No. 05-184

In The

Supreme Court of the United States

Salim Ahmed Hamdan,

Petitioner,

v.

Donald H. Rumsfeld, *et al*.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* JACK N. RAKOVE, FRED ANDERSON, CAROLINE COX, R. DON HIGGINBOTHAM, CHARLES A. LOFGREN, ROBERT L. MIDDLEKAUF, LOIS G. SCHWOERER, AND JOHN SHY IN SUPPORT OF PETITIONER

Pamela S. Karlan
(Counsel of Record)
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

January 4, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

STATEMENT OF INTEREST

Amici curiae are historians whose research interests include the origins of the Constitution; the military history of eighteenth-century America, including issues of civil-military relations; and the English antecedents of American ideas and institutions. *Amici curiae* believe that historical understanding of these topics may assist the Court in considering the legal and constitutional issues presented in this case.[1]

Jack N. Rakove is the Coe Professor of History and Professor of Political Science and (by courtesy) of Law at Stanford University. His books include The Beginnings of National Politics: An Interpretive History of the Continental Congress (1979) and Original Meanings: Politics and Ideas in the Making of the Constitution (1996), which received the Pulitzer Prize in History. His other writings include *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 Perspectives in American History, New Series 233 (1984), and *Making Foreign Policy: The View from 1787*, in Foreign Policy and the Constitution (Robert A. Goldwin & Robert A. Licht eds. 1990). He is past president of the Society for the History of the Early American Republic.

Fred Anderson is Professor of History at the University of Colorado and author of Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766 (2000), and A People's Army: Massachusetts Soldiers and Society in the Seven Years' War (1984).

Caroline Cox is Assoc. Professor of History at University of the Pacific and author of A Proper Sense of Honor: Service and Sacrifice in George Washington's Army (2004).

---

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici* state that none of the parties or their counsel wrote the brief in whole or in part and that no one other than *amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

R. Don Higginbotham is the Dowd Professor of History at the University of North Carolina, Chapel Hill. His writings include The War of American Independence: Military Attitudes, Policies, and Practice, 1763-1789 (1971); War and Society in Revolutionary America: The Wider Dimensions of Conflict (1988); George Washington and the American Military Tradition (1985); and George Washington: Uniting a Nation (2002). He is past president of the Southern Historical Association and the Society for the History of the Early American Republic.

Charles A. Lofgren is Professor of History and Politics at Claremont McKenna College, and author of "Government from Reflection and Choice": Constitutional Essays on War, Foreign Relations, and Federalism (1986); The Plessy Case: A Legal-Historical Interpretation (1987), and *The Original Understanding of Original Intent?*, 5 Const. Comm. 77 (1988).

Robert L. Middlekauff is the Preston Hotchkis Professor of History Emeritus at the University of California, Berkeley. His many works on early American history include The Glorious Cause: The American Revolution, 1763-1789 (rev. ed. 2005), a volume in the Oxford History of the United States, and Benjamin Franklin and His Enemies (1996).

Lois G. Schwoerer is Elmer Louis Kayser Professor of History Emerita at George Washington University, the author of "No Standing Armies!": The Antiarmy Ideology in Seventeenth-Century England (1974) and The Declaration of Rights, 1689 (1981), and past president of the North American Conference for British Studies.

John Shy is Professor of History, Emeritus, at the University of Michigan, and the author of Toward Lexington: The Role of the British Army in the Coming of the American Revolution (1965) and A People Numerous and Armed: Reflections on the Military Struggle for American Independence (rev. ed. 1990).

INTRODUCTION AND SUMMARY OF ARGUMENT

A central question raised by this case is whether "the inherent powers of the President" authorize establishment of the military commission used to try petitioner. Pet. Cert. i. The answer to that question is surely informed by the original understanding of the quantum of authority the president can claim as Commander-in-Chief or as the repository of the executive power vested by Article II, Section 1 of the Constitution. Contrary to the view of some legal scholars who have recently asserted that the American founders retained a broad conception of the unilateral power and discretionary authority of the executive in the realm of military and diplomatic affairs,[2] the adopters of our Constitution rejected a monarchical conception of executive prerogative, and instead maintained and extended the legislative supervision and control of executive power that were the profound legacy of Anglo-American constitutional history since the early seventeenth century. The framers conspicuously divided powers relating to military and foreign affairs between Congress and the executive, while making treaties judicially enforceable under the Supremacy Clause.

The framers and ratifiers of 1787-1788 inhabited a constitutional world that emphasized the imperative of constraining the executive, whether monarchical or republican, to act according to settled law. This tradition reflected deep suspicion of applying military justice even to soldiers, much less to others. The framers understood that the presidency they were proposing would act with greater vigor than the weak governorships of the states or the "deliberating executive assembly" of the Continental Congress. But in the realm of national security, their principal goal was to enhance

---

[2] See, *e.g.*, John Yoo, The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11 (2005); Saikrishna B Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231 (2001).

the effectiveness of the Union by granting legislative and revenue powers to Congress and enabling the judiciary to enforce national treaties. In vesting executive power in a single person, the framers were as concerned with establishing responsibility as they were with fostering the proverbial executive virtues of "energy" and "dispatch."

The historical context for understanding the original intention of the Constitution's allocation of military and diplomatic powers starts with the great controversies of Stuart England that culminated in the Glorious Revolution and constitutional settlement of 1688-89. Disputes over the command and use of military forces led to important reductions in the royal prerogative. Although the king retained unilateral authority to take the nation to war and to conclude treaties, he could not maintain or discipline military forces without annual parliamentary consent. Contemporary observers regarded this distinctive arrangement as a fundamental source of the balanced constitution they admired.

