Europe invaded and besieged”); *id.* at 145–56 (discussing the origin of vassalage relationships as forms of military protection).

75. See LYNN WHITE, JR., MEDIEVAL TECHNOLOGY AND SOCIAL CHANGE 27, 38 (1962). See also BLOCH, *supra* note 74, at 153–56 (connecting the introduction of the stirrup to forms of warfare and thence to forms of social organization). Cf. KEEGAN, HISTORY OF WARFARE, *supra* note 36, at 285–86 (noting that while there is some debate on the origin of stirrups, their influence on warfare is undeniable).

land and armed protection emerged. This is what Keegan calls “the age-old connection between arms and landholding.”<sup>76</sup> The medieval landholder was “a man whose power on the battlefield derived from his horse, his retinue of followers and the skill-at-arms they learnt while peasants laboured to keep them in leisure . . . .”<sup>77</sup> Titles of nobility, like the fiefs that accompanied them, were awarded for feats of military prowess, and thus the hereditary aristocracy owed their estates to their ancestors’ battlefield successes.<sup>78</sup>

In feudal cultures, just as in heroic cultures, military valor was a matter of honor for rulers, as illustrated by two remarkably similar stories. In the battle of Maldon in 991, Byrhtnoth, the Earl of Essex, rejected an easy tactic against Viking invaders—defending a narrow causeway they had to cross—because the Vikings challenged him to a fair fight. He allowed the Vikings to cross the causeway and form their ranks, after which they proceeded to kill Byrhtnoth and crush his army.<sup>79</sup> Fifteen centuries earlier, Hsiang, the Duke of Sung, had faced a similar situation against his adversary at a river in central China, and did exactly the same thing as Byrhtnoth, with similarly disastrous results. The wounded and defeated Hsiang defended his decision. “When the ancients had their armies in the field, they would not attack an enemy when he was in a defile; and though I am but the poor representative of a fallen dynasty, I will not sound my drums to attack an unformed host.”<sup>80</sup> For the feudal ruler, failure to exhibit military valor is failure to live up to the code that defines his class and legitimizes his claim to govern.

### C. FUNCTIONAL DIFFERENTIATION WITHIN FUSED DOMINION

To describe fused dominion in heroic or feudal cultures is already to grasp the immense distance between then and now. Alexander the Great and Richard the Lion-Hearted may not have differentiated between their roles as rulers and warriors, but over the centuries those roles have become

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76. KEEGAN, MASK, *supra* note 42, at 172.

77. *Id.* at 173.

78. *See, e.g.,* ANNE CLIFFORD, THE MEMOIR OF 1603 AND THE DIARY OF 1616–1619, at 18 (Katherine O. Acheson ed., 2007).

79. This encounter is memorialized in the eponymous Old English poem *The Battle of Maldon*, in THE BATTLE OF MALDON AND SHORT POEMS FROM THE SAXON CHRONICLE 1 (Walter John Sedgefield ed., 1904).

80. 5 THE CHINESE CLASSICS 183 (James Legge ed. & trans., 2d ed. 1960), *quoted in* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 225 (1978).



almost entirely distinct. (I leave to one side victorious generals in civil wars or coups who install themselves as presidents.) With a few notable exceptions, they were already functionally distinct at the time of the American revolution: rulers had largely abandoned military command by the sixteenth century, and a century later even generals abjured fighting in the heroic style in favor of commanding from the rear.<sup>81</sup> Gradually, generals ceased being fighters, and rulers ceased being generals. Thus, even when fused dominion remains a formal or constitutional reality, it was no longer a functional reality—not at the time the Commander in Chief Clause was framed, nor today.

Let us review this development in a bit more detail. In brief, it grew out of four factors: (1) the increasing danger projectile weapons posed to rulers and other commanders fighting in the front lines; (2) the changing nature of armies as professional soldiers replaced feudal retainers; (3) evolving tactics that made heroic demonstrations of military prowess by leaders more difficult and less necessary; and (4) increasing demands for rulers to stay home and rule as principalities gave way to bureaucratic nation-states.

The Age of Gunpowder emerged from the Age of Chivalry in the fourteenth and fifteenth centuries; and even though gunfire did not become accurate at great distances until the nineteenth century, gunfire volleys could penetrate armor long before that.<sup>82</sup> Indeed, even before gunpowder, the invention of longbows made it hazardous for the warrior-king to lead his troops. Regardless of his skill as a knight, he could be picked off by archers at a distance. In response, he commands from the rear, not the front, and increasingly he does not personally command at all.<sup>83</sup>

Obviously, the danger of losing a king to battlefield death long predated gunpowder and longbows. Alexander, who always placed himself at the front of the charge, suffered innumerable wounds, including a nearly fatal arrow in the lung when he single-handedly leaped from the wall into an enemy city and was cut off from his men when the scaling-ladder collapsed behind him.<sup>84</sup> But this was precisely the kind of heroic risk-

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81. MARTIN VAN CREVELD, *COMMAND IN WAR* 17, 39, 57 (1985) [hereinafter VAN CREVELD, *COMMAND IN WAR*]; VAN CREVELD, *RISE AND DECLINE*, *supra* note 68, at 119–20.

82. See KEEGAN, *HISTORY OF WARFARE*, *supra* note 36, at 319–33; GEORGE QUESTER, *OFFENSE AND DEFENSE IN THE INTERNATIONAL SYSTEM* 47–48 (2d ed. 2002); ROBERT ROUTLEDGE, *DISCOVERIES AND INVENTIONS OF THE NINETEENTH CENTURY* 170–71 (14th ed. 1903).

83. See VAN CREVELD, *COMMAND IN WAR*, *supra* note 81, at 51.

84. KEEGAN, *MASK*, *supra* note 42, at 63; NORMAN F. CANTOR, *ALEXANDER THE GREAT: JOURNEY TO THE END OF THE EARTH* 133 (2005).

taking that galvanized Alexander's army and legitimized his rule. Compare the fate of another ambitious young soldier-king, Sweden's Charles XII. Charles, like Alexander, loved only war and not government—and died at age 36 in 1718 when a random shot found his head as he peeked over the lip of a trench during a siege.<sup>85</sup> The difference was the crucial one between heroic death in combat and meaningless death at a distance, at the hands of an anonymous musketeer. Risking the former legitimated the hero-ruler; risking the latter did not.<sup>86</sup>

The hazards of battlefield command in the Gunpowder Age are just one piece of a more complex story involving social, political, and military transformations. As the 1453 fall of Constantinople first made clear, walled cities and fortified castles were vulnerable to artillery.<sup>87</sup> Henceforth, armies increasingly took the field to contest for open territory.<sup>88</sup> As maneuver warfare became more important, and growing economies gave rulers more money, paid soldiers led by professionalized officers replaced feudal retainers.<sup>89</sup> The very word “soldier” derives from *solidus*, a Roman coin whose name denoted the stipend paid to mercenaries.<sup>90</sup> Likewise, “commissioned officer” originally referred to the commissions monarchs paid to the entrepreneurs who raised and equipped companies.<sup>91</sup> Mercenaries fought side by side with national armies until the time of Napoleon, with his mass conscription of citizen-soldiers.<sup>92</sup> Frederick the Great's army was half mercenary, and of course George III hired Hessian mercenaries to supplement British regulars in the American Revolution.<sup>93</sup>

Tactics evolved as well. In the eighteenth century, the slowness of fire and inaccuracy of musketry led to a style of fighting with closely drilled infantry who fired off volleys in multiple ranks.<sup>94</sup> Not only did the

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85. See, e.g., R. NISBET BAIN, *CHARLES XII AND THE COLLAPSE OF THE SWEDISH EMPIRE: 1682–1719*, at 298–99 (London, Knickerbocker Press 1895); 1 CARLTON J.H. HAYES, *A POLITICAL AND SOCIAL HISTORY OF MODERN EUROPE* 378 (1922).

86. “Since killing was now carried out at a distance by bullets that failed to distinguish between nobleman and commoner, it had in any case ceased being fun.” VAN CREVELD, *COMMAND IN WAR*, *supra* note 81, at 52.

87. See PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 79 (2002).

88. See *id.* at 80; VAN CREVELD, *RISE AND DECLINE*, *supra* note 68, at 156–57.

89. NEFF, *supra* note 68, at 87–88.

90. *Id.* at 87; SINGER, *CORPORATE WARRIORS*, *supra* note 64, at 29.

91. See SINGER, *CORPORATE WARRIORS*, *supra* note 64, at 23.

92. See *id.* at 29; KEEGAN, *MASK*, *supra* note 42, at 175–76 (describing Napoleon's citizen-soldiers).

93. SINGER, *CORPORATE WARRIORS*, *supra* note 64, at 32–33.

94. See KEEGAN, *MASK*, *supra* note 42, at 131, 170–71.

Gunpowder Revolution make royal participation in battle more hazardous even at a distance, it also changed the nature of armies: now, skill with a hand weapon became less important than relatively unskilled soldiers laying down fields of fire. As a result, monarchs had less need to earn their armies' respect and loyalty with demonstrations of valor, particularly when so many of the soldiers were foreign mercenaries with their own captains.<sup>95</sup> At the same time, the emergence of larger, more bureaucratic states made it increasingly imperative that rulers stay home and rule.<sup>96</sup> A ruler who also happened to be a great general might occasionally take to the field to lead cavalry charges, but by doing so he risked the fate of Sweden's Gustavus Adolphus, who was often wounded in combat and eventually killed at the battle of Lützen.<sup>97</sup>

By the nineteenth century, rulers' appearances at battles had often become purely symbolic.<sup>98</sup> Even an experienced military man like Prussia's King Wilhelm left the planning for the 1866 war of German unification to his chief of staff Moltke.<sup>99</sup> Although the king accompanied Moltke to the decisive battle of Königgrätz, he and his retinue were "so much useless ballast," who played no role in decisionmaking.<sup>100</sup> And both Moltke and the king remained in the rear during the fighting, with little information about what was transpiring on the battlefield, and not much to do except forage for cigars in Bismarck's humidor.<sup>101</sup>

At the time of the American constitutional founding and even later there were occasional heads of state who commanded armies brilliantly. Frederick the Great—commanding from the rear—was the master tactician of his time, as Napoleon was of his.<sup>102</sup> But these were rare. George II was the last British king to command troops in battle, in 1743 at Dettingen.<sup>103</sup> Although the 62-year-old George Washington led troops against the Whiskey Rebellion while he was president, he turned back before the

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95. *Id.* at 122–26.

96. See VAN CREVELD, *COMMAND IN WAR*, *supra* note 81, at 39.

97. See KEEGAN, *HISTORY OF WARFARE*, *supra* note 36, at 341.

98. VAN CREVELD, *COMMAND IN WAR*, *supra* note 81, at 22.

99. *Id.* at 112, 115–32.

100. *Id.* at 132.

101. See *id.* at 137–38.

102. See *id.* at 62–64 (describing Napoleon as "the most competent human being who ever lived"); KEEGAN, *MASK*, *supra* note 42, at 30, 327 (describing Frederick's mastery of the "Oblique Order" of attack, and Frederick and Wellington as "the masters of gunpowder warfare," despite that Wellington lived half a century after Frederick).

103. HANNAH SMITH, *GEORGIAN MONARCHY: POLITICS AND CULTURE, 1714–1760*, at 106 (2006).

action began.<sup>104</sup> There is no evidence that Washington's contemporaries thought leading troops is what presidents are supposed to do; and in fact, no president has done so since.<sup>105</sup> A few decades after the Constitution was adopted, Justice Story wrote in his *Commentaries*, regarding whether the president would take personal command of the military, that "there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents."<sup>106</sup>

To be sure, as late as 1765 William Blackstone described the British king as "generalissimo, or the first in military command, within the kingdom."<sup>107</sup> But this was merely a description of the king's historical prerogative, as Blackstone makes clear.<sup>108</sup> In reality, less than three decades later, England established a commander in chief post separate from the King, with the King's posts as first general and admiral remaining in title only—what Huntington, borrowing Walter Bagehot's terminology, calls a merely "dignified" rather than "efficient" title of government.<sup>109</sup> When modern rulers have played at being generals, the results were either

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104. William Hogeland, *Inventing Alexander Hamilton*, BOSTON REV., Nov.–Dec. 2007, at 21, 24, available at <http://bostonreview.net/BR32.6/hogeland.php>. See WILLIAM O. STODDARD, *THE LIVES OF THE PRESIDENTS: GEORGE WASHINGTON* 298 (New York, White, Stokes & Allen 1886). See generally WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* (2006) (describing the history and motivation for the Whiskey Rebellion).

105. Huntington asserts that President Madison took a personal hand in organizing the defense of Washington, D.C. in 1814. HUNTINGTON, *supra* note 2, at 185. But this is not correct. Madison, together with several cabinet members, personally rode out to watch the Battle of Bladensburg five miles from the White House, and personally chewed out his secretary of war, General John Armstrong, for not helping General Winder organize the defenses. See Memorandum from James Madison on the Battle of Bladensburg (Aug. 24, 1814), available at [http://www.constitution.org/jm/18140824\\_bladensburg.txt](http://www.constitution.org/jm/18140824_bladensburg.txt) (last visited Mar. 28, 2008). But Madison played no role in planning the defense ("The un-ruliness [sic] of my horse prevented me from joining in the short conversation that took place"), nor in the battle that followed, other than moving to the rear the moment fighting began and "leaving military movements . . . to the military functionaries who were responsible for them." *Id.* Then, when the British routed the American forces, "I fell down into the road leading to the city and returned to it," joining the headlong retreat that henceforth became known as the "Bladensburg Races." See *id.*

106. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 328 (Melvin M. Bigelow ed., Boston, Little, Brown & Co., 5th ed. 1891).

107. WILLIAM BLACKSTONE, *1 COMMENTARIES* \*262.

108. Blackstone's description of the king as "generalissimo, or the first in military command," occurs in the chapter entitled "Of the King's Prerogative." The king's prerogative, Blackstone explains, is "that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity." *Id.* at \*239.

109. HUNTINGTON, *supra* note 2, at 187 (quoting WALTER BAGEHOT, *THE ENGLISH CONSTITUTION, AND OTHER POLITICAL ESSAYS* 72 (New York, D. Appleton & Co., rev. ed. 1893)). Great Britain abolished this separate post of commander in chief in 1895, but without restoring effective command to the monarch. *Id.*

ludicrous (the Czar and the Kaiser posturing in World War I)<sup>110</sup> or suicidal (Hitler's catastrophic conduct of World War II, when he made himself supreme commander, maneuvered battalions hundreds of miles away with no comprehension of the terrain they faced, and regularly overruled his generals, who sarcastically referred to him as the *Gröfaz*, a German acronym for "greatest field commander of all time").<sup>111</sup> The image of Lyndon Johnson poring over a map of Vietnam to choose bombing targets is not a pretty one.<sup>112</sup>

To sum up, even at the time of the constitutional framing—and more so today—civilian leadership and military ability had lost their essential connection, even if civilian and military dominion remain fused as a matter of law. The connection between command ability and battlefield heroism had likewise eroded. Commanding generals no longer fight in person, and heads of state no longer general. Henceforth, the moral and political connections between heroic risk-taking in combat, effective military command, and political rule were snapped at both links. The premodern imagery of the hero-ruler still lingers in popular culture: presidents fight with their own hands in summer popcorn-fare like *Independence Day* and *Air Force One*.<sup>113</sup> But the helmeted presidential candidate Michael Dukakis riding in an M1 tank, like George W. Bush landing on a "Mission Accomplished" aircraft carrier, dressed in a top-gun flight suit, were widely and justifiably criticized for photo-op fakery.<sup>114</sup>

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110. See, e.g., DALE C. COPELAND, *THE ORIGINS OF MAJOR WAR 79–117* (2000); KING'S COMPLETE HISTORY OF THE WORLD WAR 80 (W.C. King ed., 1922); Proclamation, Czar Nicholas II to Grand Duke Nicholas (Sept. 5, 1915), in 3 SOURCE RECORDS OF THE GREAT WAR 320, 320–21 (Charles F. Horne ed., 1923).

111. The word *Gröfaz* abbreviates *Grösster Feldherr aller Zeiten*. RICHARD HUMBLE, *HITLER'S GENERALS* 3 (1974). See FRIEDRICH PERCYVAL RECK-MALLECZEWEN, *DIARY OF A MAN IN DESPAIR* 174 (Paul Rubens trans., 1970) (sarcastic use of term by public); Dean Andrew, *Strategic Culture in the Luftwaffe—Did it Exist in World War II and Has it Transitioned into the Air Force?*, 4 DEFENCE STUDIES 361, 366 (2004) (sarcastic use of term by German officers). However, the origin of the phrase was not sarcastic: it was German General Wilhelm Keitel's sycophantic description of Hitler after the fall of France in 1940. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 353 (1992). For an illuminating discussion of Hitler's "false heroic" commandership, see KEEGAN, *MASK*, *supra* note 42, at 235–310.

112. See ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 175 (2002) (defending Johnson's participation); PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 172 (2003); DORIS KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 330–31 (1976).

113. *AIR FORCE ONE* (Colombia Pictures Corp. 1997); *INDEPENDENCE DAY* (Twentieth Century-Fox Film Corp. 1996).

114. Gideon Rachman, *Defining Moment: Michael Dukakis and the Battle for Commander-in-Chief*, *FIN. TIMES*, June 2, 2007, at 46 ("The image of Michael Dukakis posing in a tank must be a contender for the single worst-conceived photo opportunity in history. . . . President Bush's advisers

One consequence of these transformations in the nature of command and rule is that vesting the commander in chief power in the president has precisely nothing to do with the president's competence in military matters, either at the time of the framing or now. A corollary is that a common bit of rhetoric about why courts should not review presidential decisions in the GWOT—"courts must not second-guess the military on the battlefield"—misses the all-important fact that while the president is supreme military commander as a constitutional designation, he is not a general and he is not on the battlefield. When the Fourth Circuit's *Hamdi* opinion says "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants,"<sup>115</sup> it is simply being anachronistic. The Supreme Court's *Hamdi* opinion does no better. The Court states that "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them,"<sup>116</sup> apparently not recognizing that "those who are best positioned"—military officers—and those who are "most politically accountable" for making them—elected officials—are not the same people. To support its assertion, the Court cites an earlier decision recognizing "broad powers in military commanders engaged in day-to-day fighting in a theater of war."<sup>117</sup> But, to repeat: the executive is not a military commander engaged in day-to-day fighting in a theater of war. The president is not commander in chief because of military prowess, but rather to ensure that military decisions are subject to civilian control.

#### D. MILITARY DICTATORSHIPS

I shall say only a few words about the final form that fused dominion takes: modern consolidationism in the form of military dictatorship. As we have seen, fused dominion emerged in heroic and feudal societies because military prowess was thought to legitimize rule. This is not the case in the modern military dictatorship. After the collapse of fascism, modern states, including most military dictatorships, pay at least lip service to democratic elections, constitutionalism, and legal processes as the basis for a normal regime's legitimacy.

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might have pondered this lesson before putting their man on an aircraft-carrier against the backdrop of a fate-tempting banner proclaiming: "Mission accomplished."); Bret Schulte, *The Photo Op That Tanked*, U.S. NEWS & WORLD REP., Jan. 28, 2008, at 51 ("The photo of Dukakis with a doopy grin and a huge helmet aboard a tank was turned into an ad ridiculing him as soft on defense.").

115. *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

116. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004).

117. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Military dictators draw their title to rule from the claim that an emergency has made a normal regime impossible, so the normal basis for legitimacy must be suspended. The name and model comes from the Roman institution of dictatorship.<sup>118</sup> Ordinarily, the Republic was governed collegially by two consuls—a separationist institution.<sup>119</sup> But in times of emergency, the senate could issue an emergency decree (*senatus consultum*) requiring a consul to appoint a temporary extraordinary magistrate, the dictator, who would exercise sole absolute power until the emergency was over, or six months lapsed, whichever came first.<sup>120</sup> Remarkably, only two dictators, Sulla and Caesar, prolonged their dictatorships past the six-month limit; and Caesar's dictatorship was the end of the republic.<sup>121</sup>

The modern dictator bases his military seizure of power on the claim that an emergency demands it. Coups take place in times of tumult—times of economic or political collapse, near-civil war, flamboyant corruption, labor militancy, or ethnic violence. Proclaiming a state of emergency, the modern military dictator suspends ordinary law and replaces it with martial law.

