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THE AMERICAN TESTAMENT

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. . . to . . . provide for the common defense, . . .

There can be no question of a general sort about the inclusion of this objective. Indeed Jay and Madison, in the *Federalist Papers*, spoke of it as "first":

> Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first. The *safety* of the people doubtless has relation to a great variety of circumstances and considerations, and consequently affords great latitude to those who wish to define it precisely and comprehensively.
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> At present I mean only to consider it as it respects security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes. As the former of these comes first in order, it is proper it should be the first discussed. Let us therefore proceed to examine whether the people are not right in their opinion that a cordial Union, under an efficient national government, affords the best security that can be devised against *hostilities* from abroad [John Jay, *Federalist* #3].
>
> Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils [James Madison, *Federalist* #41].

However, questions certainly did arise concerning how the defense would be "common," where and how the authority "to provide" for defense would be constitutionally placed, and how such authority could be limited so that its exercise would not threaten the concern for other objectives, especially the preservation of liberty. "The liberties of Rome," Madison wrote in *Federalist #41*, "proved the final victim to her military triumphs; . . . the liberties of Europe . . . have, with few exceptions, been the price of her military establishments."

In the consideration of such questions, certain premises were appealed to because of their clear relevance.

The Virginia Declaration of Rights, written by George Mason and adopted by the Virginia Constitutional Convention on June 12, 1776, was one of the central documents of the era. Section 13 of that Declaration read as follows:

> That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

The three propositions in that Section 13 probably circulated in the Grand Convention and in the ratifying conventions as propositions that should be regulative for the determination and ratification of the military part of the Constitution.

The first question concerned the placing of the authority for defense as between the states and the to-be-newly-constituted Federal Government. The Federal side of that argument was, of course, vigorously presented in the *Federalist Papers*, supporting the military sections of the proposed Constitution. In *Federalist #25*, Hamilton wrote:

> [The] transfer [of] the care of the common defense from the federal head to the individual members [would be] a project oppressive to some States, dangerous to all, and baneful to the Confederacy. . . . I expect we shall be told that the [States'] militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence.

That moment of Hamiltonian scorn was not the best that he and Madison could do by way of persuasion. On behalf of the proposed Constitution's denial to the states of the right to raise armies, they spelled out again and again, in several of the *Federalist Papers*, the debilitating confusion that would arise from the opposite course, and the dire prospects of internecine warfare it could well bring. Indeed, of all the arguments for firm federal union probably the strongest was the argument that it was indispensable to providing for the common defense. In *Federalist #25*, Hamilton wrote: "The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different

degrees, is therefore common. And the means of guarding against it ought, in like manner, to be the objects of the common councils and of a common treasury."

However, once granted that "the war power," as it later came to be called, should be predominantly placed in the national government (predominantly, because the state "militias" were constitutionally given a subordinate, counterbalancing role in national defense) , the questions arose: How shall it be defined? How shall it be "limited," since, after all, constitutional government is limited government?

The apprehension in such questions was not taken lightly. Indeed, in *Federalist* #8, though he was there arguing for federal control of the war power, Hamilton spoke generally:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

Immediately following that paragraph, the next paragraph begins: "The institutions chiefly alluded to are standing armies and the correspondent appendages of military establishments. Standing armies, it is said, are not provided against in the new Constitution; and it is therefore inferred that they may exist under it."

In fact, standing armies are not safeguarded against in the new Constitution. It is possible for them to exist under it. From six of the ratifying conventions came, in one form or another, amendments designed to keep faith with the national "prejudice" that standing peacetime armies are "ever a menace to liberty."

In countering that "prejudice" and defending the proposed Constitution, Madison and Hamilton did three things: First, they argued generally and, it would seem, convincingly that no restrictions could be rationally placed on the power to provide for the common defense; second, by tracing the historical origins of the "prejudice" against standing armies, they tried to show why it should not become immoderate: third, they argued prospectively that there was little likelihood that anything but a small standing army, no hazard to liberty, would ever be needed.

Two texts will suffice to delineate the argument against the irrationality of any restrictions on the power to provide for the common defense. In *Federalist* #23, Hamilton wrote as follows:

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances. . . .
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> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it. . . . It rests upon [an] axiom as simple as [it is] universal; the *means* ought to be proportioned to the *end.*

In *Federalist #41,* Madison, noting that the issue had been confronted in earlier papers, nevertheless reiterated the argument:

> But was it necessary to give an indefinite power of raising troops, as well as providing fleets; and of maintaining both in peace, as well as in war? . . . The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.
>
> How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be

> regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.