So did the colonists, whose legislative assemblies were modeled on Parliament and the powers it had secured in 1689. Colonial legislation frequently restricted the military power of royal officials, and reflected the same unease with military justice that permeated English law. Americans also adopted the anti-standing army attitudes that remained part of British political culture, including the fear that an uncontrolled executive could use such a force to impose tyranny.

These attitudes shaped the radical reduction in executive power that marked the new constitutions Americans began writing in 1776. At the national level, the Continental Congress succeeded to the military and diplomatic powers of the Crown. But these executive powers were lodged in a body that acted like a legislature, and which was regarded as a representative assembly for the states.

From the outset of the Federal Convention of 1787, the framers rejected the royal prerogative as a model for a republican presidency. They embodied this original, limited

understanding of executive power by distributing an array of powers relating to military and foreign affairs between Congress and the president. Far from conceiving of legislative control as simply a subtraction from a corpus of inherent executive power, the framers vested Congress, acting with the consent of the president, with the duty to regulate essential aspects of national security. That understanding of the Constitution comports far better with the suspicion of executive power that permeated American political culture in this period than any account emphasizing a broad delegation of discretionary authority to the novel office of a national presidency. Thus, Justice Robert Jackson was correct in the *Steel Seizure Cases* when he explained that "I cannot accept the view that [the vesting] clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

The ratification debates of 1787-88 reinforce that conclusion. Had the ratifiers believed that they approving a presidency vested with unilateral authority of the kind that has been asserted in recent months, they would have rejected the Constitution as a betrayal of republican principles. The Anti-Federalists repeatedly denounced, and the Constitution's supporters repeatedly disclaimed, the tyrannical potential of a wide range of other constitutional provisions. That neither group invoked the Vesting Clause of Article II in these debates strongly suggests that that clause was not originally understood as an expansive conferral of executive power.

The broad reading of the Vesting Clause did not emerge until 1793, amid partisan controversy over a presidential proclamation of neutrality. In that controversy, Alexander Hamilton's attempt to argue that the war and treaty powers were inherently executive in nature was refuted by James Madison's appeal to the understandings of 1787-88, including arguments then made by Hamilton.

ARGUMENT

I. THE AMERICAN UNDERSTANDING OF EXECUTIVE POWER AROSE FROM OVER A CENTURY OF ANGLO-AMERICAN EFFORTS TO CONSTRAIN THE PREROGATIVE POWER OF THE CROWN AND EXECUTIVE OFFICIALS

Justice Jackson's concurrence in the *Steel Seizure Cases* lamented "the poverty of really useful and unambiguous authority applicable to concrete problems of executive power," claiming that "[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh," 343 U.S. at 634. Recent historians have in fact reconstructed how the American colonists thought about executive power, and traced the impact of their ideas on the new constitutions written between 1776 and 1787. This recent historical research is essential in any serious attempt to recover the original meaning of the Constitution, because even contemporaneous dictionaries cannot always establish what the words of the Constitution meant to its adopters. As James Madison observed in *Federalist* 37, "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas." The Federalist No. 37, at 270 (Benjamin F. Wright ed. 1961). In an era of major constitutional innovation, familiar terms and basic concepts were subject to intense scrutiny and alteration. Accordingly, historians have relied on an array of sources that illuminate the meaning of key constitutional terms, beginning with the voluminous records of debates covering the framing and ratification of the Constitution, but also extending to materials that reflect the larger context of Anglo-American thinking and

practice before the Revolution and the conduct of public affairs during the struggle for independence.[3]

A. The Eighteenth-Century British Constitution Substantially Limited Crown Prerogative Power with Respect to Military Affairs

Prior to the Revolution, American ideas of executive power were profoundly shaped by Anglo-American constitutional developments that emphasized curtailing the prerogative powers and political influence of the Crown. Many of these developments involved the Crown's assertion of unilateral control over military affairs and national security, and thus helped spark the great constitutional disputes of seventeenth-century England. Military issues were a critical element in the worsening relations between King and Parliament that resulted in the Petition of Right in 1628; the outbreak of civil war in 1642; mounting disillusion with the regime of Oliver Cromwell in the 1650s; the restoration of the Stuart monarchy in 1660; and the Glorious Revolution of 1688 and its ensuing constitutional settlement in 1689

At the start of this period, the king indisputably commanded English armed forces as part of the royal prerogative. Article VII of the Petition of Right first challenged that prerogative by complaining that the application of martial law, even against soldiers, when unsupported by parliamentary consent, violated the rights of subjects. The revolutionary Parliament of 1641-42 further challenged royal power by proposing a Militia Ordinance that would wrest control of the militia from the king to itself. The country soon plunged into a civil war between two armies, one loyal to Charles I, the other to Parliament. The victory of the latter led to the king's execution in 1649 and the abolition of the monarchy and the House of Lords. But as the New Model Army repeatedly intervened in politics – purging

---

[3] See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 3-22 (1996).

dissidents from Parliament in 1648, dissolving the Rump Parliament in 1653, supporting the military governance of the country in the mid-1650s – it generated intense opposition to its existence as a "standing army" inimical to liberty. Because the army served as an instrument of power for Cromwell, the Lord Protector, this opposition supported the idea that "Parliament and not the executive should command the military force, whether army or militia." Lois G. Schwoerer, "No Standing Armies!": The Antiarmy Ideology in Seventeenth-Century England 71 (1974); see *id.* at 23-71.