The medieval archetype for martial law was a city under attack or siege, whose military commander would supplant the civilian government while the crisis lasted. The modern version began in 1811, when Napoleon proclaimed that he could henceforth declare a state of siege as a legal fiction, “whenever circumstances require giving more forces and more power to the military police, without it being necessary to put the place in a state of siege.”<sup>122</sup> This *état de siège fictif* became the legal prototype for

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118. Robert J. Bonner, *Emergency Government in Rome and Athens*, 18 CLASSICAL J. 144, 145, 150 (1922).

119. *See id.* at 145.

120. *Id.* at 145, 150.

121. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 26–27 (1948) (noting that Sulla and Caesar were the only Roman dictators with no externally imposed limitations on their terms of office and that after Caesar's death, the dictatorship was abolished); Victor Ehrenberg, *Imperium Maius in the Roman Republic*, 74 AM. J. OF PHILOLOGY 113, 123–29 (1953). Giorgio Agamben argues that the true prototype for contemporary rule by emergency decree is not the dictator, but a different Roman legal device, the *iustitium*, in which a *senatus consultum* suspended the law and called on officials, or sometimes on the entire people, to defend the state by whatever means necessary. GIORGIO AGAMBEN, STATE OF EXCEPTION 41–51 (Kevin Attell trans., 2005) [hereinafter AGAMBEN, STATE OF EXCEPTION]. The difference, Agamben argues, is that the law continued in force under a dictator—although the dictator himself was not bound by it—whereas the *iustitium* established a “space without law.” *Id.* at 51.

122. AGAMBEN, STATE OF EXCEPTION, *supra* note 121, at 4–5 (quoting THEODOR REINACH, DE L'ÉTAT DU SIÈGE: ÉTUDE HISTORIQUE ET JURIDIQUE 109 (Paris, F. Pichon 1885)).

other nineteenth- and twentieth-century regimes of rule by emergency decree, still called “states of siege” in nations influenced by French legal theory.<sup>123</sup> European countries made frequent use of the device in the nineteenth and twentieth centuries; France declared a state of siege from 1914 until 1919,<sup>124</sup> and Germany existed under emergency decrees through the final years of the Weimar Republic and the entire period of the Third Reich.<sup>125</sup> The modern dictator seizes power and institutes the state of siege, typically promising a return to civilian normality at a time in the future when it is safe to lift the siege.

Thus the principal difference between the modern military dictator and the heroic or feudal leader is that the modern dictator imposes military rule under the pretext that it is a temporary exception. The dictator’s claim to fused dominion is not that warmaking prowess legitimizes rule, but that civilian life has to be militarized for the duration of the crisis (which may, of course, last for decades).

Carl Schmitt, the great theorist of dictatorship, famously wrote, “Sovereign is he who decides on the exception.”<sup>126</sup> Schmitt’s epigram is notoriously slippery. Understood as a realist descriptive claim, it sounds plausible: anyone with the power to declare that the rules do not apply is the *de facto* sovereign. As a normative recommendation, it is the dangerous claim that in an emergency the sovereign has to be able to declare that the ordinary rules do not apply. (The Constitution is not a suicide pact.) If, in addition, the sovereign gets to decide what is or is not an emergency, Schmitt’s epigram becomes a recipe for dictatorship. And if the *de jure* sovereign will not or cannot deal with the emergency, the colonels or generals will seize power, and then, having decided on the exception, they become sovereign.

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123. *Id.* at 4–10; Max Radin, *Martial Law and the State of Siege*, 30 CAL. L. REV. 634, 638 (1942) (describing the concept of *état de siège fictif* or “constructive state of siege” as being codified in the Declaration passed by the Constitutional Assembly of the Second Republic in 1848 providing for the possibility of such in France).

124. AGAMBEN, *STATE OF EXCEPTION*, *supra* note 121, at 12.

125. *Id.* at 14–16. The device was an emergency suspension of constitutional rights under Article 48 of the Weimar constitution. *Id.* at 14–15. For a survey of rule by emergency decree in France, Germany, Switzerland, Italy, Great Britain, and the United States, see *id.* at 11–22.

126. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985). Schmitt’s concept of the exception is explored with great dialectical subtlety in AGAMBEN, *STATE OF EXCEPTION*, *supra* note 121, as well as GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1998). For a more straightforward discussion, see Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 CARDOZO L. REV. 1825 (2000).



But there is a deeper point to Schmitt's epigram. Schmitt means to startle us with a paradox. Ordinarily, we think of the sovereign as a lawmaker: sovereign is he who decides on the rules. By insisting instead that the sovereign is he who decides on the exception, Schmitt in effect invites us to treat the exception—the crisis or emergency—as the core case, and the rule of law as a peripheral one. Rule becomes exception and exception becomes rule. This inversion is precisely the basis of fused dominion in military dictatorships. As the emergency stretches on, the temporary seizure of power by the strong man, who suspends rights in the name of restoring civil order, becomes permanent.

### III. AMERICAN THINKING ABOUT THE GILGAMESH PROBLEM AT THE TIME OF THE FOUNDING

#### A. CONSTRAINING THE MILITARY: "A CAESAR OR A CROMWELL"

At this point, I wish to examine American thinking in the founding era on civilian control of the military and what I have called the "Gilgamesh problem" of domesticating the warrior. This is not because I adhere to originalism; in any case, there are few areas of the law where originalism makes less sense than civilian-military relations. The differences between a few thousand musketeers and a military of over a million, garrisoned around the globe and backed by a thermonuclear force capable of depopulating continents in a matter of days, are simply too great. Nor are threats comparable, when a handful of terrorists can bring down skyscrapers with stolen planes, and a single child soldier with an AK-47 can lay down more fire than a regiment of Napoleon's infantry. It nevertheless seems important to understand what problems and preoccupations went into the constitutional design in order to know at least the broad contours of what the Constitution means by a commander in chief. Then we can turn to the present and judge which of the founding generation's concerns have continued contemporary relevance.

Recall the basic argument for a separationist conception of fused dominion: first, that civilian control of the military is essential to forestalling military coups and military rule; second, that civilian control, vested in the chief executive, generates the countervailing problem of ensuring that the president does not abuse his command, either by despotic rule or by military adventurism. Did founding-era Americans think about these problems in anything like these terms? The answer is decidedly yes.

The founding generation had crucial historical examples of military

coups to ponder. There is, first, Julius Caesar, who crossed the Rubicon with his army and precipitated the civil wars that ended the Roman republic and made him the first emperor.<sup>127</sup>

How did the framers think about Caesar? To answer this question, consider George Washington's favorite drama, Joseph Addison's 1713 play *Cato*. Washington saw the play several times, sometimes quoted it, and even had it performed for his troops at Valley Forge.<sup>128</sup> The play contrasts the virtue of Cato, "the greatest soul that ever warmed [a] Roman breast,"<sup>129</sup> with his mortal opponent, Caesar. Addison's Caesar displays both of the great dangers of military rule: coup-mongering and adventurism. As for coups, one of his characters laments that "Caesar's sword has made Rome's senate little, [a]nd thinn'd its ranks."<sup>130</sup> And again:

The Roman empire fallen! O curst ambition!  
 Fallen into Caesar's hands! our great forefathers  
 Had left him nought to conquer but his country.<sup>131</sup>

As for adventurism, we learn in the play's opening speech that

Already Caesar  
 Has Ravag'd more than half the globe, and sees  
 Mankind grown thin by his destructive sword:  
 Should he go farther, numbers would be wanting  
 To form new battles, and support his crimes.  
 Ye gods, what havoc does ambition make  
 Among your works!<sup>132</sup>

And, a bit later:

Alas! thou know'st not Caesar's active soul,  
 With what a dreadful course he rushes on

127. *Rubicon*, *supra* note 56.

128. See Fredric M. Litto, *Addison's Cato in the Colonies*, 23 WM. & MARY Q. 431, 441, 447 (1966).

129. JOSEPH ADDISON, *CATO*, act V, sc. iv (1713), available at [http://www.constitution.org/addison/cato\\_play.htm](http://www.constitution.org/addison/cato_play.htm) (last visited Mar. 28, 2008).

130. *Id.* at act II, sc. ii.

131. *Id.* at act IV, sc. iv.

132. *Id.* at act I, sc. i.

From war to war. . . .”<sup>133</sup>

Addison makes clear that Caesar’s flaws are not unique to his era: “Falsehood and fraud shoot up in every soil, [t]he product of all climes—Rome has its Caesar.”<sup>134</sup>

Washington was hardly alone in his fondness for *Cato*: it was the most popular drama in colonial America.<sup>135</sup> Patrick Henry paraphrased Addison’s play in his “give me liberty or give me death” speech, and Nathan Hale did the same when he regretted that he had only one life to give for his country.<sup>136</sup> In the infant republic, Noah Webster included verses from *Cato* in his reader for young people, which went through seventy-seven editions between 1785 and 1835.<sup>137</sup> The play was admired for its models of sober, public-spirited republican virtue, but Garry Wills believes that the “influence of Addison’s play is probably to be sought less in any positive model it gave Washington than in what it warned against in verse after verse: Caesarism.”<sup>138</sup>

To be sure, those who invoked Caesar’s ghost had in mind not only his imperial ambition and adventurism, but also his populist politics; the constitutional framers and debaters who feared excessive democracy regularly invoked Caesar to show what disasters populism brings.<sup>139</sup> Thus, in a 1792 letter, Hamilton wrote Washington that “*Cato* was the Tory—*Caesar* the Whig of his day. The former frequently resisted—the latter always flattered the follies of the people. Yet the former perished with the Republic; the latter destroyed it.”<sup>140</sup> This might indicate that when they

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133. *Id.* at act I, sc. iii.

134. *Id.* at act IV, sc. iv.

135. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 44 (rev. ed. 1992) (pointing to the “universal” popularity of *Cato*, and connecting it to Trenchard and Gordon’s *Cato Letters*, a major source of colonial suspicion of an unchecked military authority in executive hands); GARRY WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* 137 (1984); Litto, *supra* note 128, at 442 (documenting *Cato*’s “transition . . . from pre-Revolutionary classic to instrument of rebellion”). Bailyn notes that while the colonists liked to pepper their writings with classical allusions, these frequently displayed their actual ignorance of the sources they were quoting—the one exception being their serious knowledge of Roman history. BAILYN, *supra*, at 24–25.

136. Litto, *supra* note 128, at 443–46. When Cato’s dead son is brought before him, he says “[W]hat pity is it [t]hat we can die but once to save our country!” ADDISON, *supra* note 129, at act IV, sc. iv.

137. Litto, *supra* note 128, at 448.

138. WILLS, *supra* note 135, at 136.

139. See the passages indexed under Caesar’s name in M. N. S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* (1994).

140. Thomas P. Govan, *Alexander Hamilton and Julius Caesar: A Note on the Use of Historical Evidence*, 32 WM. & MARY Q. 475, 478 (1975) (quoting Letter from Alexander Hamilton to George Washington) (Aug. 18, 1792), in 12 *THE PAPERS OF ALEXANDER HAMILTON* 252 (Harold C. Syrett &

invoked Caesar the framers were worried about popular democracy, not military coups.

We should remember, though, that at a time when popular militias were the dominant American military institution, fear of populism and fear of rebellion could not be sharply distinguished. To see this, consider John Adams's discussion of Caesar in his *Defence of the Constitutions of Government of the United States of America*:

No military station existed in Italy, lest some general might overawe the republic. Italy, however, was understood to extend only from Tarentum to the Arnus and the Rubicon. Cisalpine Gaul was not reputed in Italy, and might be held by a military officer and an army. Caesar, from a deliberate and sagacious ambition, procured from the people an unprecedented prolongation of his appointments for five years; but the distribution of the provinces was still the prerogative of the senate, by the Sempronian law. Caesar had ever been at variance with a majority of the senate. . . . He had no hopes of obtaining from them the prolongation of his power, and the command of a province. . . . In order to carry his point, he must set aside the authority of the senate, and destroy the only check, the only appearance of a balance, remaining in the constitution. A tool of his, the tribune Vatinius, moved *the people* to set aside the law of Sempronius, and by their own unlimited power name Caesar as proconsul of Cisalpine Gaul and Illyricum for five years, with an army of several legions. The senate [was] alarmed, and in vain opposed. The people voted it.<sup>141</sup>

To Adams, at any rate, the fear that “some general might overawe the republic,” the destruction of checks and balances, and the danger of populism are nearly indistinguishable. To ask whether “Caesarism” meant popular democracy or military coups is to presume a false dichotomy.

In addition to Caesar, an obvious classical model of the dangers of military coups was the Praetorian Guard, the Roman emperors' elite force. Instituted by Augustus, the Guard repeatedly made and broke emperors. For perfectly valid reasons, the Praetorians assassinated the monstrous emperor Caligula and replaced him with Claudius, but that was just the beginning.<sup>142</sup> Over the next two centuries (until Diocletian broke their

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Jacob E. Cooke eds., 1967). Hamilton repeated this analogy in his third Catullus paper. *Id.* at 478–79.

141. 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 271–72 (London, Stockdale 1794) (1787).

142. On Caligula as a “monstrous” emperor, see C. SUETONIUS TRANQUILLUS, THE LIVES OF THE TWELVE CAESARS 435–38 (Loeb Classical Library 1913) (n.d.), *available at* [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Caligula\\*.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Caligula*.html) (last visited Mar. 28, 2008). On his assassination, see *id.* at 489–95.

power) the Praetorian Guard murdered or deposed approximately a dozen other emperors, and created or elevated about half a dozen.<sup>143</sup> The military coup became one of the most persistent of Roman imperial institutions.

But the framers had more immediate models of military coups and Praetorian guards at hand, drawn from the English civil war. The background lay in the fierce efficacy of Cromwell's New Model Army, the first in English history to choose officers by merit rather than birth.<sup>144</sup> Formed in 1645, the New Model Army was responsible for the victory of the Parliamentarians over the Royalists.<sup>145</sup> Once Parliament had Charles I in its hands, it tried to demobilize and disband the army—but the army resisted, in part because the troops had not been paid.<sup>146</sup> The army's radical members, influenced by the Levellers, promoted their own constitutional proposals at the Putney Debates of 1647, and in 1648 seized Charles as a bargaining chip.<sup>147</sup> That same December, in Pride's Purge, the army forcibly prevented antiregicide members of Parliament from entering Westminster, creating the Rump Parliament in order to ensure a favorable vote on whether Charles would be tried for treason.<sup>148</sup> In 1649, the army's Levellers staged an unsuccessful mutiny.<sup>149</sup> Then, in 1653, Cromwell led his troops to Westminster and dramatically dissolved Parliament.<sup>150</sup> For the next six years he ruled England as a military dictator, including fifteen months of strict military rule in 1655 through 1657.<sup>151</sup> When Oliver Cromwell's feckless son Richard became Lord Protector after Oliver's death, the army removed him, reinstalled the Rump Parliament (1659)—and then, when the Rump annoyed the army, dissolved Parliament again, leading within a year to the restoration of monarchy.<sup>152</sup> In effect, England had witnessed five military coups and an unsuccessful mutiny in the space of fifteen years.<sup>153</sup>

143. Conveniently summarized in tabular form at Wikipedia.org, Praetorian Guard, at [http://en.wikipedia.org/wiki/Praetorian\\_Guard](http://en.wikipedia.org/wiki/Praetorian_Guard) (last visited Mar. 28, 2008).

144. See 2 SAMUEL R. GARDINER, HISTORY OF THE GREAT CIVIL WAR, 1642–1649, at 196 (Longmans, Green & Co. 1911) (1893) [hereinafter GARDINER, CIVIL WAR].

145. *Id.* at 192; DEREK HIRST, ENGLAND IN CONFLICT, 1603–1660: KINGDOM, COMMUNITY, COMMONWEALTH 230 (1999).

146. HIRST, *supra* note 145, at 236–39.

147. See 4 GARDINER, CIVIL WAR, *supra* note 144, at 245–46, 254–60.

148. See HIRST, *supra* note 145, at 253.

149. *Id.* at 259.

150. See *id.* at 278.

151. See *id.* at 283–315.

152. See *id.* at 316–27.

153. For a detailed history of the English Civil War, see generally GARDINER, CIVIL WAR, *supra* note 144; SAMUEL RAWSON GARDINER, HISTORY OF THE COMMONWEALTH AND PROTECTORATE,

Not all these uprisings were sinister or dictatorial—far from it. The demands of the Putney Debates were for one-man-one-vote suffrage rules, and the Levellers advocated toleration, liberty, and economic equality.<sup>154</sup> Still, the English civil war offered an object lesson on the ability of an army to seize political institutions; and American framers had no sympathy for Leveller ideas.

It might be thought that English history of the previous century would be of only marginal interest to the American constitutional framers. In fact, however, a revolt of angry, unpaid soldiers was hardly ancient history. In March 1783, only Washington's persuasive power prevented mutiny in the Newburgh crisis, and three months later Congress fled from Philadelphia to Princeton after unpaid Pennsylvania soldiers surrounded the statehouse.<sup>155</sup>

Alexander Hamilton was perhaps the most strongly pro-executive and nationalist of the constitutional founders. But even Hamilton, in *The Federalist No. 21*, warned against the dangers posed by “malcontents . . . headed by a Caesar or by a Cromwell.”<sup>156</sup> He twice warned Washington against Catalines and Caesars, and described Aaron Burr as “an embryo-Caesar in the United States.”<sup>157</sup> Significantly, Hamilton appealed to the same historical analogies as the Anti-Federalist “Brutus,” who wrote:

I firmly believe, no country in the world had ever a more patriotic army, than the one which so ably served this country, in the late war.

But had the General who commanded them, been possessed of the spirit of a Julius Cesar or a Cromwell, the liberties of this country, had in all probability, terminated with the war. . . .<sup>158</sup>

Hamilton was warning about popular uprisings, Brutus about the national army; their arguments and politics were diametrically opposed.

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1649–1656 (AMS Press, Inc. 1965) (1901).

154. CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* 92, 93 (1972). On the Levellers' ideas, see *id.* at 86–120; on the radicalism of the New Model Army, see *id.* at 46–58.

155. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 143 (1996); Lawrence Delbert Cress, *Republican Liberty and National Security: American Military Policy as an Ideological Problem, 1783 to 1789*, 38 *WM. & MARY Q.* 73, 88 (1981) [hereinafter Cress, *Republican Liberty and National Security*]. On the Newburgh mutiny, see WILLS, *supra* note 135, at 6–9.

156. *THE FEDERALIST NO. 21*, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

157. See Govan, *supra* note 140, at 477. It is evidence like this that makes Thomas Govan skeptical of Jefferson's report that Hamilton idolized Caesar. See *id.* at 479.

158. Brutus, X, N.Y. J., Jan. 24, 1788, available at <http://www.constitution.org/afp/brutus10.htm> (last visited Mar. 28, 2008).

Remarkably, though, they both used Caesar and Cromwell as symbols for military seizure of power.

In short, at the time of the framing, Caesar and Cromwell stood as cautionary precedents of the danger of military coups and the importance of civilian control of the military. Perhaps because the danger was so obvious, the Commander in Chief Clause instituted civilian control of the military with virtually no debate at the Philadelphia convention.<sup>159</sup>

#### B. CONSTRAINING THE CIVILIAN COMMANDER: THE STANDING ARMY DEBATE

What about the complementary concern—not fear of military rebellion, but fear of what the civilian commander in chief might do with the military? This played an even more important role in founding-era debates, preeminently on the question of whether there should be a standing national army, distinct from state militias. The very fact that this *was* a question may seem incredible from the vantage point of a nation whose current military outspends the next twenty countries put together.<sup>160</sup> But, as we shall see, the standing army debate was very much about fears concerning the oppressive and adventuristic possibilities of a commander in chief with his own troops. What to our eyes may seem a ridiculous issue was, in the eyes of the framers and their adversaries, fraught with meaning about states' rights and the powers of the national government to work its will by force.

The standing army would be a national army under the command of national politicians. By contrast, state militias would grow from local soil, with local roots and sympathies, and would supposedly serve as a check on the national government. Thus praise of state militias, like hostility to a standing army, should be read as tropes for fear of the oppressive possibilities built into federal control of the military; the arguments that publicists offered make this explicitly clear. These were mostly concerns of the Anti-Federalists, but some of the reassurances the Federalists offered in

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159. "It is reasonable to assume that the commander-in-chief clause was noncontroversial because the Framers intended it to convey tightly circumscribed authority . . ." W. Taylor Reveley, III, *Constitutional Allocation of the War Powers Between the President and Congress: 1787–1788*, 15 VA. J. INT'L L. 73, 113 (1974).