Against the nearly axiomatic, "obvious," "conclusive" quality of such arguments for no restrictions, how could the "prejudice" against standing armies so stubbornly persist? Hamilton, in *Federalist # z6,* proposed a genetic explanation. He wrote:

> The idea of restraining the legislative authority, in the means of providing for the national defense, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened. . . . It may not be amiss in this place concisely to remark the origin and progress of the idea, which aims at the exclusion of military establishments in time of peace. Though in speculative minds it may arise from a contemplation of the nature and tendency of such institutions, fortified by the events that have happened in other ages and countries, yet as a national sentiment, it must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these States have in general sprung. [After a review of English constitutional history up to the 1689 Bill of Rights), the people of America may be said to have derived an hereditary impression of danger to liberty, from standing armies in time of peace. The circumstances of [the American) revolution quickened the public sensibility on every point connected with the security of popular rights, and in some instances raised the warmth of our zeal beyond the degree which consisted with the due temperature of the body politic. . . . The principles which had taught us to be jealous of the power of an hereditary monarch were by an injudicious excess extended to the representatives of the people in their popular assemblies.

In the last sentence, Hamilton was adverting to two facts: (1) that the article in the English Bill of Rights had read: "the raising or keeping a standing army within the kingdom -in time of peace, unless with the consent of Parliament, was against law"; and (2) that in the proposed Constitution for the United States the power

regarding standing armies resided in "the representatives of the people in their popular assemblies."

In the latter half of *Federalist* #26, and in other papers, Hamilton argued the extreme unlikelihood of "an army so large as seriously to menace the liberties of a great community." "What colorable reason could be assigned, in a country so situated, for such vast augmentations of the military force? It is impossible that the people would be long deceived; and the destruction of the project, and of the projectors, would quickly follow the discovery. . . . Upon what pretense could he [the Executive) be put in possession of a force of that magnitude in time of peace? . . It is not easy to conceive a possibility that dangers so formidable can assail the whole Union as, to demand a force considerable enough to place our liberties in the least jeopardy." Before leaving this point, it should be noted that in tribute to the "prejudice" that regarded large standing armies as a danger to liberty, the actual practice in the subsequent century involved very small armies.

The direct address to the "prejudice" about standing armies was, however, only a part of the answer that could be given to expressions of dismay about the national government's being endowed with unlimited power in military affairs. The Framers, to restrain the domestic effects of the exercise of that power, resorted here, as in other dimensions of the Constitution, to the separation of powers and to the device of checks and balances.

For the purposes here, a concise summary is given in Walter Millis's 1959 pamphlet, *The Constitution and the Common Defense:*

> The President's exercise of his virtually absolute powers in the military and foreign field was controlled in the first instance by making him subject to impeachment and, quadrennially, to retirement by the electorate. His treaties were to be supreme law [and Jay in *Federalist #64* recognized, long before Senator Bricker, the possibility of "making law by treaty"), but this Executive invasion of the Legislative field was checked by requiring a two-thirds vote in the Senate for treaty ratification. There was no restriction upon his powers as commander-in-chief; but it was Congress which would raise, maintain, regulate, and provide the funds for the forces available to him to command. It was required that military, like other, appropriations must originate in the popular branch; and by restricting Army appropriations to run no more than two years, each new Congress was not only assured the opportunity but placed under the necessity of reviewing afresh the military establishment. The

> President's selection of military, as of other, officers was subject to Senatorial confirmation. Finally, the power to declare war was vested in the Congress, not the President.

Here, then, the Framers thought, was a powerful system of checks upon the exercise, by the President or the national govern ment, of the almost absolute authority given them in the field of foreign and military policy. The *Federalist* authors argued for the adequacy of such checks as a protection to liberty. They adverted especially to the separation of the purse and the sword; to the two-year restriction on appropriations for the Army; and to the placing in Congress of the power to declare war. [When Pierce Butler, in the Convention, had wished to give that power to the President, Elbridge Gerry replied that he had "never expected to hear in a republic a motion to empower the Executive alone to declare war.")

However, the Constitution could not quite stop with such provisions for the assignment and the restraint of the war power. It had further to meet two of the deepest impulses of the times. Both were present in Section 13 of the Virginia Declaration of Rights, previously quoted. One was the reluctance of the states and state governments to surrender a complete monopoly of military power to the federal union. The other was the widespread conviction that only an armed people could remain a free people; the common defense, in the last analysis, could never be entrusted wholly to national armies but must remain in the hands of the people themselves.

The first concern was met in the ingenious compromises set forth in the clauses in Article I, Section VIII, that deal with the militia. The second concern was met by Madison's inclusion in his proposed Bill of Rights of what is now the Second Amendment.

Through the first seventy years of our history, the military establishment that issued from such provisions, checks, and compromises, in the opinion of Walter Millis, "operated with rather notable success to realize the hopes which had been pinned upon it." Millis goes on to say: "It averted inter-state or inter-sectional war by eliminating strategic and economic causes for one. Greatly aided, to be sure, by geography and the inter-national politics of the time, it relieved the young nation of the burdens and political perils of large standing armies. At the same time, it created a Union of sufficient military strength, actual or potential, to repel whatever military threats there were from the outside world." Neither the War of 1812 nor the Mexican War "led to any significant movement to revise the military structure or the military provisions of the Constitution."