The restoration of the Stuart monarchy confirmed royal control of the nation's military forces. The Disbanding Act of 1660, adopted to retire the troops who had maintained the Cromwellian regime, "allowed the king to raise as many soldiers as he wished so long as he paid for them." *Id.* at 75. Moreover, "[t]he Militia Act of 1661 unequivocally confirmed the monarch's right to sole command of the military forces of the nation." Lois G. Schwoerer, The Declaration of Rights, 1689, at 72 (1981). But the argument over the danger of a standing army, free from parliamentary regulation or control, gradually revived. One grievance was that Charles II and his successor, James II, were commissioning Catholics as officers, in violation of the Test Act, which required officeholders to swear an oath denying the Catholic doctrine of transubstantiation. In the paranoiac political atmosphere of the 1680s, the fear that James would enforce his rule through a Catholic-officered army subject to neither parliamentary regulation nor funding was a major factor leading to the Glorious Revolution that brought William of Orange and his wife Mary (James's Protestant daughter) to the throne in 1689.

Their accession was accompanied by acceptance of the Declaration of Rights that Parliament adopted in February 1689 and later reenacted as the Bill of Rights. Its sixth article marked a decisive shift in English constitutional doctrine: "That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of

Parliament, is against law." The Bill of Rights (1689), *reprinted in* 1 The Founders' Constitution 433 (Philip B. Kurland & Ralph Lerner eds. 1987). This was new law that repudiated the prior understanding that the king could maintain such troops as he wished so long as he paid for their maintenance. This significant reduction in the royal prerogative has been called "the most important clause in the Bill of Rights." Schwoerer, "No Standing Armies," *supra*, at 151. The enactment of the first Mutiny Act in April 1689 also marked a milestone in the annals of martial law. For the first time, Parliament established the principle that military law and discipline had to rest upon statutory foundations, reversing ancient practice that made the issuance of Articles of War part of the prerogative.

Article VI and the Mutiny Act were foundational texts of the British constitution that eighteenth-century commentators so admired. After 1689, Parliament granted military supplies on an annual basis, which assured that it would meet annually, something the Stuart kings had been loath to permit. It treated the Mutiny Act the same way, "ensuring that without annual parliamentary reauthorization army discipline would be almost unattainable." David T. Hardy & Williams S. Fields, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 Am. J. Leg. Hist. 393, 409 (1991). For present purposes, the Mutiny Acts are especially significant because they simultaneously authorized and limited much of what the crown could do in the realm of military administration, including martial law. By 1750, the Mutiny Act had evolved into "a comprehensive statute covering the discipline, recruitment, housing, and movement of the army." John Shy, Toward Lexington: The Role of the British Army in the Coming of the American Revolution 164 (1965). It "touched on virtually every significant aspect of army administration." Fred Anderson, Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766, at 648 (2000).

These parliamentary practices proved a necessary prelude to acceptance of the idea that Britain would have to maintain a standing army just as its continental rivals did. But these concessions to military necessity remained constitutionally problematic, in part because they were viewed as a departure from prior conventions, and in part because they threatened to blur the difference between Britain's balanced constitution and the absolutist monarchies of Europe. Even as British armies gained unprecedented victories, an anti-standing army ideology remained a conspicuous part of British (and American) political culture, and with it the belief that only parliamentary vigilance could maintain British liberty. See Schwoerer, "No Standing Armies," *supra*, at 188-200.[4]

Thus, British constitutional understanding prior to the American Revolution recognized that the Crown's regulatory power over military affairs depended on positive legislative authorization rather than on the inherent nature of executive power. To be sure, even after these key constitutional changes, the king retained command of all military and naval forces, including the militia, and possessed full power to take the nation into war, and to negotiate and ratify treaties. The king was thus regarded, in Blackstone's words, as "the generalissimo, or the first in military command, within the kingdom." 1 William Blackstone, Commentaries *254. Yet even Blackstone testifies to how much the animus against standing armies and military justice permeated British thinking. "For martial law, which is built upon no settled principles, but is entirely arbitrary in it's decisions, is, as sir Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing

[4] See also Lawrence D. Cress, Citizens in Arms: The Army and the Militia in American Society to the War of 1812 (1982); John Phillip Reid, In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution (1981).

which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land." *Id.* at *400. Thus, British norms presupposed that martial law – that is, unilateral crown adjudication under the guise of control over military affairs – marked a deviation from constitutional principles. This concern was annually registered in the preamble to the Mutiny Act, which routinely declared "That a standing army in time of peace; execution of martial law in a time of peace, are against law." *Quoted in* Reid, *supra*, at 6.

It also extended to crucial aspects of colonial governance. Following the Seven Years War, General Gage, the British commander, sought an extension of the Mutiny Act to North America, in part to provide legal authority to try civilians in military courts for offenses committed west of the 1763 Proclamation Line, where no colonial courts had jurisdiction. The ministry and Parliament instead required offenders to be brought "to the Civil Magistrate of the next adjoining Province." Stat. of 5 Geo. III ch. 3, *quoted in* Frederick Bernays Wiener, Civilians under Military Justice: The British Practice since 1689 Especially in North America 68 (1967); see Shy, Toward Lexington, *supra*, at 191-99.

B. Colonial Ideas of Governance Reflect a Similar Concern with Checking Executive Power

British constitutional principles and concerns with the king's unilateral control over military affairs played a major role in shaping colonial ideas of governance. The colonists modeled their own representative assemblies on the House of Commons, and believed these legislatures should enjoy the same privileges. They viewed the establishment of the legal supremacy of Parliament in 1689 as the key constitutional norm that the internal governance of the colonies should replicate. But the conflicts between royal prerogative and parliamentary privilege that had repeatedly disrupted seventeenth-century English politics continued to fester in

eighteenth-century America. Royal governors retained powers that the crown no longer exercised in Britain. They could veto and suspend legislation, prorogue and dissolve legislative meetings, and remove judges and other high officials at pleasure. This disparity between Britain and America gave colonial politics a feverish character. Normal political decisions often escalated into constitutional quarrels over the respective powers of legislatures and governors. Much like the House of Commons, colonial assemblies used their power of the purse to enhance their privileges and authority.[5]

