

# The Spirit of Civilian Control Over the Military: Lessons from the United States Constitution

Byron SHIBATA\*

## I . Introduction

Since the Persian Gulf War in 1991, the world community, especially the United States, has increasingly called upon Japan to contribute to international peacekeeping activities. However, as article 9 of the Japanese constitution prohibits the nation from maintaining or fielding a military force,<sup>1)</sup> major legal dilemmas and obstacles are associated with unrestricted Japanese participation in any multinational operations involving military force. Some in Japan, therefore, have called for a revision of the Japanese Constitution. The wisdom of that proposal is, of course, debatable, and such a potentially cataclysmic change should first be the subject of intense public discussion, scrutiny, and deliberations. However, if the Japanese people do ultimately decide to authorize a military force, there should be adequate constitutional safeguards to prevent the type of military tyranny and ultimate self-destruction that climaxed in Japan's defeat in World War II. Although there are many examples to consider, the United States Constitution is the oldest existing law that protects the superiority of the civil power over the military. As such, the U. S. example can provide a useful reference point for other nations. This article, therefore, explains the principles of civilian control over the military in the U. S. constitution. Specifically, the author will explore the civilian authority over military operational command, the power to declare war, organizational standing, budget and financing, and psychological controls over the military. Although this article is not intended to be a comprehensive comparative study, the author will also draw some comparisons with two very different historical examples, Imperial Germany and Japan; two military superpowers that chose a constitutional route divergent from the United States, and a route that led to military tyranny their ultimate destruction.

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\* Assistant Professor, Law Faculty, Ritsumeikan University; Member of the State Bar of California (inactive status); B.A., University of California at Los Angeles; J.D., William S. Richardson School of Law, University of Hawaii.

1) In relevant part, article 9 states, "the Japanese people forever renounce war as a sovereign right . . . land, sea, and air forces, as well as other war potential, will never be maintained." See *Nihonkoku Kenpo*, art. 9 (1946). The current international political situation is rather ironic, as it was the U. S. government, particularly General Douglas MacArthur, which insisted on inserting article 9 into the Japanese Constitution.

## II . History and Policy Rationales for Civilian Control

Although the United States has a strong tradition of civilian control over military matters, the principle itself is not expressly written in the Constitution. Yet the history of the nation, both political and legislative, leading up to adoption of the Constitution evidences this principle was of primary importance to the Constitution's framers. For example, the U. S. Declaration of Independence lists among its grievances Britain's policies in the colonies of a large standing army and a "military supremacy over civilian power." Such policies were evidently in violation of Britain's own legal traditions. The English Bill of Rights stipulated that "raising or keeping a standing army within this kingdom in time of peace, unless it be with consent of parliament, is against law."<sup>2)</sup> The colonies, therefore, built upon these English traditions, enacting laws for protection of liberty and democracy against potential military tyranny. Virginia's Declaration of Rights, for example, stated that "in all cases, the military should be under strict subordination to, and governed by, the civil power."<sup>3)</sup> No stronger language for espousing the principle of civilian supremacy could have been found, by a legislature whose past members included two of America's first Commanders-in-Chief, George Washington and Thomas Jefferson.

## III . Operational Command

Building upon this history and tradition, individual provisions of the U. S. Constitution, although they do not expressly use the terms "civilian control," clearly establish the principle of civilian supremacy over the military. Perhaps the best known U. S. constitutional provision on civilian supremacy is art. II, sec. 2, which states that the "President shall be Commander-in-Chief of the Army and Navy." Although this provision is generally espoused as the rule providing for civilian control over the military, in more accurate terms, the provision vests the President with operational command over all U. S. military forces. The Framers of the U. S. Constitution ultimately decided that of all government officials, it would be the President who would have direct field command; what is termed today as "command and control," over the nation's military forces.

During the U. S. constitutional debates, however, some quarters expressed concerns over the President turning into a de facto king like the British king whom the Americans had recently freed themselves from. Furthermore, vesting the power of military command into one being was also viewed by some to be inconsistent with the principle of separation of powers inherent in the Constitution.<sup>4)</sup> However, the Framers ultimately dismissed such

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2) See Donald N. Zillman, *The Sixteenth Annual Edward H. Young Lecture: A Bicentennial View of Military-Civilian Relations*, 120 *Mil. L. Rev.* 1, 5 (1988).

3) *Id.*

4) See *The Federalist* No. 70 (Alexander Hamilton). Hamilton observed, "There is an idea, which ↗

concerns, mainly out of pragmatic concerns. For example, a proposal at the American Constitutional Convention to make a three-person executive council failed because of concerns over a “general with three heads.”<sup>5)</sup> Likewise, a proposal for the legislature to share command powers with the executive was rebuffed as an arrangement that “would have been a clear formula for disaster” in the recent U. S. Revolutionary War.<sup>6)</sup> As Alexander Hamilton stated, “The ingredients, which constitute energy in the executive are first unity. . . . That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”<sup>7)</sup> Thus, attempts at diluting the executive’s power, despite valid concerns over the threat to liberty posed by vesting great military powers into one individual, were eventually defeated.

Today, the spirit of civilian control in the U. S. Constitution continues, and is perhaps stronger than in the past. In the original administration of George Washington, there were essentially only two civilians in the military chain of command: The President and the Secretary of War. In modern times, the 1947 National Security Act and its amendments set the current military command structure — In addition to the President, there are seven subordinate civilian officials at the top of the chain of command: Secretary of Defense, the Secretaries of the three main military departments, and the department Under-Secretaries.<sup>8)</sup> Only after these civilians do the top uniformed military commanders then come into the chain of command. Specifically, the Joint Chiefs of Staff of the Army, Navy, Air Force, and Marine Corps are officially the highest ranking military officers. However, the Joint Chiefs are merely an advisory body to the President; without presidential or Defense Secretary authorization, these officers do not have direct command authority over any troops.<sup>9)</sup>

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is not without its advocates, that a vigorous executive is inconsistent with the genius of a republican government.” *Id.*

5) See Zillman, *supra* note 2, at 8.