160. CHRISTOPHER HELLMAN & TRAVIS SHARP, CTR. FOR ARMS CONTROL AND NON-PROLIFERATION, *THE FY 2009 PENTAGON SPENDING REQUEST—GLOBAL MILITARY SPENDING* (2008), available at [http://www.armscontrolcenter.org/policy/securityspending/articles/fy09\\_dod\\_request\\_global/](http://www.armscontrolcenter.org/policy/securityspending/articles/fy09_dod_request_global/).

rebuttal acknowledge the concern, although perhaps not sincerely. (Thus, for example, Madison responded to criticisms of Elbridge Gerry, a resolute opponent of strong national government, by saying that “as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia.”<sup>161</sup> It is unlikely that Madison really thought the greatest danger to liberty comes from large standing armies.)

Three background facts are important to understanding this debate (which today can only strike us as quaint and peculiar). First was the fact that in the founding era, everyone, Federalists and Anti-Federalists alike, assumed that the bulk of national defense would lie in the hands of state militias rather than the national army, and that the militiamen would outnumber the army by a wide margin. George Washington proposed a standing army of 25,000, with 800 artillerymen, and a militia force of 80,000—and Washington was among the framers most critical of militias and most in favor of a strong national army.<sup>162</sup> In the War of 1812, militiamen made up 88 percent of American forces.<sup>163</sup> By the Civil War, the militia system had deteriorated due to shirking and resistance—but the standing army was also small, at war’s onset only about 16,000 strong.<sup>164</sup> Indeed, for the first half of the nineteenth century the peacetime army exceeded 10,000 only twice, in 1816 and 1849.<sup>165</sup>

Second, the American debate partly recapitulated a long-recurrent English aversion to standing armies, and a corresponding preference for locally raised militias that might defend against their excesses. In

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161. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 388 (Max Farrand ed., 1966) [hereinafter Farrand].

162. Byron W. Daynes, *George Washington: Reluctant Occupant, Uncertain Model for the Presidency*, in GEORGE WASHINGTON AND THE ORIGINS OF THE AMERICAN PRESIDENCY 3, 24 (Mark J. Rozell, William D. Pederson & Frank J. Williams eds., 2000); 1 JAMES BISER WHISKER, *THE AMERICAN COLONIAL MILITIA: INTRODUCTION TO THE AMERICAN COLONIAL MILITIA* 172 (1997) (noting Washington’s contempt for the militia’s performance during the Revolutionary War); DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 197 (2d ed. 2005) (noting a sarcastic quip by Washington in response to an advocate of a weak national army).

163. WILLIAM H. RIKER, *SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY* 41 (1957).

164. On the deterioration of the militia system before the Civil War, see *id.* at 21–40; on the size of the 1860 Army, see 5 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT: MILLENNIAL EDITION 5-354 (Susan B. Carter et al. eds., 2006) [hereinafter HISTORICAL STATISTICS].

165. See HISTORICAL STATISTICS, *supra* note 164, at 5-353. The size of the army spiked up during wartime mobilizations, including the War of 1812 (1812–1814), the Mexican War (1846–1848) and the Second Seminole War (1835–1842). See *id.*



Blackstone's words, "In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. . . . The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war."<sup>166</sup> The aversion arose initially from the oppressions carried out against Saxons by William the Conqueror's soldiers; it was reinforced by the behavior of the mercenaries and impressed criminals who populated late medieval armies and routinely committed violence against civilians; and it was renewed during the revolutionary period, when Charles's incessant demand for military financing was soon mirrored by Cromwell's military dictatorship.<sup>167</sup> After the Glorious Revolution, Parliament passed the Mutiny Act of 1689 to control the army, budgeting it on a year by year basis.<sup>168</sup>

The aversion to standing armies was a recurrent theme among radical Whig publicists, including some who were widely read and quoted in the colonies and became staples of revolutionary and (later) Anti-Federalist thought. Algernon Sidney, for example, believed that corruption flows from the monarch and can best be counteracted by a strong and vital militia.<sup>169</sup> John Trenchard and Thomas Gordon, two English journalists, published a series of letters in the 1720s that crystallized the concerns of radical English Whigs. *Cato's Letters* were one of the most commonly read and cited works in the colonies.<sup>170</sup> In the letter *No. 94, Against Standing Armies*, Trenchard and Gordon wrote: "They tell us that matters are come to that pass, . . . that we must submit to this great evil [i.e., a standing army], to prevent a greater: As if any mischief could be more terrible than the highest and most terrible of all mischiefs, universal corruption, and a military government."<sup>171</sup> Similarly, Trenchard wrote in *No. 95, Further*

166. 1 BLACKSTONE, *supra* note 107, at \*408.

167. William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 397-99, 402-04 (1991).

168. *See id.* at 405-06.

169. LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 18 (1982) [hereinafter CRESS, *CITIZENS IN ARMS*]; Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 J. OF HIST. OF IDEAS 43, 47 (1979) [hereinafter Cress, *Radical Whiggery*]. *See also* BAILYN, *supra* note 135, at 34-35 (describing Sidney's great influence on the colonists).

170. *See, e.g.*, BAILYN, *supra* note 135, at 35-36, 44; FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 77-78* (1985).

171. John Trenchard & Thomas Gordon, *No. 94, Against Standing Armies* (Sept. 15, 1722), reprinted in 3 *CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* (Ronald Hamowy ed., Liberty Fund 1995) (1755), available at [http://oll.libertyfund.org/files/1239/Trenchard\\_0226.03.pdf](http://oll.libertyfund.org/files/1239/Trenchard_0226.03.pdf). By 1776, according to Lawrence Cress, a

*Reasonings Against Standing Armies*, “[i]t is certain, that all parts of Europe which are enslaved, have been enslaved by armies; and it is absolutely impossible, that any nation which keeps them amongst themselves can long preserve their liberties.”<sup>172</sup>

This is not to say that radical Whigs dominated the English debate. Adam Smith, for one, had no patience with the radicals, and argued that division of labor requires a professionalized army for the modern state.<sup>173</sup> Acknowledging that “[t]he standing army of Caesar destroyed the Roman republic” and “[t]he standing army of Cromwel [sic] turned the long parliament out of doors,” Smith nevertheless rejected the republicans’ charge that a standing army is “dangerous to liberty”; unfortunately, he did so only with the fatuous and unempirical rejoinder that making the sovereign himself the commanding general would alleviate his fears of revolt and make him more moderate and tolerant.<sup>174</sup> (Mr. Smith, permit me to introduce you to General Pinochet.)

Smith was not the only English defender of standing armies. As moderate Whigs recognized, the requirements of empire and the realities of modern warfare made standing armies indispensable.<sup>175</sup> But relics of the political aversion remained. David Hackett Fisher writes:

As a social institution, the British army in 1776 was a bundle of paradoxes. Regimental badges and colors proclaimed that it served the king, but it was entirely the creature of Parliament. The army cherished its traditions but operated under a law called the Mutiny Act that expired every twelve months. The British people took pride in its achievements but deeply feared the power of a standing army and kept it on a short leash.<sup>176</sup>

Third, and doubtless more important than these British debates, the King’s use of a standing army to subdue the unruly American colonies was bitterly resented, and appears among the grievances listed in the

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copy of *Cato’s Letters* was in nearly 40 percent of colonial libraries. Similarly, Harrington and Sidney appeared on the shelves of or were read by many of the well-known Framers. Cress, *Radical Whiggery*, *supra* note 169, at 54. Additionally, a New York newspaper serialized Trenchard’s tract *An Argument Shewing that A Standing Army is Inconsistent with a Free Government* in the late 1760s. *Id.* at 55.

172. John Trenchard, *No. 95, Further Reasonings Against Standing Armies* (Sept. 22, 1722), *reprinted in* 3 *CATO’S LETTERS*, *supra* note 171.

173. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 658–68 (Edwin Cannan ed., Modern Library Ed., Random House 1937) (1776).

174. *Id.* at 667–68.

175. CRESS, *CITIZENS IN ARMS*, *supra* note 169, at 25–28.

176. DAVID HACKETT FISHER, *WASHINGTON’S CROSSING* 33 (2004). *See also* 1 BLACKSTONE, *supra* note 107, at \*414–15 (describing how the standing army was kept on a short leash).

Declaration of Independence.<sup>177</sup> George III first stationed a standing army in America in 1763.<sup>178</sup> This led to a series of inflammatory incidents: brawling between several thousand New Yorkers and British troops in the spring of 1766; smaller brawls with British troops in Boston in 1769, and the Boston Massacre in 1770.<sup>179</sup> In response to the Intolerable Acts, Americans ratcheted up their rhetoric in criticizing the crown. Thomas Jefferson wrote that King George III had “no right to land a single armed man on our shores” and noted his concern that “his majesty ha[d] expressly made the civil subordinate to the military.”<sup>180</sup> When General Thomas Gage was made governor of Massachusetts in May 1774, colonists witnessed fused dominion in action.<sup>181</sup> Militia mobilization followed soon after, in Massachusetts, Maryland, and Virginia by January 1775; and the other colonies by autumn 1775.

One might have supposed that the experience of the Revolution, when the Continental Army outperformed the unreliable militias, would have calmed concern about a national army, and indeed driven home to the colonists the need for a professional force; and that is certainly the lesson that the Federalists drew. Nevertheless, fear of an army remained, and at Elbridge Gerry’s proposal, the 700 Continental Army troops remaining in 1784 were slashed to a custodial force of just eighty.<sup>182</sup> (Later, debating at the constitutional convention whether the national army could be used to quell state rebellions, Gerry “was agst. [sic] letting loose the myrmidons of the U. States on a State without its own consent.”<sup>183</sup>)

The fear that a standing army would empower a tyrant appears again and again in the ratification debates over the new Constitution. “A Democratic Federalist,” responding in the *Pennsylvania Herald* to James Wilson’s speech to the Pennsylvania legislature, inveighs against “a STANDING ARMY, that *great support of tyrants* . . . .”<sup>184</sup> Centinel writes,

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177. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

178. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789*, at 55 (rev. & expanded ed. 2005).

179. *Id.* at 198, 202–03, 209–12.

180. *Id.* at 242.

181. Cress, *Radical Whiggery*, *supra* note 169, at 58–59.

182. HUNTINGTON, *supra* note 2, at 143–44; Cress, *Republican Liberty and National Security*, *supra* note 155, at 89.

183. 2 Farrand, *supra* note 161, at 317.

184. A Democratic Federalist, *Letter to the Editor*, PA. HERALD, Oct. 17, 1787, reprinted in DAVID E. YOUNG, *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT AND AN ARMED POPULACE, 1787–1792*, at 45, 47 (David E. Young ed., 2d ed. 1995) [hereinafter YOUNG, SECOND AMENDMENT].

“A standing army with regular provision of pay and contingencies, would afford a strong temptation to some ambitious man to step up into the throne, and to seize absolute power.”<sup>185</sup> The Pennsylvania Anti-Federalist Minority elaborates:

A standing army in the hands of a government placed so independent of the people may be made a fatal instrument to overturn the public liberties; it may be employed to enforce the collection of the most oppressive taxes, and to carry into execution the most arbitrary measures. An ambitious man who may have the army at his devotion may step up into the throne, and seize upon absolute power.<sup>186</sup>

Brutus agrees:

The liberties of a people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power, which they may see proper to exercise, but there is great hazard, that an army will subvert the forms of the government, under whose authority, they are raised, and establish one, according to the pleasure of their leader.<sup>187</sup>

Philadelphiensis writes, “Who can deny but the president general will be a king to all intents and purposes, and one of the most dangerous kind too—a king elected to command a standing army.”<sup>188</sup> And Samuel Nason, speaking at the Massachusetts Ratifying Convention on February 1, 1788, invokes Caesar’s ghost:

Suffer me, sir, to say a few words on the fatal effects of standing armies, that bane of republican governments. A standing army! Was it not with this that Caesar passed the *Rubicon*, and laid prostrate the liberties of his country? By this have seven eighths of the once free nations of the globe been brought into bondage! Time would fail me, were I to attempt to recapitulate the havoc made in the world by standing armies. Britain attempted to enforce her arbitrary measures by a standing army.<sup>189</sup>

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185. Centinel II, *Letter to the Editor*, INDEPENDENT GAZETTEER, Oct. 24, 1787, reprinted in YOUNG, SECOND AMENDMENT, *supra* note 184, at 58, 59.

186. Pennsylvania Minority, *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, PA. PACKET, Dec. 18, 1787, reprinted in YOUNG, SECOND AMENDMENT, *supra* note 184, at 154, 174.

187. Brutus, *supra* note 158.

188. Philadelphiensis, *The President As Military King (Anti-Federalist No. 74)*, FREEMAN’S J., Feb. 6 & 20, Apr. 9, 1788, available at <http://www.thisnation.com/library/antifederalist/74.html> (last visited Mar. 28, 2008).

189. Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Feb. 1, 1788) (testimony of Samuel Nason), in 2 ELLIOT’S DEBATES 125, 136 (Jonathan Elliot ed., 2d ed. 1937).

There is, to be sure, a great deal bordering on hysteria in these warnings, as Hamilton complained in *The Federalist No. 29*.<sup>190</sup> Notably, however, the Federalists did not dismiss the worry; instead, they emphasized that the separation of powers will adequately guarantee against the tyranny of the commander in chief. George Nicholas, speaking at the Virginia ratifying convention, says, “The President is to command. But the regulation of the army and navy is given to Congress. Our representatives will be a powerful check here.”<sup>191</sup> As for fear that the president will abuse his command of the militia, “No, sir, the President is not to have this power. God forbid we should ever see a public man in this country who should have this power. Congress only are to have the power of calling forth the militia.”<sup>192</sup> To the Federalists, the power of the executive to abuse the standing army is a genuine problem, but one to which the Constitution provides an adequate institutional solution.

### C. ADVENTURISM

Finally, the constitutional debates of the founding era also registered concern about possible military adventurism on the part of a president with his own army.<sup>193</sup> Several of the framers and ratifiers, both Federalists and Anti-Federalists, condemned the adventurism of European kings. Thus Hamilton, in the course of arguing that the new republic’s military expenses would be lower than in Great Britain, referred to “the ambitious enterprises and vainglorious pursuits of a monarchy.”<sup>194</sup> Jay observed that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”<sup>195</sup> The Anti-Federalist “Brutus” likewise noted that “[t]he European

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190. THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 156, at 186. As Rakove notes, “The claim that adoption of the Constitution would lead to armed tyranny struck Federalists as the most fantastic of their opponents’ demagogic pronouncements.” RAKOVE, *supra* note 155, at 185.

191. The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 14, 1788) (testimony of George Nicholas), in 3 ELLIOT’S DEBATES, *supra* note 189, at 365, 391.

192. *Id.* at 392–93.

193. A sustained argument about this subject may be found in Treanor, *supra* note 72, who argues that the framers and ratifiers were deeply concerned that a president’s desire for fame might lead him to launch unjustified wars. *Id.* at 700. Treanor believes that these concerns provide evidence that the Declare War Clause means that Congress has the primary power over war and peace. *Id.* I have gratefully gleaned source material I quote in this section from Treanor’s interesting paper.

194. THE FEDERALIST NO. 34 (Alexander Hamilton), *supra* note 156, at 209.

195. THE FEDERALIST NO. 4 (John Jay), *supra* note 156, at 46.

governments are almost all of them framed, and administered with a view to arms, and war, as that in which their chief glory consists . . . .”<sup>196</sup> All these warnings echo Montesquieu, who wrote in his chapter on war, “Above all, let one not speak of the prince’s glory; his glory is his arrogance; it is a passion and not a legitimate right.”<sup>197</sup> Montesquieu cautions that when “principles of glory” direct the decision to go to war, “all is lost” and “tides of blood will inundate the earth.”<sup>198</sup>

Recall Kant’s argument that the republican form of government was to be the cure for this infirmity. The *Federalist* writer “Foreign Spectator” wrote that

military honor . . . is indeed very dazzling. . . . Yet this honor is not sufficient for republics, because it regards war rather as a theatre of glory, than a trial of patriotic virtue, and values a Caesar . . . [who] to astonish the world by his talents, became its conqueror, and the master of his own country.”<sup>199</sup>

But Patrick Henry worried that even a republic might not be immune from adventurism: “The glorious republic of Holland has erected monuments of her warlike intrepidity and valor; yet she is now totally ruined by a stadtholder, a Dutch President. The destructive wars into which that nation has been plunged, has since involved her in ambition.”<sup>200</sup>

The framers’ solution was not to rely solely on republican dislike of vainglory, but rather to remove the powers of declaring war and funding the military from the president to Congress. At South Carolina’s ratifying convention, Pierce Butler recalled that at the Constitutional Convention “[s]ome gentlemen were inclined to give this power [of making war or peace] to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.”<sup>201</sup> And in a well-

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196. Brutus VII, *Letter to the Editor*, N.Y. J., Jan. 3, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 234, 236 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

197. MONTESQUIEU: THE SPIRIT OF THE LAWS 139 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989).

198. *Id.*

199. Foreign Spectator, *An Essay on the Means of Promoting Federal Sentiments in the United States*, INDEPENDENT GAZETTEER, Sept. 8, 1787.

200. The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 9, 1788) (testimony of Patrick Henry), in 3 ELLIOT’S DEBATES, *supra* note 189, at 150, 160.

201. Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution (Jan. 16, 1788) (testimony of Pierce Butler), in 4 ELLIOT’S DEBATES, *supra*

known 1789 letter to Madison, Jefferson wrote (in an argument reminiscent of Kant's), "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."<sup>202</sup> Some years later, Madison wrote to Jefferson, "The constitution supposes, what the History of all [Governments] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature]."<sup>203</sup>

Perhaps the most thoughtful diagnosis of adventurism came from Adams, who grasped the psychological and political rewards that accrue to a war president. In his *Discourses on Davila*, written in 1790, Adams mused that "the man of spirit and ambition . . . looks forward with satisfaction to the prospect of foreign war . . . in which he may draw upon himself the attention and admiration of mankind."<sup>204</sup> And again: "With what impatience does the man of spirit and ambition, who is depressed by his situation, look round for some great opportunity to distinguish himself? No circumstances, which can afford this appear to him undesirable; he even looks forward with satisfaction to the prospect of foreign war . . ."<sup>205</sup> He went on: "The answer . . . can be none other than this, that, as nature has established in the bosoms of heroes no limits to those passions; and as the world, instead of restraining, encourages them, the check must be in the form of government."<sup>206</sup>

By 1793, Madison had already begun his turn away from support of strong central government. In his debate with Hamilton in the Pacificus-Helvedius letters, he offered a warning about executive adventurism. It is worth repeating here, because even though it postdated the constitutional debate, it offers a late eighteenth-century statement about the evils of adventurism as forceful as Kant's:

War is in fact the true nurse of executive aggrandizement. In war a

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note 189, at 253, 263.

202. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958).

203. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 1031, 1032 (James Morton Smith ed., 1995).

204. JOHN ADAMS, DISCOURSES ON DAVILA: A SERIES OF PAPERS ON POLITICAL HISTORY, reprinted in 6 THE WORKS OF JOHN ADAMS 223, 260 (Charles Francis Adams ed., Boston, Little & Brown 1851).

205. *Id.*

206. *Id.* at 262-63.

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physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; . . . the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.<sup>207</sup>

Nor was the warning an idle one. When Madison's adversary Hamilton eventually saw his dream fulfilled of a standing army with himself as its inspector-general, he promptly devised what his biographer Ron Chernow calls "a harebrained scheme" to invade Latin America.<sup>208</sup>

#### D. THE CONSTITUTIONAL RESULT

In short, all components of the argument for separationist civilian control of the military were alive and in play during the framing and ratification of the U.S. Constitution. The danger of a military mutiny, as exemplified by Caesar and Cromwell, and nearly experienced at Newburgh and Philadelphia, was well understood. The countervailing danger that a civilian leader of a standing army might use it to abuse or seize power was familiar from British debates and colonial experience. Even if Federalists regarded Anti-Federalists harping on this theme as absurd alarmists, the argument was one they responded to seriously.

How were these concerns reflected in the Constitution that resulted? A brief canvass will suffice to show how the framers of the Constitution and the Bill of Rights created a separationist structure to keep the president's war powers in check.<sup>209</sup> First, and most obviously, the Constitution hives off important powers of war and peace from the executive and gives them to Congress:

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

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207. 15 JAMES MADISON, "Helvidius" No. 4, in THE PAPERS OF JAMES MADISON, *supra* note 73, at 106, 108.

208. RON CHERNOW, ALEXANDER HAMILTON 567 (2004).

209. In this section I draw on Huntington's analysis in chapter 7 of THE SOLDIER AND THE STATE, *supra* note 2, at 163-92.