Consistent with parliamentary precedents, American assemblies often imposed legal restraints on royal authority, even in military affairs. "[A]stute manipulation of the power of the purse had allowed assemblies to make inroads into such traditional executive prerogatives as the appointment of commanding officers, the planning of military operations, and even the deployment of forces." Cress, *supra*, at 8. Other legislation regulated the disciplining of colonial soldiers recruited for the imperial wars of the eighteenth century. During the Seven Years War, colonies enacted their own Mutiny Acts to govern the trial and punishment of their soldiers. In both language and application, these acts reflected "the traditional distrust of standing armies," although New England laws favored more moderate punishments than the comparable acts of southern colonies. Fred Anderson, A People's Army: Massachusetts Soldiers and Society in the Seven Years' War 124 (1984); see also Carolyn Cox, A Proper Sense of Honor: Service and Sacrifice in George Washington's Army 89-92 (2004). American protests against the parliamentary Quartering Act of 1765

[5] For general discussion, see Bernard Bailyn, The Origins of American Politics (1968); Mary P. Clarke, Parliamentary Privilege in the American Colonies (1943); and Jack P. Greene, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776 (1963).

invoked the same principle leveled against the Stamp Act: that a Parliament where Americans were not represented could not adopt legislation infringing their rights.

These recurring disputes explain one further aspect of American politics. The colonists proved highly receptive to a body of English political writings that regularly denounced the rise of ministerial power and influence as a threat to fundamental principles of parliamentary supremacy and independence. The best known of these writers were John Trenchard and Thomas Gordon, co-authors of *Cato's Letters*, but their themes resounded in numerous other works. In their view, the Crown's use of patronage and other means of "corruption" – including the election of military officers to the House of Commons – was sapping the principles of 1689, turning Britain's "balanced constitution" into a regime that the executive could dominate.[6] Such criticisms had to be directed not against the king, which would be sedition, but rather against his ministers. Even so, these writings preserved many of the anti-monarchical sentiments of the seventeenth century. After 1765, the colonists increasingly used this account of British politics to explain why the British government seemed intent on curtailing Americans liberties.

The belief that power-craving ministers would make a "standing army" the instrument of such tyranny was a staple theme in this literature. The colonists' familiarity with these works helps to explain why anti-standing army sentiments figured prominently in their political ideology. This concern was further reinforced by the direct contact colonial military units had with British forces during the Seven Years War. The Articles of War promulgated under the parliamentary Mutiny Acts subjected British soldiers to a brutal discipline that corresponding colonial legislation did not impose.[7]

---

[6] See Bernard Bailyn, The Ideological Origins of the American Revolution 34-93 (1967, 1992).

[7] See Anderson, A People's Army, *supra*, at 121-41; Cox, A Proper Sense of Honor, *supra*, at 86-94.

Americans received firsthand proof of the sinister uses to which standing armies could be put when the British government stationed regular soldiers in Boston in 1768, in order to support the enforcement of the Townshend duties. The troops came at the request of the royal governor, but over the protests of the colonial legislature. The eventual result was the Boston Massacre, which confirmed the stock lesson about the danger of standing armies.[8]

II. REVOLUTIONARY ERA STATE CONSTITUTIONS SIGNIFICANTLY CONSTRAINED EXECUTIVE POWER, PARTICULARLY OVER MILITARY AFFAIRS

American anti-monarchicalism was vividly expressed in two documents of 1776: Thomas Paine's *Common Sense* and the Declaration of Independence. The latter necessarily comprised an extended list of grievances against George III because Americans regarded the Crown as their sole remaining constitutional link to the empire. Several of those grievances echoed the classic arguments against standing armies free from legislative control: "He has kept among us, in times of peace, Standing Armies, without the Consent of our legislatures. – He has affected to render the Military independent of and superior to the Civil power." The king was also assailed for assenting to Parliament's "Acts of pretended Legislation: – For quartering large bodies of armed troops among us: – For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States." The Declaration of Independence (1776), *reprinted in* 1 The Founders' Constitution, *supra*, at 10.

Once having renounced king and empire, however, the revolutionaries most clearly expressed their ideas of executive power in the state constitutions they drafted concurrently with independence. Arguably the most pronounced characteristic of these constitutions was their radical reduction of executive

[8] See Shy, Toward Lexington, *supra*, 267-320.

power. In essence, executive power became just that: an agency-like authority, or duty, to implement (to "execute") the acts of a supreme legislature.[9] The concept of prerogative – of an independent residuum of inherent executive power – was virtually banished from the American political vocabulary. A republican governor, John Adams wrote, should be "stripped of most of those badges of domination called prerogatives." John Adams, Thoughts on Government (1776), *reprinted in* 1 The Founders' Constitution, *supra*, at 109. On this point, Adams was actually more moderate than most of his countrymen, because he would have granted the governor a legislative veto. None of the constitutions written in 1776 retained the veto, or the associated right of the crown to suspend legislation. The power of the governors to control legislative meetings was also eliminated, and the power to make appointments substantially reduced. The prevailing reaction against the concept of prerogative was well expressed in the Virginia constitution, which declared that the governor "shall not, under any pretence, exercise any power or prerogative by virtue of any Law, statute, or Custom, of England," save a limited power to grant reprieves and pardons. *Id.* at 8. The Virginia Declaration of Rights, and similar documents in other states, also asserted "[t]hat all power of suspending laws, or the execution of laws, by any authority without consent of the Representatives of the people is injurious to their rights and ought not to be exercised." *Id.* at 6.

