Georgia State University Law Review

Volume 19
Issue 4 *Summer 2003*

Article 10

6-1-2003

Structuralism and the War Powers: The Army, Navy and Militia Clauses

Robert J. Delahunty

STRUCTURALISM AND THE WAR POWERS: THE ARMY, NAVY AND MILITIA CLAUSES

Robert J. Delahunty*

INTRODUCTION

Hannah Arendt once wrote that the aim of the Founders' Constitution was "to reconcile the advantages of monarchy in foreign affairs with those of republicanism in domestic policy."[1] Allowing for the exaggeration that is pardonable in an epigram, her insight is correct. This Article is designed to explore and develop Arendt's claim in the context of the President's war powers.

The starting place is the work of the scholar whom this Symposium honors, Professor H. Jefferson Powell. Among Professor Powell's many significant contributions to constitutional scholarship is his emphasis on structuralism as a mode of analyzing separation of powers questions in the area of foreign affairs.[2] Particularly in the constitutional law of foreign affairs, as Professor Powell has emphasized, structuralist analysis is a sound approach. Although the relevant texts are bare and the evidence of the Framers' or Ratifiers' specific intent is often ambiguous (as, for example, in the Declare War Clause[3]), it is possible to make disciplined inferences from reading the texts as an attempt to form a coherent, unitary whole. This involves both extrapolating a unifying structure

---

* Associate Professor of Law, University of St. Thomas School of Law; formerly Special Counsel, Office of Legal Counsel, U.S. Department of Justice; Deputy General Counsel, Office of Homeland Security. The views expressed in this Article are purely my own. I am most grateful to Professors Jefferson Powell, John McGinnis, and Antonio Perez for their comments on drafts of this Article.

1. HANNAH ARENDT, ON REVOLUTION 152 (1963).

2. *See, e.g.*, H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 26-27 (2002).

3. For example, the debate at the Philadelphia Convention on August 17, 1787 resulted in changing the draft submitted by the Committee on Detail so that Congress was given the power to "declare" rather than to "make" war. Countless scholars have scrutinized the debate carefully, but its import remains ambiguous. As one excellent scholar concluded, "The 'ifs' must remain, for the record is unclear. The only certainty which emerges from the debate is that the wording was changed." Charles A. Lofgren, *Government from Reflection and Choice*, *in* CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 9 (1986).

from the text (much as, for example, Justice Harlan sought to do, in his dissenting opinion in *Ullman*, for the "liberty" protected by due process[4]) and studying the practice of institutional interactions within the American government.

We may distinguish two broad kinds of "structuralism." One considers the constitutional text and the relationships between them in the abstract (as Justice Scalia did in *Printz*[5] and Chief Justice Burger did in *Bowsher*[6]), while the other considers them in light of history and governmental practice. Roughly, these types can be characterized as "conceptual" and "historical" or "empirical" forms of structuralism.

Historically based structuralist analysis itself can be developed in either of at least two ways—by considering the post-Founding institutional practices of American government, or by examining the constitutional texts and their relationships in light of (a) pre-constitutional American and British governmental practice and (b) the political—including geopolitical—environment of the Founding. Although Professor Powell is very interested in historically based structuralist analysis of the first kind, much of his work could be characterized as the latter. This Article is also an essay in historical structuralism of the latter kind.

The question I want to investigate is the nature and scope of the President's independent constitutional war power. Standardly, there are two very broad answers: presidentialist and congressionalist. A more nuanced, and perhaps more illuminating, distinction is between (a) those positions that presuppose that the Declare War Clause is a source of congressional authority that imposes some antecedent limits on the President's power to engage in war making and (b) those that deny that presupposition.

An important example of the former view, which attributes this kind of checking function to the Declare War Clause, is found in a

4. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

5. Printz v. United States, 521 U.S. 898 (1997). Justice Scalia rested his argument there on "the structure of the Constitution" or its "'essential postulates'" from which he sought to derive "a principle that controls" the disposition of the case. *Id.* at 918.

6. Bowsher v. Synar, 478 U.S. 714, 726 (1986).

1994 opinion by the Justice Department's Office of Legal Counsel entitled *Deployment of United States Armed Forces into Haiti*.[7] That opinion presupposes that the Declare War Clause vests the Congress with some (undefined) measure of authority to constrain the President's ability to initiate hostilities.[8] However, the opinion argues that a declaration of war was not a constitutional necessity in that case—a military intervention of some 20,000 United States troops to bring down a military dictatorship in Haiti and to restore the elected government—because of a variety of factors specific to the intervention, including the nature, scope, and duration of the deployment. These factors, it was reasoned, led to the conclusion that the intervention in question was not a "war" within the meaning of the Declare War Clause, and hence did not require antecedent congressional authorization under that clause.[9]

While I do not disagree with the conclusion of that opinion, the position that I will outline in this Article is an alternative to, and a critique of, it. Specifically, I take issue with the assumption that unilateral presidential deployments of the military into armed conflict (or situations that threaten to give rise to armed conflict) must in at least some cases be antecedently authorized by Congress pursuant to its power under the Declare War Clause.[10]

---

7. 18 Op. Off. Legal Counsel 34 (1994), *reprinted in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 572 (1999). Assistant Attorney General Walter Dellinger, who signed the opinion, defended it in Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107 (1995). A disclaimer: both Professor Powell and I helped to draft the 1994 opinion.

8. *See* Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 34 (1994), *reprinted in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 572 (1999).

9. *Id.*

10. For analytical purposes, it may be useful to identify four distinct positions along the spectrum of current scholarly opinion about the war powers.

- At one extreme is the view that before the President may lawfully deploy the armed forces into conflict (or possibly even into situations that threaten conflict), Congress must first have enacted a formal declaration of war. Some (non-textual) exceptions are allowed, for example, to repulse invasions of the United States or its territories (or, perhaps, to forestall imminent invasions).
- The second position differs from the first in two main ways: (1) by permitting Congressional authorization to be granted by an Act of Congress other than a declaration of war and (2) by enlarging—but not by very far—the range of circumstances in which the President may unilaterally deploy the armed forces into conflict. Within this position, opinions may differ as to what kinds of statutory enactment suffice to provide authorization

The thesis I want to offer instead can be summarized as follows: Congress' power to control the Executive's ability, on its own initiative, to deploy military personnel or resources into situations that involve or threaten armed conflict is not rooted in the Declare War Clause but in the clauses of Article I relating to standing Armies, the Navy, and the Militia[11] (I will call these the Army, Navy,

---

(for example, whether an appropriation or conscription law would suffice); whether authorization may be retroactive (that is, whether a legislative ratification of the President's acts can be valid); whether any authorization must be specific to the deployment at hand, or may be more general; and what range of circumstances permits unilateral Presidential action. However, the usual assumptions seem to be that any authorization must be through substantive law rather than an appropriation; it must be prospective and case-specific; and it is almost always needed.

- Third is the position (which I take to be Professor Powell's position) that authorization is *only* needed where the level of violence and/or the political and policy consequences of the deployment are such that the deployment amounts to a "war" in a constitutional sense. Authorization on this view may be provided through a variety of statutory vehicles other than a declaration of war; may be prospective; and may be general rather than situation-specific. Precisely *what* circumstances rise to the level of a constitutional "war" cannot be antecedently determined—that is a question of judgment in the particular case.
- The fourth view, which is defended here, is that legally sufficient authorization is provided whenever Congress, by law, places the instruments of military power in the President's hands. No further Congressional action by way of authorization is normally required. Congress may, however, constrain the President's legal authority in a variety of ways, most prominently by attaching conditions to provisions calling military forces into being, sustaining them, or appropriating for them. As this Article discusses later, Congress' power to attach such conditions was well understood in the early Republic.

11. In developing this "structuralist" argument, I do not propose to explore in detail the debates at the Philadelphia Convention or the State ratifying conventions. However, I submit that they too yield important evidence for the view I am taking. For example, in his important—but oddly neglected—remarks to the Virginia Ratifying Convention on June 14, 1788, James Madison responded to Patrick Henry's argument that the British Constitution was superior to the one proposed by the Federalists in part because it separated the power of the sword from the power of the purse. *See* John C. Yoo, *War and the Constitutional Text*, 69 Chi. L. Rev. 1639, 1659 (2002). That separation, coupled with the long-term dynastic interests of the royal family, made the British system less prone to executive war-making than the scheme proposed for the United States. Madison replied to Henry by enumerating the checks on executive war-making that the proposed federalist system put in the hands of Congress, without once mentioning the Declare War Clause. He said:

> The sword is in the hands of the British king. The purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist. Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether? If he says so, it will violate the meaning of that maxim. This would be novelty unprecedented. The purse is in the hands of the representatives of the people. They have the appropriation of all moneys. They have the direction and regulation of land and naval forces. They are to provide for calling forth the militia; and the President is to have the command, and, in conjunction with the Senate, to appoint the officers.

John Yoo rightly underscores the importance of this passage for understanding the original conception of the President's war powers. *See id.*

and Militia Clauses).[12] This understanding of the relationship of the various powers is borne out by a structuralist analysis of the political and, especially, geopolitical circumstances of the Founding.

I. THE GEOPOLITICAL CIRCUMSTANCES OF THE PRE-CONSTITUTIONAL REPUBLIC

Because my analysis emphasizes the geopolitical circumstances of the Founding, it is useful to begin with a broad overview of how they presented themselves to the Founders.

At the end of the eighteenth century, the United States' strategic situation bore no resemblance to that of the "sole remaining superpower" of the start of the twenty-first century.[13] The United States in the late eighteenth century were (the plural is intended) marginal players in the European State system—on the periphery, the Atlantic littoral. Their position was extremely precarious.[14]

Although they had emerged successfully from their war with Great Britain, they had done so only with the indispensable assistance of continental powers (notably France, but also Spain and Holland).[15]

---

12. The Spending Clause is, of course, also relevant, as Professor Powell (for one) has rightly and strenuously insisted. *See* POWELL, *supra* note 2, at 110 ("Congress's power over spending is the source of the legislature's ultimate power to counterbalance the executive branch and therefore to deter the possibility of executive waywardness or tyranny."). However, the Army and Navy Clauses in themselves subsume the spending power. For some general observations on the Spending Clause and war powers, see Louis Fisher, *The Spending Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 227-29 (David Gray Adler and Larry N. George eds., 1996).

13. An excellent overview of the diplomatic objectives and strategic liabilities of the United States in the years immediately preceding the Constitution may be found in DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 201-03 (2003).

14. One commentator noted:

> At its birth, the United States was a large, rich nation with great military potential, but also, with its long coastline, seaborne commerce, vast frontier, and hostile European-held territory nearby, a nation immensely vulnerable to surprise attack and invasion. Poised to the north, in control of the Great Lakes and the most important forts in the Northwest, with access to the Lake Champlain–Hudson River corridor, lay the British. To the west lay the Spanish. Both possessed great influence on Indian tribes which held the key to the fur trade, frontier security, and the new nation's ability to occupy over half of its newly-won territory.