6) *Id.* Elbridge Gerry made this comment evidently in response to Virginia Governor Randolph’s proposal. See also Jon Van Dyke, *The Influence of the U. S. Constitution on the Asia-Pacific Region*, XXI, No.1 Hawaii Bar Journal 1, 2 (1987).

7) See The Federalist No. 70 (Alexander Hamilton).

8) See generally National Security Act, 50 U. S.C. sec. 401 (1947). The 1950 and 1960 Department of Defense Reorganization Acts further clarified this civilian command structure. The departments of the Army, Navy, and Air Force are sub-cabinet level departments. The U. S. Marine Corps is a part of the Department of the Navy. The fifth military service, the Coast Guard, is positioned in the Department of Transportation, but in times of war becomes a part of the Navy. See, e.g., MILNET: The U. S. Military, The Civilians, available at <http://www.milnet.com/milnet/milnet/usmil.htm>.

9) See, e.g., MILNET: The U. S. Military, The Civilians, available at <http://www.milnet.com/milnet/usmil.htm>. The National Security Council, comprised of the President, Vice-President, Secretary of State, and Secretary of Defense, is also a consultative and advisory body within the U.S. executive branch.

In addition to the pragmatic considerations of conducting war, another key rationale for the U. S. Framers entrusting the President with the power to “make war” was that the U. S. executive was to be an elected republican official, altogether different from the historical precedent of hereditary monarchs. Indeed, the American Executive contrasts greatly with the monarchical executive rulers found in constitutions such as those of Imperial Germany and Japan.<sup>10)</sup> The Constitution of the Empire of Japan, for example, expressly vested the Emperor with “the supreme command of the Army and Navy.”<sup>11)</sup> In practical terms, of course, much of the day-to-day operational command authority was delegated to subordinate military officers. However, in Imperial Japan, these subordinates were under the exclusive control of the Emperor, based on the Emperor’s supreme command power and his power to appoint and dismiss officers. Indeed, the Emperor’s Precepts to Soldiers and Sailors stated that although the Emperor may delegate “subordinate commands to Our subjects, ultimate authority We Ourselves shall hold and never delegate to any subject.”<sup>12)</sup>

A fundamental failing of the Japanese constitutional structure was the exclusion of civilians from the chain of command. The Emperor had the power of supreme command, and the generals and admirals were answerable only to him.<sup>13)</sup> Proponents of civilian involvement argued that art. LV, which stated that state ministers “shall give their advice to the Emperor and be responsible for it,” authorized civilian officials’ advice regarding all affairs of the nation, including those military.<sup>14)</sup> This argument could find support in historical precedent. At the beginning of the Meiji Era — the military (army and navy) ministries were not considered to be any different from other civilian administrative ministries or entities.<sup>15)</sup> However, these arguments and precedents ultimately failed to carve out a position for civilians in military operational command decisions.

The Japanese made further fundamental mistakes by strengthening the constitutional

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10) Arguably, the Japanese and German emperors were neither, in the modern sense, “executives” or “military,” as their legitimacy was based in divine right rather than popular election, and because they combined military and civilian personas. This type of arrangement dates back to the earliest days of recorded history, and far from providing for civilian restraint against military tyranny, endangered democracy and individual liberties. Indeed, at least some of these monarchs — Kaiser Wilhelm II is a clear example — as a general policy, subordinated civilian considerations to military ones.

11) Dai Nippon Teikoku Kenpo, art. XI, XII (1889) [hereinafter Constitution of the Empire of Japan].

12) Imperial Precepts to Soldiers and Sailors, Jan. 4, 1883 (Japan).

13) Constitution of the Empire of Japan, art. XI (1889); Saburo Ienaga, *The Pacific War 1931-1945* 34 (1978).

14) See Ienaga, *supra* note 13, at 34.

15) Ienaga, *supra* note 13, at 35. This organizational conception was likely a remnant of the Tokugawa Shogun’s regime, which although overthrown by the Meiji leaders, was probably the reference point for the Meiji oligarchs as far as their basic concepts of government were concerned. The Tokugawa bakufu did not clearly differentiate between military and civilian officials. All officials of the Tokugawa government were in one respect “military,” hailing from the hereditary samurai caste, but were also civilian in another respect, as by the end of the Tokugawa’s reign, Japan had known no wars for two centuries and many of the samurai occupied non-military bureaucratic roles.

autonomy of the military through legislative and administrative ordinances. The best known of these was the rule that the top ministers of the army and navy ministries be major generals or vice admirals.<sup>16)</sup> Originally an unwritten ministry practice, the custom was codified in 1900.<sup>17)</sup> This regulation was to have dire consequences for Japan, as the military could refuse to appoint a minister from its active duty roster.<sup>18)</sup> By exercising this option, the military could prevent a Prime Minister from completely forming a Cabinet, thereby toppling governments. The military, particularly the army, did not hesitate to use this power, as in 1936, when Premier-nominee Koki Hirota was compelled to resign because he could not form a Cabinet. Use of this ordinance ultimately became akin to a coup by the military—a quiet, gradual, and legal coup, but a coup nonetheless.

Furthermore, the Japanese military was not above also using legal sleight of hand to strengthen its position. For example, 1887 Cabinet regulations originally required military officers and ministers to report to the Prime Minister, except for the Chief of Staff, who could report directly to the Emperor.<sup>19)</sup> However, the military reportedly deleted the term “Chief of Staff,” a change which authorized all military officers to sidestep the prime minister and answer only to the Emperor.<sup>20)</sup>

In the German Empire, the Constitution had similar military command provisions; unsurprisingly, considering the Germans were the spiritual godfathers of the Meiji Constitution.<sup>21)</sup> In specific terms, the Constitution of the German Empire, art. 63 stipulated, “The entire land force of the Reich will form a single army which in war and peace is under the command of the Emperor.”<sup>22)</sup> Furthermore, art. 53 placed the German navy under the “chief command” of the Emperor. There were a number of key dangers with this system. Obviously, this constitutional arrangement gave the Emperor a great degree of legal power, and as congenital chance determines the personal effectiveness of hereditary monarchs, Imperial Germany experienced misfortune with its succession of Kaisers. Wilhelm I was disinclined to actively exercise his constitutional command powers, while Wilhelm II was militarily incompetent. Furthermore, the Bundesrat, the chamber of parliament that was to act as an executive organ, never became a vigorous entity, due in part to the overshadowing presence of Chancellor Otto Von Bismarck.<sup>23)</sup> This system, there-

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16) Presumably, this requirement was to inject professional expertise into an area of government that was too important to be left to civilian amateurs.