Nine of the eleven states that adopted new constitutions after independence explicitly designated the governor (or, in Pennsylvania, the president of the executive council) as "commander in chief" and (in six states) "captain general." But five of those states (Delaware, Georgia, Massachusetts, New Hampshire, and North Carolina) added the qualifier "for the time being" to this title, implying that this power was

---

[9] Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 132-143 (1969).

being given amid the urgent circumstances of an ongoing war, rather than permanently vested. Six permitted the governor to "embody" the militia, though four of these states required the advice of the executive or privy council. The most expansive statement of military powers came from John Adams, the chief author of the 1780 Massachusetts constitution. It authorized the governor "to lead and conduct" the forces of the Commonwealth, "and with them to encounter, repel, resist, expel and pursue, by force of arms, as well by sea as by land, within or without the limits of this Commonwealth, and also to kill, slay and destroy, if necessary, and conquer, by all fitting ways, enterprizes and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this Commonwealth . . . ." But all this was to be done "agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise." *Id.* at 17-18.

None of the state constitutions explicitly authorized governors to initiate hostilities. Under the empire, such decisions were the prerogative of the Crown. The animus against executive power manifested in the first state constitutions, however, and the prior history of colonial legislation, make it highly unlikely that the executive was conceived as retaining that prerogative. Because a war was already underway, under the direction of the Continental Congress, this was not an urgent question "for the time being." Moreover, the war-making capacity of the states was itself severely restricted by the Articles of Confederation, drafted in 1776-77 but not ratified until 1781.

III. THE CONTINENTAL CONGRESS'S CONTROL OVER MILITARY AFFAIRS REFLECTED AN UNDERSTANDING OF THE SEPARATION OF POWERS THAT DISTINGUISHED BETWEEN PURELY EXECUTIVE AND JOINTLY-EXERCISED "FEDERATIVE" POWERS

From its inception in 1774, the Continental Congress controlled conduct of the colonists' relations with other countries, including the mother country. In June 1775, it converted the provincial forces opposing British troops in Boston into a Continental Army, and soon appointed George Washington its commander-in-chief. The Continental Congress also adopted articles of war to govern the disciplining of these troops.

Under these circumstances, it could be argued that the Continental Congress was an executive body because it exercised powers formerly lodged with the Crown. This was the sense in which the North Carolina delegate, Thomas Burke, described Congress as "a deliberating Executive assembly," 4 Letters of Members of the Continental Congress 367-68 (Edmund Cody Burnett ed. 1921-36), or James Madison later observed that the state governorships might be less important than the judiciary, "all the great powers which are properly executive being transferd to the Fœderal Government." Letter to Caleb Wallace (Aug. 23, 1785) *reprinted in* James Madison, Writings 39, 41 (Library of America 1999).

This usage tracked the classification of powers found in authoritative writings. That usage had its own ambiguity, however. Separation of powers was not yet a fully articulated theory, nor, as Madison later noted in both *Federalist* 37 and 47, was it capable of rigidly isolating executive, legislative, and judicial powers in three distinct compartments. "Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science." The Federalist, No. 37, at 269. Moreover, the dominant paradigm for praising the British constitution was the theory of mixed government, which stressed not the functional separation of powers across departments but the balance obtained by uniting monarchy, aristocracy, and the people legislatively through the King-in-Parliament.

The leading theorists of separation of powers were John Locke and the Baron de Montesquieu. In his *Second Treatise of Government*, Locke distinguished three kinds of power: legislative, executive, and federative, which "contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the commonwealth." John Locke, Second Treatise of Government ch. XII, § 146 (1690). Locke held that the executive and federative powers were "really distinct in themselves." But because both "requir[ed] the force of society for their exercise," it was "impracticable" to deposit them in different "hands," because the ensuing rivalry could end in "disorder and ruin." *Id.* § 148. Here Locke was clearly evoking the English civil war of the 1640s. Locke insisted, however, that executive and federative power were "both *ministerial and subordinate to the legislative*." *Id.* § 153.

Montesquieu's great contribution to the theory was to recognize judicial power as a third branch of government, distinct from the legislature and executive. In his famous chapter "Of the constitution of England" in *The Spirit of the Laws*, he first identified three kinds of power this way: "the legislative; the executive in regard to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." Baron de Montesquieu, Spirit of Laws, Bk. 11, ch. 6 (1748), *reprinted in* 1 The Founders' Constitution, *supra*, at 624. Several paragraphs later, however, he reformulated his trinity of powers as "that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." *Id.* at 625. Concerned now only with domestic governance, Montesquieu said nothing more about the conduct of "the executive in regard to things dependent on the law of nations." He did warn, however, that the legislature "would run the risk of losing its liberty" if it did not fund the military annually. *Id.* a 628. He also justified executive command of the army on the belief that the soldiery will not respect the "timidity," "prudence," and habits of "counsel" of deliberative bodies. *Ibid.*. Between

them, Locke and Montesquieu had thus identified four kinds of power, not three, and the fourth, relating to war and diplomacy, received least scrutiny.[10]

This distinction between executive and federative power thus complicates any simple effort to say that the Continental Congress was exercising executive power in its war- and treaty-making capacities. So do the procedures for debate and decision that Congress followed. Thomas Burke's description of Congress as "a deliberating executive assembly" is revealing. Its rules were closely modeled on standard legislative procedures. Congress was a representative assembly whose members were politically accountable to the state legislatures. It did much of its work in committee, reached decisions through legislative-style debates, conducted roll calls, and published its journals. Congress frequently delayed decisions until it achieved the consensus that a body managing a revolution needed to attain.[11] The most divisive disputes Congress experienced involved its conduct of foreign policy: a prolonged 1779 debate over peace terms and the 1786 debate over the negotiation of a treaty with Spain.[12] Thus even if the powers of Congress were deemed executive under the conventional British classification, its procedures were legislative and its decisions – even on foreign policy – reflected its character as a representative body. This notably applied to the promulgation of Articles of War, a subject on which General Washington's urgent desire to move closer to British practices required several days of debate to gain the acceptance of Congress.[13]

---

[10] See M.J.C. Vile, Constitutionalism and the Separation of Powers 58-68, 86-87 (1967).

