

## Abstract

Title of dissertation: Democracy's Achilles Heel? The Political Theory of the National Security State

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Is there a constitutional solution for the problem of ensuring a relatively seamless fit between political goals and military means in a national security crisis? Can the executive branch be constituted in such a manner that political ends and military means will be more closely aligned – that factionalism inside the executive branch will be better controlled and the tyranny of misalignment rendered less costly – without undermining the political advantages of doing so? As valuable as it may be for citizens in a democracy to promote the principles upon which they believe an enlightened national security policy should be founded, it is at least as important to determine how the institutions involved in the generation and execution of national security policy work, and to identify which types of human behavior need to be restrained or encouraged if any particular vision of national security is to be realized. In this dissertation I engage with the constitutional theory of James Madison and Alexander Hamilton and argue that the intelligence of war – the relative consistency of political ends and military means – must be understood as a constitutional problem. If we want to minimize the tyranny of misalignment – if we want to reduce the cost in lives and treasure of misaligned ends and means – we must think constitutionally about the structures of the national security state.

# **Democracy's Achilles Heel?**

## **The Political Theory of the National Security State**

by

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## 1 Introduction

*We take, and must continue to take, morally hazardous actions to preserve our civilization. We must exercise our power. But we ought neither to believe that a nation is capable of perfect disinterestedness in its exercise, nor become complacent about particular degrees of interest and passion which corrupt the justice by which the exercise of power is legitimated.*

- Reinhold Niebuhr

*Wars then must sometimes be our lot; and all the wise can do, will be to avoid that half of them which would be produced by our own follies, and our own acts of injustice; and to make for the other half the best preparations we can.*

- Thomas Jefferson

*War in general, and the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with these means.*

- Carl von Clausewitz, On War

Is there a constitutional solution for the problem of ensuring a relatively seamless fit between political goals and military means in a national security crisis? Can the executive branch, to be more precise, be constituted in such a manner that political ends and military means will be more closely aligned – that factionalism inside the executive branch will be better controlled and the tyranny of misalignment rendered less costly – without undermining the political advantages of doing so?<sup>1</sup>

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<sup>1</sup> I use the adverb “relatively” in the first sentence and the phrase “more closely” in the second not to be evasive but because a seamless fit – a perfect fit between political ends and military means – is beyond the capacity of even the most gifted statesmen and military strategists to secure. Angels might conceivably be able to ensure a seamless fit between political goals and military means in a national security crisis, but if our decision-makers were

Most political theorists, national security experts and defense reformers would argue that we do not need to worry about controlling faction *inside* the executive branch. They would also argue that the executive branch as presently constituted is a political asset that would be severely compromised by any violation of its most fundamental organizational principle, which is the principle of unity. The assumption underlying the conventional wisdom on these subjects – a largely unstated assumption – is that political ends and military means, despite the strictly hierarchical structure of our executive department, will closely align in a national security crisis. This assumption, I would suggest, not only reflects a lack of familiarity with how decisions about the use of force are actually made, but draws our attention away from the tyranny of misalignment, which should be at the very center of contemporary efforts to reform the national security state.

Whether the wars our nation fights in the future will be driven by choice or necessity – whether they will be fought for defensive, humanitarian, preemptive or preventive purposes – whether they will be just or unjust – are questions that raise a complex set of ethical issues that a nation with a preponderance of international power must constantly debate if it hopes to exercise its military power wisely. As valuable as it may be for citizens in a democracy to promote the principles upon which they believe an enlightened national security policy should be founded, however, it is more important, I would suggest, to determine how the institutions involved in the generation and execution of national security policy work, and to identify which types of human behavior need to be restrained or encouraged if any particular vision of national security is to be realized. What I will argue in this dissertation is that the intelligence of war – the relative consistency of political ends and military means – must be understood as a constitutional problem. If we want to minimize the tyranny of misalignment

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angels, as Madison reminds us, we would not need governments, much less separation of powers systems and formal deliberative bodies.

– if we want to reduce the cost in lives and treasure of misaligned ends and means – we must think constitutionally about the structures of the national security state.

The alternative to studying the politics of national security from an institutional perspective is to engage in one of a variety of forms of normative analysis. But even scholars who identify themselves as “realists” in international politics share with interventionists and isolationists of all stripes an affinity for the “kind of analysis that first posits certain values or norms derived from abstract analysis ... and then proceed to apply these values to the political realm without serious consideration of whether they could be incorporated into a workable regime.”<sup>2</sup> In this sense most students of national security are idealists: they concern themselves with when and how America should use military force in defense of its national interests and not on whether its political institutions as presently constituted are capable of producing the outcomes they desire.<sup>3</sup> This is deeply problematic, I would suggest, because, as an empirically-minded political theorist cautions us, it is “utopian to think that what happens in politics is a function of the normative ideas that circulate in and around the political world.”<sup>4</sup>

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<sup>2</sup> James W. Ceaser, “Reconstructing Political Science,” in Stephen Elkin and Karol Soltan, eds., *New Constitutionalism*, (Pennsylvania State University Press, 1996), p. 56.

<sup>3</sup> The primary alternative to thinking constitutionally about the national security state is, to make my point somewhat differently, to join the many scholars on both sides of the political spectrum who still believe in the art of persuasion. But not only is the attention of most civilian decision-makers elsewhere – usually on the arguments of advisors with whom they already agree – but the persistence with which most national security experts defend their ideas reminds me of the game in which children have to pass a square object through a square hole, a circular object through a circular hole, and a triangular object through a triangular hole. The difference between the way national security experts and children play this game is that whereas the latter eventually figure out which object goes in which hole, national security experts tend to expend all of their energy trying to force the same object – the same ideal national security policy, the same ideal for civil-military relations, the same ideal for national security decision-making – through the same stubbornly unaccommodating institutional structures.

<sup>4</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1997), p. 1. I would not dismiss the influence of normative ideas, but I share with Alexis De Tocqueville not only his great respect for forms, but his understanding of why this respect is not universal. Tocqueville was deeply worried about the “instinctive contempt” citizens in a democracy feel for political institutions – for the “forms” that “serve as a barrier between the strong and the weak, the ruler and the people, to retard the one and give the other time to look about him.” He feared for the fate of the kinds of political institutions that are tasked with controlling and disciplining government power. “Nothing is more pitiful than the arrogant disdain of most of our contemporaries for questions of form; for the smallest questions of form have acquired in our time an importance which they never had before; many of the greatest interests of mankind depend upon them. I think that if the statesmen of

National security is an abstract concept that covers a great deal of terrain, but if we distill the purpose of our various national security decision-making processes to a single, fundamental goal, we would be left with something resembling the following statement. We want the outcome of the national security decision-making process to make it less likely that we will fight wars we cannot win and more likely that we will win the wars we choose to fight. We could perhaps amend this statement to reflect the fact that we often choose to fight wars that we can win but should not have chosen to fight in the first place, for reasons other than the odds of success or failure, but the benefit of my original formulation is that it keeps political and ideological preferences largely at bay.<sup>5</sup> Which of our governmental institutions are tasked with these responsibilities, and what kind of institutional dynamics are most likely to increase the likelihood that when we must use military force, we will do so wisely and effectively?<sup>6</sup>

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aristocratic ages could sometimes condemn forms with impunity, and frequently rise above them, the statesmen to whom the government of nations is not confided ought to treat the very least among them with respect, and not neglect them without imperious necessity. In aristocracies the observance of forms was superstitious; among us they ought to be kept up with a deliberate and enlightened deference" (Alexis De Tocqueville, *Democracy in America* (Digireads Publishing, 2007), p. 499).

<sup>5</sup> Jack Goldsmith argues that "constitutional theory is usually grounded in a theory of preferred outcomes" (Jack Goldsmith, "The Accountability President," *The New Republic*, February 18, 2010). Richard Betts indirectly concurs: whether professional soldiers have too much, too little or the right amount of influence on defense policy is a very important question, but it is a "judgment that depends on one's political preferences" (Richard K. Betts, *Soldiers, Statesmen, and Cold War Crises* (New York: Columbia University Press, 1991), p. xv). I am not convinced that objectivity is quite so elusive. The tragedy of the Iraq and Afghan wars from a planning point of view, for example, is that so much military knowledge and experience was frozen out of the decision-making process (other kinds of knowledge and experience were neglected as well – cultural and regional expertise, for example – but, as I will explain over the course of this dissertation, a constitutional theorist is limited in his ambition by the tools at his disposal). Had *informal* deliberative bodies worked as designed, political aims and military means would have been more closely aligned (alternatively, it is possible that an irreconcilable gap between political ends and military means might have been identified and the president persuaded to use means other than force to promote his objectives). It is because this outcome is not unique in American history – because the violence of faction, as Madison teaches us, will always prove a stern test for institutions that rely on voluntary cooperation – that we need to consider building constitutional mechanisms into the executive department to keep the decision-making process open to at least a modest range of perspectives and points of view. I would like to believe this is a strenuously non-partisan approach to constitutional theory and defense reform.

<sup>6</sup> There is a maxim that applies here, at least indirectly, though my memory has failed me and I am unable to pay my respects to its author. "All of the good that a nation can do by violence is contingent; the evil is real and palpable."

The challenge for students of national security who approach crisis decision-making from an institutional perspective – for those of us who believe that the tools of constitutional theory should be able to improve the quality of national security decision-making – has three major components. First, we need to identify the most important institutions involved in formulating and executing military actions in a national security emergency. Second, we need to establish some kind of objective criteria to determine how these institutions have performed in the past. Finally, we need to determine if there are any patterns of behavior that will enable us to know roughly what we should expect from these institutions in the future, and therefore how best to reform them if we prefer a different set of policy outcomes. The challenges raised by these questions appear at first glance to be impossibly complex.<sup>7</sup> Military interventions are relatively few and infrequent, and the power dynamics both inside institutions and between institutions are always partly a reflection of irreproducible personalities and contexts. History also seems to derive great pleasure from pitting each new generation of military historians against the last, and preventing the emergence of a strong consensus on how these institutions performed in individual cases. But the tyranny of misalignment – the need for a process of adjustment and adaptation to ensure that political ends and military means are closely aligned – enables us to transition from a set of unwieldy abstractions and a dearth of empirical evidence to a specific, concrete problem that is amenable to a constitutional analysis.

To understand why our government is constituted in the particular way that it is – and how it might be constituted differently, if there are things we can agree it does not do well – we need to turn

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<sup>7</sup> The difficulty in writing constructively about “national security” is reflected by the range of scholarly work on the subject, which includes studies of the role of the presidency in our constitutional order; the struggle between the legislature and executive for control of foreign policy; the efficacy and constitutionality of the war powers resolution; civil-military relations theory; military history; grand strategy; military strategy and tactics; and the role of international law and institutions.

to the essays that James Madison and Alexander Hamilton wrote in defense of the Constitution.<sup>8</sup> Madison is widely considered our greatest political theorist. Hamilton's reputation may be a notch below his colleague's – he was certainly not as innovative a theorist in terms of devising republican remedies for distinctly republican diseases – but he offers us a thorough explanation of how to balance the requisites to energy and security in the constitution of the executive department. What neither Madison nor Hamilton offers us, however, is a constitutional theory grounded in a general theory of war. The constitutional theory on which our republic was founded, I will argue in this dissertation, has a distinct blind spot, and our constitutional system suffers as a consequence. Our nation is vulnerable to the violence of faction because we are no longer an insulated state and the requisites to energy and safety in the executive department are no longer properly balanced.

Carl von Clausewitz, who has few peers as a theorist of war, insists not only that political ends and military capabilities must be tightly, almost seamlessly aligned if the political ends we hope to secure through the use of force are to have any chance of being realized, but that war will be an act of senseless bloodshed in the absence of such alignment. Is the executive branch as presently constituted capable of harmonizing political ends and military means on a consistent basis? In both theory and practice, I will argue in this dissertation, our republic is presently incapable of ensuring the necessary degree of alignment between political ends and military means, and this is largely due to the absence of a deliberative separation of power *inside* the executive branch.<sup>9</sup>

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<sup>8</sup> John Jay's contributions to *The Federalist* are few in number and, with the exception of his theory of international politics, which we will discuss in Chapter 5, do not contribute significantly to our understanding of our constitutional system.

<sup>9</sup> What I will not attempt to do in this dissertation – what the limits of history and statistics may preclude even a more sophisticated student of military history from accomplishing – is demonstrate the regularity and extent to which political ends and military means have in fact been misaligned in U.S. history. I will also not attempt to pinpoint the precise degree to which misalignment has been responsible for the unnecessary loss of lives and treasure.

Even if I have accurately identified a serious weakness in our national security system, there still might not be an institutional solution – however modest, however imperfect, as most institutional solutions are – for the problem of ensuring a relatively seamless fit between political goals of our civilian leaders and the military means employed to secure these goals. Perhaps democracy has an Achilles Heel. Perhaps there is no way to harmonize political ends and military means without jeopardizing other values and objectives – energy, secrecy, dispatch and decision in the executive department, for example, or civilian control of the military – that democracy holds dear.<sup>10</sup> Perhaps we must accept the claim of constitutional scholars Joseph Bessette and Jeffery Tulis, who argue that the absence of “formal internal checks on the exercise of executive power is no accident,” and that the framers went to great lengths to “make the fundamental law hospitable to an energetic executive.” Perhaps we have to accept that the president is free to make effective use of her vast discretionary powers and that “the opportunity to act subsequently to combat executive overreaching” is reserved to the legislature and judiciary.<sup>11</sup> Even though the damage done by misaligned political ends and military means is largely irreversible – that lives and treasure cannot be recovered by subsequent course corrections – perhaps we have to accept the inevitable errors of passion and prejudice that result from one-man rule.<sup>12</sup> This is a possibility that readers are encouraged to entertain over the course of this dissertation.<sup>13</sup> But readers

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<sup>10</sup> James Ceaser is critical of the anti-federalists and many contemporary scholars for refusing to “think constitutionally – to realize that certain objectives, perhaps desirable in the abstract, could not be attained without producing other, more undesirable consequences; or that certain desirable objectives could not be achieved in full without sacrificing other, more desirable ends” (James Ceaser, *Liberal Democracy and Political Science* (Johns Hopkins University Press, 1990), p. 125). My basic argument in this dissertation is that thinking constitutionally about the national security state will lead us to embrace a minor departure from the status quo – a minor departure from the principle of unity.

<sup>11</sup> Joseph M. Bessette and Jeffery Tulis, *The Presidency in the Constitutional Order* (Louisiana State University Press, 1981), p. 16.

<sup>12</sup> I will address the subject of one-man rule at length later in this dissertation, but let me state here that I am not convinced that the choice we must make is between, on the one hand, “a constitutional arrangement that allows for a substantial degree of executive initiative and discretion,” and, on the other, “a set of arrangements that so constrains and restricts the executive power as to render it incapable of carrying out its proper tasks” (Bessette and Tulis, p. 24).

<sup>13</sup> Clement Fetovic addresses the issue of the irreconcilability of ultimate ends and values in the context of presidential prerogative: “A viable constitution must simultaneously accomplish two inconsistent goals: first, it

should also keep in mind that political institutions are entities that “establish the structures within which fallible human beings attempt to solve” political problems, rather than solutions in themselves. Institutions perform admirably, and can therefore be judged positively, as political theorist James Ceaser puts it, to the degree that “they lessen the probability that decision-makers commit serious errors and increase the probability they may make good decisions.”<sup>14</sup> A deliberative separation of power inside the executive branch, I will argue, not only meets these probabilistic criteria, but would do so with greater regularity than the system we presently have in place.

If this dissertation is to be persuasive – if I am to convince readers to revisit a set of long-held and once-defensible assumptions about how decisions should be made inside the executive department in a national security crisis – if I am to convince readers that the doctrines of the unitary executive and absolute civilian control of the military need to be relaxed and that the best solution to the ends-means problem would be to grant the chairman of the JCS a degree of statutory independence over the power to ensure that political ends and military means are closely aligned – I will have to flush out the many tensions, complexities and contradictions embedded in the following three questions.<sup>15</sup> First question: What is the political theory of *The Federalist* as it applies to national security? What, in other words, are

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must enable statesmen to deal with the ordinary and extraordinary problems of politics; second, it must prevent those same statesmen from becoming threats to the liberties and other values they are appointed to preserve. The second task requires a diminution of discretionary powers, whereas the first requires the preservation of political judgment, which cannot be reduced to legalistic rules or doctrinal formulae. This involves a delicate balancing act, but we must not delude ourselves into thinking that it is possible to achieve both objectives without sacrificing some cherished values” (Clement Fatovic, “Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives,” *Journal of Political Science*, Vol. 48., No. 3 (July 2004), p. 442).

<sup>14</sup> Ceaser, *Liberal Democracy and Political Science*, p. 187.

<sup>15</sup> When delegates to the constitutional convention began to debate the specific features of the executive branch, James Wilson suggested that a single person should fill the role of the executive. A “considerable pause” ensued. These are Madison’s words. The considerable pause that settled over the chamber reflected a deep-seated distrust of executive power. As Herbert Storing reports, “It was as if the delegates were reluctant to enter into what they knew was the enormously difficult, perhaps insoluble, problem of establishing an adequate executive that would be consistent with the principles of republican government” (Herbert Storing, “Introduction,” in Charles Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Liberty Fund, reprint, 2007), p. 163). When my research led me to the conclusion that a military officer needed a degree of independence to ensure that the process of adjustment and adaptation between political ends and military means is sufficiently deliberative, the pause that settled over me was similarly disconcerting.

the political principles upon which our republic was founded, and how do these principles apply to national security? Second question: What is the political theory upon which our national security state was founded? To be more precise, what is the largely implicit political theory that informs the 1947 National Security Act and the Goldwater-Nichols Act of 1986? Third question: If there are discrepancies between these two sets of founding principles – and I am convinced there are – why should defense reformers turn to the political theory of *The Federalist* for inspiration and guidance?

Each of these questions presents us with a host of challenges – and each one encourages us to think constitutionally about the national security state. With respect to the first question, does *The Federalist* present a consistent vision of the role of the executive in matters of national security? What did the concept of “national security” mean to political theorists in the late eighteenth century? Why did we inherit a constitutional order that assumes that energy, secrecy, dispatch and decision are best secured through a unitary executive? Why should the greater unpredictability of international politics be associated with an increase in the level of trust we are expected to place in the president, rather than an additional layer of constitutional checks and balances to control the potential violence of faction? Does a diversity of views in the executive open the door to a spirit of feebleness as surely and inexorably as a lack of constitutional checks and balances in the legislature opens the door to the spirit of faction? Why did Madison and Hamilton, the two principal authors of *The Federalist*, think it was so important to mix government powers, rather than merely separate them? Are James Madison and Alexander Hamilton even of one mind on the subject of executive power and prerogative?<sup>16</sup>

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<sup>16</sup> Madison and Hamilton shared a deep pessimism about human nature and its likely impact on national security policymaking. They both appreciated the frequency with which fallible human beings tend to overestimate their analytical skills, underestimate the role of unintended consequences, and forget how often good intentions go dangerously awry. Despite these philosophical similarities, however, most contemporary scholars assume that the views of these two theorists on executive power are incompatible. Madison and Hamilton certainly had strong post-ratification disagreements about executive and legislative prerogatives. But the differences between them, as we will see over the course of this dissertation, have been exaggerated. Among the arguments I will make is

A central claim in this dissertation is that when a nation is engaged in constitutional choice – an activity which, in the words of Vincent Ostrom, “need not be limited to constitutional conventions or constitutional amendments pertaining to national government, but can apply to all institutions of human governance” – it would be wise for its citizens to begin their deliberations with the principles that rightfully obsessed Madison and Hamilton as they analyzed which forms and structures would be best suited to a republican regime.<sup>17</sup> Most contemporary students of political theory and defense reform are convinced that the organization of the national security state raises strictly sub-constitutional issues, but Madison’s theory of faction – the centerpiece of his constitutional theory – and Hamilton’s crucial distinction between insulated and non-insulated states – the centerpiece of his theory of international politics – suggest this is a mistaken assumption.

That we live in a radically different world than American in the 1780s goes without saying. Might there still be “basic design principles that are sufficiently fundamental to apply to quite different times and places in human societies”?<sup>18</sup> In general, I would like to believe I share Professor Ostrom’s professional modesty and reserve. On this particular occasion, however, I think a fairly bold and assertive answer is in order. There are indeed basic design principles set forth in *The Federalist* that are widely if not universally applicable and that defense reformers and national security experts have, to the nation’s detriment, largely ignored. The irony of the National Security Act of 1947 and subsequent amendments to this landmark piece of legislation – all experiments in constitutional choice – is that defense reformers engaged in debates about the institutional dynamics of the national security state did not engage with the same constitutional theory – the same intellectual tools – upon which our republic was founded.

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that both Madison’s and Hamilton’s constitutional theory support the introduction of additional checks and balances into our constitutional system to better control the violence of national security factions.

<sup>17</sup> Vincent Ostrom, *The Political Theory of a Compound Republic* (Lexington Books, 2007), p. 8.

<sup>18</sup> *Ibid.*, p. 9.

Why do most defense reformers claim fidelity to our written constitution but largely ignore the constitutional theory upon which it was founded? Part of the explanation for this neglect surely lies with the fact that very few political theorists have studied the creation and reform of the national security state. How do we explain this disciplinary rigidity? We would need the help of sociologists and intellectual historians to provide a thorough answer to this question, but political theory has largely ignored defense reform, I would suggest, because the discipline assumes that energy and deliberation represent a legitimate and illuminating dichotomy.<sup>19</sup> Political theory does not seem to appreciate the profound difference between the strong executive, singular, and a strong executive department, and that, at least in a national security crisis, an executive branch properly designed can be both energetic and deliberative.

Well-executed national security policies, as defense reformers are well aware, actually depend upon these supposedly antagonistic principles being integrated, and it is because of this widely recognized need for a process that is both energetic and deliberative that I argue we need to look beyond the conventional understanding of the executive department. If we assume that a strong executive and careful deliberation are incompatible – if we assume that energy and deliberation is an

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<sup>19</sup> The human mind seems somewhat addicted to these kinds of sharp juxtapositions. The danger of “dualisms,” I would suggest, is that they obscure as much as they illuminate. “If there’s anything we philosophers really hate it’s an untenable dualism. Exposing untenable dualisms is a lot of what we do for a living. It’s no small job, I assure you. They (the dualisms, not the philosophers) are insidious, and they are ubiquitous; perpetual vigilance is required” (Jerry Fodor, “Where is my mind?” *London Review of Books*, Vol. 31, No. 3, 12 February, 2009, p. 13). Energy and deliberation may have represented an illuminating dichotomy at a certain stage in the development of republican theory – when legislatures were insufficiently deliberative and executive were practically impotent – but it is an impediment when we turn our attention to the improving the quality of statecraft in a state that has at least as much to fear from the tyranny of misalignment as the tyranny we associate with the abuse of political power and the loss of individual rights.

inflexible either / or and that the two problem-solving methods cannot coexist – it would never occur to us to think about introducing a deliberative separation of power inside the executive branch.<sup>20</sup>

If we study the legislative and executive branches through a comparative lens, the energy / deliberation dichotomy makes sense. Deliberation is slow and unwieldy, and therefore best suited to an procedurally patient, inclusive legislature. Energy is characterized by speed and efficiency, and energetic decision-making, as we know, is a necessary characteristic of the executive. But this theoretical juxtaposition rests on a misleading assumption: that, on the one hand, national emergencies require a unified executive – a branch of government that would only be bogged down by careful deliberation – and that, on the other hand, non-emergencies alone are amenable to a deliberative process. But the great challenge for a nation in a national security crisis is not only to determine what poses a genuine threat to its security but, if civilian leaders decide that military force is required to meet this threat, to ensure that political aims and military means are properly aligned. The later part of this fundamental challenge, Madison teaches us, can only be achieved through a *formal* deliberative process. Unless the power to ensure a reasonably close alignment between political ends and military means is intermixed – unless this power is shared between civilians and soldiers – the national security decision-making process will be insufficiently deliberative to close the gap between political ends and military means.<sup>21</sup>

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<sup>20</sup> I will make a distinction in Chapter 3 between legislative bodies, which are poorly equipped to participate in a national security crisis, and constitutional devices that are incorporated into a constitutional system to increase the odds that a decision-making process is genuinely deliberative.

<sup>21</sup> Political scientist and national security scholar Richard Betts argues that policymakers tend to “lack sufficient awareness of how limitations of the means complicate and often derail the ends” (Richard K. Betts, “From Cold War to Hot Peace: The Habit of American Force,” *Political Science Quarterly*, Vol. 127, No. 3 (Fall 2012), p. 354. To assume that the process of adjustment and adaptation is primarily one-directional – that only means have to adapt to ends – is, as I will argue in Chapter 3, as misguided as it is commonplace. As historian William Emerson puts it, “The relationship of policy to strategy is a reciprocal one, for military requirements, as the military history of the twentieth century so clearly attests, impinge upon and often dislodge political purposes” (William Emerson, “Franklin Roosevelt as Commander-in-Chief in World War II,” *Military Affairs*, Vol. 22, No. 4 (Winter 1958-1959), p. 182).

In his contributions to *The Federalist*, Hamilton offers a series of stinging rebukes to anyone inclined by temperament or experience to over-estimate the intelligence of deliberative processes. He was certainly a passionate advocate of a strong, unitary executive department. But we must not forget that his animated theoretical defense of unity reflected a distrust of state and national legislatures and a conviction that good administration is synonymous with good government. No matter how attractive certain traditional republican principles might be, he argued, a government that was not well executed would flounder. Hamilton, as a noted student of the founding era remarks, defends the idea that “administration is the beginning and end of government.”<sup>22</sup> Given the strength of this conviction – his unshakeable belief that a good government is first and foremost a well administered government – it is not hard to imagine that if Hamilton were alive today, he would be unnerved by the level of incompetence in the planning and execution of our wars. What is good administration in a national security crisis, after all, if not ensuring that political ends and military means are adequately aligned? Mismanagement was once the province of the legislature: hence the need for a strong executive department. Today, in the domain of national security, mismanagement is an attribute of the executive, and unfortunately we cannot turn to the legislature to improve what it has never demonstrated a propensity to do well.<sup>23</sup> The problem with our constitutional system, I would suggest, is that the authors of *The Federalist* did not anticipate the leverage future presidents would possess over national security

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<sup>22</sup> Herbert Storing, “Introduction,” in Charles Thach, *The Creation of the Presidency, 1775 – 1789: A Study in Constitutional History* (Liberty Fund, 2007), p. 171.

<sup>23</sup> Is there a viable alternative to presidential supremacy in national security? Even if we were convinced that powerful presidents have led the country into unnecessary and disastrous wars, do we have reason to believe that a different model of executive-legislative decision-making would produce better results? Robert Dahl, for one, is skeptical: whatever may be the case in domestic affairs, “it is undoubtedly true that in international politics, the executive-administrative branch has much better facilities than does Congress for interpreting reality and formulating means for dealing ‘correctly’ with that reality” (Robert A. Dahl, *Congress and Foreign Policy* (Norton, 1950), p. 103). I. M. Destler makes a similar argument: “The legislative branch can hardly be a force for foreign affairs leadership and coherence. Congress can at most be a restraint on the President – sometimes for good, sometimes for ill – or the source of useful but sporadic initiatives” (I. M. Destler, *Presidents, Bureaucrats, and Foreign Policy: The Politics of Organizational Reform* (Princeton University Press, 1972), pp. 85-86). My argument in this dissertation is that we need to look inside the executive department for viable alternatives to presidential supremacy in national security, rather than search for new models of legislative-executive decision-making.

decision-making and thus sharply underestimated the need to control executive-branch faction. Hamilton and Madison were both cognizant of the enormous benefits that would accrue to the new nation as a result of its relative isolation from the tumultuous power struggles that characterized European affairs in the late eighteenth century. But they mistakenly presumed that the basic laws of geography – the relative impermeability of oceans, mountains and deserts – would forever define the national security interests of the American republic. As scholars in a radically non-insulated republic, the question we must therefore ask ourselves is this: Can the present constitution of the executive branch could be altered in a manner that would better keep factions better under control – that would add wisdom and stability to decision-making in a national security crisis – and do so without imposing the kind of restraints on executive action that would destroy energy and make a mockery of the idea of limited self-government? Can we discover, as Schlesinger put it in the midst of the Vietnam War, a “middle ground between making the President a czar and making him a puppet”?<sup>24</sup>

The second broad question this dissertation addresses – What is the political theory upon which our national security state was founded? – presents an elusive challenge, since few scholars approach the national security state and defense reform from the perspective of constitutional theorists.<sup>25</sup> The

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<sup>24</sup> In *The Imperial Presidency*, Schlesinger was concerned about the “capture by the Presidency of the most vital of national decisions, the decision to go to war,” and argued that “we need a strong Presidency – but a strong Presidency within the Constitution” (Arthur M. Schlesinger Jr., *The Imperial Presidency* (Houghton Mifflin Company, 1973), p. ix-x). He believed that the shift in the constitutional balance of power between the executive and legislative branches was dangerous and needed to be corrected. (This is a shift that Garry Wills traces back to the advent of nuclear weapons and the passage of the Atomic Energy Act. “Lodging the ‘fate of the world’ in one man, with no constitutional check on his actions,” he argues, “caused a violent break in our whole governmental system” (Garry Wills, *Bomb Power* (Penguin Press, 2010), p. 46. I find his arguments provocative but unconvincing, for reasons that will be made clear over the course of this dissertation.) What I will argue in this dissertation is that if we want to improve the quality of a particular aspect of national security decision-making – crisis decision-making on the use of force – we need to look at institutional relationships *inside* the executive department. Schlesinger focused on the initial decision to go to war, which invokes our separation of powers system and the debate over legislative and executive prerogatives. The need to align political ends and military means shifts the focus to the relationship between our top civilian and military leaders. The alignment problem is still partly a decision about going to war or not, but the why or why not is based on more pragmatic considerations.

<sup>25</sup> Two examples of thoughtful political theorists who largely ignore defense reform: Robert Dahl, *Congress and Foreign Policy* (Norton, 1950); and Louis Fisher, *Presidential War Power* (Kansas: University of Kansas Press, 2004). Two examples of thoughtful political scientists who do not engage in serious constitutional analysis: Richard

notion that civilian control over the military is essential for protecting the republic against tyranny goes back to the debates at the Constitutional Convention, and it has been the dominant principle in civil-military relations ever since.<sup>26</sup> With the passage of the National Security Act of 1947, our nation's commitment to this principle was strongly reaffirmed. The Hoover Commission report of 1949 concluded that civilian control over the military needed to be strengthened in order to "safeguard our democratic traditions against militarism." In 1953, the Rockefeller Committee on defense organization made recommendations based on two overlapping principles: the challenge reformers faced was to provide the nation with "maximum security at minimum cost," and to do so "without danger to our free institutions, based on the fundamental principle of civilian control of the military establishment."<sup>27</sup> Conventional wisdom today also states rather calmly and unequivocally that civilian control of the military is a fundamental principle of good republican government.

Scholars who write about a crisis in civil-military relations are usually referring to one of two things: either a vast disconnect between civilian and military cultures, or the complicated relationship between senior military leaders and their civilian counterparts in the legislative and executive branches. In the latter case, the crisis is described as a product of fraught relations between political actors competing for power and influence. In this dissertation, civil-military relations are approached from a different perspective. What we will focus on is the civil-military decision-making nexus – the top echelon of civilian and military leaders who plan and execute military actions in a national security crisis.

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Neustadt, *Presidential Power: the Politics of Leadership* (New York: John Wiley & Sons, 1960); and Charles Stevenson, *Warriors and Politicians* (Routledge, 2006).

<sup>26</sup> A determination not to repeat the mistakes of previous nation-states that had experimented with democracy led the Founders to place authority for the nation's defense firmly in civilian hands. Policy matters would be decided by the president and Congress, and the military, though considered vital to the security and prosperity of the nation, would play a negligible role in the formulation of national security policy and strategy.

<sup>27</sup> *Commission on Organization of the Executive Branch of the Government (1947-1949), the national security organization; a report to congress* (Government Printing Office, 1949), pp. 2-3; *Report of the Rockefeller Committee on Department of Defense Organization*, Senate Committee on Armed Services, 83<sup>rd</sup> Congress., 1<sup>st</sup> session (Government Printing Office, 1953), p. 1; Department of Defense Reorganization Act of 1958: hearings before the Committee on Armed Services, U.S. Senate, 85<sup>th</sup> Congress., 2<sup>nd</sup> session (Government Printing Office, 1959), pp. 24-33.

Defense reformers who study the relationship between top civilian and military leaders in the executive department tend to focus on two interrelated concerns: first, how effectively do existing institutions provide professional military advice up the chain-of-command, on budgeting and procurement issues as well as war planning and fighting; and, second, how well does the military conduct military operations. These are serious and fundamental issues, but we will not be able to combat the tyranny of misalignment if we look at the military side of the civil-military equation in isolation. The principle role of the chairman of the Joint Chiefs of Staff (JCS) is to provide military advice to civilian leaders. The quality of advice moving up the chain of command certainly matters. But factionalism inside the executive branch renders the quality issue somewhat mute: only when factiousness is adequately controlled does the quality of military advice positively influence the quality of civilian decision-making.<sup>28</sup>

Although most defense reformers recognize the need for a constructive relationship between top civilians and military leaders, they have struggled mightily to identify ways to cultivate a more deliberative decision-making environment.<sup>29</sup> Reformers focus most of their attention on eliminating service parochialism, improving joint operations, and promoting interagency cooperation. The conundrum: civilians must exercise absolute control the military, and yet it is counterproductive when they dominate their military counterparts. Absolute civilian control of the military requires strictly hierarchical decision-making structures, and this leaves us without a structural alternative to civilian

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<sup>28</sup> The danger of political power is not simply that those who possess it are relatively free to act on their impulses and are less likely to have the patience to listen to opinions that differ from their own. Power also exacerbates our noted inability to easily differentiate between praise that is warranted and praise that should be flagged for being more manipulative than sincere.

<sup>29</sup> Christopher Gibson and Don Snider defend a common normative ideal for civil-military relations. The quality of national security policy would likely improve, they argue, as a consequence of a healthy debate “between well-qualified and experienced civilians and military decision-makers sharing the responsibilities of national defense (Christopher Gibson and Don Snider, “Civil-Military Relations and the Potential to Influence,” *Armed Forces & Society* (Winter 1999), p. 213). The question we should be asking ourselves, I would argue, is not what is the ideal for civil-military relations, since this is fairly easy to agree upon, but how can we design institutions so that our national security system will approximate this ideal with some regularity.

dominance. If we take absolute civilian control as a foundational doctrine – if we agree with Peter Feaver that, “Regardless of how superior the military view of a situation may be, the civilian view trumps it” – we are left arguing for a new normative framework to manage civil-military relations. But it is unrealistic to expect decision-making norms to change significantly and durably in the absence of significant structural reform – in the absence, in other words, of *constitutional* reform.

The underlying assumption of most defense reformers (not to mention most constitutional theorists) is that the decision-making structures and processes a president uses to design and execute defense policy are sub-constitutional features of government.<sup>30</sup> This is why they place great emphasis on the importance of informal deliberative institutions within the executive branch but rarely explore the possibility that a subset of national security problems might be best addressed by introducing a *formal* deliberative body into the executive. Many students of national security recognize the supreme value of having a president who is intellectually gifted and naturally inclined to deliberate, but this judgment has not led them to challenge the hierarchical relationships that presently define the national security decision-making nexus. The constitutional problem – the fact that when groups within an administration disagree about how to respond to an national security crisis the decision-making process gets politicized; the politicization of the system increases the odds of non-deliberative practices dominating the decision-making process; and non-deliberative practices increase the odds of poor planning and incompetent execution – remains unresolved.<sup>31</sup>

The third question – Does the political theory of *The Federalist* inform the political theory of the national security state, as it would be reasonable to assume, or does the largely implicit political theory

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<sup>30</sup> Fidelity to the Constitution is understood by most contemporary defense reformers to mean adherence to two basic principles: not infringing on executive-legislative branch relations and preserving a president-centric executive branch.

<sup>31</sup> A formal deliberative body in the executive branch – a deliberative separation of power – would ideally function as an institutional version of a familiar prayer: God, give us the grace to accept with serenity the things that cannot be changed, the courage to change the things that should be changed, and the wisdom to distinguish the one from the other.

of the latter represent a significant and potentially dangerous departure? – presented this student of the politics of the national security state with his most serious challenge: not only do I lack a set of experiences that would have provided me with unique insights into the national security decision-making process – as an officer in the military, a combatant commander, a member of the JCS, a CIA officer, a national security expert working at the Pentagon, a secretary of defense, a national security advisor to the president – but a persuasive answer to this multi-faceted question will only be possible if I am able to answer the first two questions convincingly.

The United States began to play a significant role on the international stage a half-century or so before the creation of the national security state. At the time, the proto-defense community was concerned with the challenge of integrating and expanding diffuse elements of national power. This concern appears to be relatively straightforward. The expansion of national power was somewhat controversial at the time – isolationists of various stripes were adverse to the idea of projecting American power – but integrating a state’s power resources is clearly a basic responsibility of a republican government. This concern with integrating and expanding national power naturally played a significant role in the debates leading up to the passage of the 1947 National Security Act, and was a driving motivation in all subsequent defense reform efforts. The desire to fully harness a state’s power resources is certainly a valid preoccupation. But the resources at the disposal of one branch of government cannot be dramatically increased without having an impact on the balance of power in a constitutional system, which is delicate by nature. What I will argue in this dissertation is that our superpower status – our evolution into a powerful non-insulated state – puts Madison and Hamilton’s constitutional system under stresses they did not anticipate.<sup>32</sup> This presents a direct challenge to

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<sup>32</sup> “Hamilton appears to have reflected the contemporary opinion in describing [the powers of the commander-in-chief as ‘nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy,’ that is, as powers of purely military character,” writes historian William Emerson. “Under modern conditions of war, however, these vague powers have implications broader than any foreseen by

constitutional theorists interested in defense reform: if the modern architects of the national security state had focused on these new stresses, would they have thought differently about the constitutional of the executive branch?<sup>33</sup>

Clausewitz's once-innovative argument, that politicians need to be in control of war-planning and fighting because "there can be no question of a purely military evaluation of a great strategic issue, or of a purely military scheme to solve it," is now conventional wisdom.<sup>34</sup> War, we now understand, must be controlled by the "hand of politics." But we need to recognize that Clausewitz meant this in a very idiosyncratic sense. The hand in question is an abstraction. Clausewitz was content to bracket off the political aspect of war. This intellectual maneuver of abstraction liberates Clausewitz to focus on his theory of war, but a constitutional theorist does not have the luxury of turning his attention to a more circumscribed subject.<sup>35</sup> In a republic, politicians – rather than "politics" or the "political point of view" – controls war. The difference between politicians and politics? Politicians, Madison teaches us, are best understood as individuals animated by the spirit of faction. And this means we need to focus on how factiousness influences national security decision-making and not merely on subordinating the

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the framers of the Constitution and have been utilized, in effect, to set aside the Constitution itself under emergency" (William Emerson, "Franklin Roosevelt as Commander-in-Chief in World War II," *Military Affairs*, Vol. 22, No. 4 (Winter 1958-1959), p. 182). Even if we disagree with Emerson's claim about the jettisoning of the Constitution, he is surely right to point out that the modern conditions of war – and, I would add, our ability as a modern superpower to wage war anywhere on the planet – could not have been foreseen by the framers.

<sup>33</sup> The new stresses on our constitutional system that derive from our status as a powerful non-insulated state are particularly disruptive in a national security crisis. "It is during potential or actual crises that the operational chain of command is placed under its greatest stress," General William Smith explains. "In such circumstances, the key decisions are made by civilian authorities in Washington – the president and the secretary of defense. The forces to be committed, their mission, their plans are all determined at the highest levels and passed down the chain of command" (William Y. Smith, "The U. S. Chain of Command – Present and Future," in Robert J. Art et al., eds., *Reorganizing America's Defense* (Pergamon and Brassey's International Defense Publishers, 1985), p. 296). The danger of anti-deliberative practices is most acute at precisely those moments in a national security crisis when deliberative decision-making offers the greatest rewards.

<sup>34</sup> Carl von Clausewitz, *On War*, trans. by Peter Paret (Princeton University Press, 1976), p. 380.

<sup>35</sup> As Peter Paret, a noted biographer and student of Clausewitz, writes, "Since the theory of war deals with the use of force against external enemies, Clausewitz was logically correct in not exploring the problems posed by irrational or mistaken political leadership – questions he left to political theory" (Peter Paret, *Clausewitz and the State* (Princeton University Press, 1985), p. 370). Elsewhere Paret makes the suggestion that Clausewitz's aversion to self-promotion and general distrust of politicians may have had something to do with his reluctance to analyze the political dimension of war in any detail.

military point of view to the political point of view. Factions are certainly more likely to be anti-deliberative than deliberative in character, and therefore pose an indirect, internal threat to national security on par with many direct, external threats.

What political theorists and defense reformers need to focus on are the *politics* of national security: the political realities that constitutional theory has since its conception strived to understand and control. Are the institutions that presently shape the politics of national security more likely to align political purposes and military objectives or fudge the gap between them? The precise distribution of outcomes aside – this is a subject that even a supremely confident statistician would probably not want to tackle – if the latter is a plausible scenario, which the history of the national security state suggests that it is, then our institutions may be designed in a manner that grossly undervalues the need for a formal process of adjustment and adaptation. “The first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make,” Clausewitz writes, “is to establish by that test the kind of war on which they are embarking, neither mistaking it for, nor trying to turn it into, something that is alien to its nature.” The present constitution of the executive branch, I would suggest, fails to take into consideration “the first of all strategic questions and the most comprehensive.”<sup>36</sup> The *process* of adapting political purposes and military means – do we have such a process formally in place? Many scholars insist that civilians have a right to be wrong, irrespective of the just how wrong and how anti-deliberative they might be. If there were no viable alternative constitutional arrangements – if the political theory of the Founders offered us no potential remedies for the problem of ends-means harmonization – he would of course be correct. But I am not convinced that our theoretical inheritance is quite so impoverished.<sup>37</sup>

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<sup>36</sup> Clausewitz, p. 394.

<sup>37</sup> Hanna Pitkin reminds us that, if we serve as representatives of the people, “we ought to have reasons for what we do, and be prepared to justify our actions to those” on whose behalf we make public policy (Hanna Pitkin, *The Concept of Representation* (UC Press, 1972), p. 119). A president in a national security crisis cannot always justify

Here is the central argument in this dissertation, stated abstractly: There is a problem with how our government works, and constitutional theory offers a potential solution. The problem, unfortunately, has not attracted the attention of many political theorists and, as a result, the military historians, national security experts and soldier-scholars who have been searching for a solution to the problem have not considered the full range of constitutional devices available to them. The absence of a conversation between political theorists and defense reformers, I am convinced, has left our nation in a precarious position.

The goal of this dissertation is therefore to begin what I believe is a long-overdue conversation. Political theorists have ignored the crucial challenge of ends-means alignment, and defense reformers have failed to engage with constitutional theory at a level that would generate potential solutions to a seemingly irresolvable problem.

Is a conversation between these strangers even possible? Is the simple fact that a serious conversation has not already taken place evidence that defense reformers have no more to learn from political theorists, and political theorists have no more to learn from defense reformers, than, for example, astronomers and oncologists have to learn from each other?

The assumption shared by almost all defense reformers is that the constitutional issues related to the national security state were settled 225 years ago. The assumption shared by almost all political theorists is that although there is some ambiguity about the meaning of certain articles and clauses in the Constitution, the institutional dynamics inside the executive branch do not lend themselves to constitutional analysis. Both defense reformers and political theorists, I hope to persuade readers, have been remiss in their mutual neglect: constitutional theory has a great deal to contribute to contemporary defense reform debates.

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his policy choices to the public at large, but he should have to justify and defend his decisions to knowledgeable insiders who might not agree with his assumptions.

The constitutional theory on which our republic was founded, I will argue over the course of this dissertation, is not the constitutional theory on which our national security state was founded. This claim will undoubtedly strike political theorists as a bit peculiar. If the legislation that created the national security state in 1947 had violated the Constitution, it would surely have been declared unconstitutional by the judiciary. Most defense reformers, I suspect, will respond to my assertion combatively. They are students of the national security state, after all, and firmly believe that its complex organization, if flawed in certain respects, nevertheless remains entirely consistent with the fundamental law of the land.

The discomfort of constitutional theorists, I would suggest, can be largely explained by a lack of familiarity with the actual defense reform debates that produced the National Security Act of 1947 and the Goldwater-Nichols Act of 1986; the stridency of defense reformers, by a preoccupation with the basic divisions outlined in the written Constitution that has prohibited a deeper understanding of the theoretical arguments that recommend the specific forms and structures in our deceptively simple constitutional system.

The first part of this dissertation – Chapters 1-5 – has two primary objectives. It is partly an analysis of *The Federalist*, which is where we find the theoretical arguments behind the specific forms and principles that define our constitutional system. The intent of this discussion is to encourage defense reformers to think about the constitutional theory on which our republic was founded. In these essays we find not only a defense of our constitutional system but an explanation as to why other competing principles and forms were ultimately rejected, and this is precisely the kind of discussion that has not been a part of defense reform debates.

The second objective is to illuminate aspects of Madison's and Hamilton's political thought that have been neglected, underweighted or misinterpreted in the political theory literature. The political

problems and personal prejudices that inspire us to return to historical documents obviously influence how we interpret them. If we are concerned with the unequal distribution of capital in contemporary America, for example, we are unlikely to wonder why Madison did not seem to pay much attention to the problem of national security factions. Similarly, if we are interested in Hamilton's defense of executive prerogative, we are unlikely to focus our attention on his theory of international politics, which distinguishes between insulated and non-insulated states, and explore the implications of this distinction for the delicate balance between the requisites to energy and safety in the constitution of the executive department.

I do not know how original my arguments are in these chapters – nor whether my research was driven more by the spirit of problem solving or the spirit of prejudice – but I would like to believe that my investigations benefit from having approached the arguments in *The Federalist* from a fairly unique perspective. Does constitutional theory have anything to teach us about how to ensure a reasonable alignment of political ends and military means in a national security crisis? This question, as we shall see, translates surprisingly well into the language of *The Federalist*. How, borrowing Hamilton's conceptual vocabulary, do we balance the requisites to energy and safety in the executive branch, once we transition from an insulated to a non-insulated state? How, shifting to Madison's conceptual vocabulary, do we control the violence of faction in a national security crisis?

Chapter 2 is a fairly lengthy discussion of Madison's theory of faction. I pursue two basic arguments in this chapter. In the first section I argue that Madison's theory of faction has been interpreted in two fundamentally different ways, and that only a strong theory of faction is consistent with Madison's broader constitutional theory. A weak theory of faction, which is popular in the political theory literature, prevents us from appreciating the magnitude and multi-dimensionality of the threat that the violence of faction poses to republican government. The second basic argument I make is that

constitutional checks and balances are best understood as auxiliary mechanisms designed not merely to prevent inter-departmental encroachment and usurpation, as many political theorists assume, but also to promote deliberation (inter-departmental and intra-departmental) and thereby minimize the violence of faction that emanates from within the individual departments of government. These two arguments, combined, provide the theoretical foundation upon which subsequent chapters build. When we analyze the institutional structures of the national security state with Madison's theory of faction as one of our primary intellectual tools, we realize that the problem of ends-means harmonization is a problem of faction. Ends-means disharmony, to put it somewhat differently, is an unanticipated consequence of the violence of faction. If there is a constitutional solution, therefore, it will involve a blending and intermixing of a tightly circumscribed power. The specific proposal I sketch in Chapter 8 – the centerpiece of which is a limited veto for the chairman of the JCS, based on an intermixing of the power to declare ends and means sufficiently aligned – owes its genesis to Madison's insistence that the greatest advantage of a well-constructed republic is its tendency to break and control the violence of faction, and that we should endorse "any plan which, without violating the principles to which he is attached, provides a proper cure for it."<sup>38</sup>

In Chapter 3 I introduce Clausewitz's theoretical injunction regarding the necessity of aligning political ends and military means into the discussion. At least as important as the decision to go to war or not is the process by which political ends and military means are harmonized inside the executive department before an armed conflict begins. In the absence of a process of ends-means adjustment and adaptation, war will only be a sensible, intelligent activity if political ends and military means fortuitously align.<sup>39</sup> Can this essential process be formalized? Clausewitz was not a political theorist.

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<sup>38</sup> James Madison, *The Federalist*, No. 10, Paragraph 1.

<sup>39</sup> Clausewitz considered Bonaparte and Frederick the Great to be political *and* military geniuses, and argued that it was an extremely rare combination of intuition and experience that enabled them to resist the common and destructive temptation of statesmen to "look to certain military moves and actions to produce effects that are

Madison, as we know, was not a theorist of war. Both theorists, however, were exceptionally astute observers of human and political behavior, and it is by putting them into conversation that we are able to formulate the central problem this dissertation addresses: How do we ensure that factions within the executive branch – be they comprised of civilians or soldiers – are strongly discouraged from initiating a war in which political purposes and military means are inadequately aligned?

I also argue in this chapter that we need to adopt an institutional conception of the national interest – that we need to build upon Madison’s institutional conception of the public interest – and that the national interest is best understood as the creation and maintenance of a deliberative core inside the executive branch. Political ends and military means can only be harmonized through a deliberative process. We have inherited a constitutional system, however, in which deliberation inside the executive takes place only on a voluntary basis. As a consequence, the process of harmonizing ends and means is often only superficially deliberative. Madison teaches us that constitutional checks and balances improve the quality of lawmaking and statecraft by forcing lawmakers and statesmen to deliberate. Madison also teaches us that lawmakers and statesmen must be forced to deliberate since human beings in positions of power have an understandable tendency to disdain deliberative processes. I argue in this chapter that we need to introduce constitutional checks and balances into the executive branch – that the national interest is best understood as the creation and maintenance of a formal deliberative body inside the executive department – for precisely these two reasons. The principle of voluntary deliberation is simply no match for the anti-deliberative instincts of most men and women, even in a national security crisis.

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foreign to their nature” (Carl von Clausewitz, *On War*, p. 608). It goes without saying that there are few military or political geniuses in the world, much less political and military geniuses, and that although republics may on occasion win the representational lottery – elect presidents who combine in themselves a set of talents and perspectives that almost defy our understanding of human nature – they will not last for long if they are not acutely respectful of the odds.

Past a certain point, I realize, constitutional checks and balances are as likely to degrade the quality of lawmaking and statecraft as to improve them, but I am convinced we have not yet reached this point of diminishing returns. A Madison-Clausewitz synthesis suggests that a deliberative separation of power inside the executive branch would offer our nation greater security against the danger of ends-means misalignment than the informal mechanisms that presently characterize the executive department, and that the risks of formalization would be minimal.

The final two chapters in Part I of this dissertation represent a departure from the theoretical discussion outlined above. Chapter 4 is a critique of the argument put forth by Harvey Mansfield in favor of one-man rule. Mansfield offers the most rigorous, systematic defense of the necessity of a strong, unitary executive in our constitutional order – of the idea that a great deal of discretionary power must be available to the commander-in-chief for a republic to survive and flourish in a dangerous world. What I argue in this chapter is a comparative lens is what enables students of presidency to determine whether or not the executive has sufficient power to meet her responsibilities, and that this lens leads to the mistaken conclusion that no decision-making process in the executive branch can be genuinely deliberative. Energy, secrecy, dispatch and decision, I argue, can be preserved in a republican system of government without yielding to the so-called necessity of one-man rule. The great theoretical innovation of the Founders was not the smuggling of monarchical power into our constitutional order, as Mansfield insists, but amending the doctrine of the separate of powers so that the spirit of faction, whether it obtained a foothold inside or outside of government, would be frustrated by a combination of the constitutional means and personal motives of other political actors. As Hamilton puts it, constitutional checks and balances are the “powerful means” by which “the excellencies of republican government may be retained and its imperfections lessened or avoided.”<sup>40</sup>

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<sup>40</sup> Alexander Hamilton, James Madison and John Jay, *The Federalist* (Everyman, 1992), No. 9, Paragraph 3.

In Chapter 5 I argue that the Founders did not think systematically about the relationship between constitutional theory and international politics, and that the present constitution of the executive branch suffers as a consequence. Jay and Hamilton make a very strong case for union, based on a structural theory of international politics that predicts a disastrous, bloody result if state legislatures vote for disunion. They argue convincingly that any peaceful interlude between the disunited states would be destroyed by the interests, enmities, hopes and fears of citizens and leaders in these new political communities, but this does not lead them to the conclusion, consistent with their own assumptions, that citizens and executives in a united republic might one day be as vulnerable to these corrupting influences as those in the disunited states.

The distinction Hamilton makes between insulated and non-insulated states is crucial for our discussion. Hamilton does not present us with a constitutional system suited to any republic, irrespective of its relative international power, but an insulated republic. In a non-insulated state, he argues, too much power will inevitably accrue to the executive, and the requisites to energy and safety – safety from the abuse of executive power – will be dangerously imbalanced. The implication of Hamilton’s argument is clear: our constitutional system was designed for an insulated state, and a state with standing armies and a permanent military establishment, not to mention hegemonic international power, may need additional constitutional mechanisms to control the violence of executive-branch faction.<sup>41</sup>

Part II of this dissertation – Chapters 6-8 – begins with an analysis of the creation of our national security state and ends with a defense reform proposal that I argue is consistent with the political theory of *The Federalist*. Chapter 6 is a study of the National Security Act of 1947. A global power with

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<sup>41</sup> Most contemporary scholars assume that because our permanent military establishment has not led to recurring outbreaks of conventional tyranny – the destruction of civil and political rights – we can comfortably embrace the present constitution of the executive department. But Hamilton’s theory of international politics provides us with good reason to question whether the requisites to energy and safety in the executive remain properly balanced.

a permanent military establishment, it was widely understood by reformers, could not rely on the informal, impermanent national security structures that had previously characterized the state. Institutional innovation was needed. What I argue in this chapter is that the founders of our national security state weighed a different set of principles and forms as institutional designers than the founders of our republic. Constitutional theory is rightly obsessed with what I call boundary questions. Where are we to draw the line between what constitutes too much and too little power in the hands of key political actors? The participants in the “constitutional convention” of 1945-1947, I argue, tiptoed around these kinds of questions. They did not ask themselves when the risk of significant power being abused is greater than the danger of power being insufficiently concentrated (partly because they could not imagine effective civilian control of the military evolving into civilian dominance in matters previously understood to belong to the military sphere of authority). The constitutional problem of national security decision-making in a non-insulated state – of balancing the requisites to energy and safety in the constitution of the executive branch – was not a subject of debate.

Let me elaborate on the admittedly imperfect analogy mentioned above as a way of introducing the arguments I present in Chapter 7. The framers of our national security state, I would suggest, have more in common with the framers of the Articles of Confederation than the framers of the Constitution. This is why I am more of a respectful student than critic of General Marshall, President Truman, Secretary Forrestal, Ferdinand Eberstadt and other leading defense reform figures in the 1940s. But just as the framers of our Constitution had a wealth of experience under the Articles of Confederation to draw upon, and we would be critical of them today if they had not relaxed their theoretical allegiances to reflect this experience, defense reformers in the 1980s had almost forty years of experience with the structures of the national security state, and criticism would be warranted if they failed to respond to these experiences creatively. What I argue in this chapter is that most advocates of the Goldwater-Nichols Act of 1986 fixated on military reform rather than on the broader and more substantive issue of

defense reform, despite mounting evidence that some of the forms and principles on which the national security state was founded were not based on workable concepts.

Chapter 8 begins with a discussion of the contemporary defense reform movement and ends with an analysis of a reform proposal that I argue is consistent with both Madison's and Hamilton's constitutional theory and that represents only a modest structural departure from the national security system we presently have in place. Most contemporary defense reformers recognize the supreme importance of functional civil-military relations. They believe it is imperative that civilian and military leaders maintain a climate favorable to deliberation.<sup>42</sup> Nevertheless, these same reformers fail to appreciate the fact that formal constitutional mechanisms are required to promote the very degree of deliberation they consider essential. As a result, none of the defense reform proposals presently in circulation address the problem of reconciling political ends and military means when they do not fortuitously align.

I arrived at a deliberative separation of power inside the executive department – a limited veto in the hands of the chairman of the JSC – as a partial solution to the ends-means problem based on the importance of four key constitutional issues: the need for constitutional checks and balances to combat the violence of faction; the necessity of executive energy; the demand for wisdom and stability in the administration of government; and the positive correlation between the independence of individual political actors and the caliber of their performance.

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<sup>42</sup> The ideal for the civil-military relations – for how statesmen and generals should deliberate on the compatibility of political ends and military means – is as unrealistic as it is widely cited. To take one example, Paul Yingling argues that if our nation is to prevail in a war, generals must, to begin with, provide statesmen with an accurate estimation of the strategic possibilities. “The general is responsible for estimating the likelihood of success in applying force to achieve the aims of policy. The general describes both the means necessary for the successful prosecution of war and the ways in which the nation will employ those means. If the policymaker desires ends for which the means he provides are insufficient, the general is responsible for advising the statesman of this incongruence. The statesman must then scale back the ends of policy or mobilize popular passions to provide greater means” (Paul Yingling, “A Failure in Generalship,” p. X). Constitutional theory teaches us that the expectations embedded in this ideal simply cannot be realized in a strictly hierarchical system.

We can no longer afford to assume, I argue in this chapter, that the president should sit, unopposed, unchecked and unbalanced, at the top of the chain of command. Nor can we continue to assume that the ideal for civil-military relations is a clear and enforceable division of labor between political and military responsibilities. We must therefore place more trust in the men and women who fight our wars and are most likely to possess the kind of experience and expertise required to ensure that military means are properly aligned with the political goals of our civilian leaders. The chairman of the JCS, I would suggest, needs to possess sufficient “energy” to force his civilian counterparts to participate in a genuinely deliberative process. How much trust should we place in such a military figure? How do we create a military officer who would be powerful enough to promote a process of ends-means alignment in a national security crisis without being so powerful that he would weaken civilian control of the military? A chairman should only be independent enough – “energetic” enough – to defend the nation against the tyranny of misalignment.<sup>43</sup>

Only by blending and intermixing of the power to decide on the relative consistency of political ends and military means – only by relaxing the doctrines of the unitary executive and absolute civilian control of the military – can we ensure that our wars are fought wisely and effectively and not characterized by wanton destruction. “The fact that slaughter is a horrifying spectacle must make us take war more seriously, not provide an excuse for gradually blunting our swords in the name of humanity.”<sup>44</sup> I quote Clausewitz here because I want to make it clear that this dissertation was written not because I have fundamental moral objections to war but because I am convinced that most defense reformers and political theorists do not take war seriously enough.

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<sup>43</sup> Even with a deliberative separation of power in place, the president would only “depend” on his top military advisor to the extent that he must participate in a formal deliberative process if he decides to deploy military forces to pursue his political objectives. No matter what the chairman advises or recommends – no matter how strongly he might disagree with the judgment of his civilian counterparts – the president would be under no obligation to use military force if he thinks that doing so would be unwise or ineffective.