17) The Ministry of Military Affairs (*hyobusho*) starting in 1871 required that its head minister be a general or admiral. See, e.g., Kodansha Ltd., *Japan: An Illustrated Encyclopedia* 480 (1993). The Cabinet of Aritomo Yamagata in 1900 required that its army and navy ministers be active-duty full generals and admirals. Ienaga, *supra* note 13, at 35.

18) This practice was referred to as “*gunbatsu*.”

19) Ienaga, *supra* note 13, at 35.

20) *Id.*

21) German leaders including German Chancellor Otto Von Bismarck tutored Japanese leaders on their views about what constituted appropriate public law.

22) *Verfassung des Deutsche Reich*, art. 63 (1871) [hereinafter *Constitution of the German Empire*].

fore, left a vacuum in the military field, which was originally filled by the strong personal leadership of Von Bismarck.<sup>24)</sup> However, the German legislature was divorced from this chain of operational military command. Thus, although Bismarck was initially able to fill the constitutional void left by the German emperors through force of personality,<sup>25)</sup> subsequent legislatures were constitutionally unable to assert operational control over the military. There were civilian offices legally authorized to participate in military command matters—the Prussian War Ministry the Military Cabinet, and the Naval Cabinet—<sup>26)</sup> but because they had a relatively weak constitutional position, the German General Staff ultimately became predominant in military affairs. The German General Staff was an organization created by Scharnhorst and Gneisenau during the Napoleonic Wars, and eventually comprised the elite of the German officer corps.<sup>27)</sup> Unlike the civilian offices, the General Staff was “largely without checks and balances, and thus became the ultimate power-factor within the state,”<sup>28)</sup> attaining its greatest power in World War I and becoming, in effect, the general administrators of all of Germany.<sup>29)</sup> Following the war, as a quintessential “state within a state,” the General Staff showed incredible resilience, successfully resisting Allied attempts to change the army, and re-inventing itself as the foundation for the German army in World War II.

Ultimately, civilians in Imperial Germany were never able to exercise strong control over the military because of their weak legal position.<sup>30)</sup> Because the Chancellor was legally separated from the military departments and command structure, only one Chancellor, Von Bismarck, was able to exercise a substantial check on the military. However, this was due to his unusually strong personality, and his unique status as *de facto* founder

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23) See, e.g. Edgar Feuchtwanger, *Imperial Germany: 1850-1918* 63 (2001).

24) The Chancellor was Germany’s top administrative official. See, e.g., *The Democratic Tradition, Four German Constitutions* 30-32 (Elmar M. Hucko ed., Berg Publishers Limited 1987) [hereinafter *Four German Constitutions*]. In essence, he was the only effectively functioning executive other than the Emperor. The Chancellor presided over the Bundesrat, and was Prussian premier and foreign minister. See Feuchtwanger, *supra* note 23, at 63.

25) Feuchtwanger comments that “Bismarck was so overwhelming a figure, his standing with the public as the Reich founder so monumental, that almost unlimited means of manipulation were open to him.” See Feuchtwanger, *supra* note 23, at 63.

26) See *Four German Constitutions*, *supra* note 24, at 31. Under the federal arrangement set forth in the Imperial German Constitution, these were Prussian, not federal government, offices, and were therefore independent of federal legislative control. *Id.* Furthermore, there were never equivalent Imperial offices. See Feuchtwanger, *supra* note 23, at 62.

27) See Heinz Guderian, *Panzer Leader* 454 (translated from the German by B. H. Lidell Hart, 1952). Guderian was a Field Marshal in the German Army during World War II, and one of the few senior German generals found innocent by the Allies of any war crimes.

28) See *Four German Constitutions*, *supra* note 24, at 31.

29) *Id.*

30) The legislature was also weakened by the German practice of drafting legislation in Imperial administrative offices, and the practice of strictly separating membership in the Bundesrat and Reichstag. See Feuchtwanger, *supra* note 23, at 62.

of the German Empire and kingmaker to the throne — not because of any rule of constitutional law. After Bismarck, the constitutional structure prevented succeeding chancellors from exercising such influence. Ultimately, in World War I, this arrangement was to prove literally fatal to Germany.

#### IV . The Power to Declare War

In the United States, as the issue over military command authority — the power to “make war” — was dispensed with relatively quickly, the American constitutional debates shifted to other military issues, such as what government officials should have the authority to declare war. Ultimately, this power was expressly given to the legislature, the U. S. Congress. However, the Framers left vague the extent of — and the relationship between — the war-making and war-declaration powers. The details and resolution of the obvious tensions between these two powers<sup>31)</sup> were — as with many other provisions of the U. S. Constitution — left for future generations to decide. The dynamic between these two powers has caused debate, tensions, and conflicts throughout U. S. constitutional history. The issue has dominated much of the U. S. Supreme Court jurisprudence on constitutional war powers, and is still not entirely clear to this day.<sup>32)</sup> However, the Supreme Court, as interpreter of the U. S. Constitution, early on adopted a highly deferential and pragmatic interpretation of the war-making and war-declaration dynamic. In broad terms, the Court considered that the exigencies of war, particularly in event of invasion, demanded judicial deference to the Executive. In the famed U. S. Civil War-era Prize Cases, the Court boldly held that if “a war be made by invasion of a foreign Nation, the President is not only authorized but bound to resist force, by force . . . He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”<sup>33)</sup> However, since that time because of the disasters resulting from legislative and judicial deference to the Presidency during the Vietnam War, Congress has moved away from acquiescence toward the President, and made some efforts to rein in the President. Most notably, the War Powers Resolution of 1973 was an attempt to avoid the type of aggressive use of executive power witnessed in the Vietnam War.<sup>34)</sup> It must be noted, however, that despite several

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31) See Zillman, *supra* note 2, at 8.