To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . . .<sup>210</sup>

There is, of course, a vigorous debate of long standing over whether the congressional power to declare war leaves the president free to launch undeclared wars; there is no need to review that debate here.<sup>211</sup> For our purposes, the most important point to note about these clauses, other than that they represent significant powers over the military given to Congress rather than the executive, is that where Great Britain's Mutiny Act put the British army on one-year funding cycles, the framers loosened the tethers slightly by expanding the cycle to two years. But the tether remains. It is also important to notice that the power to call out the militia rests with Congress rather than the president (although in the Militia Act of 1792 Congress gave part of the power back to the president, by authorizing him to call out the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe.")<sup>212</sup>

Second, the Constitution takes great care to ensure that the president cannot pack the militias with his own chosen officers; those appointments, along with the authority to train the militias, are left to the states:

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively, the Appointment of the Officers*, and the Authority of training the Militia according to the discipline prescribed by Congress.<sup>213</sup>

Given the preeminent military role that the framers anticipated for the militias, this set a major roadblock to any president's efforts to centralize military force under his personal command.<sup>214</sup> A parallel precaution lies in the Article 2 Appointments Clause requirement of Senate advice and consent for appointments of federal officers, which by subsequent law

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210. U.S. CONST. art. I, § 8.

211. Treanor references some of the dozens of major (and less major) scholars who have contributed to this debate. See Treanor, *supra* note 72, at 696–98.

212. Militia Act of 1792, sess. 1, ch. 28, 1 Stat. 264 (1792), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=387> (last visited Mar. 28, 2008).

213. U.S. CONST. art. I, § 8 (emphasis added).

214. See Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321 (2005).

includes generals.<sup>215</sup> The Second and Third Amendments, forbidding the government from disarming militiamen and from quartering federal troops in private homes during peacetime, offer further safeguards against the kinds of abuse of standing armies that the Anti-Federalists feared.<sup>216</sup> And Congress's constitutional authority includes "governing" as well as disciplining the militia when it is called into national service. That gives Congress a power parallel to that provided over the federal army and navy by the Government and Regulation clause: it is Congress, not the president, that writes the rules governing the militias.

A more subtle check on military power is the Incompatibility Clause of Article 1, section 6, which ensures the civilian character of the legislature by forbidding sitting senators and representatives from simultaneously serving in any other federal office, including military office.<sup>217</sup>

The same is not true of the president, however, and this shows the limits to which the framers were willing to go in demilitarizing the presidency. There is no constitutional bar to a serving military officer being president. Nor is the president's role as commander in chief merely "dignified." While some of the Anti-Federalists argued against permitting the president to command troops in the field, they lost that fight.<sup>218</sup> Even Hamilton's proposal that the president "shall have the direction of war when commenced, but he shall not take the actual command in the field of an army without the consent of the Senate and Assembly" is not reflected

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215. U.S. CONST. art. II, § 2, cl. 2; 10 U.S.C. § 601(a) (2000).

216. U.S. CONST. amends. II–III.

217. See U.S. CONST. art. I, § 6, cl. 2. By contrast, the Ineligibility Clause of the same section leaves open the possibility for senators and representatives to join the military during their term of office (presumably, taking leave from the office because of the Incompatibility Clause). See *id.* For discussion, see HUNTINGTON, *supra* note 2, at 165–66.

218. Luther Martin reported to the Maryland legislature that "[o]bjections were made to that part of this article, by which the President is appointed Commander-in-chief . . . and it was wished to be so far restrained, that he should not command in person; but this could not be obtained." 3 Farrand, *supra* note 161, at 217–18. At the Virginia ratification debate, Patrick Henry warned in vain that "the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master." The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 5, 1788) (testimony of Patrick Henry), in 3 ELLIOT'S DEBATES, *supra* note 189, at 35, 59. See also The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 14, 1788) (testimony of Patrick Henry), in 3 ELLIOT'S DEBATES, *supra* note 189, at 410, 411 (warning about the dangers of an empowered president). Even the Committee on Detail's version of the Commander in Chief Clause specifying that the President occupies that role "by Virtue of his Office" (and thus not by virtue of his military abilities) disappeared in revision. 2 Farrand, *supra* note 161, at 158.

in the final product.<sup>219</sup> Perhaps with a future President Washington in mind, the framers left open the possibility of a president on horseback taking effective command of troops. Obviously, it does not follow that they expected presidents to command troops in the field; Justice Story's previously quoted judgment that "there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents" accurately interprets both the state of warfare in 1789 and the import of the constitutional debate.<sup>220</sup>

One last constitutional provision is significant. That is the Take Care Clause of Article II, section 3, which, by requiring that the president "take [c]are that the [l]aws be faithfully executed," insists that the president remains at bottom a rule of law official.<sup>221</sup> There is no hint in either the text or debates that this duty ceases when presidents act in their capacity as commander in chief.

The subsequent jurisprudence of the Take Care Clause is complex, and deals with issues that the framers and ratifiers never debated, and most likely never even considered.<sup>222</sup> For our purposes, however, the central point is simple: the Take Care Clause emphasizes the primacy of the president's civilian, rule-of-law, office over his military one. Military commanders, after all, do not have a duty to take care that the laws be faithfully executed. Of course, they are not supposed to violate the laws of war or permit their troops to do so. But their basic job is to win wars, not execute laws. The battlefield, their arena of special expertise, is the antithesis of a rule of law society. When generals impose martial law, that too is the antithesis of the rule of law. To insist that the president must take care that the laws are faithfully executed is to emphasize a fundamentally civilian duty. The Take Care Clause embeds the presidency in a civilian,

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219. 3 Farrand, *supra* note 161, at 617, 624.

220. See *supra* note 106 and accompanying text.

221. See U.S. CONST. art. II, § 3.

222. These are issues such as whether the laws the president must faithfully execute include the Constitution (see, e.g., *In re Neagle*, 135 U.S. 1, 5-7 (1890) (yes)); whether executive agency interpretations of law have primacy (*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (yes)); whether presidents can be compelled by third parties to execute laws (e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (no)); whether presidents can, as a matter of discretion, refuse to execute laws (*Kendall v. United States*, 37 U.S. 524 (1838) (holding "[t]o contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and is entirely inadmissible")). But presidents do it anyway. See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 914-15 (1990); Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 809 (1999). Though these issues have some relevance for our topic, it would be too much of a diversion to consider them here.

rule of law culture, not a military, efficacy-first culture. Even though the framers did not explicitly draft the Take Care Clause as a check on a president's military ambitions, its emphasis on the primacy of civilian rule of law provides powerful evidence that the Constitution was not meant to establish a warrior-president. The underlying theories are simply too different. The consolidationist fuses civilian rule and military office; but the U.S. Constitution circumscribes the executive's war powers and subordinates the executive to the law. It is separationist through and through. The idea that the commander in chief can override otherwise-valid laws seems very remote from the notion that the commander in chief office vests in a civilian president with a duty to take care that the laws are faithfully executed.

Of course, one might reply that in time of military crisis the president must be able to cut legal corners in order to preserve the nation, and that preserving the nation is itself necessary to faithfully execute its laws. That was the point of Lincoln's famous rhetorical question in his 1861 war address: "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>223</sup> (He was responding to the criticism "that one who is sworn to 'take care that the laws be faithfully executed,' should not himself violate them."<sup>224</sup>) In effect, Lincoln argued that the Take Care Clause *required* him to violate laws in order to save the republic, because with no republic no laws could be executed, faithfully or otherwise.

In response, it may be conceded that in a dire emergency someone—of course, it need not be the president—might have to exercise extralegal emergency powers. But the imperative is a practical, not a legal, one. Lincoln's twist on the argument for emergency powers is that they are not extralegal. But his somewhat dubious construction of the Take Care Clause makes sense only if the necessity is dire and the emergency powers are exceedingly short-term, as Lincoln's were. Otherwise, it simply is not true that law violation is in the ultimate service of faithfully executing the laws. Long-term emergency powers do not execute laws—they supplant laws. As in a military dictatorship, exception becomes rule as faithful execution of the law gets deferred for years. Thus the proposition that the Take Care Clause licenses the long-term suspension of laws has no plausibility.

But in any event, Lincoln's argument has nothing to do with the

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223. President Abraham Lincoln, July 4th Message to Congress (July 4, 1861), *available at* <http://millercenter.org/scripps/archive/speeches> (last visited Mar. 28, 2008).

224. *Id.*

Commander in Chief Clause (and his war address never invokes it). On the one hand, not every military action involves an emergency; on the other, not every emergency requires a military response. So the idea that the Take Care Clause empowers the president to violate laws when acting as commander in chief has no plausible basis.

#### E. WHY THE PRESIDENT?

So far, I have argued that all three of the major concerns of separationism—fear of military coups, the countervailing fear of civilian abuse of military power, and concern about adventurism—were active components of the constitutional debate, and that the result was a separationist constitution. This seems to neglect the other side of the debate: the arguments on behalf of a powerful executive, especially in wartime, and the undeniable fact that the Constitution does award the commander in chief power to the president. As I shall now suggest, however, even that decision had nothing to do with the consolidationist theory that the executive possesses military competence.

This part of the story begins with the experience of the Revolution, when Congress was the civilian controller of the military.<sup>225</sup> When Congress appointed Washington commander in chief of the Continental Army in June 1775, it instructed him “punctually to observe and follow such orders and directions, from time to time, as you shall receive from this or a future Congress . . . or a committee of Congress, for that purpose appointed.”<sup>226</sup> Thus, the Continental Congress initially retained commander in chief power for itself, apparently out of concern that, left to his own devices, Washington could make himself a dictator.<sup>227</sup> But this arrangement proved so incredibly inefficient that in December 1776, with the military effort on the verge of collapse, Congress turned operational command entirely over to Washington. Two weeks later, he crossed the Delaware and revived the revolutionaries’ fortunes with the victory at Princeton. In David Hackett Fischer’s words:

Their grant of new powers to George Washington affirmed the rule of law, recognized the principle of civil supremacy over the military, and established the authority of Congress as representative of the states and

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225. For detailed discussion of the relationship between this revolutionary experience and the subsequent constitutional understanding of the commander in chief authority, see Barron & Lederman, *Framing the Problem*, *supra* note 11, at 772–92.

226. Reveley, *supra* note 159, at 91.

227. FISCHER, *supra* note 176, at 143–44.

the sovereign people. At the same time, it also established another principle: the conduct of military operations by military officers, subject to the general oversight of Congress but without Congressional interference in operations.

This was an American compromise of some complexity. Other countries have gone a different way in the modern world. In many nations military officers took over the government by force of arms, and sometimes the army became the state. In Fascist and Communist regimes, civilian gauleiters and commissars controlled the military. The United States went a third way: civil control and military direction of its wars.<sup>228</sup>

In making the president, rather than Congress, the civilian controller of the military, it is important to see that the constitutional framers were not objecting to this “third way.” They still wanted civilian control and military direction of wars. Their issue was that Congress would be too cumbersome a mechanism for even this kind of indirect control. It would frequently be out of session, sometimes for extended periods; its members could not assemble quickly; and, most importantly, the frictions and inefficiencies of debate would provide slow, uncertain guidance. Military command needs unity.

At the constitutional convention, Pierce Butler warned about “the manner in which a plurality of military heads distracted Holland when threatened with invasion by the imperial troops. One man was for directing the force to the defence of this part, another to that part of the Country . . . .”<sup>229</sup> Two days later, Elbridge Gerry agreed that it would be a mistake to have “a general with three heads.”<sup>230</sup> Notwithstanding these worries, Patterson’s New Jersey Plan favored a multiple executive, “provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.”<sup>231</sup> But the Convention dropped Patterson’s plan six weeks later, and adopted a single executive.<sup>232</sup> Its motion to do so did not specify who would receive the commander in chief power, but when the Committee on Detail returned a few days later with a draft, it assigned that power to the president.<sup>233</sup>

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228. *Id.* at 144–45.

229. 1 Farrand, *supra* note 161, at 89.

230. *Id.* at 97.

231. *Id.* at 244.

232. 2 Farrand, *supra* note 161, at 116.

233. *Id.* at 185.

In *The Federalist No. 70*, Hamilton argued on behalf of a vigorous executive, including a denunciation of plural rule because “difference of opinion . . . might impede or frustrate the most important measures of the government in the most critical emergencies of the state.”<sup>234</sup> His list of the four preconditions of an energetic executive places unity first, before duration, resources, and competent powers.<sup>235</sup> Hamilton expanded the argument for unity of military command in *The Federalist No. 74*:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.<sup>236</sup>

In the North Carolina debate, James Iredell agreed: “From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person.”<sup>237</sup> This holds for a civilian commander in chief as well. In discussing the war powers, the framers understood that if the United States were suddenly attacked, the president would have to order troops to repel the attack without waiting for a Congressional declaration.<sup>238</sup>

In *The Federalist No. 70* Hamilton went further: arguing for a vigorous executive, he appealed by analogy to Roman history, where “often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator.”<sup>239</sup> But there is no evidence that other framers or ratifiers shared Hamilton’s apparent enthusiasm for an executive with dictatorial emergency powers; indeed, comments he made elsewhere suggest that Hamilton was not advocating dictatorship in emergencies, merely warning that weak government invites it.<sup>240</sup> In the end none of the framers, including Hamilton, advocated

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234. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 156, at 426.

235. *Id.* at 424.

236. THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 156, at 447.

237. Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 28, 1788) (testimony of James Iredell), in 4 ELLIOT’S DEBATES, *supra* note 189, at 106–07.

238. See 2 Farrand, *supra* note 161, at 318–19.

239. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 156, at 423.

240. In the New York debate, Hamilton made the point explicitly: “Establish a weak government, and you must at times overleap the bounds. Rome was obliged to create dictators.” The Notes of the Secret Debates of the Federal Convention of 1787 (Yates’s Minutes) (June 19, 1787) (testimony of

dictatorial powers for the executive, even in wartime.

The fundamental point was that, given the need for civilian control of the military, the choice of making the president commander in chief prevailed because it was universally regarded as better than the alternatives of making Congress the commander in chief or having multiple commanders in chief. Although a substantial number of framers and ratifiers were alive to the dangers of a national government in command of an army, Congress was just as much part of the national government as the president; and the need for swift, unified military response to a sudden emergency dictated that the one-headed rather than many-headed branch of government should take control. None of these arguments amounts to repudiation of the need for civilian control of the military; in fact, none of them rules out concurrent authority by the other branches of government. And none of them rests on the consolidationist view that the president possesses military competence, or that civilian leadership entails military leadership. Assigning the commander in chief power to the president follows from the fact that the president is one and the legislators are many, not the fact that the president is the chief civilian executive.

#### F. SUMMARY OF THE ORIGINAL UNDERSTANDING

Let me summarize. I have tried to show that the framers and ratifiers of the Constitution were vividly aware of all the components of the separationist theory underlying civilian control of the military. Founding-era polemics make that clear, but so does evidence from the Constitution itself, clearly manifesting the aim of constraining the executive's power to use military force as he sees fit. To varying degrees, the framers and ratifiers feared a Caesar or a Cromwell, wished to limit the president's power to abuse the standing army, despised military adventurism, and feared that a president with formidable war powers might indulge in it. Civilian control, not the desire to consolidate civil and military executive power, formed the background of the Commander in Chief Clause. The founding generation had no sympathy with the dying feudal ideology that ties civilian legitimacy to military ability. Although the framers and

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Alexander Hamilton), in 1 ELLIOT'S DEBATES, *supra* note 189, at 423, 427. Elsewhere, Hamilton refers to "the mad project of creating a *dictator*." The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution (June 28, 1788) (testimony of Alexander Hamilton), in 2 ELLIOT'S DEBATES, *supra* note 189, at 360. Farrand contains only two casual, cryptic references to the institution of dictatorship (one of them Hamilton's). See 1 Farrand, *supra* note 161, at 73, 329. The small handful of references to Roman dictators in the state ratification debates is uniformly unflattering.



ratifiers did not want to rule out the possibility that a militarily gifted president might take efficient command of troops, they had no expectation that this would happen. Instead, their expectation was (in David Hackett Fischer's previously quoted words) the "third way" of civil control and military direction of the nation's wars. The president (rather than Congress) received the commander in chief power solely out of the need for rapid, unified response in the face of a sudden invasion or similar military emergency, coupled with the background demand that supreme military command lie in the hands of civilians. And even in wartime, the presidential commander in chief remains under the obligation to execute the laws faithfully.

#### IV. THE MODERN THEORY OF CIVILIAN-MILITARY RELATIONS

##### A. THEN AND NOW

We have seen that the theory underlying the Commander in Chief Clause was separationist, not consolidationist, and it contemplated a civilian commander in chief whose military competence could be near zero and whose exercise of the command function would be circumscribed by hiving off crucial military powers and giving them to Congress or the states. Although case law on the Commander in Chief Clause is sparse, such early nineteenth-century cases as *Little v. Barreme* (which upheld civil liability against a naval officer for taking action that Congress had prohibited, even though President Adams had ordered it) and *Fleming v. Page* (which held that the president's commander in chief authority is narrowly military) confirmed that understanding.<sup>241</sup>

But the world has changed, and many of the debates that preoccupied the framers and ratifiers of the Constitution are little more than historical curiosities today. Nobody in the United States fears a military coup, or ever has since the Constitution went into effect. The standing army debate has vanished to the point that few contemporary Americans would even recognize the phrase "standing army." The Third Amendment is nothing more than a constitutional curiosity, never once litigated in the Supreme Court. As for the Second Amendment, it has come increasingly to stand for individual gun rights having nothing to do with militias; and those today who insist that the Second Amendment has to do primarily with militias are

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241. *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

advocates of gun control, not militias.

For that matter, the militias of yesteryear—retitled the National Guard in 1933<sup>242</sup>—bear no resemblance to the primary defensive force that the framers and ratifiers envisioned. The last serious use the antebellum national government made of state militias was the Seminole War of 1836 to 1842, and by 1860 the militia system had effectively collapsed.<sup>243</sup> State militias revived in the 1870s, but that is largely because they proved useful in violently repressing the labor movement—a rather bitter irony given the founding era’s image of the militias as defenders of the people’s liberty.<sup>244</sup>

We should likewise not forget that the Anti-Federalists came out on the wrong side of history. They favored an agrarian America, feared the dominance of urban financiers, and doubted the very possibility of large republics. Although some Anti-Federalists were protoliberalists whose mantle contemporary libertarians claim, they were generally no friends of the capitalist enterprise dear to the hearts of today’s libertarians. The Anti-Federalists were often Southern sectionalists, isolationists, and antimodernists.<sup>245</sup> Like it or not, we are Hamilton’s heirs, not George Mason’s or Patrick Henry’s. Phrases like “militiamen” and “*posse comitatus*,” which represented objects of serious debate during the framing and ratification, today belong to lunatics stockpiling ammo in case the government sends the black helicopters after them.

#### B. THE PERSISTENCE OF SEPARATIONIST CONCERNS

But not all the preoccupations of the founding and ratifying debates are obsolete. Concerns about military interference with politics, presidential abuse of the commander in chief power, and military adventurism remain alive and well. They take a less dramatic form than the founding generation’s worries about armed seizures of power, but even the less extreme forms show that the fundamental political forces that the founding generation debated still exist and still need to be held in check.

The “third way” is, in effect, a moral compact between civilian and military leaders. As it has evolved over two centuries, its basic clauses are easy to describe. On the military side, the obligation is to cede overall

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242. RIKER, *supra* note 163, at 67.

243. *Id.* at 41.

244. *Id.* at 46–55.

245. See generally Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955) (discussing Anti-Federalists).

control (that is, political decisionmaking) to civilian leaders; more generally, to abstain from politics. It is also to offer objective and independent military advice to civilian leaders. Last but obviously not least, it is to obey lawful orders, even very foolish ones issued in blatant disregard of military advice. On the civilian side, the first obligation is to listen hard to military advice and take it seriously, even if it is politically unwelcome; the second obligation is to use the military prudently and reluctantly, knowing that every war comes with a butcher's bill attached; and third is to respect the political neutrality of the military, not using it to advance domestic partisan ends.