<sup>44</sup> Clausewitz, p. 260.

## 2 Madison's Theory of Faction

*The aim of every political constitution is or ought to be to first obtain for rulers of men who possess most wisdom to discern, and most virtue to pursue the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold the public trust.*

- James Madison

*If a man remembers how very many times he has been wrong in his judgment, will it not be foolish of him not to mistrust it ever after?*

- Michel de Montaigne

*Who is man? Is he a rational animal? If he is, then the goals can ultimately be achieved. If he is not, then there is little point in making the effort. All the evidence of history suggests that man is indeed a rational animal but with a near infinite capacity for folly.*

- Robert McNamara

Political theory as an academic discipline traditionally focuses on domestic politics, rather than international politics, and this once-understandable bias means that constitutional theorists and institutional designers past and present have largely concentrated on creating and maintaining the kind of inter-departmental institutions that protect the rights and dignity of citizens against the abuse of government power. Political theory – and this includes the political theory of *The Federalist* – has been much less attentive to the question of how best to protect a liberal democracy from factions *inside* the executive department – from individuals and groups that put lives and treasure unnecessarily at risk by

misusing their decision-making power in a national security crisis. Domestic tyranny, in other words, rather than the tyranny of misalignment, has captured the attention of the discipline.

The purpose of this chapter is to persuade readers that a strong theory of faction should be one of our primary intellectual tools when we analyze the institutional structures of the national security state. Over the course of this dissertation I will argue that the principles and forms on which our national security state was founded are based on unworkable concepts. Part of the explanation for this unsuitability is that defense reformers and political theorists usually adopt a truncated definition of faction and therefore underestimate the forces that must be controlled if a constitutional system is to be successful.

Experience under the Articles of Confederation taught friends of popular government that the “principles and forms” that inspired our nation’s first constitution were not based on “workable concepts.”<sup>1</sup> Precisely how unworkable they were – whether or not they could have been salvaged through incremental, piecemeal reform – we cannot know with certainty, since this particular experiment in constitutional choice was never conducted. But the delegates to the constitutional convention in 1787 did adopt a dramatic, innovative program of reform, and their arguments for doing so ultimately proved persuasive. As Madison argued in *The Federalist*, No. 37, “the existing Confederation is founded on principles which are fallacious,” and we must therefore “change this first foundation, and with it the superstructure resting upon it.”<sup>2</sup>

Was there a single overarching principle introduced into the constitution of the new government that illuminates the fundamental differences between our republic before and after it adopted a new foundation – and that should play a more central role in the design of our national

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<sup>1</sup> I borrow this terminology from Vincent Ostrom, *The Political Theory of a Compound Republic* (Lexington Books, 2007).

<sup>2</sup> James Madison, *The Federalist* (Everyman, 1992), No. 37, Paragraph 6.

security state? Patterns of political behavior under our revolutionary-era system of government had convinced many friends of republican government that traditional republican theory had to be amended if republicanism was to be redeemed. Merely placing great power directly into the hands of the people and their representatives was clearly not the antidote to tyranny and injustice that republican theory had promised. Republican majorities proved they could exercise power as unjustly as absolute monarchs. Representatives of the people proved they could disregard the rights and interests of their constituents as readily as unelected government officials. But what precisely did traditional republican theory lack? What theoretical breakthrough recommended a new set of forms, principles and relationships? What omission – what theoretical blind spot – led to the structural demise of the confederacy?<sup>3</sup>

The greatest weakness of the government structures adopted by the Articles of Confederation, the evidence suggests, was their pervasive susceptibility to what Madison identified as the greatest internal threat to popular government. But the problem was not merely that our post-independence system of government lacked an adequate remedy for the violence of faction – for the “instability, injustice, and confusion introduced into the public councils” by factions, the “mortal diseases under which popular governments have everywhere perished.”<sup>4</sup> More critically, it lacked a theory of faction that could have illuminated what such a structural remedy might look like. The principle difference between the unworkable concepts that informed the Articles of Confederation and the workable concepts that inform our present constitutional system is a better understanding of the forces that must be controlled if a popular system of government is to be successful. A theory of faction – a strong theory of faction, rather than a weak theory of faction, as I will explain over the course of this chapter –

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<sup>3</sup> I do not want to clutter this discussion with constant references to defense reform, but all of the questions I raise in this and next chapter have two basic purposes: first, to clarify the constitutional theory on which our republic was founded; and, second, to present a new, alternative theoretical approach to defense reform.

<sup>4</sup> James Madison, *The Federalist*, No. 10, Paragraph 1.

is what enables us to weigh the inevitable tradeoffs that must be made within any single constitutional system. The structural innovations that would be adopted by the new republic to ensure a just and stable republican regime – a self-limiting popular sovereign, which the republic under the Articles of Confederation was not – were largely determined by their ability to mitigate the deleterious effects of faction.<sup>5</sup>

**1. Extend the Sphere.** Madison served in the Virginia delegation to Congress for three years in the early 1780s (delegates to the national legislature under the Articles of Confederation could only serve for a total of three out of any six years), and the Virginia state assembly for a similar length of time before, in the summer of 1786, embarking on a tour of other states to debate the future of the confederacy.<sup>6</sup> At this juncture in his complimentary careers as a politician and a political theorist, Madison understood clearly the fundamental challenge the American experience with self-government presented to conventional republican theory.<sup>7</sup> “There is no maxim in my opinion which is more likely to be misapplied, and which therefore more needs elucidation,” Madison observed, “than the current one that the interest of the majority is the political standard of right and wrong.”<sup>8</sup>

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<sup>5</sup> The questions in this paragraph are the kind we will apply directly to defense reform in future chapters. What forces must be controlled in a national security crisis if a popular system of government is to be successful? Does the present constitution of the executive branch expose us to an unnecessary degree to the deleterious effects of faction?

<sup>6</sup> See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Vintage, 1997); Ralph Ketcham, *James Madison: A Biography* (University of Virginia, 1990); Irving Brant, *James Madison* (Bobbs Merrill, 1941); Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy*, (Cambridge University Press, 1991); and Gary Wills, *James Madison* (Times Books, 2002).

<sup>7</sup> I do not think it is a coincidence that the most insightful reformers at the constitutional convention were experienced politicians as well as students of political theory and government. It should also not come as a surprise that some of the most insightful defense reformers, as we will see in the second part of this dissertation, have been soldier-scholars, men with a solid feel for the realities of war and politics.

<sup>8</sup> James Madison to James Monroe, October 5, 1786, *The Writings of James Madison* (G.P. Putnam’s Sons, 1900).

The formula for good government was not quite as simple as the republican revolutionaries had assumed: just because citizens elected members of their state assemblies by popular vote and were represented at the national level by state delegations did not guarantee that lawmakers would deliberate with the general interest of the Union, the particular interest of their individual states, and the rights of minorities always and simultaneously in the forefront of their minds. The Articles of Confederation deserved credit for adopting a scheme of representation at the state and national levels, but as a comprehensive constitutional system it was incapable of protecting individual rights and the public interest against the machinations of factious rulers. The underlying premise of republican government – that the majority could be trusted to rule wisely through a basic scheme of representation – had to be reconsidered.

Power concentrated in the hands of the people, students of popular government discovered, is as dangerous as power concentrated in the hands of a monarch or prince. Madison summarized the mood of alarm among friends of popular government:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interesting and overbearing majority.<sup>9</sup>

The crux of the problem was that the minimal restraints on legislative misrule adopted by the framers of the Articles of Confederation proved to be no match for the factious spirit that had brought ruin to so

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<sup>9</sup> Madison, *The Federalist*, No. 10, Paragraph 1. Majority faction is a disease unique to popular government. This does not mean, however, that minority factions do not present an equal or greater threat to stability and justice in a republican regime. We need to keep in mind that popular governments share this affliction with all other types of regimes, and that Madison was concerned with both sources of misrule and instability.

many past experiments in self-government. The indictment had a two-fold character: first, state assemblies were infused with a spirit of faction that was responsible for a spate of opprobrious legislation; and, second, the parochial interests that animated individual state delegations to the national legislature rendered the central government (already weak by design) effectively impotent. The political wisdom and self-restraint of the people and their representatives, to state it somewhat differently, had proven to be an illusory pillar of popular government.

Madison's genius lay not in identifying these disturbing patterns of legislative behavior but in proposing a solution to what many other students of politics considered an intractable problem. A popular government must "secure the public good and private rights" against the danger of majority and minority factions, and yet it must do so in a manner that preserves "the spirit and the form of popular government."<sup>10</sup> His ability to reconcile these competing ideals – to find republican remedies for republican diseases – is why he is generally recognized as America's preeminent political theorist.<sup>11</sup>

Here is how Madison opens *The Federalist*, No. 10, the essay in which he introduces his theory of faction and defends what he considers a partial cure for popular government's most dangerous vice:

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous

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<sup>10</sup> Madison, *The Federalist*, No. 10, Paragraph 11.

<sup>11</sup> I do not mean to imply he reconciled these competing ideals to everyone's satisfaction. Nor that he is universally recognized as our preeminent political theorist. Hamilton, for example, clearly made an invaluable contribution to the theory behind our constitution, but we can safely assert that he was less enamored with the republican principle than Madison. See Lance Banning, "The Hamiltonian Madison: A Reconsideration," *Virginia Magazine of History and Biography*, Vol. 92, No. 1 (January 1984); and Neil Riemer, "The Republicanism of James Madison," *Political Science Quarterly*, Vol. 69, No. 1 (March 1954).

vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it.<sup>12</sup>

The violence of faction must be broken and controlled, he argues, because popular governments without a cure for faction will succumb to “instability, injustice and confusion,” and ultimately perish. It may seem obvious to readers today that eliminating faction – imposing uniformity of thought and belief on a diverse population through force or indoctrination – is merely a rhetorical alternative to breaking and controlling faction. But recognizing the extent to which the causes of faction are “sown in the nature of man,” and therefore cannot be eliminated, was merely a starting point for Madison’s reflections on institutional design. What distinguishes Madison as a constitutional theorist is his insistence that there is a republican remedy for the kind of intra-societal strife that is inevitable in a popular government and that previous theorists had assumed could only be mitigated through non-republican means.<sup>13</sup>

Here is Madison’s definition of faction, which he presents at an early juncture in the essay:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.<sup>14</sup>

This is a definition with which most of us are familiar. A faction is a majority or minority that presents a threat to the rights of others or the public good. What I want to suggest is that this definition of faction

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<sup>12</sup> Madison, *The Federalist*, No. 10, Paragraph 1.

<sup>13</sup> Inevitable in all governments, all societies of men. Only in theory – utopian theory – is intra-societal strife not an enduring political problem.

<sup>14</sup> Madison, *The Federalist*, No. 10, Paragraph 2.

can be interpreted in two different ways – has in fact been understood by theorists of American political thought in two different ways – and that these alternative interpretations (which Madison inadvertently encouraged, as I will explain below) lead us to think differently about the magnitude of the problem faction presents to popular government.<sup>15</sup>

Let us recall that a common impulse of passion *or* of interest can actuate a faction; that a faction can be adverse to the rights of other citizens *or* to the permanent and aggregate interests of the community; and that a faction can consist of a majority *or* a minority. Let us also keep in mind that we rely on theories of human behavior to inform our arguments for and against specific design features in a republican regime. What I want to suggest here is that we end up with two different theories of faction depending on how sensitive we remain to the various components in Madison’s definition, and that this has significant implications for our understanding of institutional design.<sup>16</sup> A strong theory of faction keeps in circulation all six variables in the definition, while a weak theory of faction neglects one or more. What I will suggest over the course of this chapter is that it is partly because Madison shifts somewhat unwittingly between a strong and weak theory of faction at various points in *The Federalist*, No. 10 that so many contemporary political scientists interpret Madison primarily as a defender of private property, and so few defense reformers analyze the structures of our national security state in terms of their ability to control the violence of faction.<sup>17</sup> I am not interested in uncovering a causal explanation for this neglect – the purpose of this chapter, as I mentioned earlier, is to suggest that a strong theory of faction should be one of our primary intellectual tools when we analyze the

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<sup>15</sup> I argue later in this dissertation that even Madison underestimated the magnitude of the problem, due to his relative disinterest in the constitution of the executive department and his understandable inability to imagine the challenges of crisis decision-making in a non-insulated state (in Chapter 5 I elaborate on the fundamental difference between insulated and non-insulated states).

<sup>16</sup> David Epstein also makes a distinction between interested factions and passionate factions in his study of *The Federalist*, No. 10. See David Epstein, *The Political Theory of the Federalist* (University of Chicago, 1984).

<sup>17</sup> The emphasis on the protection of property has a distinguish legacy that spans the last century. For early and latter versions of this argument, see, respectively, Charles Beard, *An Economic Interpretation of the Constitution of the United States* (Dover, 2004); and Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madison Framework and its Legacy* (University of Chicago Press, 1994).

institutional structures of the national security state – but recognizing that there are two plausible interpretations of Madison’s theory of faction, and understanding the difference between them, will help clarify my larger claim. Before I pursue this argument further, however, I think it would be helpful to return to Madison’s experience as a legislator under the Articles of Confederation to flush out his understanding of what constitutes an actual faction. It was as a legislator, after all, that Madison began to appreciate the enormity of the challenge that the spirit of faction poses to popular government.

Biographers of Madison, historians of the revolutionary era, and students of American political thought inform us that a broad set of experiences from his tenure as a state legislator, and later as a national legislator, weighed heavily on Madison’s mind as he developed his theory of faction. In “Vices of the Political System of the United States,” written early in 1787, Madison summarized his criticisms of the Articles of Confederation in a kind of proto bullet-point format that helped structure his thoughts without suppressing his palpable frustration with the poor quality of state legislation. “Paper money, instalments of debts, occlusion of Courts, and making property a legal tender” are characterized as “aggressions” on the rights of other states. If a state legislature is presented with a “temptation” to encroach on federal authority or the rights of other states it will inevitably do so, embarking on courses of action that are “destructive of the general harmony.” A “want of concert” describes most instances in which the national dignity and the common interest require coordinated action. The “fatal omission” responsible for these developments was a “mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals.” In addition to the aforementioned problems of inter-state rivalry, state violations of international laws and treaties, and a pervasive disregard of federal statutes and appeals, state legislatures had a distinct propensity to over-

legislate, a habit which led to laws being “repealed or superseded, before any trial can have been made of their merits” – an instability in legislation that was a nuisance of the most “pestilent kind.”<sup>18</sup>

This is a large and expansive catalogue of the mischiefs of faction. Had lawmakers in the thirteen republics proven adept at legislating in a manner that respected minority rights and reflected the general interests of society, the Articles of Confederation would have remained the fundamental law of the land (if not for two hundred and thirty-five years, at least for an extended period of time). Experience taught Madison, however, that whenever a majority faction was presented with an opportunity to seize government power and impose its designs on a minority – whether the majority be comprised of “debtors, creditors, planters, merchants, manufacturers, members of a certain religious sect, inhabitants of a particular region, or some other political, economic, or cultural group” – it would rarely refrain from doing so.<sup>19</sup> Experience also taught Madison that a mere dependence on the people, in terms of regular elections, did not mean that representatives would be free of the spirit of faction.<sup>20</sup> Representatives might be less factious than the population at large, but under the Articles of Confederation this provided little consolation.

Let us now return to my claim that Madison presents us with the equivalent of two theories of faction.<sup>21</sup> I do not mean to suggest that these theories are incompatible. For Madison, different

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<sup>18</sup> James Madison, “Vices of the Political System of the United States,” available at: <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>.

<sup>19</sup> Charles F. Hobson, “The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government,” *William and Mary Quarterly*, Vol. 36, No. 2 (April, 1979), p. 222.

<sup>20</sup> I should point out here that regular elections are one of the two requisites to security against the abuse of executive power (the other being impeachment). I argue in Chapter 8 that the requisites to energy and security in the executive branch are no longer properly balanced. If we want to ensure that political ends and military means are adequately aligned, we cannot rely on constitutional mechanisms that are designed for an insulated state and that are only triggered after the fact – after a war with misaligned ends and means has already commenced and significant obstacles exist to rational adjustment and adaptation. We should not, in other words, rely too heavily on corrective mechanisms that take effect only after lives and treasure have already been lost.

<sup>21</sup> I arrived at this particular conclusion after engaging with Epstein’s sensitive reading of *The Federalist*, No. 10. He makes a helpful distinction between interested and passionate factions. I prefer to talk about a strong and weak theory of faction because I am interested not only in the nature of factions, but how best to control them in a

practical problems forced him to emphasize different aspects of a single theory of faction. But the only way to explain why a weak theory of faction has been so influential in the political science literature is to appreciate the extent to which Madison appears to drift between two substantively different theories of faction in *The Federalist*, No. 10. Madison's strong, all-inclusive theory of faction, I would suggest, is a response to the following historically-grounded prediction: "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."<sup>22</sup> Madison argues that man's fallible reason presents a grave threat to popular governments because it is frequently an object of man's self-love. When citizens, legislators or statesmen are heavily invested in erroneous assumptions – when identity, ideology and personal convictions collaborate at the political level – popular governments are particularly vulnerable. I call this a strong theory of faction because majorities and minorities are implicated; rational, well-intentioned arguments are as potentially destructive as irrational (or unscrupulous) arguments; and both the rights of other citizens and the permanent and aggregate interests of the community are at risk. It is also a strong theory of faction because the spirit of faction is understood to pervade both society and government, and its all-pervasiveness, as we shall see later in this chapter, necessitates constitutional checks and balances as well as social checks and balances to properly control it.

A weak theory of faction has a different point of departure. "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle" – along with, I

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constitutional system. A strong theory of faction, as I will explain shortly, argues that we need strong set of constitutional checks and balances to control them. A weak theory of faction, in contrast, requires fewer auxiliary mechanisms and less blending of powers. A discussion I did not find helpful, but which once dominated the literature on Madison's theory of faction, took place in the middle of the last century. Robert Dahl's claims about pluralism were central to this debate. Dahl argued that extending the sphere is a sufficient defense against the violence of faction, and that constitutional checks and balances are therefore redundant at best, and anti-democratic at worst. Dahl is obviously a very impressive political theorist, and he has a great deal to say about how our constitutional system actually works, but I do not find corroboration for this particular claim in Madison's writings.

<sup>22</sup> Madison, *The Federalist*, No. 10, Paragraph 6.

want to emphasize, the fallible reason of man – “to a uniformity of interests.”<sup>23</sup> In this passage Madison draws our attention to two different causes of faction. When these causes are treated in isolation, we end up with what amounts to two theories of faction, each of which has a different set of implications for institutional designers. A weak theory of faction is primarily concerned with controlling majority factions actuated by rational economic interests – interests that are direct descendants of the diversity in the faculties of men. A strong theory of faction, in contrast, is not problem-specific and calls for a greater number and variety of design features to protect against the violence of faction. It is also a strong theory of faction, I should add, that we will import into the second part of this dissertation, in our discussion of defense reform.

Before we explore Madison’s strong theory of faction in greater depth – a theory that I argue we would be wise to engage with when we think about the internal structural dynamics of the national security state – let us review the logic behind his apparent weak theory of faction (this, I would suggest, is what contemporary defense reformers unwittingly reference when they claim fidelity to the constitutional theory of the founders). The most “common and durable source of factions,” Madison declares, “has been the various and unequal distribution of property.”

Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.<sup>24</sup>

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<sup>23</sup> Ibid.

<sup>24</sup> Madison, *The Federalist*, No. 10, Paragraph 7.

The interests involved in the kind of factious politics described in this passage are purely economic interests. If a law concerning private debts were under consideration in the legislature, two antagonistic parties would naturally form – a party of creditors and a party of debtors – and attempt to impose their policy preferences on each other. The introduction of protective legislation against foreign manufacturers would of course be supported by domestic manufacturers who have to compete directly with these foreign entities and opposed by importers who would benefit from maintaining an open market. The apportionment of taxes also has obvious impacts on different economic interests and invites lawmakers to indulge their self-interest. As Madison explains, determining the particulars of a tax scheme is “an act which seems to require the most exact impartiality,” and yet there is perhaps “no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice.” The very basic problem here is that a group with economic interests at stake – “Every shilling with which they overburden the inferior number is a shilling saved to their own pockets” – will rarely defer to the cause of justice when it finds itself in the majority.<sup>25</sup>

Economic-basic majorities at the state and national level present a danger to popular government that previous American experiments in constitutional choice had not sufficiently addressed. Popular government seems to demand, at a minimum, a fidelity to majority rule. Unfortunately for friends of republican government, majorities can be as self-indulgent as monarchs and princes. The most consistently unruly majorities, Madison argues, will be activated by the unequal distribution of property. The “principle task of modern legislation” is therefore not merely the broad regulation of the great variety of interests that will understandably compete for influence in a diverse commercial society but the regulation of a majority that is likely to be particularly factious because of a complete or relative lack of property. In this characterization of factious politics we are firmly grounded in a rational political-economy in which factions form for rational reasons and their political agendas are clear and

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<sup>25</sup> Madison, *The Federalist*, No. 10, Paragraph 8.

unambiguous. Majorities may be too myopic to appreciate what it would mean to rule in the public interest – to appreciate the distinction between legislation that appeals to a majority of citizens at a particular moment in time and legislation that promotes long-term peace and prosperity – but their reason need not be fallible, and their self-love need not express itself politically.<sup>26</sup>

In short, a weak theory of faction is concerned primarily with the need to control the kind of factions that inevitably form in a heterogeneous society in which wealth and property are distributed unequally.<sup>27</sup> These are clearly not the kind of factions we need to worry about in a national security crisis. A strong theory of faction, in contrast, presents us with a significantly more complex understanding of the causes behind, and the motivations of, factious groups and individuals, and, I should point out here, leads us to different conclusions about the kind of defenses we might need to introduce into the executive branch to control faction.

As long as the reason of man continues fallible, and he is at liberty to exercise it, different positions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.<sup>28</sup>

Citizens in a republic are at liberty to exercise their reason as voters, representatives and statesmen. As a direct result of our freedom to exercise our mental faculties, our rational economic interests will not be the sole driver of our politics. Citizens may still choose to support a party that promises to put a few extra shillings in their pockets, irrespective of where these shillings originally come from and where they

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<sup>26</sup> This narrow understanding of faction is what enabled mid-century pluralists such as Dahl to draw upon the political theory of *The Federalist* for support. If this is how faction is understood, it makes sense that scholars would gravitate to the issue of private property.

<sup>27</sup> I do not mean to imply that the unequal distribution of capital is not an enormous challenge for republican theorists. I only want to suggest that the problem of faction is more challenging – more protean and unwieldy – than most property-centric theorists seem to realize.

<sup>28</sup> Madison, *The Federalist*, No. 10, Paragraph 6.

might otherwise go, but in a world in which self-love is given free expression, citizens will often be passionate defenders of ideas that, unbeknownst to them, testify to their fallibility. A strong theory of faction offers us a constitutional response to two fundamental assumptions, rather than merely one: first, that the diversity in the faculties of men produces a broad spectrum of interests; and, second, though no less important, that the reason of man is profoundly fallible.

A republic needs to be designed with a strong theory of faction in mind for a very simple reason: when fallible opinions and passionate natures are invited into the political process, as is the case in a popular government, the public interest is permanently under threat. Tyranny is not the only danger that must be averted, even though it presents the most direct and immediate threat to a regime. Political theorist David Epstein argues that Madison was acutely aware of the magnitude of the threat that the alliance of man's fallible reason and passionate nature posed to popular government: "To be passionate about an opinion is to struggle on its behalf and to insist that the opinion be respected by others who would deny its worth." In the absence of passion, we generally try to persuade other people of the merits of our position. Alternatively, we exempt ourselves from political debate on the grounds that either our cause is hopeless or we might be wrong. "But a passionate opiner feels a stake in his opinion because it is his; his desire that his opinion prevail resembles the desire to rule other men."<sup>29</sup> A strong theory of faction recognizes that politics is driven by passions as much as by interests – a particularly acute problem in a national security crisis – and that a republic needs to be adequately defended against both kinds of disruptive forces. Madison may have addressed the problem of class-based majority factions at length, but we cannot ignore his much broader description of the factional threat to self-government. In Madison's words:

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<sup>29</sup> David F. Epstein, *The Political Theory of the Federalist* (University of Chicago, 1984), p. 71.

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions,' have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.<sup>30</sup>

Inflamed zealots trying to vex and oppress each other presents us with a very different image of factional politics than that of self-interested majorities understandably, if myopically, pursuing favorable tax apportionments. Factions can form around ideologies as easily as economic interests. Irrational formulations can dominate policy-making processes as easily as rational constructions. And it is not merely a diversity of interests and human fallibility that an institutional designer must address: constitutional theorists must understand that men with zealous opinions and attachments are not always capable or interested in trying to persuade their fellow citizens of the merits of their opinions and cannot always be controlled by structural mechanisms that might effectively thwart class-based majority factions.<sup>31</sup> “So strong is this propensity of mankind to fall into mutual animosities,” Madison writes, “that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.”<sup>32</sup>

At this point in the discussion, we have moved far beyond the realm of self-interest and property. It is not only that self-love, as Epstein puts it, “makes men defend the opinions which their

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<sup>30</sup> Madison, *The Federalist*, No. 10, Paragraph 7.

<sup>31</sup> As we will see in the second part of this dissertation, defense reformers lean heavily on informal mechanisms – on voluntary cooperation and good intentions – in their design proposals. Civilian and military leaders should cooperate. Civilian and military leaders should respect their distinct spheres of expertise. The president has the national interest at heart and can therefore be trusted to sit unopposed at the top of the chain of command – can be trusted to tap into the expertise of his subordinates. They invest a great deal of hope in parchment-like barriers to achieve the results they want, rather than exploring the possibility that formal mechanisms might be better at controlling faction and promoting deliberation.

<sup>32</sup> Madison, *The Federalist*, No. 10, Paragraph 7.

fallible reason adopts.” We must also defend a republic against the frequency with which “self-love seems to prompt men to stubbornly assert themselves, and to adopt whatever grounds of division can serve as a vehicle for their belligerence.”<sup>33</sup> Although extending the sphere might be a strong defense against factions that form as a result of the various and unequal distribution of property, it will not effectively control factions of a more passionate – more hostile and more vexatious – nature. We simply cannot conclude from the arguments in the essay under discussion that an extended republic and thoughtful scheme of representation comprise a comprehensive cure to faction.

**2. Constitutional Checks and Balances.** A sophisticated scheme of representation and an extended sphere are two structural features that help mitigate the deleterious effects of faction. The great advantage of a representational system of government is that it dilutes the passions of the people and refines their interests. The great advantage of a large, diverse republic is that an extended sphere encourages the formation of broad coalitions and thereby diminishes the power any particular faction may obtain through electoral processes. Madison was confident that a large, heterogeneous republic would be considerably more likely to provide justice and stability for its citizens than a small, relatively homogeneous republic. But a government with the constitutional fortitude to control the governed presents institutional designers with a second, equally profound challenge. “In framing a government which is to be administered by men over men,” Madison writes in *The Federalist*, No. 51, “the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>34</sup> How is a government that is powerful enough to control the people – a government that is sufficiently removed from the people that it can act with a significant degree of independence – to control itself?

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<sup>33</sup> Epstein, p. 77.

<sup>34</sup> Madison, *The Federalist*, No. 51, Paragraph 4.

Madison is an advocate not of smuggling monarchical power into republican theory (an alternative method for combating the abuse of governmental power, which we will discuss in Chapter 4), but of the necessity of “auxiliary precautions” – of constitutional mechanisms that achieve for popular government what a system of representation and an extended sphere alone cannot accomplish. “A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”<sup>35</sup> Auxiliary precautions are non-electoral, non-normative control mechanisms built into a constitutional system. They are constitutional checks and balances on governmental power, in contrast to social checks and balances.<sup>36</sup> Let us briefly return to the first part of the equation quoted above: the government must be able to control the governed. This prerequisite for a just and stable republican regime harks back to Madison’s dissertation on faction, with its emphasis on the need to diffuse the potential violence of faction. The second part of the equation – the government must be able to control itself – is not quite as clear and transparent. What kind of behavior must be controlled in this latter instance? What, precisely, is the nature of the threat posed by a government insufficiently controlled by auxiliary mechanisms?

Madison insists that a dependence on the people in a republican system is the primary control on government. The people are equipped to play such a crucial role in a republic because they are assumed to command sufficient virtue to choose their representatives wisely, at least on a fairly regular basis. The people, we could say, must be able to choose enough virtuous representatives over the course of time to compensate for the less virtuous – less public-minded – representatives who use the “vicious arts” to smuggle themselves and their factiousness into office. This is what Madison had in mind when he wrote that without “sufficient virtue among men for self-government ... nothing less than

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<sup>35</sup> Ibid.

<sup>36</sup> The distinction between constitutional and social checks and balances is explained clearly by Professors Carey and Ostrom. See Vincent Ostrom, *The Political Theory of the Compound Republic* (Institute for Contemporary Studies Press, 1987); and George W. Carey, *The Federalist: Design for a Constitutional Republic* (University of Illinois Press, 1994).

the chains of despotism can restrain them from destroying and devouring one another.”<sup>37</sup> Two other people-centered control mechanisms come into play in this context. First, the desire of officials to get reelected is a fairly strong incentive to govern responsibly. Second, in the event that officials do violate the trust of the citizenry, they will, with some regularity, at least, be voted out of office. But a dependence on the people alone – even if we invoke all three control mechanisms – is nevertheless inadequate to prevent the abuse of governmental power.<sup>38</sup> What vulnerabilities remain unaddressed? Why does Madison insist that auxiliary mechanisms are necessary to fortify a dependence on the people? What can public officials do once in office that the people alone cannot adequately control?

When elections work to perfection, they “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their own country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” Unfortunately elections do not always (or even consistently) bring to power our most enlightened citizens. “Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people.”<sup>39</sup> Public officials, once they have obtained a degree of independence from the people – once they have been elected, in other words – must still be controlled, lest they prove better campaigners than representatives and statesmen. Elections increase the odds that

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<sup>37</sup> Madison, *The Federalist*, No. 55, Paragraph 9.

<sup>38</sup> As we will see in Chapter 8, Hamilton argues that a dependence on the people alone (through elections and the threat of impeachment) provides the necessary safety mechanisms to balance the requisites to energy in the constitution of the executive branch. In this respect we can say that the framers of the national security state and contemporary defense reformers share Hamilton’s faith in a set of minimal constraints on executive power. But this is misleading because it ignores the fact that Hamilton insisted that the requisites to energy and safety would remain balanced only so long as the United States remained an insulated republic (as we will see in Chapter 5). Students of international relations, national security and defense reform tend to ignore this very fundamental distinction, and this leads to what I consider a fairly gross overestimation of the therapeutic effects of regular presidential elections. If we overestimate the therapeutic effects of elections, along with the threat of impeachment, and underestimate the potential violence of faction, we end up with an executive branch in which the requisites to energy and safety are no longer effectively counterpoised.

<sup>39</sup> Madison, *The Federalist*, No. 10, Paragraph 16.

representatives will be wise and virtuous – that the people who govern us will not sacrifice the public interest to “temporary or partial considerations” – but an incremental improvement in the quality of our leaders does not guarantee sufficiently enlightened leadership.<sup>40</sup>

This much is perfectly clear: a dependence on the people is insufficient to ensure a just and stable government. What nevertheless remains ambiguous in the text is the precise nature of the threat that rulers pose to the justice and stability of a republican regime. What are the specific intra-governmental pathologies for which a sophisticated republican theorist must propose adequate remedies?

Madison employs a specific conceptual vocabulary in *The Federalist*, No. 51, and this makes it appear as though he is focused exclusively on the danger of “encroachment” and “usurpation.” It would be understandable to conclude from the conceptual terminology that dominates this essay that it is dedicated solely to the problem of government tyranny. But is a dangerous concentration of power – the result of trans-departmental power grabs – the only issue that exercises Madison’s republican imagination in this essay? Are encroachment and usurpation the only threats to a just and stable regime that a dependence on the people alone cannot diffuse? When Madison writes that a government must be able to control itself, is he concerned only with preserving the right distribution of power among the three great departments? Let me phrase my concern a bit differently: If a government is able to preserve the necessary separation of powers between the legislative, executive and judicial departments, can we safely and confidently conclude that Madison’s design intentions have been fully realized?

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<sup>40</sup> Defense reformers and political theorists both place an inordinate amount of trust in two devices: elections and the threat of impeachment. By the end of the first part of this dissertation it should be clear to the reader that the combined force of these two devices are inadequate to control the violence of faction inside the executive branch. The second part of this dissertation will address the question of what if any constitutional interventions might improve the situation.

These questions are important, I would suggest, because there are various ways to interpret Madison's constitutional theory, and not all interpretations are equally respectful of the complexity of his constitutional system. Does Madison address the problem of faction in *The Federalist*, No. 10, and focus his attention on a completely separate problem – the danger of inter-departmental encroachment – in *The Federalist* No. 51? In the political science literature, this is indeed the conventional interpretation of the nature of the relationship – largely mute – between these two fundamental essays. The former essay teaches us how to control faction, and the latter essay teaches us how to control the individual departments of government once the federal government has been granted the power necessary to thwart the inevitable factiousness of the people. Robert Dahl is a widely respected political scientist who employs this division of labor.<sup>41</sup> Dahl claims that Madison was concerned with two fundamental threats to republican government: the threat of leadership and the threat of factionalism. The challenge that leadership poses to a constitutional theorist is relatively straightforward. Since no electoral system can effectively weed out all men of “factious tempers,” “local prejudices,” or “sinister designs,” we need an effective system of separation of powers – not a pure separation of powers – in order to impose restraints on those who hold power. The danger here is the encroaching nature of power. Once parchment barriers are reinforced by constitutional checks and balances – once parchment barriers are defensible in practice – the problem of encroaching power – of leadership – is solved. If the departments cannot encroach upon each other, these scholars conclude, the people are safe from government. The problem of faction – isolated from the problem of leadership – is now reduced to the problem of majority faction, since minority factions are defeated by the republican

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<sup>41</sup> What follows is a sample list of major scholars who belong to an interpretive school of thought I call usurpers – theorists who subscribe to the view that Madison was concerned solely with the inter-department usurpation of power in *The Federalist*, No. 51, and that a government can be said to exhibit sufficient self-control if it thwarts the kind of inter-departmental encroachment that leads to usurpation. Robert Dahl, “Republican or Democrat,” *Perspectives on Politics*, Vol. 3. No. 3 (Sept., 2005); George W. Carey, “Separation of Powers and the Madison Model: A Reply to Critics,” *American Political Science Review*, Vol. 72, No. 1 (March 1978); M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998); and Martin Diamond, “Democracy and the Federalist: A Reconsideration of the Framers’ Intent,” *American Political Science Review*, Vol. 53, No. 1 (March 1959).

principle. Majority factions pose a threat to individual rights and the public interest, the logic goes, but a government free from encroachment and usurpation does not. What I want to emphasize with this brief review of Dahl's position is that it is commonplace for political scientists to treat leadership and faction as two separate, largely unrelated challenges.<sup>42</sup> *The Federalist*, No. 51, read in isolation, does provide some evidence for this interpretation, but it is nevertheless inconsistent with Madison's overall constitutional theory.<sup>43</sup> A strict division of labor between these two essays simply does not take into account Madison's concern with the permanent and aggregate interests of the community.

It will be helpful at this point in my argument to analyze *The Federalist* No. 51 in some detail. This essays contains a defense of a set of principles and forms that are fundamental to our understanding of the political theory on which our republic was founded, and therefore provides us with invaluable intellectual resources for thinking about the principles and forms that should be incorporated into the decision-making structures of our national security state (let me remind the reader that the key feature of the reform proposal I will defend in Chapter 8 is a chairman of the JCS with a limited veto over a tightly circumscribed power).

In *The Federalist*, No. 51, Madison, as we know, defends a constitutional system in which power is not merely distributed among its constituent parts, but blended and mixed. Contrary to traditional republican theory, it is not sufficient to define in a written constitution the boundaries of the legislative, executive and judicial departments. Parchment barriers alone will not protect against the "encroaching spirit of power." Rigidly separate and distinct departments, to phrase it somewhat differently, will not

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<sup>42</sup> I suspect that constitutional checks and balances have been characterized as anti-democratic by some political theorists because they are not understood as necessary to both thwart usurpation and control faction. If they are understood only as mechanisms to prevent inter-governmental usurpation, it is easy to understand why they would appear suspicious – unnecessary, extravagant, biased – to scholars with a progressive orientation.

<sup>43</sup> What Lance Banning cautioned students of *The Federalist*, No. 10, applies well to *The Federalist*, No. 51: every part of this essay "must be considered in relationship to every other part and to the essay's total context. Fascination with the essay, proper in itself, too readily encourages a tendency to turn to it or even to a part of it in isolation from the other writings, including other numbers of *The Federalist*, which clarify its central concepts and qualify its place in Madison's thinking." Lance Banning, "The Hamiltonian Madison: A Reconsideration," *The Virginia Magazine of History and Biography*, Vol. 92, No. 1 (1984), p. 15.

prevent the accumulation of the three great powers of government in the same hands. Free government requires, instead, that these powers be “connected and blended” in such a manner that each has a measure of constitutional control over the others. Here is how Madison frames the problem in an early, preliminary discussion of the subject:

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasions of the others. What this security ought to be is the great problem to be solved.<sup>44</sup>

Power, if it is to be exercised in the interests of the people, must be distributed among a government’s constituent parts. In practice, however, a pure separation of powers is inoperable. The danger is as follows: “unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”<sup>45</sup>

The antidote to government tyranny is not merely the construction of impermeable barriers and the enforcement of departmental integrity. The separation of powers principle has to be relaxed in order to reflect, as John Manning, a contemporary legal scholar puts it, “countless context-specific choices about how to assign, structure, divide, blend, and balance federal power.”<sup>46</sup> The only viable

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<sup>44</sup> Madison, *The Federalist*, No. 48, Paragraph 2.

<sup>45</sup> Madison, *The Federalist*, No. 48, Paragraph 1.

<sup>46</sup> John F. Manning, “Separation of Powers as Ordinary Interpretation,” *Harvard Law Review*, Vol. 124, No. 3 (January 2011), p. 9.

security against a gradual concentration of the several powers in the same department, Madison writes, “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” The necessary constitutional means *and* personal motives: federal power is balanced when means and motives work in conjunction and can defend themselves against the means and motives of public officials domiciled in other departments.<sup>47</sup> Good institutional design depends upon the appropriate application of the principle of “supplying by opposite and rival interests, the defect of better motives.” Power must be divided and arranged in such a manner that “private interests” serve as “centinel over the public rights.” To assume other, better motives on the part of either citizens or statesmen would be unrealistic. When it comes to the great mass of power that resides in modern states, “inventions of prudence” – another term for auxiliary mechanisms – serve as our main line of defense against the abuse of power.<sup>48</sup>

If we wish to maintain *in practice* the division of power among the three great departments, the structure of government has to be contrived in a manner so that “its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” To secure and maintain this delicate balance, Madison recommends that each department have “a will of its own.” The way to establish this vital degree of independence, at least to approximate the ideal, is to ensure that members of each department have “as little agency as possible in the appointment of the members of the others,” and that they are “as little dependant as possible on those of the others, for the emoluments annexed to their offices.”<sup>49</sup> These two criteria are necessary but insufficient: we still need additional constitutional defenses against encroachment. This is why, to return to a key formulation, Madison argues that the only way to prevent the concentration of multiple powers in the same

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<sup>47</sup> Or within the *same* department, as I will argue over the course of this dissertation. Recall from the introduction that I propose the introduction of a new power – the power to ensure a reasonable alignment between political ends and military means – and that I argue that this power needs to be intermixed between civil and military leaders in order to promote deliberation and improve the quality of national security crisis decision-making.

<sup>48</sup> Madison, *The Federalist*, No. 51, Paragraph 1.

<sup>49</sup> *Ibid.*

department is to give “to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” This multi-faceted defense of independence is one of the distinguishing features of Madison’s constitutional theory. As Vile puts it, there was now a “new body of constitutional doctrine that justified and expounded the system of separation of powers buttressed and maintained by the checks and balances built into the Constitution.”<sup>50</sup> A degree of independence, I want to emphasize, is essential.<sup>51</sup> “More than any constitutional theorist before or since,” legal theorist Darly J. Levinson comments, “Madison recognized that the central challenge of constitutional design was to convert parchment barriers into politically meaningful constraints on government behavior,” and this would be impossible if each individual department did not have a will of its own.<sup>52</sup>

With the basic arguments in the text now fresh in our minds, let me explain why I am uncomfortable with a strict division of labor between *The Federalist*, Nos. 10 and 51. Here is the logic behind my primary objection: If we embrace a strict division of labor between the two essays, we must logically conclude that factional strife inside government is dangerous only because it is a direct driver of encroachment and usurpation. Madison appears to subscribe to this view when he worries, in an earlier essay, about “a gradual concentration of the several powers in the same department,” and states that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.”<sup>53</sup> Madison’s focus on the threat of despotism in *The Federalist*, No. 51 does indeed suggest a narrow concern with the enforcement of parchment barriers. As I mentioned earlier,

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<sup>50</sup> M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998), p. 176.

<sup>51</sup> In the second part of this dissertation I argue that the fact that military leaders are at present completely dependent on their civilian counterparts in the executive branch has profound consequences for the quality of informal decision-making processes in which they participate as advisors.

<sup>52</sup> Darly J. Levinson, “Parchment and Politics: the Positive Puzzle of Constitutional Commitment,” *Harvard Law Review*, Vol. 124, No. 3 (January 2011), p. 9.

<sup>53</sup> Madison, *The Federalist*, No. 47, Paragraph 3.

readers have ample evidence to conclude that the two essays under discussion do indeed address distinct problems. Ambition must be made to counteract ambition, and the constitutional rights of the place must be aligned with the interests of those expected to defend them, in order to preserve a necessary and delicate separation of powers. This is not, I repeat, an indefensible interpretation of the text. It is, however, significantly flawed, and it suggests a lack of familiarity with Madison's broader expectations for a well-designed republic.

If I may briefly indulge in a metaphor, what comes to mind when I encounter scholars who rely upon this division of labor is trench warfare. Reconnaissance missions and minor skirmishes are routine, and major assaults are launched at least once or twice a generation, generally under new and inexperienced leadership, but the motives of public officials – some queer amalgamation of honor, patriotism, ambition, courage, indifference and greed – combined with row upon row of barbed wire, for as far as the eye can see, enable the great departments of government to defend their positions. I do not mean to suggest that the various departments of governments do not need to be able to defend themselves against attack. Government tyranny – the concentration of the powers of the three great departments of government in the same hands – is certainly a grave threat. But interpreting constitutional checks and balances as structural mechanisms designed exclusively to prevent encroachment and usurpation, I would suggest, only makes sense if inter-department trespass is the only kind of governmental behavior that poses a threat to the peace and security of a republic.

My claim is that constitutional checks and balances are expected to do much more than merely enforce parchment barriers in Madison's constitutional system.<sup>54</sup> In *The Federalist* No. 37, Madison alludes to what else he has in mind:

It is a misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good; and that this spirit is more apt to be diminished than promoted by those occasions which require an unusual exercise of it.<sup>55</sup>

In *The Federalist*, No. 57, he is equally suggestive:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.<sup>56</sup>

Madison, I hope to persuade readers, believed that the right collection of constitutional checks and balances would, in addition to preventing encroachment, greatly improve the quality of lawmaking and statecraft.<sup>57</sup> In the absence of constitutional checks and balances – even if parchment barriers are not breached and individual rights are not under direct attack – factiousness, rather than wisdom and virtue, would dominate the individual departments of government and threaten the public interest. The

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<sup>54</sup> This claim is not unique, though it does represent a minority position in the political theory literature. For a persuasive defense of this enforcement-plus interpretation, see James Ceaser, *Liberal Democracy and Political Science* (Johns Hopkins University Press, 1990).

<sup>55</sup> Madison, *The Federalist*, No. 37, Paragraph 3.

<sup>56</sup> Madison, *The Federalist*, No. 57, Paragraph 3.

<sup>57</sup> Lawmaking *and* statecraft: most students of Madison focus exclusively on how to improve the quality of lawmaking, and assume that deliberation has a very limited contextual application a constitutional system.

emphasis that Madison puts on the moral purposes of a republican regime throughout his contributions to *The Federalist* makes it clear that constitutional checks and balances are expected to play a multi-faceted role in his constitutional system.

“Madison’s political and intellectual life was devoted to guarding against the selfishness of faction,” Joseph Kobylka and Bradley Carter, two contemporary students of Madison’s political thought, remind us. He understood that humans could “act in accordance with interests larger than their own, just as they could behave factiously.” The task Madison therefore took upon himself was not to “devise a theory that explained this ambivalence, but to construct political institutions that check the ignoble and promote the noble.” Kobylka and Carter are certainly correct to emphasize Madison’s deep attachment to the moral purposes of a republican regime. In Madison’s constitutional system, citizens must have sufficient virtue to choose representatives who will govern with at least a modicum of public-spiritedness. But this is not the whole protection against faction. “Madison’s constitutional machine,” as the authors put it, “is complete with primary systems to promote and facilitate the expression of public virtue” – a sophisticated scheme of representation, an extended sphere – “and auxiliaries to prevent the destruction of the virtuous whole should public virtue occasionally wane.”<sup>58</sup> The relative wisdom, patriotism and love of justice of public officials make it less likely they will sacrifice the public good to temporary or partial considerations, but this relative abundance of virtue does not reduce the threat of intra-governmental factiousness to the point at which it need not trouble a constitutional theorist. The focus of *The Federalist*, No. 51 may be on a new and improved doctrine of separation of powers – or, perhaps more accurately, the need to supplement a revised separation of powers doctrine

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<sup>58</sup> Joseph F. Kobylka and Bradley Kent Carter, “The Federalist and the Constitutional Order: Human Nature and Institutional Structure,” *Polity*, Vol. 20, No. 2 (Winter 1987), p. 197.

with constitutional checks and balances – but “its argument clearly points to the ability of the separate branches to stymie factious actions of the others.”<sup>59</sup>

This emphasis on intra-governmental factiousness is a valuable corrective to the encroachment-only bias in the literature.<sup>60</sup> Madison was certainly not the value-free pluralist mid-twentieth century political scientists claimed.<sup>61</sup> But even if we acknowledge the danger of factious rule and abandon a strict division of labor between the problem of faction and the problem of leadership, we have yet to identify the particular nature of the threat posed by factious rulers. If institutional designers prevent any one branch from encroaching on the powers of the other branches – from capturing enough governmental power to launch factional projects unchallenged – has the problem of intra-governmental faction been effectively stymied?

What I want to impress upon readers is this: the individual departments of department, drawing solely upon their own legitimate constitutional power, also pose a factional threat to the welfare of a republic. Let us revisit Madison’s definition of faction:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.<sup>62</sup>

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<sup>59</sup> Ibid., p. 203.

<sup>60</sup> This is what opens up the possibility of a constitutional solution to the ends-means problem that I will elaborate upon in the next chapter.

<sup>61</sup> See Robert Dahl, *Who Governs? Democracy and Power in an American City* (Yale University Press, 1964).

<sup>62</sup> Madison, *The Federalist*, No. 10, Paragraph 2.

The main problem of republican government during the revolutionary era revolved around the absence of mechanisms to give wisdom and steadiness to legislation.<sup>63</sup> Madison was not alone in doubting whether a majority of state legislators could ever be “relied upon to act responsibly on either state or federal issues,” as historian and political scientist Jack Rakove reports.<sup>64</sup> This was a near universal indictment of the performance of state assemblies under the post-independence state constitutions. What distinguished Madison from his reform-minded peers was not his search for an institutional solution to this problem that would preserve the republican character of the regime, but his recognition that the spirit of faction represented a multi-pronged threat to popular government that required a multi-dimensional remedy.

As all students of government know well, public officials are not always responsive to their constituents: they can and do betray the interests of those who elect them (they can also, I should point out, be *too* responsive to their constituents). But this is not the only sense in which a representational system fails to support the ideal of representative government. Unfortunately, the relative virtue of candidates is not always easy to assess over the course of a political campaign. Rhetoric and obfuscation probably win as many elections as clarity and honesty. As a result of this imperfect selection process, the factiousness of seemingly virtuous representatives will have ample opportunity to express itself once candidates enter public office. And even if elections were more effective filters, many issues that lawmakers and statesmen will encounter as decision-makers have no direct precedent (or have illusory precedents, as historians constantly remind us). This presents a real danger. We are all unimaginative and inflexible in some contexts, and open-minded and deliberative in others, and this is why it is terribly unrealistic to expect voters to know ahead of time which combinations of individuals

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<sup>63</sup> I will argue in the second part of this dissertation that the main problem with our national security state revolves around the absence of mechanisms to give wisdom and steadiness to decisions about the consistency of political ends and military means that must always be made in a national security crisis.

<sup>64</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, (Vintage, 1997), p. 40.

and subjects will provoke outbreaks of factiousness. A constitutional theorist concerned with the quality of lawmaking and statecraft must therefore propose auxiliary mechanisms to defend against outbreaks of factionalism while representatives and statesmen are in office and acting within the legal parameters of their department. It is as important to control the passions of public officials as it is to control the passions of the people. As Hamilton puts it, “tempestuous waves of sedition and party rage” can overwhelm the republic at any time.<sup>65</sup> Too much damage can be done in between elections to safely assume that a dependency on the people alone (through elections and the threat of impeachment) is a reliable control on government. Without constitutional checks and balances – even in the absence of inter-departmental encroachment – the individual departments of government would inevitably morph into entities that are unlikely to identify, much less act upon, the permanent and aggregate interests of the community.

How does Madison propose to control intra-department faction, given the inadequacy of the people as a sole line of defense? In *The Federalist*, Nos. 62 and 63, Madison argues that a second legislative body – a branch of the legislature with fewer members, longer terms, and different qualifications for office would create a very different institutional temperament – would be a republic’s most efficacious check against unwise and unjust legislation.<sup>66</sup> But the judgment of the people, in terms of who they regularly choose for representatives, is still too suspect for a single institutional mechanism – bicameralism – to work unaided. To raise the quality of lawmaking to a sufficiently high level, a second mechanism is required: a joint executive-judicial council of revision that possesses a limited veto, or a select committee of legislators tasked with drafting final bills. The logic behind this recommendation is worth emphasizing: multiple auxiliary mechanisms are required as insurance against

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<sup>65</sup> Madison, *The Federalist*, No. 9, Paragraph 1.

<sup>66</sup> The legislative power is divided and shared to improve the quality of lawmaking. Might a small component of executive power be equally partitioned in order to improve the quality of statecraft – of decision-making in a national security crisis?

mixed motives and compromised legislation. Madison, of course, would lose this particular debate at the Constitutional Convention and have to settle for a limited negative in the executive. But Madison's defense of bicameralism still provides us with an excellent example of how auxiliary mechanisms are expected to work in his constitutional system – and why they might be advantageously introduced into the constitution of the executive branch in our national security state.

In *The Federalist* No. 62, Madison argues that a constitutional system requires a relatively “stable institution in the government” and the suppression of the “mischievous effects of a mutable government.” The calamitous effects of erratic, undependable policy cannot be underestimated, and the most deplorable of these, Madison writes, “is that diminution of attachment and reverence which steals into the hearts of people toward a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes” (Paragraph 19). Madison argues that the “nature of the senatorial trust” requires greater “information and stability of character” (Paragraph 3) – that the senate must be a “salutary check on the government” (Paragraph 9) – that two assemblies are less likely to be “seduced by factious leaders into intemperate and pernicious resolutions” (Paragraph 10) – and that senators must be duly acquainted with the “objects and principles of legislation” in order to limit the repeating and amending of laws, which “fill and disgrace our voluminous codes” and stand as “monuments of deficient wisdom” (Paragraph 11). All of the above statements speak to the danger of factional lawmaking – for the need to control the violence of faction – and make it clear that constitutional checks and balances are important not only to protect constitutional borders against incursion. The wisdom and steadiness of legislation – the wisdom and steadiness of government in general – depends on auxiliary mechanisms as well.

In *The Federalist*, No. 63, Madison argues that popular government needs “a select and stable member of government” in order to protect against “unenlightened and variable policy.” It is worth quoting the following central passage at length:

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?<sup>67</sup>

Constitutional checks and balances are necessary to improve the quality of lawmaking and statecraft. In a republic under pressure – and, as we know, it is unusual for our republic not to be under substantial pressure – we cannot safely assume that a unicameral legislature will be in possession of sufficient reason, justice and truth to govern wisely. Put differently, the problem of faction has not been sufficiently addressed by the mere separation of government into three distinct departments. Representatives of the people are only marginally less fallible than the people themselves, and they are at least as vulnerable to self-love. As Epstein writes, “Some men’s love of power – together with the complementary susceptibility of other men to the charms of the ambitious – preserves the danger of oppression by rulers which the popularization of government might seem to have abolished.”<sup>68</sup>

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<sup>67</sup> Madison, *The Federalist*, No. 63, Paragraph 7.

<sup>68</sup> Epstein, *The Political Theory of the Federalist* (Chicago, 1984), p. 127.

Republican government is unique in that it seeks a republican remedy for the adverse consequences of political liberty, but it shares with other forms of government a vulnerability to the adverse consequences of the rulers who indulge their selfishness and ambition, do not realize the extent to which self-love influences their judgment, or grossly underestimate the extent of their fallibility. The people represent a new tyrant, at least potentially, in a republic. But the arrival of this new and somewhat mysterious actor on the political stage does not imply that the old tyrants – rulers who willfully abuse their power or, in the words of political theorist Charles Anderson, those who are unable to distinguish “sound judgment and good sense from fantasy, illusion and foolishness” – have gone into exile.<sup>69</sup>

## Conclusion

I have developed two basic arguments in this chapter. In the first section, I explained how Madison’s theory of faction has been interpreted in two fundamentally different ways, and argued that only a strong theory of faction – based on an expansive definition of faction – is consistent with Madison’s broader constitutional theory. Only a strong theory of faction leads us to appreciate the magnitude and multi-dimensionality of the threat that the violence of faction poses to popular government – and this,

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<sup>69</sup> Charles Anderson, “Pragmatic Liberalism, the Rule of Law, and the Pluralist Regime,” in Stephen Elkin and Karol Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (University of Chicago, 1993). Not all rulers will prove to be willfully tyrannical or unwittingly cruel (although the very nature of politics might embroil politicians in complex decisions that involve a degree of unwitting cruelty). But a strong case can be made, I would suggest, that even with leaders who manage to cultivate an unusual talent for distinguishing between sound and unsound judgments, their shrewdness will probably apply only to a limited range of policy arenas, ones in which they have a wealth of personal experience, as both policymaker and someone affected by the policy-making of others, and does not apply do the entire range of policy issues with which they will grapple. Good judgment, like expertise, I suspect, is not a fungible asset.

as I have mentioned in numerous, perhaps unnecessary asides, has implications for how we should think about decision-making in our national security state.

Why do most scholars interpret *The Federalist*, No. 10 more narrowly than we have in this chapter? Why is a weak theory of faction so well represented in the literature? This is only speculation – and also potentially self-incriminating – but I am tempted to conclude that scholars have let themselves be misled by the specificity of their academic projects. To claim, for example, as political theorist Jennifer Nedelsky does, that Madison’s “single most important statement on representative government” is his assertion that the first object of government is the “protection of different and unequal faculties of acquiring property,” certainly plays to her strengths as a theorist of private property (and she is unquestionably very insightful on this subject), but it also transforms an essay on the various causes and effects of faction into a narrow defense of property rights.<sup>70</sup> Was the basic problem of republican government that of determining the appropriate relations between property and individual rights, as Nedelsky argues, or was it rather, as I would suggest, the rampant “instability, injustice and confusion” in public councils, which encompasses a much wider range of subjects? I do not doubt that property was “a paradigmatic instance of the central problem of republican government,” but the central problem of republican government for Madison was devising a proper cure for the violence of faction *broadly understood*.

If a commercial republic need only to control majority factions animated by unequal distributions of property, institutional designers would be able to focus exclusively on defending a republic against the limited threats predicted by a weak theory of faction. But extending the sphere and implementing a sophisticated scheme of representation are alone insufficient innovations to control the kind of factionalism that is a consequence of our general inability as a species to appreciate the fallibility

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<sup>70</sup> Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madison Framework and its Legacy* (University of Chicago Press, 1994), p. 17.

of our beloved reason. Madison does drift between two theories of faction in one of the essays analyzed in this chapter, but we must keep in mind that his weak theory of faction is problem-specific, whereas his strong theory of faction is more inclusive, more sensitive to a host of problems that threaten the justice and stability of our republic.

The second basic argument I made in this chapter is that constitutional checks and balances are best understood as auxiliary mechanisms designed not merely to prevent encroachment and usurpation but to minimize the violence of faction that emanates from within the individual departments of government. Even in the absence of broached parchment barriers, factionalism poses a severe threat to popular government. Each department, in other words, remains a potential locus for factional projects. Madison was shocked by the character of state assemblymen and the quality of their collective decision-making during the revolutionary era. Representative bodies under individual state constitutions were, to put it mildly, insufficiently dispassionate and disinterested to legislate in the public interest. Neither state governments nor the national government, in other words, could control either the people or themselves. Extending the sphere and adopting a refined system of representation, Madison argued, would go a long way toward controlling majority factions. These same design features would also create a dependence on the people that would act as the first line of defense against a wayward government.<sup>71</sup> But Madison was not convinced that an incremental improvement in the quality of our elected rulers would guarantee a sufficiently enlightened government. Auxiliary mechanisms would be absolutely necessary.

Constitutional checks and balances are incorporated into a separation of powers system partly in order to prevent encroachment and usurpation. But enforcing parchment barriers is not their only function. If we want to remain faithful to Madison's constitutional theory, we must appreciate the

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<sup>71</sup> A dependence on the people is a republic's first line of defense against a wayward government. I argue in the second part of this dissertation that the JCS comprise our last line of defense against the tyranny of misalignment.

extent to which factionalism can undermine the quality of lawmaking and statecraft. Constitutional checks and balances are necessary to control the spirit of faction both inside the government as a whole, as well as within each individual department of government. Encroachment and usurpation are not, in other words, the only inter-governmental threats to the permanent and aggregate interests of the community. The broad challenge Madison grapples with in *The Federalist*, Nos. 10 and 51 is how to minimize the violence of faction in all its forms and manifestations, and at all of its multifarious access points. Madison was deeply concerned with the danger of majorities trampling on the “rules of justice and the rights of the minor party,” and he knew that the concentration of the powers of government in the same hands was the very definition of tyranny, but he also understood that the politics of faction could unfold in a variety of treacherous ways. Only a cocktail of design features – constitutional checks and balances in addition to social checks and balances – can offer relief from the violence of faction and, in the process, help promote the permanent and aggregate interests of the community.