RICHARD H. KOHN, EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 288 (1975).

15. Indeed, James Madison acknowledged at the Philadelphia Convention that "we owe perhaps our liberty" to rivalries in the European State system. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (Max Farrand ed., 1911) (remarks of James Madison on June 28, 1787).

The United States did not possess the military or material resources remotely commensurable with those of any of these established powers. At the start of President Washington's first Administration, the United States Army consisted of a mere 800 officers and men, most of them stationed along the Ohio River, and there was no United States Navy.[16]

Moreover, they were republics in a world of monarchies. Although there were or had been a few European republics (Britain itself under the Commonwealth, the Dutch Republic, Venice[17]), the character of the American governments made them ideologically unattractive to at least some of their recent continental allies (especially Spain).[18] Furthermore, if Britain was itself, functionally, a "republic" rather than a monarchy, Britain was also the American governments' most likely antagonist.[19]

Additionally, despite nominal independence, the United States were at serious risk of becoming mere commodity-exporting dependencies within the British imperial trading system.[20] Hence, in

16. *See* MORRIS J. MACGREGOR, THE FORMATIVE YEARS, 1783-1812, *reprinted from* Office of the Chief of Military History, United States Army, American Military History, Army Historical Series, *available at* http:www.army.mil/cmh-pg/books/AHM/AHM-05 (last visited Feb. 2, 2003).

17. Even in these exceptional cases, republican government was either precarious or attenuated. In *The Federalist* No. 39, Madison questioned whether Holland, Venice or Poland truly merited "the honorable title of republic." THE FEDERALIST NO. 39 (James Madison).

18. Spain's support of the Americans during the Revolutionary War was motivated by considerations of power politics alone, not by any sympathy for the colonial rebels. Even while France maintained an accredited diplomatic representative to the United States, Spain sent only an "observer" without diplomatic functions, in order to avoid the appearance of recognizing American independence. *See* SAMUEL FLAGG BEMIS, THE DIPLOMACY OF THE AMERICAN REVOLUTION 88-89 (1935). The United States was "feared by the Spanish King and Ministry for its potentialities of aggressive expansion, contemned for its unholy spirit of insurrection, [and] regarded only as a cat's-paw in the great game against Great Britain." *Id.* at 101.

19. Montesquieu described Britain as "a nation [that maybe justly called a] republic, disguised under the form of monarchy." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS vol. I, ch. 19, at 74 (Anne M. Cohler et al. trans., 1989). Indeed, Montesquieu did not merely discern the "republican" substance veiled by Britain's "monarchical" form; he penetrated further into the historically unprecedented nature of the British constitution, and recognized that the conceptual repertoire that pre-modern thought had developed for classifying and analyzing political forms was not truly applicable to Britain. Thus, in his view, it was misleading to characterize Britain as *either* a "monarchy" or a "republic," because its constitution represented something novel and distinctively modern. *See* PIERRE MANENT, THE CITY OF MAN 11-17 (Marc A. Le Pain trans., 1998).

20. In 1789, about 75% of the products Americans exported was going to British ports and about 90% of the goods they imported were coming from Britain. So, economically, the United States was "deeply involved with, even dependent on, Britain." ALEXANDER DECONDE, DECISIONS FOR PEACE:

part, the efforts by Jefferson, Madison and others to encourage a (long-term) policy of global free trade, coupled with a (short-term) one of import-substitution.[21] They were also dependent on foreign capital investment—mainly British—to sponsor their internal economic development.

Further, their relationship with Great Britain had by no means healed. There were still outstanding conflicts over debt repayments, the evacuation of the Northwest Territory, the terms of trade, and other crucial matters.[22] The American states had also not abandoned the hope of attaching British Canada to themselves.[23] The time was still in the future when the Royal Navy would protect the United States' coastline from other foreign forces, while the United States held Canada hostage to Britain's good behavior.[24]

The states were also threatened because they were hemmed in by the colonies of hostile or potentially hostile powers, who were

---

THE FEDERALIST ERA 24 (1970). More generally, it was the aim of "all Europe" to see the Americans "as unimportant Consumers of her Manufactures & Productions, and as useful Laborurers to furnish her with raw Materials." HENDRICKSON, *supra* note 13, at 204 (quoting letter to Congress from American peace commissioners, September 10, 1783).

21. *See generally* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA ch. 6 (1980); JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984).

22. *See, e.g.*, CHARLES R. RITCHESON, AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARDS THE UNITED STATES 1783-1795, at 49-87 (1969); ANDREW C. MCLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION 1783-1789, at 77-8 (pb. ed. 1962).

23. One of the major war aims of the American Revolution, in addition to attaining independence, "was to conquer or absorb all of the British Empire's holdings in North American, meaning [primarily] Canada." RICHARD W. VAN ALSTYNE, THE RISING AMERICAN EMPIRE 29 (1960). The Revolutionaries had mounted an invasion of Canada on two fronts in 1775 to 1776, capturing Montreal but failing to take Quebec; after these reversals, the Continental Congress attempted to detach Canada from the British Empire by diplomatic rather than military means, sending a delegation led by Benjamin Franklin in 1776. There was "no disagreement among the American leaders on the importance of taking and keeping Canada. John Adams declared that opinion was unanimous on the subject." *Id.* at 39. Congress continued to plan for the invasion of Canada in 1778 and 1779. *See id.* at 54-55. These hopes did not dim with the end of hostilities. The American representatives at the peace conference, led by Benjamin Franklin, unsuccessfully sought the cession of Canada and Nova Scotia by the British. *See* GEORGE M. WRONG, CANADA AND THE AMERICAN REVOLUTION: THE DISRUPTION OF THE FIRST BRITISH EMPIRE 353-54; 356-7; 364-65 (1968 reprint of 1935 ed.). The Articles of Confederation had included a provision specifically authorizing the admission of Canada to the Union on favorable terms. ARTICLES OF CONFEDERATION art. xi. The project of annexing Canada was a longstanding ambition—indeed, a "hobbyhorse"—of Benjamin Franklin. *See* GERALD STOURZH, BENJAMIN FRANKLIN AND AMERICAN FOREIGN POLICY, 142-44, 208-11 (1954); *see also* VAN ALSTYNE, *supra*, at 20-1, 26-7.

24. *See* SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 571 (1949).

capable of mounting armed campaigns against them by land as well as by sea—Spain to the south and west, Britain to the north.[25] These two nations were, as Hamilton observes in *The Federalist* No. 24, "the principal maritime powers of Europe," and the possibility of "[a] future concert of views" between them with regards to the American states—notwithstanding Spain's dynastic link with France—was, in his judgment, not "improbable."[26] Aggravating those difficulties was the presence of potentially hostile Indian tribes that had often lent their assistance to European enemies of the British-American settlers.[27]

Finally, the American states were susceptible to severe internal divisions, largely regionally-based, over key questions such as access to world markets through the Mississippi.[28] *The Federalist* papers demonstrate acute awareness of these tensions and repeatedly emphasize the danger that European powers might exploit them.[29] The Constitution can be seen as an attempt to overcome these conflicts—"a reasoned response to a serious security problem that espied a sequence in which internal division and the intervention of superpowers" would make America the theater of perpetual war, just as Europe was.[30]

---

25. THE FEDERALIST NO. 24 (Alexander Hamilton).

26. Further, in *The Federalist* No. 11, Hamilton alludes to British and Spanish uneasiness at the prospect of American expansionism.

27. In his famous speech of June 19, 1787 to the Philadelphia Convention (as recorded in Robert Yates's notes), Hamilton reviewed for the other Framers "the variety of important subjects that must necessarily engage the attention of a national government. You have to protect your rights against Canada on the north, Spain on the south, and your western frontiers against the savages [sic]." *Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention, reprinted in*, THE MAKINGS OF THE AMERICAN REPUBLIC: THE GREAT DOCUMENTS 1774-1789, at 779 (Charles Callan Tansill ed.).

28. *See, e.g.*, MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781, at 218-24 (1940); MCLAUGHLIN, *supra* note 22, at 70-77. Patrick Henry had said that he "would rather part with the confederation than relinquish the navigation of the Mississippi."

29. *See, e.g.*, THE FEDERALIST NO. 4 (John Jay), NOS. 6, 11 (Alexander Hamilton), NO. 46 (James Madison).

30. HENDRICKSON, *supra* note 13, at 259; *see also id.* at 7, 8-10, 238-40.

II. THE MAIN PURPOSES OF THE ARMY, NAVY, AND MILITIA CLAUSES

The Constitution was framed largely in order to address these grave strategic problems. Consequently, any analysis of the Constitution's foreign affairs provisions, including the war powers, and of the relationships they create between the Federal government and the states and among the three federal branches, must take lively account of them. Most relevantly here, the clauses of chief concern to us, the Army, Navy, and Militia Clauses, seem to have had at least three main—and interconnected—purposes in view:

- To enable the Federal government to deploy military forces of sufficient strength and depth to meet challenges to the security of the American homeland, whether from European or Indian enemies or both, and to be able to project force abroad at least to the extent of protecting American merchants abroad; but, at the same time, to avoid creating a military establishment on such a scale that maintaining it would strain the new Nation's resources, create a military caste that could become hostile to republicanism or otherwise a threat to liberty, or encourage adventures in conquests that could provoke unnecessary wars.
- To give full effect to the collective national interest in having a professional, expert military that would enable the United States to hold its own against the European states that had been the most successful proponents of the ongoing "military revolution"[31] while respecting the interests of state and local power-holders in preserving a significant role in the defense of the homeland for the non-professional militias that they dominated and controlled.
- To ensure a vital role for Congress in decisions that by committing sovereignty, citizens, territory and finances at risk it to war put the Nation's; but at the same time, to preserve the suppleness and discretion that only broad executive power could bring to times of crisis, and to maintain the unity and

31. Hamilton notes that modern times had "produced an entire revolution in the system of war." THE FEDERALIST NO. 8. *See generally* GEOFFREY PARKER, THE MILITARY REVOLUTION (2d ed. 1996); WILLIAM H. MCNEILL, THE PURSUIT OF POWER chs. 4-5 (1982).

integration of political, military, and diplomatic command that the "Executive Power" and "Commander in Chief" Clauses were designed to achieve.

Although the third of these purposes is of greatest relevance here, a sound structuralist account of the war powers must keep all three objectives in view. With that background, I turn to the more detailed analysis of the Army, Navy, and Militia Clauses.