On the military side, the classic form of defection from the moral compact occurs when military leaders meddle in politics. An obvious contemporary concern is military intervention in party politics.<sup>246</sup> A recent case in point concerns Army General David Petraeus's September 2004 Op-Ed in the *Washington Post*, which presented an upbeat picture of Iraqi security forces, less than six weeks before a national election in which Iraq progress was a crucial issue.<sup>247</sup> Petraeus had recently taken over the training of Iraqi forces, and observers gave him high grades.<sup>248</sup> Nevertheless, the Op-Ed was an unusual intervention. As one commentator wrote, "If Petraeus wrote on his own initiative, he was injecting himself improperly into a political campaign. If he was encouraged or even allowed to do this by his civilian superiors, he was allowing himself to be used for partisan political purposes."<sup>249</sup>

A more common problem arises when military leaders resist policy choices by civilian leadership. This has happened many times. To varying degrees, the military initially resisted racial integration, women in the military, and, more recently, President Clinton's attempt to permit gays to

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246. See Marybeth Peterson Ulrich, *Infusing Normative Civil-Military Relations Principles in the Officer Corps*, in *THE FUTURE OF THE ARMY PROFESSION* 655, 665–70 (Lloyd J. Matthews ed., 2d ed. 2005).

247. David H. Petraeus, Op-Ed., *Battling for Iraq*, WASH. POST, Sept. 26, 2004, at B7.

248. THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 394, 410 (2006). However, Ricks also notes that around the same time Rand Corporation researchers found "a gap of sixty thousand between the number of trained police claimed by the top Iraqi police officer and the number cited by U.S. officials." *Id.* at 395. Petraeus's Op-Ed cited high numbers of trained and equipped Iraqi police; and Iraqi police were a far more problematic force than Petraeus represented. *Id.* at 340–41.

249. Lawrence J. Korb, *The Wrong Man to Assess the Iraq War: Gen. Petraeus, the Architect of the Surge, Can't Offer an Unbiased Opinion on its Effectiveness*, STAR-LEDGER (Newark, N.J.), May 30, 2007, at 15.

serve openly.<sup>250</sup> Of course, these were policy choices about the military itself; they are not troubling in the same way that military interference with civilian affairs would be. Only the latter would be analogous to the founding generation's worries about a Caesar or a Cromwell.

More troubling was the role played by Colin Powell during the George H. W. Bush administration, when Powell was chairman of the Joint Chiefs of Staff ("JCS"). During the Balkan Wars, Powell gave an on-the-record interview to the *New York Times* arguing against the use of U.S. military force in Bosnia—an interview that arguably tied the administration's hands at a time when it had not yet decided what to do about Bosnia.<sup>251</sup>

Perhaps the most significant example of a military initiative to constrain civilian political choices was General Creighton Abrams's post-Vietnam force reorganization. Abrams assigned key combat support roles to the reserves, a move designed to ensure that U.S. forces could no longer be used without mobilizing the reserves.<sup>252</sup> The idea was to force civilian leaders to burn political capital and garner popular support if they wanted a war; as Abrams said, "They're *never* going to take us to war again without calling up the reserves."<sup>253</sup> In an interview, a four-star general remarked that Abrams devised the strategy "with malice aforethought" to tie civilian hands and prevent another Vietnam.<sup>254</sup> Now, Abrams's strategy may well have been a prudent one: in the aftermath of Vietnam, military morale was at its absolute nadir, and Abrams wanted to buy the Army a respite to reconstruct and rebuild itself. He also shared the widely held diagnosis that the erosion of popular support within the United States ultimately caused the defeat in Vietnam. Prudent or not, however, Abrams's scheme represents a military-imposed constraint on the civilian leadership's foreign policy options.

Obviously, none of these examples rises to the level of a mutiny or a coup; but, by resisting political choices that lie within the authority of elected leaders, all of them violate the moral compact built into civilian

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250. MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES, 1940–1965, at 348 (1981) (racial integration); Lucinda Joy Peach, *Gender Ideology in the Ethics of Women in Combat*, in IT'S OUR MILITARY, TOO!: WOMEN AND THE U.S. MILITARY 156 (Judith Hicks Stiehm ed., 1996) (gender integration); Richard H. P. Sia, *Chiefs May Bar Gays in Combat; Top Brass Seek to Avoid Full Integration*, BALT. SUN, Feb. 24, 1993, at 1A (integration of gays).

251. FEAVER, *supra* note 112, at 259–62.

252. *See id.* at 67; BACEVICH, *supra* note 32, at 39–40.

253. JAMES KITFIELD, PRODIGAL SOLDIERS 151 (1995).

254. LEWIS SORLEY, THUNDERBOLT: GENERAL CREIGHTON ABRAMS AND THE ARMY OF HIS TIMES 363–64 (1992).

control of the military (sometimes in response to the military's perception that civilian leaders have violated the moral compact by making feckless political choices that degrade military effectiveness). They demonstrate that even if the eighteenth-century fear of coups has little contemporary relevance, a scaled-down fear of military interference with politics remains relevant. (In actual combat situations, it should be noted, the military hardly ever thwarts civilian plans by refusing to accept them: Feaver's careful coding of twenty-seven key post-1945 incidents finds only four in which the military "shirked."<sup>255</sup>)

What about the second concern of the framers and ratifiers, about the potential that a president might abuse the command of a standing army to expand and consolidate his power? Clearly, under currently imaginable circumstances the worry about a presidential coup is just as farfetched as worry about a Praetorian mutiny—the government is *not* sending in the black helicopters. But the generalized concern about presidents aggrandizing executive power is entirely real, as is the more specific concern about presidents aggrandizing power by asserting their commander in chief authority.

The generalized concern is hardly new: Arthur M. Schlesinger, Jr. wrote *The Imperial Presidency* in 1973, and he dates imperial presidentialism back to the Truman Administration.<sup>256</sup> Most if not all administrations since then have made muscular assertions of executive power.<sup>257</sup> The Bush Administration's assertions of executive power have been remarkable and far-reaching. They are grounded in the "unitary executive" theory fueled by the perception by the president and vice president that presidential power had dangerously eroded after Vietnam. These assertions include the commander in chief override argument, freewheeling use of signing statements to spin legislation in a direction favorable to executive power, greatly enhanced secrecy of executive branch processes, intensely partisan efforts to maintain discipline within the executive branch, and aggressive maneuvers to keep the review of executive decisions out of the courts.<sup>258</sup>

The more specific concern about presidents enhancing their power by

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255. FEAVER, *supra* note 112, at 140–45.

256. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 136 (1973).

257. Even the Carter Administration was not immune. Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785 (1984).

258. For a comprehensive overview of the subject, see CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007).

asserting the commander in chief authority obviously dates back at least to *Youngstown* in the Truman administration, if not earlier.<sup>259</sup> But the Bush administration's assertions of commander in chief authority have been particularly far-reaching. For example, President Bush's signing statement regarding the Detainee Treatment Act, which prohibits cruel, inhuman, or degrading treatment short of torture, asserted that he would implement the prohibition "in a manner consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch."<sup>260</sup> This statement, vague though it is, would be empty unless the president meant that his commander in chief authority permits him to order cruel, inhuman, or degrading treatment of detainees. In the same legislation, Congress amended statutes to ensure that JAGs give independent legal advice, in response to the back-to-back scandals of Abu Ghraib and the release of torture-permissive legal opinions; here, President Bush's signing statement asserted that "[t]he executive branch shall construe [the amendments] in a manner consistent with: (1) the President's constitutional authorities to take care that the laws be faithfully executed, to supervise the unitary executive branch, and as Commander in Chief . . . ."<sup>261</sup>

The JAG signing statement is particularly significant. Vice President Cheney's hostility to the independence of the JAG Corps dates back to his tenure as Secretary of Defense in the early 1990s, and has continued unabated throughout the second Bush Administration.<sup>262</sup> On one interpretation, the attempt to subordinate the JAGs' independence might be regarded as a salutary effort to maintain civilian control over the military.<sup>263</sup> But according to the "third way," the moral compact between the civilian leadership and the uniformed military holds that, while the military does not interfere in politics, the civilian leadership takes independent military advice seriously. When the military are JAG lawyers, that means permitting them to offer independent legal advice—which is, in fact, an ethical requirement for all lawyers, including military lawyers.<sup>264</sup>

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259. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Barron and Lederman demonstrate in exhaustive detail that conflicts between Congress and the commander in chief have a long history. Barron & Lederman, *Constitutional History*, *supra* note 11.

260. Bush, Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, *supra* note 10, at 2673.

261. *Id.*

262. SAVAGE, *supra* note 258, at 279–89.

263. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1834 (2007).

264. ABA Model Rule 2.1 requires lawyers to offer candid and independent advice to clients; this

Attempting to subordinate the JAGs to civilian lawyers in the Defense Department—political appointees—violates that moral compact.<sup>265</sup>

Finally, the experiences of Vietnam and Iraq—and some would add Kosovo—raise the specter of military adventurism.<sup>266</sup> Neither represented adventurism in the classic sense of rulers launching wars for purposes of self-aggrandizement or personal glory. Rather, what makes both these wars adventuristic is that the presidents decided almost unilaterally to launch or escalate them, insulating themselves in the process from military advice. In the Bush administration, the momentous decision to go to war was made by a tiny, secretive circle of high-level officials—as mentioned earlier, Woodward asserts that the president consulted only two advisors<sup>267</sup>—and Thomas Ricks quotes a four-star general about how they ducked military advice:

There was a conscious cutting off of advice and concerns, so that the guy who ultimately had to make the decision, the president, didn't get the advice. Well before the troops crossed the line of departure . . . concern was raised about what would happen in the postwar period, how you would deal with this decapitated country. It was blown off.<sup>268</sup>

Descriptions of the almost solipsistic Iraq decisionmaking in the Bush White House eerily echo H. R. McMaster's stunning and influential

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rule appears in the rules of conduct for all three services' JAG Corps. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008); DEP'T OF THE NAVY RULES OF PROF'L CONDUCT R. 2.1, JAGINST 5803.1C (2004); RULES OF PROF'L CONDUCT FOR LAWYERS R. 2.1, ARMY REG. 27-26 (1992); AIR FORCE RULES OF PROF'L CONDUCT, R. 2.1 (2005). For discussion of the independent-advice requirement, see DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 153-58, 197-204 (2007).

265. The two signing statements are related. JAG advice to military commanders bases itself on the law of war, which prohibits cruel or humiliating treatment of captives. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 13, 14, Aug. 12, 1949, reprinted in *THE GENEVA CONVENTIONS OF AUGUST 12, 1949*, at 77, 77, 83, 84 (Geneva, International Committee of the Red Cross 1949); Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 27, 31, Aug. 12, 1949, reprinted in *THE GENEVA CONVENTIONS OF AUGUST 12, 1949*, *supra*, at 155, 156, 167, 168. JAG independence would interfere with the kind of cruel treatment that the first signing statement apparently asserts is the commander in chief's prerogative.

266. I am reluctant to label Kosovo adventuristic because of its circumspectly limited scope, but I recognize that many critics, both on the political right and the antiwar left, regard it as such. It had, at best, slender justification under international law, and President Clinton's early announcement that he would not use ground troops flew in the face of military advice. These are symptoms of adventurism. However, I accept that the humanitarian catastrophe was sufficient justification for the war. On these points see David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION* 79 (Pablo de Greiff & Ciaran Cronin eds., 2002).

267. *See supra* note 30 and accompanying text.

268. RICKS, *supra* note 248, at 99.

history of decisionmaking in the early stages of Vietnam escalation.<sup>269</sup> John F. Kennedy, he reports, cut the National Security Council and Joint Chiefs out of the advising loop, preferring to confer only with his “inner club.”<sup>270</sup> Kennedy blamed the Bay of Pigs fiasco on bad advice from the Joint Chiefs;<sup>271</sup> and, after their advice on the Cuban missile crisis proved inferior to Defense Secretary Robert S. McNamara’s strategy, McNamara increasingly came to believe that he and his systems analysts could plan a war better than the military.<sup>272</sup> Interservice squabbles among the Chiefs undercut their effectiveness as advisors during both the Kennedy and Johnson years, making it easier for the defense secretary to arrogate decisionmaking to himself.<sup>273</sup> Johnson, inheriting Kennedy’s advisors, confined his Vietnam decisionmaking to a small circle of civilians—McNamara, John McNaughton, the Bundy brothers—with only retired General Maxwell Taylor to provide a military perspective. The highly political Taylor was at odds with the JCS, and occasionally lied when communicating their advice to the president; Johnson, in turn, lied to the Chiefs and manipulated them.<sup>274</sup> In September 1964 the JCS war-gamed the escalating Vietnam conflict, and the result foretold with astounding accuracy virtually the entire future of the war, including that “escalation of American military involvement would erode public support for the war in the United States” and allow North Vietnam to outlast the Americans.<sup>275</sup> The game’s conclusions, however, “were never seriously studied and had no discernible impact on American policy.”<sup>276</sup> The two most costly and divisive warmaking decisions of the past half-century, Vietnam and Iraq, were a direct result of presidents who violated the moral compact represented by the “third way.”

In short, none of the founding generation’s concerns about military insubordination, presidential power aggrandizement, and military

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269. H. R. MCMASTER, *DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM* (1997). The book is deeply influential in the military, in part because of McMaster’s distinguished military career; he is currently a top commander in Iraq. Simon Tisdall, *Military Chiefs Give US Six Months to Win Iraq War*, *GUARDIAN* (London), Feb. 28, 2007, available at <http://www.guardian.co.uk/world/2007/feb/28/iraq.usa> (describing McMaster as part of “elite team of officers advising US commander General David Petraeus in Baghdad . . . who are leading experts in counter-insurgency”).

270. *Id.* at 4–5.

271. *Id.* at 6.

272. *Id.* at 29–30.

273. *See id.* at 18, 327–30.

274. *See id.* at 77–78, 94, 105–06.

275. *Id.* at 157.

276. *Id.* at 158.



adventurism are dead, even if they do not take the extreme forms that the Anti-Federalists feared. In Faulkner's phrase, the past is not dead—it is not even past.<sup>277</sup>

### C. THE "THIRD WAY" TODAY

Seeing that the founders' and ratifiers' concerns still exist today does not answer the question of whether separationism remains the best response to them. To determine whether the separationist conception of the commander in chief makes continued sense today, we will need to fast-forward to contemporary conceptions of civilian-military relations. The background question I shall use to organize discussion is whether Fischer's "third way"—civil control and military direction, avoiding both the politicization of the military and the militarization of civilian life—remains as valid now as it did when the Continental Congress abandoned its effort to micromanage General Washington. For, if so, then the unwritten understanding that the Commander in Chief Clause is not meant to create a consolidationist warrior-executive with expansive war powers remains valid as well.

Answering this question will require some delving into contemporary debates about civilian-military relations. But, as a first approximation, it seems clear that the argument for the "third way" is, if anything, stronger today than at the time of the framing.

For one thing, military command is a far more technical and specialized subject today than two centuries ago. Lincoln personally tested firearms during the Civil War, after which he pressed the Army's head ordnance officer to mass produce breech-loading rifles.<sup>278</sup> The idea of a twenty-first-century president personally evaluating hi-tech weapons systems is absurd.

Furthermore, a modern president's domestic-policy responsibilities exceed anything that an eighteenth- or nineteenth-century predecessor could have imagined. Along with these responsibilities go overwhelming political demands on modern presidents in an era of photo-ops and nonstop electioneering and fund-raising. Together, the modern president's other responsibilities make the idea of direct presidential military supervision unthinkable on anything other than a very occasional basis. Presidents simply have too much else to do. Adam Smith, we recall, argued that the

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277. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

278. COHEN, *supra* note 112, at 25, 213.

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division of labor requires a professional military.<sup>279</sup> That division of labor has proceeded far beyond Smith's wildest dreams. Civil-military consolidationism today is impossible.

A contemporary example will illustrate the problem. In 2004, Robert D. Blackwill was the coordinator for strategic planning for Iraq in the National Security Council.<sup>280</sup> He traveled with President Bush throughout the last two months of the 2004 election campaign.

Blackwill was struck that there was never any real time to discuss policy. . . . As the NSC coordinator for Iraq, Blackwill probably knew as much about the war as anybody in the White House. He had spent months in Iraq with Bremer. But he was with the campaign only as part of the politics of reelection. Not once did Bush ask Blackwill what things were like in Iraq, what he had seen, or what should be done. Blackwill was astonished at the round-the-clock, all-consuming focus on winning the election. Nothing else came close.<sup>281</sup>

The obvious response by defenders of executive preeminence in military matters is one that I briefly considered earlier: that "the president" is really shorthand for "the executive branch that the president heads." The real issue is executive branch leadership of war efforts, not individual presidential leadership. At the president's disposal are a National Security Council, a Defense Department, and hundreds of militarily sophisticated civilian staff (including former military officers and life-long students of national security). These, not the president personally, exercise the commander in chief's day-to-day operational functions. On important issues the president remains, in George W. Bush's famous word, the ultimate "decider"; but most of the commander in chief power gets exercised by proxy.

However, this response undercuts the familiar Hamiltonian arguments for executive preeminence. For Hamilton, remember, the essential contrast is between the deliberative, slow-moving, friction-ridden, many-headed legislature and the energetic, expeditious, resourceful executive. Hamilton considers unity the first precondition for an energetic executive, and unity means, quite literally, the unity of a single will. Hamilton's argument for executive preeminence collapses if plurality replaces unity because dozens or hundreds of people are actually discharging the president's powers of war and peace. Under such circumstances we find interagency and

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279. See *supra* note 173 and accompanying text.

280. WOODWARD, *supra* note 30, at 240–41.

281. *Id.* at 335–36.

interservice competition in place of unity, and grinding bureaucratic friction in place of dispatch.

The Iraq war offers illuminating examples. In 2005, Donald Rumsfeld explained to National Security Advisor Stephen Hadley that the inability of the U.S. government to accomplish even elementary tasks in the Iraq war resulted because “the interagency process was broken.”<sup>282</sup> In saying this, he was echoing Condoleezza Rice, who two years earlier complained to Blackwill about “the dysfunctional U.S. government”<sup>283</sup>—except that she believed that Rumsfeld was part of the dysfunction.

[Blackwill] soon understood what she meant. He attended the deputies committee meetings where Armitage and Doug Feith often sat across from each other in the Situation Room. The hostility between them was enormous . . . .

The principals meetings or NSC meetings with Powell and Rumsfeld . . . had the same surreal quality, rarely airing the real issues. . . . Rumsfeld made his presentation looking at the president, while Powell looked straight ahead. Then Powell would make his to the president with Rumsfeld looking straight ahead. They didn’t even comment on each other’s statements or views. So Bush never had the benefit of a serious, substantive discussion between his principal advisers. And the president, whose legs often jiggled under the table, did not force a discussion.

Blackwill saw Rice try to intervene and get nowhere. So critical comments and questions—especially about military strategy—never surfaced. . . . The image locked in Blackwill’s mind of Rice, dutiful, informed and polite, at one end of the table, and the inexperienced president at the other, legs dancing, while the bulls [Cheney, Powell, and Rumsfeld] staked out their ground, almost snorting defiantly, hoofs pawing the table, daring a challenge that never came.<sup>284</sup>

Of course, as an alternative to the sclerotic bureaucracy, the president can choose to confine decisionmaking to himself and his closest advisors, as in the initial decision to invade Iraq. The result was a process in which expert advice was frequently ignored; and as a direct consequence, the Iraq war proceeded without a cogent postinvasion plan.<sup>285</sup> That is the dilemma:

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282. *Id.* at 379–80.

283. *Id.* at 241.

284. *Id.* at 241–42.

285. CHANDRASEKARAN, *supra* note 16, at 28–37; RICKS, *supra* note 248 at 96–111; WOODWARD, *supra* note 30, at 316–17. Specifically, there was no plan (and not enough troops) to provide immediate security and prevent looting; no plan to secure caches of conventional weapons that Saddam Hussein had distributed throughout Iraq and which helped arm the insurgency; no plan to

Hamiltonian unity comes from centralized decisionmaking, but competence comes from division of labor among many hands. You cannot have it both ways. If the president is going to proxy the commander in chief power through a civilian bureaucracy, the argument for war powers concentrated in the executive, based as it is on Hamilton's contrast between unity and multiplicity, fails. If, on the other hand, the president centralizes decisionmaking to herself and a handful of advisors, to approximate the unity of will Hamilton had in mind, then the complexity of the job under modern conditions makes it nearly impossible to carry out. Given this dilemma, it surely seems more plausible to maintain the "third way" of civilian control and military direction.

To say that the executive branch (in distinction from the president) lacks the unity of will Hamilton's institutional competence argument requires is obviously not to say that some other branch of government is superior to the executive in that respect. Rather, it is to say that the institutional competence argument for exclusive executive-branch prerogatives in matters of war and peace cannot be sustained. The operative word here is "exclusive": the commander in chief override, like the argument for great judicial deference to the executive in military matters, looks weaker and less appealing once we realize that "the executive" is either a single-willed but amateur decisionmaker, or a bureaucracy whose failures of competence are often as conspicuous as its successes. Based on institutional competence, the argument for overlapping or concurrent powers appears a lot more appealing. In the legislative context, this means a substantial claim for Congressional war powers; in the judicial context, it means less deference to executive branch assertions grounded in the commander in chief's illusory military expertise—particularly when those assertions involve subjects far removed from the narrow power of military command.