### 3 The Tyranny of Misalignment

*In the same way a man who has not fully mastered a foreign language sometimes fails to express himself correctly, so statesmen often issue orders that defeat the purpose they are meant to serve.*

- Clausewitz

*If the domestic population will not tolerate even a moderately high level of casualties among its own armed forces, but insists on an immediate show of success, this will put any government under pressure to adopt whatever measures promise quick, apparently decisive results, even if they are indiscriminately devastating in the short term, and highly counterproductive in the long run.*

- Raymond Geuss

*Regardless of how superior the military view of a situation may be, the civilian view trumps it. Civilians should get what they ask for, even if it is not what they really want. In other words, civilians have a right to be wrong.*

- Peter Feaver

Let us revisit the basic question this dissertation explores: Is there a constitutional solution for the problem of ensuring a relatively seamless fit between political goals and military means in a national security crisis?

Constitutional solutions do not solve problems so much as they manage and mitigate them. And there are always delicate tradeoffs involved. As Madison wisely cautioned his readers, there are “inconveniences which must be unavoidably blended with all political advantages” and “possible abuses

which must be incident to every power of trust, of which a beneficial use can be made.”<sup>1</sup> No constitutional solution to a particular problem of governance is impervious to human error, manipulation or abuse. No constitutional arrangement is therefore immune to valid criticism. But institutional design, we must remember, deals with probabilities, percentages, balancing acts. With this understanding of constitutional theory in mind – knowing we must proceed cautiously and that even effective constitution solutions are vulnerable to valid criticism – let us reformulate the question posed above. Can the executive branch be constituted in such a manner that political ends and military means are more closely aligned – constituted in such a manner that factionalism inside the executive branch is better controlled – without undermining the political advantages of doing so?

In the last chapter, we reviewed the factional foundation of Madison’s constitutional theory. The forms and principles he defends in *The Federalist* as necessary to control the violence of faction offer us a set of intellectual tools for thinking about the constitution not only of a republic but the individual branches of government within a republic (constitutional theory deals with both the constitution of the whole and the constitution of the individual components of a particular constitutional system). What Madison unfortunately did not explore in his contributions to *The Federalist* – largely because his attention was elsewhere, on the weakness of the central government and the pathologies of state legislatures – is the fact that the spirit of faction, uncontrolled, will dominate national security policymaking as naturally as it does domestic policymaking.<sup>2</sup> Madison may

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<sup>1</sup> James Madison, *The Federalist*, No. 41, Paragraph 4.

<sup>2</sup> The consensus of historians (and the themes and subjects covered in Madison’s letters and essays during this period) makes it clear that Madison was not a student of war or national security. Military historians Allan R. Millett and Peter Maslowski attribute this partly to inexperience: “Of the authors of *The Federalist Papers*, James Madison could claim the least familiarity with military affairs, for, unlike Alexander Hamilton and John Jay, he had known neither the sting of battle nor the tension of international diplomacy during the American Revolution” (Allan R. Millett and Peter Maslowski, *For the Common Defense* (Free Press, 1994), p. 586). Another military historian, Richard Kohn, writes that Madison was not a creature of the war in the same sense as Knox, Pickering, McHenry, Hamilton and Washington, men who experienced the problem of a weak central government and the lack of a professional standing army in the War of Independence and whom Kohn characterizes as spokesman for the national military establishment (Richard Kohn, *Eagle and Sword* (Free Press, 1984), pp. 9-13). We will analyze

have been “alert to the dangers of minority faction, most especially to the possibility that rulers, once independent of the people, could become the most dangerous minority of all,” as Lance Banning points out, but he was very much a part of a tradition in political theory that looks almost exclusively at those groups, individuals and abstract forces with designs on the liberty of individual citizens.<sup>3</sup> Constitutional checks and balances are certainly necessary to prevent domestic tyranny, and we can understand why political theorists have been on a two-and-a-half-millennia crusade to promote the rule of law and protect citizens against the arbitrary exercise of power.<sup>4</sup> But it is important to recognize that a faction with a foothold in government – especially with a foothold in the executive department – can wreak havoc in a republic even if it does not pose a direct threat to individual liberty.<sup>5</sup> Madison may have designed a system that encourages a struggle between the legislative and executive branches for control of foreign policy,<sup>6</sup> but he was understandably unfamiliar with modern warfare – with national security decision-making in a non-insulated state – and did not put in place any constitutional mechanisms to

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Alexander Hamilton’s defense of a strong executive and the particular constitution of our executive department in Chapters 4, 5 and 8, but let me just point out here that, as Lance Banning puts it, it was Hamilton, rather than Madison, who was “committed to the view that firm executive guidance and a sizable professional army were among the necessary means to national greatness” (Lance Banning, “The Madisonian Hamilton: A Reconsideration,” *The Virginia Magazine of History and Biography*, Vol. 92, No. 1 (1984), p. 23).

<sup>3</sup> Lance Banning, p. 15.

<sup>4</sup> As contemporary political theorist Judith Shklar explains, the primary aim of republican theory has been “to secure the political conditions that are necessary for the exercise of personal freedom” (Judith Shklar, *Political Thought and Political Thinkers* (University of Chicago Press, 1998), p. 3.

<sup>5</sup> Both Madison and Hamilton, I would suggest, assumed that national security factions would be controlled by circumstance, and that opportunities for statesmen to launch factional projects or dismantle informal deliberative bodies would be almost non-existent in an insulated state (see Chapter 5 for a discussion of the international political theory of *The Federalist*).

<sup>6</sup> The debate between legislative and executive power has exercised the minds of a number of exceptional scholars. See, for example, Edward S. Corwin, *The President: Office and Powers*, 5th Edition (NYU Press, 1984); Robert A Dahl, *Congress and Foreign Policy* (Norton, 1950); Louis Fisher, *Presidential War Power* (University of Kansas Press, Revised Edition, 2004); and Jeremy D. Rosner, *The New Tug-Of-War: Congress, the Executive Branch, and National Security*, (Carnegie Endowment for International Peace, 1995). As Corwin famously argued, the Constitution created an invitation to struggle for the privilege of directing U.S. foreign policy. The problem with the debate over whether the legislature or executive should have more responsibility in this equation is that no one on the legislative or executive side of the argument seems to be persuaded by the arguments presented by scholars on the other side. Part of the impetus for this dissertation is the belief that the prerogative debate has been exhausted: that compelling arguments exist on both sides, and that neither the pro-legislature or pro-executive camp will ever be victorious.

ensure that the political purposes of statesmen would be aligned with the military means at their disposal.<sup>7</sup>

This inexperience with the realities of war – his innocence, we could say – is why we need to put Madison in conversation with Carl von Clausewitz. Clausewitz was primarily a theorist of war, but he understood the profound influence politics has on matters of war and peace, and he draws our attention to what I argue in this dissertation is one of the great unresolved problems – too often unacknowledged and unaddressed – in republican theory. If a nation is to wage war sensibly – discerningly, judiciously, competently – political ends and military means must be closely aligned. What would prohibit or discourage the alignment of political ends and military means? Clausewitz highlights the significance of the problem – the fundamental importance of adjustment and adaptation – but we need Madison – an updated Madison – to understand why we should *expect* the gap between ends and means to be unnecessarily wide, and how it might be narrowed. What Madison teaches us is that misalignment is best understood as a reflection of the excessive influence of the spirit of faction. If we want to close the gap between political ends and military means, we need to understand which features of Madison’s constitutional system are designed to control faction and, simultaneously, promote the permanent and aggregate interests of the community. What I will argue in this chapter is that we have good reason to believe that a deliberative separation of powers inside the executive branch would offer our nation greater security against the danger of ends-means misalignment than the informal, voluntary mechanisms that presently characterize the executive department.

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<sup>7</sup> As we will see over the course of the next two chapters, the difference between insulated and non-insulated states is crucial for understanding Hamilton’s defense of executive power and the position of the presidency in our constitutional system. He explicitly argues for the importance of a strong, independent, unitary executive in an *insulated* republic.

## The Constitutional Challenge

Can reading Clausewitz save us from future military mistakes? Bruce Fleming, a critic of national security “strategists” who he believes overstate the potential influence of military strategy, began an essay in *Parameters*, a military journal, with this question, and answered it quickly and decisively (if a touch impetuously). “No, though to read the commentators, we’d never know it.” Christopher Bassford, a great admirer of Clausewitz’s strategic insights, felt obliged to respond to Fleming, and did so in a brisk and confident manner (if a bit ornery). Fleming argues that Clausewitz’s great treatise, *On War*, is “so satisfying and ultimately so pointless” because, like the Bible, Virgil’s *Aeneid*, and the works of Shakespeare, it is “so broad in scope, so inclusive, even of contradictions internal to themselves, that [it] can be used to justify almost anything.” Bassford is largely bewildered by Fleming’s position. Does the interpretive malleability of a Shakespeare play mean that contemporary literary critics should limit themselves to studying and promoting the ideas of less sophisticated dramatists? “Fleming’s critique,” he writes, “is not of Clausewitz but of the misuse of Clausewitz’s descriptive, explanatory theory in a prescriptive manner by charlatans and ideologues.”<sup>8</sup>

It is not entirely clear that Fleming’s and Bassford’s views on Clausewitz are incompatible. They clearly differ on a fundamental philosophical question – on whether great theorists generally enlighten future generations or inspire among self-professed disciples a plethora of dangerous misunderstandings – but they both have tremendous respect for Clausewitz as a theorist of war. They disagree not on the degree of wisdom and insight to be found in *On War* but on the capacity of agenda-driven parties to read him with the requisite patience, detachment and intelligence.<sup>9</sup> Political theorists, I would suggest,

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<sup>8</sup> Bruce Fleming, “Can Reading Clausewitz Save Us from Future Mistakes?” *Parameters* (Spring 2004); Christopher Bassford, “Letter to the Editor,” *Parameters* (Summer 2004).

<sup>9</sup> The problem, as we know, is fairly universal. As Peter Paret, a widely praised biographer, translator and interpreter of Clausewitz puts it: “Every theory that outlasts its creator tends to be interpreted unhistorically,

are fairly well equipped to engage professionally with Clausewitz, even though very few of us have chosen to do so. We are “trained” not to look for definitive interpretations of a text or an historical event but to juxtapose various interpretations and to try to make sense of the tension – points of friction, we could say – between them. Having immersed myself in the literature by and on Clausewitz, there indeed appear to be in circulation almost as many versions of this Prussian thinker as there are interpretations of Plato, Machiavelli and Madison (not to mention Nietzsche, perhaps the most projection-friendly secular thinker in history). There are certainly distinct schools of thought out there, schools with seemingly little tolerance for each other, and their respective claims to intellectual integrity remind me of the age-old dispute between philosophers and sophists – “sophists” being the derogatory term one school of philosophers deploys in an attempt to delegitimize members of a competing school.<sup>10</sup>

As readers of *On War*, political theorists have one clear, indisputable advantage over the competition (along with all of the obvious and perhaps not so obvious disadvantages, which range from inexperience on the battlefield to over-confidence as analysts of contemporary politics). Unlike military strategists, who have to master the entire text in order to properly interpret arguments about particular aspects of warfare, we can get away with a single reading of the book and concentrate our energies on a

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according to the constantly changing concerns of later days.” Clausewitz’s writings, he adds, “have suffered the attendant distortions more than most” (Peter Paret, *Clausewitz and the State* (Princeton University Press, 1985), p. 8).

<sup>10</sup> Among the noted admirers of Clausewitz worth consulting: Raymond Aron, *Clausewitz: Philosopher of War* (Simon & Schuster, 1986); W. B. Gallie, *Philosophers of War and Peace: Kant, Clausewitz, Marx, Engels and Tolstoy* (Cambridge University Press, 1979); Michael Howard, *Clausewitz* (Oxford University Press, 1983); Peter Paret, *Clausewitz and the State* (Princeton University Press, 1985); Christopher Bassford, *Clausewitz in English* (Oxford University Press, 1994); Andreas Herberg-Rothe, *Clausewitz’s Puzzle* (Oxford University Press, 2007); Hew Strachan and Andreas Herberg-Rothe, eds., *Clausewitz in the Twenty-First Century* (Oxford, 2007); Jon Tetsuro Sumida, *Decoding Clausewitz* (University of Kansas, Reprint Edition, 2001). Among the noted critics: Liddell Hart, *Strategy* (Meridian Books, Second Revised Edition, 1991); Martin van Creveld, *The Transformation of War: The Most Radical Reinterpretation of Armed Conflict since Clausewitz* (Free Press, 1991); John Keegan, *A History of Warfare* (Vintage, 1991).

careful, close study of the political issues raised in Book I and Book VIII, Chapter 6.<sup>11</sup> What political theorists find most interesting about Clausewitz – at least political theorists who are interested in defense reform and the constitution of the executive branch – is his discussion of the critical importance of aligning political purposes and military means. This subject is of course very familiar to students of Clausewitz, and some readers may feel somewhat let down by its evocation. But political theory, I hope to demonstrate, offers a unique perspective on this subject. What kind of institutional dynamics within the executive branch would improve the likelihood that the inevitable gap between political purposes and military means is not excessively wide? Clausewitz teaches us that the *politics* of national security, rather than the caliber of a national army or its internal organization, has the greatest influence on whether a particular military intervention is a success or failure, and it is this suggestion – that the problem of harmonizing political purposes and military means is a *political* problem, and therefore might also be a *constitutional* problem – that resonates so deeply with this particular political theorist.<sup>12</sup> How might the intellectual tools of constitutional theory be brought to bear on the problem of aligning political goals and military means?<sup>13</sup> What would constitutional theory recommend in terms of how to increase the likelihood that ends and means will be adequately aligned and, as a direct result, military force employed more wisely and effectively?

Clausewitz is famous for, among other things, his discussions of total and limited war; the sources and effects of friction; the importance of leadership; the role chance and probability; the difference between moral and material factors in combat; the relative advantage of defense; and the

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<sup>11</sup> Again, to quote from a scholar considered an authority on the subject: In Clausewitz's eyes, "the opening chapter was the best introduction to his book, and thus it is also the best imaginable guide to his entire theoretical work" (Peter Paret, *Clausewitz and the State* (Princeton University Press, 1985), p. 382).

<sup>12</sup> There is a lively debate in the literature about the translation of policy / politics from the German, the later choice – politics – encompassing a greater variety of forces and having a more deterministic impact on war.

<sup>13</sup> International relations theorists were for a long time dismissive of the influence of domestic politics on matters of war and peace. This has changed over the last decade or so, but the sub-field in political science still generally ignores the influence of domestic institutional design (focusing more narrowly on regime type and the social forces active within these basic regimes).

relationship between political ends and military means. Despite such dramatic, revolutionary changes in war and military technology over the last two centuries, his value to students of war has not diminished. How do we explain the endurance of his ideas and methods? Clausewitz remains extremely relevant today, I would suggest, largely because of his appreciation for the *limits* of theory.<sup>14</sup> All theories of war, Clausewitz writes in *On War*, are based on abstract ideas and principles, and the logic of abstraction often leads theorists into a world of extremes and absolutes that has little relationship with reality. The danger of abstract thinking is that, though a poor guide for navigating the idiosyncratic, context-specific nature of the real world, it has a profound impact on how we understand and interpret our external environments. Theory thus presents us with an acute challenge: we need theory, and yet we cannot afford to lose track of its severe limitations. We must therefore proceed with extreme caution. When we navigate the transition from the abstract to the real world, we must never forget that practice rarely if ever conforms to the precision and clarity of theory.

In the particular case of war, reality would conform to the “logical subtleties” of a theorist only if three conditions were met. First, war would have to be a “wholly isolated act, occurring suddenly and not produced by previous events in the political world.” Second, it would have to consist of “a single decisive act or a set of simultaneous ones.” Finally, the result achieved would have to be “complete and perfect in itself, uninfluenced by any previous estimate of the political situation it would bring about.”<sup>15</sup> What makes the fulfillment of these prerequisites so unlikely? The answer is as humbling for a theorist of war as it is simple: politics. War is not just a craft, but a great socio-political activity: the reason nations and communities go to war “always lies in some political situation, and the occasion is always

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<sup>14</sup> It is easy to imagine Madison and Clausewitz having a spirited and productive conversation about war and constitutional theory in part because they share a deep appreciation for the limits of theory and a skeptical attitude toward untested ideas and abstractions.

<sup>15</sup> Carl von Clausewitz, *On War*, trans. by Peter Paret (Princeton University Press, 1984), Book I, Chapter 1.6.

due to some political object.”<sup>16</sup> Politics is ultimately what humbles theorists of war – what *should* humble theorists of war – and it is what leads Clausewitz to insist that if war is to be a sensible endeavor, it must be understood as an instrument of policy.

At this point in the discussion, political theorists are likely to nod their heads contentedly. Who other than an over-confident prince or a victory-obsessed general would think that the violence of war was something other than an instrument of policy? But the mere fact that most political theorists would quietly applaud Clausewitz for insisting on the political nature of war, I am afraid, does not let contemporary political theorists off the hook. War is “something pointless and devoid of sense,” Clausewitz writes, unless the logic of war is determined not by its own unique logic but by the “political aim” for which military force has been deployed. The relationship here appears to be fairly transparent. War makes sense only when the inevitable death and destruction caused by violent means advances the political aim for which a particular war is fought. And the initiation of war, he insists, does not alter this basic premise. If at some point an ongoing war develops its own unique logic, it loses its purpose and descends into the realm of senseless violence. Now, as important as it may be to clarify the relationship between war and politics, how do we move from the realm of theoretical thinking to the kind of real-world competence that ensures our nation’s wars are in fact meaningful, sensible endeavors from start to finish? “If war is part of policy,” Clausewitz writes, “policy will determine its character.”<sup>17</sup> Policy, it is clear, must dictate the character and parameters of a war. But merely philosophizing about the importance of the relationship does not guarantee its centrality in the political process. How are we to ensure that political ends and military means are in a constructive dialogue before the initiation of a military engagement?<sup>18</sup> This is the question that political theorists have unwittingly ceded to military

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<sup>16</sup> Clausewitz, Book I, Chapter 1.23.

<sup>17</sup> Clausewitz, Book VIII, Chapter 6.B.

<sup>18</sup> Before, during and after, would be ideal. But the former, I would argue – ensuring they are aligned before the commencement of a military engagement – is the most important, since we have greater leverage over outcomes

strategists, defense intellectuals, and students of international relations. Is political theory as an academic discipline justified in withdrawing from this critical terrain? Has the problem of harmonizing political ends and military means already been addressed satisfactorily? Has constitutional theory contributed all that it can to this dilemma?

At the time Clausewitz was writing and soldiering, it was not obvious to most politicians, soldiers or theorists of war that the logic of war should never be allowed to diverge from the political logic that endorsed the use of force in the first place. The absence of clarity on this relationship was a major target of Clausewitz's intellectual efforts. War is an "act of policy" because the rationale for war between civilized peoples "always lies in some political situation and the occasion is always due to some political object." Most of his contemporaries believed that "war would of its own independent will usurp the place of policy the moment policy had brought it into being," and that it would thereafter "rule by the laws of its own nature."<sup>19</sup> Many of his contemporaries argued that this metamorphosis was not only inevitable but as it should be.<sup>20</sup> Clausewitz recognizes that war does indeed unfold unpredictably, but he insists that it nevertheless remains to a large extent comprehensible and controllable and therefore subject to the action of a "superior intelligence." We must keep in mind that war "springs from some political purpose," and that it is "natural that the prime cause of its existence will remain the supreme consideration in conducting it."<sup>21</sup>

When a war is being planned and later fought, should the political point of view at any point give way to the purely military point of view, or should the political point of view "remain dominant and

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and consequences before an event begins than once it takes on a life of its own. The politics of war, I think most military historian would agree, not only gets more complicated as a war unfolds, but reversing course and compensating for mistakes and misjudgments becomes increasingly difficult.

<sup>19</sup> Clausewitz, Book I, Chapter 1:23.

<sup>20</sup> Peter Paret covers Clausewitz's debates with other contemporaneous theorists of war at length, and his study of Clausewitz is widely acknowledged to be the touchstone in the field. See Peter Paret, *Clausewitz and the State* (Princeton University Press, 1985). Michael Howard includes a chapter on the legacy of Clausewitz in his study. See Michael Howard, *Clausewitz* (Oxford University Press, 1983)

<sup>21</sup> Clausewitz, Book, I, Chapter 1:23.

the military be subordinated to it?” Clausewitz, as we know, argues that it is logically incoherent as well as potentially self-destructive to subordinate the political view to the military. “Policy is the guiding intelligence and war only the instrument,” he insists. “No other possibility exists, then, than to subordinate the military point of view to the political.”<sup>22</sup> This is the point of view on the relationship between war and politics that we have inherited from Clausewitz and now defend rather nonchalantly. Most students of national security assume we have already answered persuasively what was *once* a serious constitutional problem. The president is our commander-in-chief, and he sits firmly and unequivocally atop the military chain-of-command. As a result of this vertical arrangement, the political view is guaranteed to dominate in the political-military relationship. But scholars content with this basic structure, I would argue, have missed one of the most important aspects of Clausewitz’s analysis. Can we safely assume that Clausewitz’s “political point of view” is synonymous with the political point of view of any particular group of civilian leaders? Although many contemporary politicians certainly have political gifts, this does not mean these politicians have an understanding of what constitutes the political point of view or how to adapt a political point of view to military realities. Why should we assume that, in a national security crisis, when external threats or actions raise the possibility of a military intervention, our politicians will adopt a strictly “political point of view,” our soldiers a strictly “military point of view,” and that by entrusting all decision-making power to civilians in the civil-military decision making process, we ensure the sensible use of violence?

Two profound *constitutional* problems arise as soon as we try to translate Clausewitz’s theoretical injunction regarding political ends and military means into practice. Not only is it foolish to assume that politicians will naturally recognize the “political point of view” when it comes to matters of war and peace, but it is equally misguided to assume that we have institutions in place that address the problem of closely aligning political aims and military means. The long-held assumption that absolute

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<sup>22</sup> Clausewitz, *On War*, Book VIII, Chapter 6B.

civilian control of the military solves the ends-means problem – that as long as generals are fully subordinate to their civilian counterparts, all will be well – is as “primitive” as the revolutionary-era assumptions that majority rule is the antidote to government tyranny, that representatives of the people will faithfully represent their constituencies, that parchment barriers alone can control the encroaching nature of power, and that a republic can thrive with a weak executive department. We certainly want the military component to be subordinate to the political component in matters of war and peace. At the same time, however, we do not want the military to jettison its hard-earned experience and expertise when there are disagreements about the wisdom and efficacy of the use of force. Hence the question we must ask ourselves is profoundly and unambiguously constitutional. How do we ensure that factions within the executive branch – be they comprised of civilians or soldiers – are strongly discouraged from initiating a war in which political purposes and military force are dangerously misaligned? This is a profoundly constitutional problem because it directs us to precisely the kind of fundamental question – how best to combine constitutional means and personal motives in the various departments of government – that exercised the founding fathers.

Clausewitz was not at all naïve about the politics of national security. He knew that the policy that ultimately emerges from a decision-making process “can err, subserve the ambitions, private interests, and vanity of those in power.”<sup>23</sup> As a military officer, he had firsthand experience with the compulsiveness and irrationality of political leaders. But he was a theorist of war, not a theorist of politics, and he consciously limited the scope of his study. He chose to largely ignore the aforementioned obstacles and inconveniences because he wanted to set aside the political aspects of policy formation and concentrate on the operational side of war (in particular, on supreme command). Despite the frequency with which he expected governments to botch crucial decisions on war and peace – to misjudge the consistency of political ends and military means – he nevertheless proceeded in his

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<sup>23</sup> Clausewitz, Book VIII, Chapter 6B.

theorizing on the assumption that civilian leaders, however misinformed, however incompetent, however distracted by the politics of national security, were at least more likely than the passionate, ill-informed masses to discern the true interests of a state.

Unlike Clausewitz, those of us concerned with the quality of contemporary national security decision-making must think very seriously about the fallibility, ambition, vanity and self-love of both our civilian and military leaders – must, in other words, think very seriously about the influence of national security factions. Does it still make sense to defend unwaveringly the principle of absolute civilian control of the military? Is Peter Feaver correct when he argues not only that civilians have a right to be wrong but that this right should be unqualified in matters of national security? General William Y. Smith, a participant in the debates that led to the Goldwater-Nichols Act of 1986, explains that the military chain of command “must execute orders from above and issue guidance and orders to subordinates.”<sup>24</sup> This is the part of the equation that leads defense reformers to focus on centralizing the organization of the military and fine-tuning the hierarchical relationship between civilians and soldiers inside the executive branch. But to function properly, he adds, “advice and recommendations” must also move up the chain of command. The chain of command, we can safely conclude, though strictly hierarchical, cannot function properly unless it is a two-way conduit in the decision-making process. We seem to have reached an impasse. How can the chain of command be both unflinchingly vertical and an effective two-way conduit? Laurence Korb, a defense reformer and student of national security, reminds us of the ideal relationship between soldiers and statesmen within the executive branch: the department of defense, he writes, “must be organized and operated to ensure civilian control while not undermining or diluting military professionalism.” This means that, on the one hand, “civilian control must not be exercised in such a manner that military opinions and expertise are

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<sup>24</sup> William Y. Smith, “The U.S. Military Chain of Command – Present and Future,” in Robert J. Art, Vincent Davis and Samuel Huntington, *Reorganizing America’s Defense* (Pergamon-Brassey’s, 1985), p. 293. This round of defense reform debates culminated in the Goldwater-Nichols Act of 1986, which we will cover in detail in Chapter 8.

excluded from or downgraded within the decisionmaking process,” and that, on the other hand, “military considerations cannot be allowed to dominate the process.” This, of course, is the *ideal* of civilian-military relations. “Maintaining a proper balance or equilibrium in this area,” Korb humbly concludes, “has been and will be both a delicate and challenging task.”<sup>25</sup> An exquisitely challenging task – insurmountable, I would argue – if we refuse to engage with the intellectual tools – the principles and forms – upon which our republic was founded. It is, after all, precisely the creation and maintenance of delicate balances and equilibriums that is the unique and distinguished provenance of constitutional theory.

### **An Institutional Conception of the Public Interest**

In the previous chapter I argued that a strong theory of faction undergirds Madison’s constitutional theory, and that fundamental governing structures in a republic need to be designed with a strong theory of faction in mind for a very simple reason: when fallible opinions and passionate natures are invited into the political process, as they are in our republic, individual rights and the public interest are perpetually under threat. If a republic is to survive and flourish, Madison was convinced, the violence of faction must be broken and controlled. Only when social checks and balances are combined with constitutional checks and balances can we be reasonably confident that the potential damage to our republic caused by factious legislators and statesmen will be contained (or, in the best-case scenario, overcome by the virtue and public spiritedness of other citizens, legislators and statesmen). Only a cocktail of design features, I argued, provides adequate relief for the violence of faction.

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<sup>25</sup> Lawrence Korb, *The Joint Chiefs of Staff* (Indiana University Press, 1976), p. 223. These issues will be covered in depth in Part II of this dissertation, especially in Chapters 6 and 7.

In the last chapter I also focused attention on the second part of the basic twofold challenge of self-government: a government with sufficient power to control the people will not itself be easy to control. This problem – the untethered nature of government power in the absence of effective constitutional checks and balances – will exercise us for the rest of this chapter. Madison understood that public officials had to be granted an almost un-republican degree of independence from the people in order to partially insulate decision-makers from the very opinions and passions that self-government proudly (if a bit warily) invites into the political process. The burden on institutional designers would of course be significantly lighter if the men and women elected to public office possessed exceptionally sharp analytical skills and borderline angelic temperaments – if the “cool and deliberative sense of the community” prevailed unaided, based on our electoral judgments alone – but, as we know, representatives “of factious tempers, of local prejudice, or of sinister design, may, by intrigue, by coercion, or by other means, first obtain the suffrage, and then betray the interests, of the people.”<sup>26</sup> It is because the people will not always choose their representatives wisely that constitutional checks and balances must be introduced into a separation of powers system. Without auxiliary mechanisms – without internal devices that limit the power of our leaders to pursue factional projects – our fallible representatives would possess outright, or be able to usurp with relative ease, sufficient power to violate our rights and undermine the health and stability of our regime. The primary control on a government in a republican system may be the people, but in the absence of auxiliary mechanisms, factiousness will dominate the interactions between the individual departments of government as well as within each department. As I explained in the previous chapter, parchment barriers need not be breached for factional projects to be launched.

The violence of faction? Are not the distinctions between factions and non-factions, and between factious individuals and non-factious individuals, being asked to do an excessive amount of

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<sup>26</sup> Madison, *The Federalist*, No. 10, Paragraph 16.

work in this analysis? If we cannot make a clear distinction between factious groups and non-factious groups, or between political actors who suppress their factiousness in deference to the public interest and those who claim allegiance to the public interest merely for rhetorical purposes or out of ignorance, do we gain any intellectual leverage on the nature of the internal dangers against which a republic must be adequately defended? Let me approach this problem from a slightly different perspective. If Madison's theory of faction depends on the ability of constitutional checks and balances both to control faction and to provide avenues for non-factious groups to pursue the public interest, does the ambiguity of these fundamental concepts undermine the value of Madison's constitutional theory? This line of inquiry is particularly relevant to this dissertation because if we have exhausted the descriptive power of these central concepts, it would make little sense to base an analysis of the structures of the national security state on Madison's strong theory of faction.

If a faction is merely a group that promotes a set of policies that is at odds with the ideologically-driven preferences of another group – if “faction” is merely a political weapon and the “public interest” merely a rhetorical device – then a contemporary student of the national security state would have little to gain by engaging with the political theory upon which our republic was founded. Madison does offer us an expansive definition of faction, but it is too abstract, I would suggest, to help us distinguish clearly between factional and non-factional groups and projects. And this ambiguity presents us with a seemingly irresolvable problem: How can we compare the structures of two different republics – or compare two sets of institutional designs for the same department in a single republic – if we cannot identify with precision what a well-designed republic must control in order to survive, and what it must promote in order to flourish?

To help us get traction on this issue, let us briefly return to Madison's expansive definition of faction:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.<sup>27</sup>

This definition of faction invites us to think about faction as a disruptive political force that need not be based on self-interest alone. Factions can rally around principles as easily as interests, and rational ideas as easily as irrational ones. Fallibility and self-love can combine to create a political force as deleterious to the health and stability of a republic as the unequal distribution of property. Madison offers us an expansive definition of faction – a definition, as I argued in the previous chapter, which forms the foundation for his strong theory of faction – but, as I mentioned, it is nevertheless frustratingly imprecise. Part of the problem here is that Madison thought the difference between groups united by a spirit of faction and groups united by public-spiritedness would be fairly obvious to well-educated citizens and experienced legislators. He did not feel compelled to delve directly into the metaphysics of truth or express an explicit epistemological position in his writings, and this abstemiousness has disappointed many contemporary scholars. Madison may have insisted that “the public good, the real welfare of the great body of the people, is the sole object to be pursued,” and that “no form of government whatever has any other value than as it may be fitted to the attainment of this object,” but we are not as enamored with the principles of the Enlightenment as he was, and are under significantly more pressure to align our arguments with the more rigorous standards of twenty-first-century social science.<sup>28</sup> Madison may have drawn a stark contrast between the disreputable pursuit of narrow factional interests and the enlightened pursuit of broad public interests, but, as Robert Goodwin remarks, he and his fellow founders “gestured at many meanings” of the common good, some of which

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<sup>27</sup> Madison, *The Federalist*, No. 10, Paragraph 2.

<sup>28</sup> Madison, *The Federalist*, No. 45, Paragraph 2.

are “subtly different from one another,” others of which are “blatantly in conflict, all of which were largely unnoticed by these writers themselves.”<sup>29</sup>

The interests of factions and the public interest, though clearly antagonistic, appear to be mere theoretical evasions, crutches. We know by definition that factions are hostile to the permanent and aggregate interests of the community, but are they identifiable by objective standards?<sup>30</sup> Factiousness may be a crime of sorts – a crime of passion, we could say – but can we conclude without a reasonable doubt that this or that group has committed a bookable offense?

At this point in the discussion, let me turn to Stephen Elkin, a political scientist and constitutional theorist who has demonstrated in his work an admirable respect for the various and interrelated components of Madison’s constitutional system. Elkin is sensitive to the fact that Madison abstained from a discussion of the precise content of the public interest. Contrary to scholars who believe this omission points to a major flaw in Madison’s constitutional theory, however, he understands it as a distinct strength. “To attempt to spell out the public interest in detail would not only

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<sup>29</sup> Robert E. Goodin, “Institutionalizing the Public Interest: The Defense of Deadlock and Beyond,” *American Political Science Review*, Vol. 90, No. 2 (June 1966), p. 332-333. Goodwin partly attributes this to the philosophical culture of the time: “Like virtually all political writers of the period, the Founders tended to employ the phrase ‘public interest’ with relatively little reflection.”

<sup>30</sup> After spirited debates on the subject in the 1960s, William Galston reports in a recent essay, the concept of the public interest had received a very public burial. Prior to its latest revival at the turn of the century, the concept was widely dismissed as being “so vague, so contested, and so mired in subjectivity and partisanship as to admit of no objective and meaningful specification” (William Galston, “An old debate renewed: the politics of the public interest,” *Daedalus*, Vol. 136, No. 4 (Fall 2007), p. 11). Edwin Haefele tries to gain traction on the public interest through a discussion of civic virtue. A citizen who possess civic virtue cares about “public purposes and public destinations.” This detour allows him to conclude that “concerns about the long-term good of the polity are concerns rooted in civic virtue.” But how do we distinguish between those who “possess empathy and strive for creative resolutions of public problems” from mere political activists who seek “specific outcomes”? (Edwin T. Haefele, “What Constitutes the American Republic?” in Karol Soltan and Stephen Elkin, eds., *The Constitution of Good Societies* (Pennsylvania State University, 1996), pp. 211, 222). Walter Lacquer, another student of politics who wrestled with the concept of the public interest, has been credited with formulating a compelling definition, but it is admired, I would suggest, only because it is forgivingly abstract. “The public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently” (Walter Lacquer, *Essays in the Public Philosophy* (Little Brown, 1955), p. 42).

be impossible, because impossibly complex, but also unwise.”<sup>31</sup> Elkin argues that the “broad dimensions” of the public interest are suggested by Madison’s arguments in *The Federalist* and elsewhere, and that these include securing individual rights, fostering a commercial society, developing a vibrant civil society, and promoting a degree of economic equality.<sup>32</sup> Elkin, of course, has his critics – he has been accused of projecting onto Madison his own particular vision of a good liberal society – but we need not visit these arguments here, as they focus on issues that would lead us too far away from our focus on national security.<sup>33</sup> What is relevant to this dissertation is his claim that we should set aside our fixation on the specific content of the public interest and focus on the extent to which “the substance of the public interest is institutional.” Elkin’s characterization of the strengths of an institutional conception of the public interest is worth quoting at length:

An institutional conception of the public interest has impressive advantages. For a start, it is broad enough to be applicable to changing circumstances. Whatever else the public interest is, it must provide direction across largely unknown circumstances, possibilities for action, and political conflicts. By contrast, a conception of the public interest made up of policy goals quickly outlives its usefulness; it provides little guidance once the particular world for which it was designed passes away, as it must. A focus on institutions, on modes of association designed to enable members of a community to cope intelligently with political unknowns, is more promising.<sup>34</sup>

An institutional conception of the public interest is not only consistent with Madison’s constitutional theory, I would suggest – with his preoccupation with principles and forms – but it also saves students of

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<sup>31</sup> Stephen L. Elkin, *Reconstructing the Commercial Republic: Constitutional Design after Madison* (University of Chicago Press, 2006), p. 30.

<sup>32</sup> For another student of Madison who concurs with this broad sketch of the public interest, see Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Cornell University Press, 1995).

<sup>33</sup> See, for example, Alan Gibson, “Property vs. Democracy,” *Claremont Review of Books*, Vol. 8, No. 2 (Spring 2008).

<sup>34</sup> Elkin, p. 130.

government from mistaking their particular policy preferences for the public interest. An institutional conception of the public interest – as well as an institutional conception of the national interest, as I will argue shortly – focuses on the long-term capabilities of a constitutional system and is “broad enough to be applicable to changing circumstances and political unknowns.” The public interest – and its mortal enemy, factionalism – now appear to us in a different light. If a lawmaker is committed to defending the “constitutive institutions in a regime” – the institutions that give a regime its “characteristic manner of working” – we can say she is promoting the public interest, irrespective of her position on any particular policy issue. To serve the public interest means first and foremost to safeguard the political institutions in a republic that are deliberative in form and designed to control faction.

Now, if differentiating between factiousness and non-factiousness – between two incompatible conceptions of the public interest – were as hopelessly subjective as differentiating between exceptional and unexceptional works of art, we would be at a loss to identify precisely what a popular government must be able to control, and what it must be able to promote, in order to govern competently and retain the allegiance of the people. But just as an institutional conception of the public interest rescues us from the almost unavoidable danger of conflating our policy goals with the public interest, an institutional conception of faction helps us to recognize and overcome our deep-seated “aesthetic” prejudices. A group that attempts to “weaken or eliminate the devices needed to prevent faction,” or to “make deliberative lawmaking significantly harder,” reveals through its hostility to necessary republican devices its factional orientation.<sup>35</sup> Deliberation is the lynchpin in this analysis: a republic properly structured – one in which each branch of government has the constitutional means to demand

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<sup>35</sup> Elkin, p. 137.

persuasive arguments from the other branches – forces lawmakers and statesmen who might otherwise be inclined to lecture or bully their colleagues to publically defend their positions.<sup>36</sup>

Constitutional checks and balances, recall, serve a twofold function. First, they provide members of each of the three departments of government with the means and motives to defend their constitutional authority against inter-departmental incursions. Second, and no less important, they improve the quality of lawmaking and statecraft by mandating a degree of cooperation between public officials in different departments. In Madison’s constitutional system, the powers of the three branches of government are shared, rather than strictly separated. If we had a pure system of separation of powers – if the legislative, executive and judicial powers were completely isolated and impermeable – not only would the likelihood of inter-departmental encroachment and usurpation increase, but a creative intermingling of ideas and ambitions would be precluded. But how do constitutional checks and balances actually work? How do shared powers control factiousness and improve the quality of lawmaking and statecraft? How do auxiliary mechanisms increase the odds that public officials will actually deliberate constructively? How do auxiliary mechanisms increase the odds that public officials will not circumvent or disable whatever deliberative processes get in their way?

The danger in any assembly of men – and not merely a large legislative assembly – is that its members will “yield to the impulse of sudden and violent passions,” and “be seduced by factious leaders into intemperate and pernicious resolutions.”<sup>37</sup> When intemperance and perniciousness characterize the actions of a single body in a bicameral legislature, or in a single branch of government in a tripartite regime, constitutional checks and balances are designed to play a preventive role. Whether individual rights or the permanent and aggregate interests of the community are at risk, laws and resolutions that make a mockery of the ideals of dispassionateness and disinterestedness need to be suppressed.

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<sup>36</sup> As we will see in the second part of this dissertation, civilian leaders inclined to lecture and bully their military subordinates are largely free to do so, given the present constitution of the executive department.

<sup>37</sup> Madison, *The Federalist*, No. 62, Paragraph 10.

Bicameralism, judicial review and an executive veto are three constitutional checks and balances endowed with the requisite counterforce to halt such projects in their tracks. In this context, the quality of lawmaking and statecraft is improved only in the sense that the progress of the most noxious kinds of enterprises is inhibited. But constitutional checks and balances are not merely a set of restraints. Only when public officials prove unwilling or incapable of disinterestedness and dispassionateness in their official duties are checks and balances actually tripped. In a well-designed republic, constitutional checks and balances often lay dormant not because the spirit of faction has been exorcised from government but because of what we could call a kind of scarecrow effect. Constitutional checks and balances can discourage factionalism by their mere presence alone. Bicameralism, for example, encourages members of the two legislative bodies to work toward accommodation before they submit their respective bills because of the necessity of the concurrence of the two bodies in the final passage of any law or resolution. The threat of a presidential veto also promotes a similar kind of strategic adjustment.

In addition to obstructionism and the threat of obstructionism, there is a third way in which constitutional checks and balances are expected to improve the quality of lawmaking and statecraft. Constitutional checks and balance force lawmakers and statesmen to *deliberate*. Skepticism on this subject – on the ability of, and frequency with which, elected officials actually deliberate – is of course widespread. If spouses, university colleagues and business partners often struggle to deliberate constructively, why should we expect our representatives – men and women who tend to be more ambitious and ideological than the norm – to exercise faculties that few of us seem to possess in abundance? Daniel Epstein captures our reservations well: “While a certain ‘structure’ of government may make government unlikely to be tyrannical, it is harder to see how a structure can cause government to be ‘good’ in intelligently securing the public safety and encouraging national prosperity.”

Is it not more reasonable to assume that “the quality of the government will depend on the quality of those who hold its powers”?<sup>38</sup>

David Epstein, invoking Madison, rejects this assumption, and argues that, in our constitutional system, government is expected to serve the public good as well as refrain from the public ill. Elkin concurs: “The existence of permanent and aggregate interests of the community suggests that the problem of representative government for Madison was not only to prevent something from happening, but also to secure or promote whatever these permanent and aggregate interests might be.”<sup>39</sup> It is not enough, in other words, for government to exercise its powers in a strictly preventive manner, in defense of individual rights. Security from internal and external threats, and the generation of national wealth through the regulation of commerce are among the public goods a competent government is expected to provide.<sup>40</sup> Constitutional checks and balances are grafted onto a separation of powers system not only to prevent tyranny but to encourage the kind of inter-departmental cooperation that promotes the public interest (and that would not occur with sufficient regularity without them). “The same constitution of the regime that would prevent faction,” Elkin reminds us, “would also create the active government necessary for securing rights and for securing the permanent and aggregate interests of the community.”<sup>41</sup> Madison insisted that the branches of government “were to be intimates, not separate fortresses that could refuse to cooperate with one another,” and that the purpose of cooperation is to promote the public interest.<sup>42</sup> The emphasis cannot be on merely distancing representatives from the passions of the people. Even if representatives are less factious than their constituents, in the absence of inter-governmental deliberation – of collaborative problem-solving – the quality of lawmaking and statecraft will still fall woefully short of the minimum levels of stability and

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<sup>38</sup> David Epstein, *The Political Theory of the Federalist* (Chicago, 1984), p. 165.

<sup>39</sup> Elkin, pp. 26-27.

<sup>40</sup> Elkin’s basket of public goods is larger than Epstein’s, but they agree on these two basic ingredients.

<sup>41</sup> Elkin, p. 27.

<sup>42</sup> James Madison, *The Federalist*, No. 45, Paragraph 2.

prosperity the public demands. And since powerful men and women rarely deliberate voluntarily, constitutional checks and balances are embedded in a republican system of government in order to force public officials to deliberate on matters of public importance *against their will*.<sup>43</sup>

But do constitutional checks and balances work according to design? Do they actually promote deliberation among public officials and, as a consequence, have a positive impact on the quality of lawmaking and statecraft? The evidence suggests that a fair amount of skepticism is warranted – perhaps even a great deal of skepticism – but that pure, unadulterated cynicism is not.<sup>44</sup> Some public officials, no matter how strong the nudge toward deliberation might be, will lack to such an extent the three qualities Max Weber argued were of the greatest importance for a politician – “passion, a sense of responsibility, and a sense of proportion” – that they will never possess the inner calm and composure necessary to allow differences of opinion to impinge upon their private reality.<sup>45</sup> At the same time, no politician is a model of utter senselessness and sterility. Most politicians – most human beings – inhabit the amorphous middle ground between the sublime and the sociopathic, and we can

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<sup>43</sup> In our hierarchically organized executive department, civilian leaders can easily refuse to cooperate with their military counterparts. The purpose of a deliberative separation of power inside the executive department is to promote the kind of civil-military cooperation that most defense reformers recognize is essential prior to a military conflict but that presently occurs only on a voluntary basis. A remark made by Hannah Arendt is worth introducing in this context. The subject matter she was writing about was certainly different, but the underlying principle addresses my concern with informal deliberation. “As is frequently the case in discussions that are conducted with a great show of emotion, the down-to-earth interests of certain groups, whose excitement is entirely concerned with factual matters and who therefore try to distort the facts, become quickly and inextricably involved with the untrammelled inspirations of intellectuals who, on the contrary, are not in the least interested in facts but treat them merely as a springboard for ‘ideas’” (Hannah Arendt, *Eichmann in Jerusalem* (Viking Press, 1964), p. 285). Let me reiterate my basic argument: for a host of cognitive and psychological reasons, civilian leaders must be forced to deliberate with their military counterparts.

<sup>44</sup> Many contemporary observers of American politics associate deliberation with legislators talking past each other and presenting lengthy monologues in front of nearly empty legislative chambers. Cynics will be chastened by the evidence in favor of constructive deliberation presented by Joseph Bessette, in *The Mild Voice of Reason* (University of Chicago, 1994). Many political theorists associate deliberation with deliberative democracy, which is, to grossly over-simplify a very sophisticated school of thought, an attempt to curtail the influence of power by nudging democratic regimes toward this more inclusive, rational ideal. What I should emphasize in this context is that deliberation is as much about minimizing error as it is about maximizing participation. To return to Madison, it is a partial antidote to the prevalence of human error, bias and misperception (to the ineradicable spirit of faction). For a thoughtful critic of scholars who emphasize only the benevolent powers of deliberation, see Ian Shapiro, *The State of Democratic Theory* (Princeton University Press 2003).

<sup>45</sup> Max Weber, *The Vocation Lectures* (Hackett Publishing Company, 2004), p. 77.

therefore conclude with confidence that facts and rational arguments are not irrelevant factors in political debates. As political theorist and student of the legislature Joseph Bessette observes, politics is best understood as a “complex mix of politics” – what he calls bargaining and compromise – “and deliberation, of the ‘play of politics’ and the reasoned effort to promote good policy.”<sup>46</sup> Even in the most deliberation-friendly institutional settings, non-deliberative factors will always be influential. The “unforced force of the better argument,” we could say, only routs domination in theory.<sup>47</sup> But it is untenable to argue that politicians only bully, bluster and seduce their colleagues and constituents, and that they never deliberate about the merits and demerits of public policy. The caliber of lawmaking and statecraft will certainly reflect in part the quality of those in office. But if a republic is to survive and flourish – if it is to recommend itself to its own citizens – its governing structures must be designed in a manner that ensures that the “complex mix of politics” remains complex and is not routinely stripped of its deliberative component.

### **An Institutional Conception of the National Interest**

A great and enduring threat to a republic is that a popular leader, often with the support of an energized populace, will “throw off regular deliberative procedures.” The pronounced tendency of power-holders to be evasive, shifty and deceptive – the extent to which deliberative processes must be imposed upon

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<sup>46</sup> Joseph Bessette, *The Mild Voice of Reason* (University of Chicago, 1994), p. 151.

<sup>47</sup> This is a phrase from Jurgen Habermas’s discourse ethics and an example of the deliberative ideal. The challenge for constitutional theorists, I would suggest, is that too many decision-makers in a republic will never learn what Montaigne considers the most fundamental lesson of experience. “To learn that one has said or done a foolish thing, that is nothing; one must learn that one is nothing but a fool, a much more comprehensive and important lesson.” If men were angels – “If a man remembers how very many times he has been wrong in his judgment,” and therefore knows that “it is foolish of him to distrust it ever after” – we might still need governments, but we would not have to worry as much about our reliance on informal deliberative processes in a national security crisis (Michel de Montaigne, “On Experience,” in Donald Frame, trans. and ed., *Selected Essays: Montaigne* (Dover, 1943)).

those in power – is why I argue in this section that we need to think of the national interest as the creation and maintenance of a deliberative core *inside* the executive branch. As we shall see in the second part of this dissertation, there are, at present, only informal deliberative bodies inside the executive branch, even though the political theory on which our republic was founded argues that informal checks and balances are as ineffective at regulating the behavior of governments as mere parchment barriers. Formal mechanisms, Madison teaches us, are indispensable in a constitutional system. Voluntary cooperation, in contrast, is a constitutional fantasy: ambitious people in positions of power simply do not cooperate voluntarily with the regularity good governance requires.

Constitutional checks and balances, of course, have a limited utility: past a certain point, deployed in excess – if they compromise energy, secrecy, dispatch or decision, for example – they are as likely to degrade the quality of lawmaking and statecraft as to improve it. With this understanding of the limited utility of constitutional checks and balances in mind, we can now ask ourselves if Madison’s constitutional theory offers us a set of intellectual tools that might improve the quality of executive-branch decision-making in a national security emergency.<sup>48</sup> Over the next few pages I hope to persuade the reader that it does offer us a set of invaluable tools – tools that will enable us to draw illuminating parallels between an institutional conception of the public interest and an institutional conception of the national interest, as well as between conventional factions and national security factions – and that

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<sup>48</sup> James Ceaser rebukes one of his fellow political theorists with the following remark: “it is not so clear that we should prefer more procedural democracy to continued security” (*Liberal Democracy and Political Science*, p. 126). Here is his elaboration: “There is no disputing Dahl’s claim that our role as a major world power has placed tremendous strains on our system of government. But this observation, while reminding us of a problem, offers us no instruction about how to deal with it. Either we can attempt to cope with the challenge, working to maintain a republican form of government in the face of these new difficulties, or we can seek to remove the impediments by weakening the presidency and disarming the military establishment” (p. 125-126). His criticism of Dahl may be valid, but he indulges in two either / or choices in his rebuttal that do a disservice to his own sophisticated understanding of constitutional theory. If we are unhappy with the performance of the executive department in national crises, is our only choice, as he suggests, between security and more procedural democracy, or between maintaining a republican form of government and weakening the presidency and disarming the military establishment?

the advantages of incorporating *formal* deliberative mechanisms inside the executive branch far outweigh the “possible abuses which must be incident to every power of trust.”<sup>49</sup>

Among political theorists, I realize, there is not much support for this position. Elkin, for example, argues that a “deliberative core” is a necessity in a well-designed republic, and that, for a republic to realize its full potential and fulfill its responsibilities, a diverse range of views must participate in a “vigorous discussion of the concrete meaning of the public interest.” He characterizes deliberation as “a process of regular and public argument in which there is a premium on making clear the reasoning behind their positions.”<sup>50</sup> Elkin argues that the legislature is the only department of government in a republic in which the essential components of a genuinely deliberative process – a wide range of views, vigorous discussion, the regular and public use of practical reason – are present. Unlike the legislature, however, the presidency is “not presently structured to function as a deliberative institution, and even with the best will in the world, probably and should not become one.”<sup>51</sup> Although the president can contribute to congressional deliberations in a few ways – by recommending legislation, for example, or through the threat or actual use of a presidential veto<sup>52</sup> – the virtues of the executive branch are a product of its unity, and this is “not a good foundation on which to build a deliberative separation of powers that will give careful consideration to whether governmental action serves the public interest.”<sup>53</sup>

Are supporters of the status quo correct to argue that the required unity of the executive power is incompatible with a deliberative separation of power inside the executive branch? As Elkin puts it, “institutional reform of the presidency ought not be high on the list of things that friends of republican

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<sup>49</sup> Madison, *The Federalist*, No. 41, Paragraph 4.

<sup>50</sup> Elkin, p. 159.

<sup>51</sup> Elkin, p. 160.

<sup>52</sup> Joseph Bessette, *The Mild Voice of Reason* (University of Chicago, 1994).

<sup>53</sup> Elkin, p. 159.

government should worry about.”<sup>54</sup> He argues, instead, that the present strengths of the executive need to be maintained. But would the virtues that flow from a unitary executive be compromised by the inclusion of any kind of pluralist device inside the executive department, however limited, however tightly circumscribed? Is the quality of national security decision-making better left to chance – to the wisdom and worldliness of our commander-in-chief – than to the kind of auxiliary mechanisms that promote deliberation and help control faction? If deliberation is defined in part as a process of regular and public argument, as Elkin and most other political theorists define it, it is indeed difficult to imagine how to integrate formal deliberative mechanisms into a branch of government that obviously requires a degree of secrecy and dispatch to perform its functions. But his definition of deliberation – a definition that rests on the once-fruitful dichotomy between energy and deliberation and is contributes to the larger argument he makes for increasing the deliberative capacities of the legislature – suggests a lack of familiarity with how decisions in a national security crisis are actually made. National security decision-making certainly cannot be deliberative in the sense of being public and inviting into the debate a comprehensive set of views, but it also cannot be so non-deliberative or anti-deliberative that it gives free reign to the violence of faction.<sup>55</sup>

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<sup>54</sup> Elkin, p. 160.

<sup>55</sup> In an analysis of the distinction between energy and deliberation in *The Federalist*, David Epstein draws the following conclusion: “All of this suggests that execution does not really require much deliberation, perhaps because it does not present many choices. To execute well means to execute vigorously whatever laws there are against whatever lawbreakers there are. The choices which require deliberation are apparently made by the legislature. Precisely to the extent that the executive’s function is dictated by necessity, the executive’s most necessary quality is something other than an ability to deliberate and choose” (Epstein, David, *The Political Theory of the Federalist* (Chicago, 1984), p. 173). David Crockett concurs: “The framers believed that the president had to possess the quality of energy to be able to act effectively in these areas and that the only way to give the office that energy was to make the institution a unitary office, composed of one person. The importance of energy in the constitutional system ... cannot be overstated” (David Crockett, “Executive Privilege,” in Bessette and Tulis, eds., *The Constitutional Presidency*, (Johns Hopkins University Press, 2009), p. 213). It can be overstated, I would suggest, if it precludes the possibility of serious deliberation. “Plural institutions like legislatures,” Crockett argues, “are simply not structured to provide these qualities.” Perhaps, but not all deliberative bodies are legislative bodies. “It would not take long to construct scenarios where speed and secrecy are essential to success in the military and diplomatic field, and where untimely public disclosure would greatly impair – perhaps even destroy – the goal of ensuring the security of the nation” (p. 217). Perhaps, but not all deliberative bodies require public disclosure. The irony of the extent to which advocates of executive supremacy in national security base their

Let us return to the question with which I opened this chapter: Is there an institutional solution – however modest, however imperfect – for the constitutional challenge of insuring a relatively seamless fit between political goals and military means?<sup>56</sup> War, Clausewitz taught us, must be understood as an act of policy. This part of the equation is perfectly clear. Even though war is a “pulsation of violence, variable in strength and therefore variable in the speed with which it explodes and discharges its energy,” it must nevertheless remain under the control of a “superior intelligence.”<sup>57</sup> Military aims must never conflict with the ultimately political purpose for which the military was deployed. This hierarchical relationship between political aims and military means suggests that we have good reason to endorse a constitutional system in which military leaders are subordinate to their civilian counterparts inside the executive branch and the president presides over a department organized hierarchically. But might the relationship between political aims and military means be too complicated – too vulnerable to the violence of faction – to be treated in such a manner? Must the so-called political view held by civilian leaders be granted tyrannical power?

If war is to be sensible, the political objective in war must be thoroughly vetted, disciplined, controlled. As Clausewitz argues, the political objective must “adapt itself to its chosen means.” This may only require minor adjustments, but the process of adaptation must sometimes “radically” change the initial political objectives. The political aim remains the “first consideration,” but it cannot be indulged wholesale merely because it is the dominant element in the political-military relationship. It

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arguments on the energy / deliberation dichotomy is that we already have informal deliberative bodies in the executive department to help the president make decisions about war and peace, and the planning process for military conflicts in the twenty-first century have taken longer on average than the great deliberators at the constitutional convention needed to agree upon the design of our republic.

<sup>56</sup> The power to go to war is a power shared by the legislature and the executive, however disputed the exact apportionment of this power may be. These two branches will also to some extent debate the consistency of political goals and military means, at least at a very rudimentary level. When a president seeks legislative authorization for a war, he must in part attempt to persuade legislators that the nation possesses the military strength and skill to achieve his desired ends. But wars are planned inside the executive branch, and it is to the constitution of the executive branch that we must look if we want to close the persistent gap between political ends and military means.

<sup>57</sup> Clausewitz, Book 1, Chapter 1.23.

cannot be wholly indulged both because of the danger of misalignment and because the process of adaptation is only partly rational, by which I mean objective and subjective factors will always influence the assessment of participants. The objective factors “comprise the specific characteristics and strengths of the state in question,” and the political, economic, technological, intellectual, and social characteristics of an age. The subjective factors “consist in the free will of the leadership, which should conform to the objective realities, but sometimes does not.”<sup>58</sup>

The political objective, in other words, is vulnerable to the spirit of faction. Ideological and non-ideological considerations, in other words, are impossible to tease apart.<sup>59</sup> The political objective emerges from the application of the “political point of view” to a particular national security threat only in theory. In reality, we must either control faction in a national security crisis or accept the consequences of ends-means misalignment. The political point of view is not synonymous with the policy preferences of any particular group of civilian leaders. The fallibility, ambition and self-love of our civilian leaders prohibit us from drawing such a convenient, symmetrical conclusion. The national interest – an abstraction democratic leaders tend to invoke to advance their policy preferences – is unfortunately as malleable a concept as the public interest (if, that is, as I will explain momentarily, we forsake an institutional conception of the national interest).

Alexander George, a life-long student of national security, in a short book in which he presents readers with a handful of subjects that had flummoxed him throughout his entire career, asks this question about the national interest: “Is the concept of national interest robust enough to enable policy makers, if they are so inclined, to exclude ideological considerations from influencing their foreign policy considerations?” It is impossible, in other words, to conduct foreign policy strictly on the basis of “sober calculations of the national interest.” It would of course be nice for decision-makers if such a super-

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<sup>58</sup> Peter Paret, *Clausewitz and the State* (Princeton University Press, 1985), p. 378.

<sup>59</sup> I would argue that there are no “realists” in international politics, only politicians and national security experts who claim to be more realistic than their political opponents.

ordinate criterion existed and could be relied upon to justify difficult decisions – to help them “cut through the problem of complexity and to cope with the uncertainties affecting choice among alternative policies” – but unfortunately the concept of the national interest is “nonoperational” and “cannot be employed as a utility function in rigorous policy analysis.”<sup>60</sup>

The synthesis of Madison and Clausewitz now is almost complete. Let us return to Elkin’s claim that we should set aside our debates about the specific content of the public interest and focus on the extent to which “the substance of the public interest is institutional.” What is a national security faction? A group of civilian or military leaders that attempts to “weaken or eliminate the devices needed to prevent faction.” What is the national interest? The creation and maintenance of deliberative devices inside the executive branch. What complicates this analogy between the public interest and the national interest, of course, is that the deliberative devices in the executive branch that are designed to improve the quality of national security decision-making are informal, and therefore remain largely at the mercy of faction. As a result of the premium we have placed on informal cooperation inside the executive branch, we have no reason to expect that the “cool and deliberative” sense of the community will prevail in a national security crisis. Constitutional checks and balances, recall, are incorporated into our constitutional system to service three purposes: dissuade factiousness, prevent the initiation of factional projects, and promote deliberation. Madison, as I mentioned earlier, insisted that the branches of government “were to be intimates, not separate fortresses that could refuse to cooperate with each other.” Can constitutional theory be utilized by defense reformers to promote a similar kind of constructive intimacy between institutions inside the executive branch?