32) See, e.g., *The Prize Cases*, 67 U. S. 635; *Youngstown Sheet and Tube Co. v. Sawyer* 343 U. S. 579. U. S. Presidents have often committed U. S. forces to military operations without a declaration of war. Examples include President Wilson’s dispatch of military forces to Mexico to hunt down revolutionary Pancho Villa; President Truman in the Korean War; presidents Kennedy, Johnson, and Nixon in the Vietnam War; President Carter’s commando mission to save hostages in Iran; President Reagan’s invasion of Grenada and bombing of Libya; President Bush in the Persian Gulf War; and President Clinton’s bombing of Iraq and Serbia. See, e.g., David P. Currie, *The Constitution of the United States, A Primer for the People* 40-41 (2d ed. 2000); Harold Evans, *The American Century* 138-139 (1999).

33) *The Prize Cases* 67 U. S. 635, 668.

major U. S. military actions since the Vietnam War, Congress has never actively attempted to invoke the Resolution.

In contrast, debates over the war-making and war-declaration dynamic never materialized throughout the existence of Japan's Meiji Constitution, simply because the authority to declare and make war were combined into the person of the Emperor. Art. XI vested all war-making authority into the Emperor, while art. XII gave the Emperor to declare war, make peace, and conclude treaties. Furthermore, Art. XIV gave the Emperor the power to declare a state of siege, a broad and extremely powerful prerogative.<sup>35)</sup> Interestingly, Hirobumi Ito in his Commentaries on the Constitution, makes arguments for strong executive powers similar to those made by Alexander Hamilton in the Federalist Papers. Ito states that "it is desirable that a monarch should manifest the unity of sovereign power that represents the State in its intercourse with foreign powers," because "in war and treaty matters, promptness in forming plans according to the nature of the crisis is of paramount importance."<sup>36)</sup> However, it must be noted that unlike Hamilton, Ito makes these arguments in favor of a hereditary Emperor, not a popularly elected civilian official.

In Imperial Germany, the Emperor also possessed the power to declare war and to conclude peace.<sup>37)</sup> However, to accommodate the democratic, liberal elements in German politics, the Constitution required, for a declaration of war, the consent of the German Bundesrat (Federal Council).<sup>38)</sup> This arrangement superficially resembles the American, rather than the Japanese, Constitution, although the German Constitution attempted to clarify some of the ambiguities found in the U. S. system. For example, article 11 contains a qualification that the Emperor could declare war independently in the event of "an attack on the territory or the coast of the (German) Federation has taken place," thereby

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34) See War Powers Resolution, 50 U. S.C. sec. 1541 (1973); Currie, *supra* note 32, at 41. Among its other provisions, the War Powers Resolution requires the President to report to Congress within 48 hours of sending troops "into hostilities or where imminent involvement in hostilities is clearly indicated by the circumstances; into the territory, airspace or waters of a foreign nation . . . except for deployments which relate solely to supply, replacement, repair, or training of such forces; or in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." 50 U. S. C. sec. 1543 (1973). Within 60 calendar days of making such a report, the President is required to withdraw forces unless Congress has made a declaration of war, specific statutory authorization for extension of commitment, or there has been an attack on the United States. 50 U. S. C. sec. 1544 (1973). Further, the "President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations." 50 U. S. C. sec. 1542.

35) Significantly, the power to declare emergencies and accordingly acquire sweeping powers has no parallel in the U. S. Constitution.

36) Hirobumi Ito, *Commentaries on the Constitution of the Empire of Japan*, 1889.

37) *Constitution of the German Empire*, art. 68 (1871).

38) See *Four German Constitutions*, *supra* note 24, at 30; *Constitution of the German Empire*, art. 11 (1871).



strengthening the authority of the Emperor in emergency situations.

## V . Military Organizational Standing

In contrast to the war-making and war-declaration dynamic, the U. S. Constitution is clearer about the legislative branch's other military powers. Specifically, the Constitution, art. 1, sec. 8 gives Congress the power to: 1) grant letters of marque and reprisal, and make rules on captures; 2) establish and maintain military forces, but with budgetary appropriations no longer than two years at a time; 3) make rules in government and regulation of the military; 4) provide for calling forth the militia to enforce the laws of the nation, suppress insurrections, and repel invasions; 5) and provide for organizing, arming, and disciplining the militia and governing those units that are used for federal service.<sup>39)</sup> However, the Constitution also reserves "to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."<sup>40)</sup>

Thus, in essence, the powers to establish, internally regulate, and provision the military are vested solely with the Congress. Some of these specific powers merit explanation. The power to "raise armies" and "provide for a navy" is, of course, the power to establish military forces, but this constitutional authority implies the power to dissolve these forces as well. The permanent existence of a standing army, or at least a large one, was not necessarily presumed in the Constitution. History shows that many of the Framers were opposed to a permanent, standing army.<sup>41)</sup> Indeed, much popular opinion was against a standing military force. For much of the history of the United States, American policy was not to maintain a large standing army. The United States often maintained a small army for domestic security and occasional foreign expeditions, usually expanding the military only at times of war.<sup>42)</sup>

Ultimately, Congress' power of legal "life and death" over legislatively created military entities can be illustrated in many situations throughout U. S. history. In the modern era,

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39) The literal language of the Constitution is that Congress has the authority to: "To declare War, grant letters of marque and reprisal, and make Rules Concerning Captures on Land and Water; To raise and support Armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a Navy; To make Rules for Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; 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." The Constitution of the United States of America, art. I, sec. 8.