III. THE ARMY CLAUSE

Article I, Section 8, Clause 12 of the U.S. Constitution vests in Congress the power "to raise and support armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."[32]

The Army Clause provides express authorization to create and maintain a standing professional armed force on land, subject to Federal control, distinct from existing bodies such as the State militias, and under the command of the President.[33] Despite the objections of Anti-Federalists, there was no limitation on Congress' power to create and maintain this force in times of peace. The Framers did,however, place a different constraint on Congress' power: any appropriation of funds for this land force had to be revisited regularly, within the two-year cycle for elections to the House of Representatives.[34]

The provision was ratified against the backdrop of centuries-long British and American hostility to the concept of a standing army—hostility that had undoubtedly played an important part in the collapse of the Stuart dynasty in the "Glorious Revolution" of 1688.[35]

---

32. U.S. CONST. art. I, § 8, cl. 12.

33. *Id.*

34. As one scholar has perceptively noted, the Constitution's scheme for allocating war powers "put it in the hands of the people, through their representatives [in the House], to judge whether wars were defensive or ambitious, just or unjust, essential to the public good or an inexcusable waste of life and a drain on the public revenue." KARL-FRIEDRICH WALLING, REPUBLICAN EMPIRE: ALEXANDER HAMILTON ON WAR AND FREE GOVERNMENT, 119 (1999).

35. *See generally* LOIS G. SCHWOERER, "NO STANDING ARMIES!" THE ANTIARMY IDEOLOGY IN SEVENTEENTH CENTURY ENGLAND (1974). As late as 1778, well-informed Englishmen believed that the King intended to turn the armies he had deployed against the American Revolutionaries against his subjects in Britain itself and suspected that he intended to use the reconquered colonies as an

The Bill of Rights adopted at that time had declared (inaccurately) that it was illegal for the King, on his own, to raise and maintain an army in peacetime,[36] and it affirmed that it was ancient right and law that, without Parliament's consent, there should be no standing army in time of peace.[37] The American colonists were heirs to this tradition of hostility to standing armies[38] and, from the 1720s onwards, had been avid readers of tracts that denounced them, including Trenchard and Gordon's *Cato's Letters* and Trenchard's *An Argument Shewing that a Standing Army is Inconsistent with a Free Government*.[39]

Within the Founding generation, practical experience sharpened the Americans' fear of and hostility toward standing armies. The Boston Massacre of 1770, in which five civilians died at the hands of the British army, "became a *cause célèbre* up and down the seacoast . . . [and] permanently embedded the prejudice against standing armies into the American political tradition."[40] The Declaration of

---

independent source of revenue for the Crown, free from Parliamentary control. *See* ERIC ROBSON, THE AMERICAN REVOLUTION IN ITS POLITICAL AND MILITARY ASPECTS, 1763-1783, at 16-17 (1972).

36. *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (1689), *available at* http:/www.yale.edu/lawweb/Avalon/England (visited Feb. 4, 2003) ("That the raising or keeping of a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law").

37. SCHWOERER, *supra* note 35, at 151. In fact, it had been an ancient prerogative of the crown that the King could "keep as many soldiers as he want[ed] so long as he pa[id] for them." *Id.* at 76. Charles II had exercised this prerogative by maintaining a force of Royal Guards at his own expense. *Id.* James II had declared that he would fund his own standing army from the permanent funds available to him. *Id.* at 145; *see also* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. I, ch. 13, at 401 (1765). Thus, by denying the President the power to "raise and support" armies without Congressional consent, the Constitution seems to provide that the President may not use sources other than congressional appropriations—including funds provided by state, foreign, or private sources—for an army.

38. "No principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime." KOHN, *supra* note 14, at 2.

> Because of their political heritage, because they viewed a standing army as the one uncontrollable institution in society, because they believed that it must inevitably undermine civilian authority, debauch the virtue of a population, and become the tool by which a tyrant would rise and hold power, Americans defined militarism and the standing army as one and the same. The existence of such a force inevitably destroyed liberty, producing a military dictatorship and leading to the imposition of military values and practices on society.

Id. at 282.

39. SCHWOERER, *supra* note 35, at 196.

40. *Id.* at 5-6.

Independence condemned George III, among other reasons, because "[h]e has kept among us, in times of peace, Standing Armies, without the consent of our legislatures."[41] Even Alexander Hamilton, a powerful and effective advocate of the need for a professional Federal army, acknowledged that such "establishments . . . bear a malignant aspect to liberty and economy."[42]

There were several strands in the polemic against standing armies. At least three of them can be picked out.[43] First, they were conceived of as threats to liberty—forces by which kings and rulers could overbear and oppress their subjects.[44] Second, they were alleged to

41. Likewise, the *Declaration and Resolves of the First Continental Congress* (Oct. 14, 1774), *available at* http://www.restoringamerica.org/documents/declarationsresolves.html, resolved that "the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law."

42. THE FEDERALIST NO. 8 (Alexander Hamilton). Likewise, Madison in *The Federalist* No. 14 refers to "those military establishments which have subverted the liberties of the Old World." However, in *The Federalist* No. 46, Madison, while conceding that a peacetime standing army has "inconveniences" even if maintained on "the smallest scale" and that it may be "fatal" in its consequences if maintained on "an extensive scale," nonetheless argues that a "wise nation" will not "rashly preclude itself from any resource which may become essential to its safety." THE FEDERALIST NO. 46 (James Madison).

43. In addition to the three factors identified in the text, the argument against standing armies also drew support from the claim that a militia composed of an armed citizenry was always to be preferred to a professional military establishment on land. The case for the militia drew on a rich complex of ideas involving certain conceptions of personal and political freedom, republican virtue, the proper balance of estates in a well-ordered polity, and the supposed superiority of the fighting capabilities of citizen forces as against hired (and often foreign) troops. These ideas traced back to Machiavelli and, in the English tradition, Harrington and Sydney, and were very familiar to the Founders. *See, e.g.*, J.G.A. POCOCK, POLITICS, LANGUAGE & TIME: ESSAYS IN POLITICAL THOUGHT AND HISTORY 104-47 (1971). It is not my intention to explore that complex of ideas here.

44. Blackstone's view of the matter was the prevalent one.

> In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. . . . [I]n free states the profession of a soldier . . . is justly an object of jealousy. . . . The laws therefore and constitution of these kingdoms knows no such state as that of a perpetual standing soldier, bred up to no other profession than that of war. . . . [Armies] are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom.

BLACKSTONE, *supra* note 37, bk. I, ch. 12 at 395, 400. Professional standing armies were associated with illiberal rulers such as (in England) the Stuart dynasts and Oliver Cromwell or (on the Continent) Louis XIV (whose "standing army was initially designed to assure the king's superiority over any and every challenge to his authority within France." MCNEIL, *supra* note 31, at 125). The Anti-federalist writer "Brutus" claimed that "[i]n despotic governments, as well as in all the monarchies of Europe, standing armies are kept up to execute the commands of the prince or the magistrate, and are employed for this purpose when occasion requires: But they have always proved the destruction of liberty, and [are] abhorrent to the spirit of a free republic." *Essays of Brutus*, *in* THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 115 (Herbert J. Storing ed., 1985) (alteration in original). In 1776, Adam Smith could report as settled opinion (with which he disagreed) that "[m]en of republican

be wasteful and unnecessary—Britain's (and later, the United States') fortunate position as an island[45] required only defensive forces, that is, a Navy and a militia, to serve as a homeland defense force. Third and most relevantly here, a standing army in the hands of rulers ambitious for fame could lead those rulers to engage in wars of aggression and conquest abroad—wars like Louis XIV's unending struggles for continental dominance of Europe, which had left France baffled, overspent, and exhausted.[46] The Founders—themselves driven, as Douglass Adair has demonstrated, by the love of fame[47]—

---

principles have been jealous of a standing army as dangerous to liberty." ADAM SMITH, THE WEALTH OF NATIONS V, at 295 (Andrew Skinner ed., 1999). As if to illustrate Smith's description of the "republican" consensus, Jean Jacques Rousseau had written four years earlier that standing armies, "the plague and depopulators of Europe, are good for two purposes only, to attack and conquer neighbours, or to bind and enslave citizens." *Considerations on the Government of Poland, in* JEAN JACQUES ROUSSEAU, POLITICAL WRITINGS 237 (Frederick Watkins ed., 1986) (1772).

45. Although the United States is of course not an "island" in a geographical sense, it is so in a geopolitical one. *See* PETER PADFIELD, MARITIME SUPREMACY AND THE OPENING OF THE WESTERN MIND (1999); NATHAN MILLER, THE U.S. NAVY: A HISTORY 9 (3d ed. 1997). Conversely, other geographical "islands"—Ireland, Madagascar, and Cuba—are, unlike Britain, not geopolitical ones. *See* CARL SCHMITT, LAND AND SEA 49 (Simona Draghici trans., 1997). The Founders understood very clearly that the United States' geopolitical "situation bears [a] likeness to the insular advantage of Great Britain." THE FEDERALIST NO. 41 (James Madison). William Henry Drayton, the Chief Justice of South Carolina, asked, "Is not the situation of the United States insular with respect to the power of the old world: the quarter from which alone we are to apprehend danger?" VAN ALSTYNE, *supra* note 23, at 41 (quoting Drayton).

46. "The numerous wars of Louis XIV were costly, largely unsuccessful, and often foolhardy. It is wry commentary on Louis' ambitions that, after a century of bitter, continuous warfare, Spain and the Dutch Republic settled their differences and allied against France during the War of the Spanish Succession. Paths of glory led but to a diplomatic legacy for France of having almost all the European powers aligned against it." BRIAN M. DOWNING, THE MILITARY REVOLUTION AND POLITICAL CHANGE: ORIGINS OF DEMOCRACY AND AUTOCRACY IN EARLY MODERN EUROPE 132 (1992). Louis was even reduced to selling his personal set of 5,000 silver toy soldiers to pay for his wars. *See* MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 154 (1999). The wars of Louis' successors left France even weaker fiscally. *See* DOWNING *supra*.

The French case was not exceptional. "Most European armies were direct adjuncts of royal power. They were paid for and led by monarchs. Trans-national in composition, these troops were less the armies of nations than the forces of states whose diplomatic and military objectives were defined by the dynastic and territorial interests of their rulers. Most British visitors to Frederick the Great's Prussia were struck by the remarkable degree of *personal* control that the king exercised over his army and administration." JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783, at 43 (1989). Moreover, the costs of land wars in Europe had been ruinous. *Id.* at 40-41; *see also* NEAL FERGUSON, THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD, 1700-2000, at 398 (2001) (setting out evidence that profits from wars of early modern period were typically outweighed by costs of securing and collecting them).

47. DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS, 3-36 (1974); *see also* William Michael Treanor, *Fame, The Founding Fathers, and The Power to Declare War*, 82 CORNELL L. REV. 695, 729-40 (1997). Moreover, royal caprice as well as desire for fame was understood to be a leading cause of

were unquestionably aware of the last of these dangers.[48] John Jay, for example, observed in *The Federalist* No. 4 that "absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory."[49] Within the lifetimes of many of the Founders, a figure rose up in Europe—Napoleon Bonaparte—in whom these dangers were personified to perfection.[50]

Standing armies—or, at least, the possibility of raising them, even in peacetime—were, however, also viewed by many as necessities of the modern state. Hamilton argued the case persuasively in *The Federalist* Nos. 24-25.[51] (Rather daringly, he even disputed the politically popular claim that the Revolution had been won by the local militia, and that the militia alone would suffice as a homeland defense.) Hamilton was defending the clear consensus of the

---

war. "A favorite story of the eighteenth century illustrating the arbitrariness which dominated foreign policy was the story of the palace window: Louvois, fearing disgrace because Louis XIV had expressed displeasure with Louvois' arrangements concerning the construction of the windows of the Trianon, instigated the king to renew the war against the Habsburgs in order to divert his attention from architectural matters." FELIX GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 62 (1961).