In the light of the aforementioned need for a process of adjustment and adaptation between political ends and military means in a national security crisis – in light of the inevitability of national

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<sup>60</sup> Alexander George, *On Foreign Policy: Unfinished Business* (Paradigm Publishers, 2006), p. 5.

security factions – how comfortable should we be with the present constitution of the executive branch? Does a strictly hierarchical relationship between our civilian and military leaders – the doctrine of absolute civilian control of the military – provide us with a mechanism that is likely to secure the necessary degree of adjustment and adaptation? As compelling as the doctrine of absolute civilian control of the military is in theory, how does it work in practice? Does it adequately address the basic requirement for waging a sensible, purposeful war, which is harmonizing ends and means? The art of adaptation and adjustment requires creativity and imagination, but most of all it requires objectivity and experience. Where is this objectivity and experience – the cool and deliberative sense of the community – most likely to be found within the executive branch? And if it is not found in any one place – if it emerges through a synthesis of knowledge and expertise – can we create a more deliberation-friendly institutional dynamic inside the executive branch?

## Conclusion

Clausewitz believed that the task of military theory was to make soldiers more sensitive to their surroundings.

We cannot formulate principles, rules, or methods: history does not provide a basis for them. On the contrary, at almost every turn one finds peculiar features that are often incomprehensible and sometimes astonishingly odd. Nevertheless it is useful to study history in connection with this subject as with others. While there may be no system, no mechanical way of recognizing the truth, truth does exist. To recognize it one generally needs seasoned judgment and an instinct born of long experience.<sup>61</sup>

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<sup>61</sup> Clausewitz, Book VI, Chapter 30.

Are civilians or soldiers more likely to acquire the experiences necessary to judge the appropriateness of particular military means? Madison's objective as an institutional designer was to constitute a regime that would be more likely to act on seasoned judgment and an instinct born of long experience – to formulate policy in a disinterested and dispassionate manner – than to act on unseasoned judgment and an undisciplined, unrefined instinct. My claim is not that soldiers are better able to harmonize ends and means than civilians.<sup>62</sup> My claim is only that a formal deliberative body inside the executive branch would be better at ensuring that political ends and military means are reasonably compatible at the initiation of a military engagement than the informal deliberative body we rely upon today. The purpose of a deliberative process should be to ensure both that military leaders use violence in pursuit of political ends and that civilian leaders are unable to entertain fanciful theories about the predictability and manageability of war. It is because political ends and military means do not naturally align – because they must be *forced* into alignment through constitutional checks and balances – that harmonizing ends and means is best understood as a constitutional challenge.<sup>63</sup>

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<sup>62</sup> I am as skeptical of military leaders as civilian. Robert Scales may be right to suggest that the “generals of the future will have to be capable of going beyond fighting from a battle plan to seeing the battlefield before any plans have been formulated, thinking in time and imagining cultural, political, and geostrategic circumstances that have yet to materialize,” but it would be unwise to design institutions that depended upon this ideal being realization with any frequency (Robert H. Scales, “The Quality of Command,” *Foreign Affairs*, Vol. 91, No. 6 (November / December 2012)). In defense of our future military leaders, it may be true that “experience in one conflict may have little relevance in the next,” and that “tactical experience at one level of command as a junior officer often offers little knowledge or understanding about the conduct of operations, much less strategy at higher levels of command,” but a constitutional theorist has the advantage of being as sensitive – as tolerant, we could say – of the fallibility of our military leaders as our civilian leaders (Williamson Murray, “History, War and the Future,” *Orbis* (Fall 2008), p. 548).

<sup>63</sup> Most national security policymaking can be accurately described as sub-constitutional (budgeting, procurement, long-term strategy, military roles and missions, etc.). Nevertheless, aligning political ends and military means presents a fundamental, constitutional challenge to self-government. A republican government must first be able to control the people, and then control itself. What would the later part of this equation mean in a national security crisis if not the ability to control executive branch factions in order to ensure the alignment of political ends and military means?



#### 4 Executive Power: A Strong Executive or One-Man Rule?

*What will become of a youth so circumstanced, above all if he belongs to a great country and is conspicuous there for his birth and wealth, as well as for a tall and handsome person? Will he not be filled with unbounded ambition, believing himself well able to manage the affairs of all the world, at home and abroad, and thereupon give himself airs and be puffed up with senseless self-conceit?*

- Plato

*The best is he who of himself doth know / good too is he who listens to the wise / But he who neither knows himself nor heeds / The words of others, is a useless man.*

- Hesiod

*Vital interests, despite common assumptions to the contrary, have only a vague connection with objective fact. A sovereign nation determines for itself what its vital interests are, and its leaders accomplish this exacting task largely by using their highly fallible and inevitably biased human judgment to interpret the external political environment.*

- Bernard Brodie

Even if readers are convinced of two points I made in the last chapter – that political ends and military means must be harmonized for a military engagement to be an intelligent, sensible activity, and that Madison’s theory of faction explains why we should not expect political ends and military means to regularly align in a constitutional system in which the executive branch is organized hierarchically – they might nevertheless dismiss my suggestion that a deliberative separation of power in the executive branch would improve the quality of national security decision-making. Advocates of the doctrine of the unitary executive, for example, could easily cite Alexander Hamilton’s forceful demolition of executive-branch plurality in *The Federalist*, No. 70, and argue that pluralism of any kind – and a senior military

officer in the executive branch who possessed a limited veto would violate the principle of unity – only conceals faults, destroys responsibility, muddles decision-making and invites disaster. What I will argue in this chapter is that we can endorse a strong executive in the realm of national security – capture the benefits of executive energy – without having to gamble on one-man rule.

In the political theory literature, a strong executive has a distinct profile, is an amalgamation of a particular set of characteristics, and strength is generally a measure of two capacities: the ability of the executive to initiate actions when emergency conditions demand a timely and forceful response from the national government, and the capacity of the executive to impose a long-term vision of society on a recalcitrant set of political, social and economic institutions, including the legislature, which generally exhibits a strong preference for the status quo.<sup>1</sup> We may not be able to produce a quantitative measure of executive strength – we may lack a precise set of metrics for calculating the power of presidents across time and circumstance – but political theory has been less concerned with the precision of this concept than with its comparative credentials. How does the strength of the executive compare to the strength of the legislature (or, for that matter, the judiciary) in any particular constitutional order?

A comparative lens is what enables students of the presidency to determine whether or not the executive has sufficient power to meet her responsibilities. In a national security crisis, we can roughly evaluate the power of the executive by reflecting on the following question: Does the executive have the leverage necessary to respond forcefully and energetically to a crisis situation – or, on the contrary,

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<sup>1</sup> For an excellent introduction to the subject of executive power, see Joseph M. Bessette and Jeffrey K. Tulis, “Preface,” and “On the Constitution, Politics, and the Presidency,” in Joseph M. Bessette and Jeffrey K. Tulis, eds., *The Constitutional Presidency* (Johns Hopkins University Press, 2009). For an equally insightful analysis of the major constructions of presidential power over the course of U.S. history, as well as a provocative discussion of the doctrine of the unitary executive as a developmental phenomenon, see Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review*, Vol. 122. As Skowronek thoughtfully reminds us, “Constitutional construction is an American political tradition, perhaps *the* American political tradition” (p. 2101). In a slight variation on the second capacity mentioned above, Herbert Storing argues that the president’s duty to “check the legislature and even the people, when they are wrong, carries a duty, not merely to resist but to lead, to provide the *direction* that finally only he can provide” (Herbert Storing, “Introduction,” in Charles Thach, *The Creation of the Presidency* (Liberty Fund, 2007), p. 171).

is her ability to respond to the emergency hindered by an incorrigibly slow and deliberative body that prohibits the government from responding to a national emergency with the requisite speed and dexterity?<sup>2</sup> In theory we may have a government of laws, rather than of men, advocates of a strong, unitary executive argue, but the demands placed upon a constitutional government in a dangerous and unpredictable world force us to jettison our deep reservations about the rule of men and endorse an executive with extra-legal or extra-constitutional power in the name of order and security.

Among the political theorists who defend a strong, unitary executive, perhaps the most sophisticated – certainly the most clever and combative – is Harvey Mansfield.<sup>3</sup> Before we analyze his position in detail, there are of course other theorists who defend one-man rule, just as there are numerous scholars who are critical of the “imperial presidency.”<sup>4</sup> The advocate of executive power who has perhaps received the most critical attention over the last few years is John Yoo.<sup>5</sup> His theoretical arguments in defense of executive power in a national security emergency, however, are not particularly original (his combination of historical and legal research is what gives his work its distinctive character). Another notable contemporary defender of presidential war power is Richard A. Posner.<sup>6</sup> He argues that individual rights cannot always be protected in a national security emergency – that the costs of doing so outweigh the benefits – and that, in the name of public safety, they may be temporarily

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<sup>2</sup> I should point out here that the deliberative bodies feared in this context are legislative or judicial in nature, as well as any power-sharing arrangement between the executive and other two branches of government. What is not considered is a deliberative body inside the executive branch.

<sup>3</sup> For a review of the broader scholarly landscape, and another widely cited defense of the doctrine of the unitary executive, see Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press, 2008).

<sup>4</sup> Arthur Schlesinger, Jr., *The Imperial Presidency* (Mariner Books, Reprint Edition, 2004). More recently, David Adler has developed this critique. “America’s backward march toward monarchism, characterized by presidential usurpation of warmaking and foreign affairs authority, and sweeping assertions of executive privilege, secrecy, immunity and prerogative powers, represents contempt for constitutionalism, republicanism, and the rule of law David Gray Adler, “The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism,” *Presidential Studies Quarterly*, Vol. 36, No. 3 (Summer 2006), p. 159.

<sup>5</sup> John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (University of Chicago Press, 2005).

<sup>6</sup> Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

suspended. NSA surveillance, military tribunals and torture are all examples of practices that we unhesitatingly reject in peacetime but that we may have to embrace in a national security emergency. Yoo, Posner and other defenders of executive power, I would suggest, do not add clarity or depth to Mansfield's theoretical arguments, though they do apply them to more contemporary issues.<sup>7</sup> They also do not address the subject that interests us in this chapter. We are concerned not with the power of the executive relative to the legislature, but the wisdom – or lack thereof – of introducing a deliberative separation of powers into the executive branch to promote the alignment of political ends and military means.

What makes Mansfield theoretical defense of executive power unique – and justifies a close study of his treatise on executive power – is his claim that the great theoretical innovation of the Founders was the smuggling of monarchical power into our constitutional order.

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<sup>7</sup> Three distinguished scholars who strongly disagree with the constitutional and normative arguments made by advocates of the doctrine of the unitary executive are Louis Fisher, Stephen Holmes and Harold Koh. Fisher, an expert on presidential war power, writes that in the area of war-making, the “fundamental characteristic of American government – the framers’ reliance on checks and balances – has been abandoned.” Although the framers were determined to prevent a single person or set of advisors from making war, “We now have presidential wars, set in motion unilaterally by our chief executives and unrestrained by either judicial or legislative checks” (Louis Fisher, “The War Power: No Checks, No Balance,” in Colton C. Campbell, et al, *Congress and the Politics of Foreign Policy* (Prentice Hall, 2003), p. 1-2). Fisher argues that the system of checks and balances between the legislature and executive branches of government need to be either tightened or restored (in part because the Truman, Reagan, elder Bush, Clinton and younger Bush administrations all claimed they could order large-scale military interventions without congressional approval). Appeals to the original intent of the founders, and tinkering with the War Powers Resolution, Fisher believes, are unlikely to discipline the president. What he suggests is that Congress learns to thrust and parry with the powerful weapons already at its disposal, such as its prerogatives to authorize and appropriate funds (see *Presidential War Power* (University of Kansas Press, 2004), p. 275). What Fisher fails to consider in his analysis is the frequency with which congressmen willingly conspire with the president to ensure that his range of motion remains unimpeded and his powers robust. And when the same party controls both Congress and the White House, the majority, at least at the onset of an international crisis, is much more likely to lobby on behalf of the president’s agenda than to question his judgment. Holmes is equally perturbed by the concentration of power in the executive branch and argues that domestic and international law, rather than being burdensome, offer necessary protections against the fallacy of rulers. Contrary to Yoo and Posner, he rejects the idea that the demands of national security put a premium on executive branch flexibility and that the executive “needs to suspend the rule of law whenever it thinks that it is an obstacle” (Stephen Holmes, *The Matador’s Cape: America’s Reckless Response to Terror* (Cambridge University Press, 2007), p. 272). Harold Koh argues that congress has the constitutional authority to determine the nature and timing of a military conflict, and that the power to declare war is not subordinate to the president’s power to make war (Harold H. Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Yale University Press, 1990).

*The Long, Sad, Horrifying Experience of Republics*

Mansfield's definition of a strong executive is admirably clear and straightforward. The American president is "a single executive with ample powers not elected by the legislature, hence strong."<sup>8</sup> The key features here are single, ample, and not elected by the legislature. A strong executive is a unitary executive, independent from the other branches of government, and in possession of powers that enable office holders to act in a manner that appears to contravene the idea of a constitutionalized executive. He is still a republican executive, however, rather than merely a popular monarch. He is equipped with the necessary energy to respond to emergencies without being simply an emergency device built into the constitution. The American president is neither a "revived" Roman dictator nor a "moderated" British monarch, and our constitution, Mansfield argues, therefore "establishes the first republic with a strong executive that is consistent with republicanism."<sup>9</sup>

Republican theory prior to 1787 had multiple strains and variants. Mansfield is dismissive of what he calls "primitive" republicanism, and he argues that the authors of *The Federalist* were equally vexed by the endurance of this experience-resistant, self-destructive version of republican theory. What distinguishes the political theory of *The Federalist* from all previous republican theory, Mansfield claims, and what makes it distinctly modern, is its understanding of the power of necessity. Necessity properly understood, he argues, is what mandates the creation of a strong executive power.

At this point in his argument, most if not all students of *The Federalist* would be in a receptive, agreeable mood. The concept of necessity, in this limited context, is pleasantly abstract and merely evokes the number and diversity of challenges that all nations confront over the course of time. History

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<sup>8</sup> Harvey Mansfield, *Taming the Prince* (Johns Hopkins University, 1989), p. 147.

<sup>9</sup> Mansfield, p. 148.

certainly presented republican theorists in the late-eighteenth century with plenty of failed experiments in self-government upon which to reflect and draw valuable conclusions. This wealth of history and anecdote provided the founding fathers with at least one unequivocal lesson: if the purpose of the constitutional convention was to create a stable, secure, long-lasting republican regime, structural innovation would be necessary.<sup>10</sup> But this rather simple, cautionary tale is not what Mansfield has in mind. History, he argues, is more authoritative with respect to the particular structure a constitutional system must adopt. For Mansfield, the fact that all previous experiments in republican rule ended in failure demonstrates the necessity of a certain kind of republican regime fronted by a very specific kind of executive.

The United States Constitution, he writes, “constitutionalizes the necessities of republican experience – and in no respect more obviously than in the executive.”<sup>11</sup> History teaches us that human affairs are defined by recurrent stresses and strains. Human nature and the fundamental character of political life, if taken seriously, make a mockery of republican faith. “In its ‘energy’ or quickness, the executive deals more than any other branch with the accidents and force that may thwart or disturb republican choice,” and therefore must be given preeminence in a constitutional system.<sup>12</sup> As nice as it might be to choose a government that conforms to the principles of “primitive” republicanism – a government that places great faith in the judgment and decency of average citizens and in the ability of deliberative bodies to respond with the requisite speed and dispatch to issues of pressing importance – this is simply not a realistic option.<sup>13</sup> History informs us that our options are in fact tightly

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<sup>10</sup> If I may indulge in a brief aside: Our inheritance of history and anecdote, I would suggest, far surpasses our inheritance of wisdom. An empty, non-operational aphorism, some readers might complain. But if history and anecdote were not so vulnerable to abuse – if wisdom flowed more naturally from the accumulation of history and anecdote – men would be far more angelic than Madison assumed, and we would have much less need to place our faith in self-government in the subtle balancing acts of constitutional theory.

<sup>11</sup> Mansfield, p. 255.

<sup>12</sup> Mansfield, pp. 255-256.

<sup>13</sup> Political scientist Mark Landy makes a similar point: “Fearful of tyranny, the framers did not give supreme power to the president. But they reluctantly concluded that threats to the safety and well-being of the republic would

circumscribed. The history of republican rule – a history of incompetence, betrayal, implosion – teaches us that such a faith-based conception of self-government is untenable. Mansfield summarizes his argument with typical concision and flair: “By finding a place for the necessities of government within the framework of government itself, the Constitution corrects the foolish optimism of republicanism which thinks, in essence, that men can live by the laws they choose and never have to bow to the necessities they do not choose, or learn from their experience of them.”<sup>14</sup> As republican theorists, if we are realistic about our options – if we are not blinded by romantic, primitive notions of political life – the logic of history has done the bulk of our work for us.

What were the specific lessons of history that impressed themselves so forcefully on the Founders, the lessons which we must respect with equal commitment today? The “new republicanism” that was forged at the constitutional convention – a republicanism that managed to combine the “freedom of republics” and the “strength of monarchies” – drew upon the sad, multi-millennial history of experiments in republican governance. The Founders, Mansfield explains, believed that all previous republics, including those that experienced periods of great success, had succumbed to tyrannical excesses. A republic without monarchical strength, the Founders understood, would be unable to defend itself from internal and external threats in a volatile world. The Founders were not great and innovative students of history. They deserve praise because they deferred to common sense and were not held hostage by romantic ideas.<sup>15</sup> They changed the history of republican government by

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arise that would have to be addressed with the agility that only a lone decision-maker could provide” (Marc Landy, “Terror and the Executive,” in *National Affairs*, No. 3 (Spring 2010), p. 105).

<sup>14</sup> Mansfield, p. 257.

<sup>15</sup> There are many ways to phrase the basic argument in this dissertation. Madison and Hamilton deserve praise, Mansfield explains, because they deferred to common sense and were not held hostage by romantic ideas. I would argue that if common sense teaches us anything about decision making in a national security crisis it is that political ends and military means must be closely aligned if we are to deploy force sensibly. Common sense also teaches us, I would suggest, that it is terribly romantic to assume that the president has the national interest at heart and that we need not worry about executive-branch factiousness in a national security crisis.

introducing the world to a republican theory that combined the freedom of republican rule and the strength and security of monarchy.<sup>16</sup>

The experience of self-government under the Articles of the Confederation, Mansfield argues, made it perfectly clear that republican theory needed a major overhaul. Three issues, he suggests, were particularly salient. First, the Revolutionary War taught Americans that state governments needed stronger executives. Second, Shays' Rebellion, a domestic crisis, taught Americans that secrecy and dispatch were essential characteristics of a national government. Finally, the hostage-taking incident in the Bey of Algeria, a foreign crisis, taught Americans that only a powerful executive would be able to diffuse and combat international threats. This brief survey of post-independence politics leads Mansfield to make the following claim: "The task of political science in *The Federalist* was to show that an energetic executive could be republicanized."<sup>17</sup> *The Federalist*, No. 70, he would have us believe –

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<sup>16</sup> As I mentioned in an earlier footnote, this is a highly contentious claim. The authors of our Constitution, Louis Fisher argues, were determined to prevent a single person or set of advisors from making war. That we now have "presidential wars, set in motion unilaterally by our chief executives and unrestrained by either judicial or legislative checks," cannot be justified with reference to the Constitution (Louis Fisher, "The War Power: No Checks, No Balance," in Colton C. Campbell, et al, *Congress and the Politics of Foreign Policy* (Pearson, 2002), p. 2). Much has of course been written over the last half-century about the expansion of the president's war-making powers. Madison's belief that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others," appears, in this light, to have been somewhat of a declaration of faith (*The Federalist*, No. 51, Paragraph 4). Legislators should be clamoring to inject themselves more forcefully into debates about war and peace – to defend their legislative prerogatives – and yet they have been relatively passive at precisely those times when the stakes have been highest. Appears, I say, because there are at least three different ways to interpret the passivity of Congress in the face of this supposed presidential power grab: either the necessary constitutional means to resist this kind of encroachment never existed; the personal ambition of individual legislators rarely unite in opposition to the national security policies of a president unless these policies have proven over time to be deeply problematic; or – my preferred explanation, as we will see in the next chapter – our relative position in the world has changed so dramatically since the framers designed our constitution that the very tyranny they expected to contain through a sophisticated set of checks and balances has seeped through the old foundation.

<sup>17</sup> Mansfield, p. 250.

rather than *The Federalist*, Nos. 10 and 51 – is the key to understanding both the logic behind our constitutional order and the success of our republic.<sup>18</sup>

### *The Federalist, No. 70*

*The Federalist*, No. 70 begins modestly. Although some well-intentioned citizens believe that a “vigorous executive is inconsistent with the genius of republican government,” this had better not be the case, since in the absence of a rigorous executive, republican government is impossible. “Energy in the Executive,” despite the republican prejudice to the contrary, “is a leading character in the definition of good government” (Paragraph 1). After the decade-long experience of self-government under the Articles of Confederation, it was widely understood by the Founders that the executive would have to be entrusted with a substantial degree of power and independence for the national government to be effective.<sup>19</sup> That an energetic executive – energetic rather than feeble – is an important component of

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<sup>18</sup> Jeremy D. Bailey helps us to understand why Hamilton is such a central figure among contemporary advocates of the unitary executive. “First, unlike Madison, Hamilton seems to offer a consistently proexecutive body of writings throughout his career, thereby offering an opportunity to use postratification practice to illustrate preratification understanding. Second, his defense of unity in the executive offers a democratic logic that can transcend history and speak to modern political practice, even as it offers a way to understand that history” (Jeremy D. Bailey, “The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton,” *The American Political Science Review*, Vol. 102, No. 4 (Nov., 2008), p. 457-458). The democratic logic he refers to in this passage is the logic of accountability: when power is held in the hands of one person, voters need not be particularly astute detectives to determine who is responsible for the success or failure of particular government actions and to reward or punish them accordingly, in the next electoral cycle. I argue in Chapter 5 that it is a mistake to draw conclusions about Hamilton’s support for a unitary executive without taking into consideration his arguments in *The Federalist*, No. 8, about the nature of the challenges such a powerful figure would be expected to face. I also argue in Chapter 8 that Hamilton’s other ten essays in *The Federalist* on the constitution of the executive branch express a much more sophisticated understanding of the need to balance the requisites to energy and safety in the executive department.

<sup>19</sup> For an especially thorough and convincing discussion of the debates on executive power and the organization of the executive branch executive power at the Constitutional Convention, as well as how the executive branch received its final form during the early years of the new nation, see Charles Thach, *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (Liberty Fund, 2007).

the constitutional puzzle may not have been universally accepted in 1787, but it was still a very modest, widely supported claim.<sup>20</sup>

But Hamilton is not, after this initial declaration, a particularly modest political theorist, by which I mean he is not interested in discussing the subtle, difficult tradeoffs inherent in constitutional design.<sup>21</sup> After briefly reviewing the history of the Roman republic and highlighting the frequency with which it was “obliged to take refuge in the absolute power of a single man” in order to thwart the emergence of domestic tyrants and combat the advances of external enemies, he leaps from this impressionistic, anecdotal history of executive power to a rather imperious conclusion (Paragraph 1). A feeble executive is rejected – on the grounds that a feeble executive is synonymous with bad execution, and “a government ill executed, whatever it may be in theory, must be, in practice, a bad government” – and an energetic government is declared victorious (Paragraph 2). From this point on in the essay, it is assumed that all sensible men agree on the necessity of an energetic executive, and that all that is left for the author to clarify are the precise ingredients that constitute this energy. The possibility of an energetic executive branch – as an executive branch that is energetic and purposeful as a result of its relative independence from the other main departments of government, rather than its embrace of one-man rule – is never considered.

Energy is secured through four key ingredients: unity, duration, adequate compensation and ample powers.<sup>22</sup> Protection against an executive outfitted with these provisions – safety from a

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<sup>20</sup> For an excellent compilation of anti-Federalist texts, see Ralph Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates* (Signet Classic, 2003).

<sup>21</sup> In Chapter 8 we will discuss Hamilton’s other essays on the constitution of the executive department in order to explore how to introduce a deliberative separation of power into the executive branch (how, to be more specific, to create a deliberative device that satisfies Hamilton’s requisites to energy and safety in a *non-insulated* state). In these essays he is rigorous and practical and largely immune to the criticism of immodesty. It is in *The Federalist*, No. 70 – the essay most frequently cited by advocates of the unitary executive – that his immodesty as a constitutional theorist is most pronounced.

<sup>22</sup> In Chapter 5 I argue that Hamilton presents us with the ideal constitution of the executive branch for an insulated republic. To figure out how he might have balanced the requisites to energy and safety in a non-

powerful executive with tyrannical impulses – is secured by dependence on the people and clear lines of responsibility. The juxtaposition of these two fundamental principles of republican government – energy and security – and the subsequent introduction of six key ingredients necessary to realize these principles, suggests that a delicate balancing act awaits us. The argument for a unitary executive, however, turns out to rest almost entirely on a rejection of pluralism. “Whenever two or more persons are engaged in any common enterprise or pursuit there is always the danger of difference of opinion.” If a difference of opinion erupts between public servants “clothed with equal dignity and authority,” we should expect that the animosity generated by such disagreement is likely to impair the planning and operations for which these combatants are responsible. And if “bitter dissensions” should “unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government and in the most critical emergencies of the state” (Paragraph 11). Whereas the inconveniences that result from differences of opinion and perspective are acceptable in a legislature – an institution in which such jostling and competition “may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority” – this kind of obstructionism in the executive is deleterious. “[N]o favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it” (Paragraph 13). The greatest threat to a republic with a plural executive would come not from internal and external enemies but from the

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insulated republic – and to understand how a deliberative separation of powers inside the executive branch might be configured – we need to understand the role and implications of these ingredients, and why such a premium is placed on unity. We will cover this material at length in Chapter 8. It is in this chapter that I bring constitutional theory and defense reform into a creative conversation and propose a constitutional solution to the problem of aligning political ends and means alignment in a national security crisis.

obstinacy and caprice of the men who constitute the plurality. Vanity and conceit would distract from the great interests of society and a fatal loss of energy would result.

Plurality in the executive is declared a profound and unmitigated threat to national security. Energy is the “bulwark of national security,” and decision, activity, secrecy, and dispatch, the fruits of energy, are diminished in direct proportion to numerical enlargement of the executive (Paragraph 13). “An artful cabal in [the executive] would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness” (Paragraph 14). Multiple magistrates and councils of any kind are not only unnecessary but are corrupting influences that offer no compensatory benefits. “A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults” (Paragraph 22). Pluralism conceals faults, destroys responsibility and invites disaster. Unity is recommended not because it is our best option among imperfect alternatives but because safety against a unitary executive is easily secured and there are no arguments to recommend pluralism. The notion that executive power is safer in the hands of a number of men, rather than in the hands of a single man, is a fallacy.<sup>23</sup>

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<sup>23</sup> Let me quote from Steven Calabresi, an expert on the doctrine of the unitary executive, in defense of my interpretation of this essay (my claim that the arguments in the essay are overly simplistic). “Thus, whereas a plural executive would both dilute executive energy and popular accountability and control, a unitary executive would lead to the opposite result. Executive energy would be enhanced and so would the likelihood that it would be used in conformity with the interests of the nation” (Steven Calabresi, “Some Normative Arguments for the Unitary Executive,” *Arkansas Law Review*, Vol. 38, No. 1 (Spring 1995), p. 44. But why should we assume that the energy of the executive would be used in conformity with the interests of the nation? What happened to the great difficulty in a republic of determining precisely what these interests are? Even the claim that unity always enhances energy is suspect: in a national security crisis, for example, collaboration, consensus and trust can be sources of energy, and they often flow from deliberative decision-making procedures.

There are at least two ways to engage with these arguments. Based on the evidence in *The Federalist*, No. 70, it is perfectly reasonable, I would suggest, to be baffled by Hamilton's reputation as an astute constitutional theorist. Is the choice between unity and plurality really as simple as the choice between competence and feebleness? Does unity lead to responsibility, and responsibility to good governance, in such a smooth and linear manner? Are there no benefits whatsoever to pluralism in the executive branch, given the incredibly wide range of activities that fall within the executive domain?<sup>24</sup> Does a diversity of views in the executive open the door to a spirit of feebleness as surely and as violently as a lack of constitutional checks and balances in the legislative branch opens the door to the spirit of faction? Are the restraints of public opinion and the threat of impeachment sufficient checks on the personal and ideological ambitions on the president and his political appointees to negate the need for any additional safety measures?<sup>25</sup> Hamilton may have been a financial and administrative genius, but he was not, at least in this essay, a serious constitutional theorist. A serious constitutional theorist, I would argue, searches for points of friction, for paradoxes and conundrums, for excruciating tradeoffs, for delicate balancing acts, and Hamilton does not do this in his defense of unity.

The alternative mode of engagement would be to look beyond the unpersuasive rhetoric and assume that Hamilton must have understood at least some of the responsibilities of the executive very differently than we do today. In the realm of national security, for example, if a president only had to respond to unequivocal threats from external enemies – if decision-making in a national security crisis

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<sup>24</sup> In Hamilton's defense, he was writing at a time when no one could have imagined the future size and complexity of our administrative state.

<sup>25</sup> This is a subject we cover at length in Chapter 8. How do we properly balance the requisites to energy and to safety in a non-insulated state? In Chapter 6 we delve into the "constitutional convention" of 1945-1947 to familiarize ourselves with the principles and forms on which the national security state was founded. In Chapter 7 we explore the principles and forms that animated defense reformers during the Goldwater-Nichols debates in the 1980s. By the time we return to Hamilton and Madison in Chapter 8, I hope it is clear to the reader why I think defense reformers would benefit from a close study of the political theory of *The Federalist* and political theorists should apply their expertise to the structures of the national security state. Let me just point out here that these two requisites to safety – elections and the threat of impeachment – are expected by most contemporary defense reformers do to a great deal of heavy lifting in our republic to compensate for the absence of any immediate checks and balances on the exercise of executive power.

were an either / or proposition rather than an brutally complex game of percentages and probabilities subject to human fallibility and ideological distortion – then we would indeed be unwise as constitutional theorists to recommend any measures that compromised activity, secrecy, dispatch and decision in the executive. Why open the door to interests and passions that would only frustrate the measures of government in the most critical emergencies of the state? Why risk making the executive less accountable to the people? Hamilton’s understanding of the responsibilities of the executive in the late eighteenth century, I would argue, was indeed quite different than we understand them today, and gives contemporary scholars permission to reconsider his unqualified embrace of unity. Who could have imagined in 1787, after all, the promise and peril of the kind of military power the United States would possess in the twentieth century? This is the main argument I pursue in the next chapter, so I will not elaborate upon it here, except to mention that the transition from an insulated to a non-insulated state is marked by a great expansion not only in the scope of responsibility of the executive, but in the potential for the spirit of faction to undermine the quality of national security decision-making.

Let us return to the subject at hand. Even if we think Hamilton presents a context-specific understanding of executive power in this essay, we still might have to accept the basic premise of *The Federalist*, No. 70, which is its unequivocal rejection of pluralism. Is there a viable alternative to one-man rule?

### *The Political Theory of The Federalist*

Let us return to the particulars of our institutional inheritance. Mansfield argues that we have inherited the following: A government that is free, and yet strong enough both to deter its enemies and to

provide security to its citizens. The extent to which freedom and strength are able to coexist, he argues, is the genius of our Constitution. Precisely because freedom and strength are not natural collaborators and are, in fact, often in direct competition with each other, the invention of free government remains, and will always remain, in a precarious state. Free government is inherently fragile because the very strength it must possess in order to vouchsafe the security of its citizens can also be used to deprive its citizens of their freedom. Mansfield defers to Lincoln for clarity and great-leader heft: “Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?”<sup>26</sup> Mansfield believes that for free government to be strong enough to maintain its existence, it must be very strong indeed, and that this strength must be lodged not merely in the national government or the executive branch, but in the hands of a single executive. This belief is what unites most contemporary advocates of executive power. Energy in a republican regime is essential, and the requisite quantum of energy can only be generated through, and effectively harnessed by, a single executive.

Mansfield’s claim that the authors of *The Federalist* were equally committed to a republicanized version of one-man rule – equally committed to an anti-pluralist principle in the constitution of the executive branch – rests primarily on two claims that I will challenge in the sections below. In the first section we will explore the following question: Is the concept of necessity as useful – as unambiguous and dictatorial – as he assumes? In the second: Was the primary task of the political theory of *The Federalist* to create a powerful executive under the pretext of erecting a law-bound constitutional regime?

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<sup>26</sup> Quoted in Mansfield, p. X.

1. *By finding a place for the necessities of government within the framework of government itself, the Constitution corrects the foolish optimism of republicanism which thinks, in essence, that men can live by the laws they choose and never have to bow to the necessities they do not choose, or learn from their experience of them.* Perhaps I am being unnecessarily confrontational here, but is there not a whiff of romantic obscurantism in Mansfield's heavy reliance on the idea of necessity? Contemporary political theorists rarely claim that history is a coherent narrative that offers us fixed and indisputable answers, and yet he clearly equates "necessity" with the "lessons of history," as though such lessons were absolute and indisputable truths.<sup>27</sup> History, as most of us realize, is sometimes based on facts to which we all have access and can interpret with ease, but often it is the story of the particular prejudices of a group of scholars who belong to a particular school of thought and mistakenly assume they have assembled an objective narrative of the past. Mansfield surely appreciates the extent to which group and individual biases compete on surprisingly equal terms with reason and method in our study of historical phenomena. He is, after all, a very sophisticated political thinker. Why, then, does he lean so heavily on the concept of necessity (the necessities of international politics to which a republic must be able to respond; the necessity of certain design features in a republic) in his defense of a strong executive? Why does he claim that the Founders shared an understanding of history and necessity when unanimity among a group of such diverse and opinionated scholar-politicians is close to a statistical impossibility?

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<sup>27</sup> Leonard Sorenson, I would suggest, engages in a similar kind of romantic obscurantism when he invokes history and executive power. He argues that the doctrine of proportionate means defended in *The Federalist* culminates not only in a government with unlimited powers but an executive with a great deal of discretion in foreign policy. "There are certain crucial political advantages of constitutional prerogative which outweigh its philosophical, moral, and political disadvantages. Proper acts of prerogative typically occur in the context of the greatest, history-shaping, events in the life of a nation. They are among those awesome acts, those illustrious and memorable deeds, of the greatest political heroes," (Leonard R. Sorenson, "The Federalist Papers on the Constitutionality of Executive Prerogative, *Presidential Studies Quarterly*, Vol. 19, No. 2 (Spring 1989), p. 277). Proper acts of prerogative? Is history not also shaped by prerogative exercised improperly?

The history of self-government, Mansfield claims, taught the Founders that the “republican prejudice” against energetic government had to be abandoned. The architectonic device and stabilizing mechanism that the history of republican rule imposed upon them – and imposes on us today – is a unitary executive with a degree of power and independence that evokes our monarchical past. “In executive leadership, bygone partisans of monarchy do not quite have all they ever wanted, but they have enough to satisfy them that modern republicans have unwittingly admitted much truth in the monarchist cause.”<sup>28</sup> We know we need an executive who can, in a national emergency, transgress the law on our behalf, and yet as citizens in a republic we want to believe that our executive is in fact executing our will in a constitutional manner. We know we need a monarch to protect us but we are too enamored with the idea of self-government to call our executive by such a name. The general nature of law – its abstract, imprecise, context-blind nature – teaches us that an executive cannot effectively fulfill her responsibilities if she is bound by the law. Executives must make decisions in response to very unique, irreproducible pressures, threats and opportunities that no set of pre-existing laws, no matter how comprehensive, can adequately address. The irresolvable disconnect between the generality of law and the idiosyncratic nature of political life necessitates a degree of flexibility and improvisation in the executive that is at odds with the idea of a government in which the people rule and the executive is fully subordinate to the law.

This argument – that an executive fully subordinate to the law is an executive ill-equipped to protect the nation in an emergency – draws heavily upon Locke’s defense of executive prerogative.<sup>29</sup> It

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<sup>28</sup> Mansfield, p. 294.

<sup>29</sup> John Locke’s discussion of executive prerogative in his *Second Treatise of Government* has obviously received a great deal of attention over the years, and continues to do so today. Should we understand Locke’s discussion of prerogative to mean that the president is authorized by the law to take extra-legal actions in extraordinary circumstances – or that such actions are best understood as extra-constitutional? In this debate, there are “constitutionalists” and “extra-constitutionalists,” going all the way back to Hamilton and Jefferson, respectively. The former argue that executive prerogative exists only in the sense that the legislature can authorize the executive to circumvent the constitution in an emergency (see, for example, David Weaver, “Locke, Leadership, and the Federalist,” *American Journal of Political Science*, Vol. 41, No. 2 (April 1997); Thomas Langston and Michael

is worth familiarizing ourselves with his arguments because he is widely cited by contemporary advocates of executive power. In Locke's constitutional theory, domestic politics is guided by two powers that need to be separated: legislative and executive. In international politics, however, the lack of a viable exit strategy from the state of nature that defines this realm evokes what Locke calls the federative power, which is the "power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth."<sup>30</sup> Despite the importance of separating legislative and executive power when it comes to national political life, the management of national security, Locke argues, and contemporary advocates of one-man rule second enthusiastically, should not be subject to the same division and oversight.<sup>31</sup>

What happened to Locke's discussion of the extent of human frailty and our gift for confusing private and public interest? What happened to the human passions, which, he argues, if undisciplined by established law, lead to disorder and the ruin of a commonwealth? Locke clearly appreciates these dangers – threats to a republic that Madison's theory of faction teaches us how best to control – and

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Lind, "John Locke and the Limits of Presidential Prerogative," *Polity*, Vol. 24., No. 1 (Fall 1991). The extra-constitutionalists claim that Locke's executive prerogative is a natural rather than constitutional power and therefore beyond constitutional control. The "legalism" of the constitutionalists, these scholars argue, is dangerous in a national security emergency. An executive acting on behalf of the public interest has the right to act without or even against the laws (see, for example, Clement Fatovic, "Congressional and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives," *American Journal of Political Science*, Vol. 48, No. 3 (July 2004); and Ross J. Corbett, "The Extraconstitutionality of Lockean Prerogative," *The Review of Politics*, Vol. 68, No. 3 (Summer 2006).

<sup>30</sup> John Locke, *Second Treatise of Government* (Hackett Publishing Company, 1980), XII. 146.

<sup>31</sup> Among those scholars critical of the assumption that Lockean prerogative is consistent with the political science of *The Federalist* is Morton J. Frisch. "The great originality of the American regime can be said to be its incorporation of monarchical or executive power within the framework of traditional republicanism, a blend now referred to as presidential government," he writes, but "Lockean prerogative is clearly incompatible with the American Constitution" (Morton J. Frisch, "Executive Power and Republican Government – 1787," *Presidential Studies Quarterly*, Vol. 17, No. 2 (Spring 1987), pp. 282 and 286). Richard Pious is another noted scholar who argues that executive power is left "ambiguous and undefined" in the Constitution, and that interpreting the boundaries of executive power is an unambiguously political act. "There is no question that the weight of scholarship favors doctrines that limit executive power and provide for both interbranch policy codetermination and checks and balances," he writes, but history tells a different story: "The scholars have won the battle of constitutional analysis, but they have lost the war over executive powers" (Richard M. Pious, "Inherent War and Executive Powers and Prerogative Politics," *Presidential Studies Quarterly*, Vol. 37, No. 1 (March 2007), pp. 66 and 81).

yet, on the subject of federative power, he jettisons the principles that guided his earlier work on domestic politics and institutional design. “And though this *federative* power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the *executive*; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good.”<sup>32</sup> The unpredictability of the enemy, he argues, forces citizens in even a well-designed commonwealth to trust the wisdom, prudence and skill of those in whose hands federative power has been placed – to grant them, in other words, great leeway in the conduct of foreign affairs.<sup>33</sup> If a republic is to survive and flourish, fidelity to the law cannot be its highest obligation.

A student of national security might reasonably wonder why the greater unpredictability of international politics should be associated with an increase in the level of trust we are expected to place in a single civilian leader, rather than a call for more substantial checks and balances, but Locke insists that though executive and federative powers are “distinct in themselves, yet they are hardly to be separated.”<sup>34</sup> The legislative power must be the supreme power in every commonwealth, the power to which all other powers must be subordinate, and yet the federative power – the power of war and peace – must be placed solely in the hands of a single executive with a great deal of latitude to act not only beyond the law, but at times against it.

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<sup>32</sup> Locke, XII.147.

<sup>33</sup> Benjamin Kleinerman argues that Locke was “far more aware of the dangers of executive prerogative than the more optimistic accounts in the scholarship have appreciated,” and that, as a consequence, was “surprisingly pessimistic about the permanent sustenance of legislative constitutionalism.” Although the people have “advanced beyond their simplistic trust in kingly ‘father-figures’ who would look out for their good,” they still remain “far too passive for the vigilance essential to ‘umpire’ well the necessity of executive action outside the laws,” (Benjamin A. Kleinerman, “Can the Prince Really Be Tamed? Executive Prerogative Popular Apathy, and the Constitutional Frame In Locke’s *Second Treatise*,” *American Political Science Review*, Vol. 101, No. 2 (May 2007), p. 210).

<sup>34</sup> Locke, XII.148.

What happened to Locke's great respect for the "variety of opinions, and contrariety of interests" that coexist in any community of men, and that would, he suggests, quickly fell Hobbes' mighty *Leviathan*?<sup>35</sup> Are decisions about the use of force so uncomplicated and impervious to ideological rigidity that we need not worry about the disruptive passions and interests of those charged with planning and executing a nation's wars? Are decisions about war and peace even more axiomatic than his natural law, which, though perfectly transparent and easily comprehensible, still needs an impartial judge to interpret and thereby protect us from our subjective and competing interpretations? Locke, despite his profound concern for the abuse of state power – despite his sensitivity to the many ways in which power and subjectivity can lead a constitutional regime to ruin – nevertheless appears to answer these questions in the affirmative. The federative and executive powers are both "*ministerial and subordinate to the legislative,*" and yet "several things should be left to the discretion of him that has the executive power."<sup>36</sup> In a world in which threats are difficult to decipher and formulating effective responses to these ambiguous threats presents an enormous challenge for even the brightest and most experienced among us, is there no viable alternative to giving a single executive the power to act on matters of national security according to his judgment and discretion? Must a grant of extra-legal or extra-constitutional power to the executive branch be synonymous with one-man rule? Is the choice we must make as republican theorists between an executive who is subordinate to the law, and therefore too inflexible and programmatic to meet the necessities of international political life, and a unitary executive who is free to transcend the law, and respond to these necessities as she sees fit?

Mansfield claims that extra-constitutional powers must be available to the executive – that constitutional boundaries must be permeable – if a republic is to prosper.<sup>37</sup> Critics of executive power

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<sup>35</sup> Locke, VIII.98.

<sup>36</sup> Locke, XIII.153, XIII.159.

<sup>37</sup> Hamilton argues that the power to attend to the common defense "ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent &

may grumble when presidents take actions that offend their morals or judgments, but these protestations, he argues, subside as soon as the policy preferences of these critics require a similarly forceful exercise of executive power. Mansfield argues that we all agree on the necessity of a strong executive, even though some of us shy away from the implications of our position. Either we are honest supporters of executive power or we are partisans and hypocrites.<sup>38</sup> Ambivalence is logically permissible, but this ambivalence manifests itself in our attempt to conceal from ourselves the fact that executive power is indeed a necessity. Despite our desire to nurture a belief in government by the people and for the people, we recognize the need a very powerful, solitary figure at the head of government. This is why the Founders created a formal executive with vast, informal powers.<sup>39</sup> Our executive may not possess outright tyrannical power, but it is nevertheless “far more powerful than the supposed, theoretical formal executive.”<sup>40</sup> We may be enamored with legislative and judicial processes – processes which end in decisions that reflect a sequence of arguments and counterarguments – but we do not speak of executive process precisely because we realize that the nature of executive decision-

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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” (*The Federalist*, No. 23, Paragraph 4).

<sup>38</sup> Progressives favored executive power in the early and middle parts of the last century, while conservatives rejected it; since the 1970s, these positions have largely reversed. Jack Goldsmith presents a nice summary of this politics-driven history of executive power. As he thoughtfully speculates, “Yoo’s account of the constitutional founding would have set James Burnham’s hat on fire” (Jack Goldsmith, “The Accountability Presidency,” *The New Republic* (February 2010)). He could have written the same thing about the inflammatory relationship between mid-twentieth century and contemporary progressive scholars on the subject of executive power. For the progressive and conservative positions during the early and middle part of the last century, see, respectively, Woodrow Wilson, *Congressional Government* (Quid Pro, LCC, 2011); and James Burnham, *Congress and the American Tradition* (Henry Regnery Company, 1959).

<sup>39</sup> Abraham Sofaer argues that both advocates and critics of executive power present exaggerated claims. Executive power is best understood in the context of our separation of powers system. Concurrent authority creates what Justice Robert H. Jackson called a zone of twilight: “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law” (Abraham D. Sofaer, “Presidential Power and National Security,” *Presidential Studies Quarterly*, Vol. 37, No. 1 (March 2007), p. 119).

<sup>40</sup> Mansfield, p. 4.

making is fundamentally different from the deliberative, compromise-seeking processes that define the other two branches of government.

Perhaps there is not a viable alternative to one-man rule, but I would argue it is premature to reach such a conclusion. Advocates of a strong, unitary executive, I would suggest, make a fundamental error in their defense of executive power: they focus strictly on the comparative power of the three branches of government. This leads them to insist on executive supremacy in matter of national security policy – that certain powers of the common defense cannot be shared between multiple departments of government – and as a result never consider the practical nature of executive branch decision-making in a national security emergency. Political theorists may not speak of an executive process, as Mansfield points out, but defense reformers most certainly do. And as I argued in the previous two chapters, deliberation in a constitutional system is not encouraged merely to facilitate compromise-seeking: it can improve the quality of lawmaking and statecraft. The choice between unity and plurality in the executive branch is not a simple, obvious choice between competence and feebleness.

*2. The task of political science in The Federalist was to show that an energetic executive could be republicanized.* Was the great theoretical innovation of the founding fathers the smuggling of monarchical power – singularity and strength – into a constitutional order? Is this design innovation – this seemingly awkward synthesis of regime types – the feature of our constitutional order most deserving of our praise and allegiance?

The genius of our republican form of government, one could argue, owes more to the friction and turbulence of the founding debates than of harmony and agreement among the founders. With this possibility in mind, we could make a compelling case in support of the idea that our constitutional order

is a product of the compromises and tradeoffs that were forced upon its various architects, and that our republic benefited from this clash of principles and temperaments.<sup>41</sup> *Publius*, in other words, understood republican constitutionalism better than either Madison or Hamilton. Had we had a single founder, we would have inherited a less well-designed, less durable, less dynamic republic.

This argument certainly has its merits. I would suggest, however, that it does not always serve contemporary scholars well to conflate the political theories of the two primary authors of *The Federalist*. If we want to examine key principles from the founding era in order to test their applicability to contemporary institutional dynamics, we must recognize that the various arguments made by Madison and Hamilton in *The Federalist* are not always compatible. Do we gain in clarity and understanding by conflating their political theories? Does a selective presentation of the political science upon which our republic was founded – aligning our arguments with either Madison or Hamilton – help us to grapple with contemporary problems? Most advocates of one-man rule – of the “personalization of executive power,” and the “strict administrative subordination to the will of the President”<sup>42</sup> – follow the convention of treating the political theory of *The Federalist* as a single, coherent theory. A composite view certainly has much to teach us about constitutional theory and institutional design, but I would suggest that we do ourselves a disservice when we do not study *The Federalist* from *both* a composite and individual-thinker perspective.<sup>43</sup>

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<sup>41</sup> Not all features of our Constitution, of course, emerged from a creative friction between first principles. Two of the famous compromises at the convention – equal representation in the senate and the three-fifths clause – have less to do with principles of constitutional theory than the overriding concern with preserving the union.

<sup>42</sup> Skowronek, pp. 2099, 2097.

<sup>43</sup> Critics of the unitary executive are more likely to juxtapose the arguments of Madison and Hamilton, and the Pacificus-Helvidius debates of 1793-1794 (provoked by Washington’s Neutrality Proclamation) are often used to clarify their respective positions on executive power. As stimulating as these debates are, I generally subscribe to the methodological view that argues it is better to ground our arguments about the meaning of Constitution in pre-enactment history rather than post-enactment history, in order to filter out political preferences and institutional loyalty. In terms of this methodological preference, as we will see in Chapters 6, 7 and 8, students of the national security state have one clear disadvantage compared with students of the founding era: it is very

What was the main task of the political science of *The Federalist*? It is understandable that an advocate of one-man rule would nominate the creation of a powerful executive for this honor. But if we take Madison's contributions to *The Federalist* seriously, rather than subordinating them to Hamilton's, we would have to nominate the problem of faction – the need to design institutions capable of controlling factional impulses of both majorities and minorities – as the overarching task and central theoretical challenge of *The Federalist*. This is not a superficial distinction. If we approach *The Federalist* from Hamilton's perspective<sup>44</sup> – How do we republicanize an executive that by necessity must be strong and energetic? – rather than from Madison's perspective – How do we mitigate the problem of majority and minority factions? – we will weigh very differently the various political principles that compete for our loyalty as constitutional theorists and do not always co-exist peacefully in our constitutional order.<sup>45</sup> How scholars approach the two primary contributors to *The Federalist* – how they select and omit arguments from the various essays – makes an enormous difference.<sup>46</sup>

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difficult, if not impossible, to isolate the political principles from the political preferences and institutional loyalties of the founders and reformers of the national security state.

<sup>44</sup> I do not mean to imply that this is the only way to interpret Hamilton. It is Mansfield's Hamilton, and also the Hamilton of *The Federalist*, No. 70. As Morton Frisch argues, Hamilton was not "unconcerned about the abuses that might result from executive power. He knew well the untoward tendencies of a strong executive and to the extent that the government as a whole was limited by its ends, executive energy was limited too. The presidency, as strong as it was, was intended to secure only limited ends" (Morton J. Frisch, "Executive Power and Republican Government – 1787," *Presidential Studies Quarterly*, Vol. 17, No. 2 (Spring 1987), p. 283). In the next chapter I will argue that these ends were once sharply limited by circumstance – by our status as an insulated state – and that, which our evolution into a powerful non-insulated state, executive energy is no longer as limited as Hamilton assumed it would be.

<sup>45</sup> The basic difference between Madison and Hamilton, political scientist Charles F. Hobson argues, was that "Hamilton unblushingly preferred a monarchy on the British model while Madison sought to establish a national government on republican principles" (Charles F. Hobson, "The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government," *The William and Mary Quarterly*, Vol. 36, No. 2 (April 1979), p. 218. In Philadelphia, he elaborates, Madison "offered a means of strengthening the central government without resorting to monarchy while showing that a strong union provided a setting in which republicanism would not only survive but flourish" (p. 225).

<sup>46</sup> I do not mean to suggest that *one* of the great tasks of the political science in *The Federalist* was not to demonstrate how an energetic executive could be republicanized. What I am suggesting is that a more fundamental task of the political science in *The Federalist* was to explain how factiousness, which had destroyed all previous experiments in popular government, could be controlled. If we accept this premise, students of the national security state have a strong argument for turning to the political science in *The Federalist* to weigh the relative advantages and disadvantages of hierarchical and non-hierarchical structures inside the executive branch.

Let us briefly return to Madison's theory of faction, which I covered in detail in the previous two chapters. None of the numerous advantages promised by a well-constructed republic, Madison argues, deserves our attention more than its tendency to break and control the violence of faction. "The friend of popular government never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail therefore to set a due value on any plan which, *without violating the principles to which he is attached*, provides a proper cure for it."<sup>47</sup> Madison's great constitutional project was designing a set of institutions that would consistently frustrate the spirit of faction, whether this spirit resided inside or outside of government, and in whichever of the three main departments of government it managed to grab a foothold.

Madison and Hamilton both argue that the greatest threat to their projected constitutional order would come from the legislature. But on the subject of executive power, this agreement reflects a narrow overlapping consensus, rather than a substantive convergence of perspectives. Hamilton wanted a strong executive so that a single national figure could exercise significant power independently of the people and their representatives. Madison wanted a strong executive to rebuff legislative aggrandizement.<sup>48</sup> The difference here must be respected if we are to reflect critically on the role of the executive today. The difference can perhaps be best characterized as one-man rule and one-man oversight. Madison encouraged his fellow citizens to give up their instinctive hostility to a large republic and a strong central government, but he was certainly not as convinced of the merits of one-man rule as Hamilton.<sup>49</sup> Hamilton insisted that the executive had to be above the law in extraordinary

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<sup>47</sup> Madison, *The Federalist*, No. 10, Paragraph 1.

<sup>48</sup> The contrast here is drawn a bit too starkly: Hamilton also had a great fear of legislative over-reach and argued that the executive needed to be energetic in part to act as an effective disciplinarian and counterweight.

<sup>49</sup> As Charles Thach reports: "The truth is that Madison's views on executive power were extremely vague when he came to Philadelphia in 1787 ... Madison saw the defects of what existed, but he did not as clearly see the remedies" (*The Creation of the Presidency, 1775-1789*, p. 70-71). In a letter written to Washington on April 16, 1787, he states candidly: "I have scarcely ventured as yet to form my own opinion either of the manner in which [the executive] ought to be constituted or of the authorities with which it ought to be clothed" (Quoted in Thach, p. 72. The executive department under the Articles of Convention was obviously too weak – too dependent on the

circumstances in order to respond to domestic insurrection and threats from foreign powers. For Madison, these issues were secondary to his focus on legislative misrule. An executive had to be strong, he argued, not primarily to respond to national security threats but to counter the threat to liberty posed by a potentially pernicious legislature. A strong executive *branch* is required in Madison's constitutional system because otherwise it would be impossible to maintain the constitution equilibrium that is so crucial for stability.<sup>50</sup> Republican principles – primitive republican principles – are compromised not to sneak monarchical power into the executive but to preserve a delicate and essential separation of powers. It is either an error in judgment or an act of partisanship to reproduce under the name *Publius* Hamilton's arguments for a unitary executive when there is ample evidence to suggest that there is a disconnect between the principles Hamilton and Madison privilege in their respective approaches to institutional design.<sup>51</sup>

Advocates of one-man rule frequently refer to *The Federalist*, No. 37 to close this gap between Madison and Hamilton and portray the former as being as committed to a unitary executive as the latter. But Madison's affinity for an energetic government in this essay has much less in common with Hamilton's preference for one-man rule than proponents of this maneuver seem to assume.<sup>52</sup> The challenges encountered by the constitutional convention were many, Madison candidly informs us, and among the most elusive was trying to figure out how to combine "the requisite stability and energy in

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legislature – and hence a degree of independence was required. But by the resolutions introduced by Madison on June 1 suggest, the executive Madison supported at the convention was "essentially subordinate to the legislature" (p. 73).

<sup>50</sup> Madison, *The Federalist*, No. 39.

<sup>51</sup> George Thomas argues that "taking Hamilton seriously" on the subject of extraordinary executive power "might suggest the practical difficulty – if not the theoretical impossibility – of limiting government by way of constitutional democracy" (George Thomas, "The Limits of Constitutional Government: Alexander Hamilton on Extraordinary Power and Executive Discretion," Paper presented at the Annual Meeting of the American Political Science Association, Seattle, WA, September 1-4, 2011).

<sup>52</sup> Bailey argues that Madison's executive is too modest to close the gap, and that it "would not have the latitude in foreign policy desired by those who make foreign policy arguments from the unitary executive" (Jeremy D. Bailey, "The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton," *The American Political Science Review*, Vol. 102, No. 4 (Nov., 2008), p. 464.

government with the inviolable attention due to liberty and the republican form.”<sup>53</sup> Were the participants at the convention able to mingle liberty, stability and energy in the right proportions? Advocates of one-man rule have little if any doubt about the proper ordering of these concepts: without a sufficiently energetic executive – without a unitary executive – instability and tyranny would be inevitable. The great importance they place on energy – we had better hope a vigorous executive is not inconsistent with the genius of republican government – leads them to assume that Madison’s framing of the issue – the challenge of mingling liberty, stability and energy in the right proportions – is largely a rhetorical device. But energy, Madison argues, is essential not only to secure a republic against internal and external threats, but to promote the “prompt and salutary execution of the laws which enter into the very definition of good government.”<sup>54</sup> It is the “vicissitudes and uncertainties” of state administrations under the Articles of the Confederation that command Madison’s attention in these passages. Energy is a necessary component of good government primarily because it serves as an antidote to the pathologies of the legislatures.

Let me end this section by repeating my primary objection to Mansfield’s approach to *The Federalist*. By subsuming Hamilton and Madison under the name *Publius* to buttress his argument in favor of one-man rule, he effaces a good deal of Madison’s political thought in the process and ends up with a composite constitutional theory that Madison (and perhaps even Hamilton, as I will argue in the next chapter) would reject. For Madison, the primary purpose of executive power is to serve as an antidote to legislative power: strength in the executive is essential not because of the necessity of extra-constitutional power, but because he believes the executive department must be protected against legislative encroachment if a republican system of government is to maintain its delicate equilibrium. As political scientist Stephen Skowronek points out, the Founders assumed that the legislature, with its

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<sup>53</sup> Madison, *The Federalist*, No. 37, Paragraph 7.

<sup>54</sup> *Ibid.*

“vast repository of expressed powers and its close proximity to the people, was the branch most likely to exploit public sentiments, and that a properly constituted executive” – a strong executive – “would help to stabilize the affairs of state.”<sup>55</sup> For Madison, the primary threat to republican government comes from within – from legislative misrule – rather than from the kind of internal and external enemies who carry guns and would, if our defenses proved inadequate, tyrannize us against our will.<sup>56</sup>

### *Conclusion*

Must we conflate a strong executive branch and one-man rule? Are there alternative ways of constituting the executive branch that respect the principles of the Founders – that perhaps even realize them to a greater degree? Can energy, secrecy, dispatch and decision be preserved in a republican system of government without yielding, however grudgingly, to the necessity of one-man rule? In *The Federalist*, No. 78, Hamilton describes the judiciary as “the least dangerous” department of government because it may “truly be said to have neither FORCE nor WILL, but merely judgment.”<sup>57</sup> Can we create a “department” within the executive branch that fits this description – that can exercise judgment but is largely devoid of force and will? Is it possible to control faction within the executive department without compromising its administrative punch and dexterity?

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<sup>55</sup> Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review*, Vol. 122 (June 2009), p. 2072.

<sup>56</sup> Part of the explanation for Madison’s apparent endorsement of the unitary executive in *The Federalist* comes from his desire to maximize the executive’s responsibility and accountability to the people. If the Senate shared in more executive functions, executive responsibility would be lost, and without adequate compensation. In this context, what I argue in this dissertation is that ensuring a close alignment of political ends and military means in a national security crisis *is* adequate compensation for the degree of responsibility that might be lost with the introduction of an element of pluralism.

<sup>57</sup> Hamilton, *The Federalist*, No. 78, Paragraph 2.