[11] Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress 198-205 (1979).

[12] See *id.* at 255-74, 349-50.

[13] See Cox, Proper Sense of Honor, *supra*, at 94-96.

IV. THE VESTING CLAUSE OF ARTICLE II DID NOT GRANT THE PRESIDENT AN UNSPECIFIED PLENARY POWER

The paramount purpose of the Federal Convention was to give the national government adequate legal authority and resources to provide for the common defense and to conduct foreign relations. The president's designation as commander-in-chief was secondary to the task of granting Congress the requisite authority to establish, support, and regulate the nation's armed forces.[14] The Framers did not design the Vesting Clause of Article II as a plenary grant of unspecified executive powers. Their allocation of military and diplomatic powers between the branches expanded upon British practice in limiting executive authority. Their understandings are reflected in the convention proceedings, in the constitutional text, and in the debates surrounding ratification.

A. Nothing in the Record of the Constitutional Convention Suggests that the Framers Intended to Endow the President with Unilateral Control over National Security and Military Affairs

Article 7 of the Virginia Plan proposed "that a National Executive be instituted. . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation." 1 Records of the Federal Convention of 1787, at 21 (Max Farrand ed. 1966) (hereafter Farrand). When this clause was first debated, James Wilson objected to the latter set of powers, noting that "the Prerogatives of the British Monarch" were not "a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.," while citing the authority of

[14] Thus the most recent historical work supporting this interpretation of the origins of the Constitution stresses issues of legislative power while nearly neglecting the presidency. Max M. Edling, A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State (2003).

"Writers on the Laws of Nations" to support this view. *Id.* at 65-66. Madison, though himself the principal author of the Virginia Plan, seconded Wilson, noting that "executive powers ex vi termini, do not include the Rights of war & peace &c." *Id.* at 70. In response to a motion from Madison, the Convention eliminated the reference to "the Executive rights" under the Confederation. *Id.* at 67. At that point, the power to make war and conclude treaties was either subsumed under the "legislative rights" to be transferred from the Continental Congress to the new national legislature, or else had implausibly disappeared from the revised Virginia Plan.

After early June, substantive discussion of the executive lapsed for some weeks, but two references from mid-June shed further light on the framers' thinking. The New Jersey Plan proposed a plural executive whose duties would include "direct[ing] all military operations," though they would be barred from doing so in person. *Id.* at 244. The existing Congress would retain power to make war; whether it or the executive would conduct diplomacy was left uncertain. In his famous speech of June 18, Alexander Hamilton praised the British constitution and proposed an executive to serve for life. But Hamilton's "Governour" would not retain the military and diplomatic prerogatives of the Crown. The executive would "have the direction of war when authorized or begun" by the Senate; the "sole appointment" of heads of departments; and the appointment of ambassadors subject to confirmation by the Senate, which would also have the power of "advising and approving all Treaties." *Id.* at 292.

Discussion of the presidency resumed in mid-July but was limited to issues of election and tenure. On July 26 the Committee of Detail began converting the resolutions adopted thus far into a working constitution. It was this committee that first enumerated the specific powers of the legislature and executive, including the initial version of the Vesting and Commander-in-Chief Clauses. All other powers relating to military affairs were vested in Congress, while the Senate was

authorized "to make treaties, and to appoint Ambassadors, and Judges of the supreme Court." 2 Farrand, *supra*, at 183.

The committee reported on August 6, and over the next five weeks the institution of the presidency took shape. In regard to defense and diplomacy, the critical discussions were August 17 and 23. The Committee of Detail had proposed giving Congress the power "to make war." This was criticized on the 17th by Charles Pinckney and Pierce Butler of South Carolina, who respectively proposed giving it either to the Senate or the president. Madison and Elbridge Gerry then "moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks." Roger Sherman, Gerry, and George Mason all denounced the idea that the executive should be able to initiate war. Rufus King also explained "that '*make*' war might be understood to 'conduct' it which was an Executive function." *Id.* at 319. The substitution was passed. *Id.* at 318-19. On the basis of this much scrutinized debate, it is impossible to conclude that the framers thought the president's power as commander in chief subsumed an authority to initiate hostilities modeled on the prerogative of the Crown.

The August 23 debate on treaty-making proved less conclusive. It opened with Madison suggesting that "the President should be an agent in Treaties," but focused instead on Gouverneur Morris's motion to require treaties to be ratified by Congress. General dissatisfaction with the clause authorizing the Senate to make treaties and appointments led the Convention to postpone its further discussion. See *id.* at 392-94. The clause then became one of the items referred to the Committee on Postponed Parts. Its report of September 4 authorized the president to make treaties and appointments with the advice and consent of the Senate. A motion to require treaty ratification by Congress was quickly rejected. A longer discussion greeted Madison's motion allowing peace treaties to be made "without the concurrence of the President," whose importance in wartime might tempt him "to impede a treaty of peace." *Id.* at 541, 540.

This enlargement of presidential authority was consequential, and it clearly suggests that the Framers foresaw advantages in empowering a unitary executive to conduct diplomacy. See Rakove, *Solving a Constitutional Puzzle*, *supra*, at 275-80. Still, their concluding discussions remained more concerned with the defects of the Senate than with the attributes of the executive. Expressed concerns about the two-thirds vote required for ratification and the size of a quorum also indicate that the Framers believed the Senate would exercise significant power in treaty-making. Conversely, no one suggested that the ultimate placement of the treaty clause in Article II occurred because the Framers belatedly realized that leaving that power with the Senate would violate a fundamental norm of the separation of powers.