48. For example, in *The Federalist* No. 6, Hamilton attributed many wars to "the attachments, enmities, interests, hopes, and fears of leading individuals in the[ir] communities," who "have not scrupled to sacrifice the national tranquility to personal advantage or personal gratification." THE FEDERALIST NO. 6 (Alexander Hamilton). He cited as examples Pericles and Cardinal Wolsey. *Id.*

Ever willing to question the conventional wisdom, however, Hamilton emphasized that wars of this kind were often caused by popular leaders (Pericles of course being one) as well as by kings or royal favorites (like Wolsey). He also distinguished a second kind of war, caused by "the rivalships and competitions of commerce between commercial nations." Additionally, he ridiculed the notion that "[c]ommercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other," asking whether "republics in practice [have] been less addicted to war than monarchies?" The answer, he argued, was clearly that they were not less addicted: even Britain's wars "have, in numerous instances, proceeded from the people." *See generally* GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 148-52 (1970) (analyzing Hamilton's views on the causes of wars).

49. THE FEDERALIST NO. 4 (John Jay). Jay went on to point out, however, that there were other "inducements to war" that "affect nations as often as kings." *Id.* Wars, in other words, were often popular rather than royal.

50. Thomas Jefferson, who was to describe Napoleon as "the first and chiefest apostle of the desolation of men and mortals," also found his career to be a "lesson against the danger of standing armies." 13 THE WRITINGS OF THOMAS JEFFERSON 358 (Andrew A. Lipscomb ed., 1903); 10 *id.* at 154.

51. THE FEDERALIST NOS. 24, 25 (Alexander Hamilton). Alexander Hamilton's advocacy of standing armies stemmed from more than a belief in their military necessity. His experience in the Revolutionary Army had probably shown him that a Federal or Continental Army could be a power instrument for creating a distinctly *American* national identity, by bringing together men from the different regions and states. *See* WALLING, *supra* note 34, at 236.

Founders.[52] James Wilson, in a speech he delivered at the Pennsylvania State House Yard in October, 1787 that was frequently reprinted in the debates over ratification thereafter, argued for the necessity of peacetime standing armies:

> I do not know a nation in the world, which has not found it necessary and useful to maintain the appearance of strength in a season of the most profound tranquility. . . . [W]hat would be our national situation were it otherwise [with us]? Every principle of policy must be subverted, and the government must declare war, before they are prepared to carry it on. Whatever may be the provocation, however important the object in view, and however necessary dispatch and secrecy may be, still the declaration must precede the preparation, and the enemy will be informed of your intention, not only before you are equipped for an attack, but even before you are fortified for a defense. The consequence is too obvious to require further delineation, and no man, who regards the dignity and safety of his country, can deny the necessity of a military force, under the control and restrictions which the new constitution provides.[53]

John Jay warned the citizens of New York in 1788 that the failure to ratify the proposed Constitution would only *magnify* the need for standing armies because disunion would in all probability result from that failure, and "[t]hen every State would be a little nation, jealous of its neighbour, and anxious to strengthen itself, by foreign alliances, against its former friends. . . . Then would rise mutual restrictions and fears, mutual garrisons and standing armies, and all those dreadful eils which for so many ages plagued England, Scotland, Wales, and Ireland, while they continued disunited, and were played off against each other."[54] Gouverneur Morris, recalling in 1815 the discussions in the Philadelphia Convention on the need

52. *Id.*

53. *James Wilson's Speech at a Public Meeting (October 6 1787), reprinted in*, THE DEBATE ON THE CONSTITUTION: PART ONE 63, 65-66 (Bernard Bailyn ed.) [hereinafter Bailyn].

54. John Jay, *An Address to the People, reprinted in* 1 THE FOUNDERS' CONSTITUTION ch. 7, document 22 (Philip B. Kurland and Ralph Lerner eds., 1987).

for an army, said that "'[t]he danger we meant chiefly to provide against . . . was, the hazarding of the national safety by a reliance on that expensive and inefficient force'"—that is, the militia.[55] George Washington had been committed to a national army since 1783; Edmund Randolph argued for one from the very beginning of the Philadelphia Convention; Charles Pinckney and William Patterson spoke in favor of a small standing army as well.[56] "The [Philadelphia] convention never seriously debated allowing Congress a permanent army. . . . The Founding Fathers were determined to provide for national security even if they viewed armies as dangerous or jeopardized the chances for ratification by the people. '[I]f they [armies] be necessary,' Madison stated flatly, 'the calamity must be submitted to.'"[57] Other modernizing figures—Adam Smith among them—went further, arguing that the dangers of a professional standing army had been badly exaggerated.[58]

The question for the Founders thus became how to provide for the possibility of a standing professional army even in peacetime, while also guarding against the abuses to which such a military establishment was thought to be prone. Particularly, they wanted to guard against the risk that a President, intent on winning fame, might use a standing army to start costly and destructive wars of aggression.

The Founders devised a solution closely modeled on the British one embedded in the Bill of Rights of 1688 and followed in

55. KOHN, *supra* note 14, at 283 (quoting Morris).

56. *Id.* at 77.

57. *Id.* at 77-78; *see also id.* at 297-98. Madison, joined by Hamilton, also noted in *The Federalist* No. 19 that the "deplorable" military situation of the Holy Roman Empire owed much to the fact that it maintained only a "small body of national troops," and even those forces were "defectively kept up, badly paid, infected with local prejudices, and supported by irregular and disproportionate contributions to the treasury." In *The Federalist* No. 41, Madison, following the lead of the Scottish historian William Robertson, traced the emergence of the standing army from its introduction by Charles VII of France and concluded that the logic of deterrence compelled France's rivals to establish similar forces: "Had [Charles VII's] example not been followed by other nations, all Europe must long ago have worn the chains of a universal monarch. Were every nation except France now to disband its peace establishment, the same event might follow." Indeed Madison (like Jay) argued that the *failure* of the American states and regions would inevitably trigger an arms race in North America that would "set the example in the new as Charles VII did in the old world . . . . [T]he face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes." *Id.* *See generally* HENDRICKSON, *supra* note 13, at 41-42.

58. ADAM SMITH, THE WEALTH OF NATIONS bk. 5, ch. 1, pt. 1 (1776).

parliamentary practice since then: to permit the creation of such armies, but only with legislative authorization regularly and routinely reconsidered.[59]

Hamilton described the British practice in *The Federalist* No. 26, summarizing its historical origins:

> In England, for a long time after the Norman Conquest, the authority of the monarch was almost unlimited. Inroads were gradually made upon the [King's] prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct. But it was not till the revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to *the undefined power of making war, an acknowledged prerogative of the crown* (emphasis added), Charles II. had by his own authority kept on foot in time of peace a body of 5,000 regular troops. And this number James II. increased to 30,000; who were paid out of his civil list. At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that "the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against the law.[60]

Hamilton commends the British solution, arguing that it represented the best attainable balance of the competing considerations.[61] Those who framed it, he says,

> were aware that a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set

59. In the British practice at the time of the Founding, Parliament voted an appropriation for the army each year. *See* BLACKSTONE, *supra* note 37, bk. I, ch. 13.

60. THE FEDERALIST NO. 26 (Alexander Hamilton) (emphasis in original). Even as a young firebrand and pamphleteer before the Revolution, Hamilton recognized that under the British Constitution the King was "supreme protector of the empire," "the generalissimo, or first in military command; in him was vested the power of making war and peace, or raising armies, equipping fleets and directing all their motions." WALLING, *supra* note 34, at 40 (quoting Hamilton).

61. THE FEDERALIST NO. 26 (Alexander Hamilton).

> to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government: and that when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.[62]

Hamilton does *not* say, and *could not* have said, that the framers of the Bill of Rights of 1688 had attempted to take away the King's "acknowledged prerogative" of "making war."[63] Rather, they had eliminated any claim of prerogative to raise armies and to support them (from the King's own funds or otherwise).[64] Parliament's check on the King's power of "making war," therefore, was to deny him the means by which to do so—by holding the army down to a scale that made wars of conquest or adventure abroad a military impossibility.[65] *However, once Parliament had raised and funded an army, it remained within the King's prerogative how to dispose of*

---

62. *Id.*

63. *See id.*

64. *Id.*

65. In general, the evolution of Parliament might be viewed as the centuries-long development of a forum in which the tax-seeking rulers of England and their powerful, resources-rich subjects could negotiate and compromise over the terms and conditions under which the subjects would provide a share of their resources to those rulers for the purpose (very largely) of securing collective goods deriving from (successful) defense or conquest.

> The ruler can use this forum to make clear the terms and benefits of the contract; the members of parliament need not accept it until they are satisfied that they . . . will indeed benefit from its establishment. Parliamentary procedures also tend to reveal both the ruler's and the constituents' preferences and to provide a location for continued and repeated interaction. Moreover, rulers are accountable to parliaments. If they have not kept past contracts, it will be difficult for them to make new ones. If they have failed to enforce the contributions of some parties to the contract, this too will be known. Finally, parliament helps rulers assert social pressure on constituents to keep their side of the bargain.

MARGARET LEVI, OF RULE AND REVENUE 118 (1988). Although the acquisition of steady and substantial revenues would benefit the ruler, the very existence of a Parliament could magnify the subjects' strength—and their awareness of that strength. That in turn could lead to the ruler's greater dependency on Parliament. "As the costs of war grew, wise monarchs therefore chose their military ventures with an eye to the opinions of the taxpayers [as reflected in Parliament], the better to elicit support for their policies and to strengthen theri willingness to pay for them." ROBERT H. BATES, PROSPERITY AND VIOLENCE, THE POLITICAL ECONOMY OF DEVELOPMENT 78 (2001).

it—and that prerogative included the use of the army in military engagements abroad against foreign powers.[66]

Here, Hamilton is following Blackstone, who in the *Commentaries on the Laws of England* makes the distinction between the King's power of "raising and regulating fleets and armies" and his "prerogative of enlisting and of governing them" abundantly clear.[67] The latter prerogative, Blackstone found, comprehended not only the command of the militia within the kingdom and empire, but also that of "all forces by sea and land, and of all forts and places of strength."[68] Still more pointedly, in discussing the Crown's sources of revenue, Blackstone noted that although the British standing armies were "kept on foot, it is true, from year to year, and that by the power of parliament: [yet] during that year they must, by the nature of our constitution, if raised at all, *be at the absolute disposal of the crown.*"[69]

In following Blackstone's interpretation of the Crown's prerogatives and powers, Hamilton by no means stands alone. Careful reading shows that the design of the first two Articles of the Constitution partly emulates the British constitutional model as Blackstone had delineated it and partly deviates from that model.[70]

---

66. *See id.*

67. For a somewhat different account of Hamilton's view of executive power, emphasizing his reliance on Locke rather than on Blackstone, see WALLING, *supra* note 34, at 126, 144-47. Walling argues that Hamilton incorporated the elements of Locke's federative power [which included the power to make war] that had not been specifically transferred to Congress into the executive power of the president. The federative power was traditionally associated with kings; therefore, Morton J. Frisch is clearly right to suggest that the 'great originality of the American regime' was Hamilton's 'incorporation of monarchical or executive power within the framework of traditional republicanism, a blend now referred to as presidential government.'" *Id.* at 126.