The problem with Mansfield's approach to constitution theory, I would suggest, is that it remains at a level of abstraction that diminishes its practical relevance. He is a historian of constitutional theory and executive power, not a defense reformer wrestling with specific problems. Advocates of one-man rule would argue that there are no outstanding constitutional problems that need to be solved – that a strong executive is the modern solution to an ancient problem, and that we need not worry about the issues raised in the previous paragraph – but this position only reveals a lack of familiarity with debates about defense organization that have exercised students of national security and defense reform since the founding of our national security state.<sup>58</sup> The arguments of Mansfield and other advocates of one-man rule are compelling only if we ignore how executive power is actually exercised in our republic, and how decisions regarding the use of force are actually made.<sup>59</sup>

Liberal constitutions, Mansfield writes, “would not work without a branch whose function could be accurately described – though you might never hear it described that way – as getting around the constitution when necessary.”<sup>60</sup> The politics of such theoretical arguments aside – they may encourage executives not only to ignore popular opinion and the will of the legislature but any informal deliberative processes designed to improve the quality of executive branch decision-making – extra-constitutional power can obviously be exercised unwisely. The wise exercise of national power, I am acutely aware, is not something any constitutional theorist can guarantee, no matter which set of principles she privileges. The question we must therefore ask ourselves is whether one-man rule is in fact a necessity in the sense that it minimizes an ineradicable margin of error.

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<sup>58</sup> These are subjects we will cover in the second part of this dissertation. Familiarity with the defense reform debates that led to the National Security Act in 1947 and the Goldwater-Nichols Act of 1986 – the principles and forms upon which our national security state was founded – should make it clear to political theorists why this author is interested in provoking an inter-disciplinary conversation.

<sup>59</sup> How are such decisions actually made? The second part of this dissertation addresses this question at length.

<sup>60</sup> Mansfield, pp. 5-6.

As an amateur student of history, and someone in awe of our inability as a species to grasp fully how much we do not know, and the consequences of our ignorance, I am not easily seduced by the image of a wise, prudent, deliberative-minded executive – a virtuous executive, we could say – who routinely harnesses the great energy at his disposal to repel unequivocal threats to the nation’s security and welfare. Rulers, to put it mildly, do not always exhibit tactical and strategic genius under stress. Why, I wonder each time I encounter another *theoretical* defense of executive power, do advocates of one-man rule always seem to assume that statesmen entrusted with great energy and strength will possess the poise and humility necessary to exercise their power wisely? Why is the assumption so widespread in the literature that the power of public opinion (elections) and a fear of impeachment will compensate for the normal human allotment of intellectual and emotional weaknesses?<sup>61</sup> In *The Federalist*, No. 51, Madison gives us one of the great maxims in the history of political theory: “If all men were angels, no government would be necessary.”<sup>62</sup> The great myth that animates executive-power realists is the idea that the abundant energy lodged in the executive branch will be exercised by preternaturally calm, knowledgeable and deliberative-minded executives who have cultivated a tactical and strategic genius. Only fictional princes, I think it is safe to say, ever reach a level of intellectual and emotional maturity that would make such statecraft possible.<sup>63</sup>

But even if readers agree that the men and women elected to our highest office are unlikely to be properly equipped to exercise great power according to their discretion, I have only succeeded in pointing out a fairly obvious weakness in our constitutional order. I have not proposed a corrective, and

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<sup>61</sup> This is another subject we will return to in the second part of this dissertation. In an insulated state, these two requisites to safety might indeed be sufficient to ensure that a strong, unitary executive governed in the interests of the people. In a non-insulated state, additional requisites to safety may be required. Are *ex post* means of limiting extraordinary power in a national security crisis likely to improve the quality of decision-making?

<sup>62</sup> Madison, *The Federalist*, No. 51, Paragraph 3.

<sup>63</sup> There are of course many echoes of Niccolò Machiavelli in the literature. Machiavelli was surely correct to argue that conventional morality can thwart the benevolent projects of a genius. But this insight is no more helpful to a constitutional theorist than pointing out that conventional morality can thwart the benevolent projects of an angel. If men were angels – or geniuses – no government would be necessary. In this context, Machiavelli is an ideal theorist, rather than a problem-driven realist, and closer in spirit to John Rawls than to Carl von Clausewitz.

a better alternative may not exist. It could very well be that one-man rule is a necessary weakness of our republican system and that any attempt to correct the problems that arise because of one-man rule would be counterproductive. The comparative lens used by most constitutional theorists certainly leads us to draw this conclusion. In a national security crisis, we want the executive branch to be strong and nimble, and the participation of members of the legislature or judiciary would be unlikely to improve the forcefulness or wisdom of our response. But I would suggest that this lens has its limitations. It leads us, with respect to the constitution of the executive branch, to privilege Hamilton's constitutional preoccupations over Madison's and endorse, however grudgingly, some version of one-man rule. It also leads us to accept as useful if not wholly convincing the dichotomy between energy and deliberation (the former being a feature of the executive, the later of the legislature and judiciary). And it leads us to reject the possibility that a deliberative separation of power inside the executive branch might control the influence of faction without compromising its energy, secrecy, dispatch or decision. It prevents us from asking what I would suggest is the crucial question: In a national security crisis, are there decision-making arenas in which factiousness presents a greater threat to the republic than a degree of pluralism? If our only choice were between a strong executive and an executive weakened by legislative oversight, constitutional theory would have little to offer a student of the national security state. But if we are convinced that the genius of our constitution is the remarkable attention it pays to the problem of faction – and Hamilton, as I argue in the next chapter, was much more concerned with executive-branch faction than most advocates of one-man rule realize – then we will not have to ignore or reject certain components of the political theory of *The Federalist* when we defend the introduction of a deliberative separation of power into the executive branch.



## 5 The International Political Theory of *The Federalist*

*The president of the United States possesses almost royal prerogatives, which he has no occasion to make use of, and the rights which, up to now, he can use are very circumscribed: the laws permit him to be strong, circumstances keep him weak.*

- Tocqueville

*The dilemmas involved are pre-eminently American dilemmas, not because America has weaknesses that others do not have but because America is powerful as no nation has ever been before, and the discrepancy between her power and the power of others appears to be increasing. One may hope that America, with her vast resources and democratic traditions, with her diverse and creative population, will find the wisdom to match her power; but one can hardly be confident because the wisdom required is greater wisdom than any great nation has ever shown before.*

- William Fulbright

*The history of human conduct does not warrant that exalted opinion of human virtue which could make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be the President of the United States.*

- Alexander Hamilton

What should a constitutional theorist know about international politics? Let me be a bit more provocative: What *must* a constitutional theorist know about international politics in order to design national security institutions wisely?<sup>1</sup>

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<sup>1</sup> I use the word “provocative” because political theorists have been critical of international relations theorists for excluding domestic political variables from their models of the behavior of states in the international system. I am critical of this tendency as well, but I suspect that the desire of IR scholars to develop system level theories and create an independent niche within political science has a lot to do with the trajectory of the discipline. If IR is about studying variables that are unique to the international system, then it is perfectly logical to exclude domestic politics from its analysis. Part of what I argue in this chapter is that constitutional theorists cannot afford to be equally selective.

In this chapter I am going to analyze the international political theory of *The Federalist*. International relations as an academic discipline obviously did not exist at the time *The Federalist* was written, but these essays nevertheless contain a coherent theory of international politics that not only had a profound influence on the design of our republic but have serious implications for how contemporary scholars should think about relationship between international politics and domestic institutional design.<sup>2</sup> The international political theory presented by Alexander Hamilton and John Jay in *The Federalist* makes a key distinction between insulated and non-insulated states. Although the logic of this distinction was not explored at length, the implication is clear: insulated and non-insulated republics are best served by different constitutional orders. In his contributions to *The Federalist*, Hamilton characterizes the United States as an insulated state, and makes it clear that he expects it to remain so for the foreseeable future. The fact that the United States is now a global superpower – is “immensely and unprecedentedly rich,” a “hyper-power,” a nation with a military capability that “dwarfs that of most other countries combined,” as Geoffrey Wheatcroft puts it – is an invitation – an urgent invitation, I would argue – to rethink the constitution of our executive branch.<sup>3</sup>

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<sup>2</sup> Stephen Walt, a political scientist and student of national security policy, is critical of the larger IR community for widening the gap between theory and policy over the last few decades and not producing much policy-relevant theoretical work (Stephen Walt, “The Relationship between Theory and Policy in International Relations.” *Annual Review of Political Science*, Vol. 8 (2005). I share this general criticism. This does not mean, however, that defense reformers or political theorists interested in national security policy can ignore the relationship between constitutional theory and international relations theory.

<sup>3</sup> Geoffrey Wheatcroft, “Boxed In: The Constraints of U.S Foreign Policy,” *World Affairs Journal* (January / February 2010). If we had to characterize our constitution as being based on a single overarching principle, a good candidate would be that hegemonic power is rarely exercised wisely. This principle applies to states in the international system, I would suggest, as reliably as to individuals or individual institutions in a constitutional system. As we will see in the second part of this dissertation, however, most participants at the “constitutional convention” of 1945-1947, advocates of the Goldwater-Nichols Act of 1986, and contemporary defense reformers approach the problem of national security as though American’s hegemonic power in international politics were unproblematic. Few defense reformers or constitutional theorists are as consistently skeptical of the exercise of power as Bernard Brodie. “A large nation will not only be more nearly certain to resist so direct an offense as invasion of its own borders, but, depending on its sense of power and importance, it will also commit itself to war or warlike acts over a broader spectrum of what it asserts to be provocations, which is to say simply that it interprets more expansively its ‘vital interests’” (War and Politics, p. 2). I would only add here that it is particular administrations, rather than nations, that commit themselves to war or warlike acts in defense of a nation’s so-called vital interests.

Here are two questions I would like the reader to keep in mind as we interpret the international political theory of *The Federalist*. First question: Did the Founders think systematically about the relationship between constitutional theory and international politics? Phrased somewhat differently, do the Founders present a constitutional system that would possess the proper balance of executive energy and safety in any republic, irrespective of its relative international power?<sup>4</sup> Second question: If they did not think systematically about this relationship, does the present constitution of the executive branch suffer as a consequence from *unnecessary* imperfections? The best constitutions – the best constitutional theories – create constitutional orders that are able to adapt to changing circumstances. If insulated and non-insulated states are not equally able to promote wisdom and stability in a national security crisis, would the later *benefit* from a different balance of the requisites to energy and safety in the constitution of its executive branch?

### Jay's Theory of International Politics

#### *Union or Else!*

Jay's first contribution to *The Federalist* addresses the most fundamental question of the ratification debates: whether the people of America should "be one nation, under one federal government," or "divide themselves into separate confederacies" (No. 2, Paragraph 2). His argument begins with an

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<sup>4</sup> William Wohlforth notes that the United States is "freer than most states to disregard the international system and its incentives" (William Wohlforth, "The Stability of a Unipolar World," *International Security*, Vol. 24, No. 1 (Summer, 1999), p. 8). The international system clearly does not constrain the United States in the same manner it did in the late eighteenth century. What I argue in this chapter is that the magnitude of these constraints should have an impact on the requisites to safety against the abuse of executive power we build into our constitutional system. Constitutional theorists have much less reason to worry about the discretionary power of a strong unitary executive in a world in which the United States is not particularly free to disregard the international system and its various incentives.

appeal to common sense: because government is an indispensable necessity, men must cede to it some of the natural rights they are understandably loathe to relinquish. With this concession in mind, Jay asks his readers if the safety and happiness of the citizenry should be entrusted to union or division, to one federal government or multiple sovereignties. Jay is clearly frustrated by the erosion of what had been a long-standing consensus in favor of union.<sup>5</sup> The emergence of an alternative doctrine – one that assumes individual rights would be better protected by disunion – is almost incomprehensible to him, and his lack of sympathy with this position leads him to present his readers with a stark alternative: either union under a single federal government, which would promote happiness and prosperity, or division into a number of “unsocial, jealous, and alien sovereignties,” which would obviously be antithetical to the happiness and prosperity of all but a small minority (No. 2, Paragraph 6).

Part of what animates Jay’s union-or-else position is a very favorable judgment of America’s history as a single political entity: “As a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign states” (No. 2, Paragraph 7). Jay is well aware that the federal government, which was brought into existence under emergency circumstances, is seriously flawed. “It is not to be wondered at, that a government instituted in times so inauspicious, should on experiment be found greatly deficient and inadequate to the purpose it was intended to answer” (No. 2, Paragraph 8). But the deficiencies and inadequacies of the central government, he argues, would be best addressed by a new and improved central government, rather than abandoning the principle of union altogether. In none of his contributions to *The Federalist* does Jay directly refute

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<sup>5</sup> “When the King of Great Britain,” Jay remarked in a 1788 address to the people of New York, “misguided by men who did not merit his confidence, asserted the unjust claim of binding us in all cases whatsoever, and prepared to obtain our submission by force ... Union was then considered as the most essential of human means, and we almost worshipped it with as much fervor as pagans in distress implored the protection of their tutelar deities. That Union was the child of wisdom. Heaven blessed it and wrought out our political salvation” (John Jay, “An Address to the People of the State of New York,” in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay*, Vol. 3, 1782-1793 (G. P. Putnam’s Sons, 1891).

the logic of division – the positive arguments for multiple sovereignties or confederacies. His defense of union is therefore rather minimalist. He endorses the deliberative practices employed by the representatives at the constitutional convention; claims that all wise and experienced men identify union with greatness and prosperity and disunion with violence and tyranny; and concludes that we should put our trust in wise and experienced men.

After praising his collaborators, Jay enters into a discussion about the importance of personal safety, which he considers the preeminent object of consideration to which a wise and free people will gravitate. Peace and tranquility are threatened by “dangers from *foreign arms and influence*,” as well as “dangers of the *like kind* arising from domestic causes” (No. 3, Paragraph 4). How does he establish the primacy of union in terms of its ability to secure the people from foreign hostilities? He takes the roundabout approach of an already-committed advocate of union. There are just and unjust wars, he points out. If a united America would provoke other nations into fewer just wars than a disunited America, then citizens must vote for union. A single national government, he argues, would act more justly than several smaller governments, and would therefore be less likely to provoke foreign powers though unjust actions. Here is the key passage that summarizes his basic argument:

Because when once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it; for, although town or country, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments, yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government – especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon to some of the States. Hence, it will result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more *safe* with respect to us (No. 3, Paragraph 8).

Rather than sketch a theory of international politics that would support his pro-union position, Jay relies here entirely on what I call the talent-pool principle: the larger the talent pool for a political election, the more likely talented people will end up in government. Members in a national government, whether elected or appointed, are less likely to be beholden to personal or local interests than members of a smaller state government in which a majority of citizens might vote unwisely or irresponsibly. As a result, the proposed union will not, as smaller states with multiple borders inevitably will, succumb to the “impulse of sudden irritation,” nor will it be affected by the pride that inhibits honest reflection and self-criticism, as its character will be temperate and cool (No. 3, Paragraph 15). Jay hints at a theory of international relations with his reference to the danger of crowded neighborhoods – a theory that, in general outline, has much in common with classical realism – but his talent-pool principle ends up doing the heavy lifting.<sup>6</sup>

In his third contribution to the *The Federalist*, Jay focuses on the kinds of wars likely to be provoked by the inevitable rise in American economic influence.<sup>7</sup> It is in this essay that he begins to

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<sup>6</sup> Despite their many differences, Niccolo Machiavelli, Jean-Jacques Rousseau, Blaise Pascal, Emmanuel Kant, E. L. Carr, Raymond Aron, Hans Morgenthau and George Kennan all fit loosely under the general rubric of classical realism. Certainly the other labels popular in contemporary international relations theory – neorealist, neoliberalist and constructivist – are less appropriate. I use classical realism to capture the idea that these scholars were not advocates of a single level of analysis and took leadership, domestic politics and the basic structure of the international system into consideration in their attempts to understand patterns of war and peace. Perhaps Jay would fit best with a “state-centric realist” in international political economy such as Robert Gilpin, who incorporates the influence of international trade and economic power into his understanding of international politics (Robert Gilpin, *The Political Economy of International Relations* (Princeton University Press, 1987). Labels are always a bit misleading, but identifying which kind of theories of international politics the Founders would have rejected will contribute to our analysis.

<sup>7</sup> It is worth pointing out that economic power is here kept distinct from military power. States which might suffer from our rising economic power would naturally be tempted to interfere with our emergence as a global competitor. In emphasizing the threat our rise as an economic power might pose to other nations, Jay appears to be convinced that our military power would not rise in conjunction with our economic power, and that whatever military power we possessed would only ever be used for unambiguously defensive purposes. Jay expressed a strong desire to see the union gain the respect and recognition of established European powers, and he believed this required a strong economy based on fixed borders, a stable currency, a robust system of credit, and new trading partners. The inability the Confederation to perform its national economic duties was an invitation to

sketch a slightly more systematic theory of international politics. With a new economic competitor on the scene, “jealousies and uneasinesses may gradually slide into the minds and cabinets of other nations” (No. 4, Paragraph 9). Under these circumstances, a strong union is essential: “Wisely, therefore, do they consider union and a good national government as necessary to put and keep them in such a situation as, instead of inviting war, will tend to repress and discourage it” (No. 4, Paragraph 10). This is a blunt form of economic materialism: the greater the economic resources of a nation – as long as a nation is governed reasonably well – the less tempted other nations will be to arrest her natural development in an attempt to preserve their relative superiority.

After this discussion of the dynamics of international economic competition – the inevitability with which powerful nations will try to compromise the economic independence of emerging competitors – Jay turns to the problem of unjust wars. What defenses are embedded in the constitution to protect against manufactured wars, as opposed to just wars, which are “disgraceful” to human nature and yet characterize the rule of absolute monarchs (No. 4, Paragraph 2)? The defense of a strong national executive, Jay argues, must begin with a detailed description of the institutions that will be in place to prevent such executives from making war for “purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans” (No. 4, Paragraph 3). This list of concerns is a bit antiquated, but if we swap ideological fixations for private compacts, we end up with a legitimate set of challenges – “inducements to war” – that must be checked or at least diminished through institutional safeguards.<sup>8</sup>

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foreign powers to meddle economically in our affairs. The literature both by and on Jay is sparse compared with what has been written by and about James Madison and Alexander Hamilton, but his correspondence and public papers are still full of insights into his economic-driven vision of American greatness. See, especially, Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay, Vol. 3, 1782-1793* (G. P. Putnam’s Sons, 1891).

<sup>8</sup> Antiquated in the sense that personal affronts and private compacts are less likely to be responsible for “disgraceful” wars today than the unwillingness or inability of civilian leaders to subject their assumptions and

What safeguards does Jay argue are built into our constitution in order to prevent our executive from engaging in wars “not sanctified by justice or the voice and interests of the people” (No. 4, Paragraph 3)? Jay mentions only one such mechanism: a single government “can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found” (No. 4, Paragraph 12). The talent-pool principle makes yet another appearance. Jay mentions other advantages, such as uniform policy-making and a tendency to suppress particular interests, but these are arguments against disunion, not safeguards against the unwise exercise of national power in matters pertaining to war and peace.

Jay, I think most readers would agree, makes a strong case for union:

Leave America divided into thirteen or, if you please, into three or four independent governments – what armies could they raise and pay – what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense? Would there be no danger of their being flattered in neutrality by its specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquility and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? (No. 4, Paragraph 15).

But Jay, I would suggest, fails to distinguish between the defensive strength of union and the danger, in terms of the executive engaging in a war not sanctified by justice or the interests of the people, of a

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beliefs to close scrutiny. The focus in this passage on personal motives also suggests that Jay has in mind a weak theory of faction, rather than a strong theory of faction. A weak theory of faction, as I explained in Chapter 2 and 3, discourages theorists from thinking about how to control ideologically-driven factions. If constitutional theory only had to worry about the dangerous interjection of private interests into the international affairs of the state, this constitutional theorist would be largely content with the present constitution of the executive department.

union with the strength to project military power abroad.<sup>9</sup> Jay is most concerned with presenting to the world a model of strength and efficiency: “If [foreign nations] see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment” (No. 4, Paragraph 17). Divided, we would soon be objects of contempt and outrage, and suffer accordingly.<sup>10</sup> Jay may be right about the wisdom of union, but his passion for union and antipathy for disunion, I would suggest, blinds him to the diversity of challenges and dangers of international politics. The absence of a clearly articulated theory of international politics – the dangers not only to an emerging nation but an established power – is an impediment to the articulation of a constitutional theory that would fit a republic irrespective of its economic and military stature.

### *More Heavy Lifting: The Talent-Pool Principle Revisited*

By granting the President and the Senate jointly the power of making treaties, Jay argues in another contribution to *The Federalist*, the proposed constitution “affords the highest security that it will be

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<sup>9</sup> As we will see in the second part of this dissertation, this distinction – between defensive strength and the strength to project military power abroad – also has implications for civil-military relations. As David Hendrickson explains, “Every system of civil-military relations must contend with disputes over the level and scope of military authority, and finding the proper distribution of authority in the realms of strategy, operations, and administration in no easy thing” (David C. Hendrickson, *Reforming Defense: The State of American Civil-Military Relations* (Johns Hopkins University Press, 1988), p. 29). Part of what I argue in this dissertation is that we have reached an impasse in terms of the applicability of conventional ideals for civil-military relations, and that this is why we need to reengage with the constitutional theory on which our republic was founded.

<sup>10</sup> At the time Jay was writing, the Spanish, French and English – not to mention Native Americans – were all embedded inside, or hovering around the periphery of, the nation, and either actively or passively searching for frailties and weaknesses. This may not be an accurate representation of the motives and actions of these groups and nations, but Jay certainly believed that the nation had to be unified in order to deal with direct threats to the territorial boundaries of the United States. For an overview of Jay’s concerns during the convention and ratification debates, see Walter Stahr, *John Jay: Founding Father* (Continuum, 2006).

exercised by men the best qualified for the purpose, and in the matter most conducive to the public good” (No. 64, Paragraph 3). The now-familiar assumption here is that “able and honest men ... perfectly acquainted with our national concerns,” will in practice exercise treaty-making power (No. 64, Paragraph 5). Jay believes that the electoral processes outlined in the constitution are sufficient to achieve this result. Presidents will be by law over thirty-five, and senators over thirty. These safety measures “confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle” (No. 64, Paragraph 4). Jay’s faith in age restrictions and the electoral college can be explained in part by the context in which he makes his arguments. Opponents of the treaty-making provision as presented in the proposed constitution fell roughly into two camps: those who argued that only men invested with legislative authority should possess treaty-making power, and those who believed that treaties, rather than being the supreme law of the land, should resemble legislative acts, and be similarly amenable to repeal. If contemporary constitutional theorists had to choose between giving treaty-making power to the president, with the approval of two-thirds of the senate, and giving it solely to a popular assembly, few would choose the former arrangement.<sup>11</sup> Similarly, if constitutional theorists had to choose between equating treaties with the supreme law of the land, and making them amenable to repeal, few would defend the latter option. But the ease with which these decisions are made, I would suggest, distracts us – as it distracted Jay – from engaging in a more thorough constitutional analysis.

What if presidents are not particularly attuned to the complexities of war, peace and commerce, as Jay assumes they will be? What if they are imperfectly acquainted with our national concerns and do not choose their advisors wisely? What if they lack the knowledge and intuition to improve our

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<sup>11</sup> In terms of their decision-making aptitude in foreign policy, their knowledge and expertise on matters pertaining to international politics, popular assemblies have never inspired much confidence in republican theorists.

international position at decisive moments in our history? Jay is explicit about the objective of constitutional theory: on the subject of the power of treaty making, for example, he argues that a well-designed republic guarantees that “our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations on the one hand, and from secrecy and dispatch on the other” (No. 64, Paragraph 8). This is surely the ideal: talent, integrity and deliberation, coupled with secrecy and dispatch, and not only in our negotiations for treaties but the domain of national security in general. But should contemporary constitutional theorists be as confident as Jay was in 1787 that we have in place the kind of institutional structures that will secure every advantage that can be derived from these inputs in a national security crisis?<sup>12</sup>

What I would argue – with Madison as my inspiration – is that ableness, honesty, talent and integrity do not preclude factional affiliations. Jay’s faith in electoral procedures – supplemented by the power of impeachment, which, he believed, conspires through fear of punishment and disgrace to encourage good behavior – is unwarranted. As students of international politics and national security know well, factions are formed not only by people who pursue selfish interests but patriots who mistakenly believe they are pursuing the permanent and aggregate interests of the community. Part of the genius of Madison’s political theory is its commitment to controlling faction. Unlike most political theorists before him, he abandoned the utopian goal of eliminating factions. Jay, in contrast, neglects the importance of controlling faction and takes refuge in the overly idealistic notion of eliminating faction through electoral procedures. Jay, I would suggest, fails to appreciate the need for additional

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<sup>12</sup> Our democracy, let me remind the reader, was founded on the principle that great ambition is commonplace, while great leadership is rare. Good intentions may or may not be the norm, but great leadership is too rare a phenomenon upon which to base a theory of republican government. We need constitutional checks and balances precisely because we cannot assume great leadership in times of peace or war. As Hayek puts it, because “all men in the pursuit of immediate aims are apt – or, because of the limitation of their intellect, in fact bound – to violate rules of conduct which they would nevertheless wish to see generally observed” (F. A. Hayek, *The Road to Serfdom* (G. Routledge & Sons, 1944), p. 179).

auxiliary mechanisms to control the factional impulses of presidents in a powerful state.<sup>13</sup> And he does so despite the fact he is convinced that the universal laws of international politics would destroy the happiness of prosperity of citizens if they chose disunion, which would expose them not only to the jealousies and uneasiness of the leaders of other nations, but their own.

### **Hamilton's Theory of International Politics**

#### *The Gambler*

Do citizens possess the capacity to choose their form of government wisely? This question may have tormented all of the Founders on some occasions, and inspired them on others, but Hamilton's ambivalence is particularly pronounced. "Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good," he writes in his opening contribution to *The Federalist*. The American people have been given a rare and precious opportunity – the opportunity to deliberate on a new constitution – and it would be ideal if they took full advantage of this unique and fortuitous situation and focused their deliberative energies on the identification and realization of the public good. "But this is a thing more

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<sup>13</sup> I do not mean to come across as overly critical. Did any theorist, statesman or science fiction writer, for that matter, anticipate in the late-eighteenth century the discretionary power the twentieth and twenty-first century executive would exercise in national security? Did any founding-era scholar have an understanding of what it would mean to be a contemporary global superpower? In a letter to George Washington early in 1787, Jay presented a vision of the executive that suggests a fairly constrained understanding of the powers he would exercise. "Shall we have a king?" He answers this question with a rhetorical one: "Might we not have a governor-general limited in his prerogatives and duration?" ("John Jay to General Washington, January, 7, 1787," in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay, Vol. 3, 1782-1793* (G. P. Putnam's Sons, 1891).

ardently to be wished than seriously to be expected.”<sup>14</sup> Distinguishing between our true interests, and fraudulent versions of our true interests, is an exercise fraught with difficulty.<sup>15</sup>

How will citizens be able to differentiate between sincere and valid criticisms of the proposed constitution and mere dissembling and demagoguery? “The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions and prejudices little favorable to the discovery of truth.”<sup>16</sup> Hamilton appeals to his readers to keep in mind the many reasons why some participants in the ratification debates might *consciously* choose to misrepresent the benefits and dangers of the new constitution. Those who will lose power, wealth or prestige as a result of the adoption of the new constitution will understandably attempt to steer citizens away from the truth. Although Hamilton believes the nation as a whole would benefit enormously from adopting the proposed constitution, he readily acknowledges that a minority of citizens would see their privileges curtailed.<sup>17</sup>

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<sup>14</sup> Alexander Hamilton, *The Federalist*, No. 1, Paragraph 2.

<sup>15</sup> The public good, in this context, is the most advantageous *form* of government. Hamilton is announcing to his readers that he will attempt to distinguish between their “true” and “fraudulent” interests, in terms of union / disunion and other features of a constitutional order. Too often in national security and defense reform scholars try to distinguish between true and fraudulent interests not in term of forms and institutions but policy preferences. In response to this or that particular national security threat – or, more generally, given this or that reality about the international political system – we should do, or refrain from doing, x, y, or z. From an institutional perspective, our “true” interest in a national security crisis, as I argue at length in Chapter 3, is to have in place institutional devices that ensure that the views of the president and his closest civilian advisors are subjected to the only kind of decision-making process that can reliably bring political ends and military means into relatively close alignment. Charles Stevenson, a noted military historian and defense reformer with whom we will engage in Chapter 8, believes that we presently have an informal deliberative process in place that accomplishes what I argue can only be secured on a regular basis through a formal deliberative process.

<sup>16</sup> Hamilton, *The Federalist*, No. 1, Paragraph 2.

<sup>17</sup> As we will see in Chapters 6 and 7, the strongest defenders of the unification of the armed services and a streamlined chain of command have been presidents and their closest civilian advisors. In the “constitutional convention” of 1945-1947, for example, President Truman and Harold Brown, his budget director, energetically fought back the attempt of one group of reformers to dilute executive power. Immediately after the passage of this legislation, they also worked hard to define how the National Security Council would function. We will address the merits of these arguments in latter chapters. What I want to point out is that both Hamilton and Madison recognized that it was an enormous advantage to be able to form a government largely from scratch, and that

The objections of this minority, however, represent only one of the many serious challenges facing honest and concerned citizens. Along with the conscious dissemination of untruths – along with crude attempts to misrepresent the merits of the constitution – the ratification debates will be buffeted by ignorance, illogic, incomprehension, and the various and sometimes mysterious machinations of the unconscious mind. Hamilton demonstrates a sophisticated understanding of human psychology when he writes that “it cannot be doubted that much of the opposition which has made its appearance, or may hereafter make its appearance, will spring from sources, blameless at least, if not respectable – the honest errors of minds led astray by preconceived jealousies and fears.”<sup>18</sup> Between conscious dissemblers and unconscious saboteurs, Hamilton provides us with an impressive catalogue of the challenges honest citizens must overcome.

The ideas I have sketched so far may not appear to bear directly on international politics. It may also be somewhat unclear why I have chosen to highlight passages from *The Federalist*, No. 1, written as a broad introduction to the arguments that follow. But in this particular essay Hamilton expresses a fundamental point about political decision-making with a clarity and forcefulness that warrants our attention. Despite his sensitivity to the obstacles to truth-seeking, he does not appear to doubt his own ability to filter out these same pressures and temptations and calmly discern the true and precise character of the public good. Although deeply skeptical of the ability of most citizens and opinion-makers to identify the right solution to any particular problem, Hamilton is not the least bit skeptical of his own aptitude for pure and rigorous inquiry. This preferential treatment, I would suggest, leads to a dubious assumption that influenced his constitutional thought and has had adverse consequences for our nation’s ability to navigate the turbulent waters of international politics. Although exquisitely

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reforming an established regime, a system of government in which power, wealth and prestige were already dispersed, meant that individuals and institutions would be very much on the defensive, and obstacles to judicious reform would increase exponentially.

<sup>18</sup> Hamilton, *The Federalist*, No. 1, Paragraph 4.

sensitive to the fallibility of the average human mind, he believes that a gifted minority of citizens is immune to the perplexities and biases that cloud the judgment of the vast majority. This is a familiar kind of elitism. Hamilton assumed that men of high natural intelligence, if properly educated, could reason their way to the truth. As a broad generalization, this assumption may indeed be true. But as we know in our more introspective age, merely because a person is aware of the extent to which prejudices are at play in the minds of others does not mean he is equally aware of the extent to which his own thoughts are subject to similar distortions.<sup>19</sup>

Does Hamilton's embrace of the idea of exceptional leaders create a dilemma for students of his political thought?<sup>20</sup> The authors of *The Federalist* largely share a basic theory of human motivation. They may at times exempt themselves from the general implications of this theory – each may have thought himself and a few of his political allies as being largely immune to the passions and prejudices that taint the thoughts and actions of most men – but they shared a general understanding of human nature and the profound challenge it posed to republican government.<sup>21</sup> The motives of most human beings are at best mixed, and mixed motives generally steer men toward self-interestedness and away from the pursuit of the public interest. These beliefs contribute mightily to the reason why we live in a

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<sup>19</sup> If I had to make a very bold claim here, with Chapter 4 still fresh in our minds, I would argue that if we translate the thoughts of any notably *self-critical* philosopher into the language of constitutional theory, we would end up with a strong theory of faction. We would end up with a mildly postmodern conception of the truth and constitutional constraints to ensure that people who insist on a single truth or vision are unable to dominate the state's levers of power, and not romantic notions of statesmen possessing exceptional judgment and virtue. We would end up with lots of powers creatively intermixed, rather than one-man rule.

<sup>20</sup> The major biographers of Hamilton all present a man who was extremely bright and principled, and who held himself in extremely high regard, at least after he had proven to himself that he was a successful soldier and statesman. See, for example, Ron Chernow, *Alexander Hamilton* (Penguin Books, 2005); and Forrest McDonald, *Alexander Hamilton: A Biography* (W. W. Norton and Company, 1982). Another common way of explaining the great faith Hamilton appears to place in the judgment and temperament of future presidents – aside from conflating his judgment and temperament with those of future executives – is the prominence in his mind of the man who would almost certainly be the first president under the new constitution. "Hamilton's treatment of the powers of the desirable chief executive in ten numbers of the *Federalist* is the description of a living man; his readers and hearers, unless singularly lacking, must have seen the trusted hero in the chief of the nation as defined," (Broadus Mitchell, "Alexander Hamilton, Executive Power, and the New Nation," *Political Science Quarterly*, Vol. 17, No. 2 (Spring 1987), p. 335).

<sup>21</sup> For a stimulating discussion of the intersection of psychology and institutional design in *The Federalist*, see Morton White, *Philosophy, The Federalist and the Constitution* (Oxford University Press, 1989).

republic with a system of representation, a bicameral legislature, and shared powers. And yet in his contributions to *The Federalist* that address national security, Hamilton argues that obstacles to truth-seeking are modest and that the policy-making process therefore only requires rudimentary safeguards against the errors of statesmen, be they honest or otherwise.

Why would a sophisticated student of human psychology adopt such a seemingly uncritical position in the domain of national security, where robust safeguards against the passions and prejudices of statesmen would seem to be required? It could be that the pragmatism in these early passages is a rhetorical device rather than a statement of conviction. What happened, after all, to the idea that wise and good men frequently oppose each other on opposite sides of great national discussions? It is as though he were wed to two incompatible models of politics: one for domestic politics and one for international politics.<sup>22</sup> Michael Federici, a student of Hamilton, is equally perplexed: “In his political thinking, he consistently believed in the imperfectability of human nature and the permanent presence of evil in political life, yet his statesmanship was at times animated by a self-confidence that was at odds with his view of human nature.”<sup>23</sup> Why would the errors that lead men astray in the domestic political arena not apply to the international political arena?

Hamilton argues that “a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government.” History teaches us that “the former has been found a much more certain road to the introduction of despotism,” and that of the men “who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing

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<sup>22</sup> I do not mean to invoke Aaron Wildavsky’s two presidency thesis here. My argument is that Hamilton’s two models are based on a logical inconsistency – on two different understandings of human nature.

<sup>23</sup> Michael P. Federici, *The Political Philosophy of Alexander Hamilton* (Johns Hopkins University Press, 2012), p. 149.

demagogues, and ending tyrants.”<sup>24</sup> Let us leave the precise details and percentages alluded to here to historians and statisticians. What I want to point out is that the problem with our constitutional order – the problem, to be more specific, with the constitution of our executive branch – is not that it poses a serious, direct threat to the liberty of the people. Ever since our emergence as a global power, a relatively firm and efficient government led by a single executive has been reasonably compatible with the preservation of liberty. But this relatively impressive track record does not mean that our powerful executives have always acted in the “national interest,” or that there are not other forms of tyranny that should concern us.<sup>25</sup>

Why does Hamilton, whose skepticism about decision-makers in this essay is profound, never seriously consider the possibility that presidents might lack the knowledge or temperament to govern wisely on matters of war and peace? If citizens and their representatives would struggle to identify the truth in the ratification debates, why not in matters related to war and peace? Hamilton appears to hold a view of international politics in which great men produce great results because great men – at least the great men that will, through electoral processes, consistently rise to power in a united America – will be immune to pressures from inside and outside of our republic; will accurately discern balance of power configurations; demonstrate near infallible judgment in their choices of alliances; and rarely if ever fail to distinguish between wars of necessity and wars of choice. The following appears to be Hamilton’s foundational proposition: Great men are reasonable and, fortunately, the international political environment rewards reasonableness. Hamilton’s executive belongs in certain respects to the same fanciful world as Plato’s Philosopher-King and Machiavelli’s Prince. In this alternative world, leaders possess genuinely superhuman powers: they can see through the pre-war fog of conflicting perspectives and points of view as easily as superman can see through walls. Hamilton knew he was

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<sup>24</sup> Hamilton, *The Federalist*, No. 1, Paragraph 5.

<sup>25</sup> By relatively impressive I do not mean to suggest an absence of serious blemishes.

gambling on the people's ability to choose their form of government wisely. What he did not apparently realize was how much blood and treasure he was gambling on the exceptional knowledge and temperament of future executives.<sup>26</sup>

### *The Classical Realist*

Hamilton sketches a theory of international politics in *The Federalist*, Nos. 6, 7, 8 and 9. Whereas Jay discusses at some length the dangers we would face from foreign nations as a disunited plurality of states, Hamilton addresses in these thematically interrelated essays the threats posed by inter-state rivalries, domestic factions and internal convulsions. The simple fact that men are "ambitious, vindictive, and rapacious" effectively guarantees that the motives for violent conflict between individual states will be ever-present. Only a utopian would fail to see the great danger that would result from disunion. "To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages" (No. 6, Paragraph 2). Hamilton's vision of international politics is rather grim:

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<sup>26</sup> Let me draw a link between the questions I raise here and a subject broached in the previous chapter. Hamilton and other advocates of executive power claim that the executive needs to possess ample discretionary power to deal with a future that is too mysterious and unpredictable to lend itself to anticipatory legislation. "Though it is easy to assert, in general terms, the possibility of forming a rational judgment of a due provision against probable dangers, yet we may safely challenge those who make the assertion to bring forward their data, and may affirm that they would be found as vague and uncertain as any that could be produced to establish the probable duration of the world" (Hamilton, *The Federalist*, No. 34, Paragraph 4). This argument certainly supports granting the executive a significant degree of independence from the legislature. But this sensitivity to the unlegislable future should also be associated with an appreciation of our equally pronounced inability to predict the future circumstances in which a strong, unitary executive might exercise his power. The unpredictable future should argue not only for a cautious approach to the idea of subordinating the executive to the rule of law, but placing excessive trust in the judgment and temperament of one man, which is to say in an executive branch organized hierarchically.

The causes of hostility among nations are innumerable. There are some which have a general and almost constant operation upon the collective bodies of society. Of this description are the love of power or the desire of pre-eminence and dominion – the jealousy of power, or the desire of equality and safety. There are others which have a more circumscribed though an equally operative influence within their spheres. Such are the rivalships and competitions of commerce between commercial nations. And there are others, not less numerous than either of the former, which take their origin entirely in private passions; in the attachments, enmities, interests, hopes, and fears of leading individuals in the communities of which they are members (No. 6, Paragraph 6).

The history of war between nations testifies to the fact that both monarchies and republics are prone to aggression. The logic behind this observation is simple and straightforward: “Are not the former administered by *men* as well as the latter?” (No. 6, Paragraph 9). Men may on occasion be motivated by virtue, but ambition, vindictiveness, and greed are far more common motives for action. Leaders are prone to self-justifying rationalizations, and popular assemblies are “frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities,” and this combination works against whatever peaceful tendencies we might be tempted to assign to commercial republics (No. 6, Paragraph 9).

Hamilton argues that republics do not have any built-in constitutional mechanisms to thwart their war-making proclivities. This is a very pessimistic view of republican government: Hamilton does not believe that constitutional theory can protect states from their own aggressive impulses, much less their neighbors’ inhospitable intentions, if they live in a crowded neighborhood. Contrary to much contemporary scholarship, international trade and interdependence, he argues, does not mitigate the problem: “Has commerce hitherto done anything more than change the object of war? Is not the love of wealth as domineering and enterprising a passion as that of power and glory?” (No. 6, Paragraph 9). Hamilton would be startled to learn that quite a few modern scholars believe that globalization and the

spread of democracy promote peace.<sup>27</sup> Experience – that least fallible of guides, as Hamilton puts it – must be the final arbiter in these kinds of debates. “[W]hat reason can we have to confide in those reveries which would seduce us into an expectation of peace and cordiality between members of the present confederacy, in a state of separation?” (No. 6, Paragraph 17). Hamilton can barely contain his contempt for those who believe that thirteen independent states would peacefully coexist. Why would these states make war on each other? “It would be a full answer to this question to say – precisely the same inducements which have, at different times, deluged in blood all the nations of the world” (No. 7, Paragraph 1).

Hamilton has no doubts about the disaster that would befall the individual states of the confederacy if they choose disunion. War and destruction would be the natural consequence of any political arrangement other than complete union.<sup>28</sup> But how, exactly, would union protect citizens from

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<sup>27</sup> We would not align Hamilton with contemporary supporters of the democratic peace thesis. Democratic peace theorists have put forward strong empirical evidence to support the generalization that democracies rarely go to war with each other. Scholars working within this program now focus most of their research on trying to establish the causal logic behind this regularity. Supporters of the democratic peace thesis tend to fall into two camps: those who attribute this peace dividend to shared common norms (see, for example, Michael W. Doyle, “Kant, Liberal Legacies, and Foreign Affairs,” in Michael E. Brown, Sean M. Lynn-Jones, and Steven Miller, *Debating the Democratic Peace* (MIT Press, 1983) and those who explain this phenomenon by highlighting the role of democratic institutions, primarily democratic elections (see, for example, Bruce Bueno de Mesquita, James D. Morrow, and Randolph M. Silversson and Alastair Smith, “An Institutional Explanation of the Democratic Peace,” *American Political Science Review*, Vol. 93, No. 4 (December 1999). Sebastian Rosato offers a very thorough – and what I consider very persuasive – critique of the institutional and normative logics that underpins the democratic peace. Since the Founders placed a great deal of faith in the power of elections to rationalize national security policy, let me quote from his basic criticism of the institutionalists: “There is no a priori reason to believe that a leader who is likely to lose office for fighting a losing or costly war, but unlikely to be exiled, imprisoned, or killed in the process, should feel more accountable for his policy choices than a leader who is unlikely to lose office but can expect to be punished severely in the unlikely event that he is in fact removed” (Sebastian Rosato, “The Flawed Logic of the Democratic Peace Thesis,” *American Political Science Review*, Vol. 97, No. 4 (November 2003), pp. 593-594). I mention this body of literature because it largely ignores how the constitution of the executive department might influence national security policy. It also points to an inconsistency in Hamilton’s reflections on international politics: democracy would not save the disunited states, he argues, and yet he places a great deal of faith in democratic institutions – elections and the threat of impeachment – to protect the nation from the abuse of executive power.

<sup>28</sup> Geography plays a critical role in Hamilton’s understanding of international politics. Disunion would produce a very crowded neighborhood. Borrowing this geographical lens, we could argue that, contra the democratic peace thesis, which is widely accepted by national security experts, that we cannot learn much about the behavior of democratic states by lumping together the war-proneness of countries as structurally “chaste” as Belgium – a weak

the tumultuous nature of international politics? Hamilton begins his security-based defense of the proposed constitution by glancing back in horror at the “petty republics” of Greece and Italy. Brief “intervals of felicity” there may have been, but these peaceful interludes were inevitably overwhelmed by “tempestuous waves of sedition and party rage.” The talents and endowments that were periodically able to emerge from the gloom were simply no match for the “vices of government” (No. 9, Paragraph 1). But this history need not be repeated, he argues. There is still reason for republican optimism. The new and vastly improved science of politics can save us from rage, sedition, greed, ambition and the many vices of government. The failed republics of the past were not structured properly, he argues, and it is in a new set of architectonic principles that the hope of free government rests.

The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principle progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided (No. 9, Paragraph 3).

Hamilton is convinced that the imperfection of republican government can be minimized by the new science of politics. Separation of powers, checks and balances within the legislature, an independent judiciary and representative democracy rather than direct democracy are the discoveries he justifiably celebrates. But does the therapeutic role of these innovations address the dangers inherent in international politics that he outlines in his spirited rejection of disunion? Hamilton believes that “momentary passions, and immediate interests, have a more active and imperious control over human

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state in a crowded neighborhood – and as structurally “promiscuous” as the United States – a state so powerful that old understandings of geographical opportunities and constraints no longer apply.

conduct than general and remote considerations of policy, utility, or justice,” and this is what leads him to reject arguments about the pacific nature of republics (No. 6, Paragraph 9). Neither leaders, popular assemblies, nor the citizenry are reliable political actors when their passions and self-interest are aroused, as they are with alarming frequency. The dangers of disunion are clear at this point. But how will the innovative design features of the new political science protect the union from unjust, misguided and self-destructive wars?

### *The Insulationist*

Let us now turn our attention to *The Federalist*, No. 8, which I consider the most important essay in *The Federalist* on the relationship between domestic institutional design and international politics.<sup>29</sup> Hamilton begins this crucial but largely neglected essay by reminding his readers that the political units that would emerge from disunion would be “subject to those vicissitudes of peace and war, of friendship and enmity with each other, which have fallen to the lot of all neighboring nations not united under one government” (No. 8, Paragraph 1). This essay elaborates upon the causes and consequences of these predicted vicissitudes.

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<sup>29</sup> In the previous chapter I was critical of scholars who choose selectively from *The Federalist* to support their arguments. In this context, let me point out that I have not encountered a single discussion of this essay in the executive power literature. David Grey Adler is also critical of the way Hamilton has been appropriated by contemporary advocates of executive power. “The Bush administration’s conscription of Hamilton to justify its soaring claims of executive power invites fresh consideration of his views. Does Hamilton bear responsibility for the absolutist pretensions of the Bush presidency?” The answers to these questions, he argues, depend on which of Hamilton’s writings we prioritize. “Who is the subject of inquiry: Hamilton as delegate to the Philadelphia Convention, as “Publius” in *The Federalist Papers*, or as “Pacificus” during the 1793 dispute over the Neutrality Proclamation?” (David Grey Adler, “Hamilton and the Bush Theory of Presidential Power in Foreign Affairs,” *Presidential Studies Quarterly*, Vol. 40, No. 3 (September 2010), p. 532. I would add to this remark that our understanding of Hamilton changes if we exclude certain essays in *The Federalist* from our analyses, whether it is Nos. 69 and 75, on the constitutional allocation of foreign affairs powers, or No. 8, which suggests that insulated and non-insulated states present a republican theorist with a different set of constitutional challenges.

In the immediate aftermath of disunion, the absence of established armies and fortifications would be an invitation to war and plunder. The populous and therefore relatively more powerful states would naturally respond to the weakness of their less populous neighbors with aggression. No impediments would exist to check the covetousness of potential invaders. Predatory violence and profound insecurity would be the defining characteristics of interstate relations at this juncture. Although this volatile and highly unstable situation would not last for long, its replacement would give citizens little cause for optimism. “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” (No. 8, Paragraph 4). The creation of standing armies would be the inevitable response to the profound insecurity of living in independent states.<sup>30</sup> In exchange for personal security from violent and predatory neighbors, citizens would embrace a form of government that presented grave risks to their personal freedom.

Hamilton argues that standing armies and military establishments pose two direct challenges to individual liberty. First, military establishments are a great source of power and influence, and this

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<sup>30</sup> The IR theorist with whom I would argue Hamilton has the strongest affinities is Kenneth Waltz (Kenneth Waltz, *Theory of International Politics* (Random House, 1979). Waltz’s structural realism is based on three core assumptions that Hamilton adopts in his own reflections: anarchy, self-help, and power balancing. The international system is characterized as anarchic since there is no supranational body that possesses a monopoly on the legitimate use of force. Unlike the hierarchical systems that exist within states, the international system lacks an established “chain of command.” States in an anarchic system must therefore help themselves, since there is no institution capable of punishing aggressors and no guarantees that an ally today might not be an adversary at some time in the future. The practice of self-help, forced upon states by the anarchic nature of the system, leads states to engage in strategic balancing, an activity in which states form alliances and coalitions in an attempt to provide its citizens with a semblance of security in an inherently insecure world. I mention the similarities here because I will soon argue that Hamilton’s distinction between insulated and non-insulated states suggests the bare outlines of a kind of systemic theory of international politics. In order to preempt a certain kind of criticism of Waltz, let me add that in his theory of international relations there is room for the personalities – the institutions and institutional relationships – of individual regimes. As he argues, his theory was intended to add an additional causal layer to pre-existing conceptions of international relations, not to supplant the variables his predecessors, mostly diplomatic historians and political theorists, had already identified as central to understanding state behavior. In reality, “everything is related to everything else, and one domain cannot be separated from others” (Kenneth Waltz, “Structural Realism After the Cold War,” *American Political Science Review*, Vol. 25, No. 1 (Summer 2000)).

means that there is always a strong risk that this power and influence will not be exercised in a manner friendly to individual rights. Second, because it is “of the nature of war to increase the executive at the expense of the legislative authority,” republican constitutions otherwise able to preserve the delicate balance of power between the branches of government would “acquire a progressive direction towards monarchy” (No. 8, Paragraph 5). Although Hamilton had a greater appreciation for monarchical government than most of his fellow founders, he is explicit in this essay about the need to avoid a drift toward monarchy. Dissolve the Confederacy and standing armies are inevitable. Standing armies necessitate powerful executives. The existence of powerful executives set in motion the “engines of despotism,” the scourge of continental Europe (No. 8, Paragraph 6).

Hamilton’s rejection of disunion appears to put him in a theoretical pinch. On the one hand he argues that disunion would engender an inevitable drift toward monarchy and despotism in the newly independent states. On the other hand, he does not believe that this general law of international politics – that there is no such thing as a safe neighborhood – poses a significant threat to his proposed union. Hamilton escapes this apparent contradiction by making a distinction between the kind of standing armies that would be required in the case of disunion, and the nature of the army that would be needed to defend and protect the union. He makes a pivotal assumption at this point in his argument. Here is the key passage:

There is a wide difference, also, between military establishments in a country seldom exposed by its situation to internal invasions, and in one which is often subject to them, and always apprehensive of them. The rulers of the former can have no good pretext, if they are even so inclined, to keep on foot armies so numerous as must of necessity be maintained in the latter. These armies being, in the first case, rarely, if at all, called into activity for interior defense, the people are in no danger of being broken to military subordination ... The smallness of the army renders the natural strength of the community an over-match for it; and the citizens, not habituated to look up to the

military power for protection, or to submit to its oppressions, neither love nor fear the soldiery; they view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights. The army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the people (No. 8, Paragraph 9).

Hamilton's understanding of international politics differentiates between two types of states: insulated and non-insulated. A state that is non-insulated – that lives in a crowded neighborhood – is at an enormous disadvantage. “The perpetual menacing of danger,” he writes, “oblige the government to be always prepared to repel it; its armies must be numerous enough for instant defense. The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen” (No. 8, Paragraph 10). A state that is insulated – that does not have potential aggressors on its borders – has primarily to worry about defending itself against small domestic disturbances.<sup>31</sup> In the case of disunion, the independent states would suffer from profound overexposure. In the case of union, the citizens would benefit from a condition that approximated insulation. The historical models for the security of union and insecurity of disunion are Britain and continental Europe. Britain's geographical position is extremely fortuitous, and without it, “she, like them, would in all probability be, at this day, a victim to the absolute power of a single man” (No. 8,

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<sup>31</sup> Lambert Harper, in his thoughtful study of Hamilton's approach to foreign policy, interprets an insulated state to mean a nation possessing the characteristics of an island. This does not imply, however, a self-sufficient or isolated state. “The creation of a strong union obviated internecine conflict, but not foreign wars” (Harper Lambert, *American Machiavelli: Alexander Hamilton and the Origins of U.S. Foreign Policy* (Cambridge University Press, 2007), p. 5. Hamilton's concern with spill-over effects is expressed strongly in *The Federalist*, No. 34, where he writes about the ambition and enmity of other nations: “A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us?” The lesson of European affairs is blunt: “Let us recollect that peace or war will not always be left to our option; that however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition of others” (Hamilton, *The Federalist*, No. 34, Paragraph 5). These arguments present a less tranquil state of affairs than in the essay under discussion here – a state does indeed have to worry about potential aggressors – but this does not render the volatility associated with being a non-insulated state any less pronounced.

Paragraph 11). What must be avoided at all costs is the kind of fragmentation that characterizes continental Europe and has fueled centuries of violence and tyranny.

The logic that cautions against disunion is the same logic that endorses insulation. Disunion or the loss of isolation would introduce threats to liberty and security that are “real, certain, and formidable” (No. 8, Paragraph 13). Hamilton’s constitutional theory – particularly his embrace of a strong executive – rests significantly on his understanding of the relationship between geography and international politics. “If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation” (No. 8, Paragraph 12). And when a nation that profits from relative insulation – not only in terms of outside threats but the range of options available to national security decision-makers – develops into a global hegemon? Hamilton never imagined the power the new nation would one day wield on the international stage. Although he believed in American greatness, it was simply inconceivable in 1787 that the unified republic he defended with such passion and insight would one day have military bases in hundreds of countries around the world and the financial resources, technical sophistication and manpower to fight major wars on multiple continents simultaneously, and that these conflicts would not be unambiguously defensive in nature.<sup>32</sup>

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<sup>32</sup> Let us return briefly to Waltz’s structural realism. Even if democracies generally incline toward moderation and peacefulness, a democratic state could still be a danger both to itself and to other states in the international system if it acquires a preponderance of power. This argument aligns with Hamilton’s emphasis on the danger of crowded neighborhoods: the kind of neighborhood in which a state resides is a stronger indicator of how it will behave on the international stage than regime type. In a crowded neighborhood, unbalanced power is a hazard no matter who wields it, and this is not the case, I should add, because power necessarily corrupts or because powerful states are always aggressive and expansionist. The problem is that calculating a state’s national interest, as I argued in Chapter 3, is a deeply subjective endeavor. Another way to capture this high degree of subjectivity – of factiousness, we could say – is that the minds of decision-makers in every administration are impregnated with an idiosyncratic subset of a society’s pool of norms. This does not mean that decision-makers ignore the distribution of material capabilities in the international system or that material considerations might not, as a general rule, dictate the behavior of states. What it does mean is that the “self-interested” behavior of a state, under one administration, is not a reliable indicator of the “self-interested” behavior we should expect to observe in the future, under a different administration. In powerful democracies, in other words, the norms that influence national security decision-making act most consistently and measurably at the level of individual administrations, and this dynamic, I would suggest, speaks directly to the problem of unchecked national security factions.

This lack of imagination and foresight, however understandable, has serious consequences for his constitutional theory. When the armies of a state must be “numerous enough for instant defense,” the separation of powers system in a republic will tilt inexorably toward the executive.<sup>33</sup> The continual necessity for the services of the soldier not only “degrades the condition of the citizen” but forces the state to elevate the military over the civil (No. 8, Paragraph 10). This elevation puts too much power in the hands of the executive and is antithetical to liberty. Republican theory at the time of our founding was “primitive” in the sense that it did not have to contend with the problem of a large and permanent military establishment. Hamilton’s great fear was the loss of personal liberties that non-insulation more or less guaranteed. But even if our personal liberties are not be seriously threatened by this dynamic, the degradation of the citizen, and the elevation of the military over the civil, are not the only two dangers to which an institutional designer must be extremely sensitive.

Why do states go to war with each another? This was not a question that agitated too many political scientists prior to 1914 (much less back in the late-eighteenth century), since the general causes of war struck most students of history as rather obvious. States went to war either because they thought they could gain wealth, territory or status by doing so, or because they were attacked by an aggressive state and forced to defend themselves. Going to war, in many respects, was what sovereign states did. States went to war, to borrow a formulation from economics, when the benefits of conquest significantly outweighed the costs. With industrialization, changes in state-society relations, and increasing economic interdependence, political scientists were put on the defensive. The disastrous consequences of World War I – the death of millions, the collapse of numerous regimes, the

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<sup>33</sup> Grant Hammond argues that the framers never envisioned that two of the principles to which they “were firmly committed—relative isolationism in world politics and the absence of a large standing military force—would be so thoroughly displaced by what they sought to avoid.” Not that we should be surprised: “the world in which they lived and the principles that guided their thinking have been changed virtually beyond recognition” (Grant Hammond, “Time for a Revolution: The Transformation from National Defense to International Security,” in Douglas Stuart, ed., *Organizing for National Security* (Strategic Studies Institute, U.S. Army War College, 2000), p. 144).

extraordinary material destruction – was an affront to common sense and presented scholars with an acute challenge. Once the costs of international conflict in both lives and treasure had risen dramatically, why would states continue to go to war and put their security and prosperity at risk?<sup>34</sup>

These kinds of questions and themes – and the theories and arguments that have arisen over the last century in response to them – simply did not haunt the intellectual firmament in the late eighteenth century. The authors of *The Federalist* never imagined a world in which the nature of national security threats would be profoundly ambiguous and wars not obviously and directly a matter of self-defense. They shared with Walt Whitman, writing a century later, a limited understanding of international politics: confident that no foreign conqueror could subdue a unified American, it was a “fear of conflicting and irreconcilable interiors, and the lack of a common skeleton, knitting all close,” that troubled them.<sup>35</sup> As a result of this worldview – as a result of the theory of international politics that implicitly informs the constitutional theory of the Founders – they never imagined that the violence of faction could dominate the national security decision-making process.

That men who lived at the time of the constitutional convention and ratification debates did not imagine the United States evolving into a hegemonic world power that possessed fighter jets, smart bombs, nuclear weapons, unmanned drones, and a million-man standing army is hardly a surprise. They probably did not anticipate the impact railroads and the electric telegraph would have on international relations in the early nineteenth century.<sup>36</sup> Important constitutional questions, however, arise from this

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<sup>34</sup> Norman Angell famously predicted an end to major wars. The elaborate economic relationships between great powers in the early years of the last century, he thought, made the prospect of a world war practically unfathomable (Norman Angell, *The Great Illusion* (G. P. Putnam and Sons, 1910). Liberal peace theory would lay largely dormant through two hot wars and most of a cold war before its late-twentieth century revival.

<sup>35</sup> Walt Whitman, “Democratic Vistas,” in *Walt Whitman’s America: selections from Leaves of grass, Democratic vistas, Specimen days, and Portraits of Lincoln* (World Publishing Company, 1964).

<sup>36</sup> Military historian Michael Howard writes, in a remarkably informative and stimulating short book, that in the eighteenth century it was “generally accepted that there was a strict limit to the size of armies that could usefully be deployed in the field,” and that, with the introduction of railways, “these limits disappeared.” Other technological advances were equally unanticipated, including the extent to which war would be “a matter of

understandable short-sightedness. Does the inability of the Founders to anticipate the power dynamics of our contemporary world mean that their constitutional theory is ill-equipped to manage them? The theory of international politics embedded in *The Federalist* is clearly outdated. Does this necessarily mean that our constitutional order is vulnerable as a consequence? My research into the structures of the national security state, which I will present in the second half of this dissertation, suggests that that the international political theory of *The Federalist* does not provide a secure foundation for our non-insulated republic.<sup>37</sup>

## Conclusion

Let us return to the two questions with which I opened this chapter. First question: Did Hamilton or Jay think systematically about the relationship between constitutional theory and international politics? I hope the reader is convinced at this point that not enough systematic thinking about the relationship between international politics and institutional design takes place in *The Federalist*. The creative force

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scientific calculation, administrative planning, and professional expertise” by the late nineteenth century. By the time America transitioned from an insulated to non-insulated state sometime in the late nineteenth-early twentieth century, the invention of high explosives had increased “the range of all weapons to a hitherto inconceivable extent,” the “problem of supplying and deploying large forces” had evaporated, and “belt-fed, water-cooled machine-guns” were firing several hundred rounds a minute (Michael Howard, *War in European History* (Oxford University Press, Updated Edition, 2009), pp. 94-115).