There was no recorded discussion of how the Framers viewed either the Vesting or the Commander-in-Chief Clauses. Given the precedent of the state constitutions, the latter was uncontroversial. By default, the president had to be the commander-in-chief because that was the only way to preserve civilian supremacy over the military when Congress was not in session – as it usually would not be. The Vesting Clause, however, underwent a last-minute alteration that escaped discussion and possibly even notice. The Committee of Detail had proposed that "The Executive Power of the United States shall be vested in a single person. His stile shall be, 'The President of the United States;' and his title shall be, 'His Excellency.'" 2 Farrand, *supra*, at 185. That language was intact when the Convention sent its completed resolutions to the Committee of Style on September 10. *Id.* at 572. The Committee revised the clause to its permanent form: "The executive power shall be vested in a president of the United States of America." *Id.* at 597. One could hypothesize that this alteration silently transformed an avowedly republican and American notion of executive power – a form of executive power, that is, distinctive to the United States – into something smacking of a generically monarchical character

and British precedent. But it defies the historical imagination to propose that this silent change was a matter of substantive doctrine rather than editorial concision. The most explicit definition of the executive offered at Philadelphia had come from James Wilson in June: "The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not <appertaining to and> appointed by the Legislature." 1 Farrand, *supra*, at 66.

The framers would have universally agreed that the real significance of this clause lay not in the quantum of power vested but in its placement in a single person. That issue was controversial when the Virginia Plan was introduced, and it remained a matter of discussion in August, when Gouverneur Morris proposed creating a constitutionally-mandated Council of State and Mason listed the lack of a privy council among his objections to signing the Constitution. 1 Farrand, *supra*, at 66, 96-97; 2 Farrand, *supra*, at 342-44.

B. The Constitutional Text Reflects the Framers' Intention to Enhance, Not Relax, the British Constitution's Constraints on Executive Power

The military powers vested in Congress appear not as a diminution of executive authority but as the very foundation on which the new government would protect the national security. There is no need here to examine these powers in detail. What is worth noting, however, is that they expanded the scope of congressional authority in comparison to the corresponding power of Parliament, while reducing the residual prerogative of the American president relative to the Crown. In Britain, for example, the power to issue letters of marque and reprisal was part of the prerogative; under the Constitution, it was vested in Congress, a shift which hardly supports an expansive view of the Commander-in-Chief Clause. So, too, authority to mobilize the militia was the prerogative of the Crown, but a congressional power in America. Parliament's control over military supplies and discipline has its counterparts in Article I, Section 8 as well.

Thus, the Constitution both embodied and expanded upon the British constitutional understanding that the executive's power over military affairs was limited by legislative control. "Most of the traditional domestic prerogative powers and some of the federative were lodged in one or both houses of Congress." Forrest McDonald, The American Presidency: An Intellectual History 179 (1994). In 1787 as in 1776, American constitutionalism had no room for an inherent or undefined executive prerogative.

C. The Ratification Debates of 1787-1788 Reinforce a Narrow Reading of the Vesting and Commander-in-Chief Clauses

Had the Vesting or Commander-in-Chief Clauses been understood to confer sweeping and unilateral powers on the president, they would surely have occasioned significant comment and criticism during the ratification debates. Other provisions that gave broad power to the national government were subject to sustained attack by Anti-Federalists, who promiscuously identified numerous dangers lurking elsewhere in the Constitution. They directed substantial criticism against the Necessary and Proper and the Supremacy Clauses – two other provisions where they detected a breadth of power at least as great as that putatively assigned to the Vesting Clause. Yet the voluminous published records of the ratification debates indicate that the significance the ratifiers attached to the Vesting Clause was exclusively concerned with its deposit of executive power in a single person.[15] The meaning of the first three words of the clause was ignored.

---

[15] Professor McDonald nonetheless suggests that Anti-Federalists viewed the Vesting Clause "not as an abstract general statement, given substance only by the specified enumerated powers that follow, but as a positive, comprehensive, unspecified, and ominous grant of authority." *Id.* at 193. But he cites no sources, which is remarkable when one considers how freely Anti-Federalists identified numerous other dangers in the Constitution.

The Commander-in-Chief Clause also received little attention. Some Anti-Federalists predictably depicted the president as a Caesar in waiting. More often, they directed their fears of military despotism against the congressional power to appropriate funds capable of supporting a dreaded standing army. Since these appropriations could run for two years, this seemed a regressive step back from the British practice of annual supplies. More generally, Anti-Federalists warned that the military clauses of the Constitution would allow the national government to gain dominion over the supine states or a cowering citizenry. The military issue was thus more a problem of federalism than of separation of powers. The best remedy, Anti-Federalists generally argued, was to limit the taxing authority of Congress and to promote amendments denouncing standing armies and affirming that "a well-regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State." The Complete Bill of Rights: The Drafts, Debates, Sources and Origins 182 (Neil H. Cogan ed. 1997).

Nor did any Federalist writer define "the executive power" expansively, not even Hamilton, the nation's leading proponent of "an energetic Executive." The Federalist, No. 70, at 451. He devoted eleven essays of The Federalist to the presidency without once hinting that this phrase was an independent source of authority. Like other writers, however, Hamilton energetically defended the unitary executive that was the real point of controversy over the Vesting Clause. In *Federalist* 69, he also compared the authority of the president with that of the Crown and the governorships of the states. In a brief discussion of the Commander-in-Chief Clause, he argued that the president had less power than the king, whose authority "extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all of which, by the Constitution under consideration, would appertain to the legislature." *Id.* at 446.. More remarkably, he noted that the commander-in-chief clauses of the Massachusetts and New Hampshire constitutions "confer larger powers upon their

respective governors, than could be claimed by a President of the United States." *Ibid.*

Even more revealing is Hamilton's defense of the treaty clause in *Federalist* 75. The major Anti-Federalist criticism of the constitutional scheme of separated powers lay against the Senate, which was repeatedly faulted for combining legislative, executive, and judicial power (as the trial court for impeachments). See Rakove, Original Meanings, *supra*, at 268-75. That criticism sometimes included the Senate's role in treaty-making. Hamilton's rebuttal on this specific point carried a strong echo of Locke:

> Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them.