68. BLACKSTONE, *supra* note 37, bk. I, ch. 7.

69. *Id.*, bk. I, ch. 7, at 325.

70. *See* Yoo, *supra* note 11, at 1677-78. The resemblances of the proposed Constitution to that of Britain, as well as the differences between them, were often noted in the debates over ratification. Moreover, the British Constitution was often defended as an admirable model. In the June 19, 1787 speech discussed above, Hamilton told the Philadelphia Convention that "the British government forms the best model the world ever produced, and such has been its progress in the minds of the many, that this truth gradually gains ground." Federalist publicists made similar points in the ratification debates. One such writer was Noah Webster, the author of a widely read and influential tract, *"An Examination into the Leading Principles of the Federal Constitution"* (Oct. 17, 1787). Webster maintained that "the two *best constitutions* that ever existed in Europe [were] the *Roman* and the *British.*" Bailyn, *supra* note 53, at 129, 135. *See also* ROBSON, *supra* note 35, at 221 ("[T]he eighteenth-century British constitution

As a general matter, what Blackstone had counted as royal prerogatives were devolved on the President by virtue of the Executive Power clause of Article II, section 1, clause.[71] However, the Founders also reassigned some of the royal prerogatives to the Congress or, as with the treaty-making power, required them to be shared between the President and the Senate.[72] In the Army Clause, the Founders carved out the powers of raising and supporting armies from the mass of war powers that had been, or might plausibly be, claimed for the crown, and vested those specific powers in Congress, but otherwise left the "undefined power of making war" in the Executive.

This interpretation of the Army Clause also accords with Montesquieu's understanding of the relationship of executive and legislative power.[73] In *The Spirit of the Laws*, in the chapter entitled "On the Constitution of England," Montesquieu lays down the general proposition that "[t]he executive power should be in the hands of a monarch, because the part of the government that almost always needs immediate action is better administered by one than by many, whereas what depends on legislative power is often better ordered by many than by one."[74] By that standard, the decision whether to deploy armies either at home or abroad must clearly be left to the Executive, for such decisions require promptitude and discretion in situations calling for "immediate action."

---

and its practice" was "preserved" by the American Constitution of 1787 "and its practice to this day . . . as if kept in a refrigerator.").

71. U.S. CONST. Art. II, §1, cl. 1. W.W. Crosskey demonstrated this fifty years ago. *See* WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 415-28 (1953). A very pointed example of the Founders' reliance on Blackstone's exposition of executive power came in the debate on June 18, 1788 at the Virginia Ratifying Convention over the Constitution's Treaty Clause, when James Madison, in citing Blackstone's *Commentaries*, referred to it as "a book which is in every man's hand." 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 1382 (John P. Kaminski & Gaspare J. Saladino et al. eds., 1993). On the next day of that debate, George Nicholas actually quoted the text from Blackstone that Madison had in mind. *See id.* at 1388-89.

72. *See* U.S. CONST. Art. I, §3.

73. *See* MONTESQUIEU, *supra* note 19.

74. *Id.*, part I, ch. 6, at http://www.uark.edu/depts/comminfo/cambridge/spirit.html (last visited 3/10/2003).

Consistent with that view, Montesquieu also argues that "[o]nce the army is established, it should be directly dependent on the executive power, not on the legislative body; and this is the nature of the thing, as its concern is more with action than with deliberation."[75] Finally, in the same chapter, Montesquieu specifies two distinct types of executive power—one relating to "the things depending on the right of nations" and the other "depending on civil right"—and states that by the former the Executive "makes peace or war, sends or receives embassies, establishes security, and prevents invasions."[76] Thus, in a work that deeply influenced the Founders' thinking on the subject of separation of powers, the power to control the deployments of an army is assigned to the Executive, once the legislature has called such a force into being.[77]

This is not to say, of course, that Montesquieu denied any role for legislative power in this sphere. On the contrary, he warns that "[i]f the executive power enacts on the raising of public funds without the consent of the legislature, there will no longer be liberty."[78] He also argues that "[i]f the legislative power enacts, not from year to year, but forever, on the raising of public funds, it runs the risk of losing its liberty. . . . The same is true if the legislative power enacts, not from year to year, but forever, about the land and sea forces, which it should entrust to the executive power."[79] In short, the legislature must control the funding for the military, and the decision whether to create and fund a military must be made and remade by the legislature regularly at set intervals.[80]

In *The Federalist* No. 26, Hamilton develops this side of Montesquieu's ideas by emphasizing that a standing army cannot remain in existence purely through legislative inertia. "The Legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate on the propriety of

75. *Id.* at 165.
76. *Id.* at 156-57.
77. *See generally* MONTESQUIEU, *supra* note 19, vol. I, bk. 11, ch. 6.
78. *Id.* at 164.
79. *Id.*
80. *See generally id.*

keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army."[81]

In all essentials, the Founders followed Montesquieu's precepts.[82] They differed only in requiring Congressional review of funding decisions every *other* year, rather than every year, presumably to conform to the electoral cycle of the House of Representatives, and

81. THE FEDERALIST NO. 26 (Alexander Hamilton).

82. Jean-Louis de Lolme, an eighteenth century Genevan artist and student of the British Constitution, reached similar conclusions on these matters and, like Montesquieu, significantly influenced the Founders. De Lolme's *The Constitution of England or an Account of the English Government* was published in London in an English language edition in 1775. The work was studied by the Founders, most of all by John Adams, who judged it "a more intelligible explanation" of the British Constitution than any written by an Englishman and "the best defense of the political balance of the three powers that was ever written." CORREA MOYLAN WALSH, THE POLITICAL SCIENCE OF JOHN ADAMS: A STUDY IN THE THEORY OF MIXED GOVERNMENT AND THE BICAMERAL SYSTEM 2333 (1915); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 575 (1969). In the chapter of his book entitled "Of the Executive Power," de Lolme stated that in the British Constitution, the King "is, in right of his Crown, the Generalissimo of all sea or land forces whatever; he alone can levy troops, equip fleets, build fortresses, and fill all the posts in them." JEAN-LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND OR AN ACCOUNT OF THE ENGLISH GOVERNMENT 69 (1792). In addition, de Lolme stated, the King "is, with regard to foreign Nations, the representative and the depository of all the power and collective majesty of the Nation: he . . . has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper." *Id.* In the following chapter, "The Boundaries which the Constitution has set to the Royal Prerogative," de Lolme further remarked that the King "*disposes, without controul, of the whole military power in the State.*" *Id.* at 70 (emphasis added). Yet at the same time, as Montesquieu had done, de Lolme emphasized the critical dependency of the Crown on parliamentary appropriations, even in military matters:

> It is still from [Parliament's] liberality alone that the King can obtain subsidies; and in these days, when every thing is rated by pecuniary estimation, when gold is become the great moving spirit of affairs, it may be safely affirmed, that he who depends on the will of other men, is, whatever his power may be in other respects, in a state of real dependence. . . . The King of England, therefore, has the prerogative of commanding armies, and equipping fleets—without the concurrence of his Parliament he cannot maintain them. . . . He can declare war—but without his Parliament it is impossible for him to carry it on. . . . [T]he Royal Prerogative . . . is like a ship completely equipped, but from which Parliament can at pleasure draw off water, and leave it aground,—and also set it afloat again, by granting subsidies.

Id. at 70-71. De Lolme also noted that as land forces "may become an immediate weapon in the hands of Power, for throwing down all the barriers of public liberty, the King cannot raise them without the consent of Parliament." *Id.* at 79. He also pointed out that "this army is only established for one year; at the end of that term, it is (unless re-established) to be *ipso facto* disbanded." *Id.* at 80.

they only required periodic review of funding decisions for the *army*, not the navy.[83] I shall turn to that topic shortly.

Does vesting the power to raise and support armies in the Congress provide an effective check on executive ambitions, especially when Presidents are driven by love of fame? In the circumstances of the late 1780s, it must have appeared so.[84] Congress would have been expected, in ordinary peacetime circumstances, to authorize only a small federal land force, capable of performing such tasks as manning frontier or coastal garrisons or forts; protecting settlers from Indians or, no less important, preventing settlers from encroaching on Indian, British or Spanish lands; and putting down insurrections that were too large for unassisted state or local militias to suppress.

In times of crisis, when war was threatened or when the Nation had been invaded, Congress would have been expected to authorize larger federal land forces, but it would also have been expected to scale down those forces after the emergency had passed (one purpose, surely, of the biennial appropriation requirement). In no realistic scenario could Congress have been expected, in the absence of a crisis, to place so substantial an army at a President's disposal that he might be tempted, for example, to invade Canada unilaterally. Financial constraints alone ensured, in the early Republic, that this could not happen. As Hamilton realistically argued, "the extent of the military force must, at all events, be regulated by the resources of the country. For a long time to come, it will not be possible to maintain a large army."[85]

---

83. The requirement for biennial elections for the House of Representatives was of course designed to ensure that that body maintained "an immediate dependence on, and an intimate sympathy with, the people." THE FEDERALIST NO. 52 (James Madison).

84. To eighteenth century Americans, "[t]he power of the purse was . . . the determinant of sovereignty, and upon its location and extent depended the power of government, the existence of civil rights, and the integrity of representative institutions." E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790, at xiv-xv (1961). It should not be surprising, therefore, that the Founders reposed so much confidence in this method of controlling warmaking. To the present day, Congress' powers with regard to appropriations "constitute a low-cost vehicle for effective legislative control over executive activity." Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360 (1988).

85. THE FEDERALIST NO. 28 (Alexander Hamilton).

Finally, early practice in the years immediately after the Founding demonstrates that the Army Clause was used in a way that accommodated the needs both for Presidential discretion in the deployment of force and for congressional oversight and control. In 1798, President John Adams confronted the difficult task of responding to French attacks on American commerce without bringing a divided nation into full-scale war. Alexander Hamilton advised him (through an intermediary) to ask Congress, not only to increase the size of the regular army, but also to authorize a *provisional* army that the President could mobilize in the event of actual war, invasion, or "imminent danger" to the nation. Adams in fact asked Congress to authorize a provisional army that he could call into service "in case of emergency." The Senate passed a bill that authorized the President to enlist a provisional army of 20,000 "whenever he shall judge the public safety requires the measure."