<sup>37</sup> From systems theories we can “draw some inferences about the expected behavior and fate of the units: namely, how they will have to compete with and adjust to one another if they are to survive and flourish. To the extent that the dynamics of a system limit the freedom of its units, their behavior and the outcomes of their behavior become predictable” (Kenneth N. Waltz, “The Origins of War in Neorealist Theory,” *Journal of Interdisciplinary History*, Vol. 18, No. 4 (Spring 1988), p. 618). What logically follows from this argument is that we should expect fewer constraints on the freedom of states to lead to less predictable state behavior, and this is another way of saying that the spirit of faction will have a strong and potentially violent influence on national security policy in powerful non-insulated states. Structural realism – as opposed to classical realism – teaches us that there are indirect threats to the security of a republic that the Founders failed to anticipate and that contemporary constitutional theorists generally ignore. A non-insulated state can harm its citizens not only through the conventional route, which is domestic tyranny in all of its variations, but by unwisely exercising its power abroad.

behind Hamilton's and Jay's reflections on international politics was a comparison between the advantages of union and the disadvantages of disunion, not a comprehensive theory of international relations.<sup>38</sup> As a consequence, there are many inconsistencies in their arguments. Jay, for example, may be right about the wisdom of union, but his passion for union and antipathy for disunion blinds him to many of the challenges and dangers of international politics. Hamilton offers us a more comprehensive theory of international politics, but it is still insufficiently universal. He recognizes the subjective nature of the public interest, for example, but defends a constitutional theory that assumes an objective national interest. He forcefully argues that "attachments, enmities, interests, hopes, and fears of a community or cabinet" would destroy any peaceful interludes between the disunited states, but he does not seem to realize that future presidents and national security advisors would be as vulnerable to these corrupting influences as the leaders of individual states in a disunited federation. In sum, there is plenty of evidence, I believe, to support my claim that the Founders did not think systematically about the relationship between constitutional and international political theory.

The second question presents us with a much greater challenge. Even if we acknowledge that the Founders did not think systematically about this relationship, does our constitutional system suffer as a consequence? This is the question that animates the second part of my dissertation, on the political theory of the national security state. But let me mention here that the absence of an internally consistent structural theory of international politics is responsible for a weakness in the political theory of *The Federalist*. Hamilton, as I mentioned, is a skeptic of the idea of a "democratic peace" between

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<sup>3838</sup> Viktor Vanberg and James Buchanan argue that the "fundamental problem of constitutional choice can be stated in the following question: "How can we maintain a desirable constitutional order among ourselves, given that – at any and every point in the continuing process – we cannot know what will be known, invented, and created tomorrow, what potential solutions may be available to us, what problems we will face, or even what we will perceive as problems tomorrow?" (Viktor J. Vanberg and James M. Buchanan, "Constitutional Choice, Rational Ignorance, and the Limits of Reason," in Karol Soltan and Stephen Elkin, *The Constitution of Good Societies* (Pennsylvania State University Press, 1996), p. 55. A consistent theory of international politics, I would suggest, helps us to anticipate future challenges and therefore to maintain a desirable constitutional order even though the particular problems we will face in the future may have little in common with the problems we face at the moment of constitutional choice.

disunited states and yet he does not apply his arguments in support of this position to the future behavior of the federal entity he hopes to chaperone into existence. Hamilton is an inconsistent realist: he is an exceptionalist in the sense that he assumes the republic he champions will not succumb to universal temptations and proclivities. In the absence of an internally consistent theory of international politics, I would suggest, it is very difficult to fully appreciate the threat that the *possession* of relative international power presents to a republican regime. Hamilton conceived of America as an insulated nation and did not anticipate the steady erosion of this inestimable blessing. He presents us with a truncated theory of international politics: the international political theory of an insulated state. The theory of international politics that informs the constitution of our executive branch, in other words, does not recommend the same constitutional order for the state we once were, and the state we have since become.

“At the head of the American forces,” William Emerson writes, “the Constitution places an amateur strategist of high and unrivalled rank. As Commander-in-Chief, the President may select, discharge, hearken to or ignore his military advisers without check or even the necessity of explanation. He can, if he chooses, assert his will quite independently of any subordinate military agency, for, in his relations with the military, the authority of the President as Commander-in-Chief is clear and unchallenged.” In the second part of this dissertation I will argue that although this constitutional arrangement may have once had much to recommend it, it no longer serves our nation well.<sup>39</sup>

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<sup>39</sup> William Emerson, “Franklin Roosevelt as Commander-in-Chief in World War II,” *Military Affairs*, Vol. 22, No. 4 (Winter 1958-1959), p. 182.



## 6 The Creation of the National Security State

*Unfortunately, in our preoccupation with what governments should do to address contemporary problems, we give little critical attention to the intellectual tools that are appropriate to the constitutional level of analysis.*

- Vincent Ostrom

*Far from fulfilling the hopes of an earlier generation that modern principles of organization would strengthen the quest for more rational policies, the structural features of hierarchy, specialization, and centralization that characterize all complex organizations have produced chronic pathologies of information processing and appraisal.*

- Alexander George

*The critical policy question is what effect will occur if we change the allocation of decision-making rights. Centralization from this perspective can be defined as the monopolization of decision-making rights in one organization while federal solutions would indicate that decision-making rights are dispersed to a number of semi-autonomous organizations. At its core, government reorganization is nothing more than assessing the effect that different allocations of decision-making rights will have on the realization of public purposes within the political context of a democratic society.*

- Robert Hawkins

This chapter is essential to this dissertation not because of the strength or boldness of the claims I will make here – my claims will in fact be quite modest – but because we cannot understand the defense reform debates of the 1980s, which culminated in the Goldwater-Nichols Act of 1986, or the assumptions and preoccupations of contemporary defense reformers, without being familiar with the

debates that led to passage of the National Security Act of 1947.<sup>1</sup> We also need to be familiar with the constitutional theory to which the creators of the national security state claimed allegiance – the constitutional theory that recommended the institutional structures we have inherited – to appreciate which constitutional principles and forms defended in *The Federalist* did not receive the attention they may have deserved. A familiarity with these debates is also essential if we hope to make a practical – rather than merely theoretical – contribution to contemporary defense reform.

A basic story can be told about the creation of the national security state.<sup>2</sup> In the aftermath of World War II, Congress passed legislation to formalize institutional arrangements that had arisen out of the need to prosecute the military conflict more effectively and efficiently, especially in the European theater, where the United States had to collaborate intimately with her allies.<sup>3</sup> The intent of the

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<sup>1</sup> The National Security Act of 1947 was also an experiment in constitutional choice. In this respect it has something noteworthy in common with the Articles of Confederation. Both were revolutionary in the sense that they were largely without precedent. I do not mean to overstretch this analogy, but the authors of both of these experiments in constitutional choice lacked the kind of practical experience with forms and principles that latter reformers would advantageously possess. If Madison, Hamilton and other key participants at the Constitutional Convention had not learned a great deal about republican government from a decade under the Articles of Confederation, we would very likely not be celebrating their accomplishments today. Just as the revolutionaries in 1776 did not have much experience with popular self-government, the authors of the National Security Act of 1947 had little experience with the operations of a national military establishment. The relationship between law and behavior in the domain of national security, we could say, was largely unknown (it might have been less unknown if *The Federalist* had a wider readership at the time, but that is another story). What I would suggest is that sixty-five years after the passage of this landmark piece of legislation, we now know enough about the institutional dynamics of the national security state to explore constitutional solutions to the problem of misaligned political ends and military means. Why defense reformers in the 1980s did not explore the possibility of introducing a formal deliberative process into the executive department is a subject we will cover in the next chapter.

<sup>2</sup> There are three comprehensive histories of the debates that led to the passage of the National Security Act of 1947. All three are impressive scholarly studies. What authors Michael Hogan, Douglas Stuart and Demetrios Caraley do not attempt to do in their work, however, is tease apart the political goals of key figures in these debates from the constitutional principles and forms they advocate. Hogan and Stuart do an excellent job of identifying the national security ideologies that inspired key reformers, but they leave largely unaddressed the relationship between these ideologies, the specific proposals advocated, and the constitutional theory on which our republic was founded. Caraley asks a poignant question – “Why should such an intense political conflict have developed over proposals to unify the military services?” – but opts to “neither explicitly judge the merits of the issues concerning unification nor offer organizational blueprints of its own” (Demetrios Caraley, *The Politics of Military Unification: A Study of Conflict and the Policy Process* (Columbia University Press, 1966), p. x. See Michael Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1947* (Cambridge University Press, 1998); and Douglas Stuart, *Creating the National Security State* (Princeton University Press, 2008).

<sup>3</sup> Numerous interdepartmental committees formed during the war to address specific organizational challenges. Richard Best, among other scholars, argues that while these committees facilitated cooperation and coordination,

National Security Act of 1947 – certainly one of the most important pieces of legislation in the twentieth century, despite the lack of attention it has received by the scholarly community – was to preserve “the generally successful balance of judgment and power between Roosevelt and the Joint Chiefs of Staff (JCS), between the individual members of the JCS, between the JCS and the theater commanders, and between the theater commanders and the service component commanders.”<sup>4</sup> The ideal behind this legislation was to ensure that actors who had previously been relatively independent agents – the President, the Secretary of War, The Secretary of the Navy, the Secretary of State, the military services, the JCS, the intelligence agencies and Congress – would work as a cohesive unit in the future. A Secretary of Defense was established and put in charge of coordinating the different services, and the JCS (in its corporate, pre-chairman days) was given the responsibility of harmonizing inter-service relations. The effectiveness of President Roosevelt’s highly personalized leadership style, it was widely recognized, was not something the nation could rely on in the future.<sup>5</sup> A goal of the legislation was therefore to put institutions in place that would compensate for whichever leadership styles and personal idiosyncrasies future civilian leaders might possess. The National Security Act of 1947 was the

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they were nevertheless inadequate as long-term solutions because they represented a piecemeal approach to the larger challenge of coordinating national security policymaking. See Richard A. Best Jr., “The National Security Council: An Organization Assessment,” *Congressional Research Service* (January 2011).

<sup>4</sup> Allan R. Millett, “The Organizational Impact of Military Success and Failure: An Historical Perspective,” in Millett et. al., *The Reorganization of the Joint Chiefs of Staff: A Critical Analysis* (Washington: Pergamon-Brassey’s, 1986), p. 12.

<sup>5</sup> Historian William Emerson is critical of scholars who focus their attention on the late stages of the war and conclude that Roosevelt was too deferential to his military advisors. He may have afforded his military chiefs great freedom and authority in operational matters, but even late in the war his “ascendancy over his chiefs was no less real and his control, indirect but persuasive, over the major decisions of the war no less marked” (William Emerson, “Franklin Roosevelt as Commander-in-Chief in World War II,” *Military Affairs*, Vol. 22. No. 4, p. 205). I mention this distinction between control over the major decisions of the war and control over operational matters to highlight the following point: the creators of the national security state appear to have assumed that while presidents would direct future wars (with or without much consultation with the legislature), military leaders would retain control over operational matters. Such a clear division of responsibilities promotes a degree of ends-means harmonization even in the absence a formal deliberative body (only a degree: military leaders may be able to choose the means they consider best suited to the stated political objectives, which often narrows the potential gap between ends and means, but this exercise of military judgment does not equate with a process of mutual adjustment and adaptation). And as long as a clear division of responsibility between civilian and military leaders exists, the absence of formal mechanisms for ensuring a relatively seamless fit between political ends and military means is unlikely to attract much attention.

“statutory expression of the collective hope that some balance of horizontal bureaucratic proliferation and decision-making centralization would improve the quality of national security policy.”<sup>6</sup> Ensuring a high degree of collaboration between different institutions of government, despite turnover in leadership and changes in the international environment, was the fundamental intent of the legislation.<sup>7</sup>

As I mentioned, this is an overly simplistic version of the story of how and why reformers attempted to improve the quality of America’s national security decision-making in the aftermath of World War II. It is overly simplistic because it is a narrative largely stripped of its political, ideological and constitutional undercurrents. Politically, there were power struggles between the armed services; between various executive agencies and departments; between reformers inside and outside of government; and between the legislative and executive departments for control over the military establishment.<sup>8</sup> Ideologically, reformers disagreed about the role America should play in the post-war world; the size and purpose of the defense establishment; the importance of peacetime planning and preparation for future military operations; the necessity of industrial mobilization to enhance national security preparedness; whether horizontal or vertical principles of organization should guide the consolidation of the armed services; and how best to distribute national resources between the military and non-military sectors of the economy (some scholars feared a lapse into prewar unpreparedness, others a monopolization of economic resources by the military).<sup>9</sup> With respect to the constitutional

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<sup>6</sup> Millett, p. 13.

<sup>7</sup> As we will see later in this chapter, the legislation merged the Departments of War, the Navy and the Air Force (newly created) into the National Military Establishment; created the position of the Secretary of Defense to head the National Military Establishment; and established the National Security Council, the Central Intelligence Agency, the Joint Chiefs of Staff, and the National Security Research Board.

<sup>8</sup> As a new institutionalist working with a principle-agent framework, Amy Zegart focuses her attention on the bargains struck between key political actors in the final formulation of the legislation and discounts the influence of principled arguments (Amy Zegart, *Flawed by Design: The Evolution of the CIA, JSC, and NSC* (Stanford University Press, 1999)).

<sup>9</sup> Two influential books in the 1930s argued that our separation of powers system was an obstacle to the president’s ability to carry out his responsibilities. Our nation could only compete with our less open and democratic international competitors if significant changes were made to our constitutional system. Decision-makers, they argued, had to be further insulated from fractious, interest-group-driven democratic practices. See

component of these debates, which is what interests us here, Douglas Stuart argues that the National Security Act of 1947 is best understood as “a dialogue about how best to adjust American values and interests to the non-negotiable demands of national security.”<sup>10</sup> This is a fairly apt description. But what is difficult to ascertain from primary and secondary sources is the extent to which this requisite adjustment of values to the non-negotiable demands of national security was understood to involve a recommitment to – or partial renunciation of – the political forms and principles on which our republic was founded.

Let me suggest two plausible explanations for this ambiguity. First, most of the participants in these debates – whether they supported the unification of the armed services or pushed for a set of new agencies and departments to address the enormous challenges of national security in the early Cold War era – claimed fidelity to the Constitution. An unequivocal (and at times strident) allegiance to the Constitution, however, does not imply a familiarity with the nuanced arguments that went into its construction. Many impressive thinkers, soldiers and politicians participated in these debates. Despite an abundance and diversity of talent, however, there is no theoretical defense of the National Security Act of 1947 on par with *The Federalist*. I do not mean to suggest this is surprising: there are few texts in the history of political theory that compare favorably with *The Federalist*. What I want to point out is that participants in these debates generally articulated strong political preferences but did not couch their arguments for institutional reform in terms of devising republican remedies for distinctly republican diseases or balancing the requisites to energy and safety in the constitution of the executive department. The basic question on the mind of most reformers was how to compete with the

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William Y. Elliot, *The Need for Constitutional Reform: A Program for National Security* (McGraw-Hill, 1935); and Arthur N. Holcombe, *Government in a Planned Democracy* (McGraw-Hill, 1935). The extent to which such ideological arguments influenced reformers is difficult to determine, not least because World War II, as Melvyn Leffler points out, “resurrected faith in the capacity of the capitalist system to serve the welfare of the American people” (Melvyn Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (Stanford University Press, 1992), p. 13).

<sup>10</sup> Douglas Stuart, *Creating the National Security State* (Princeton University Press, 2008), p. 3.

organizational advantages of authoritarian regimes around the world without bankrupting the nation or turning it into a “garrison state.”<sup>11</sup> The concerns of the Founders – the importance of connecting the interests of men with the constitutional rights of the place, for example, or the understanding that a power to advance the public interest always involves a discretion that can be abused<sup>12</sup> – may have been in the back of the minds of some reformers, but these principles of institutional design are largely absent from the unification debates.

For the second plausible explanation, let me turn to an argument made by Douglas Stuart:

Two clusters of related issues came to dominate wartime and postwar discussions about the new national security bureaucracy. The first cluster of issues involved proposals for the unification of the armed services. This was by far the most important topic for US defense planners, as well as the topic that was accorded the greatest attention by Congress, the president, and the media. The second cluster of issues dealt with proposals for reform of the executive branch to improve political-military consultation, institutionalize intelligence gathering and analysis, enhance presidential management of resources affecting national security, and establish a more efficient system for presidential advisement and national security planning.<sup>13</sup>

The first cluster of issues, which focuses primarily on the structural relationships between the armed services, does not lend itself to a constitutional level of analysis. The structure of the armed forces, to return to a distinction I introduced in an earlier chapter, is primarily a sub-constitutional issue. But civil-

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<sup>11</sup> Aaron Friedberg convincingly explains why such a state never developed in the U.S. See *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy* (Princeton University Press, 2000). But it is understandable why many were concerned. Michael Hogan and Douglas Stuart both argue that many defense reformers were motivated by the belief that the nation had to be prepared for a more or less permanent national security crisis. See Michael Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1947* (Cambridge University Press, 1998); and Douglas Stuart, *Creating the National Security State* (Princeton University Press, 2008).

<sup>12</sup> For a list of “operational” rules for government reorganization distilled from the political theory of *The Federalist*, see Vincent Ostrom, *The Political Theory of the Compound Republic* (Institute for Contemporary Studies Press, 1987).

<sup>13</sup> Stuart, p. 74.

military relations and national security decision-making – the central issues under investigation in this dissertation – invoke founding-era debates about the constitution of the executive branch and warrant a constitutional level of analysis. What I want to emphasize here is not that organizational, administrative or management theory is inadequate to the tasks defense reformers set themselves, but that the intellectual tools that individual reformers choose to work with often reflects the nature of the problems they hope to mitigate.<sup>14</sup>

This chapter has five main sections: The Unification Debate, The Eberstadt Report, The “Constitutional Convention” of 1945-1947, The National Security Act of 1947, and Constitutional Theory and the National Security State. Each of the first three sections corresponds with a distinct period in the debates that would eventually lead to the passage of the National Security Act of 1947. What began as a fairly narrow debate about the organization of the military would eventually encompass a much greater range of subjects and ambitions. In these first three sections we will identify the particular problems that animated reformers and summarize the basic arguments they made in support of their proposals. In the final section we will return to the relationship between the forms and principles advocated by defense reformers and the forms and principles defended by Madison and Hamilton in *The Federalist*.

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<sup>14</sup> Why our ideas about how best to construct a commercial republic change over time is a fascinating question that lies far beyond the scope of this dissertation. It is worth mentioning here, however, that Woodrow Wilson has been identified by numerous scholars of intellectual history as being a pivotal figure in the evolution of ideas about American government. In his frequently cited book, *Congressional Government*, he certainly presents a political theory that differs in significant ways from the political theory of *The Federalist*. Robert Hawkins, a student of government reorganization, argues that the fundamental difference between the political theory of *The Federalist* and the political theory that gave birth to organizational, administrative and management theory is their respective starting points. “The Federalists started with the individual, assumed individuals were self-interested, and then set forth a set of propositions as to how to organize citizens to realize a good society. The reform theory starts with organizations, builds a conceptual foundation that orders organizations in a hierarchy and assumes that these arrangements will produce an efficient and responsive system for citizens” (Robert B. Hawkins, “Government Reorganization: A Federal Interest,” *Publius*, Vol. 8, No. 2 (Spring, 1978), pp. 7-9). Administration theory is less concerned than political theory with, as John Dryzek puts it, the question of “how to design institutions in light of the manifest imperfection of human beings” (John Dryzek, *Democracy in Capitalist Times: Ideals, Limits, and Struggle* (Oxford University Press, 1996), p. 58).

## The Unification Debate

The Army was strongly in favor of unification. Army Chief of Staff George Marshall took the early lead in promoting the unification plan and trying to usher it through the legislative process.<sup>15</sup> A lack of unified command was the primary issue that vexed supporters of consolidation. Unification of the armed services, it was argued, was the obvious, practical solution to the problems of inefficiency and duplication that resulted from the JSC committee system. The organizational structures improvised during World War II may have enabled the Army, Navy and Air Force to cooperate reasonably well in the execution of their respective duties during the war, it was argued, but they would prove painfully inadequate during peacetime, especially with the impending contraction in the defense budget. Frustration with the functionality of committee systems was particularly pronounced among pro-unification reformers. Alias Huzar, an historian and political scientist who studied these debates as they unfolded, captures this sentiment well:

If the Joint Chiefs of Staff and other committees could supply only slow and incomplete integration even under the pressure of war, the pattern of organization on which they were based cannot be expected to provide the integration that is desirable in administration, services, and supply – possibly even in operations – in time of peace when the cohesive force of a threat to the nation’s existence is absent and when the armed services are engaged in a struggle for self-sufficiency with sharply curtailed military appropriations.<sup>16</sup>

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<sup>15</sup> General Marshall formally recommended unification of the War and Navy Departments to the JCS in October, 1943. An early iteration of the Army’s unification plan was presented to Congress on April 24, 1944. The Woodrum Committee held hearings on postwar military policy in mid-1944 and approved the principle of postwar unification of the armed services along the lines Marshall and other Army spokesmen had proposed (*Proposal to establish a single department of armed forces: Hearings before the Select Committee on Post-War Military Policy, House of Representatives, 78<sup>th</sup> Congress, 2<sup>nd</sup> session* (Government Printing Office, 1944).

<sup>16</sup> Alias Huzar, “Notes on the Unification Controversy,” *Public Administration Review*, Vol. 6, No. 4 (Autumn 1946), p. 306.

To address this concern, reformers proposed merging the Army and Navy departments into a single department of the armed forces; replacing the secretaries of the two departments with a single civilian secretary, and replacing the JCS committee system with a general staff headed by an officer who would report directly to the president. Separate land, sea and air components would exist within this unified structure, but they would not be assigned departmental status, which would have muddied the chain of command.

At this early stage of the unification debates, General Marshall and his supporters appear to have been guided by a set of pragmatic concerns. They believed that consolidation would improve the internal cohesion of the military and thus bolster the nation's overall defense posture. Pearl Harbor and World War II had convinced them that the existence of the separate services had led to unnecessary duplications, inefficiencies and waste. President Truman, who was an ally of Marshall's in the Senate and, as president, would play a prominent role in the later stages of these debates, wrote an article in *Collier's Magazine* in 1944 in which he called attention to the fact that the United States had adjacent air installations in various locations because the Army did not have landing rights on Navy runways and the Navy did not have permission to land its planes on Army runways.<sup>17</sup> In the absence of unification, the United States would end up with two separate, uncoordinated departments of defense (and ultimately a third, with the inevitable elevation of the Air Force to department status), and these kinds of inefficiencies would proliferate. The commander in chief, he argued, should be supported by a new defense organization in which every element of the nation's defense would be unified in one department under one authoritative head who reported directly to the president. Committees like the JCS may be useful for generating ideas and providing a platform for different opinions, but they flounder when the participants cannot reconcile their differences.

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<sup>17</sup> Harry Truman, "Our Armed Forces Must be Unified," *Collier's Magazine*, Vol. 114, No. 9 (August 26, 1944).

Unity of command was the fundamental, organizing principle of the unification plan: it was assumed by supporters of unification that consolidation would work best both in the theater of operations and in the policy-making arena. Unification in Washington would allow for increased centralization, and this, in turn, would enable a single civilian administrator, to whom the service chiefs would be subordinate, to make significant inroads against the problems of economic inefficiencies and service parochialism.<sup>18</sup> The primary target of reformers was the unanimous-consent, JCS committee system. The goal of reformers was to replace this coordinate system with a single secretary of the armed services who would be advised by the JCS and assisted by a group of staff officers. Future wars were unlikely to conform to the simple, elemental partitions of past conflicts, and this meant that ground, sea and air forces would have to be employed simultaneously and with great coordination for operations to be effective. President Truman would emphasize this point in a special speech before Congress in late 1945 that was designed to generate legislative momentum for the Army unification plan: "Even in the field our unity of operations was greatly impaired by the differences in training, in doctrine, in communication systems, and in supply and distribution systems, that stemmed from the division of leadership in Washington."<sup>19</sup> Only unification in a single department of the armed forces, under a single chief of staff, would allow for the kind of system-wide integration required.

The Navy resisted the push for unification. In part this was because the Navy assumed that unification of the armed services posed a direct threat: the Army and Air Force were perceived as natural allies, and this alliance, if allowed to take root within a single department, would not only skew the competition for limited resources away from the Navy but lead to a streamlining of the armed

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<sup>18</sup> Caraley is skeptical about the sincerity of these economic predictions: "It is difficult to evaluate the degree to which Secretary of War Patterson, General Marshall, and the other ground-force leaders actually believed that great savings would result from unification, although that was one of their professed goals" (*The Politics of Military Unification*, p. 70).

<sup>19</sup> Harry S. Truman, "Special Message to the Congress Recommending the Establishment of a Department of National Defense," December 19, 1945, available at [t:http://www.trumanlibrary.org/publicpapers/index.php?pid=508](http://www.trumanlibrary.org/publicpapers/index.php?pid=508).

services in which the Navy would lose its aviation capacity to the Air Force and its ground forces (the Marine Corps) to the Army.<sup>20</sup> The central goal of the Navy coalition was “preserving the Navy and all its constituent parts as they had developing during World War II, that is, a sizeable fleet based primarily on the naval air power of fast-carrier task forces and including a ‘Fleet Marine Force’ as the country’s combat-ready landing force and as the trustee and refiner of amphibious warfare expertise.”<sup>21</sup> The Navy feared not only a diminishment in resources but also a strategic move away from sea-power, which, it believed, would both erode its status and prestige and put the nation at risk. As Naval historian James Hewes explains, the Navy preferred “to continue the common direction of military and naval forces through cooperation under the JCS committee system.”<sup>22</sup>

Instead of unification and consolidation, the Navy and its supporters in the legislature wanted to preserve the system of coordination and consultation that emerged during the war.<sup>23</sup> Paul Hammond argues that the Navy’s initial resistance was understandable: “The Army’s unification plan of 1944 was practically identical with the existing structure of the War Department, with three administrative commands under the Chief of Staff.”<sup>24</sup> Army organization, in other words, was based on a vertical chain of command, while the Navy’s management structure was more decentralized. The Army was also accustomed to relying on executive branch leadership to promote its interests, while the Navy had cultivated strong relationships with members of the legislature for the same purposes. Unification, as a

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<sup>20</sup> Part of the explanation for the tension between the Navy and the Air Force is that the latter advocated a strategic doctrine that assigned a higher priority to air power than sea power, and this threatened the future size and prestige of the Navy. Part of the explanation for the tension between the Army and Navy is that the former resented the creation and massive growth of the Marine Corps (Navy “ground forces” totaled nearly half a million by the end of the war).

<sup>21</sup> Caraley, p. 86.

<sup>22</sup> James E. Hewes, *From Root to McNamara: Army Organization and Administration, 1900-1963* (Center of Military History, United States Army, 1975), p. 164.

<sup>23</sup> Interservice relations in the early part of the twentieth century were not exactly ideal. Woodrow Wilson’s Secretary of the Navy, Josephus Daniels, once told his counterpart in the War Department, Lindley Garrison: “Joe, I don’t care a damn about the Navy, and [you don’t] care a damn about the Army. You run your machine and I will run mine” (quoted in Caraley, p. 4).

<sup>24</sup> Paul Hammond, *Organizing for Defense: The American Military Establishment in the Twentieth Century* (Princeton University Press, 1961), pp. 195-196.

result of this dynamic, would strongly favor the Army. The fact that the Army and Navy had different surrogates in the government is why Stuart argues that “the postwar unification debate was part of a larger struggle between Congress and the president for control over the national security establishment.”<sup>25</sup>

Navy spokesmen argued that the principle of coequal military services had served the nation well during World War II and should therefore be preserved. Each civilian secretary and service chief of staff had been able to offer his opinion directly to the president and his peers during the war, and this had greatly improved the quality of military decision-making.<sup>26</sup> Deliberative structures and horizontal decision-making had proven their merits. To abolish the JCS committee system simply to put an end to differences of opinion struck Navy supporters as foolish. Debate within the military, the Navy argued, should be encouraged. Differences of opinion, rather than being frowned upon, should be debated, at length if need be, and this is precisely what the current system ensured.<sup>27</sup> Admiral King defended separate service departments and the principle of cooperative decision-making when he argued before Congress that, as a nation, “we must, in the future, develop to the fullest extent the capacity of each branch of our military services because we must be adequately prepared to fight a war of whatever character the future may bring.”<sup>28</sup> Granting one man the power to compel agreement was problematic. What protection would there be against this power being exercised arbitrarily? Would not final decisions reflect partisan considerations rather than the collective wisdom of the armed services? Unity

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<sup>25</sup> Stuart, p. 77.

<sup>26</sup> As we will see in the next chapter, supporters of military reform in the 1980s placed little value in deliberative structures and horizontal decision-making. The Goldwater-Nichols Act of 1986 put a premium on the concentration of both civilian and military authority.

<sup>27</sup> Despite its enthusiasm for unification during these debates, the Army once proposed interdepartmental committees as a substitute for departmental unification: “The army and the navy, threatened with unification for reasons of economy after World War I, had proposed committees instead [of unification] and successfully withstood the challenge” (Alfred D. Sander, “Truman and the National Security Council: 1945-1947, *The Journal of American History*, Vol. 59, No. 2 (September, 1972), p. 370. In the aftermath of World War I, a committee system was deemed the best defense against an across-the-board contraction of the armed services.

<sup>28</sup> Quoted in Huzar, p. 301.

in the field may be necessary and desirable, but unity in Washington would be dangerous. In the words of Charles Eliot, a scholar and journalist who participated in these debates, “It is submitted that the consultative system will be more flexible and adaptable than a system of centralized control, because it will be less dependent on individual prejudices and preconceptions and less vulnerable to the fixed idea of a single individual.”<sup>29</sup>

The Army and Navy, of course, were not merely concerned with promoting their vision of the common good. They were also concerned about the fierce competition that was likely to characterize the postwar era, and understandably wanted to be well positioned within the executive branch to promote their interests. We should hardly be surprised by “the natural repugnance of the parties to a relinquishment of power,” as Madison put it in his notes, or by “a natural jealousy of its abuse in other hands than their own,” two of the principle difficulties incident to the formation of all power-sharing arrangements.<sup>30</sup> But the parochial aspect of these debates, I would argue, has been over-emphasized in the literature. To what extent did supporters and critics of unification disguise their real interests in the matter? Here is a typical remark on the influence of service parochialism:

Army spokesmen, who wanted unification because they thought it would provide them with a greater share of the defense budget, said they supported it because it promised greater efficiency and a stronger national defense. Navy spokesmen, fearful of being submerged by the larger army, held up the specter of a military takeover. They claimed that the job of directing the armed forces was too big for any one man; therefore, the civilian secretary would be forced to rely more and more on the military until eventually civilian control of the services would cease to be a reality.<sup>31</sup>

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<sup>29</sup> George Fielding Eliot, “Merger or Coordination?” *Foreign Affairs*, Vol. 24. No. 2 (January, 1946), p. 276.

<sup>30</sup> Madison, “Debates in the Federal Convention of 1787,” Paragraph 11. Available at: <http://oll.libertyfund.org>.

<sup>31</sup> Hammond, pp. 374-375.

Service parochialism certainly influenced these debates: attitudes toward unification must have been partly formed by estimates of how its provisions would impact the individual services. But the existence of mixed motives does not diminish the extent to which these were also principled debates.<sup>32</sup> Eliot offers what I would suggest is a more accurate assessment of the range of concerns that motivated reformers:

We should not misunderstand this diversity of service opinion and we should not attribute it to mere jealousy. Every officer of every service is anxious that the United States should remain strong and secure, and is firmly convinced that the contribution to be made to that strength and security by his particular service must not be weakened. And every one of them who has had any experience in budgetary matters knows that there is going to be a good deal of paring, and wants to be in a position to defend the service to which he is devoted when the paring begins.<sup>33</sup>

There was certainly a principled side to this early round of defense reform debates. The Navy disagreed with the Army assessment of the military's performance in the recent war and was concerned that a single secretary would not be able to present the president with a balanced military point of view. Each service had to be able to defend itself against encroachment, the Navy argued, and each service

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<sup>32</sup> Here is an example of the intermingling of parochial and generalist motives, and what I would suggest was probably the norm: "After the humbling demobilization of the army after World War I, Marshall wanted to unite the services both for improved postwar coordination and cooperation, and to limit competition for congressional favor as a way of protecting the army's postwar budgetary position" (Brian, Waddell, *Toward the National Security State: Civil-Military Relations during World War II* (Praeger, 2008), p. 124). As a general rule, I think we can assume mixed motives in most political debates and save ourselves from the folly of attempting to disentangle and weight the always complicated and ever-changing motives of other people. Let me also mention here that a distinct strength of constitutional theory – what perhaps distinguishes the political theory of *The Federalist* from more contemporary theories of government – is its eagerness to invite into the political process the risks and opportunities associated with mixed motives.

<sup>33</sup> Eliot, p. 264. This quotation speaks to the larger argument I will be making in Chapter 8. In a national security crisis we would not want to place an inordinate amount of faith in the wisdom and expertise of our military leaders. But soldiers certainly bring a different set of loyalties and ambitions to the decision-making process than their civilian counterparts. To a constitutional theorist interested in defense reform, this suggests that a formal (rather than informal) deliberative body might be able to improve the quality of decision-making. More specifically, improve the process of adjustment and adaptation that is necessary to ensure that political ends and military means are closely aligned.

secretary needed to have direct, unrestricted access to the president.<sup>34</sup> The proposed national military establishment would simply be too large and complex to be administered well by a single individual. The Navy position at this point in the unification debates was clear: unified action in the field, coordination in Washington.

### **The Eberstadt Report**

The Navy's initial response to the Army's unification plan may have been primarily defensive – an attempt to refute the underlying logic for unification – but when Secretary of the Navy James Forrestal recruited Ferdinand Eberstadt, a management and administrative expert with wartime experience in mobilization and production,<sup>35</sup> to study the unification matter within the broader context of national security, its range of concerns expanded well beyond a mere rejection of a military reorganization plan put forth by a competing service.<sup>36</sup> Here are the three questions Eberstadt and his team set out to answer:

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<sup>34</sup> This is another issue that will resurface in the next chapter. Goldwater-Nichols made the chairman of the JCS the principle military advisor to the president, the secretary of defense, and the NSC, diminishing the influence of the service chiefs in the process.

<sup>35</sup> Eberstadt had previously conducted a study of the Army Navy Munitions Board (ANMB). In an "ambitious" report issued in 1941, he "envisioned the ANMB as the lead agency for facilitating both interservice cooperation and military interaction with the US domestic economy" (Stuart, p. 110). This report shares key principles with what he produced for Secretary Forrestal.

<sup>36</sup> Jeffrey Dorwart considers James Forrestal and Ferdinand Ebersdadt to be the two primary architects of the modern national security establishment (Jeffrey Dorwart, *Eberstadt and Forrestal: A National Security Partnership, 1909-1949* (Texas A&M University Press, 1991). Robert Cuff recognizes that they were significant figures but wisely points out that it is impossible to know the actual extent of their influence on the final legislation (Cuff, Robert, "Ferdinand Eberstadt, the National Security Research Board, and the Search for Integrated Mobilization Planning," *The Public Historian*, Vol. 7, No. 4 (Autumn, 1985). Paul Hammond argues that the Eberstadt Report did not break new ground and that many of the reforms it suggested were already underway (Paul Hammond, *Organizing for Defense: The American Military Establishment in the Twentieth Century* (Princeton University Press, 1961).

1. Would unification of the War and Navy departments under a single head improve our national security?
2. If not, what changes in the present relationships of the military services and departments has our war experience indicated as desirable to improve our national security?
3. What form of postwar organization should be established and maintained to enable the military services and other Government departments and agencies most effectively to provide for and protect our national security?<sup>37</sup>

The Eberstadt Report was submitted to the Senate Committee on Naval Affairs on May 15, 1945. It not only rejected the logic that informed the Army's unification plan but, as I mentioned, presented an alternative organizational plan for the postwar national security establishment. Given the legacy of World War II and the immense national security challenges that lay ahead, Eberstadt and his colleagues argued that lawmakers needed to think not only about the wisdom of merging the service departments but about the importance of integrating all of the political, military and economic agencies that contributed directly and indirectly to national security into a formal system of coordination.<sup>38</sup> A single department of national defense might help improve coordination between the services, eliminate duplication of efforts, and reduce overall appropriations for national defense, but it would not coordinate the efforts and plans of the military with other departments of government also concerned with national defense.

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<sup>37</sup> Ferdinand Eberstadt, *Unification of the War and Navy departments and Postwar Organization for National Security, Report to Hon. James Forrestal* (Government Printing Office, 1945), pp. 3-5.

<sup>38</sup> On the narrower subject of unification, the Eberstadt Report argued that it was difficult, if not impossible, to weigh the merits and defects of "a military system which has successfully borne the huge strains and burdens of the greatest war in history" against a proposed system that had yet to be tested (Eberstadt Report, p. 6). Paul Hammond devotes an entire chapter of his book on the American military establishment in the twentieth century to the problem of appraising the World War II experience with military organization. Did the JCS committee system perform admirably? As Paul Hammond points out, the services "differed considerably in their own appraisals of its wartime success." The problem from an historical point of view is that it is "difficult to establish criteria for judging whether the JCS performed its functions significantly slower than any alternative organization would have, or whether instead the complaints were inevitable, under the circumstances" (Paul Hammond, *Organizing for Defense: The American Military Establishment in the Twentieth Century* (Princeton University Press), pp. 160, 170). He concludes his appraisal of the coordinate system of organization in World War II by suggesting that it did not establish its value beyond a reasonable doubt.

What the unification plan ignored – and what national security most demanded – was the need for a broader, more encompassing organizational structure. Instead of consolidation, the Army and Navy departments (along with a newly established Air Force Department), the report argued, should be tied together through formal links with military and non-military organizations. This was an extremely ambitious proposal that did not merely flirt with state-building, as the unification plan did. “Our present situation calls for action far more drastic and far-reaching than unification of the military services. It calls for a *complete realignment of our governmental organization to serve our national security* in the light of our new world power and position, our new international commitments and the epochal new scientific discoveries.”<sup>39</sup>

The organizational form for our military services was only one – and not the most important – of the many questions that had to be urgently addressed. National security preparedness depends more on establishing productive collaborate relationships between military and civilian agencies and between the public and private sectors than strictly between the military departments. The following agencies would be at the center of this new integrated network: the National Security Council (NSC), the Joint Chiefs of Staff (JCS), the National Security Resource Board (NSRB), the Central Intelligence Agency (CIA), the Research and Development Board, and a Military Education and Training Board. The NSC was the centerpiece of the proposal. The council would include the Secretary of State and the secretaries of the three armed services, and be presided over by the President. This is where overall political and military policy would be formulated and the execution of these policies properly coordinated.

Political scientist Jeffrey Dorwart characterizes the underlying logic of the Eberstadt Report as follows: “The Eberstadt Plan advanced collaboration, coordination, and consultation among government agencies, between government and business, and between the military and industry through clusters of

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<sup>39</sup> Press Release for the Eberstadt Report, quoted in Waddell, p. 127.

formal and informal coordinating structures.”<sup>40</sup> These formal and informal structures are what Eberstadt called “ligaments of coordination.” The metaphor is apt: what troubled Eberstadt and his team most about the pre-1947 national security system were the perilous gaps between vital agencies and actors.<sup>41</sup> Among the worrisome gaps were those between foreign and military policy; between the State Department and the military establishments; between strategic planning and its logistic implementation; between the JCS and the military and civilian agencies responsible for industrial mobilization; between and within the military services, principally in the field of procurement and logistics; between the executive and legislative branches of our government; and between the government and the people.<sup>42</sup> The NSC was expected to do a great deal of heavy lifting in this context.<sup>43</sup> It was to serve as “a permanent vehicle for maintaining active, close and continuous contact between the departments and agencies of government responsible for our foreign and military policies, including formulation and coordination of such policies, the assessing and appraising of our foreign objectives, commitments and risks, and keeping these in balance with our military power.”<sup>44</sup>

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<sup>40</sup> Dorwart, p. 102.

<sup>41</sup> As we will see in Chapter 8, a major theme in the contemporary defense reform literature is that a lack of interagency cooperation still afflicts the national security system.

<sup>42</sup> *Eberstadt Report*, p. 5.

<sup>43</sup> Pendleton Herring was an influential member of the team that drafted the *Eberstadt Report*. The new science of administration, he argued in two influential books, *Public Administration and the Public Interest* and *The Impact of War: Our American Democracy under Arms*, published in 1936 and 1941 respectively, could help our republic respond to the new national security environment without compromising its democratic values. This is a reasonable assumption. But what makes it difficult to judge the constitutional implications of such suggestions are claims that the science of administration can accomplish this goal by adopting some of the internal dynamics of authoritarian regimes and distancing decision-makers economically and militarily from fractious, interest-group-driven democratic practices.

<sup>44</sup> *Eberstadt Report*, p. 15.

## The “Constitutional Convention” of 1945-1947

Although two competing plans were now on the table, the overarching logic that should inform the new national security system was not in dispute: structural problems revealed during the war, the emergence of an increasingly large and unwieldy bureaucracy, and the magnitude of the national security challenges the nation would face in the aftermath of the war suggested to both sides of the reform debate that the various elements of the proto national security state had to be better coordinated. Most participants in these debates agreed that the United States in the postwar period “would have to assume major peacekeeping functions, rebuild the world economy, and ensure international stability in the face of revolutionary unrest.”<sup>45</sup> This substantial overlap contributed to a strong consensus on a number of key issues. Whatever specific structural reforms were ultimately decided upon, both sides agreed that they needed to accomplish four things: facilitate the integration of foreign and military policy; improve military planning and preparedness; ensure greater unity of command in the field; and reduce waste in the overall budget of the armed services.<sup>46</sup>

Common ground proved much more elusive when it came to the particular kind of structures that would best achieve these goals. President Truman and his supporters believed that replacing the JCS committee system with a general staff that worked directly under the president was the key innovation that would best prepare the United States to fulfill its political-military duties and

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<sup>45</sup> Dorwart, p. 102.

<sup>46</sup> The two sides also agreed that individual service autonomy and prestige should be preserved; that no one service should dominate its partners; that the Air Force should be an independent branch of the armed services; that a new agency would be responsible for improving the military’s access to, and ability to absorb, the latest scientific and technical innovations; and that more emphasis needed to be placed on inter-service training and education of officers.

responsibilities in the postwar era.<sup>47</sup> Eberstadt and his colleagues, in contrast, argued that unification would not only fail to work as advertised, but that there were serious gaps in the nation's security structure that required a collection of new civilian and military agencies and departments to formulate and execute national security policy.

At this juncture in the unification debate, Truman attempted to draw upon his authority as president to accelerate the legislative process. He tasked Secretary of War Patterson and Secretary of the Navy Forrestal with working out a compromise. Certain organizational features of the new national security state were easily resolved: the final legislation would include a national security council, a national security resource board, and a central intelligence agency. Huzar argues that a wide consensus had emerged with respect to the importance of these three agencies, though their final form remained in doubt. Most reformers agreed that these agencies would "fill serious gaps in the nation's security structure" and improve the "quality and the correlation of estimates of technological trends in weapons, political prospects of hostilities, and industrial mobilization required to wage war."<sup>48</sup> The issue that Patterson and Forrestal could not resolve was the original question of whether the armed services should be unified in a single department.<sup>49</sup> This makes perfect sense: the two parties could not agree either to endorse or scrap unification because the principles at stake were central to their respective understandings of how organizations and democratic politics work. Advocates and critics of unification believed that the strength and security of the nation would be enhanced by a reorganization of the executive branch included some degree of increased centralization. Where the two sides of the unification debate parted ways was on the point at which increased consolidation and a streamlined

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<sup>47</sup> Hogan argues that no one was more responsible for the emergence of the national security state than Truman, "and yet no one was more convinced that national security needs, however urgent, could wreck the budget, militarize society, and undermine the welfare state that had grown out of the New Deal" (Cross of Iron, p. 7).

<sup>48</sup> Huzar, p. 300.

<sup>49</sup> Two relatively minor issues also remained unsettled at this stage: the role of the Marine Corps and the status of naval air power.

chain of command would begin to have an adverse impact on national security preparedness and policymaking.

Why did Navy spokesmen invoke a man on horseback in their critique of the Army unification plan, claiming that a single military department presented a dangerous challenge to the Constitution? Why did they argue that a department of defense strong enough to unify the armed services would be so strong that it would pose a severe threat to civilian control of the military? On the other side of the ledger, members of the Army coalition claimed that key features of the Eberstadt Report posed a dangerous threat to presidential authority and democratic institutions. They argued that a defense establishment founded on collaborative principles would sharply erode democratic accountability. How should we interpret and understand these remarks? How are we to weigh the merits of these contradictory claims?

*1. Independence and Autonomy.* In hearings before the Senate Committee of Naval Affairs in 1945, Senator Robert Byrd wanted to know what “independent authority, if any, the Secretary for the Army, the Secretary for the Navy, and the Secretary for the Air Force have, independent of the control of the Secretary of Common Defense.” Senator John Thomas, who was testifying before the committee as a proponent of unification, responded that they would be very independent actors in the new system. Senator Byrd pushed for specifics: “I am not speaking about what may be done, I am asking about the law. We are going to pass a bill here. I would like to know in the law, if possible, exactly the authority that the Secretary of the Navy has as an independent officer from the Secretary of Common Defense?”

Senator Thomas had to his emend his remarks: the secretaries for the individual services would in fact have to “carry out the will of the President and the Secretary at all times.”<sup>50</sup>

If the Secretary of the Navy had no clear, formal authority, his informal powers would be vulnerable to usurpation. Senator Byrd may have been partly concerned with the power and prestige of the Navy, but his inquiry also reflects a principled position. Secretary Forrestal would carry on this line of questioning later in the hearings. He was equally uncomfortable with the ramifications of a streamlined chain of command. “I have deep misgivings about the danger of the concentration of such huge authority in the hands of one military man as this bill entrusts to the Chief of Staff. Whether it be in business, government, or military operations, I mistrust the principle of relying on a single genius to make all basic decisions.”<sup>51</sup> Whereas Byrd expressed a fear of a powerful civilian secretary, Forrestal here focuses on the danger of a single military chief. An ambitious supreme Chief of Staff, he cautioned, could dominate his civilian counterparts and mold not only military policy to suit his ends, but national policy.<sup>52</sup> Eliot was also suspicious of one-man rule under the president. “No one man can have enough experience, specialized knowledge and wisdom to warrant building our military establishment on the basis of his single judgment.”<sup>53</sup>

Eberstadt is perhaps the most persuasive opponent of the underlying logic of unification. The JCS committee system under Roosevelt’s command, he believed, had proven its effectiveness. “I am not

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<sup>50</sup> *Unification of the Armed Forces: hearings before the Committee on Naval Affairs, U.S. Senate, 79<sup>th</sup> Congress, 2<sup>nd</sup> session, on S. 2044, a bill to promote the common defense by unifying the departments and agencies of the government relating to the common defense (Government Printing Office, 1946), pp. 17-19.*

<sup>51</sup> *Ibid.*, p. 38.

<sup>52</sup> *Ibid.*, p. 44. Forrestal preferred a Director of the Common Defense with “supervisory jurisdiction.” His models were Justice Byrnes, Mr. Vinson and Mr. Nelson, who had served President Roosevelt so honorably and effectively during the war. “They did make decisions, but those decisions were not on a dictatorial or unilateral basis, they were made after listening to everybody whose interests were involved” (50). He argued for a “coordinator” rather than an “overlord.” (p. 50).

<sup>53</sup> Eliot, p. 271. He follows this strong declaration against one-man rule, however, with a major qualification: “This is not to say, of course, that no one man can be qualified to be President of the United States.” Statesmen of exceptional quality may also be rare, but the myriad imperfections of our presidents, he seems to want to believe, are largely muted and / or buttressed by our constitutional system of checks and balances. “We do not extend the one-man idea any farther than we have to, and where we must use it we guard it carefully” (p. 271).

a student of military history, but I will say this, that I have never heard of strategic plans as brilliant as those of the Joint Chiefs of Staff both in conception and in execution.”<sup>54</sup> He defended the strength of the JCS system on the grounds that it combined three essential organizational elements. “First, each member, without domination or restraint, was able to present and to contend for his own views and to check over and criticize those of the others. Second, when a final decision had to be reached, each had the duty and the power to join with the others in carrying it out. And, finally, they had the authority to appoint theater commands to executive their plans and the responsibility of supervising their executive.”<sup>55</sup> They were not, in other words, merely members of an advisory body with whom civilian leaders could choose not to engage.

The Navy Department coalition insisted that the unification plan was based on a false premise: It did not differentiate between what was required in combat areas, which is unified command, and what was required in the planning and policy-making centers in government, which is deliberation and conference. As Forrestal commented, an early draft of the final legislation still failed to respect the “democratic processes and procedures which are the basis of our Government at home.”<sup>56</sup>

*2. Presidential power and authority.* Truman was criticized by his opponents for his unflinching faith in the benefits of service unification and his inability to conceptualize the broader national security challenges that would face the United States in the aftermath of the war. With these criticisms in mind, it interesting to note how Truman characterized the Eberstadt Report in his memoirs:

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<sup>54</sup> Ibid., p. 174.

<sup>55</sup> Ibid., p. 176.

<sup>56</sup> *Unification of the Armed Forces: hearings before the Committee on Naval Affairs*, p. 31.

The principle thesis of the Navy's proposal was that military policy must be tied in with national policy through the establishment of high-level agencies. I endorsed fully the Navy's emphasis on the need for some means of more effective meshing of military planning with our foreign policy, and agreed also that we needed to provide long-range plans for industrial mobilization consistent with the civilian economy. In other words, it was clear to me that a national defense program involved not just reorganization of the armed forces, but actual coordination of the entire military, economic and political aspects of security and defense.<sup>57</sup>

Given this strong endorsement of key principles in the Eberstadt Report – his support for a “comprehensive and continuous program of national security,” as he put it in his special message to Congress in 1945 – why was there still so much friction between the two reform camps?<sup>58</sup>

Truman and his supporters had two strong objections to the Eberstadt Report: they considered the arguments against unification as being partisan and suspect rather than innovative and constructive, and they were hostile to the idea of creating any kind of high-level executive agencies, committees or boards that might lead to the dilution of presidential power.

Anyone with firsthand experience with how the separatist system functioned before and during the war, Truman argued, understood perfectly well that inter-service rivalry and conflict were impediments to forming a coherent and effective national security policy. “We cannot have the sea, land, and air members of our defense team working at what may turn out to be cross purposes, planning their programs on different assumptions as to the nature of the military establishment we need, and engaging in an open competition for funds.”<sup>59</sup> The problems with the current system were many. The JSC committee system may have contributed to the successful prosecution of the war, but

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<sup>57</sup> Harry Truman, *Memoirs: Years of Trial and Hope* (Signet Books, 1956), p. 140.

<sup>58</sup> Presidential Message to Congress, December 19, 1945, “Special Message to the Congress Recommending the Establishment of a Department of National Defense,” in Alice C. Cole et al., eds., *The Department of Defense: Documents on Establishment and Organization, 1944–1978* (Office of the Secretary of Defense, Historical Office, 1978).

<sup>59</sup> *Ibid.*

committees that operate on the principle of voluntary cooperation are simply not good substitutes for a unified system of command. Duplication and overlap within the services were unambiguous drains on limited national resources. The President and the Congress should not have to reconcile the separate programmatic and budgetary claims submitted by the individual services. The Eberstadt Report, which emphasized voluntary cooperation between the services, simply did not offer solutions to any of these pressing problems. Truman was convinced that there was “enough evidence now at hand to demonstrate beyond question the need for a unified department.”<sup>60</sup>

Truman also believed that the proposed NSC and NSRB ran counter to the American elective system and borrowed too heavily from the European model of cabinet government. He was adamant that the NSC not be granted (or be able to claim, after the passage of the legislation) any independent executive authority. The idea of an associative state – a state in which “corporate elements and government cooperated to build interorganizational structures, design policy, create a public consensus, and guide legislative action” – was dangerous. “Under our system the responsibility rests on one man – the President,” Truman wrote in his memoir. “To change it, we would have to change the Constitution, and I think we have been doing very well under our Constitution.”<sup>61</sup>

Caraley suggests that the Army commitment to the principle of one-man decision-making played a significant role in these debates. “So strongly was this decision-making dogma adhered to by some of the Army generals that they were ready to criticize the effectiveness of the JCS during World War II almost as a matter of principle, even though they did not throughout the hearings take issue with the

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<sup>60</sup> Ibid. Caraley suggests that the army dogma of one-man decision-making played a significant role in the unification debates: “So strongly was this decision-making dogma adhered to by some of the Army generals that they were ready to criticize the effectiveness of the JCS during World War II almost as a matter of principle, even though they did not throughout the hearings take issue with the content of a single one of the Chiefs’ strategic decisions” (Caraley, p. 64).

<sup>61</sup> *Years of Trial and Hope*, pp. 155-156.

content of a single one of the Chiefs' strategic decisions."<sup>62</sup> But Truman seems less attached to Army tradition in this case than committed to protecting executive power. As Senator Thomas replied to Senator Tydings when asked who would ultimately decide policies in the new national military establishment, "At no time do you get rid of the fundamental fact of our Constitution, because everything that is carried out, either as civilian or as military, is done at the direction of the President."<sup>63</sup>

### **The National Security Act of 1947**

Here is the declaration of policy included in the final draft of the legislation:

In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient, and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces, for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.<sup>64</sup>

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<sup>62</sup> Caraley, p. 64.

<sup>63</sup> *Unification of the Armed Forces: hearings before the Committee on Naval Affairs*, p. 14.

<sup>64</sup> The National Security Act of 1947 (Pub. L. 80-253, 61 Stat. 495, codified at 50 U.S.C. ch. 15). Some of the issues addressed in the final legislation are reminiscent of the kind of subtle details the framers debated at the Constitutional Convention. Which civilians and soldiers in the national security establishment should have direct access to the president? Should the president be a statutory member of the NSC, which would grant the council a

After two years of debates, which reorganization plan – which set of forms and principles – had the greater influence on the final architecture of the national security state? Douglas Stuart argues that the legislation was “a major defeat for Harry Truman, George Marshall, and the other proponents of comprehensive military unification.”<sup>65</sup> Richard Best concurs: “Eberstadt’s recommendations clearly presaged the eventual national security apparatus.”<sup>66</sup> These scholars base this assessment on the fact that the legislation created a national defense establishment composed of three military departments, each represented by a service chief and civilian service secretary, and administered by the secretary of defense.<sup>67</sup> The military was not unified; hence Truman suffered a major defeat. Amy Zegart shares this opinion, arguing that Truman failed “in the face of intense interservice military conflict.”<sup>68</sup>

As a constitutional theorist, I find these conclusions a bit puzzling. Truman and his supporters may have lost the debate over military unification, but they were clearly victorious in the broader and much more significant debate over defense reform. Hogan argues that we cannot characterize these debates as merely a power struggle between different individuals, agencies and institutions. He emphasizes the “interplay of competing ideas and ways of thinking.” There were bureaucratic struggles and inter-department competition, but the two main camps presented “different designs for an

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greater degree of decision-making power, or a non-statutory member, in order to preserve the presidential independence? Who should be designated chairman of the council: the president, secretary of state or secretary of defense? What should the composition of the council be, in terms of the ratio of civilian to military? Should congressional committee leaders serve on the council? These are certainly great and difficult and consequential questions, but they were mostly understood in terms of how to preserve presidential power and maintain a “civilian” outlook on defense policy.

<sup>65</sup> Stuart, p. 105. The incoming Secretary of the Army, Kenneth Royal, expressed this view: the new military establishment “will not save money, will not be efficient, and will not prevent interservice rivalry.”

<sup>66</sup> Richard A. Best, “The National Security Council: An Organization Assessment,” *Congressional Research Service* (January 2011), p. 5.

<sup>67</sup> Army historian James Hewes writes that Congress “adopted an organization similar to that recommended by the Navy.” All that was left of the Army unification plan was the Secretary of Defense’s responsibility to “eliminate unnecessary duplication or overlapping in the fields of procurement, supply, transportation, storage, health, and research” (James E. Hewes, *From Root to McNamara: Army Organization and Administration, 1900-1963* (Center of Military History, United States Army, 1975), pp. 164-165).

<sup>68</sup> Zegart, p. 56. She also argues, with little justification, I would suggest, that Truman was the only participant in these debates who pushed for the national interest.

organizational framework that would meet political as well as military requirements,” and adopted “different strategies of state making.”<sup>69</sup>

Charles Stevenson, who studied the National Security Act of 1947 closely and whose analysis I find persuasive, describes the legislation as a compromise between “advocates and opponents of a highly centralized military establishment, between supporters of a regularized process for interagency policymaking and defenders of Presidential prerogatives, and between an executive branch needing new legal authorities to deal with a postwar world and a Congress determined to maintain its special powers over the Armed Forces.” As a compromise, he concludes, the new law “disappointed most of the contending factions by falling short of what many advocates wished while going beyond what others considered acceptable.”<sup>70</sup> This strikes me as an accurate description of the how the law was received and understood by participants in these debates. But the fact that the bill reflects a compromise between two sets of preferences does not tell us much about how the constitutional issues at stake were resolved.

The Eberstadt Report envisioned the NSC as a kind of war cabinet. Had the NSC been granted such status – had it been assigned more than merely an advisory role in national security decision-making – this would have violated Truman’s insistence on preserving presidential power and authority. On the question of whether lateral clearance or line command should inform the organization of the national security state, Truman and his supporters did not cede any ground to their opponents. The Eberstadt Report recommended a national security council that would not merely serve the president: its authors pushed for a deliberative body that would discharge duties that, in a presidential system of government, would logically be assigned to a single department head working directly under the president. The Eberstadt Report, as Paul Hammond points out, was inspired by a different theory of

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<sup>69</sup> Hogan, pp. 7, 23.