40) The Constitution of the United States of America, art. I, sec. 8.

41) See Zillman, *supra* note 2, at 5.

42) The navy, however, was more often a relatively large force. The reasons appear many, but were likely related to the United States' original position as a mercantile marine nation (another reason for creation of the Coast Guard, called the Revenue Cutter Service, to protect U. S. merchant shipping). Other possible explanations include the U. S. 19<sup>th</sup> Century expansion into the Pacific, and the very different physical nature of the army and navy, a navy arguably presenting less of a physical threat to government and democracy than an army.

the greatest example of this authority can be seen in the unification debates following World War II. Congress considered dissolving the army and navy in favor of a combined military service, a proposal which ultimately failed. However, by passing the National Security Act of 1947 and its amendments, Congress did create a new military entity, the United States Air Force, and dissolved the departments of the Army and Navy in favor of a unified Department of Defense.<sup>43)</sup> Also in the modern era, Congress through its general legislative authority to create legal entities, has also created new quasi-military entities such as the Central Intelligence Agency and National Security Agency.<sup>44)</sup>

The power to regulate the internal organization and discipline of the armed forces is the second of Congress' main controls over the military. This authority is based in the constitutional provisions authorizing Congress to "make Rules for Government and Regulation of the land and naval Forces," and is inherent in Congress' military establishment powers. Congress has always exercised this power, and unlike the power to declare war, there have been no historical debates over the scope of this authority. Thus, throughout America's history, Congress has regularly expanded and contracted forces in times of peace, and sometimes, as in the case of the two world wars, rapidly created new armies, fleets, and air forces out with great expedience.

Related to control over the structure of the armed forces is the control over personnel decisions, the third of the U. S. legislature's main military powers. Congress has the power to raise armies, the power to recruit troops, voluntarily or through conscription, for military necessity. Perhaps more importantly, Congress has final approval over the selection of the very top level commanders of the U. S. officer corps. Although the Executive selects most military officers, Congress approves appointments for the highest generals and admirals based on its general authority to approve "officers of the United States."<sup>45)</sup> This approval authority is obviously a significant legislative (as well as popular and democratic) check on the Commander-in-Chief's selection of America's military leaders. Although Congress sometimes in practice defers details of internal regulation and discipline to the military, Congress can also be active, such as with matters involving racial and gender equality in the armed forces.

As with the power to declare war, the constitutions of Imperial Germany and Japan treated the issue of military standing much differently than did the U. S. constitution. Consistent with its overall spirit, the Imperial Japanese Constitution vested the Emperor

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43) See 50 U. S. C. sec. 401, Congressional Declaration of Purpose.

44) See, e.g., National Security Act, 50 U. S. C. sec. 402, 403, 403-1 (1947).

45) United States Constitution, art. II, sec. II. The power to approve appointment of principal officers of the United States applies to both civilian and military officers. *Weiss v. U. S.*, 510 U. S. 163, 169-170. Federal statute 10 U. S. C. sec. 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 8036, 8037, 5141, and 5148 set forth the "principal" military officers who must be appointed by Congress: The chiefs and vice-chiefs of staff of the various armed services, the chief of naval personnel, surgeons general, judge advocates general, and chiefs of chaplains. *Id.* at 171.

with absolute authority over “the organization and peace standing of the Army and Navy.”<sup>46)</sup> There was evidently not even a pretense of sharing this, or any other military powers, with a popularly elected, civilian body. Germany differed slightly from Japan in that the legislature shared limited organizational powers with the Emperor, although the Emperor was predominant. Articles 8, 63, and 65 were the key German constitutional provisions on military standing. Article 8 created committees within the German Federal Council (Bundesrat) responsible for the army, military fortresses, and naval affairs.<sup>47)</sup> Although this arrangement was somewhat more democratic control than in Japan, the Emperor nominated the members of these key committees.<sup>48)</sup> Furthermore, Articles 63 and 65 solidified the Emperor’s position by stipulating that he had the “duty and right” to determine the numbers and organizational formations of the regular army and the Landwehr (national guard). To assure the readiness of the military, the Emperor could also conduct inspections and make any changes he deemed appropriate. The power to erect fortresses within the German Empire was also the prerogative of the Emperor.<sup>49)</sup> Finally, under Article 53, the Emperor also had the power to determine the organization of the navy. Thus, although the Bundesrat imposed a limited degree of popular control over military standing issues in Germany, the Constitution was evidently drafted in such a way as to prevent undue interference with Imperial control.

## VI . Budget and Financing

The U. S. Congress’ fourth major power over the military relates to its control over the government budget. This power is related to the issue of military standing, as a military force created by legislation is obviously a hollow one without financial appropriations for personnel and provisioning. Congress’ military budgeting authority has never been challenged, although the President today has a strong hand in the budgetary controls via his authority to propose budgetary legislation.

Congress’ authority to make military budgets and spending decisions remains a significant civilian check on the military. Today, Congress makes all of the major decisions on force structuring and finance. The U. S. military is continually at the mercy of congressional appropriations, and must regularly appear before Congress to request appropriations. While he was Chief of Staff, Douglas MacArthur, a man not inclined toward humility to anyone, reportedly complained of having to “beg” for appropriations before

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46) Constitution of the Empire of Japan, art. XI (1889).

47) The Bundesrat, unlike the Reichstag, was the part of the legislature that was to represent the federal (i.e., the 25 states’) interests in the new German Empire. Due to the strong leadership of Bismarck, it was not a vigorous entity. See *Four German Constitutions*, supra note 24, at 32.

48) Bavaria had a permanent seat on these committees, and evidently could nominate their representatives independent of Imperial control. See *Four German Constitutions*, supra note 24, at 32.