Combining political realism and constitutional sophistication in equal measure, Federalist leaders like Fisher Ames recognized that enactment of their party's legislative program would enable the Adams Administration to create "the effects of a state of war" without any need for a "formed [sic] declaration" of one.[86] His advice to President Adams' Secretary of State, Timothy Pickering, was to use the authorities they hoped to gain from Congress to "[w]age war, and call it self-defense."[87]

The bill Congress passed in April of 1798 authorized a smaller provisional army that the President could bring into being in the event of a declaration of war or the occurrence of an actual or

86. Ames may have meant "formal," not "formed."

87. Letter from Fisher Ames to Timothy Pickering (July 10, 1798), *in* WORKS OF FISHER AMES 1288-89 (II W.B. Allen ed., 1983). Ames noted that under the legislation the Federalists were considering, Congress

> may authorize the burning, sinking, and destroying French ships and property *gradatim*, till no case is left which is to shelter them from hostility. . . . I need not detail the consequences of this idea, as they will occur to you, nor discriminate the odds between a formal declaration of war, which would instantly draw after it all the consequences of a state of war, and a series of acts of Congress, which would annex to our state of peace all those consequences, one by one.

Id.

imminent invasion "before the next session of Congress."[88] Later congressional action augmented the regular army and cut back the size of the provisional army—a course Republicans in Congress preferred because they wished to restrict executive discretion and to enlarge congressional control.[89]

This pattern of advice and legislation suggests the range of possibilities latent in the Army Clause.[90] Congress could create a standing army unconditionally, or it could condition its existence[91]—

---

88. *See* Act of April 28, 1798, 1 Stat. 558 (authorizing a provisional army "in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion discovered in [the President's] opinion to exist" before the following session of Congress).

89. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 596-99 (1993); ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801, at 103-08 (1966); KOHN, *supra* note 14, at 221-29.

90. Other early statutes gave the President the authority to call the militia into Federal service, but only for the specific purpose of the defense of the frontier against Indians. *See* Act of Sept. 29, 1789, § 5, 1 Stat. 95, 96; Act of Apr. 30, 1790, § 16, 1 Stat. 119, 121. Another early statute relating to the Army required the discharge of certain regiments after peace with the Indians had been achieved. *See* Act of Mar. 5, 1791, § 3, 1 Stat. 241. Further, the early Supreme Court upheld a particular legislative restriction on the deployment of a military arm (in that case, the Navy), in *Little v. Barreme*, 6 U.S. 170, 177 (1804). To be sure, this does not mean—and the later unfolding of constitutional law does not suggest—that Congress may attach such restrictions or conditions as it pleases. *See generally* The Sufficiency of the President's Certification Under the Mexican Debt Disclosure Act, *reprinted in* THE CONSTITUTION AND THE ATTORNEYS GENERAL 673, 688-96 (H. Jefferson Powell ed., 1999) (noting conditions on the exercise of presidential foreign affairs powers). But practice both in the parliaments of the seventeenth and eighteenth centuries and in the Congress of the early Republic seems to support broad legislative power to attach conditions to funding for the military.

91. British constitutional practice had long established that Parliament could insist upon conditions before agreeing to fund war measures.

> Whenever the king needed money, as he always did in the seventeenth century, he had to bargain with his subjects. He whose authority was recognized as absolute in the realm of war and peace had to ask Parliament for money to wage a war occasioned by his kingly guidance of foreign affairs; while the subject, possessing absolute control of his property, could either grant or refuse to grant money for the war, or, as parliament had long ago learned to do, grant it under certain conditions.... By 1624 the parliamentary opposition had become so skilled in its bargaining tactics that Glanville asked in a debate on foreign affairs whether 'the King be taken to be so weak as that he cannot undertake a war with contracting with his subjects?'.

MARGARET ATWOOD JUDSON, THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND 1603-1645, at 72-3 (1964). In 1624, Parliament sought to force reversals of King James I's foreign policy towards Spain and the Elector Palatinate, conditioning funding "[u]pon your Majesty's public declaration of the utter dissolution and discharge of the two treaties of marriage and Palatinate, in pursuit of our advice therein." *See* CHRISTOPHER HILL, THE CENTURY OF REVOLUTION 1603-1714, at 48 (pb. ed. 1982) (citation omitted). At the same time, Parliament also "took the novel constitutional step" of appropriating funds for specific purposes connected with a war against Spain (in defiance of royal policy). J.R. TANNER, ENGLISH

and, thereby, the President's authority to deploy it. Congress could fine-tune any conditions so as to enhance, or restrict, presidential authority over that army, and the *size* of a regular army could be calibrated so as to give Congress, or the President, varying degrees of effective control. However, underlying all of this was the assumption that *if* an army were created unconditionally, the President's decisions whether, when, and how to deploy it would be matters of his good judgment.[92]

CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689, at 50 (1966 reprint of 1928 ed.). In 1625, Parliament, opposing a land war with Spain, would only vote "a sum quite inadequate for serious war." *Id.* at 54. Sir Nathaniel Rich, in a speech to the House of Commons of August 6, 1625, claimed to trace Parliament's power to condition the grant of funds for war to the reign of Edward III. *See* SAMUEL RAWSON GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 1-2 (1958 reprint of 3d (1906) ed.). In 1677, the House of Commons used its control over appropriations to demand that King Charles II make an alliance with the Dutch against the French – a demand that the King resisted as an invasion of "the prerogative of making peace and war," causing him to adjourn Parliament. *Id.* at 237. Nonetheless, after reopening Parliament in 1678, the King reported on the making of a treaty with the Dutch and preparations for a war with France. The House of Commons appropriated funds for a new army on condition that it be employed "for the preservation of the Spanish Netherlands; and lessening the power of France," and provided also that it remain on foot only "during an actual war on France." JOHN CHILDS, THE ARMY OF CHARLES II, at 225 (1976).

> [W]hen, in 1678, Charles II suddenly levied 20,000 men, on the pretext of a war with France, the [House of C]ommons only consented to vote supplies on condition that these troops should be disbanded . . . . [S]o strong was the national prejudice under William III against a standing army, that in 1697, after the Peace of Ryswick, the [C]ommons insisted upon the dismissal of the king's Dutch guards, and on the reduction of troops to 7,000 . . . for the defence of England and 12,000 for the defence of Ireland.

THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC PERIOD TO THE PRESENT TIME 751 (10th ed. 1946). In general, as Madison remarked in *The Federalist* No. 58, the House of Commons' use of "the engine of a money bill" had for centuries ensured its "continual triumph . . . over the other branches of the government."

92. Judge Abraham Sofaer has gathered and discussed cases from the early Republic in which it was argued that the bare Congressional provision of an army (or a navy) authorized presidential actions that would entail the risk of war. *See* Abraham Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 3, 41-42 (1995). Of particular interest, Judge Sofaer has reviewed and summarized the Congressional debates during the Quasi-War with France concerning the legal effects of authorizing a navy and Congress' power to restrict the President's deployment authority once a navy had been authorized. *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 147-54 (1976). He found that these debates "contain enlightening—though hardly definitive—material on the President's power as commander-in-chief and on Congress's power to control the conduct of war." *Id.* at 165.

IV. THE NAVY CLAUSE

Article I, section 8, clause 13 provides that Congress has the power "[t]o provide and maintain a Navy."[93] Like the Army Clause, the Navy Clause vests in Congress—rather than in the President—the power to call a navy into being. It also operates, therefore, as a check on the risk of executive war-making. At the same time, it implicitly supposes that once a navy *is* called into being, the President will have the authority to dispose of it as he judges best.[94]

Like the Army Clause, the Navy Clause affirms an important—but once-contested—principle rooted in British constitutional controversies. The idea that the Crown had no power to raise and support a navy without parliamentary approval had experienced a difficult birth. During the period in which he governed without Parliament, Charles I had claimed it to be the Crown's prerogative to compel his subjects to provide funds for a navy in (what he determined to be) a time of national danger.[95] While there was a firm basis in precedent for the King's claim of extra-parliamentary authority to require seaport towns and maritime counties to furnish him with ships to counter specific threats, and in fact the King's first requisition of 1634 kept within those precedents,[96] the royal claims were rapidly enlarged so that by 1636 the King asserted the power (in effect) to levy an annual tax, even on island counties, to be paid money to meet non-emergency needs.[97] The King's position was

93. U.S. CONST. art. I, § 8, cl. 13.

94. An "Act to provide an additional armament for the further protection of the trade of the United States; and for other purposes" went into law on April 27, 1798. It authorized the President to procure and fit out no more than twelve armed vessels. The bill "was passed in the house amid great excitement. Edward Livingston, who closed the debate on the part of the opposition, said he considered 'the country now in a state of war; and let no man flatter himself that the vote which has been given is not a declaration of war.'" FRITZ GROB, THE RELATIVITY OF WAR AND PEACE: A STUDY IN LAW, HISTORY, AND POLITICS 47 (1949). Three days later, Congress enacted a statute establishing the Navy. *See* Act of Apr. 30, 1798, 1 Stat. 553, § 1. This Act directed the Secretary of the Navy to execute "such orders as he shall receive from the President of the United States, relative to . . . employment of vessels of war." The creation of an armed naval force thus in itself was understood to authorize its use by the President for making war.

95. For an overview of the controversy, see TASWELL-LANGMEAD, *supra* note 91, at 428-36.

96. *See* GARDINER, *supra* note 91, AT 105-08 (specimen of the first writ of ship money).

97. *See* TANNER, *supra* note 91, at 76-77.

challenged in the courts and upheld in *The Ship Money Case.*[98] The Answer of the Judges in the Matter of Ship-money ruled:

> [W]hen the good and safety of the kingdom in general is concerned, and the kingdom in danger, your Majesty may, by writ under the Great Seal of England, command all your subjects of this your kingdom, at their charge to provide and furnish such a number of ships, with men, victuals, and munition, and for such time as your Majesty shall think fit for the defense and safeguard of this kingdom from such danger and peril: and that by law your Majesty may compel the doing thereof in case of refusal, or refractoriness: and we are also of opinion, that in such case your Majesty is the sole judge both of the danger, and when and how the same is to be prevented and avoided.[99]

Further, the King's levy was enforced against John Hampden, over both technical and substantive objections, in a later common-law decision that generated considerable resentment against the Crown.[100]

An Act of Parliament overruled *The Ship Money Case* in 1641.[101] The Act declared the "extrajudicial opinion" of the Judges and the judgment against Hampden "were and are contrary to and against the laws and statutes of this realm, the right of property, the liberty of subjects, former resolutions in Parliament, and the Petition of Right [of 1628]."[102] The principle set forth in the 1641 Act is embedded in the Navy Clause.

---

98. 3 How. St. Tr. 988.