<sup>70</sup> Charles Stevenson, “Underlying Assumptions of the National Security Act of 1947,” *Joint Force Quarterly*, Vol. 48, No. 1 (2008), p. 129.

government. "Cabinet solidarity may be the cement of the British government, and interdepartmental committees may have certain uses, but the American Executive Branch is held together, if at all, by the authority of the President."<sup>71</sup> In the final legislation, the NSC was granted none of the independent power its advocates recommended. The NSC, as a result of Truman's understanding of the Constitution, was denied any policymaking or supervisory functions.<sup>72</sup> Even the recommendation that the council be granted responsibility to bring matters to the attention of the president, rather than merely follow presidential direction, was rejected.<sup>73</sup> The structures created by the National Security Act of 1947 may resemble those outlined in the Eberstadt Report, but the way power was ultimately distributed within the new national security establishment makes it clear that Truman did not compromise on the principle of presidential power.<sup>74</sup>

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<sup>71</sup> Paul Hammond, "The National Security Council as a Device for Interdepartmental Coordination: An Interpretation and Analysis," *American Political Science Review*, Vol. 54, No. 4 (December 1960), p. 901.

<sup>72</sup> What the Eberstadt vision left ambiguous was the relationship between the president and the NSC. By proposing a NSC without a Secretary of Defense, Eberstadt and his partners were in effect arguing that the NSC could discharge collectively duties which a presidential system of government assigns to a single department head working directly for the president.

<sup>73</sup> For a thorough discussion of the debates over the NSC and an analysis of its early performance, see Alfred D. Sander, "Truman and the National Security Council: 1945-1947," *The Journal of American History*, Vol. 59, No. 2 (September, 1972). "President Truman," he concludes, "emphasized the advisory nature of the council, viewed it as an institution which might encroach upon his constitutional prerogatives, approached it with caution and selectivity, and until Korea, kept the executive secretary and his staff at the periphery of his relationship with the other departments and agencies" (p. 388). Let me also mention here that some reformers worried about the composition of the council, and wanted to ensure that civilians outnumbered military representatives. This reflects a widespread assumption in the broader defense reform literature: that our militarized approach to foreign policy since the founding of the national security state is a reflection of the increasing power and influence of the military. But I would argue that the military was no more responsible for the militarization of defense policy after World War II than it was responsible for the changing skylines in American cities. As international relations theory teaches us, economic power and military power tend to grow together, and for reasons that have more to do with civilian and military preferences.

<sup>74</sup> Caraley points to two factors to explain Truman's insistence on a single department with a vertical chain of command: "Although Truman's sharing of the Army's organizational goals and theories would have caused him to support the War Department's plan in any event, his conception of his own role as President gave him independent incentives to press for some sort of unification of the Army and Navy into a single department." Truman had the "normal presidential desire to maximize his own control," and thought "a single cabinet officer over all the armed forces and a single military budget, by presenting a common front to Congress, would maximize presidential control over the military establishment" (Caraley, pp. 84-85).

## Constitutional Theory and the Creation of the National Security State

Had attendees of the “constitutional convention” of 1945-1947 possessed a thorough understanding of the theory behind the Constitution, might they have thought differently about how best to constitute the executive branch?<sup>75</sup> A constitutional theorist, I would suggest, would have unhesitatingly supported Truman’s defense of executive power. Eberstadt and his supporters may have had a greater appreciation for the national security challenges the nation would face in the postwar era, and hence the need for a sharp increase in inter-governmental collaboration, but they did not justify the introduction of pluralistic elements into the constitution of the executive branch with convincing constitutional arguments. They were right to worry about the capacity of any single individual – be it the president, the civilian secretary of a unified military department or a supreme military chief of staff – to manage an extremely complex organization. They were also right to doubt the ability of any single individual to correctly judge the threats the nation would face and choose wisely among the options available to meet these threats. But Madison and Hamilton also worried about these same issues, as we know, and were nevertheless convinced that, as far as the balance between energy and safety in the executive was concerned, there was nothing more an enlightened and reasonable people could desire.<sup>76</sup> Supporters of the Eberstadt plan did not explain why additional safety measures might be required to

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<sup>75</sup> In an essay on government reorganization broadly understood, Robert Hawkins argues that a “reform tradition” was ascendant during the middle of the last century. “The Federalist formulation finds its major strength in its inherently political nature,” while its major weakness is historical: “problems of interdependence and large administrative agencies did not exist when the founders formulated their theory.” In contrast, “The strength and weakness of the reform traditions lies in its concern with organizational and administrative problems. Its notion of politics is organizational and mechanistic. He is not writing about defense reform, but defense reformers certainly draw more heavily on the reform tradition than the political theory of *The Federalist*. And I firmly agree with his claim that “Reorganization should be recognized *first* as a problem of politics and policy and only then as a matter of management ((Robert Hawkins, “Government Reorganization: A Federal Interest,” *Publius*, Vol. 8, No. 2, p. 9)pp. 109, 133).

<sup>76</sup> Hamilton, *The Federalist*, No. 77.

protect against the abuse of executive power or why the introduction of pluralistic arrangements in the executive department would not result in a loss of energy, secrecy, dispatch or decision.

Let me return to the question at the center of this dissertation. Is there a constitutional solution to the problem of ensuring a relatively seamless fit between political goals and military means in a national security crisis? This question directs our attention to the civil-military decision-making nexus, the top echelon of civilian and military leaders who plan and execute military actions.

Military historian Russell Weigley argues that the tradition of professional military subordination to civil authority was firmly established during the Civil War, and that it “reached a special flowering in World War II, only to erode as the post-1945 era carried the United States into military problems for which the historic American way of war had little prepared either soldiers or statesmen.”<sup>77</sup> Not all military historians think the pre-1945 era was defined by civil-military harmony, but most agree that when military professionals had doubts about the quality of civilian leadership, they refrained from acts of direct insubordination. But this tradition of military deference to civilian authority was partly a reflection of a parallel tradition of civilian deference to the military on operational matters. What I want to suggest here is that civil-military relations before the creation of the national security state were characterized by a relatively clear division of labor between civilians and soldiers: civilians were responsible for identifying the goals of national security policy, and military professionals were responsible for choosing the appropriate means to achieve these goals. The authors of the National Security Act of 1947 assumed that this clear division of labor would persist.<sup>78</sup>

What both sides in the unification debates failed to anticipate was the extent to which the internal power dynamics in a republic – not only the relationship between the legislature and the

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<sup>77</sup> Russell F. Weigley, “The Soldier, the Statesman, and the Military Historian,” *The Journal of Military History*, No. 63 (October 1999), p. 808.

<sup>78</sup> This is Samuel Huntington’s ideal of objective civilian control of the military. We will analyze civil-military relations – both theoretical ideals and practical realities – in the next two chapters.

executive but between civilians and soldiers inside the executive department – would evolve as its relationship to the outside world changed. They were certainly sensitive to the degree to which our relative power in the international system had changed, but this did not lead them to reflect of the fact that our constitutional system was designed specifically for an insulated state. To draw attention to this omission is not to criticize the participants in these debates.<sup>79</sup> The founders of the national security state understandably did not ask themselves if it would be possible to increase a non-insulated state’s protection against the abuse of executive power without sacrificing executive energy. They understandably did not debate the wisdom of introducing additional auxiliary mechanisms into the executive branch to protect against the violence of faction. They understandably did not think about the merits of a formal process of adjustment and adaptation to ensure that political ends and military means would be adequately aligned in a national security crisis.

Ernst May, an expert on political-military consultation in the United States, argues that because the world is “as sensitive as a can of nitroglycerin,” it is essential that, “before executors of national security policy can decide what the nation ought to do, they must learn from political and military experts what the nation is able to do.”<sup>80</sup> On the surface, this demand appears to be unexceptional. Of course our statesmen need to consult with their political and military advisors before making important policy decisions. Of course there needs to be a process of adjustment and adaptation between political ends and military means. But what constitutional theory teaches us is that we should not expect statesmen to engage in deliberative processes on a strictly voluntary basis. Voluntary associations may

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<sup>79</sup> As Max Weber wrote, “It is entirely true and a fundamental fact of all history ... that the ultimate product of political activity frequently, indeed, as a matter of course, fails utterly to do justice to its original purpose and may even be a travesty of it.” Travesty may be a bit too forceful a word in the case under investigation here, but I would suggest there were lots of unintended consequences and at least one serious problem with the way the system would work that was not properly anticipated.

<sup>80</sup> Ernst R. May, “The Development of Political-Military Consultation in the United States,” *Political Science Quarterly*, Vol. 70, No. 2 (June 1955), p. 162.

play a vital role in a democratic society, but volunteerism is not a principle in which constitutional theory places much faith.

### **Conclusion**

The basic logic behind the Army's original consolidation plan was compelling. The improvised organizational structures that shaped the military's response in World War II may have performed admirably at times, but they had obvious weaknesses, and reforms were necessary. The competition between the individual services was responsible for unnecessary duplication and waste, and unification would eliminate these inefficiencies. It would also ensure that a high level of coordination and cooperation would characterize the defense department whether the nation was at war or not. The central principle at work here – unity of command – reminds us of Hamilton's defense of the doctrine of the unitary executive. As I mentioned earlier in this chapter, Truman believed that only unification in a single department of the armed forces, under a single chief of staff, would facilitate the kind of system-wide integration necessary for the military to perform its duties admirably in times of peace and war.

The basic logic behind the Navy's rejection of unification also has much to recommend it. Coordination and consultation – the principle of coequal military services – had an admirable track record: The JCS committee system, which proponents of unification wanted to abolish, had served the nation well. Consolidating the services would grant one man the power to compel agreement and prevent civilian decision-makers from being exposed to dissenting points of view. Under a system of centralized control, proponents of unification feared that the individual prejudices and preconceptions at the center of the system would not be filtered through any kind of deliberative process.

With the submission of the Eberstadt Report, the unification debate expanded to encompass the defense reform broadly speaking, rather than merely military reform, and appeals to the Constitution – if not the more nuanced constitutional theory on which our republic was founded – became frequent and impassioned. If we want to improve our national security posture, its authors argued, all of the political, military and economic agencies and organizations that contribute to national security preparedness would have to be integrated into a single system. Our new status as a world power meant that establishing formal relationships between civilian and military agencies, and between governmental and private institutions, were even more crucial than establishing formal relationships between the individual services.

How should a constitutional theorist evaluate the final form of the legislation that created our national security state? What role, we could ask, did Madison's theory of faction and Hamilton's defense of executive energy play in the unification debates? The executive branch needs to be strong enough to exercise its constitutional power in a national emergency. This much everyone agrees upon. But even if we accept this premise, where are we to draw the line between what constitutes too much and too little power in the hands of the president? The founders of the national security state, I would suggest, tiptoed around this boundary question. They did not ask themselves when the risk of significant power being abused is greater than the danger of power insufficiently concentrated.

## 7 The Goldwater-Nichols Act of 1986

*Reorganization ... decrees a change in organizational structure or jurisdiction as a beginning, and counts on this (and the shadow its prospect casts ahead) to alter the function in the desired direction or manner – whether correctly or not, we need not stop here to inquire: risks and uncertainties attend all courses of action.*

- Harvey Mansfield

*In retrospect, the Second World War still glows in the institutional minds of the armed forces not just because of the military victory, but because of the generally successful balance of judgment and power between Roosevelt and the JCS, between the individual members of the JCS and the theater commanders, and between the theater commanders and the Service component commanders.*

- Allen Millett

*The basic objective of any proposals for modifying the existing military organization of the country is to improve the caliber of military advice that the nation's leaders receive. What is good, sound, military advice? To some officials it, unfortunately, means hearing the advice that the advised wants to hear.*

- William Y. Smith

What I want to emphasize at the beginning of this chapter is that *military* reform is merely a component of *defense* reform. Too many reformers conflate the two and end up arguing that military reform alone will solve problems that are at least partly the product of poor decision-making at a higher level of organization. Most defense reformers – and almost all civilian defense reformers – are in fact military reformers: they focus exclusively on the military component of the larger civil-military decision-making

structure.<sup>1</sup> But no matter how well organized the military may be – no matter how congenially the individual services work together; no matter how fine-tuned its joint operations; no matter how fiscally responsible its proposed budgets; no matter how adaptable its force structure; no matter how thorough and sophisticated its contingency planning; no matter how inspired its strategic vision – the performance of the military ultimately hinges on the wisdom of the tasks it is assigned to perform by the president and secretary of defense.<sup>2</sup>

Soldiers who have served at the highest level of command are often quite sensitive to the distinction between defense and military reform. They have operated through and within both military and defense structures, and experience has taught them that, as desirable as military reform may be, it is easy to overestimate what its positive impact will be on military performance. Out of respect for their position in the chain of command, however, soldiers typically limit their engagement with defense reform to matters that pertain strictly to military reform. In a system where soldiers are unequivocally subordinate to their civilian counterparts, and the norm of deference to civilian authority has been thoroughly internalized, we should hardly be surprised to learn that soldiers shy away from directly criticizing the president and secretary of defense or commenting on the broader constitution of the executive branch. But this semi-voluntary abstention, though understandable, is nevertheless

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<sup>1</sup> As I discussed in the previous chapter, in the debates leading up to the passage of the National Security Act of 1947, military reform and defense reform were both subjects of discussion after the dissemination of the Eberstadt Report.

<sup>2</sup> Two edited volumes on defense reform capture the diversity of interests within the defense reform movement: Asa A. Clark IV, Peter W. Chiarelli, Jeffrey S. McKittrick and James W. Reed, eds., *The Defense Reform Debate: Issues and Analysis* (John Hopkins University Press, 1984); and Robert J. Art, Vincent Davis and Samuel Huntington, eds., *Reorganizing America's Defense: Leadership in War and Peace* (Pergamon-Brassey's, 1985). For a thoughtful discussion of this round of defense reform debates, see Gordon Lederman, *Reorganizing the Joint Chiefs of Staff: The Goldwater Nichols Act of 1986* (Greenwood Press, 1999). Goldwater-Nichols represented the "latest phase in the U. S. military's continual quest for a harmonious organizational structure," he summarizes, and by organizational structure he means that which helps (or hinders) the military to meet the "challenges and opportunities presented by the complex task of training, equipping, motivating, and commanding forces in peace and in war" (p. 11). Congressional hearings also make it clear that congressional leaders were focused primarily on military reform (*Reorganization of the Department of Defense: hearings before the Committee on Armed Services, U. S. Senate, 99<sup>th</sup> Congress, 1<sup>st</sup> session* (Government Printing Office, 1987)).

unfortunate, since the relationship between the quality of civilian decision-making and the caliber of military performance should be at the center of defense reform debates.<sup>3</sup>

Is there an underlying assumption that unites most defense reformers? Despite the many facets and complexities of the subject, the underlying assumption shared by most defense reformers is rather straightforward: reformers are united by the belief that the ability of military personnel to effectively advise, plan and conduct operations is impacted by US military organization, and that reorganizing the military in the proper manner will therefore improve how our nation prepares for and fights its wars.<sup>4</sup> We can understand why shifts in the international balance of power (real or imagined), as well as poorly executed military interventions, have won new generations of adherents to defense reform. In theory, we should be able to identify problems with the system, adjust the organizational structure accordingly, and then sit back and enjoy the fruits of our intellectual labors (observe, in other words, a statistically significant rise in military performance over time).

This shared assumption about the causal relationship between military organization and military performance is why the focal point of most defense reorganization proposals between 1947 and 1986 was the military chain of command.<sup>5</sup> The military chain of command, one reformer commented, should

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<sup>3</sup> I characterize the abstention of soldiers as being semi-voluntary because, in addition to the cultural and institutional pressures they face, soldiers may also refrain from engaging with defense reform in its broader context due to a lack of familiarity with constitutional theory, which, as I have been arguing in this dissertation, provides a unique set of conceptual footholds for a defense reformer.

<sup>4</sup> Gordon Lederman identifies a slightly different assumption, and I include it here because it echoes arguments made about the performance of the national security system World War II which I touched upon in the last chapter. "Implicit in the pro-reorganization position lay the assumption that DOD's supposed weaknesses resulted from inadequate organization rather than incompetent personnel, meaning that these putative weaknesses could not be remedied by recruiting superior individuals for leadership positions. According to this view, although superior individuals could devise ad hoc arrangements to compensate for the system's structural problems, such arrangements were inherently unstable and depended on the meshing of personalities. Establishing these ad hoc arrangements during a political-military crisis would delay decisionmaking, could cost lives, and ultimately undermine the national interest" (Gordon Lederman, *Reorganizing the Joint Chiefs of Staff: The Goldwater Nichols Act of 1986* (Greenwood Press, 1999), p. 34).

<sup>5</sup> We will see later in this chapter that most reformers focus their attention on the relationship between military organization and military performance and ignore the relationship between the quality of civilian decision-making and the quality of military performance.

do two things very well: “provide truly objective military advice to the president and secretary of advice, particularly in the allocation of scarce resources, and plan operations in peace and execute them in war.”<sup>6</sup> These are not particularly revolutionary demands or expectations, and as core principles in a debate on organizational reform they are abstract enough for even the most reticent reformers to embrace. Even critics of the defense reform movement recognized that lines of command were not as transparent as they could be; that theater commanders did not occupy a sufficiently firm position in the chain of command; that the individual services played too dominant a role in the current system; that the service chiefs faced an insuperable conflict of interest as both representatives of services and members of the Joint Chiefs of Staff; and that the joint staff was insufficiently joint and inadequately staffed. But determining precisely which kind of reforms will improve the performance of our military – and do so without creating an acute and vexing set of new problems – is of course a far more contentious subject.

### **Defense Reform 1947-1986**

James Forrestal was selected by President Truman to be our first secretary of defense. His views on defense organization, as I mentioned in the last chapter, influenced the final design of the National Security Act of 1947. Despite his original advocacy of a loose federation of the services, however, he was quickly frustrated by his lack of authority. He had previously worried that a single strategic doctrine would come to dominate defense policy if the services were united under a strong secretary of defense. He had also been convinced that the future secretary “must be free to concentrate his efforts on the

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<sup>6</sup> Thor Hanson, “Commands on Smith’s Proposals,” in Robert Art, et al., *Reorganizing America’s Defense: Leadership in War and Peace* (Pergamon-Brassey’s, 1985), p. 330.

establishment of broad policy” and, in doing so, “must look to the secretaries of the military departments for the information and data upon which his policy is to be based and then look again to them for the execution of these policies.”<sup>7</sup> After a year in office, however, he was forced to revise his position and campaign for additional reforms. Amendments to the National Security Act passed in 1949 addressed the issues that had most frustrated Secretary Forrestal. The critical problem he had faced as secretary had been the military’s inability to provide him with a consensus upon which to develop coherent strategic programs. An additional source of grief was the rivalry between the services over roles, missions, and resource allocations. Based on his personal experience, he became convinced that the secretary of defense needed more power in order to resolve these contentious issues.<sup>8</sup>

The Department of Defense was created in 1949, though an amendment to the 1947 National Security Act, and the department was placed at the center of defense policy planning so that the secretary of defense would have greater oversight over the services. A chairman was also added to the JCS, based on the assumption that a chairman would be able to speak for the military as a whole if he were not beholden to a particular service. The chairman, untainted by service loyalties and empowered to speak on behalf of the entire military, the reasoning went, would be in a better position to provide the president and the secretary of defense with quality advice. Two amendments to the National Security Act passed in the 1950s, and they focused on the same two interrelated issues that had dominated the previous round of reorganization debates: first, decentralized decision-making processes were deemed major impediments to effective policy making; and, second, the president and secretary of defense needed more control over the military if the United States was to deal effectively with external threats. Despite these amendments to the National Security Act of 1947, each of which was

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<sup>7</sup> James Forrestal, Letter to Chairman Chan Gurney, quoted in Gene M. Lyons, “The New Civil-Military Relations,” *American Political Science Review*, Vol. 55, No. 1 (1996), p. 54.

<sup>8</sup> Forrestal’s diaries are rich in observation, intelligence and personality. He was certainly a very complicated man who wrote privately about a very complicated period in American history. James Forrestal, Walter Mills, ed., *The Forrestal Diaries* (Viking Press, 1951).

intended to increase the power of the secretary of defense relative to the JCS, civilians leaders in the Eisenhower administration were still convinced at the end of the 1950s that inter-service rivalry was the greatest obstacle to successful strategic and tactical planning.<sup>9</sup>

What was the cumulative effect of these acts and amendments? The major implication of these reforms, Gene Lyons argued in the early 1960s, was to “shove the Joint Chiefs of Staff and the military departments to the periphery of operational decision-making in Washington.”<sup>10</sup> Richard Betts, writing fifteen years later, largely concurred: with the unification of the services under a civilian secretariat in the Office of the Secretary of Defense, which came as a result of the 1958 reorganization of the Department of Defense, “The Chiefs undeniably still had a large amount of influence, but in relative terms they had much less than they had previously. Although they were still influential in budget and procurement decisions, in decisions on the use of force there were usually more powerful advisers, of the stature of the secretary of state or senior members of Congress, to counteract their prestige.”<sup>11</sup> As military historian Allan Millett explains, over the course of the Cold War, the United States government “embedded military operations in an organizational structure that progressively reduced the autonomy of commanders and increased the likelihood of civilian intervention into the preparation and execution of military plans.”<sup>12</sup> The relative influence of civilian and military leaders in national security

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<sup>9</sup> President Eisenhower made his position clear in a special message to Congress: “Separate ground, sea, and air warfare is gone forever. Peacetime preparation and organization activity must conform to that fact. Strategic and tactical planning must be completely united, combat forces organized into unified commands, each equipped with the most efficient weapons systems that science can develop, singly led and prepared to fight as one, regardless of service” (Dwight D. Eisenhower, *Public Papers of the Presidents of the United States: Dwight D. Eisenhower*, 1958 (Government Printing Office, 1959), pp. 274-290. For additional material on the period between the National Security Act of 1947 and the Goldwater-Nichols Act of 1986, see Alice C. Cole et al., eds., *The Department of Defense: Documents on Establishment and Organization, 1944-1978* (Government Printing Office, 1978).

<sup>10</sup> Lyons, p. 58.

<sup>11</sup> Richard K. Betts, *Soldiers, Statesmen, and Cold War Crisis* (New York: Columbia University Press, 1991), p. 6.

<sup>12</sup> Allan Millett, “The Organizational Impact of Military Success and Failure: An Historical Perspective,” in Allan Millett et al., *The Reorganization of the Joint Chiefs of Staff* (Pergamon and Brassey’s International Defense Publishers, 1986), pp. 12-13.

policymaking clearly shifted toward civilians, and by design.<sup>13</sup> Did this recalibration have a positive effect on military preparedness and performance? Centralization may have been necessary to reconcile the tension between our growing international responsibilities and limited financial resources during the early years of the Cold War. Moderating the influence of service parochialism and rivalry may also have been necessary to accelerate the move toward unified military commands.<sup>14</sup> But supporters of these amendments did not think they went far enough to correct these problems, and critics worried about the unintended consequences of another round of military reorganization.

### **The Case for Defense Reform**

As I already mentioned, there were many critics of the national security system, and many causes to which reformers were drawn. The literature is impressively large and diverse.<sup>15</sup> But in this dissertation we are interested in arguments made by reformers that have a direct impact on crisis decision-making. Despite earlier amendments to the National Security Act of 1947, most reformers in the early 1980s were critical of two trends: the negative impact of service parochialism on military performance, and the

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<sup>13</sup> Gordon Lederman reports that President Kennedy had his own group of trusted advisors and that his preferred decision-making process “marginalized JCS members.” President Johnson and Secretary of Defense McNamara “excluded the JCS from policy planning and consulted the JCS only after policies had been decided” (*Reorganizing the Joint Chiefs of Staff: The Goldwater Nichols Act of 1986* (Greenwood Press, 1999), pp. 24-25).

<sup>14</sup> C. Kenneth Allard argues that each service developed its own distinctive “strategic paradigm” over the course of American history. These paradigms for land, sea and air operations – which roughly correlate with the ideas of Carl von Clausewitz, Alfred Thayer Mahan, and Giulio Douhet, respectively – were deeply entrenched and an obstacle to military effectiveness in the post-World War II era. C. Kenneth Allard, *Command, Control, and the Common Defense* (Yale University Press, 1990).

<sup>15</sup> The Packard Commission Report captures the wide range of issues that reforms wanted addressed. If there is a single dominant theme, it is the need for a better and more efficient system of budgeting and long-range planning to meet the needs security needs of the nation (Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President* (Government Printing Office, 1986). See also *Defense Organization: The Need for Change*, Staff Report to the Committee on Armed Services, U. S. Senate (Government Printing Office, 1985).

poor quality of advice that moved up the chain of command, from military leaders to civilian leaders. On these subjects, the most reformers who presented the most compelling arguments, I would suggest, were two soldier-scholars, General David Jones and General Edward Meyer.

1. *The need for a military counterbalance to the individual services.* Since the passage of the 1947 National Security Act, the United States has never been without critics of its defense establishment. The number of major government investigations and reports is indeed impressive. In this respect it is a bit misleading to credit any particular reformer (or any particular national security event, for that matter) with being the catalyst for this round of defense reform debates. But prior to General David Jones's call for reform in early 1982, the defense reform community was dominated by civilians outside of government and was very much a fringe movement.<sup>16</sup> General Jones's proposals lent the reform movement an urgency and legitimacy it had not previously not possessed.<sup>17</sup>

General Jones begins his critique of the defense establishment with a few striking examples of how the services have resisted new ideas and technological innovations over the years because they did not fit neatly into existing service concepts.<sup>18</sup> These examples – among them the Navy's determination to build new sailing ships after the superiority of steam power had been clearly established and the requirement of the Army Air Corps that its officers wear spurs well into the 1930s – point to the absurd

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<sup>16</sup> See John M. Oseth, "An Overview of the Reform Debate," in Asa A. Clark, et al., eds., *The Defense Reform Debate: Issues and Analysis* (John Hopkins University Press, 1984).

<sup>17</sup> General Jones was a defense reformer with a set of experiences that made him uniquely qualified to propose organizational changes to our military establishment. In addition to his experiences as a soldier who was promoted to four-star general, he served as Air Force chief of staff (1974-1978) and chairman of the JCS (1978-1982). Over the course of his JCS service he also had the privilege (and frustration, as he makes clear) of working for four different presidents and four different secretaries of defense. From a knowledge-wisdom-legitimacy perspective, the substance and diversity of his *practical* experience is not only unmatched among reformers but lends great weight to his *theoretical* arguments.

<sup>18</sup> General David C. Jones, "What's Wrong with Our Defense?" *New York Times Magazine*, November 7, 1982. General Jones presented his arguments in several print outlets over this time period. See also General David C. Jones, "Why the Joint Chiefs of Staff Must Change," *Presidential Studies Quarterly*, Vol. 12, No. 1 (Spring 1982).

and potentially deleterious impact of custom and tradition on decision-making within the individual armed services.<sup>19</sup> Once we combine the adverse impacts of custom and tradition with the pathological nature of all large bureaucracies – the Department of Defense being as large and unwieldy as they come – we can easily imagine why a former chairman of the JCS might be an advocate of reform. “We do not think through our defense problems adequately, and we are getting less capability than we should from our increased defense budgets,” he argued. As a result, there is reason to believe that “faced with a contingency requiring a major joint operation, our performance would be below the level we should expect or need.”<sup>20</sup>

General Jones draws three clear lessons from our military history. We have been generally “unprepared at the onset of each new crisis or war;” have suffered a series of “initial failures” in these conflicts; and have been forced to “reorganize our military while at war.”<sup>21</sup> We have prevailed in wars past not because we have a particular gift for strategy and tactics, he suggests, but because we have had the luxury of time and resources on our side and have been able to wear down our opponents.

To which specific structural flaws does he attribute this level of unpreparedness? His basic argument is that the “balance of influence within the defense establishment is oriented too much

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<sup>19</sup> Lt. General P. F. Gorman was less diplomatic in his criticism the “corpus of ideas, suppositions, traditions, customs prejudices, and obstinacies” that define each service. These asymmetries among the services have created doctrinal allegiances that have an adverse impact on joint planning and operations. The JCS are “charged with the responsibility to maintain traditions, spirit, morale and capabilities of their services – they are Temple Dogs, personal guardians of their culture” (Lt Gen P. F. Gorman, “Toward a Stronger Secretary of Defense,” Prepared for USMA Senior Conference XX, 4 June 1982, p. 9).

<sup>20</sup> General David C. Jones, “What’s Wrong with Our Defense?” *New York Times Magazine*, November 7, 1982. As Jay Mumford points out, “There is virtually no topic more *sacrosanct*, more exquisitely sensitive, and more certain to cause bureaucratic conflict than to attempt to realign military service roles and missions – those broad and enduring purposes set by law and the tasks which flow from those purposes as assigned by” the president and the secretary of defense” (Jay C. Mumford, “Reinventing Government: The Case of the Department of Defense,” *Public Administration Review*, Vol. 56, No. 2 (March / April 1996), p. 219).

<sup>21</sup> *Ibid.* Asa A. Clark IV argues that the services have very traditional understandings of their roles and missions and that this is an impediment not only to military performance at any particular moment in time but also to strategic innovation that would improve future performance. Service parochialism, he argues, is best understood as a consequence of each service’s “organizational essence” (Asa A. Clark IV, in Asa A. Clark IV et al, eds., *The Defense Reform Debate: Issues and Analysis* (John Hopkins University Press, 1984), p. 256).

toward the individual services.”<sup>22</sup> It is a delicate balance, he acknowledges, but the right set of reforms would promote a national perspective within the military without diminishing service autonomy to a detrimental degree.<sup>23</sup> The excessive influence of service parochialism: this is the point on which moderate and radical reformers could agree, and it is because of this consensus that the organization of the JCS was the center of attention in this round of defense reform debates.<sup>24</sup> If the high command could be purged of service parochialism, reformers argued, the entire national security system would improve dramatically.<sup>25</sup>

General Jones had more modest goals. He wanted to shift the delicate balance of power within the military system away from the individual services. The centerpiece of his reform proposal was therefore a stronger chairman of the JCS. The consequences of a weak chairman of the JCS, he argued, were felt throughout the entire national security system. In the annual competition within the military for financial resources, for example, individual service needs too often take precedent over joint

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<sup>22</sup> Ibid.

<sup>23</sup> Many scholars are not as nuanced in their criticism of the military. As John Oseth explains, some of these critics argue that the military suffers from an “insidious disability” – “a reflexive instinct for institutional self-protection and concern for self-advancement ... at all levels from service staffs in the Pentagon to fire-teams and gun crews in line units” (John Oseth, “An Overview of the Reform Debate,” in Robert J. Art, eds., *Reorganizing America’s Defense* (Pergamon and Brassey’s International Defense Publishers, 1985), p. 51).

<sup>24</sup> Service parochialism is imbued in the literature with an evocative power that rivals tyranny and despotism in the history of democratic thought. But there are arguments to be made on behalf of a system that encourages service loyalty, not the least of which is that it is critical to success in combat. MacKubin Thomas Owens argues that “interservice rivalry has the beneficial effect of spurring innovation in defense policy and in the development of doctrine and equipment in support of a strategic or tactical approach that may seem irrelevant at the time. When a single strategic view is forced upon a nation’s policymakers, flexibility and adaptability to changing circumstances may suffer” (MacKubin Thomas Owens, “The Hollow Promise of JCS Reform,” *International Security*, Vol. 10, No. 3 (Winter 1985-1986)p. 105). On the advantages of service “pluralism” and the danger of service “monism,” see, also, Gordon W. Keiser, *The U.S. Marine Corps and Defense Unification, 1944-47: The Politics of Survival* (National Defense University Press, 1982), pp. 121-122.

<sup>25</sup> If Galbraith had studied defense reform movements instead of patterns in economic thought he would still have made excellent use of the concept of conventional wisdom. It is perfectly reasonable to argue that service interests have in some instances had a negative impact on military effectiveness, but it is conventional wisdom, I would argue, to assume that the problems with the performance of the system will be solved if service parochialism were eliminated. As a critic of the conventional wisdom in defense reform bluntly puts it, “the premise upon which JCS reform is based is flawed: interservice rivalry is not the root cause of all U.S. defense problems” (MacKubin Thomas Owens, “The Hollow Promise of JCS Reform,” *International Security*, Vol. 10, No. 3 (Winter, 1985-1986), p. 109).

operations and inter-service issues.<sup>26</sup> As a consequence, the gap between stated military requirements and resources allocated to the military – the “strategy force mismatch” – is indefensibly wide. No one inside the military high command other than the chairman is in a position to honestly broker a fiscally-responsible military budget – the other members of the JCS are the heads of their services and members of the JCS, which raises the problem of “dual hatting” – and yet the chairman has only a small staff to help him differentiate between service essentials and service luxuries.<sup>27</sup> “The result of this tedious process is a defense budget that is derived primarily from the disparate desires of the individual services rather than from a well-integrated plan based on a serious examination of alternatives by the civilian and military leadership working together.”<sup>28</sup> A stronger chairman would be able to discipline the budget system and be in a position to make very tough choices about which programs to prioritize given limited resources.

General Jones wanted a “military counterbalance to the separate services.” This does not mean he recommended an entrenched general staff of military elites.<sup>29</sup> He wanted to strengthen the chairman of the JCS in order to create greater incentives than presently existed for officers to escape the

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<sup>26</sup> In his testimony before the Senate Committee on Armed Services: “We have what I would call a defense predicament in that our strategic needs, our overall requirements, far outstrip our resources, and even if we received every dollar in the President’s budget, we would still fall far short.” The JCS organization is problematic from a fiscal-strategic perspective because it is comprised “not just five individuals” but “five institutions, four services, and the Joint Staff” (*Organization, Structure, and Decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*, U. S. Senate, 99<sup>th</sup> Congress, 1<sup>st</sup> session, (Government Printing Office, 1983), pp. 141-142).

<sup>27</sup> In the realm of operations, reformers targeted “dual hatting” for two primary reasons: first, it put unnecessary pressure on combat commanders, who were encouraged by their superiors to favor their own service in the composition of their units; and, second, service parochialism split loyalties and interfered with the ability of the chiefs to provide unified advice to their civilian superiors. In terms of budget advice, the conflict of interest is more transparent. Peter Chiarelli argues that, “Expecting the chiefs, who are required by law to organize, train, and equip forces, to cut programs or personnel when they also represent service interests is unrealistic” (Peter W. Chiarelli, “Beyond Goldwater-Nichols,” *Joint Force Quarterly*, No. 2 (Autumn, 1993), p. 78).

<sup>28</sup> General Jones, “What’s Wrong with Our Defense?” *New York Times Magazine*, November 7, 1982.

<sup>29</sup> An alternative to a strong chairman that received some attention at the time was a general staff system. Under this system, the general staff would be headed by a single chief of staff and officers who served in the general staff would do so for their duration of their careers. This primary attraction of this alternative model is that it would dramatically curtail the influence of the individual services. See Edward N. Luttwak, *The Pentagon and Art of War* (Simon and Schuster, 1984); and Harold Brown, *Thinking About National Security: Defense and Foreign Policy in a Dangerous World* (Westview Press, 1983).

confines of service-oriented thinking. He wanted to alter the structure and power dynamics of the present system in order to promote a national perspective within the military. Budgetary advice, he argued, should cut across the services and transcend individual service loyalties and biases. Incentives for military decision-makers should be structured so that the military produces officers with broader inter-service experience (part of the process of creating better strategic thinkers). Decision-making spaces should be opened up with the current JCS structure so that the chairman does is not quite so beholden to the present committee system and can act with genuine independence in particular circumstances.

*2. The need to improve the quality of military advice.* General Meyer, a former Army chief of staff, was another early and influential advocate of reform to come from the military ranks.<sup>30</sup> Although he was a strong supporter of the Joint Staff system, he was convinced that “grave new dimensions to the problems of national security have occurred since the creation of the Joint system,” and that these new developments, all of which revolved around the “dramatic” gains of the Soviet Union, “cast serious doubts on whether the system as presently constituted can ever be made to work.”<sup>31</sup>

The logic that animated General Edward C. Meyer’s call for reform of the JCS system was a mainstay in the defense reform literature. The Soviet Union’s “radically improved” military capabilities – its ability to “mount and sustain a rapid offensive, be it nuclear or conventional” in several theaters simultaneously – has dramatically changed the correlation of forces between the Soviet Union and the

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<sup>30</sup> A constitutional theorist is not surprised to learn that retired military leaders engage in quite a bit of honest self-criticism, while civilians active in the executive branch tend not to be very self-critical, and, as far as I am aware, have never recommended curbing their own power and influence over the national security system.

<sup>31</sup> Edward C. Meyer, “JCS Reorganization: Why Change? How Much Change?” in Allen R. Millet et. al., *The Reorganization of the Joint Chiefs of Staff: A Critical Analysis* (Washington: Pergamon-Brassey’s, 1986), p. 53.

United States.<sup>32</sup> We are simply no longer in a position militarily to counter Soviet aggression. We do not have weeks and months to respond to an attack, as our nation once did. Changes in military technology have condensed this deliberative period to days and hours. The JCS system is therefore under much greater pressure than in the past. It is no longer feasible for each individual Chief to work with his peers to develop a coherent defense posture and to provide adequate leadership and direction to the particular branch of the armed services he represents.<sup>33</sup> In addition to the problem of limited response time (and therefore a greater need for Chiefs to spend a greater percentage of their time on national, rather than service related issues), the JCS system has been burdened by what he calls an explosion of lawmaking, regulation and queries from congressional staffs. The time available to Chiefs for strategic reflection and planning has been severely curtailed. "It is therefore necessary," he argues, "that we review and repair the way we organize for war."<sup>34</sup> The JCS method of military organization, he argued, was no longer adequate. A chief simply no longer has the time and energy to simultaneously lead his service and direct joint activities.<sup>35</sup> Major reforms, he insisted – and not merely evolutionary adjustments to the current system – were needed to meet this challenge.

What most troubled Meyer was the poor quality of professional military advice that went into national security decision-making. "Today's system fails to provide the quality of professional military advice necessary to ensure that elected and appointed civilian leadership have an adequate

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<sup>32</sup> See, for example, William J. Perry, "Defense Reform and the Quantity-Quality Quandary," in Asa A. Clark IV, et al., *The Defense Reform Debate: Issues and Analysis* (John Hopkins University Press, 1984).

<sup>33</sup> The Packard Commission report drew a similar conclusion about the capacity of the members of the JCS to fulfill their responsibilities to the president: "Better long-range planning must be based on military advice of an order not now always available – fiscally constrained, forward looking, and fully integrated" (Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President* (Government Printing Office, 1986), p. xvii).

<sup>34</sup> Edward C. Meyer, "JCS Reorganization: Why Change? How Much Change?" in Allan Millet et al., eds. *The Reorganization of the Joint Chiefs of Staff* (Pergamon and Brassey's International Defense Publishers, 1986).

<sup>35</sup> Strategic arms negotiations and annual budget preparations are each, alone, he argued, full-time jobs.

understanding of the military impact of their decisions,” he argued.<sup>36</sup> The military’s central role in arms negotiations, strategy and operations puts extreme demands on the time of the JCS, and Meyer thought this range of responsibilities should be narrowed so that military officers could “focus their attention on the critical issues which face our nation and our forces.”<sup>37</sup> Two structural changes, he believed, were essential: strengthening the position of the chairman and the combatant commands (CINCs). General Meyer was passionate about reform in part because he had a great deal of faith both in the ability of military leaders to identify the right course of action in an emergency and to persuade civilian leaders to follow their advice. He thought, for example, that if senior military leaders had been free to devote all of their time and energy to the Lebanon crisis in 1982, instead of being bogged down in managerial responsibilities, they would have been able to present the Reagan with a stronger case against intervention and may well have convinced the president to act differently.

General Meyer was frustrated with the flagrant disconnect between the responsibilities placed on members of the JCS system and the time available to them to meet these demands. But he was also sensitive to the perspective of his civilian counterparts: an overtaxed JCS system resulted in a lack of integrated military advice on defense planning in Washington and insufficiently joint military operations in the field. This leads to a very clear and unambiguous statement of why he believes reform of the JCS system is essential: “Today’s system fails to provide the quality of professional military advice necessary to ensure that elected and appointed civilian leadership have an adequate understanding of the military impact of their decisions.”<sup>38</sup>

Before we turn to critics of the defense reform agenda, let me juxtapose the arguments of General Jones and General Meyers and highlight an important point of divergence. General Meyer

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<sup>36</sup> Meyer, “Comments on Smith’s Proposals,” in Robert J. Art et al., eds., *Reorganizing America’s Defense* (Pergamon and Brassey’s International Defense Publishers, 1985), p. 55.

<sup>37</sup> Meyer, “JCS Reorganization: Why Change? How Much Change?” p. 58.

<sup>38</sup> Meyer, “Comments on Smith’s Proposals,” p. 55.

believed that if better advice moved up the chain of command, the president and secretary of defense would recognize the quality of this advice; be naturally persuaded by the knowledge and experience that informed it; and act accordingly. General Jones also believed that the military could provide the president and secretary of defense with better advice and recommendations on a host of issues if the military was modestly restructured. But unlike General Meyer, he was skeptical about the extent to which his reform proposals would improve military performance or, more broadly, national security decision-making. If a military counterbalance to the individual services can be established through institutional reform, this would certainly pay dividends. But General Jones did not assume, as General Meyer's did, that a military purged of its service-biases would inevitably have a greater influence on civilian decision-makers.

### **Critics of the Defense Reform Agenda**

The military chain of command that flows down from our commander-in-chief to our newest military recruits has three primary functions.<sup>39</sup> First, it must allocate resources wisely and efficiently. This function of the chain of command has been severely criticized by almost all students of defense reform. Second, it must serve as a smooth conduit of orders and guidance: at each node in the chain of command, orders and guidance from above must be properly executed and a new set of orders and guidance, consistent with what was received, must be passed on to subordinates. This performance of the chain of command in this capacity was also widely criticized. The third primary function of the chain of command is no less vital than the two already mentioned, and yet it tends to draw the least attention. No matter how well the chain of command allocates resources, and no matter how well it

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<sup>39</sup> See William Y. Smith, "The U. S. Military Chain of Command – Present and Future," in Robert J. Art et al., eds., *Reorganizing America's Defense* (Pergamon and Brassey's International Defense Publishers, 1985).

facilitates the dissemination of orders and guidance, the ultimate success of the system hinges on the quality of decision-making at the top of the chain of command. All military reformers recognize the importance of high-quality advice and recommendations moving up the chain of command. Few of these reformers, however, concern themselves with what happens to this information once it reaches its final destination. Here, then, is the seemingly intractable problem: a nation cannot choose its wars wisely or fight them competently if good advice does not move up the chain of command, and yet it is equally important from the perspective of wisdom and competence that this advice is thoroughly absorbed and digested by the civilian decision-makers who sit authoritatively at the top of the chain of command.

Despite the ideal of a two-directional chain of command, the absorb-and-digest part of the equation is almost entirely neglected by advocates of defense reform. How do we explain this apparent bracketing off of such an influential variable by defense reformers and national security experts? Part of the explanation for this omission, I would suggest, can be attributed to the widely held assumption that all of the constitutional issues related to executive power and national security had already been settled – that constitutional theory, in other words, has nothing to contribute to defense reform.<sup>40</sup> But this understanding about the limited utility of constitutional theory is mostly implicit in the literature. The pervasiveness of two interrelated assumptions, I would suggest, explains why reformers focus on military reform rather than broader subject of defense reform. Most defense reformers assume that a causal link between structural military organization and combat performance can be established. They also believe that the primary problem with how the defense system functions is that the military high command does not produce the kind of good and timely advice that the president and secretary of

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<sup>40</sup> As I discussed in Chapter 4, constitutional theorists contest the wisdom and legality of our constitutional order in terms of which powers were vested in the executive by the Constitution and which were acquired proactively over the course of the twentieth century, but in the minds of most military reformers, the constitution is unambiguously pro-executive.

defense require. The logic appears compelling: if we can improve the quality of advice that moves up the chain of command, we will see a system-wide improvement in the performance of our defense establishment.

*1. Can a causal link between structural military organization and combat performance be established?*

Military reform movements would not generate much support if there were not a fair number of observers who believed that the system was on the brink of failure. To be more specific, they would need to believe that the system had failed repeatedly (and therefore predictably) in the past and that future challenges would strain the system even further. The perception of failure is certainly a powerful agent of change in the political world, and it is often a necessary agent for overcoming political and bureaucratic inertia. But defense reformers face a challenge much greater than they seem to realize: it is not enough to merely identify examples of flawed military actions or to convince us that security threats exist that our military as presently constituted is unprepared to meet.<sup>41</sup> Reformers would only be justified in arguing for a particular set of military reforms if they can demonstrate a clear causal link between structural military organization and combat performance.<sup>42</sup>

If the military chain of command does not work particularly well, as many critics have argued, then improvements would naturally be in order. It is the responsibility of military professionals, after all,

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<sup>41</sup> Most reformers at the time were troubled by a sense that the nation was unprepared for war and that this was a reflection of a flawed defense posture. They had profound doubts about our nation's ability to apply military force effectively in any military operation that remained below the threshold of strategic nuclear war. As I mentioned in the previous chapter, the preparedness issue was as prominent an issue during the "constitutional convention" of 1945-1947 – and as vulnerable to political and ideological preferences.

<sup>42</sup> Identifying imperfections in a military system – just like identifying imperfections in a constitutional system – is as easy to do as finding character flaws in the most intelligent and enlightened members of our species. What ultimately matters is not how many flaws a system has, but if there is anything we can do to correct the problems we identify without creating new and significantly more debilitating ones. This understanding of complicated *human* systems in what guides my approach to the ends-means problem in the next chapter: what if any additional safeguards could be introduced into the executive department that would not upset the delicate balance between the requisites to energy and safety.

to advise, plan, and conduct military operations, and the military chain of command is what enables them to meet these diverse responsibilities. If the quality of advice, planning or execution is deemed inferior by soldiers or civilians, the constitution of the chain of command would be a logical magnet for criticism. But how easy is it to assess the performance of the military chain of command? How confidently can we assign responsibility to this or that node in the chain of command for a particular military failure?

Most reformers – and almost all civilian reformers, interestingly – are convinced that such a link between military organization and performance exists. They are not quite as suspicious of this causal relationship as Allan Millett, who humbly writes that assessing the “organizational impact of military success and failure is a task that should make any military historian quake.”<sup>43</sup> Merely to begin such an assessment, he argues, a scholar must disentangle numerous explanatory variables from the equation – among them enemy plans and initiatives; a host of environmental factors; the capabilities and limitations of our forces from a personnel perspective; levels of technology; and the unique character of our field commanders – and proceed to give each variable its appropriate weight.<sup>44</sup> Another student of defense reform echoes this sentiment. “Proposals for reform and the resulting counterarguments,” Timothy T. Lupfer writes, “are essentially judgments about what major factors affect military performance.” He argues that we must attempt to “identify the dominant cause-and-effect relationships that are suggested by the evidence,” but of course it is highly unlikely that scholars with different ideological or doctrinal orientations are going to agree on what the evidence suggests.<sup>45</sup> How can we conclude from the Vietnam War, the Iranian hostage crisis, the bombing of the Marine barracks

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<sup>43</sup> Allan R. Millett, “The Organizational Impact of Military Success and Failure: An Historical Perspective,” in Allen R. Millet et. al., *The Reorganization of the Joint Chiefs of Staff: A Critical Analysis* (Washington: Pergamon-Brassey’s, 1986), p. 3.

<sup>44</sup> It is partly a lack of appreciation for these competing variables that leads Millet to attribute the passage of the Goldwater-Nichols Act to the determined efforts of the “reform lobby.”

<sup>45</sup> Timothy T. Lupfer, “The Challenge of Military Reform,” in Asa A. Clark IV, Peter W. Chiarelli, Jeffrey S. McKittrick and James W. Reed, eds., *The Defense Deform Debate* (Johns Hopkins University Press: 1984), p. 29.

in Lebanon and the invasion of Granada, as most reformers do, that the fundamental problem brought to light by these flawed operations is the organization of the military?<sup>46</sup>

Most reformers do not share Millett's respect for the tremor-inducing nature of historical interpretation. They also seem largely immune to Bernard Brodie's warning about the relationship between history and politics: "One of the few unequivocally sound lessons of history is that the lessons we should learn are usually learned imperfectly if at all."<sup>47</sup> As a consequence, increased centralization of civilian and military authority in defense department – in effect, placing greater decision-making power in the hands of a small group of civilians in the executive branch, based on the assumption that the military is fundamentally incapable of presenting an objective and insightful point of view on crucial matters of national security – becomes the antidote to a problem – the excessive influence of the individual services – that may only be tangentially related to military performance.<sup>48</sup> Past consolidation efforts did not meet the expectations of reformers: in the aftermath of reforms, most pro-reform advocates were still been disappointed with the performance of the military. The most common explanation for these unmet expectations is that petty politics weakened reform proposals that would

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<sup>46</sup> Aspects of the invasion do indeed suggest a military in need of moderate organizational changes. In the case of the invasion of Granada, for example, we had two command centers on the same small island, and they could not communicate with each other. But as we know from welfare debates in our country, anecdotal evidence often receives greater attention from reformers than the complexity of the subject warrants.

<sup>47</sup> Bernard Brodie, quoted in David H. Petraeus, "Lessons of History and the Lessons of Vietnam," *Parameters*, Vol. XVI, No. 3 (Autumn 1986), p. 43. For an excellent discussion of this subject – how policymakers interpret history and base decisions on these interpretations – see Ernest R. May, *Lessons of the Past* (Oxford University Press, 1978).

<sup>48</sup> James R. Schlesinger expresses a very reasonable opinion on the relationship between military organization and performance: "Structure is not a substitute for well-trained forces and capable leadership. It is not a substitute for all of those elements that make up a fighting force. But improved structure does release energies and imagination which under the present system I think have little latitude to express themselves" (*Organization, Structure, and Decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*, U. S. Senate, 99<sup>th</sup> Congress, 1<sup>st</sup> session, (Government Printing Office, 1983), p. 182). Brent Scowcroft also de-emphasized the role of structure in his testimony before the Senate Committee on Armed Services: "The emphasis on structure "is not so important as emphasis on process and indeed emphasis on personality which with a small number at the top of our national security decisionmaking process are very, very important" (*Organization, Structure, and Decisionmaking procedures of the Department of Defense*, p. 493). He thought that we should not "raise, train, and equip of forces by service," but was skeptical of the grander ambitions of ardent reformers (p. 495)..

have eliminated organizational deficiencies and produced better results on the battlefield. I would like to suggest that the most salient problem with our military is not that insufficient power and authority is concentrated at the top of the chain of command. Centralization has been confused with the kind of anti-parochial “nationalization” reforms that Madison, Hamilton and their fellow founders adopted to diminish the influence of state legislatures and create a national government that could promote the permanent and aggregate interests of the community with some consistency.

“The most obvious product of Cold War defense organization,” Millett writes, “is the number of political appointees and civil servants who deal with routine business that would have been defined as service matters before World War II.” He recognizes that the growth of civilian activism may be perfectly compatible with democratic principles and may even be essential component of a well-functioning democratic regime, but he is also sensitive to its dangers.<sup>49</sup> The organizational complexity we now see is “a façade created in part to give a false sense of rationality and legitimacy to official actions, and accepted in part because it tends to diffuse responsibility for decisions gone wrong.”<sup>50</sup> The crux of the problem, in Millett’s opinion, is not military organization, though he believes that modest reforms could prove useful. What troubles him about the “reform lobby” is that it does not appreciate the extent to which the performance of the military is always to some extent a reflection of the quality of decisions made by civilians.<sup>51</sup> Cold War military operations, “ranging from active combat to

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<sup>49</sup> “A standard critique of military thinking is that professional soldiers prepare to fight the last war, relying too much on experience. The reverse complaint is that the generals fail to learn anything from the last war, ignoring experience” (Betts, p. 164). Are not defense reformers subject to the same cognitive traps? Are not civilian leaders as prone to misapplying the “lessons” of history as their military counterparts? Is so, then the crux of the problem in civil-military relations, I would suggest, is the absence of a formal deliberative process. Formal rather than informal, let me emphasize, because constitutional theory teaches us that formal deliberative mechanisms are the only way to promote deliberation and ensure that the “wisdom” and “expertise” of all essential political actors are subjected to sufficient scrutiny.

<sup>50</sup> Millett, p. 13. As we will see in the next chapter, responsibility and accountability are not guaranteed even if we have a system in place that is faithful to the doctrine of the unitary executive.

<sup>51</sup> Millett draws our attention to the increasing influence of civilians in the Department of Defense. As does Richard Betts: The National Security Act of 1947 “institutionalized the JCS and reduced their intimacy with the President by interposing layers of Defense Department civilian authorities, although it did envision a need to

'presence' and 'show of force' activities smacking of diplomatic metaphysics, have not yet shown any real susceptibility to organizational solution."<sup>52</sup> As a student of American military history, Millet is far from convinced that the military is always deployed intelligently. Intra-service relations, inter-service relations and civilian-military relations are three organizational variables that clearly have some influence on military performance, but precisely because the causal relationships are ambiguous we cannot afford to leave key variables out of our analyses.

Another skeptic of the causal relationship between military organization and military performance is Robert Murray. "Defense reform," he writes in a tone that is far from reverential, "is one of the nation's hardy perennials among debaters."<sup>53</sup> Murray draws our attention to a paradox that eludes the radar of most reformers: how can the quality of our armed forces be very high, as many defense experts have observed, while at the same time we continue to suffer operational failures? In their enthusiasm for military reorganization, reformers tend to forget that wars are lost by statesmen and civilian decision-makers at least as often as soldiers. The fact that so many reformers ignore the contribution of civilians to military failures helps explain why the JCS ends up bearing the brunt of the criticism for uninspiring military performances.<sup>54</sup> Even though the Congress historically believed that "a diversity of military opinion was better than a single military voice, and that the cost of this (in terms of

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prevent the secretary of defense's domination of the Chiefs by providing them the legal right of direct access to the President" (Betts, p. 53).

<sup>52</sup> Millet, p. 16.

<sup>53</sup> Robert Murray, "Reform of the Joint Chiefs of Staff," in Allen R. Millet, et. al., *The Reorganization of the Joint Chiefs of Staff: A Critical Analysis* (Washington, Pergamon-Brassey's, 1986), p. 61.

<sup>54</sup> William Lynn is another scholar who argued that problems in military operations, force development and strategic planning can mostly be attributed to flaws in the organizational structure of the military. The cause of much unnecessary friction in the system could be explained by what he called the centralization-decentralization dilemma. "This dilemma derives from the inherent tension between the recognized requirement for centralized planning and direction of the armed forces, and the natural desire of the military services organized separately for land, sea and air warfare to retain their historic autonomy" (William J. Lynn, "The Wars Within: The Joint Military Structure and Its Critics," in Robert J. Art, et al., eds., *Reorganizing America's Defense* (Pergamon and Brassey's International Defense Publishers, 1985).

efficiency) was preferable for our democracy,”<sup>55</sup> reformers seem convinced that a single military voice – one of the fundamental goals of structural reform – would transform our civilian leaders into sophisticated strategists and free our military leaders to win the wars they are asked to fight.

Reform of the Joint Chiefs of Staff system may indeed be desirable. “Modest reform,” Murray wrote, and most critics of reform would concur, “can be accomplished without threat to democratic values.” But the major deficiencies of the system, he cautions, “lie mainly outside the organizational chart.”<sup>56</sup> The dangerous aspect of many reform proposals, I would submit, is that they conflate the issues of military and political leadership and, as a result, display excessive faith in the benefits of military reform. Not only would some of the more radical reform proposals not fix the “problems” they are designed to remedy, they might very well exacerbate them. What constitutional theory teaches us – and why I believe it can make a valuable contribution to contemporary defense reform debates – is that it is very difficult if not impossible to draw impermeable boundaries between subcomponents of a political system – the national security system in this case – as most defense reformers tend to do. An analysis of the decision-making processes that transpire outside the organizational chart must be conducted in conjunction with an analysis of the processes conducted inside.

*2. Is the primary problem with the defense system that good and timely advice fails to make it up the chain of command?* In my opinion, the most compelling arguments during this round of defense reform debates were made by General William Y. Smith. General Smith was a defense reformer with strong reservations about the purported benefits of most military reform proposals. The system can be improved, he argued, but those who claim that it is completely dysfunctional do not understand its purpose or design. Smith was an advocate of incremental evolution rather than revolutionary change, in

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<sup>55</sup> Murray, p. 63.

<sup>56</sup> Murray, p. 64.

part because he was unusually sensitive to the politics of national security and wanted to encourage modest, evolutionary reform without generating “opposition of a determined nature that may frustrate more modest, very worthwhile and consequential advances.”<sup>57</sup> A pragmatic approach to reform led him to offer recommendations that respected two basic reform criteria. First, the chain of command should be fine-tuned in order to reduce confusion and uncertainty. Second, the type of advice rendered to the president, NSC and secretary of defense by senior military advisors should address the most difficult, contentious issues within the military, rather than merely what is most amenable to consensus, and it should be guided by fidelity to the principle of unified military thought and action, rather than catering to the particular concerns and perspectives of the individual services.

These two goals would be accomplished, he suggests, by ensuring that unified and specified commanders are active participants in the decision-making processes that directly impact the performance of the forces under their command; changing the incentive structure for officers that serve with the joint staff so that joint duty is highly coveted and rewarded within the individual services; increasing the authority of the chairman of the JCS relative to the service chiefs; and lightening the administrative load of the chiefs so they can focus on strategic thinking and other more substantive issues. If authority were concentrated in the chairman of the JCS and unified and specified commanders, we would see a marked improvement in the “issuance of guidance and orders,” as well as “military decisionmaking in peace and war.”<sup>58</sup> Field commanders with greater authority and influence would improve the quality of information and advice moving up the chain of command, while abolishing the principle of unanimity in the JCS by strengthening the chairman would make JCS advice to the president and secretary of defense sharper and more persuasive.

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<sup>57</sup> William Y. Smith, “The U. S. Chain of Command – Present and Future,” in Robert J. Art et al., eds., *Reorganizing America’s Defense* (Pergamon and Brassey’s International Defense Publishers, 1985), p. 312.

<sup>58</sup> Smith, p. 324.

Based on the arguments I have presented so far, General Smith's recommendations appear to be compatible with the Jones and Meyer proposals mentioned above. All three soldier-scholars agree that service parochialism has had a negative influence on the performance of the system and that good and timely advice on military matters does not always make it up to the top of the chain of command. But General Smith addresses an equally pressing problem with the overall structure of the defense system that most reformers neglect to address and that, he believes, ultimately has a greater impact on military performance. Military reform, he argues, must be considered in the larger context of defense reform. "Any change in the chain of command," General Smith argues, "must not be so focused on streamlining that it ignores the need for broadly based input and for as broad a consensus as possible in the decisionmaking process."<sup>59</sup> General Smith understands that the function of the joint chiefs and the chairman is to "render impartial, objective military advice to their civilian superiors."<sup>60</sup> At the same time, he knows from personal experience that we cannot assume that when the military renders high-quality advice up the chain of command it is received by civilians who are willing and able to incorporate this advice into their various calculations and assessments. General Smith is too familiar with the politics of national security to assume that the only "parochialisms" that threaten the rationality of the defense system lie on the military side of the civilian-military partnership.