49) Constitution of the German Empire, art. 65 (1871).

such congressional committees. In times of peace, Congress determines the preparedness and standing of the military, and in times of war, Congress' authority remains unchanged, affecting the execution of wars such as the War of 1812, where the government resorted to asking rich individuals for war financing,<sup>50)</sup> and the Vietnam War, where Congress eventually, albeit very slowly, cut much of the financing for that conflict.

As significant as the legislature's "power of the purse" is, throughout history, this power in itself has not always been a sufficient check on the military. Blackstone reportedly commented that in Great Britain, the "limited Parliamentary power of financial control was not always exercised sufficiently" over the military.<sup>51)</sup> Likewise, this power proved insufficient to check militarism in Imperial Germany, even though the German military was constitutionally subject to civilian legislative control over government budgets, including military budgets.<sup>52)</sup> Although initial drafts of the German Constitution removed military budgets from the civilian legislative process, the liberals ultimately prevailed, tying military budgets into part of the legislature's annual general budget. As with the issue of declaring war, insertion of these budgeting provisions into the Constitution was made to appease the liberal elements of the North German Parliament (the forerunner to the German Empire). These provisions, as Volker R. Berghalm notes, were a "considerable success, given that they were obtained from a position of virtual powerlessness."<sup>53)</sup> Despite this ostensibly major check on the military, however, in the 20<sup>th</sup> century, the legislature's control over the budget—its only control over the military—proved insufficient to check the growing aggressiveness of German militarism, which ultimately resulted in the destruction of the Empire itself.

Japan's Meiji Constitution also made no differentiation between military and civilian budgets. Thus, as with Imperial Germany, Japanese military finances were subject to annual budgets controlled by the legislature.<sup>54)</sup> And as with Germany, financial control ultimately proved no match for military force: In the "2-2-6" incident of February 26, 1936, army rebels murdered Finance Minister Korekiyo Takahashi, Lord Privy Seal Makoto Saito, and Grand Chamberlain Kantaro Suzuki, mainly because of their policies of limiting military budgets.<sup>55)</sup> Ultimately, such examples show the impotence of an amorphous intangible such as money in the face of brute physical violence. A civilian faced with martial violence faces a power "notoriously superior to any (a civilian) could command," as U. S. Chief Justice Taney stated during the American Civil War, when a military fortress

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50) See Justin Martin, Greenspan, *The Man Behind Money* 163 (2d ed. 2000).

51) See Zillman, *supra* note 2, at 7.

52) See Four German Constitutions, *supra* note 24, at 28.

53) *Id.*

54) Specifically, articles 65 and 66 of the Meiji (Imperial) Constitution authorized an annual budget to be passed by the Imperial Diet.

55) See Ienaga, *supra* note 13, at 43.

56) Clinton Rossiter, *The Supreme Court and the Commander-in-Chief* 128 (2d ed. 1976).

refused to obey a federal court's writ of habeus corpus.<sup>56)</sup>

## VII . Psychological Controls Over the Military

The issues of military standing and budgeting implicate issues of control over military training and education, and in a broader sense, the psychological controls over the military. Because of the nature of military force, it is critical for the military to at least obey—and ideally respect and believe in—civilian control in order for the system to function effectively. Many national constitutions provide for civilian control over the military but ultimately fail. In a broad sense, the reason for such failures is that a Constitution, as with any law, is merely an idea on paper. In order to effectuate a “living constitution,” to make the ideas in the constitution function in reality, individuals need to at least respect and obey the rule of law. Ideally, soldiers will believe in it, and if necessary fight for it. One of the greatest strengths of the American system, and one of the reasons that civilian control functions effectively is the respect for the Constitution and the principles contained within it—a very powerful psychological, check on the military. Civilian control is a reality in the U. S. because of these psychological controls; the respect for the rule of law and the Constitution. The Anglo-American traditions began the ideals of civilian control, and the Constitution later encoded these ideals, firmly establishing them in law and providing a value system and reference point for generations to not only learn from, but build upon.

### 1. Training and Education of Military Personnel

The U. S. military's respect for the Constitution and the rule of law exists in large part due to the variety of psychological controls on the military. For example, there no state-sponsored military schools for officers and enlisted personnel until completion of secondary education. Contrast this system with Imperial Germany and Japan, which created cadet schools for educating their future officers, indoctrinating children with a value system and psychology that would continue throughout their lives. In the United States, there are national military academies, but admission is primarily through civilian (congressional) officials—a significant control on the indoctrination, training, and initial entry into the military for most of the officer corps.<sup>57)</sup> Further, U. S. officer candidates currently have the option of attending civilian universities while undergoing reserve military training, or attending an officer training course after graduation. The main danger of the U. S. system is that appointment of officers can become highly politicized, as was the case in the U. S. Civil War.<sup>58)</sup> However, when balancing the potential of politicization of the officer corps

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57) A minority of slots in the military academies are also filled by appointments by the President and Vice President, serving military personnel, and children of dead or missing veterans. Only the U. S. Coast Guard Academy can select admittees solely through competitive examinations.

58) See Zillman, *supra* note 2, at 13-14.

with the very real danger of a gradually escalating military hostility toward civilian government (evidenced in the histories of many nations), the preferable choice becomes clear. Ultimately, through the appointments of officers in the United States, civilian psychological controls over the military are effective.