99. 1637, February 7. Rushworth, ii, 355. Gardiner, 108, 109 *available at* http://www.originalsources.com/nxt/gateway.dll/lawcl/0107%20select%documents (last visited Feb. 12, 2003). This was considered an "extra-judicial" opinion and not an opinion at common law. *See* TASWELL-LANGMEAD, *supra* note 91, at 431.

100. *See* KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I 719-30 (1990); TASWELL-LANGMEAD, *supra* note 91, at 432-35.

101. *See* Act Declaring the Illegality of Shipmoney, 1641, Aug. 7. 16 Charles I. c. 14, 5 S.R. 116. Gardiner 189-92, *available at* http://www.originalsources.com/nxt/gateway.dll/lawcl/0107%20select%documents (last visited Feb. 12, 2003).

102. Interestingly, during the Revolutionary War, General George Washington had launched a fleet without authorization from the Continental Congress, on the basis of his authority as Commander in Chief. *See* Miller, *supra* note 45, at 15.

The Navy Clause differs from the Army Clause in one obvious respect: the Constitution requires biennial Congressional reappraisal of funding for an army but not for a navy.[103] The explanation is again rooted in constitutional history and practice. Traditional English critics of a professional standing army had not thought that a professional navy posed the same potential danger to the liberty of the subject; indeed, in their view, the combination of a navy and a militia provided adequate means of both offense and defense for "free People in an insular Situation, both against foreign Invasion and domestic Tyranny."[104] The circumstances of the United States—isolated from the European continent by a vast ocean—were similar to those of insular Britain.[105] A navy, even if supplemented by a force of marines, could hardly stage a *coup* and hold down the thirteen United States—even if it was imaginable that a Federal army might be able to do so. Blackstone described the British Navy as "an army, from which, however strong and powerful no danger can ever be apprehended to liberty."[106] De Lolme wrote in *The Constitution of England* that British naval forces "cannot be turned against the liberty of the Nation, [and] at the same time . . . are the surest bulwark of the island."[107] Both the Founders and less illustrious Americans applied these views to American conditions.[108] Speaking

---

103. In addition to the explanation given in the text, a significant naval force—including trained mariners—could not, as a practical matter, be assembled within a two year period. "A navy is not to be formed on a sudden, nor are mariners to be obtained without extensive commerce and successful navigation." Anonymous, *Rudiments of Law and Government Deduced from the Law of Nature* (1783), *reprinted in* I CHARLES S. HYNEMAN AND DONALD S. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 601 (1983).

104. JAMES BURGH, POLITICAL DISQUISITIONS (1774).

105. *Id.* "In the common English view, "the combination of the militia with . . . the royal navy" ordinarily sufficed to "prevent[] the foreign invasion of Britain's shores." BREWER, *supra* note 46, at 33. Americans often thought the same to be true of themselves: in his Special Session Message to the Senate and House of May 16, 1797, President John Adams said that "[a] naval power, next to the militia, is the natural defense of the United States." *Id.*

106. BLACKSTONE, *supra* note 37.

107. DE LOLME, *supra* note 82, at 129.

108. At the beginning of the Revolutionary War, however, some British war planners believed, and some American leaders feared, that the British Navy would be able to subdue the rebellious colonies.

> In the early months of the war, some British officials suggested that since the army would never be able to subjugate the colonies, the task of subduing the rebellion should be left to the navy, which could impose a blockade that would cost little in blood and treasure. Just such a blockade was feared by the wiser of the American leaders, but the Royal

of a future United States Navy, Madison wrote in *The Federalist* No. 46 that "[t]he batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties."[109] Jefferson maintained that "a naval power can never endanger our liberties, nor occasion bloodshed; a land force would do both."[110] An anonymous South Carolina pamphleteer wrote in 1783 that "a navy is never dangerous to the liberties of their country."[111] Joseph Story stated what had been the general opinion at the Founding: the Navy Clause was "far more safe" than the Army Clause, because "[n]o nation was ever deprived of its liberty by its navy."[112] Furthermore, historians have concurred. In a classic study written in 1906, Otto Hintze noted that "[l]and forces are a kind of reorganization that permeates the whole body of the state and gives it a military cast. Sea power is only a mailed fist, reaching out into the world; it is not suitable for use against some 'enemy within.'"[113]

Moreover, historical experience known to the Founders confirmed that a navy would not threaten a republican regime. England, under Walpole, had maintained a navy at war-time levels for decades through the eighteenth century, with no diminution of political liberty.[114] Venice and Holland had been great commercial republics whose political institutions were unthreatened by their navies.

> Navy was too weak to impose it. While an admiralty official calculated in July 1776 that a minimum of fifty ships would be needed on the American Station, Vice Admiral Samuel Graves, the commander in American waters, had but twenty-nine vessels to patrol some 1,800 miles of coastline—and many of them were all but unfit for service at sea.

MILLER, *supra* note 45, at 14. King George III himself had urged in early 1778 that "'[a] sea war was the only wise plan, to prevent the arrival of military stores, clothing, etc., to the rebels, which must distress them and make them come into what Britain may decently consent to.'" ROBSON, *supra* note 35, at 183 (quoting King George III).

109. THE FEDERALIST NO. 46 (James Madison).

110. HENDRICKSON, *supra* note 13, at 63 (quoting Jefferson).

111. HYNEMAN & LUTZ, *supra* note 106, at 602.

112. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION ch. XX, § 191 (1986 ed.) (1859).

113. Otto Hintze, *Military Organization and State Organization*, *in* THE HISTORICAL ESSAYS OF OTTO HINTZE 214 (Felix Gilbert ed., 1967).

114. *See* PADFIELD, *supra* note 45, at 173.

Furthermore, the classically educated Founders[115] must surely have known that the Athenian navy had been the mainstay of the city's democracy, not a danger to it.[116] Hence, the controls over congressional establishment of an army were not carried over to the case of a navy.

Furthermore, it was possible to argue that a navy—at least for those fortunate enough to be in an insular situation—*conduced* to political liberty, rather than threatened it.[117] Navies sustained and protected both coastal and foreign commerce; indeed, by enabling the metropolitan country to acquire overseas colonies, they also provided sources of raw materials and captive markets.[118] They thus tended to enrich a maritime Nation's merchant class, giving it marked advantages in its conflicts with the landed nobility and gentry. The growth of the merchants' wealth, power, and influence, at least for influential thinkers of the Enlightenment, tended to operate as a force for peace and freedom.[119]

---

115. *See generally* CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME AND THE AMERICAN ENLIGHTENMENT (1994).

116. Thucydides has Pericles tell the Athenians that the navy is the basis of their power. *See* THUCYDIDES, THE PELOPONNESIAN WAR 2.62. Ancient critics of Athenian democracy also noted the linkages between naval power, commerce, the empowerment of the *demos*, and the decline of the landed classes. *See* PLATO, THE LAWS 704d-705a, 707a (A.E. Taylor trans., Dutton ed., 1960).

117. *See* Hintze, *supra* note 116, at 214.

> Land forces have stood since the beginning in more or less intimate alliance with the propertied classes; they still carry something of a feudal tradition in them. Sea power lacks all feudal vestiges. To an eminent degree it serves the interests of trade and industry. . . . Sea power is allied with progressive forces, whereas land forces are tied to conservative tendencies.

Id.; *see also* PADFIELD, *supra* note 45, at 3.

118. BREWER, *supra* note 46, at 168. In England, from Charles II's reign onwards,

> "blue water" strategy became official policy. Commercial wealth and naval power were seen as mutually sustaining. Flourishing trade fuelled the navy—providing funds in the form of customs revenues and manpower in the shape of able seamen, while an effective seaborne force was able not only to guard existing channels of trade but to open up new routes to commercial wealth.

Id.

119. David Hume, for instance, had argued that "commerce and industry . . . draw authority and consideration to that middling rank of men, who are the best and firmest basis of public liberty." This "middling rank" consisted of "tradesmen and merchants." Likewise, commerce was thought to inhibit the drive to war. Montesquieu held that "the spirit of commerce has a tendency to soften the manners of men and to extinguish those inflammable humours which have so often kindled into wars." *See* 3 PAUL A. RAHE, REPUBLICS ANCIENT AND MODERN 100, 121-22 (1994) (providing quotations). As noted above, however, Alexander Hamilton, in *The Federalist* No. 6, took distinctly the contrary view. *See*

Vesting in the President the authority to *deploy* the Navy—once Congress had created it—did not tend to encourage wanton executive war-making. The Navy could ordinarily be kept at a size suitable for defensive purposes only, and no President would want to divert naval forces to an expedition aimed at booty or conquest if that would leave American ports and coasts defenseless. Moreover, naval engagements with the European maritime powers would likely involve only clashes at sea, not full-scale invasions of national territory. Naval wars, it might be thought, would likely be fought offshore. Furthermore, for the very reasons that a Navy without a land force could not be used to hold down a territory like the United States, a Navy without an army could not be used to conquer and annex a land mass like British Canada or Spanish Florida, and why would a President attack such places from the sea if he lacked the means to hold them? Finally, if there was some degree of risk that a President would deploy the Navy in a way that led the country into an unwanted war, that risk was the unavoidable accompaniment of giving the President the necessary discretion to deploy the Navy to defend the country and its commerce against piracy or other unanticipated attacks and depravations.

V. THE MILITIA CLAUSES

Article I includes two Militia Clauses. It gives Congress the powers:

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

---

also Ferguson, *supra* note 46, at 395-96 (criticizing the "great illusion" that "economic rationality" will prevent war).

> the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[120]

A large part of the purpose of these Clauses was to provide the Federal government, in times of need, with an armed and trained land force that could be mobilized rapidly for the defense of the homeland or to quiet large-scale insurrections.[121] The Clauses do that by enabling the Federal Government to render the State militia suited for federal service and to mobilize and command it when need arises.

In effect, the Clauses provide the President with the authority to utilize a significant land force, even in the absence of a standing federal army. They thus ensure not only the existence of a large military reserve capable of being integrated into federal military operations but also the unity of command of that force under a single Federal head. To that extent, they greatly augment the President's military powers. Equally, they *constrain* the President's power in at least three significant ways.

First, the President has the authority to mobilize the militia only pursuant to an *Act of Congress.* To be sure, one could expect Congress to enact suitable legislation promptly—as it did, in the Act of May 2, 1792.[122] Nonetheless, the source of the President's power is congressional, not constitutional, and Congress might thus have some authority to limit and structure its grant.

Second, the President's power was to some degree checked by the States, which retained the authority to appoint militia officers—in other words, commanders who would have loyalty to the States as well as (when in federal service) to the President. More subtly, however, the very fact that the Constitution impliedly placed the state militia beyond federal interference—other than to the extent expressly stipulated—was meant to give the States leverage in

120. U.S. CONST. art. I, § 8, cls. 15-16.

121. That, at least, was part of the Federalists' case for ratification—even if many of their leading figures also doubted the wisdom of relying on the militia alone for homeland defense. "Federalists contended [that] Congress would find large bodies of [regular] troops unnecessary. The militia would bear the burden of overall security since the possibility of sudden invasion on a grand scale was precluded by America's distance from Europe." KOHN, *supra* note 14, at 85.