It will serve the purpose here to continue to make use of Walter Millis's summary history of the fortunes of the military

constitution. His brief paragraph on the Civil War cannot help but produce a shudder about the misfortunes of human history:

> The Civil War, however, represented a cataclysmic failure of the military no less than of the political and economic compromises of the Constitution. *In a sense* the war was made possible only by that careful but, as it proved, unstable balance of Federal, state, and popular military power on which the Founders had insisted. It was Lincoln's call upon the militias of the border states to assist in suppressing their rebellious sister which forced the border to choose sides. It was the "preponderating influence" of the states over the militia, stressed by Hamilton, which had permitted the continued existence of at least partially trained and equipped state forces, owing their allegiance to the governors and legislatures rather than to the President and Congress, and so enabled the Southern states to rise. It was the absence of any large standing army which permitted the rising to reach the heights it did. The military guarantees which the Constitution had afforded the states proved to be real ones. To Southerners, the war vindicated the military no less than the political powers which had been left to the states precisely in order that they might repudiate a national "tyranny."

Millis continues: "But the South lost; and in the result the military balances of 1789 were destroyed or rendered meaningless."

There is no need for any attempt here at even a brief tracing of the steps from a military establishment comprising a small standing national army, state militias, and an armed citizenry, to the present colossal military establishment—huge in size and arsenal, globally stationed, biting deep into the budget, symbiotically related to a substantial part of the nation's industrial power and to scientific and technological research, raising issues of secrecy and using agencies of secret intelligence, and having immense impact not just on foreign policy but on domestic politics. Of course, this present military establishment has more than just the mission of "providing for the common defense," which was the only military mission for all but about the last thirty years of our nation's history; it also is judged necessary to support international commitments deemed to serve vital national interests and, in some interpretations, international interests as well.

It is therefore relevant to ask whether certain ingredients in "the American Testament" survive such a radical transformation in military size and missions. The question concerns not so much the

constitutional devices as the fundamental judgments that led to their invention and adoption. In the last thirty years, during the era of confrontation and of major international commitments, the Framers' device of dual political control over the military has not worked very impressively. Before an increasing autocratic strain in the swollen Presidency and the strong positioning of the. General Staff and its huge bureaucracy, Congress, perhaps, has appeared confused and more or less impotent. Until just recently, the purse was passed quickly to the sword. And Congress has acted as if it were embarrassed by its constitutional power "to declare war."

But what of the early national presuppositions that are parts of our testament? Do they hold as principles, however remote, on which to base judgments?

The Virginia Declaration of Rights affirmed that "in all cases the military should be under strict subordination to, and governed by, the civil power." No doubt a record of violations of the spirit, if not the letter, of that principle could be drawn up. A certain wariness on the point has not been absent. Yet, with all sorts of examples before us of military takeovers of governments and societies, it is often taken for granted that "it can't happen here."

Another proposition from the Virginia Declaration read: "Standing armies, in time of peace, are dangerous to liberty." In our time of precarious peace, we have a large standing army and multifarious military installations. Damages to liberty of the sort the Founders had in mind, from their memory of the Stuarts and of George III, have not occurred. But there are, perhaps, some indications that liberty is in jeopardy. Conscription and various kinds of job-dependencies in "defense industries" have engendered inroads on individual freedom. Civil liberties have not been firmly secure under recent governments that have been anxious about subversive beliefs, aroused mass protests, and collective actions of civil dissent. In general, political liberty is diminished in degree by the existence of a huge military establishment, because it is difficult for citizens to be constantly alert to its implications and consequences.

The Supreme Court, however, has developed a tradition of concern about threats to liberties from military establishments and aims. The Court's deliverances in this area, as in others, can be judged, in hindsight, as spotty. Certainly, one of the worst blemishes on its whole record was its endorsement of the treatment of West Coast Japanese-American citizens at the outbreak of World War II. Yet, on the level of principle, there has been clarity. Two examples of judicial dicta are worth setting down here.

In a famous and major case involving the jurisdiction of military tribunals *(Ex parte Milligan,* 1866), Mr. Justice Davis, after declaring that the case "involves the very framework of the

government and the fundamental principles of American liberty," and after reviewing the Constitutional provisions for liberties, wrote as follows:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

In a 1948 case *(Woods v. Miller Co.),* Mr. Justice Jackson wrote as follows:

> The Government asserts no constitutional basis for this legislation other than this vague, undefined, and undefinable, "war power." *No one will question that this power is the most dangerous one to free government in the whole catalogue of powers.* It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in time of patriotic ferver that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passion and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.
>
> Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.

By way of underlining a persistent continuity of thought on the subject, one can put with those two judicial texts (and there are many more) these words by Madison, "the father of the Constitution," who said in *Federalist # 41:* A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an

object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

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