## 2. Personal Allegiances Versus the Rule of Law

Other psychological checks on the U. S. military exist, such as the oath of loyalty made by all military personnel. In the United States, oaths of loyalty are made by military personnel, as well as by the President, to protect and defend the Constitution.<sup>59)</sup> In other nations, military oaths were not to an abstract concept such as a Constitution or the rule of law, but were personal oaths of loyalty to personal leaders. In Imperial Germany, soldiers made personal oaths of loyalty to the Emperor, as required by article 64 of the Constitution.<sup>60)</sup> In Japan, military personnel were expected to devote absolute loyalty to the Emperor.<sup>61)</sup> Those concerned with the fighting elan of soldiers in a military controlled by civilians and ruled by law might question whether such a system can capture the imagination of its soldiers. In Japan, for example, some might question whether an oath of loyalty to a Constitution can replace the intense loyalty to personal leaders that is arguably traditional to its military history.<sup>62)</sup> Indeed, to some soldiers, an abstract concept such as a law may be a less magnetic force than a personal leader. At the same time, however, the issue of discipline over an army must also be considered as an equally critical issue. Without a respect for the rule of law and civilian control, military discipline collapses, and with that collapse, an army becomes nothing more than an armed mob, as German General Hans Von Seeckt once said when comparing the German army with the Freikorps that were waging civil wars on the streets of post-World War I Germany. Imperial Japan in the 1930s and 1940s saw a complete breakdown of the rule of law and military discipline, with military officers, often junior officers, resorting to threats and actual use of naked violence against civilians when politicking and negotiation failed. Such actions were taken by rebel soldiers in the name of the Emperor, in total disregard for military regulations or the

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59) The President, for example, upon taking office swears (or affirms) to “preserve, protect and defend the Constitution of the United States.” See Constitution of the United States of America, art. II, sec. 2.

60) In later years, Adolph Hitler as supreme leader of Germany required the military to take a personal oath of loyalty to him.

61) Constitution of the Empire of Japan, art. XI (1889); Imperial Precepts to Soldiers and Sailors, Jan. 4, 1883 (Japan).

62) The Japanese epic Chushingura, or the tale of the 47 ronin, is perhaps the most prominent example of the ideal of the traditional warrior caste’s intense personal loyalty to a leader figure, even after the leader’s death.

63) As an aside, the Japanese military’s use of brute force when subtleties failed was particularly effective in a nation with a disarmed populace. Although the U. S. example of an armed citizenry is susceptible to very valid criticisms in light of the violence in modern U. S. society, one lesson is clear ✓

chain of command.<sup>63)</sup> Ultimately, civilian control and military discipline are impossible without a respect for the rule of constitutional law. As Charles Hughes, Chief Justice of the U. S. Supreme Court, 1930–1941, once stated, “You may think that the Constitution is your security, but it is nothing but a piece of paper. You may think that the statutes are your security; they are nothing but words in a book. You may think that an elaborate mechanism of government is your security, but it is nothing at all unless you have sound and uncorrupted public opinion to give life to your Constitution, to give vitality to your statutes, to make efficient your government machinery.”

In conclusion, the psychological controls built into the U. S. system have proven effective throughout much of U. S. history. The few times in U. S. history that the military has challenged civilian authority, the triumph of civilian officials was never in doubt.<sup>64)</sup> General Douglas MacArthur is a prime example. Following World War II, there was enormous popular support for MacArthur, who was elevated to the unprecedented rank of five-star general.<sup>65)</sup> Indeed, MacArthur was a living legend, a hero of two world wars who was described by one woman, who listened to his farewell “old soldiers never die” speech, as her perception of “god.” Despite this popular sentiment, MacArthur was ultimately relieved of duty by President Truman, a relatively unpopular President who occupied office only because of the death of his predecessor, Franklin Delano Roosevelt. Despite MacArthur’s illustrious career, no sectors of the American public, military or civilian, ever seriously supported MacArthur’s cause or opposed President Truman. Indeed, the Joint Chiefs of Staff of the U. S. military strongly supported the President’s measures. Some commentators have described the sacking of MacArthur, a *de facto* American Shogun in Japan and godlike figure to the masses in Japan (as well as in the Philippines), as the best lesson in democracy the Japanese could have had.

### VIII . Issues Regarding the Effectiveness of a Military Constitutionally Controlled by Civilians

Issues of discipline aside, the question of whether a constitutionally-based system of civilian control can produce an effective fighting force is a critical one. The question is critical not only for the survival of a nation, but is important to address in a democratic system. The author, however, would pose a different question: Whether a system of civi-

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↘ from Japan’s example: A population disarmed is in no way inclined to object against military men with a monopoly on arms. See Constitution of the United States of America, amend. II. The second amendment stipulates that U. S. citizens shall have the right to keep and bear arms, but relates this right to a well-regulated militia as being necessary to protection of a free state. Id.

64) In more recent times, the example of General Singlaub “losing” to President Carter is one example. See Zillman, *supra* note 2, at 12.

65) Congress created the five-star rank of General of the Army and Fleet Admiral for a total of ten officers in World War II. No other officers have been promoted to that rank since then.

lian control can be more effective than a system of military autonomy. Based on a number of reasons, the author would argue that civilian control can indeed make the military a more effective fighting force.

One reason that civilian control can increase military effectiveness is that civilian perspectives can often serve a practical adjunct to military thinking. Because of the military's very nature — its focus on group-oriented thinking and its hierarchical, authoritarian discipline —, military training can sometimes lead to narrow modes of thought. Civilian control and participation forces the military to hear new ideas and sometimes forces it to change; something that is difficult to do for a military mind accustomed to rigid thinking and subordination to authority.

Historically, military experts, even at the very highest levels, have been handicapped by their inability to think creatively or from a broad perspective. For example, military leaders have often been the strongest opponents to technological innovation. When the machine gun became militarily practical, one European military officer ordered his subordinates to, "Take the damned things to a flank and hide them."<sup>66)</sup> John Ellis comments, "When faced with the machine gun and the attendant necessity to rethink all the old orthodoxies about the primacy of the infantry charge, such soldiers did not understand the significance of the new weapon at all, or tried to ignore it, dimly aware that it spelled the end of their own conception of warfare."<sup>67)</sup> In World War I, when the tank was first invented, military leaders thought it overrated. It took civilian leaders such as Winston Churchill to appreciate the tank's tactical potential as a breakthrough war-winner on the Western Front.<sup>68)</sup>

Likewise, at the organizational level, military leaders have likewise been limited by their dedication to tradition and convention. In *Erinnerungen eines Soldaten* (Memoirs of a Soldier), General Heinz Guderian, while defending the German General Staff system, also admits that, "Modern developments (in World War II) required reorganization along the lines of a . . . unified Supreme Command" yet "the leaders of the pre-war General Staff consistently opposed and hindered the timely creation of a comprehensive and effective Supreme Command."<sup>69)</sup> Guderian also notes that the German General Staff opposed establishment of a distinct tank corps or an independent air force.