122. *See* Houston v. Moore, 16 U.S. 433 (1820).

federal foreign and military policy. Indeed, *The Federalist* papers underscore the prospective role of the state militia as a counter-weight to a standing federal army: should abuses of Federal power occur, Hamilton notes, the States may prove "not only to be the VOICE, but, if necessary, the ARM of [popular] discontent."[123]

Third, the creation of authority enabling the Federal Government to assume control over the State militia and place it at the President's disposal did *not* give rise to the risk that the President might unilaterally deploy an armed land force on a project of aggression or foreign conquest. Unlike a standing professional army, a militia did not provide the President with an instrument, ready at hand, for military adventures abroad. At least this is so if, as was long thought, the President—like the King of England—had no authority to send the militia abroad.[124] Even in 1912, Attorney General Wickersham was of the opinion that one of "the most notable points of difference" between a standing army and the militia was that

> [w]hile [an army] was in the continued service of the Government and might be called into active service at all times and in all places where armed force is required for any purpose, the militia could be called into the actual service of the Government only in a few special cases provided for by law. *Their service has always been considered as of a rather domestic character, for the protection and defense of their own country, and the enforcement of its laws.* This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom.[125]

Although Attorney General Wickersham *did* allow that the militia could constitutionally be used outside the United States to pursue and

123. THE FEDERALIST NO. 26 (Alexander Hamilton); *see also* THE FEDERALIST NOS. 28, 51 (Alexander Hamilton).

124. Blackstone had written that the militia was not "in any compellable to march out of the kingdom." BLACKSTONE, *supra* note 37.

125. *Authority of President to Send Militia Into a Foreign Country*, 29 Op. Att'y Gen. 322, 323 (1912) (emphasis added); *see also* Perpich v. United States, 496 U.S. 334, 343 & n.13 (1990).

capture an invading force, other legal authorities thought that extra-territorial deployment of the militia even to that very limited extent was unconstitutional. The militia was to be a Homeland Defense Force, not a force that the President could project abroad.[126]

The Militia Clauses make a good fit with the Army and Navy Clauses. Together, they appear to secure the means for the United States to wage war effectively, whether offensively or defensively. They enable the Congress to determine the kinds of military forces that were to be available to the President and to calibrate the scale of those forces. They protect the institution of the State militia and the States' prerogatives to select the militia's officer class—matters important to local gentries. They also give the States the means to counteract violent federal oppression or usurpations, and they, to a great extent, displace the need for a substantial professional federal army. Finally and most importantly here, these Clauses enable Congress to put sufficient armed forces at the President's disposal to enable him to cope swiftly and flexibly with emergent situations in which military power might have to be deployed domestically.

CONCLUSION

These constraints—not the Declaration of War Clause—give Congress whatever legal authority it has to regulate and control executive war-making. In that respect, these Clauses largely incorporate—as much of the Constitution does—the traditional model of the British Constitution and its allocation of powers between the Crown and Parliament. Additionally, with specific adaptations, they follow the British constitutional model in leaving the Executive's prerogative over war-making largely intact.[127]

---

126. *See* CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 133-34 (1921) (collecting authorities). Berdahl concludes his review by finding that "the weight of authority is in support of the view that the militia cannot as such be sent out of the United States for the purposes of a foreign war." *Id.* at 134.

127. I recognize that my theory makes it incumbent on me to develop a positive account of the meaning of the Declare War Clause. If that Clause does not function as a check on the President's authority to deploy the military forces available to him—even by initiating hostilities—then the question naturally arises, "What purpose does the Clause serve?" Without attempting to answer that question here, I offer the following suggestions.

To begin with, a declaration of war could serve—as the Declaration of Independence did—as an announcement to the world at large of the United States' overall strategic aims in a war and of the causes that had led it to fight. *See* BRIEN HALLETT, THE LOST ART OF DECLARING WAR (1998). Further, like the Declaration of Independence, a declaration of war could have sweeping practical effects under public international law. Justice Chase attributed these effects to the Declaration of Independence (indeed, he explicitly likened it to a declaration of war) in his opinion in *Hylton v. Ware* when he said that upon the issuance of the Declaration the Revolution became

> a PUBLIC war between independent governments; and immediately thereupon ALL the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; . . . and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France.

3 U.S. (3 Dall.) 199, 224 (1796). Thus, the Declaration of Independence "enabled the colonists to secure recognition as belligerents from neutral countries, to demand for colonial prisoners of war the treatment accorded to regular forces, to obtain foreign alliances, to prosecute Loyalists legally if not justly, and seize their property." ROBSON, *supra* note 35, at 74. Indeed, according to the contemporary American historian of the Revolution, David Ramsey, the soldiers of the Continental Army received the Declaration with "particular satisfaction" because "[a]s far as it had validity, so far it secured them from suffering as rebels." DAVID RAMSEY, THE HISTORY OF THE AMERICAN REVOLUTION (1789), *excerpted in* HYNEMAN AND LUTZ, *supra* note 106, at 745.

Similarly, a declaration of war would give the United States the status, rights, and liabilities of a belligerent under international law; would entitle it to claim that members of its forces captured by the enemy were to be treated as prisoners of war; and would entail changes in the rights of private persons—including enemy aliens and sojourning foreign merchants—under the domestic law of the United States (or at least authorize Congress or the President to effect such changes). *See, e.g.*, Brown v. United States, 12 U.S. (8 Cr.) 110 (1814). Moreover, a declaration of war could affect the rights and liabilities of regular United States military personnel (or others acting under its authority) for acts of violence or seizures that they performed in the course of the war—for example, changing what might otherwise be unlawful private acts punishable as piracy into lawful public acts of seizing enemy ships and cargos. A declaration of war would also cancel or suspend treaties; suspend trading and other commercial relations between the belligerents and their nationals; suspend pre-war contracts between belligerents' nationals for the duration of the war, and void contracts made during wartime; and expand the domestic powers of the Government. *See, e.g.*, Taylor v. Morton, 23 F. Cas. 784, 786 (Case No. 13,799) (Cir. Ct. D. Mass. 1855) (Curtis, Circuit Justice) ("[The Constitution] gives to congress, in so many words, power to declare war, an act which, *ipso jure*, repeals all provisions of all existing treaties with the hostile nation, inconsistent with a state of war. It is true this particular power to repeal laws found in treaties, is expressly given, and is applicable only to a case of war."); Jones v. Walker, 13 F. Cas. 1059, 1062 (Case No. 7,507) (Jay, Circuit Justice) (district and date not given) (stating that the power to determine whether treaty remains valid falls "to congress (it being necessarily incident to the right of making war)"); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 18 (3d ed. 2001) (contrasting traditional views with recent trend towards denying that war terminates or even suspends treaties). Such an understanding of the legal character, function and effects of a declaration of war is fully articulated in Justice Nelson's dissenting opinion in *The Prize Cases*, 67 U.S. 635, 686-88 (1862) (Nelson, J., dissenting); *see also* Note, *Congress, The President, and The Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771, 1772 (1968). A declaration of war could serve any or all of these purposes without being constitutionally required as an antecedent to the Presidential deployment of armed forces into hostilities.

A separate line of thought also reaches the conclusion that the Declaration of War Clause was primarily designed to enable Congress to affect the position of the United States at public international law, its armed forces and its nationals, rather than to disenable the President from deploying the armed forces without antecedent legislative authorization under that Clause. Blackstone's discussion of the King's power to declare war—which he considered to be but one element of the Crown's "sole prerogative of making war and peace"—emphasizes that a declaration of war transforms what might

otherwise be regarded as the acts of "unauthorized volunteers in violence" into the public acts of a lawful belligerent's armed forces, and more generally that it places each individual member of one belligerent's society at enmity with each individual member of the other belligerent's society. BLACKSTONE, *supra* note 37, bk. I, ch. 7, at 249. Relying on the views of Grotius, Blackstone explains that the reason why "according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities" is that it may be made "certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both contending nations, from the highest to the lowest, are bound by it." *Id.* at 250.

In stating that a declaration is necessary "to make a war *completely effectual*," Blackstone is not saying that the Crown may not engage in war-making without a declaration, but rather that the quality of its subjects' acts in the course of war-making—that is, whether they are authorized public acts or unauthorized private acts of violence or depradation—would be unsettled and disputable in the absence of a declaration. Insofar as Blackstone is concerned at all with the *domestic constitutional* issues presented by war-making—as distinct from those arising under *international law*—he says that the "check of parliamentary impeachment, for improper or inglorious conduct, in beginning [or] conducting . . . a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative." *Id.* Analogously, the legislative check *ex post* on Presidential war-making would also be impeachment (as the check *ex ante* is Congress' control over the provision of the army and navy). In sum, then, Blackstone's interpretation of the Crown's power to "declare" war is consistent with the view that that is a power to affect international juridical relationships.

Finally, any plausible interpretation of the Declare War Clause must reckon with the fact that, as Hamilton put it, "the ceremony of a formal denunciation of war has of late fallen into disuse." THE FEDERALIST NO. 25. If anything, Hamilton badly understated the case. In *Griswold v. Waddington*, Chancellor Kent found:

> A formal declaration of war is not held necessary by the usage of *Europe*; and war may begin by mutual hostilities as well as by a declaration . . . . Since the peace of *Versailles* in 1763, formal declarations of war seem to have been disused in *Europe*, and all the necessary and legitimate consequences of war flow at once from a state of public hostilities, duly recognized and explicitly announced. In the war of 1756, between *England* and *France*, war was not formally declared until *May* and *June*, 1756, though vigorous and active hostilities had been carried on, by sea and land, for a whole year preceding . . . . In the war which commenced between *England* and *France*, in 1778, the first public act on the part of the *English* government, was the withdrawing of its minister from *France*, and that single act was declared by *France* to be the first breach of the peace.

16 Johns. 438 (Sup. Ct. N.Y. 1819) (italics in original). In other words, twice in the Founders' lifetimes—in the Seven Years War (known in this country as the French and Indian War) and again in the American War of Independence—hostilities had broken out between England and France, in matters concerning North America, without a declaration of war. Further, Chancellor Kent observed that the Revolutionary War "had actualy commenced" on the Smerican side the year before "our independence was . . . declared [and] the war . . . then attained that solemn form recognized by public law between independent nations." *Id.* The absence of a formal declaration during that period was not in the least unusual. "Formal declarations of war became more and more rare from about 1700 . . . . [I]n the period 1700-1870 hostilities were only in ten cases preceded by a formal declaration against more than [a] hundred without any or with one subsequent to the opening of hostilities." 9 J.H.W. VERZILJ, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 62 (1978). The rarity of declarations of war in eighteenth century State practice—particularly Great Britain's—underscores that the power conferred by the Declare War Clause was a limited one.