The Federalist No. 75, at 476. Hamilton proceeded to distinguish "the power of making treaties" from the essential tasks of legislation and execution. "The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive." *Ibid.* Here, again, was the fourfold scheme of powers of Locke and Montesquieu, now stated not as abstract theory but to describe the specific institutional arrangements of the Constitution.

V. THE BROAD READING OF THE VESTING CLAUSE ORIGINATED ONLY IN 1793, AND DID NOT REFLECT THE ORIGINAL UNDERSTANDING

The famous 1793 debate between congressman James Madison (as Helvidius) and Secretary of the Treasury Alexander Hamilton (as Pacificus) over President Washington's proclamation of neutrality in the war between revolutionary France and the European monarchies is the

locus classicus for the rival conceptions of executive power that remain controversial today.[16] In light of the history of the framing and the ratification, however, Hamilton's assertion in 1793 of a broad conception of executive power must be understood, not to reflect the original understanding, but rather to mark a decisive shift and novel interpretation.

Hamilton defended President Washington's unilateral proclamation, arguing that the Senate's role in treaty-making and Congress's power to declare war and issue letters of marque and reprisal were "*exceptions* and *qu[a]lifications*" from the general grant of executive power in the Vesting Clause, which he further distinguished from the "legislative powers herein granted" wording of Article I. *Reprinted in* 4 The Founders' Constitution, *supra*, at 64-65. In reply, Madison, at the behest of Secretary of State Thomas Jefferson, argued that this doctrine would import into American constitutional practice monarchical ideas alien to the republican principles of 1776 and 1787.

The Pacificus-Helvidius exchange focused on a number of complex questions of both great historical and contemporary interest involving the respective roles of the president and Congress in shaping the nation's foreign policy. For present purposes, *amici* focus on only the central issue discussed in this brief: how well expansive claims of inherent executive authority can be resolved in terms of the original

---

[16] Prior to 1793, there had been little discussion of the Vesting Clause with one notable exception: during the 1789 congressional debates over the removal power of the president, both houses agreed that the clause necessarily gave the president sole authority to remove subordinates. To conclude otherwise would have vitiated the fundamental administrative responsibility created by vesting the executive power in a single individual. A president who could not remove disobedient or incompetent subordinates simply could not exercise his core duty to "take care that the laws be faithfully executed." See Rakove, Original Meanings, *supra*, at 347-50.

intentions and understandings of 1787-1788. On this point, a conclusive answer is possible, and Madison expressed it.

Madison's refutation of Hamilton-Pacificus unfolded along three lines. He argued, first, for skepticism toward the writings of "the most received jurists, who wrote before a critical attention was paid to these objects"—that is, prior to the American Revolution—"and with their eyes too much on monarchical governments." *Id.* at 67. This last reservation extended to Locke and Montesquieu, though Madison noted Locke had distinguished federative from executive power.

Madison's second argument was substantive. It held that decisions as to war and peace were fundamentally legislative in nature. The obligations imposed by treaties "have the force of a *law*, and [are] to be carried into *execution*, like all *other laws*, by the *executive magistrate*." *Id.* at 67. Declarations of war had at least the same, and arguably greater, legal effect, and required similar execution by the responsible authority. Madison conceded that the boundary between the relevant claims of the two departments was not wholly fixed, but preponderant authority belonged to the legislature, and "the rule of interpreting exceptions strictly must narrow, instead of enlarging, executive pretensions on those subjects." *Id.* at 68.

Madison's third argument extended this claim with reference to the Constitution. He did not survey the whole array of powers relating to military affairs and the law of nations vested in Congress, though doing so would only have reinforced his second argument. He did, however, discuss the Commander-in-Chief Clause, arguing that "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued,* or *concluded*." That would be as gross a violation of principle as "that which separates the sword from the purse, or the power of executing from the power of enacting laws." *Ibid.*

Madison concluded his first essay with an accusation and a quotation. The accusation was that the "*royal prerogatives* in the *British government*," *id.* at 69, afforded the only

possible authority for the doctrine of Pacificus. The quotation confirming this refutation was the same passage on the nature of treaty-making from Hamilton's *Federalist* 75 quoted above. No doubt underlying Madison's conviction on this point was his own knowledge of the Convention debate of June 1, 1787, when at his motion the framers had deleted the clause transferring the "Executive rights" of the Continental Congress to the proposed national executive.

The point of this analysis is not that Madison's view offers the only possible interpretation of the Constitution. American history since the 1793 debate clearly demonstrates that it does not. But Madison's view is the only one that is consistent with the historical evidence of the original intentions of the framers and the original understanding of its ratifiers. The evidence provided by Madison's and other delegates' notes of debates confirms the former proposition, just as his ability to quote Hamilton's passage from *Federalist* 75 against him supports the latter. From an avowedly originalist perspective, focused on the debates of 1787-88, Justice Jackson's belief that the quotations "largely cancel each other," *Steel Seizure Cases*, 343 U.S. at 635, is wrong. Hamilton and other Federalists did not and could not have argued in 1787-1788 what Hamilton asserted in 1793. To have done so would not only have misrepresented the deliberations of the Convention; it would also have fed, not assuaged Anti-Federalist fears that the Constitution afforded no security against the danger of standing armies, adding a specter of presidential Caesarism to the existing alarm over a Congress armed with an unlimited power to tax, raise armies, and deploy the Necessary and Proper and Supremacy Clauses in the pursuit of tyranny.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

Pamela S. Karlan
(Counsel of Record)
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

January 4, 2006