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prevent the escape of high-level Baathists who later coordinated the insurgency; no plan to restore electricity (although there was a plan—which turned out to be unnecessary—for disaster assistance to internally displaced persons); and not even a plan to get Jay Garner, the first head of the occupation authority, into Iraq with his team. See CHANDRASEKARAN, *supra* note 16, at 41–44 (Garner); RICKS, *supra* note 248, at 135–36 (looting), 145–46 (weapons caches), 150–51 (looting), 190–91 (escape of Baathists to Syria); 154–55 (electricity); WOODWARD, *supra* note 30, at 169–70 (Garner). As all three writers report, a great deal of advance planning for the occupation had gone on in the State Department; but the Defense Department commandeered the occupation portfolio, and in one telling episode Rumsfeld and Cheney prevented Garner from adding two experienced and knowledgeable members of the State Department team to his own, because one of them was skeptical of Ahmad Chalabi, the Iraqi exile leader who neoconservatives had anointed as the future leader of Iraq. WOODWARD, *supra* note 30, at 125–29; RICKS, *supra* note 248, at 101–04; CHANDRASEKARAN, *supra* note 16, at 36–37.

This last point is important. Some might object to my line of argument that the central issue is not competence in absolute terms, but relative competence—and the executive branch certainly enjoys an advantage over Congress and the courts when it comes to military decisions. However, this argument begs the question in two respects. First, it begs the question to label a decision like whether to torture captives, or whether to classify them as enemy combatants, a military decision. Congress can and has criminalized torture, and there is no reason to doubt that deciding which forms of violence should be prohibited by a criminal law ordinarily falls within the competence of legislatures. Similarly, as Judge Mukasey argued in *Padilla*, determining on the basis of evidence whether a legal concept applies in a particular case falls under the competence of judges.<sup>286</sup> In matters far removed from battlefield activities, we actually have no reason to suppose that the executive is the most competent organ of government even on relative terms. Second, the objection begs the question by presupposing that whichever branch of government is relatively more competent should have preclusive authority, that is, authority that excludes the other branches. There is no reason to assume that that leads to better decisionmaking.

#### D. HUNTINGTON AND OBJECTIVE CIVILIAN CONTROL

To develop the argument for the “third way,” it will be useful to examine some contemporary theories of civilian-military relations. The modern study of civilian-military relations began in 1957, with Samuel Huntington’s dazzling early book *The Soldier and the State*, which remains the dominant work even half a century later. As we shall see, Huntington arrives, through a very different argument, at largely the same result as the framers and ratifiers: endorsement of the American “third way,” which insists on a division of labor in which civilian leaders set political aims and superintend the military, but without pretending military competence or assuming battlefield responsibilities.

This convergence is surprising, because Huntington’s fundamental outlook is deeply antithetical to the separationist argument for civilian control of the military. Huntington disapproves of the scheme of war powers in the U.S. Constitution, which in his view “does not permit the objective civilian control compatible with a high level of military

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286. *Padilla v. Bush*, 233 F. Supp. 2d 564, 607–08 (S.D.N.Y. 2002).

professionalism.”<sup>287</sup> Although he concedes that the separation of powers exemplifies “the basic genius of American government” and “prevents the arbitrary and dictatorial use of power,”<sup>288</sup> Huntington finds it frustratingly inefficient in military matters, and argues that it invites a dangerous blurring of political and military functions.<sup>289</sup>

Moreover, Huntington is an unabashed militarist, who concludes his book with the admonition that “today America can learn more from West Point than West Point from America.”<sup>290</sup> His political views combine frank and explicit hatred of liberalism, dislike for business conservatives because of their pacifist tendencies, and an utter contempt for ordinary American life in its “tiresome monotony” and “garish individualism.”<sup>291</sup> For Huntington, civilian America is Babylon, and he admires the professional military because it represents “a bit of Sparta in the midst of Babylon.”<sup>292</sup> His book culminates in a hymn to the “ordered serenity” of West Point, where “[b]eauty and utility are merged in gray stone,” and where “[i]n order is found peace; in discipline, fulfillment; in community, security.”<sup>293</sup> Huntington’s preference for clean, centralized Spartan hierarchy over concurrent, separated powers mirrors his distaste for “the incredible variety and discordancy” of “the American spirit at its most commonplace.”<sup>294</sup> He sometimes seems frustrated that it is America and not Sparta that he lives in and whose army he is discussing.

Fortunately, Huntington’s disdain for America’s fractious political life, and his doubts about its constitution, can be detached from the core insights of *The Soldier and the State*. Huntington’s great achievement was to reformulate the argument for civilian control in terms suitable for a contemporary professional military rather than an eighteenth-century army of farmers. Huntington announces the decisive break from eighteenth-century concerns in his early pages: “The activities of the Praetorian Guard offer few useful lessons for civilian control: the problem in the modern state is not armed revolt but the relation of the expert to the politician.”<sup>295</sup>

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287. HUNTINGTON, *supra* note 2, at 163.

288. *Id.* at 403.

289. *Id.* at 177, 401–03.

290. *Id.* at 466.

291. *Id.* at 465. On Huntington’s account of liberalism, see *id.* at 143–62; on business conservatism, see *id.* at 222–27, 289–90. For Huntington, liberalism in military affairs “constituted the gravest domestic threat to American military security.” *Id.* at 457.

292. *Id.* at 465.

293. *Id.*

294. *See id.*

295. *Id.* at 20.

To begin with, we should notice that there has never been a danger of military coup in U.S. history. Though it would be nice to credit this to the wisdom of the constitutional design, a constitution alone cannot make coups unthinkable. If they have been unthinkable in America, it is because America has been spared the social and political preconditions of military seizures of power: in the words of a contemporary student of civil-military relations, these are “catastrophic defeat in battle, collapse of the civilian political order, persistent underfunding of the military coupled with cronyism and corruption in the military personnel system.”<sup>296</sup>

Without the danger of coups, perhaps the rest of the eighteenth-century argument for civilian control of the military is equally irrelevant to the modern state. That, I will suggest shortly, is wrong. But the wide disparity between the framers’ and ratifiers’ understanding and contemporary reality sets the stage for Huntington’s argument. In his view, the original understanding of civilian-military relations is an inadequate guide to the modern problem of civilian control—the relation of the expert to the politician—because the constitutional framers simply did not envision a modern professionalized military.<sup>297</sup> That, according to Huntington, first came into being two decades later when Scharnhorst and Gneisenau modernized the Prussian military, and set the standard that all other modern militaries soon emulated.<sup>298</sup>

The emergence of military professionalism had two preconditions. First was the notion that there is indeed such a thing as “military science,” a stable set of principles that can be studied and taught in a systematic way. That idea grew out of the carefully calculated maneuver warfare of the late eighteenth century, viewed through the lens of Enlightenment rationalism.<sup>299</sup> Clausewitz’s *On War*, published posthumously in 1832, is the most famous effort to set out the principles of warfare systematically;<sup>300</sup> but an earlier benchmark is the establishment of national military academies. West Point, Saint-Cyr, and the Royal Military College all came into being in 1802, and Scharnhorst set up the Prussian Kriegsakademie (of

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296. FEATHER, *supra* note 112, at 11.

297. HUNTINGTON, *supra* note 2, at 164–65.

298. *Id.* at 30–31.

299. See RITTER, *supra* note 66, at 41–42.

300. See CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832). See also AZRIEL LORBER, *MISGUIDED WEAPONS: TECHNOLOGICAL FAILURE AND SURPRISE ON THE BATTLEFIELD* 11–12 (2002) (describing Clausewitz and *On War* as “probably [having] had the most influence on military thought”); WILLIAM R. POLK, *NEIGHBORS AND STRANGERS: THE FUNDAMENTALS OF FOREIGN AFFAIRS* 76 (1997) (identifying Clausewitz as “warfare’s most famous analyst”).

which Clausewitz was a product) eight years later. The academies combined military science with a broad general education and strict discipline; the United States, with its technological bent, also incorporated a foundation in engineering.<sup>301</sup>

Complementing the creation of military science was the establishment of meritocracy in the officer corps. In European practice, this meant abolishing the two prevailing methods for choosing officers, aristocratic birth and the purchase of commissions by wealthy families to provide careers for their sons.<sup>302</sup> Together, the establishment of an expert discipline and the merit-based recruitment of its practitioners created the professional military.

The upshot was the all-important link between expertise and professionalism in the officer corps, and this is the heart of Huntington's argument. Expertise alone is not enough. Military expertise, like expertise in other life-and-death matters, needs to be combined with professional ethics: a sense of responsibility beyond self-interest, and, in Huntington's words, "a sense of organic unity and consciousness of themselves as a group apart from laymen."<sup>303</sup> Huntington thus defines professionalism as the union of expertise, responsibility, and corporateness. No doubt professional attitudes (in this sense) are desirable in all ranks of a military organization, but they are indispensable in the officer corps. The fundamental question is how professionalism can be maintained in an organization directed by political officials responsive to electoral opinion.

A key step in professionalizing the military lay in Clausewitz's idea that military force is an instrument for rationally pursuing the state's political ends, not an instrument of glory-seeking.<sup>304</sup> At the same time that he rationalized strategy and tactics, Clausewitz turned the military into (in Huntington's words) "the tool of the state."<sup>305</sup> In Huntington's version of the relationship, the civilian government sets the political ends for which military power is used, the military provides the technical means, and neither meddles in the other's appointed sphere.

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301. See HUNTINGTON, *supra* note 2, at 42–43, 48, 198–99.

302. See, e.g., KEEGAN, MASK, *supra* note 42, at 172–74; V.G. KIERNAN, COLONIAL EMPIRES AND ARMIES 1815–1960, at 18, 19 (rev. ed. 1998); John Shy, *Jomini*, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 143, 160–61 (Peter Paret ed., 1986).

303. HUNTINGTON, *supra* note 2, at 10.

304. See CLAUSEWITZ, *supra* note 300, at 87 (describing war as "[a] political instrument, [and] a continuation of political activity by other means").

305. HUNTINGTON, *supra* note 2, at 83.



It follows that professional military officers must be apolitical as a matter of principle: their job is not to set the state's goals or to govern, but rather to execute political decisions reached by the civilian government regardless of their personal convictions. On this issue Huntington is uncompromising. In a remarkably chilly passage, he goes so far as to criticize the German officers who joined the anti-Hitler resistance: they "forgot that it is not the function of military officers to decide questions of war and peace."<sup>306</sup> Where most of the world regards Stauffenberg and his colleagues as martyrs who died gruesome deaths trying to rid the world of a monster, Huntington sees a lapse from military professionalism.

This vision of professionalism as a morally nonjudgmental, zealous pursuit of a client's ends is closer to that of lawyers, at least on one standard view of legal ethics, than that of physicians. Physicians have one overarching professional goal, healing the sick; they are not tools of their patients in any other respect. But the lawyer is the client's agent; and in contemporary legal ethics, clients set the ends of representation while lawyers hold sway over the means.<sup>307</sup> That is exactly the relationship Huntington has in mind when he speaks of military responsibility. For him, civilian control of the military is inherent in the very ideals of military professionalism. Rather than deriving civilian control from the need to solve the Gilgamesh problem or the imperatives of democratic theory, Huntington derives it directly from the concept of professionalism.<sup>308</sup>

But how is civilian control to be achieved? One time-honored idea is a kind of emotional and moral sympathy between the military and its people. This was the solution of the *Gilgamesh* poet and Plato. It was also Blackstone's idea: "[I]t is requisite that the armies . . . should . . . have the same spirit with the people . . . . Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power . . . a body too distinct from the people."<sup>309</sup> Hamilton offered a related argument in *The Federalist No. 29*.<sup>310</sup> Huntington labels

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306. *Id.* at 77.

307. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2004). I should add that many lawyers and theorists, myself included, reject this view of legal professionalism as neutral partisanship. Those taking this view argue that conscience cannot be subordinated to professional duty the way that Huntington suggests. See, e.g., DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 126–27 (1988).

308. HUNTINGTON, *supra* note 2, at 81–83.

309. 1 BLACKSTONE, *supra* note 107, at \*414.

310. "What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests?" THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 156, at 186.

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this approach “subjective civilian control,” which “achieves its end by civilianizing the military, making them the mirror of the state.”<sup>311</sup>

And he rejects it utterly. Military officers practice a singular profession, the management of violence, and their attitudes are necessarily remote from those of civilians. The very fact that they are sworn to sacrifice their own lives if necessary, even for policies that they may find politically objectionable or downright stupid, already guarantees that officers are not mirrors of the liberal state. Deadly self-sacrifice for goals not one’s own is the antithesis of liberal-individualist ideas about the importance of life, liberty, and the pursuit of happiness.

By emphasizing the civilian-military difference, Huntington emphatically does not mean that civilians are peace-loving and the military are latter-day Alexanders. Quite the contrary. One of his key insights is that the modern military professional has attitudes far removed from the glory-seeking adventurers of the *Iliad*. Professional military officers are security-conscious rather than glory-conscious, and that often makes them more antiwar than many civilians:

The military man normally opposes reckless, aggressive, belligerent action. . . . War at any time is an intensification of the threats to the military security of the state, and generally war should not be resorted to except as a final recourse, and only when the outcome is a virtual certainty. . . . Thus, the military man rarely favors war. . . . Accordingly, the professional military man contributes a cautious, conservative, restraining voice to the formulation of state policy. This has been his typical role in most modern states including fascist Germany, communist Russia, and democratic America. He is afraid of war. He wants to prepare for war. But he is never ready to fight a war.<sup>312</sup>

Civilians may be adventurist. Military professionals are not. This has certainly been the prevailing stance of the post-Vietnam U.S. military. Colin Powell, we should remember, was skeptical of both the Persian Gulf War and the Kosovo War.<sup>313</sup> Jarring as it may sound, Huntington labels the military ethic as pacifist.<sup>314</sup>

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311. HUNTINGTON, *supra* note 2, at 83.

312. *Id.* at 69.

313. For Powell’s skepticism of the Kosovo War, see *supra* note 251 and accompanying text. For Powell’s skepticism of the Persian Gulf War, see, for example, Steven Metz, *Iraq and the Evolution of American Strategy*, in *PRESIDENTIAL POLICIES AND THE ROAD TO THE SECOND IRAQ WAR: FROM FORTY ONE TO FORTY THREE* 241, 245 (John Davis ed., 2006).

314. HUNTINGTON, *supra* note 2, at 69, 79. In a famous passage, Huntington writes, “The military ethic is thus pessimistic, collectivist, historically inclined, power-oriented, nationalistic, militaristic,

If not subjective civilian control, then what? Huntington's main idea is this:

Civilian control in the objective sense is the maximizing of military professionalism. More precisely, it is that distribution of political power between military and civilian groups which is most conducive to the emergence of professional attitudes and behavior among the members of the officer corps. Objective civilian control is thus directly opposed to subjective civilian control. Subjective civilian control achieves its end by civilianizing the military, making them the mirror of the state. Objective civilian control achieves its end by militarizing the military, making them the tool of the state.<sup>315</sup>

For Huntington, a properly professionalized military is, by definition, under strict civilian control, and therefore the Anti-Federalist fear of standing armies, along with the constitutional protections against their supposed dangers, becomes almost laughably irrelevant to the modern state.

To achieve objective civilian control, Huntington advocates what he calls a "balanced pattern" between the president, the secretary of defense, and the military leadership. It establishes a line of authority from the president to the defense secretary to the chief military commanders and advisors, in which "[t]he military chief is subordinate to the secretary who is subordinate to the President, but neither of the two civilian officials exercise military command. Military command stops at the level of the military chief."<sup>316</sup>

For our purposes, the crucial consequence of Huntington's linkage between military professionalism, objective civilian control, and the

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pacifist, and instrumentalist in its view of the military profession. It is, in brief, realistic and conservative." *Id.* at 79.

315. *Id.* at 83.

316. *Id.* at 186–87. At one point, Huntington suggests that objective civilian control requires "a pyramid of authority culminating in a single civilian head," rather than the separated war powers of the U.S. Constitution, which he regards as "a perpetual invitation, if not an irresistible force, drawing military leaders into political conflicts." *Id.* at 163, 177. But this is a mistake. For one thing, unifying power in presidential hands would hardly solve the problem of keeping military officers apolitical. Just the contrary: subordinating the entire military to a single politician seems like a perfect recipe for pliant generals who tell the politician whatever he or she wants to hear rather than offering candid, independent military advice. This is already a danger, as H. R. McMaster's influential critique of the Vietnam-era JCS illustrates. MCMASTER, *supra* note 269. More fundamentally, it is hard to see what alternative to the separation of powers Huntington has in mind. Abolishing the separation of war powers would mean transferring the power to declare and fund wars into the president's hands—in effect, rolling the clock back centuries to a time when monarchs could tax at will to fund their wars. Eventually, Huntington concedes that abolishing the separation of powers would not be worth the price. HUNTINGTON, *supra* note 2, at 191.

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balanced pattern is this: even after replacing the eighteenth-century theory of civil-military relations, Huntington nevertheless retains the fundamental “third way” compromise: civilian control, military direction.

The reason should be obvious. The professional military has its own unique expertise, and it would be dangerous for the amateur president or defense secretary to ignore expert advice, and catastrophic if they go further and start to play general. Conversely, only the civilian officials set the ends of state policy. Huntington’s vision of military professionalism requires a depoliticized military that is, in words quoted earlier, a tool of the state. The separation of statesmanship and strategy would be menaced “by the tendency of politicians to invade the independent realm of the military.”<sup>317</sup>

Of course the president retains the constitutional authority to play general if he wants; that much, at least, is clear from the spare text of the Commander in Chief Clause. Huntington therefore calls the imperative toward objective civilian control “extraconstitutional, a part of our political tradition but not of our constitutional tradition. Civilian control has, in a sense, been like the party system. . . . Neither is contemplated in the Constitution, yet both have been called into existence by nonconstitutional forces.”<sup>318</sup>

This, I believe, is on the right track but not precisely right. Huntington is correct that objective civilian control—the admonition for the president not to invade the independent realm of the military—does not appear in the text of the Commander in Chief Clause, which says nothing about the civilian commander’s responsibilities. But that does not make it extraconstitutional. When a written text underspecifies its concepts, unwritten background understandings must supply the meaning. Originalists and nonoriginalists agree about this; where they disagree is about whether the relevant background understandings are those at the time of the framing or those of today. And, if the background understandings at the time of the framing and now are the same, originalists and their adversaries can agree that it defines constitutional meaning.

That is the situation with the commander in chief power. At the time of the framing and ratification, the background understanding was the “third way” of civilian control coupled with military direction, growing out of separationist premises grounded in fear of military seizures of power.

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317. HUNTINGTON, *supra* note 2, at 308.

318. *Id.* at 190.

Under Huntington's account, the background understanding remains the "third way," although it grows out of the requirements of professionalism, not out of the fear of coups and adventurism.

Huntington's point that objective civilian control is deeply embedded in our political tradition thus provides the interpretive key to the Commander in Chief Clause. According to that tradition, the civilian commander in chief has never been a consolidationist warrior-king.

Earlier, I argued that the unwritten understanding implies that the commander in chief authority consists of the narrow power of military command, rather than standing for a broad, uncircumscribed battery of "presidential war powers" over which the commander in chief holds exclusive sway. As we saw, given eighteenth-century concerns about military mutiny, presidential abuse of the standing army, and adventurism, it is vanishingly unlikely that the framers' constitution created a broad rather than a narrow commander in chief authority. A broad authority would be appropriate for a consolidationist warrior-executive, but the framers and ratifiers were separationists, not consolidationists.

Huntington's argument against the warrior-executive is simply that amateurs should not usurp control from professionals. Civilian leaders are supposed to make political choices, not military choices, and blurring the line undermines military professionalism. Huntington's is a division of labor (or, as he says, "separation of functions") argument rather than a separation of powers argument.<sup>319</sup> On either theory, the idea that the commander in chief power contains war powers beyond commanding the military makes little sense. Indeed, Huntington notices that the principal use of the Commander in Chief Clause "has been to expand presidential power against Congress in nonmilitary areas."<sup>320</sup> This, he argues, became a constitutional possibility because the Commander in Chief Clause names an office without specifying its functions; this "has been of great use to the President in expanding his power" but has "indirectly . . . impeded civilian control by increasing the likelihood that military leaders will be drawn into . . . political controversy."<sup>321</sup>

To summarize, Huntington offers five fundamental insights: (1) the reformulation of the problem of civilian control as the relation between the expert and the politician; (2) the insistence that military professionalism is

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319. *Id.* at 400–12.