Sometimes, military minds also have difficulty grasping Grand Strategy, strategy involving a global perspective on issues such as diplomacy, geography, economics, and culture, issues that although peripheral to war, sometimes have a strong effect on the outcome of war. For example, as great a tactician and strategist as he was, German General

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66) See John Ellis, *A Social History of the Machine Gun* 18 (2d ed. 1993).

67) *Id.* at 17.

68) H. G. Wells, *Outline of History* 855 (1920). Wells observes, "the military mind was still resisting the use of the tank, the obvious weapon for decision in trench warfare. Many intelligent people outside military circles understood this quite clearly . . . But had the matter rested entirely in the hands of the military there would have never been any use of tanks."

69) See Guderian, *supra* note 27, at 459.



Erich Ludendorff made a grave mistake of grand strategy by failing to grasp the possibilities of defeating Italy in World War I. Such a victory would have forced the Allied Powers to devote men and resources to that front, and would have fundamentally altered the entire status of the war.<sup>70)</sup> Again, Guderian's memoirs are instructive: "Any attempt to widen the General Staff Corps officers' appreciation of the political situation was prevented, first, by the traditional limitations of their interests to military matters."<sup>71)</sup> In contrast, Winston Churchill in World War II comes to mind as a civilian leader who as supreme commander grasped the entire world situation, and was able to maneuver diplomatic, political, and economic considerations to the ultimate goal of winning wars.<sup>72)</sup>

Democratic civilian control also yet has another important dimension. In many cases, democratic popular opinion can keep the military accountable, and it is this accountability that often makes the military a more effective fighting force. In World War II, U. S. civilian control and accountability arguably allowed men of talent such as generals Marshall, Eisenhower, and Bradley to rise to the uppermost positions of responsibility. In contrast, Germany in World War II was the classic example of a military administration plagued by incompetents holding command positions because of their personal relationships to Adolph Hitler.<sup>73)</sup>

Accountability can also lead to increased moral confidence in, and loyalty to, the military. Racial desegregation in the U. S. military—pushed initially by mainly liberal, civilian pressures—is one example. Since the Gulf War, few would argue today that the increased equality and inclusionary nature of the military has harmed U. S. fighting strength. In fact, the racially integrated military has increased the talent pool for the armed forces, as well as strengthening the loyalty of troops to the military and the ideals of the nation.<sup>74)</sup>

No rational person would argue for civilian amateurs to completely supplant military officers. Such a move would be disastrous for any nation. For an effective military force, expertise is needed, which can only be cultivated through years of intense study, training, and experience in the military sciences.<sup>75)</sup> Nonetheless, blind faith in an elite

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70) See James S. Corum, *Roots of Blitzkrieg* 3-5 (1992).

71) See Guderian, *supra* note 27, at 459.

72) See Evans, *supra* note 32, at 343.

73) Harold Evans wrote, "The constitutionally elected chief executive of the United States continued to make all key military and civilian appointments, and they were confirmed or denied by the constitutionally elected Congress. There emerged some of the most able men to serve any government anywhere at any time in history: George C. Marshall, Dwight D. Eisenhower, Douglas MacArthur, Chester Nimitz, Henry Kaiser, Harry Hopkins, Robert Oppenheimer and countless others. Albert Speer, in his postwar interrogation by Paul Nitze, attributed Germany's defeat to the softness and incompetence of the men around Hitler—Goring, Bormann, Himmler, Sauckel—and their insatiable thirst for wine, women, and song. In Hitler's court they were spared the scrutiny of a democratic press." See Evans, *supra* note 29, at 321.

74) See, e.g., Evans, *supra* note 29, at 321.

75) Alexander Hamilton made this argument for a standing army. See *The Federalist* No. 25 (Alexander Hamilton). After World War II, German General Hans Von Seeckt made similar arguments in

technocracy, particularly to a military technocracy, is antithetical to the principles of the U. S. Constitution, which above all else, recognize the need for popular controls over government officials, civilian or military. The principles underlying the U. S. constitutional system are many. The principle of democracy as a value in itself is one. However, the U. S. system also presupposes that experts and elites can be wrong. This presupposition certainly holds true in the military world as well. Indeed, Colin Powell, the highest ranking U. S. military officer at the time of the Gulf War, has stated that experts should be questioned because they are sometimes wrong.<sup>76)</sup> Experts do indeed need checks and accountability, particularly when dire military consequences are involved.

Ultimately, at least in the United States, civilian control over the military and a respect for the Constitution and rule of law have not hindered military effectiveness. In fact, World War II proved that soldiers bound by loyalty to a Constitution can prevail over soldiers bound by loyalties to personal leader figures. As the United States Constitution enters its third century, the United States faces many new challenges. Yet the eternal specter of war, and the challenges to avoid war, remain unchanged from the initial days of the Constitution. The United States has endured as a republic in no small part because of the success of the U. S. military. Although the United States has arguably had its periods of imperial aggrandizement—such as its 19<sup>th</sup> Century expansion into the Pacific and its waging of the Vietnam War—military aggression has also been reigned in by popular democratic will, such as in the dismissal of General MacArthur and the success in preventing the Korean War from moving into China. This civilian control over the military is only possible because of the type of legal arrangement found in the U. S. Constitution, which effectuates popular, democratic, and civilian control over the military. In contrast, it is the absence of this type of rule-of-law regime which enabled the militaries of past imperial nations to grow without restraint, dragging their nations as a whole into war and leading to their ultimate self-destruction.

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his efforts to maintain the function, if not the form, of the German General Staff. See Guderian, *supra* note 25, at 34-37.

76) See Col in Powell I, *My American Journey* 106 (1996).