320. *Id.* at 190.

321. *Id.* at 179.

essential to a proper relation between the expert and the politician; (3) the concept of objective civilian control, that is, the definition of civilian control as an institutional arrangement that maximizes military professionalism; (4) the proposition that objective civilian control requires a balanced pattern consisting of civilian determination of political ends and military direction of the means for attaining them; and (5) the understanding that all of these propositions are deeply embedded in our political tradition, forming our unwritten understanding of what a civilian commander in chief does.

All of these insights have great plausibility—and, taken together, they lead to the same conclusion as the eighteenth-century argument for civilian control of the military. Huntington also believes that the eighteenth-century theory is irrelevant today. But that conclusion is not crucial to the rest of the theory. There is no necessary inconsistency between eighteenth-century separationism, with its focus on the Gilgamesh problem and fear of government abuse of military power, and Huntington's emphasis on military professionalism. Both, in any case, reject the consolidationist conception of the warrior-executive, and both therefore support a narrow reading of the Commander in Chief Clause.

#### E. POLITICAL AND MILITARY DECISIONS

If civilian leaders are supposed to make political choices but not military ones, why should the president hold even the narrow power of military command? Why should the president's role as commander in chief remain an efficient rather than a merely dignified role?

The basic answer to the question of why the president must retain the power of command is that military decisions can have political implications, and civilian dominion over political decisionmaking requires the authority to subordinate military considerations to political ones. Huntington acknowledges this point.<sup>322</sup> But it plays a small part in his argument, no doubt because it fuzzies up the sharp distinction he draws between (political) ends, set by civilian leaders, and (military) means, which are left to the generals. In an important and spirited critique of Huntington, Eliot Cohen emphasizes that even minor-looking tactical choices often have political implications, and that civilian leaders properly intervene when that is the case.<sup>323</sup> This point seems correct, even on

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322. See *id.* at 72–73.

323. See COHEN, *supra* note 112, at 76, 84, 129–30, 158–59, 167–68, 242.

Huntington's premises. Unlike Cohen, however, I regard it as a friendly amendment to Huntington's theory rather than an important objection to it.

Some examples will illustrate the point that military decisions can have political implications. Earlier I mentioned the famous conflict between Truman and MacArthur over how to fight the Korean War. MacArthur strongly believed that the best strategy involved bombing Chinese targets across the Yalu River, but Truman vetoed that strategy (and fired MacArthur) because he feared it might draw the USSR into the war.<sup>324</sup> That is a political, not a military, conclusion, and the decision to avoid rather than provoke war with the USSR is likewise a political decision. Similarly, during the Cuban missile crisis, "President Kennedy personally supervised the location of each U.S. Navy vessel involved in the blockade,"<sup>325</sup> lest an admiral's narrowly tactical decision spook Khrushchev and inadvertently launch World War III. And it was Truman rather than a military officer who made the most politically fraught of all tactical decisions: the choice to drop the A-bomb on Hiroshima.<sup>326</sup> Though many of us condemn the decision on moral, legal, or political grounds, it seems obvious that it belonged in the hands of civilian officials rather than military officers. It had enormous political consequences, inaugurating the nuclear age and the Cold War.

But even lesser decisions can implicate politics. Churchill intervened in a technical dispute among his military advisors over the deployment of air power before the Normandy invasion because he realized that minimizing French civilian casualties was politically crucial, and he wanted to ensure that casualty-avoidance figured in the military calculations.<sup>327</sup> In exactly the same way, tactical choices that inflict unintended civilian casualties carry vast political risks in the current Iraq war—although in this case the political leadership initially failed to appreciate the magnitude of the risks.

Virtually any operational or tactical choice may have deeply political consequences, and that is why civilian leaders should not be barred in principle from intervening in military decisionmaking. That is ultimately why the president's post as commander in chief must remain efficient rather than dignified.

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324. See *supra* note 25 and accompanying text.

325. VAN CREVELD, *COMMAND IN WAR*, *supra* note 81, at 237.

326. HARRY S. TRUMAN, 1945: YEAR OF DECISIONS: MEMOIRS BY HARRY S. TRUMAN 421–22 (1955).

327. COHEN, *supra* note 112, at 129–30.

But it does not follow, either logically or practically, that most or even many operational choices in fact *are* political in a sense relevant to the president's expertise, nor (therefore) that presidents or other civilian leaders should routinely intrude in military command. Nor does it follow that the president's intrusion has anything to do with military expertise rather than political judgment; or that the president's political judgment is better than that of other elected officials; or that the president's political choices trump those of Congress; or that every issue the president claims is political really is.<sup>328</sup>

To be sure, in a counterinsurgency war like the current Iraq conflict, military strategy includes a political component, as military commanders forge alliances and cut deals with local leaders in order to win them away from supporting the insurgents. In such a war, military expertise is political to a high degree. But on the ground wheeling and dealing with local chieftains over endless cups of tea is a different order of politics than the traditional executive branch conduct of foreign affairs. It can intrude on foreign affairs, if a military commander makes improvident commitments on behalf of his government. Those will be the cases that call for civilian political intervention. Mostly, though, the captains and colonels on the ground will understand the local politics better than civilians in Washington do.

Furthermore, not all presidential political ends are "high" politics having to do with foreign policy or military grand strategy. Presidents may make military choices because of a "low" domestic political agenda.<sup>329</sup> Johnson opted for remaining in Vietnam but gradually escalating (and disguising the escalation) to smooth over his reelection and make it easier to enact Great Society programs.<sup>330</sup> Roosevelt initially hoped to postpone a pre-World War II military buildup because he feared it might hurt his reelection chances.<sup>331</sup> (However, his military advisor General George C. Marshall stood up to Roosevelt and persuaded him to change his mind.)<sup>332</sup>

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328. For a detailed discussion of the relative roles of the President and Congress in politico-military decisions, see Barron & Lederman, *Constitutional History*, *supra* note 11. Exhaustively canvassing both framing-era and subsequent sources, Barron and Lederman argue that the president and Congress have overlapping and concurrent powers in *Youngstown* Category III ("lowest ebb") cases. *Id.* at 1099–112; Barron & Lederman, *Framing the Problem*, *supra* note 11, at 693–94 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

329. The "high" and "low" terminology is Cohen's. COHEN, *supra* note 112, at 242.

330. McMaster demonstrates this in painful detail throughout his book. For a summary statement, see MCMASTER, *supra* note 269, at 326.

331. WEINTRAUB, *supra* note 25, at 106.

332. *Id.*



Even Lincoln urged a summer 1864 victory in Atlanta partly to bolster his reelection chances.<sup>333</sup> According to many sources, Bush administration legal strategies about detainees were molded by a preexisting agenda of enhancing executive power.<sup>334</sup>

These are clearly not the kind of political ends that either Clausewitz or Huntington have in mind when they argue that a nation's military strategy must be subservient to its political strategy. They are thinking of foreign policy, not domestic power struggles. Indeed, when politicians make military choices to bolster their own desire for political power, we face exactly the concerns that preoccupied the framers—the dangerous interaction between military leadership, hunger for power, and adventurism.<sup>335</sup> The unremarkable fact that modern presidents seek power and political advantage shows that the framers' concerns about the political exploitation of military command by civilian leaders are alive and well in the twenty-first century.

Once we recognize that some, but not necessarily many, military choices have a political dimension in the sense relevant to Huntington's argument, it becomes clear that the president's effective power as commander in chief is fully consistent with the basic Huntingtonian framework in which politics is left to the politicians while military choices are *mostly* left to the military, although with civilian monitoring and the possibility of civilian intervention. It should also be clear that low politics is not a good enough reason for a civilian commander to make military

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333. COHEN, *supra* note 112, at 242.

334. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1, A12. Regarding the pro-executive-power prior agenda, see, for example, Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REPORT, May 29, 2006, at 32, available at <http://www.usnews.com/usnews/news/articles/060529/29addington.htm>; James Taranto, *A Strong Executive*, WALL ST. J., Jan. 28, 2006, at A8, available at <http://home.nyc.rr.com/taranto/cheney.htm>. See generally SAVAGE, *supra* note 258, at 46–84 (describing executive power agenda of unitary executive enthusiasts).

335. Cohen defends the inclusion of “low” domestic politics among the legitimate reasons for leaders to intervene in military decisions, but only when they also have “high” military purposes. See COHEN, *supra* note 112, at 242. But it is important to tread carefully in this argument. Cohen writes, “President Lincoln wants a victory at Atlanta in the summer of 1864 in order to crush the Confederacy—but also to boost his own chances of reelection, *which in turn is necessary for the ultimate victory of the Union.*” *Id.* (emphasis added). The italicized phrase goes too far. The example is unconvincing; despite McClellan's less than stellar command earlier in the war, there is no reason to suppose that he would have lost or conceded the war had he been elected; he repudiated the antiwar plank of his party's platform. See A. Wilson Greene, “*I Fought the Battle Splendidly*”: George B. McClellan and the Maryland Campaign, in ANTIETAM: ESSAYS ON THE 1862 MARYLAND CAMPAIGN 56, 56–83 (Gary W. Gallagher ed., 1989); 1 WILMER L. JONES, GENERALS IN BLUE AND GRAY: LINCOLN'S GENERALS 85, 86 (2004). Probably every president thinks that his continuation in power is necessary, but that is delusion.

decisions. That would violate the moral compact at the heart of civilian control of the military.

#### F. AFTER HUNTINGTON

How has Huntington's framework fared in the half century since he proposed it? As I indicated earlier, Huntington's emphasis on military professionalism and objective civilian control remains the dominant perspective on civilian-military relations. But, like all academic theories, it has had its ups and its downs.<sup>336</sup> One observer notes that "by the mid 1990s, Huntington was no longer taught in core curricula at West Point nor in the Army's schools and had not been for a decade or so."<sup>337</sup> But he adds that in the late 1990s, faced with a troubling sense of eroding professionalism in the officer corps, the Army began to renew its interest in Huntington's thesis.<sup>338</sup>

The problems of the 1990s grew from the end of the Cold War, which led both to military downsizing and loss of clarity about the military's mission. Would it now be humanitarian interventions such as Somalia, peacekeeping and policing missions as in Bosnia, training of indigenous forces as in Colombia and the Philippines, sanction enforcement as in Iraq, or other kinds of MOOTW (military operations other than war)?<sup>339</sup> None of these falls within the core of military expertise, and the boundaries of professional jurisdiction began to fray.<sup>340</sup> Furthermore, many officers wondered whether these were missions worth dying for, a concern mirroring the post-Mogadishu perception by political leaders that casualty avoidance and force protection had now become central to the military mission.<sup>341</sup> At the same time, the Revolution in Military Affairs meant a

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336. See Edward G. Coffman, *The Long Shadow of The Soldier and the State*, 55 J. MILITARY HIST. 69 (1991).

337. Don M. Snider, *The U.S. Army as Profession*, in THE FUTURE OF THE ARMY PROFESSION, *supra* note 246, at 3, 7.

338. *Id.* at 8–16.

339. For an illuminating and admiring survey of the remarkable range of operations—from MOOTW to hot wars—that today's U.S. military undertakes, see ROBERT D. KAPLAN, *IMPERIAL GRUNTS: THE AMERICAN MILITARY ON THE GROUND* (2005).

340. That is one reason that the "Future of the Army Profession" project of West Point's Center for the Professional Military Ethic has made extensive use of Andrew Abbott's studies of professional jurisdictions and turf-competition among professions for jurisdiction over functions in understanding modern military professionalism. Snider, *supra* note 337, at 17–21.

341. Here the seminal work is the manifesto of the Center for the Professional Military Ethic: DON M. SNIDER, JOHN A. NAGL & TONY PFAFF, *ARMY PROFESSIONALISM, THE MILITARY ETHIC, AND OFFICERSHIP IN THE 21ST CENTURY* (1999), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB282.pdf>.

much more hi-tech and information-centered conception of the military; and that, together with the ideology of privatization, entailed that a large number of support functions were outsourced.<sup>342</sup> Privatization, like MOOTW, poses a threat to the jurisdictional boundaries of the military profession. Moreover, as private military contractors successfully competed for the services of trained officers, the professional ideals of altruistic service and corporateness seemed threatened by a commercial alternative. Together, these factors generated the crisis of professionalism that military observers perceived.

The Afghanistan and Iraq wars have exacerbated some of these tensions (such as concern about private military contractors<sup>343</sup>) and alleviated others (no one today thinks that force protection is the main military mission, and the two post-9/11 wars have given pride of place to the primary military expertise of “boots on the ground”). It has become clear since the 1990s that the questions of military professionalism and military ethics are once again central, not peripheral, to contemporary affairs. Huntington’s questions have emerged from their temporary eclipse.

The structure of American military forces has not followed Huntington’s recommendation of a balanced pattern. Huntington proposed a line of authority running from the president to the secretary of defense—both of whom would make political but not military decisions—to the highest military officer (presumably the chair of the Joint Chiefs of Staff), who would serve a dual role as the civilian officials’ top military advisor and the armed forces’ top commander. The current organization of the U.S. armed forces, established by the Goldwater-Nichols Act of 1986, differs significantly from Huntington’s balanced pattern. Under Goldwater-Nichols, the JCS Chair is indeed the chief advisor, but is forbidden from exercising command.<sup>344</sup> The line of command runs from the president to the secretary of defense and then directly to the combatant commander of an operation. The main purpose of Goldwater-Nichols was to end the poisonous interservice rivalries that had made military advice from the Joint Chiefs of Staff ineffectual in Vietnam; under the new statute, the JCS

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342. SINGER, CORPORATE WARRIORS, *supra* note 64, at 62–64, 66–70.

343. See SINGER, CORPORATE WARRIORS, *supra* note 64; P. W. Singer, *Outsourcing War*, FOREIGN AFF., Mar.–Apr. 2005, at 119, 122 (discussing the prominent role played in Iraq by “the coalition of the billing”).

344. 10 U.S.C. § 152(c) (2000). The reason for the reorganization was the perception that interservice rivalries had hampered military effectiveness, and thus that the chiefs of staff should not be part of the chain of command. That way, combatant commanders could exercise unified command over multiservice forces. See S. REP. No. 99-280, at 25 (1986).

Chair is the sole authorized advisor (although the other Chiefs often give Congressional testimony).<sup>345</sup> In this respect, the legislation aimed to restore some heft to military advice. Nevertheless, Huntington would presumably regard this pattern as dangerously unbalanced, because it invites civilian leaders to bypass their chief military advisors and supervise combatant commanders directly. Indeed, in one of the most significant blunders during the run-up to the Iraq War, the civilian leadership ignored Army Chief of Staff Eric Shinseki's estimate (given in Congressional testimony) that it would take hundreds of thousands of troops to pacify postwar Iraq; Under Secretary of Defense Paul Wolfowitz publicly rebuked Shinseki for his testimony, which turned out to be right.<sup>346</sup> It was not the first such episode; a few weeks after 9/11, the Chair of the JCS retired, "disgusted with Rumsfeld and feeling he had recklessly disregarded sound military advice."<sup>347</sup>

Even under Goldwater-Nichols, though, the assumption until recently had been that the combatant commander, not the president or defense secretary, is the efficient military leader in a conflict. Indeed, until 2002 combatant commanders were titled "commanders in chief." Significantly, in October 2002, then-Secretary of Defense Donald Rumsfeld prohibited that terminology, on the ground that under the Constitution only the president is commander in chief.<sup>348</sup> In one sense, this was a purely verbal change; but the implication behind it is plainly the assertion of a more domineering form of civilian command than the Huntingtonian separation of functions. Rumsfeld was surely signaling that the civilian leadership, not the military, would call the shots in the upcoming Iraq war.

Peter Feaver notes that Huntington's most important empirical prediction—that unless the United States abandoned liberalism it would lose the Cold War—turned out to be completely false; and Feaver develops an alternative model of civilian-military relations based on the economic theory of principals and agents.<sup>349</sup> Feaver argues that civilian control succeeds best when civilian leaders monitor and discipline the military intrusively. But in fact his model retains the underlying division of labor in

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345. See 10 U.S.C. § 152(c).

346. RICKS, *supra* note 248, at 96–100. On the later realization that far more troops were necessary, see, for example, WOODWARD, *supra* note 30, at 302.

347. RICKS, *supra* note 248, at 156.

348. Vernon Loeb, *One 'Chief' Commands; Others Are Out of CINC*, WASH. POST, Oct. 29, 2002, at A19.

349. See generally FEAVER, *supra* note 112, at 54–117 (elaborating a principal-agent model of civilian-military relations).

Huntington's theory: civilians make political decisions, while the military executes them and tenders military advice.<sup>350</sup> Feaver's chief innovation is the added insight that maintaining this division of labor often requires intrusive civilian monitoring of the military, in order to solve the principal-agent problem.<sup>351</sup> This should be regarded as a modification of the "third way" rather than a radical alternative to it. Although critics have rightly rejected some of Huntington's theory—as I have as well—the core of his reformulation remains largely unscathed.<sup>352</sup>

More recently, however, Eliot Cohen in *Supreme Command* has offered a more fundamental criticism of Huntington's model.<sup>353</sup> Cohen's influential book aims to replace Huntington's insistence that "military command stops at the level of the military chief"<sup>354</sup> with a far more aggressive version of civilian control. His arguments are important for us to consider, not only because of their high quality, but also because Cohen offers a far more upbeat view of an active, hands-on civilian supreme commander—one that comes closer to the warrior-executive of consolidationism. It thus poses a significant challenge to the narrower view of the commander in chief power that I have claimed forms the unwritten background understanding of the Commander in Chief Clause. Cohen's book was on President George W. Bush's reading list the summer preceding the Iraq War—a period in which high administration officials made momentous decisions about war and detainee treatment in notable disregard of military opinion.<sup>355</sup>

We have already examined one of Cohen's arguments—that politics

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350. *Id.* at 172.

351. *Id.* at 284–85.

352. See COHEN, *supra* note 112, at 226; FEAVER, *supra* note 112, at 7–9.

353. COHEN, *supra* note 112.

354. See *supra* text accompanying note 316.

355. Dana Milbank, *Bush's Summer Reading List Hints at Iraq*, WASH. POST, Aug. 20, 2002, at A11. I am referring not only to the run-up to the Iraq war, about which Thomas Ricks's *Fiasco*, *supra* note 248, provides a detailed description of the decisionmaking process, but also interrogation policies and the torture memo, whose contents were concealed from the head JAGs until many months later. See Memoranda from the Four Chief Judge Advocates General, *reprinted in* THE TORTURE DEBATE IN AMERICA, *supra* note 7, at 377–91 (detailing how they learned, six months after the fact, about the torture memo). See also Jane Mayer, *Annals of the Pentagon: The Memo*, THE NEW YORKER, Feb. 27, 2006, at 32, available at [http://www.newyorker.com/fact/content/articles/060227fa\\_fact](http://www.newyorker.com/fact/content/articles/060227fa_fact) (detailing unsuccessful efforts by Navy General Counsel Alberto Mora to influence and remain informed about detainee treatment policies). I do not mean to suggest that Cohen's book influenced the decisionmaking process, or to tar his arguments by associating them with policies that were not his topic; but his view of "supreme command" harmonizes with the administration's expansive view of the commander in chief power as well as Rumsfeld's combative efforts to restructure the military and bring it to heel—efforts that culminated in the decision to invade Iraq using too few troops to stabilize the country.

pervades military decisions. The response was that just because some military decisions have strategic political implications, it does not follow that all do, or even that many do. If this were Cohen's only argument, it would not significantly dent Huntington's theory. Like Feaver's advocacy of intrusive monitoring, it would imply only that maintaining the correct balance between civilian and military jurisdictions requires civilians to address principal-agent problems.

But the core of Cohen's argument is not that all military decisions are inherently political. It is that active, participatory civilian leadership makes even purely military decisions better. Cohen bases his argument on four case studies of brilliant civilian leadership in wartime—Lincoln, Clemenceau, Churchill, and Ben-Gurion—and argues that their nearly continuous intervention in military affairs was essential to military success in the wars they faced. The method of argument is as striking as the content. By focusing on supreme civilian leaders who played glorious roles in their nations' history, and arguing that their heroic roles included supreme military command, Cohen implicitly invites us to reimagine the civilian commander in chief on consolidationist lines, as a heroic fighting executive.

Of course, one might reply that Cohen has biased his study by picking four extraordinarily great leaders. But Cohen anticipates that reply, and argues that even "leadership without genius" is likely to do better in wartime by taking an aggressive rather than deferential stance toward the military.<sup>356</sup> Taking Huntington as his explicit target, Cohen advocates a robust, hands-on vision of supreme civilian-military command.

I do not believe that Cohen makes his case. For one thing, on careful examination his case studies prove less than Cohen thinks they do, even on their own terms.<sup>357</sup> None of them reveals a civilian leader coming close to acting as supreme military commander. None of the four played *Gröfaz*. Thus, Cohen argues that Lincoln was personally responsible for devising the Union's successful war strategy. But most of the elements Cohen includes in Lincoln's war strategy are straightforwardly political rather than military, and therefore not really in issue. These include deciding that the war aim was restoration of the Union, manipulating to ensure that the war began with an act of Southern aggression, and keeping the European

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356. COHEN, *supra* note 112, at 172–207.

357. This is assuming that his historical scholarship is sound, which I have no reason to doubt and insufficient competence to judge.

powers out of the war.<sup>358</sup> Likewise, Clemenceau's World War I roles in uplifting French morale, negotiating the armistice, and maintaining the alliance belong fundamentally to a civilian politician's portfolio rather than that of a military commander; his primary military role, though far from insignificant, was deciding which of his two commanding generals' strategies to support.<sup>359</sup> As for Churchill, Cohen acknowledges that his operational ideas were often boneheaded, and defends him largely by pointing out that "despite having the supreme power to act as he wished, he allowed himself to be talked out of every one of them"<sup>360</sup>—more a counterexample than a proof of Cohen's thesis. And in Ben-Gurion's case, Cohen focuses on his extraordinary role at the birth of the Israeli state in creating the defense forces out of politicized, fragmented, more-or-less amateur militias—a remarkable feat, but not one with lessons that readily generalize to established states with professional militaries. Ben-Gurion's challenge, after all, was creating a professionalized military, not supervising one.<sup>361</sup>

Cohen does succeed in showing that these were each active, rather than passive civilian commanders, who took enormous interest in the details of the war efforts and monitored their military leaders intrusively—prodding them, peppering them with questions, refusing to accept conventional wisdom. He also shows that by choosing generals, civilian leaders indirectly choose strategies. What he does not show is that any of these leaders ignored military advice, overruled their military leaders' considered judgments on operational matters except on rare occasions, or—except in the case of Lincoln—laid claim to extraordinary war powers.<sup>362</sup>

Nor does Cohen succeed in showing that the aggressive civilian control he favors will improve military outcomes even when the leader lacks the genius of a Lincoln or a Churchill. Indeed, when he analyzes the qualities that made his four exemplary statesmen successful, he identifies

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358. COHEN, *supra* note 112, at 30–31. Lincoln did have one major strategic insight, namely that the Union forces should concentrate on defeating the Confederate armies rather than capturing Richmond; and his eventual choice of Grant as supreme commander flowed from his understanding of strategy.

359. *See id.* at 66–79.

360. *Id.* at 114. Cohen also quotes Lord Ismay that "not once during the whole war did [Churchill] overrule his military advisers on a purely military question." *Id.* at 118 (citation omitted).

361. *See id.* at 142–72.

362. On the propriety of Lincoln's claims to extraordinary war powers—his suspension of habeas corpus, his calling out of the militia and issuing calls for troops, and his issuance of the Emancipation Proclamation—see the judicious discussion in DANIEL FARBER, *LINCOLN'S CONSTITUTION* 144–75 (2003).

capacities that more mediocre leaders conspicuously lack. These include “intuition that stands well above the norm in human affairs,”<sup>363</sup> “mastery of military detail” acquired through “prodigious study”<sup>364</sup> (requiring a commitment of time that no modern president has), “exceptional judgment of other men,”<sup>365</sup> and “the ability to see things as they are, ‘without illusions.’”<sup>366</sup> Cohen notices that “[n]ations are led and ruled by words, and each of these men, deeply read in history, politics, and literature, had mastered the arts of speech and writing on a level beyond all but the most gifted orators and authors”<sup>367</sup>—but he fails to notice that this undercuts the case for leaders who lack comparable abilities. Any leader blessed with masterly judgment, military knowledge, inspiring rhetorical gifts, and ruthless abstinence from self-deception *is* a genius. If Cohen’s thesis asserts that civilian leaders can improve military outcomes by intrusive command, but only if they have the qualities he enumerates, it turns out to be a stronger argument against intrusive civilian command than for it. By definition, middling leadership rather than genius is all we are entitled to expect from our presidents.

Cohen’s principal case study for the usefulness of aggressive civilian control even by mediocre leaders is the Vietnam War, where he argues that failure resulted from underintrusive rather than overintrusive leadership.<sup>368</sup> But, inconsistently, he also maintains that “the American politicians failed as war leaders in Vietnam not because they immersed themselves in too much detail but because they looked at the wrong details and drew the wrong conclusions from them.”<sup>369</sup> In other words, they failed because of their amateurism, not their underintrusiveness. And, despite Cohen’s argument that they did not intervene enough, it seems undeniable that the civilian leaders micromanaged the Vietnam War to an astonishing degree. It was not just a matter of Johnson picking bombing targets. The Secretary of Defense’s office also picked targets, as well as specifying the weather conditions for carrying out the missions and the level of training required of the pilots.<sup>370</sup> At one point McNamara personally decided “whether the forces in Vietnam were to be reinforced by two C-141 cargo aircraft,” while Johnson personally decided whether to reinforce the half-million

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363. COHEN, *supra* note 112, at 211.

364. *Id.* at 214.

365. *Id.* at 215.

366. *Id.* at 224.

367. *Id.* at 218.

368. *Id.* at 185.

369. *Id.* at 212.

370. VAN CREVELD, *COMMAND IN WAR*, *supra* note 81, at 244–45.



troops on the ground with three more battalions.<sup>371</sup> Martin van Creveld attributes this astonishing absorption of the civilian leadership in minutiae to a badly designed command structure, rather than a desire to play *Gröfaz*.<sup>372</sup> Regardless of the cause, however, and regardless of whether Johnson and McNamara were asking enough skeptical questions of their generals, they cannot be accused of taking a hands-off approach to the war. This case study does not offer much reassurance that aggressive leadership by amateurs is an idea to embrace.

Cohen's most telling argument is that even if civilian leaders make bad generals, military leaders also get military matters badly wrong, and it is a mistake to put their professional judgment on a pedestal.<sup>373</sup> That may well be true. It should not surprise us; as Feaver observes, "the military is perhaps the only profession that never really gets a chance to practice," only to rehearse or simulate.<sup>374</sup> Militaries are notorious for fighting the last war rather than the current war.<sup>375</sup> All the more reason for a civilian leader to engage in probing interrogation of military advice.

This deflationary, unworshipful argument about the limits of military expertise is entirely plausible, but we must be careful what conclusions to draw. Military fallibility is not a strong argument for meddling by mediocre civilian leaders. No matter how badly skewed military judgment is, we have no reason to suppose that civilian judgment will be better. The issue is one of comparative advantage, not of the absolute soundness of military judgment. A second problem lies in the lopsided way Cohen sets up his contrasts. He studies civilian leaders of genius, and mediocre leaders coupled with mediocre generals; but he never asks what happens when mediocre civilian leaders second-guess and override good military advice by excellent generals.

Ultimately, what Cohen shows is the importance of an active, questioning, and intelligent approach by civilian leaders toward military

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371. *Id.* at 246.

372. *See id.*

373. COHEN, *supra* note 112, at 112, 177–80.

374. FEAVER, *supra* note 112, at 70.

375. See Ricks's incisive discussion of the conceptual unpreparedness of the U.S. Army for postcombat operations in Iraq. RICKS, *supra* note 248, at 127–33. McMaster, deeply critical of the civilian planners in the Johnson administration, does not paint the JCS in a more favorable light. When they could agree with each other, their consistent advice was to launch an all-out war on North Vietnam, ignoring concerns that doing so might provoke war with China and the USSR. But more typically the Chiefs' fierce interservice rivalries prevented them from reaching agreement. Astoundingly, at one meeting the Air Force Chief of Staff challenged the Army Chief of Staff to an aerial dogfight to settle a disagreement. MCMASTER, *supra* note 269, at 114.

advice. This is important, and to the extent that Huntington suggests otherwise Cohen's correction is welcome. It will come as no surprise to students of professions such as medicine and law, where research over the years has repeatedly confirmed that pushy, questioning, squeaky-wheel patients and clients get better service than dormant, docile ones.<sup>376</sup> But probing and questioning are not the same as taking over; and active civilian superintendence—what Cohen aptly labels “the unequal dialogue” between civilian and military leaders<sup>377</sup>—is not the same as civilian supreme command. It may be that Cohen really intends to offer only a modest case for “unequal dialogue,” consistent with Feaver's argument for intrusive civilian monitoring of military command, and not a call for heroic leadership. If so, however, his conclusions are far closer to Huntington's idea of objective civilian control than they are to the consolidationist notion of “supreme command.”

One more point deserves emphasis. Huntington's theory, no less than that of the eighteenth century, assumes that the point of the Commander in Chief Clause is to establish civilian control of the military—as opposed, for example, to the Macedonian system of fused dominion, where the point was to pick the greatest warrior as king. Its purpose is to control and channel power, not to enhance it. Huntington's question, like those of Feaver and Cohen, is how best to achieve civilian control. None of them supposes the Commander in Chief Clause conveys anything more than authority over the military. For each of them, therefore, the Commander in Chief Clause creates a narrow power of military command, not a broad, exclusive power in matters of national security.

## V. CONSEQUENCES AND CONCLUSIONS

### A. CONSEQUENCES

This Article has not focused on issues of constitutional doctrine; it aims instead to think about how they might be approached. The approach is, in a broad sense, historicist. The text of the Commander in Chief Clause fuses civil and military dominion; it does so with few words and no explanations. Faced with a spare, minimalist constitutional text, the interpreter must ask why governments choose fused dominion, and why, in

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376. See, e.g., DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (concluding that those clients who were assertive received better treatment than those who were passive).

377. COHEN, *supra* note 112, at 208–24.

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particular, this government chose it. Answering those questions will expose the unwritten understanding that gives meaning to the underspecified concepts in the text. Fused dominion has meant different things in heroic and feudal cultures, in military dictatorships, and in liberal republics; its meaning has changed somewhat between the American republics of the eighteenth and twenty-first century. Military technology and tactics, social institutions, forms of government, and political ideologies have all contributed to the shapes fused dominion assumes, and for the historicist its meaning cannot be understood apart from these. The interpretive error I mean to ward off is, for want of a better word, anachronism.

The particular form of anachronism at stake here is imposing a concept of fused dominion drawn from heroic and feudal societies onto a liberal republic, dangerously overinflating the image of the commander in chief. In a liberal republic, the purpose of fused dominion is not to consolidate supreme civil and military powers in the hands of a single individual to facilitate warmaking, but to control the ambitions of leaders and domesticate warriors.

Of course it would also be anachronistic to suppose that the political debates of a small eighteenth-century republic with a tiny army of musketeers still make sense in a continental republic possessing apocalyptic military power. The purpose for examining theories of civil-military relations of the last half century was to guard against this anachronism. Huntington's argument, which I have accepted in part (and with amendments drawn from Feaver and Cohen) is that separation of functions is now a more urgent problem than separation of powers. But, even accepting this conclusion, the form of fused dominion remains largely the same: civilian leaders control or (in Barron and Lederman's word) superintend the military<sup>378</sup>—and can do so quite actively—but their role as commander in chief does not include broader warmaking powers.

Although I have not focused on doctrinal issues, this approach may carry doctrinal consequences. "May carry," not "carries": as Holmes said, general propositions do not decide particular cases, and the propositions defended here are quite general.<sup>379</sup> To say that the commander in chief authority is narrow does not say how narrow it is, and it would be a mistake to suppose we could read the commander in chief's rights and duties directly off of the concepts of separationism or military professionalism. In

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378. See Barron & Lederman, *Framing the Problem*, *supra* note 11, at 767–68.

379. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").

a sense, the main doctrinal consequence of this paper consists of shifting the burden of proof, so that proponents of broad presidential war powers can no longer simply wave their hands and invoke the president's "inherent constitutional authority as Commander in Chief."<sup>380</sup> If a power is not that of military command, the presumption should be that the Commander in Chief Clause does not entail it.

With this in mind, I shall list a few possible consequences in a conclusory way; this is not the place to delve into details and counterarguments.

(1) The first consequence is one to which I have already alluded. The fact that the civilian commander in chief does not hold dual office by virtue of military competence means that other branches of government need not defer to a presidential decision based on their supposedly inferior military competence.

(2) Recall our earlier discussion of Judge Mukasey's opinion in the *Padilla* case. He correctly noticed that a judge's institutional competence to decide on the basis of evidence whether Padilla was an unlawful enemy combatant was at least as great as the competence of the executive branch; but he nevertheless deferred because making the determination did not belong to his commission. That conclusion supposes that making such determinations does belong to the commission of the commander in chief. But that seems wrong. The president's commission is narrowly military, and Padilla's arrest and classification had no earmarks of the military about them. Even the battlefield determination whether captives in a foreign theater of war are enemy combatants or civilians is basically a matter of matching evidence with criteria—a fundamentally judicial task, rather than a combat competence of the military.

(3) There is no reason to suppose that the president's military powers—other than the power of command—are preclusive. Civilian control of the military does not imply exclusively executive control. Thus, it is perfectly possible that Congress and the president have concurrent authority over some decisions.<sup>381</sup> If, for example, the commander in chief wants to interrogate a wartime captive under

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380. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (2006).

381. This is the conclusion that Barron and Lederman defend in great detail. See Barron & Lederman, *Framing the Problem*, *supra* note 11, at 800–04. See also Lobel, *supra* note 11, at 4.

torture, but Congress has enacted a statute prohibiting torture, there is no reason to believe that Congress has infringed on preclusive presidential war powers.

(4) For that reason, and because the president is bound by the Take Care Clause, the commander in chief override simply does not follow from the Commander in Chief Clause.

(5) Likewise, there is no reason to suppose that the president can order military personnel to violate the laws of war, any more than any other military commander can. Under both domestic and international laws of war, soldiers receiving illegal orders are bound to disobey them.

#### B. CONCLUSION: THE PULL OF MILITARISM

At the beginning of this Article, I cautioned that a dangerous consequence of misunderstanding the restrained, limited role of the civilian commander in chief might be militarism, and I wish to conclude by returning to this caution. In a sense, it underlies the Article's fundamental contrast between consolidationism and separationism.

By militarism, I mean—following Andrew Bacevich—“a romanticized view of soldiers, a tendency to see military power as the truest measure of national greatness, and outsized expectations regarding the efficacy of force.”<sup>382</sup> Gerhard Ritter puts it in slightly more general terms: “The problem of militarism is the question of the proper relation between statesmanship as an art and war as a craft. Militarism is the exaggeration and overestimation of the military, to a degree that corrupts that relation.”<sup>383</sup> German militarists in the Weimar and Nazi periods liked to invert Clausewitz's famous formula: rather than war being politics by other means, politics “is the continuation of war by other means in peacetime.”<sup>384</sup> Along similar lines, Carl Schmitt defined politics as conflict between friend and enemy, with combat as an ever-present possibility.<sup>385</sup> These are classically militarist understandings of politics.

Few observers will doubt the strong militarist strain in contemporary America, a pendulum swing from the antimilitarist sentiments prevailing at

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382. BACEVICH, *supra* note 32, at 2.

383. RITTER, *supra* note 66, at 5.

384. *Id.* at 6 (citation omitted) (quoting General Alfred Krauss).

385. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26–33 (George Schwab trans., expanded ed. 1997).

the end of the Vietnam War. It arises from several factors.<sup>386</sup> First was the painstaking and successful effort of the U.S. military to restore its prestige and capability after Vietnam. Moving to an all-volunteer force improved the qualifications and morale of personnel. Second, with the collapse of the USSR, the possibility for conventional war as a geopolitical strategy suddenly seemed brighter, because the risk of precipitating a nuclear war was slim. Furthermore, the invention of precision-guided munitions seemed to make limited wars possible at acceptable levels of civilian casualties. The test came with the first Gulf War, and it amounted to a vindication of the U.S. military fifteen years after Vietnam. The Gulf War was soon followed by the nearly casualty-free victory in Kosovo. Both were (arguably) just wars. And both seemed to many to demonstrate the invincibility of the U.S. military. Indeed, in the 1990s, more Red Cross workers were killed in action than U.S. Army personnel.<sup>387</sup> Public esteem for military men and women (fueled by retrospective shame over the shabby treatment of Vietnam veterans) has never been higher. All the elements of militarism were in place.

September 11 added the ingredient of fear to the mix. Militarism made it seem obvious that the campaign against terrorism should be conceptualized as a war, and that the capture, detention, and interrogation of terrorists and alleged terrorists was an exercise of “war powers.” By now, years of litigation and thousands of pages of debate have made clear that each of these propositions is in fact highly controversial, both legally and morally. If they did not seem so initially, it was because the violent atrocity of 9/11 seemed to demand a decisive response, and Americans had come to identify decisive action with military action. The emergency likewise seemed to justify broad war powers. They were the contemporary equivalent of the one extraordinary presidential war power the framers recognized: to respond on his own authority to sudden attacks without waiting for a congressional declaration of war.

The invocation of emergency war powers marks the point where the danger of an overinflated commander in chief power looms large. In a time of crisis, the president forms a natural rallying point, and it is easy to forget that the president is not actually a military commander in the efficient sense. In the early weeks after 9/11 the two most visible responses—the Afghan war and the round-up of foreign Arabs within the United States—seemed like aspects of a single campaign organized swiftly by the

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386. In what follows, I largely follow the analysis of BACEVICH, *supra* note 32.

387. SINGER, *CORPORATE WARRIORS*, *supra* note 64, at 184.

executive branch. The round-up could be assimilated to the war. Compared with the enormity of 9/11, claims of violated civil liberties seemed hollow and incidental, easily brushed off by assertions of emergency war powers. This is still true six years later; thus, for example, in 2006 the Department of Justice tried to justify the National Security Agency's conduct of warrantless wiretaps prohibited by FISA on the basis of "the President's well-recognized inherent constitutional authority as Commander in Chief."<sup>388</sup>

The butcher's bill and endless frustrations of the Iraq war may have cooled some Americans' military ardor, and perhaps induced second thoughts about the invincible efficacy of military action. But at the same time, the fact that the antiterrorist campaign is being waged side by side with two Middle Eastern shooting wars in which the enemy often uses terrorist tactics lends continued credence to the idea that antiterrorist powers are "war powers." Militarism, and the consolidationist reading of the president's commander in chief power, feed into each other and amplify each other. So long as the Long Emergency beginning on September 11 continues, emergency powers packaged as war powers will encroach on rights Americans have long taken for granted.<sup>389</sup>

It will not pass unnoticed that the situation I have just described—a long emergency in which exceptions displace rules—is the very form fused dominion takes in military dictatorships. Although the parallel is striking, I am not offering a backhand argument that America is verging on military dictatorship, nor that the ambitious reading of the Commander in Chief Clause favored by the Bush administration is a gateway to military dictatorship. None of the encroachments of the past six years comes close to the level that the framers and ratifiers feared—military coup or presidential seizure of power. The dangers are subtler. Alexis de Tocqueville—so often an acute observer of American democracy—perhaps put it best:

Any long war always entails great hazards to liberty in a democracy. Not that one need apprehend that after every victory the conquering generals will seize sovereign power by force after the manner of Sulla and Caesar. The danger is of another kind. War does not always give democratic societies over to military government, but it must invariably

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388. U.S. DEP'T OF JUSTICE, *supra* note 380, at 1. In 2007, Congress legalized the warrantless wiretap program. Jim Rutenberg, *Wielding the Threat of Terrorism, Bush Outmaneuvers the Democrats*, N.Y. TIMES, Aug. 7, 2007, at A14.

389. See David Luban, *The War on Terrorism and the End of Human Rights*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 219 (Mark Tushnet ed., 2005).

and immeasurably increase the powers of civil government; it must almost automatically concentrate the direction of all men and the control of all things in the hands of the government. If that does not lead to despotism by sudden violence, it leads men gently in that direction by their habits.

All those who seek to destroy the freedom of the democratic nations must know that war is the surest and shortest means to accomplish this. That is the very first axiom of their science.<sup>390</sup>

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390. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 649–50 (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1909).