An admirable sensitivity to the power dynamics within the executive branch – and not merely within the military – is what led him to argue that the chairman of the JCS should be an advisor to the NSC, rather than a statutory member of the body. He wanted to protect against the chairman being perceived as a member of the administration's political team, which is undoubtedly what would happen if he served with the vice president and secretaries of state and defense on the NSC. "It is not inconceivable" – this is the kind of observation that suggests that he thought constitutionally about

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<sup>59</sup> Smith, p. 293.

<sup>60</sup> Smith, p. 319.

defense reform even if constitutional theory was not a part of his formal education – “that the selection of a chairman under such conditions could become politicized, as each administration would want to make certain that it had a chairman fully compatible with and supportive of its outlook and objective.”<sup>61</sup> These are the words of a soldier who does not want the military to be portrayed as hostile to the principle of civilian control of the military. “The temptation to dismiss the existing chairman and appoint its own man,” he elaborates, “would be great for an incoming administration, and the time-honored system of impartial, objective military advice would be threatened.” He knows the problem – that the military is completely subservient to the executive and that ambition is not made to counteract ambition in the case of civilian-military relations – but does not propose a solution. “What precise role do the civilian authorities want to retain to themselves, and give to the military? How much freedom and independence in both formulating and implementing the strategy do they want the military to be allowed? To my knowledge, there is not yet wide agreement on these points.”<sup>62</sup>

Millett, Murray and General Smith all agree that the major flaws with the national security system will not be eliminated by military reform alone. The JCS could be reorganized so that the chairman and chiefs were more effective – so that a national military perspective achieves dominance within the military high command – but this in no way ensures that non-parochial military advice will be properly integrated into national security decision-making. If we are concerned with the quality of national security decision-making, “Realignment of the joint chiefs and the military chain of command

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<sup>61</sup> Smith, p. 319.

<sup>62</sup> Smith, p. 325. Chairman Tower addressed the issue of civilian and military roles and responsibilities in hearings he held before the Senate Committee on Armed Services. “Rooted in our system is the belief that the military should always be controlled by civilian authority, and should not play a dominant role in the formulation of public policy.” Consistent with this principle, he asked his guests, “how would you define the areas in which defense decisionmaking should devolve primarily on the military and in which instances it should devolve primarily on civilian responsibility?” No consensus emerged, and ambiguity about civilian and military roles in national security decisionmaking processes would remain. *Organization, structure, and decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*, 12 vols., United States Senate, 99<sup>th</sup> Congress, 1<sup>st</sup> session, (Government Printing Office, 1983), pp. 92-94.

would be but a small beginning.”<sup>63</sup> Here is a soldier-scholar who confidently identifies a problem with the national security system as a whole – who knows that “good, sound, military advice” is hard to define and that to a great many civilian leaders it means merely “hearing the advice that the advised wants to hear”<sup>64</sup> – but accepts this situation as largely inevitable because he cannot conceive of a practical alternative.

### **The Goldwater-Nichols Act**

To briefly review the material I have covered in this chapter so far, there was a general consensus among reformers and critics of the defense reform agenda that the influence of the four services on national security decision-making processes was excessive. As long as members of the JCS were forced to compete with each other for resources and prestige, it was assumed, civilian leaders would lack the independent military advice they need to fulfill their job responsibilities. There was also general agreement that the structure of the military chain of command was an impediment to sound national security policy generation and execution. A final subject on which a broad consensus existed was the need to place greater emphasis on joint planning and combined operations within the military system.<sup>65</sup>

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<sup>63</sup> Smith, p. 326. Richard Betts is equally sensitive to the complex relationship between the quality of military advice moving up the chain of command and the quality of national security decision-making, and introduces another set of variables: “The constraints of policy, strategy, capabilities, organization, and doctrine are usually well recognized in decision making.” Less well recognized are another pair of influences: “One is the role that experience plays in shaping advisers’ attitudes. Another is the subtle way in which an adviser’s style and personality determine his efficacy and influence on the advisory process. More refined understanding of the function of military advice requires looking beyond doctrine to experience and beyond offices to the people who fill them” (Richard K. Betts, *Soldiers, Statesmen, and Cold War Crises* (New York: Columbia University Press, 1991), p. 164). Constitutional theory, I would suggest, is particularly sensitive to the variety of personalities, temperaments and motives of the people who hold decision-making power in a republic.

<sup>64</sup> Smith, p. 325.

<sup>65</sup> MacKubin Thomas Owens offers us a concise summary of the charges against the JCS: the JCS “provides military advice of a questionable quality; the members of the JCS, who are also the Chiefs of their respective services, are

The major components of the legislation adopted these positions – as well as the assumptions and expectations that accompanied them – and reorganized the military in two principle ways:

1) The Chairman of the JCS was designated the principle military advisor to the President, the National Security Council and the Secretary of Defense (the responsibility had previously been assigned to the JCS collectively). By increasing the independence of the Chairman with respect to the Service Chiefs, the Chairman would no longer have to reach a consensus with the four Chiefs. The Chiefs became, in essence, his military advisors – subsidiary military advisors – and the Chairman was free to accept or reject their advice. The Chairman was removed from the military chain of command and assigned six functional responsibilities: provide strategic direction of the armed forces; prepare strategic plans; prepare and review contingency plans; advise the Secretary of Defense on the budgetary process; formulate joint doctrine and policies; prepare a report on service roles and missions. The primary intention here was to improve the quality of advice moving up the chain of command and to promote joint capabilities and operability.

2) The power and influence of the CINCs was significantly increased and their responsibilities clarified. Largely excluded from the planning process in the past, and lacking authority over subordinate commands in their areas of responsibility, they were linked directly to the Secretary of Defense in the chain of command in order to increase their involvement in the planning process. They were also given responsibility for joint training, force organization, and force employment, regardless of the service to which the various forces under their command belonged, in order to make sure their authority over their forces was commensurate with their responsibilities. The primary intention with these reforms was to promote jointness and improve war-fighting.

The provisions in the Goldwater-Nichols Act borrowed heavily from General Jones' original recommendations.<sup>66</sup> The legislation also reflected General Meyer's faith in the ability of a "liberated"

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unable to set aside their parochial biases in order to provide objective military advice; since unanimity is required before the JCS can take a position, log-rolling is inevitable; the JCS will not address contentious issues for fear of bringing interservice rivalry into the open; the JCS decision-making process is cumbersome and unwieldy; and JCS staff work is poor, because of service parochialism and the fact that the services do not assign their best officers to the Joint Staff (MacKubin Thomas Owens, "The Hollow Promise of JCS Reform," *International Security*, pp. 99-100).

<sup>66</sup> For thoughtful analyses of the legislation, see Vincent Davis, "Defense Reorganization and National Security," *Annals of the American Academy of Political and Social Science*, Vol. 517, New Directions in U.S. Defense Policy (September, 1991); and Don M. Snider, "DOD Reorganization: Part I, New Imperatives," *Parameters*, (September, 1987).

military high command to persuade civilian decision-makers to incorporate their expertise and advice into their decision-making. As Lederman puts it, “By strengthening the Chairman and the CINCs and improving joint officer training, the Act aims to adjust DOD’s calibration of the three organizational tensions toward what Act supporters believed to be more appropriate balances between centralization and decentralization, geographic and functional responsibility, and general versus specialist perspectives.”<sup>67</sup>

The Goldwater-Nichols Act has been widely praised. As Christopher Bourne concludes, “The law increased cooperation and interoperability among the services, improved professional military education, and unified the national military command structure.”<sup>68</sup> Les Aspin was more effusive in his praise (as were many of the bill’s congressional supporters). Goldwater-Nichols, he wrote, was one of the “landmark laws in American history,” and represented perhaps the “greatest sea change in the history of the American military since the Continental Congress created the Continental Army in 1775.”<sup>69</sup> Reforms were clearly successful in promoting jointness and empowering the joint community. Roman and Tarr declare that “a norm of jointness, imposed from the top down, is now clearly evident in how the military functions,” and that, prior to the passage of the legislation, “the joint or unified perspective was seriously compromised by the allegiance of the service chiefs to their own service interests, but the

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<sup>67</sup> Lederman, p. 84. In terms of the appropriate balance, the goal was to offset the influence of the individual services by bolstering centralization, geographic responsibility, and the generalist perspective.

<sup>68</sup> Christopher Bourne, “Unintended Consequences of the Goldwater-Nichols Act,” *Joint Force Quarterly* (Spring 1998), p. 99.

<sup>69</sup> Les Aspin, quoted in Dennis Quinn, ed., *The Goldwater-Nichols DOD Reorganization Act: A Ten-Year Retrospective* (National Defense University Press. 1999), p. ix. It was so successful, according to James R. Locher, because “It was not until the passage of the Goldwater-Nichols Act that the military was freed, for the first time in the nation’s history, from crippling ideological, political, conceptual, and parochial constraints” (James R. Locher III, “Building on the Goldwater-Nichols Act,” in Dennis Quinn, ed., *The Goldwater-Nichols DOD Reorganization Act: A Ten-Year Retrospective* (National Defense University Press. 1999), p. 17).

evidence now shows that service parochialism is being suppressed in favor of fully integrated military advice.”<sup>70</sup>

Not all observers were equally impressed. Don Snider acknowledges the improvement in joint operations and culture, but draws attention to a potentially problematic result. “Goldwater-Nichols focused primarily on dramatically strengthening the roles and powers of the JCS chairman and the CINCs,” he argues, “but in the process also strengthened the secretary of defense by stipulating that almost all of the chairman’s new powers were to be exercised ultimately through the secretary.”<sup>71</sup> The problem with a chain of command that runs from the president to the secretary of defense, and from the secretary of defense directly to the joint and specified CINCs, excluding the JCS, is that, as another scholar puts it, “there is no guarantee that the executive branch will always turn to the JCS for candid advice.” Furthermore, even when presidents and secretaries of defense do solicit advice, it can simply be ignored if it turns out to be politically inconvenient or ideologically objectionable.<sup>72</sup> James Forrestal, the first secretary of defense, originally understood the role of secretary as primarily coordinative. He, along with the three civilian service secretaries and three service chiefs, would work largely as a committee of equals to bridge the gap between the NCS and the armed services. This ideal, as I mentioned earlier, proved unworkable, and this partly explains why several rounds of reforms were designed to strengthen the position of the office of the secretary of defense. An intent of legislation was to give the secretary more effective control over the entire military: to compensate for the inability

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<sup>70</sup> Roman and Tarr, “The Joint Chiefs of Staff: From Service Parochialism to Jointness,” *Political Science Quarterly*, Vol. 113, No. 1 (Spring 1998), p. 92.

<sup>71</sup> Don M. Snider, “DOD Reorganization: Part I, New Imperatives,” *Parameters* (September 1987), p. 167.

<sup>72</sup> David Isenberg, “Missing the Point: Why the Reforms of the Joint Chiefs of Staff Won’t Improve U.S. Defense Policy,” *CATO Institute*, Policy Analysis No. 100 (1988), p. 12. This is why General Jones, when reflecting on whether the chairman should be a member or merely an advisor to the NSC, was convinced it would not make much of a difference. “My experience with four different presidents is that they listen to whomever they want, regardless of whether an individual is or is not on the NSC.” And why, reflecting on whether or not the chief should be in the chain of command, was convinced it would not make much of a difference. “Even if the chairman were in the chain, the president and the secretary of state still constitute the national command authority” (David Jones, “What’s Wrong with the Defense Establishment?” in Asa A. Clark IV, et al, eds., *The Defense Reform Debate: Issues and Analysis* (John Hopkins University Press, 1984), p. 341).

of the civilian secretaries and service chiefs to reach consensus on budgets, roles and missions<sup>73</sup> As a scholar sensitive to the potential unintended consequences of the legislation puts it, “The shift in authority and responsibility within the highest levels of the military changed the distribution of power within the JCS and also altered both how the military generates advice and how the military leadership interacts with civilian authorities.”<sup>74</sup> What too many reformers ignored, I would suggest, was that “revolutionizing” the relationship between civilian and military leaders, even if it proved beneficial in some respects, would do little to improve – and might diminish – the quality of crisis decision-making.<sup>75</sup>

### Constitutional Theory and Defense Reform

What contribution did constitutional theory make to this round of defense reform debates? I am pretty confident that I would not be writing this dissertation if the political science of the 1980s had more in common with the political science of the 1780s. I do not mean to suggest that the political science of

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<sup>73</sup> See Steven L. Reardon, *History of the Office of the Secretary of Defense: The Formative Years, 1947-1950* (Government Printing Office, 1984); and Richard R. Haynes, *The Awesome Power* (Louisiana University Press, 1973).

<sup>74</sup> Bourne, p. 100. General Louis H. Wilson, a former Marine Corps Commandant, was critical of the role of civilian personnel in the Office of the Secretary of Defense prior to Goldwater-Nichols: “We have numerous assistant and deputy assistant secretaries, each of whom, when they come in, build his own little empire ... and thinks that he is obeying the law by exercising civilian control” (*Organization, structure, and decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*, p. 145).

<sup>75</sup> General Victor Krulak was a sharp critic of the centralization of civilian and military authority, going back to the National Security Act of 1947. In testimony before the Senate Committee on Armed Forces, he recommended abolishing the position of the chairman, reinstating the JCS committee system and diminishing the power of the secretary of defense. He may not have appreciated the obstacles to jointness in the service-oriented system, but he was right, I would suggest, to be concerned about a decision-making process that had grown increasingly insulated. “Today we have heard propositions that would focus the advice in the hands of a single military individual. From the Congress’ and the President’s point of view, this would certainly be a lot easier because there would be no conflicting views, but the advice might not be as good and it might very well be worse ... I would feel competitive advice on military matters is just as logical as competitive advice on economic matters or political matters” (*Organization, structure, and decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*, p. 99). I would only add here that competitive advice on military matters is perhaps more vital, given the immediacy and irreversibility of decisions on the use of force.

the twentieth century is impoverished in comparison with the political science of the eighteenth century, only that political and constitutional theorists, a bit of a fringe group within the broader political science community, were not as active as their colleagues in contributing to this round of defense reform debates.<sup>76</sup>

Lawrence Korb, a political scientist and student of the defense establishment, points out that the criticisms of the JCS in the twenty-five years after the founding of the national security state fell into three basic categories. First, members of the JCS too often sacrifice JCS functions and responsibilities to service duties. Second, service parochialism has eroded the quality of work done in the joint arena. And, third, the “chiefs have been politicized by the party in power and thus became partisan rather than military spokesman.”<sup>77</sup> Reorganization efforts have focused on freeing members of the JCS to focus on joint responsibilities by delegating individual services duties to vice-chiefs and transferring operational responsibilities from the JCS to unified commanders. These were also designed to reduce the influence of individual service traditions and perspectives on JCS deliberations by empowering the chairman of the JCS. But equal consideration was not given to the need to protect military leaders from political pressures (much less to the challenge of consistently aligning political ends and military means). This, I would suggest, is where the distinction between military reform and defense reform is particularly helpful. Although reformers have expended a great deal of analytical energy on how to rationalize and

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<sup>76</sup> Here is a characteristic way in which advocates of reform framed the defense reform agenda: “The United States’ defense effort is an enormous and complex enterprise. It poses unique challenges – to plan sensibly for an uncertain future, to answer new and unexpected threats to our security, and to husband our technological and industrial capabilities and resources. Meeting these challenges will require, we believe, a rededication by all concerned to some basic principles of management” (Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President*, p. 2). As I argued in the previous chapter, administrative theory has much to contribute to defense reform but should not supply the only set of intellectual tools for our analyses of the subject.

<sup>77</sup> Lawrence Korb, *The Joint Chiefs of Staff* (Indiana University Press, 1976), p. 14.

improve military organization (with mixed results), the broader subject of defense organization – of the constitution of the executive branch – has been widely neglected.<sup>78</sup>

Part of the explanation for this neglect, I would suggest, is that service parochialism is such an easy target for critics of our national security system that scholars were inadvertently distracted from questions related to the broader constitution of the executive branch. Reformers are convinced that inter-service rivalry is the “root cause of all U. S. defense problems.”<sup>79</sup> Samuel Huntington, an influential figure in defense reform since the founding of the national security state, exemplifies this position. In his contribution to this particular round of defense reform debates, he argues that strategic planning involves first the “assessment of threats and of needs,” and then the determination of the appropriate types of forces, force dispositions, timing requirements, and weapons such an assessment entails. “It also involves a whole series of closely related issues as to the circumstances under which and how American forces would be used on combat: for example, offensively or defensively, in long wars or short wars, unilaterally or in conjunction with allies, in gradual increments or in a massive initial commitment.”<sup>80</sup> Huntington does not think it is wise for strategic planning to be dominated by civilian agencies, but he blames this development on the inability of the JCS to perform its responsibilities adequately. Philip A. Odeen, another participant in these debates, concurs: even though civilian officials

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<sup>78</sup> In his testimony before the Senate Committee on Armed Services, Secretary of Defense Casper Weinberger acknowledged the importance of good military advice on defense priorities and programs. But there were other, more serious concerns: “How frequently and how fully does the Secretary of Defense consult with the Joint Chiefs of Staff and their representative, the Chairman? Even more importantly, does the Secretary look to the JCS for military advice? In my judgment, the answer to these questions is far more important than the tidy tables of organization, or “wiring diagrams,” or specific organizational arrangements” (*Organization, structure, and decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*), pp. 11-12.

<sup>79</sup> I borrow this phrase from MacKubin Thomas Owens. He argues that a better explanation for U. S. military failures since World War II has three components: “1) the confused statutory relationship and unclear functional responsibilities of different parts of the national defense structure; 2) the resulting lack of interagency coordination within the executive branch; and 3) the growth of the Office of the Secretary of Defense (OSD), which has usurped more and more traditional military tasks at the expense of the JCS, while civilian expectations about what the JCS should do have increased (“The Hollow Promise of JCS Reform,” p. 109).

<sup>80</sup> Samuel P. Huntington, “Organization and Strategy,” *Public Interest* (Spring 1984), p. 235.

in our country have a far greater involvement in the military affairs than in most other democratic countries, this is “a direct consequence of the failure of our system to provide sound, relevant advice by senior military officers.”<sup>81</sup> The problem, according to Huntington, Odeen and other defense reformers, is that parochialism has had an adverse impact on almost all aspects of the national security system. The growth of civilian influence on strategy, the argument continues, is “directly attributable to the failure of the military to approach strategy freed from its service blinders.”<sup>82</sup> Are we to assume – contra constitutional theory – that civilian and military visions would coalesce in the absence of service blinders, and that civilians would not encroach on military “prerogatives” even if the military presented a national military perspective? Are we to assume – again, contra constitutional theory – that citizens and soldiers in the chain of command would share a rational-national point of view if we could somehow liberate them from their respective prejudices and parochialisms?

One of the great questions in the forefront of Madison’s mind as he formulated his constitutional theory, Robert Dahl reminds us, was the nature of the common good. “Does a common good exist and, if so, can we know what it is?”<sup>83</sup> Dahl was critical of Madison for his excessive faith in the likelihood of representation and pure reason collaborating routinely in his constitutional system, but we need not go into his arguments here. What I want to point out is that if we assume that the common good – or, in our case, the national interest – can be ascertained by sharp and disinterested minds, then the challenge faced by institutional designers is not quite so acute. What is surprising about

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<sup>81</sup> Philip A. Odeen, p. 300. Interestingly, in his testimony before the Senate Committee on Armed Services, he argued that “there were two areas where the military clearly should have a predominant voice. That is in planning for conflicts and crises, and conducting military operations” (*Organization, structure, and decisionmaking procedures of the Department of Defense: hearings before the Committee on Armed Services*, p. 94). His ideal of civil-military relations is objective civilian control. He does not seem to realize that civilian leaders are not obliged to respect “military professionalism.” A disconnect between ideals and practice is common in the literature. What we need, I would suggest, rather than a clear and unambiguous normative division of labor between civilians and soldiers – one which will not always be respected in practice – is an intermixing of decision-making power and formal process of ends-means adjustment and adaptation.

<sup>82</sup> Huntington, p. 233.

<sup>83</sup> Robert A. Dahl, “James Madison: Republican or Democrat?” *Perspectives on Politics*, Vol. 3, No. 3 (September 2005), p. 439-448.

much of the literature on defense reform is that despite our more sophisticated philosophical position on the subjective nature of concepts such as the common good and national interest, it nevertheless assumes that the president and his closest civilian advisors know what the national interest is and, when making decisions about war and peace, act accordingly. This assumption makes the task of defense reformers – in theory – much more manageable. It means they never have to confront two crucial issues: first, the possibility that the president should not always be rewarded with the institutional structures and dynamics she wants; and, second, that whereas ineffectiveness may very well be a sign of design failure, intransigence can be a measure of constitutional success.

The system must serve the president; all intra-executive resistance is bad; we need not think at all about how we want the system to respond in the event that the president does not have the nation's interests at heart or if having her heart in the right place is not a sufficient qualification to disregard the experience and advice of military leaders.<sup>84</sup> Here is an exemplary statement made by former national security advisor Zbigniew Brzezinski before the Senate Committee on the Armed Services: "The national security decisionmaking system at the highest level is and should be a creature of the personal style of the President himself. It would be a mistake so to formalize the process as to inhibit the President's freedom to operate in a manner that is most congenial to him. To be effective, the system and the process must be responsive to the President's felt needs and to his personal predilections."<sup>85</sup> The fact that each new administration over a thirty year period conducted a major study of the defense establishment and generally concurred about both the need for reform and the shape such reform should take is evidence to most reformers that service parochialism is the primary impediment to better

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<sup>84</sup> Recall that this is also the perspective that ultimately prevailed in debates over the form of the 1947 legislation. The system should be reformed with one overarching goal in mind: how to best serve the interests of the president (on the assumption that the president's interests are the nation's interests, or at least closer than anyone else's). The gap that scholars focus on is not between political ends and military means but between, as I. M. Destler puts it, "what our Presidents seek and what the bureaucrats officially working for them actually do" (I. M. Destler, *Presidents, Bureaucrats, and Foreign Policy* (Princeton University Press, 1972), p. ix).

<sup>85</sup> *Organization, Structure, and Decisionmaking procedures of the Department of Defense*, p. 486.

national security policymaking. It does not worry reformers that all of the aforementioned reports were commissioned by presidents and conducted by presidential advisors with a stated interest in protecting – and often expanding – presidential power.<sup>86</sup> Presidents Kennedy, Johnson, Nixon, Ford, Carter, and Reagan, contemporary defense reformers point out, had to use a variety of informal mechanisms to compensate for the many failings of the JCS system. They brought military expertise directly into the White House as special advisors and they turned to civilian officials at the Pentagon. Presidents, the argument goes, simply had no other choice but to circumvent the JCS system. But when is the use of informal mechanisms in national security decision-making a sign that civilians in the executive branch constitute a faction rather than a deliberative core and that this perversion of republican ideals represents a serious threat to our republic? Must we praise unequivocally all and any “improvisational” techniques employed by the president and secretary of defense to realize their vision of the “national interest”?

Here, I would suggest, is the great constitutional challenge: how do we to create and maintain a set of national security institutions so that parochial interests are controlled and national interests prevail, especially in a national security crisis? Madison is our preeminent theorist of the relationship between the particular features of institutional design and the promotion of a national perspective. In his constitutional scheme, an extended republic is essential because it forces candidates for national political office to gain the confidence and support of a broad set of self-interested parties. Service

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<sup>86</sup> A recent interview with President Obama suggests that, whatever our opinion of a particular president, we should not lose sight of the possessive relationship most presidents have with executive power. Q: “Has your view on executive authority changed now that you’ve been president for four years?” A: “I don’t think it’s changed. I continue to believe that whenever we can codify something through legislation, it is on firmer ground. It’s not going to be reversed by a future president. It is something that will be long lasting and sturdier and more stable [than executive orders].” A bit further along in the interview: “But what I do see is that there are certain issues where a judicious use of executive power can move the argument forward or solve problems that are of immediate-enough import that we can’t afford not to do it” (“Interview with Franklin Foer and Chris Hughes,” *The New Republic*, February 11, 2013, pp. 28-29). Andrew Bacevich suggests an explanation for why presidents from both parties have failed to promote legislation to curtail executive power: “The progressive mindset pervading both of the major American political parties refuses to acknowledge the existence of limits” (Andrew J. Bacevich, “Family Man: Christopher Lasch and the Populist Imperative” *World Affairs* (May / June 2010).

parochialism – the target of most defense reformers over the last sixty years – certainly has something in common with the narrow, non-national interests Madison attempted to control as a constitutional theorist. But even if reformers are right about the need to control service parochialism within the military, do they gain the benefits of a national perspective by doing so?

They would only do so if military organization represented the entire defense establishment, which of course it does not. The more comprehensive problem of faction, I would suggest, confronts us when precisely we reach the limit of what military organization can do to improve civilian decision-making. This is why I argue that we need to study the constitution of the entire executive branch – specifically the institutional dynamics between civilians and soldiers inside the executive branch – if we want to minimize the impact of faction in a national security crisis.

### **Conclusion**

Madison teaches us that the quality of legislation increases dramatically when legislators have less than unlimited power in a republican system. This is why he supported a strong executive branch. But Madison's design principles also teach us that there is no reason to believe that a president and secretary of defense with a monopoly of decision-making power within the civilian-military decision-making nexus will make better decisions than a president and secretary of defense who must win the allegiance of a top military officer who possesses a degree of statutory independence. No matter how sublime the advice that moves up the military chain of command, it will not have a persuasive impact on civilian decision-makers so long as they are under no constitutional obligation to incorporate it into their deliberations.

## 8 A Constitutional Approach to Defense Reform

*The premise of our free government, going right back to the 1787 Constitutional Convention, has been that our government institutions should be set up, not for the ideal people we may be blessed with at the moment, but for the distant and dimly foreseeable future – and for officials who are less than perfect, or careless, or even at times overly ambitious, or even unscrupulous.*

- John Kester

*Are the mechanisms that throughout American history have ensured civilian control of the military, and held civilian leaders properly accountable for the decision to shoulder arms, still operating properly?*

- David Kennedy

*We were, at the commencement of the late war, but novices in politics, and it is to be wished that we may not now be too indolent to correct our mistakes.*

- Thomas Tudor Tucker

My basic claim in this chapter is that constitutional theory can make a significant contribution to contemporary defense reform debates. It would be more audacious to claim that the reform proposal I defend in the second half of this chapter – a limited veto in the hands of a chairman of the JCS who serves two or four-year terms on good behaviour – can make a significant contribution to American governance by improving the quality of national security crisis

decision-making.<sup>1</sup> But I will make no such claim here because I am genuinely convinced that no one working in isolation can possibly anticipate the many unexpected consequences of whatever reform proposal his research, temperament and personal experience lead him to support, and that my proposal may not withstand the scrutiny of other scholars with different research interests, temperaments and personal experiences.

Constitutional theory should be taken seriously by defense reformers for two basic reasons. First, the circumstances that led to the authors of *The Federalist* to adopt of the doctrine of absolute civilian control of the military have changed dramatically over the last 225 years, and this transformation warrants a skeptical attitude toward the wisdom of its absolutism.<sup>2</sup> Second, our experience with the structures of the national security state over the last sixty-five years suggests that we would be remiss not to reconsider the fundamental forms and principles on which it was founded.

There are both theoretical and empirical reasons, in other words, to revisit the constitution of the executive branch. Ten years under the Articles of Confederation taught the Founders a great deal about how the institutional dynamics of the national government had to be changed if the republic were to survive and flourish. Sixty-five years of experience with the structure of the national security state may not be able to teach us as much about the national security state as the decade between independence and the Constitutional Convention taught

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<sup>1</sup> The chairman of the JCS presently services a two-year term, renewable once, at the pleasure of the president. Let me clarify here that I am not proposing a limited veto over any and all uses of military force. The decision to use nuclear weapons, for example, or unmanned drones to attack a suspected terrorist, raise entirely different sets of questions and concerns than those addressed in this dissertation. It may not be easy to draw the line between the uses of military force that would require the participation of the chairman of the JCS and those that a president, under extreme time pressure, must be able to make alone – it will undoubtedly spark a spirited constitutional debate – but the intellectual and ethical burden of proof for defense reformers is not to propose a perfect alternative to the flawed system we presently have in place.

<sup>2</sup> I am not entirely comfortable with attributing the doctrine of absolute civilian control of the military to the Founders. If pressed, I would probably argue that the Founders adopted a doctrine of civilian control of the military that is less absolute than the one held by contemporary defense reformers, but this distinction is not particularly relevant to my larger argument.

the Founders – and the consequences of inaction may not be as great as they were in 1787 – but at least one problematic pattern of behavior – the corrosive influence of civil-military dysfunction on the informal process of ends-means alignment – has made itself sufficiently clear to warrant a constitutional level of analysis.

As a consequence of the institutionalization of two doctrines – the doctrine of the unitary executive and the doctrine of absolute civilian control of the military – factiousness in a national security crisis is presently massaged rather than controlled.<sup>3</sup> The pride and judgment of the president, in other words, must be coddled by precisely those military officers most qualified to challenge his or her assumptions about the role and efficacy of the use of force.<sup>4</sup> Fidelity to these two principles clearly precludes the possibility of incorporating a formal deliberative process in the executive department. A direct consequence of this is that the reason and experience of our most senior and qualified military officers can only hope for a receptive audience.

Most political scientists, defense reformers, legal scholars and national security experts, I realize, would insist that informality and volunteerism are the only principles an institutional designer should consider when contemplating the organization of the executive branch. The president must get his way, even when his top military advisors are convinced that his faith in a particular course of action is unfounded and he is deeply mistaken about the probability of success. The president, after all, is the commander-in-chief, and his authority over the military

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<sup>3</sup> I make a distinction between absolute civilian control of the military and effective civilian control of the military in the second part of this chapter.

<sup>4</sup> “Truth lives, in fact, for the most part on a credit system,” a famous American pragmatist has written. “Our thoughts and beliefs ‘pass,’ so long as nothing challenges them, just as bank notes pass so long as nobody refuses them.” Substitute assumptions about the role and efficacy of military means for “truth” and we arrive at the fundamental problem with strictly hierarchical decision-making systems. We need “agreement” between political ends and military means, and this is something that an informal deliberative process cannot reliably produce. Recent history suggests that statesmen can be so fixated on particular political objectives that they pay little respect to the “process of conduction from a present idea to a future terminus” (William James, *Pragmatism* (Dover Publications, 1995), pp. 78, 83).

must be absolute. But there are three very good reasons to question the wisdom of the doctrines of the unitary executive and absolute civilian control of the military and to reengage with the strong theory of faction that shapes our constitutional system. First, Madison did not reflect in depth on the organization of the executive department, as he readily admitted. His attention, as I mentioned in Chapters 2 and 3, was on the pathologies of legislatures, not executive departments. Second, even though many contemporary scholars trace the doctrines of the unitary executive and absolute civilian control of the military back to Hamilton, we must keep in mind that the constitution of the executive department he defends in *The Federalist* is designed for an insulated state. The third reason to question the wisdom of these doctrines is that they largely ignore the “necessity” of harmonizing political ends and military means.<sup>5</sup>

Madison and Hamilton understood many of the dangers of factiousness in the executive branch. This is partly why a two-thirds vote in the legislature overrides a presidential veto; treaties and executive appointments require the advice and consent of the Senate; and justices are granted permanent tenure on good behaviour (it is also why we have regular elections and a process by which the legislature can remove the president from office). The debates that led to the adoption of these particular constitutional devices highlight the fact that the authors of *The Federalist* believed that the executive branch is vulnerable to the spirit of faction and that the chief executive should be controlled when possible – when, in other words, the loss of energy, secrecy, dispatch and decision that might result from additional constitutional checks and balances are justified by a compensatory increase in the quality of executive branch decision-making.

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<sup>5</sup> And I do not use “necessity” here in the romantic manner I criticize in Chapter 4. By “necessity” I mean something very specific and precise. If political ends and military means are insufficiently aligned – if the gap is wider than would be the case if there were a rigorous process of adjustment and adaptation – lives and treasure will be needlessly lost. To minimize the loss of lives and treasure, political ends and military means must be properly aligned.

The Founders embraced one-man rule inside the executive branch (some more enthusiastically than others) because they were convinced that internal checks and balances would introduce a dangerous degree of inertia and dissent. What they did not take into consideration was the fact that if war is to be a sensible, intelligent endeavour – rather than, at the opposite extreme, “an imbecilic confusion into which governments drive their subjects” – political ends and military means must be closely aligned.<sup>6</sup> The problem is that ends-means alignment is not a goal easily realized in a strictly hierarchical system. In an insulated state, ends and means must be harmonized primarily for purposes of self-defense – the president, for example, must possess the energy, secrecy, dispatch and decision to marshal sufficient material and spiritual forces to repulse an attack on native soil – and the narrow range of circumstances in which military force is required keeps to a minimum both the opportunities for factiousness and the potential size of the gap between ends and means.<sup>7</sup> In a non-insulated state, however, the opportunities for factiousness are not only plentiful, but a factious president can, if he so desires, easily circumvent or disable the informal processes that presently exist in the executive department to guard against the tyranny of misalignment.<sup>8</sup>

The goal of this dissertation, let me remind the reader, is to begin what I believe is a long-overdue conversation. Political theorists have largely ignored the crucial challenge of ends-

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<sup>6</sup> W. B. Gallie, *Philosophers of War and Peace: Kant, Clausewitz, Marx, Engels and Tolstoy* (Cambridge University Press, 1979), pp. 100-132.

<sup>7</sup> Bernard Brodie uses a different conceptual language than Hamilton but makes a similar point. The main difference between an insulated and non-insulated state, or a modest power and a superpower, is that the latter “feels itself able to do something effective about a threat that remains as yet indirect or remote, which is not true of a small power except in token association with a large power.” The power of the United States today, in contrast with its relative power in the last eighteenth century, gives the leaders of our country an opportunity of choice not available to lesser powers” (Bernard Brodie, *War and Politics* (Pearson, 1974), pp. 344, 347). Hamilton and Madison, I think it is safe to assume, thought they were designing institutions for a nation whose national security choice-set would continue to be severely constrained for the foreseeable future.

<sup>8</sup> I do not mean to suggest that the president has full discretion over decisions about the use of force – that public opinion, the legislature and the military, for example, do not impose significant constraints on the president’s choice set. What I want to emphasize here are the immeasurable benefits of further narrowing the inevitable gap between political ends and military means.

means alignment, and defense reformers have generally failed to engage with constitutional theory at a level that would generate potential solutions to a seemingly irresolvable problem. With this objective in mind, this final chapter is divided into two parts. The first section is designed to introduce political theorists to the main currents of thought in contemporary defense reform. Improving jointness and interagency cooperation are two dominant themes in the literature, and I will discuss both briefly. I also engage with Christopher Gibson's argument that we need to adopt a "Madisonian approach" to defense reform. He is the only scholar with whom I am familiar who invokes Madison in his research, but he argues solely for a new normative framework to improve civil-military relations, and this reflects a serious misunderstanding of Madison's constitutional theory. As for the subject of this dissertation, none of the proposals proffered by contemporary defense reformers directly address – much less mitigate – the problem of reconciling political ends and military means when civilian leaders shun informal deliberative processes.

In the second section I return to constitutional theory and defend my reform proposal. I arrived at a deliberative separation of power inside the executive department – a limited veto in the hands of the chairman of the JSC – as a partial solution to the ends-means problem based on the importance of four key constitutional issues: the need for constitutional checks and balances to combat the violence of faction; the necessity of executive energy; the demand for wisdom and stability in the administration of government; and the positive correlation between the independence of political actors and the caliber of their performance. Here is the passage in *The Federalist* that best captures the spirit of the limited veto I propose for the chairman of the JCS: "The first thing that offers itself to our observation," Hamilton writes, "is the qualified negative of the President upon the acts or resolutions of the two houses of the legislature; or, in other words, his power of returning all bills with objections, to have the effect of preventing

their becoming laws, unless they should afterwards be ratified by two thirds of each of the component members of the legislative body.<sup>9</sup> By a limited veto I mean that there must be an executive-legislative council the president could convene to override a veto and / or remove the chairman, if she believes the veto power is being abused. Recall our earlier discussion of Madison: an institution with the “power to advance the public happiness involves a discretion which may be misapplied and abused.” This is why he argues that, “in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.”<sup>10</sup> I argue in the second part of this chapter that a deliberative separation of power is necessary to promote the public happiness – to promote the national interest – and that proper safeguards can be built into the system to guard against the ever-present potential for abuse.

### **Contemporary Defense Reform**

This section will be regrettably brief, since this is not a dissertation on contemporary defense reform alone. In a few pages I will obviously not be able to do justice to the diverse concerns of contemporary scholars. But even an abbreviated introduction to the subject will alert the reader to the kinds of constitutional forms and principles presently in circulation, and those which are being largely ignored.

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<sup>9</sup> Hamilton, No. 73, Paragraph 4.

<sup>10</sup> Madison, No. 41, Paragraph 3.

1. *Jointness*. Unsurprisingly, most of the national security experts and defense reformers who supported Goldwater-Nichols argue that the legislation has proven to be a great success. Even a scholar with doubts about the overall wisdom of the legislation agrees that the law “increased cooperation and interoperability among the services, improved professional military education, and unified the national military command structure.”<sup>11</sup> The 1991 Gulf War is widely cited as an example of the benefits of increased cooperation and integration inside the military: there were genuine improvements in joint operations and the worst redundancies and inefficiencies of the era of service independence were curtailed. On the weight of this evidence, reformers advocate for a renewed effort to pass legislation that would build upon the principles that guided Goldwater-Nichols. To simplify, what perturbed these defense reformers in the 1980s continues to trouble them today.<sup>12</sup> The perpetuation of incompatible and often hostile service cultures, they argue, impairs not only our unity of effort on the battlefield but inter-service decision-making in the Pentagon. Officers are too deeply attached to traditional service prerogatives to voluntarily support the creation of effective joint institutions.<sup>13</sup> Prior to the passage of the Goldwater-Nichols legislation, as one widely cited commentator puts it, the military services “fiercely resisted” the notion of a unified military structure. It was only with the passage of this legislation – legislation that the services bitterly and selfishly resisted – that the military was

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<sup>11</sup> Christopher M. Bourne, “Unintended Consequences of the Goldwater-Nichols Act,” *Joint Force Quarterly* (Spring 1998), p. 99.

<sup>12</sup> Robert Adolph, Charles Stiles and Franklin Hitt argue reasonably that although Goldwater-Nichols expanded the statutory role of the chairman of the JCS, the legislation “failed to provide him with the wherewithal to do the job in four key areas all relating to joint readiness” (Robert B. Adolph, Jr., Charles W. Stiles, and Franklin D. Hitt, Jr. “Why Goldwater-Nichols Didn’t Go Far Enough,” *Joint Force Quarterly*, No. 7 (Spring 1995), p. 48. The issues on which the law is vague and thus hampers the chairman’s ability to perform his duties are developing joint doctrine; conducting net assessments of military capabilities; evaluating joint readiness; and evaluating overall military preparedness.

<sup>13</sup> Reformers who are critical of the military are highly sensitive to the fact that soldiers are not likely to cooperate voluntarily. This is why they argue we need to combat service parochialism through centralization and consolidation. The irony here is that these skeptics of voluntary cooperation in the military ignore the fact that civilian leaders are by nature as uncooperative and factious as military leaders. They should be as just as skeptical of voluntary cooperation among civilians as they are of voluntary cooperation among soldiers.

“freed, for the first time in the nation’s history, from crippling ideological, political, conceptual and parochial restraints.”<sup>14</sup>

General Jones and General Meyer, who jumpstarted the defense reform movement in the early 1980s, are still cited with great respect and admiration. James Locher contends that General Jones “started a profound revolution in military affairs and changed the course of American military history.”<sup>15</sup> At the very least, he did start a mini-revolution in terms of the organization of the military: it was Jones’ testimony before Congress on February 3, 1982, as I mentioned in the previous chapter, which proved the catalyst for the legislation that would be passed four years later. What most reformers seem to forget – or never to have appreciated in the first place – is that General Jones was convinced that even with military reform, the organizational structure of the broader defense department would remain inadequate to meet the national security needs of the nation. In the previous chapter I made a distinction between defense and military reform, and argued that General Jones was an advocate of both. Contemporary defense reformers, however, almost unanimously associate General Jones’ criticism of the organizational structure of the defense department with a criticism of the performance and effectiveness of the military services. Locher argues that the military resisted reform because “the majority of military officers were then giving priority to service interests over genuine national interests and somehow had come to believe that their behavior in doing so was correct.”<sup>16</sup> It is certainly true that representatives of the services were sometimes unable to clearly differentiate between service and national interests, and often conflated the

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<sup>14</sup> James R. Locher, *Victory on the Potomac: The Goldwater–Nichols Act Unifies the Pentagon* (Texas A&M University Press, 2002), p. 17.

<sup>15</sup> *Ibid*, p. 18.

<sup>16</sup> *Ibid*, p. 12.

two.<sup>17</sup> But are not parochial interests and national interests, as Madison and Hamilton teach us, entangled in all of our thoughts?

Psychological theories of human motivation aside, we must not lose sight of the two-fold nature of the arguments put forth by General Jones and General Meyers. What made them insightful reformers is that they combined the sensitivity to organizational inefficiencies of a civilian policymaker with the understanding of the limits of military reform that a soldier gains through years of operational and administrative experience.<sup>18</sup> What they understood is that, given the present constitution of the executive branch, the performance of the military ultimately hinges on the wisdom – the deliberative instincts, we could say – of civilian decision-makers. The relationship between the quality of civilian decision-making and the caliber of military performance – rather than merely the caliber of military performance – should be at the center of defense reform debates. It is indeed advantageous to have a military counterbalance to the individual services – to reduce service parochialism and promote a national military perspective. Likewise, it is important to have the best possible advice moving up the chain of command. But military performance depends on how thoroughly civilian decision-makers absorb and digest this advice, and this is something that military reform alone cannot address.

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<sup>17</sup> A good argument *for* interservice rivalry is provided by Owens: “Interservice rivalry has the beneficial effect of spurring innovation in defense policy and in the development of doctrine and equipment in support of a strategic or tactical approach that may seem irrelevant at the time. When a single strategic view is forced upon a nation’s policymakers, flexibility and adaptability to changing circumstances may suffer.” Interservice rivalry, he argues, is largely a scapegoat. Confused statutory relationships and functional responsibilities inside the defense structure; poor interagency cooperation inside the executive branch; and the uncontrolled growth of the Office of the Secretary of Defense, he argues, are far more responsible for the problems reformers attribute to interservice rivalry.

<sup>18</sup> What made Madison and Hamilton such insightful reformers, I would suggest, were similarly rich bodies of practical experience.

How, then, do we create and maintain a set of national security institutions so that parochial interests are controlled – civilian as well as military – and a national perspective prevails? No matter how refined the advice that moves up the chain of command, it will not have a reliably persuasive impact on civilian decision-makers as long as no constitutional checks and balances are in place to control the spirit of faction. And no matter how successful military reform might be at discouraging service parochialism and promoting jointness, the appropriateness of the force to the political objective it is supposed to serve is surely the most reliable indicator of military success.

*2. Interagency Cooperation.* A second strain of thought unites many contemporary defense reformers: the imperative of greater interagency cooperation.<sup>19</sup> The legal framework put in place by the National Security Act and amended by Goldwater-Nichols, these scholars argue, has created a national defense structure that is adequate to meet present and future national security challenges. The president, secretary of defense, and Congress collectively exercise civilian control over the military despite the increased power and authority of the chairman of the JCS. There is a healthy competition for resources, roles and missions among the semi-autonomous services. There have been genuine improvements in military cooperation and

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<sup>19</sup> Bob Ulin explains the upsurge in attention to interagency cooperation in recent years as a reflection of failed coordination efforts in natural disasters and foreign contingencies: “Interagency cooperation has become a hot topic in the military services. It gained renewed traction shortly after the shock and awe campaign to depose Saddam Hussein from Iraq. General Colin Powell is reported to have remarked that “if you break it, you own it.” Indeed, we broke the back of the Hussein regime, toppled the government of Iraq, caused the Republican Guard to flee, disbanded the army and subsequently put everyone out of work thereby fueling the insurgency. It became evident that military power alone was insufficient to rebuild Iraqi society, the rule of law and the economy. Suddenly the military found itself trying to re-establish what it had broken and put in place the infrastructure that sustains health, safety and governance. However, the military is neither equipped nor trained adequately to conduct nation building. While the military is often augmented by other governmental agencies in support of contingency operations abroad, the “system” or lack thereof, to ensure effective interagency coordination poses a challenge” (Bob Ulin, “About Interagency Cooperation,” *Arthur D Simon Center* (Fort Leavenworth, Kansas, 2010), available at: [the.simoncenter.org/about-interagency-cooperation](http://the.simoncenter.org/about-interagency-cooperation)).

worst redundancies and inefficiencies of the pre-Goldwater-Nichols years have been curtailed. The basic institutions of an effective national security state are in place.

What worries these reformers is that our national security system does not integrate all of the knowledge and expertise presently at its disposal. “The problem of interagency coordination is well recognized, and has been for at least the better part of a century, but it has not been resolved. The roles and responsibilities for national security among agencies, advisors, secretaries, committees, and the White House are persistently characterized by conflicts of authority, disagreement, and a lack of coordination.”<sup>20</sup> Improved coordination is an admirable goal. Reform proposals and recommendations geared toward getting the “many disparate parts of the U.S. national security structure to row together, in both planning and execution,” are perfectly sensible. The challenge is to “identify ways to better integrate efforts while retaining the goodness inherent in agencies' distinctive knowledge and approaches to issues.”<sup>21</sup> The principle that inspires these reformers is simple: strategic and operation planning would lead to better outcomes if it were done on an interagency basis.<sup>22</sup> The present national security system simply “cannot integrate and resource the expertise and capabilities required to secure the vital

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<sup>20</sup> *Project for National Security Reform: Forging a New Shield* (Project for National Security Reform, 2008), p. 43.

<sup>21</sup> Michele A. Flournoy and Clark A. Murdock, *Beyond Goldwater-Nichols: U.S. Government and Defense Reform for a New Strategic Era* (Center for Strategic and International Studies, 2005), p. 6.

<sup>22</sup> Not all scholars are as upbeat about the potential for improving the interagency process. “The interagency process coordinates among U.S. Government agencies, and occasionally international Governmental Organizations or Non-Governmental Organizations, to craft policy initiatives and responses to events as they unfold. It usually involves the delegation of a lead agency responsible for determining the agenda, extracting agreement, and implementing decisions. The phrase imparts a notion of a well-oiled policy machine. It is largely a myth. Neither adaptation nor control is possible given the crazy quilt of organizations and players in the national security arena. The sheer difficulty of holding a meeting, even a conference call, is daunting. The “system” that we now have is too large, unwieldy, and complex to respond effectively or initiate the changes that are required” (Grant Hammond, “Time for a Revolution: The Transformation from National Defense to International Security,” in Douglas Stuart, ed., *Organizing for National Security* (Strategic Studies Institute, U.S. Army War College, 2000), p. 153).

interests of the nation.”<sup>23</sup> Interagency cooperation, in other words, is presently not the norm, and in the absence of reform, even if certain actors in the system were inclined to cooperate, multi-agency missions will inevitably be beset by bureaucratic obstacles that frustrate good intentions.<sup>24</sup>

Here is a good example of the kind of reform proposal that emerges from a concern with interagency cooperation. The authors of the Beyond Goldwater-Nichols report recommend “enhancing planning capacity for complex contingency operations in civilian agencies and creating rapidly deployable Interagency Crisis Planning Teams, comprised of regional and functional experts from all of the participating agencies, charged with developing truly interagency campaign plans.”<sup>25</sup> This kind of innovation is unlikely to cause harm, and might very well improve performance on the margins. But if factionalism is allowed to go largely unchecked inside the executive branch, agencies that are well prepared to deal with a national security emergency may have very little input into the decision-making process. It is certainly logical to argue that “by planning together, training together, and operating together, the U.S. agencies involved in national security could for the first time bring to bear coherent capabilities far greater than the sum of their parts.”<sup>26</sup> But the only way to capture the benefits of greater interagency cooperation on a consistent basis is through *constitutional* reform. If the constitution of the executive branch is off-limits, as most defense reformers assume, the best we can hope for in a national security emergency is that our president and his advisors are

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<sup>23</sup> *Project for National Security Reform*, p. 492.

<sup>24</sup> The challenge is certainly an enormous one: “There are no interagency schools, rules or unifying authority except for the President of the United States who sits at the top of the entire U.S. government. Each federal department or federal agency has its own leader, budget, career progression and mission. There is little incentive to cooperate. In fact, the struggle for budget authority is usually a zero sum game. While one might think that broad governmental experience by any federal employee is a plus, service outside of one’s own agency or department is rarely seen as career enhancing” (Ulin, “About Interagency Cooperation”).

<sup>25</sup> Flourney, p. 8.

<sup>26</sup> Flourney, p. 9.

deliberative by nature and that their initial interpretation of a national security threat, if inaccurate or incomplete, is not impervious to reason. It is certainly true that “rational analysis of merit must decide which ideas prevail,” but in a strictly hierarchical organization, rationality is in competition with factionalism, and factionalism unchecked, as we know, is more likely to jettison rational analysis than incorporate it into a constructive dialogue.<sup>27</sup> I do not mean to suggest that the establishment of new offices responsible for interagency coordination is unwise, or that enhancing operational capacity at the U.S. Agency for International Development is unproductive. But these coordinating mechanisms, no matter how robust, are likely to be overwhelmed by the spirit of faction.

If the executive branch is arranged in a strictly hierarchical fashion – if we insist upon the doctrine of absolute civilian control of the military – then we are at the mercy of faction and engaged primarily in wishful thinking when the integration and collaboration we hope for depends on the voluntary cooperation of the chief magistrate and his top civilian advisors. If we do not consider relaxing the doctrine of absolute civilian control of the military we must put all of our hopes for improving the quality of crisis decision-making in the deliberative instincts of our commander-in-chief.

3. A “*Madisonian Approach*” to *Civil-Military Relations*. Most scholars in the defense reform community appreciate the extent to which dysfunctional civil-military relations have a perverse impact on policy effectiveness.<sup>28</sup> The fact that this correlation holds as reliably in the unhurried domains of budgeting and procurement as it does in a national security crisis means that

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<sup>27</sup> Ibid., p. 18.

<sup>28</sup> By civil-military relations, as I mentioned in an earlier chapter, I am referring to civil-military relations inside the executive branch, not between the military and the society at large.

increasing the functionality of civil-military relations is an almost universal goal. But a functional relationship between top civilian and military leaders inside the executive cannot insulate a republic from policy mistakes and operational failures. Dysfunction in this relationship – dysfunction being a euphemism for varying degrees of hostility, distrust, evasiveness and incomprehension – is a reliable indicator that mistakes and miscalculations will occur that could have been avoided. Examples of dysfunction are easy to identify. Much more challenging for defense reformers is to propose effective solutions. How do we transform a frequently dysfunctional relationship into a reliably constructive collaboration?

Conventional wisdom informs us that the most important decisions on matters of war and peace must be made by our elected civilian leaders. This is how the doctrine of civilian control of the military is generally interpreted. Military leaders are expected to share their expertise with civilian decision-makers and then use the means at their disposal to fulfill the political objectives determined by their civilian counterparts, whichever particular objectives they ultimately choose to pursue. The problem with this description of civil-military relations is that it mistakenly assumes that aligning political objectives and military means is a largely natural and inevitable process.

Christopher Gibson is the only contemporary scholar with whom I am familiar who invites Madison into the defense reform conversation. Behind American's elected leaders, he writes, "stands the civil-military nexus – the top civilians and military advisors to the President and Congress who offer strategic analysis, develop options, and convey recommendations." This group of civilian and military leaders engages in what he calls "decision-support activity." This activity is critical to the national security decision-making process but "not always

effectively carried out.”<sup>29</sup> This is because dysfunctional relations inside the executive branch often promote anti-deliberative practices. What makes Gibson’s research especially interesting in the context of this dissertation, and why it is worth engaging with his arguments at some length, is that, while he applies what he calls a “Madisonian approach” to civil-military relations, he misconstrues the relationship between normative and institutional structures in Madison’s constitutional system.

Gibson argues that we need checks and balances to moderate relations inside the civil-military nexus for the same reason we need checks and balances in our broader constitutional system. A reliance on parchment barriers alone will not create a productive relationship between civilians and soldiers in the civil-military nexus any more than they will between the three great departments of government. A neat division of responsibilities between civilian and military leaders – a pure separation of “powers” – is impossible to maintain in practice, given the complexity of the issues that must be resolved.

Here is how Gibson defines civil-military relations:

Civil-military relations is defined as the delineation of duties among top-level civilian and military leaders as found in existing US legal structure (provisions in the US Constitution and US statutes) and in the norms that guide behaviour in view of how these leaders contribute individually and collectively to the national security decisionmaking process, and in all efforts to provide for the common defense.<sup>30</sup>

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<sup>29</sup> Christopher Gibson, *Securing the State: Reforming the National Security Decisionmaking Process at the Civil-Military Nexus* (Ashgate, 2008), p. 1.

<sup>30</sup> Gibson, p. 5.

Gibson understands that for the civil-military decision-making nexus to be effective, elected leaders must have access to strategic analysis, a diverse set of options, and advice from both political appointees and the military prior to making weighty national-security decisions. He also argues that dysfunction in civil-military relations cannot be reduced to a tolerable level by focusing strictly on the military side of the equation. Despite the recognition of the two-fold nature of the problem, however, he still argues, as most defense reformers do, that elected leaders must continue to exercise absolute control of the armed forces. As long as key actors in the civil-military nexus adopt his new normative framework, he claims, no actual constitutional interventions – no checks and balances – are actually required, even though he argues that reducing dysfunction in the civil-military nexus is a constitutional problem.

Gibson wants to create a more balanced relationship between civilian and military leaders – a more respectful “partnership” – but his fidelity to a conventional understanding of the constitutional theory upon which our republic was founded prevents him from identifying potential solutions to the dysfunction he deplors. Gibson diagnoses the problem – a lack of constitutional mechanisms inside the executive branch to force decision-makers to deliberate – but his solution – to promote a new normative framework – is hardly Madisonian at all, since it relies on an intervention that is no more likely to control the factiousness of political actors than parchment barriers. It is certainly important to have “clearly established expectations and standards” in order to appreciate what, on the military side, constitutes dereliction or inappropriate behavior, and what, on the civilian side, is unproductive micromanaging or excessive domination.<sup>31</sup> Gibson is correct to argue that military leaders should not interpret the doctrine of absolute civilian control of the military to mean that all disagreement and dissent has to end once their civilian counterparts have made a decision. Similarly, he states a truism

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<sup>31</sup> Gibson, p. 4.

when he insists that civilian leaders should not interpret the same doctrine to mean that they should ignore or fire top generals who disagree with them in a national security crisis. But as much as Madison appreciated the influence of norms on political life, he did not believe that normative injunctions against anti-deliberative practices alone could solve the problem of faction. “Without an anchor, a set of agreed upon interrelated principles, without normative theory,” Gibson writes, “we are unlikely to see a functional balance in civil-military relations.”<sup>32</sup> If we want a functional balance in civil-military relations, I would suggest, we need more than changes in the norms that guide civil-military relations. Is it simply not consistent with Madison’s constitutional theory to expect the relationship between political actors to change significantly and durably in the absence of constitutional reform.

### **Constitutional Theory and the National Security State**

If civil-military relations inside the executive were somehow immune to serious dysfunction, the lack of a formal process of ends-means adjustment and adaptation would not trouble a constitutional theorist. But as things presently stand, there are only informal deliberative mechanisms inside the executive branch, and a high level of dysfunction is the norm.<sup>33</sup> If we continue to rely on only informal deliberative bodies – on informal checks and balances inside the executive department – we should expect this pattern of dysfunction to continue.

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<sup>32</sup> Gibson, p. 101.

<sup>33</sup> I do not mean to suggest that civil-military relations are dysfunctional in all administrations or at all times in an administration that suffers from periods of dysfunction.

Despite these reasonable expectations, the underlying assumption of most contemporary defense reformers is that the decision-making structures and processes a president uses to plan and execute defense policy are sub-constitutional features of government. This is why most reformers end up stressing the importance of informal deliberative groups inside the executive branch: they understand the positive correlation between executive-branch deliberation and the quality of executive branch decision-making, but, with the constitution of the executive off limits, they cannot conceive of any reforms that would actually increase the likelihood that decision-making processes will be genuinely deliberative. The *constitutional* problem – when civilian and military leaders in an administration disagree about the consistency of political ends and military means, as they inevitably will, the decision-making process is highly vulnerable to faction – remains unresolved.

If Madison and Hamilton were contemporary defense reformers – if they were, let us say, recruited by a legislative subcommittee to study the constitution of the executive department in our national security state – would they approve of its internal organization? We cannot know, of course, how they would respond to the realities of the modern world, the modern national security state, the modern presidency. But I think we can safely assume that they would be at least willing to debate the wisdom of incorporating additional constitutional checks and balances into the executive branch. And thanks to the detailed notes Madison took at the Constitutional Convention, the essays Madison and Hamilton contributed to *The Federalist*, and the work of distinguished historians of the founding era such as Max Farrand, Charles Thach and Jack Rakove, we have a reasonably good idea of how such a debate would unfold.<sup>34</sup> Madison would wonder if faction could be controlled inside the executive department

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<sup>34</sup> Max Farrand, *The Records of the Federal Convention of 1787: 1937 Revised Edition in Four Volumes* (Yale University Press, 1966); Charles Thach, *The Creation of the Presidency, 1775 – 1789: A Study in*

– if the national security decision-making process could be made less prone to the violence of faction – without compromising its energy. Hamilton would initially be quite skeptical of any scheme that compromised executive unity (skeptical, perhaps, to the point of being a bit dismissive). His instincts would lead him to seriously doubt whether any advantages could flow from a deliberative body in the executive department, however limited its powers. Despite these different starting points, however, both Madison and Hamilton, I suspect, would be drawn to the following incongruity: the executive branch was designed to balance the requisites to energy and safety in a relatively weak, insulated state, and might not be able to maintain this delicate balance as a non-insulated superpower.<sup>35</sup>

1. *An institutional conception of the national interest.* If war is to be sensible, the political ends in war – not just the military means – must be vetted, disciplined, controlled. Clausewitz teaches us that there must be a process of adjustment and adaptation between political ends and military means – but we need Madison – an updated Madison – to understand how we might incorporate such a process into a constitutional system. What Madison teaches us is that misalignment between political ends and military means is best understood as a consequence of the excessive influence of faction. He also teaches us that the greatest advantage of a well-constructed republic is its tendency to break and control the violence of faction, and that we should endorse “any plan which, without violating the principles to which he is attached, provides a proper cure for it.”<sup>36</sup>

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*Constitutional History* (Liberty Fund, 2007); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, (Vintage, 1997).

<sup>35</sup> Other fundamental problems would surely come to mind – such as the power dynamics between the three main departments of government – but as I mentioned elsewhere in this dissertation, these issues have been explored at length by other scholars, and no workable, reform-friendly consensus seems forthcoming.

<sup>36</sup> Madison, *The Federalist*, No. 10, Paragraph 1.

How do we ensure that factions within the executive branch – be they comprised of civilians or soldiers – are strongly discouraged from initiating a war in which political objectives and military resources are poorly aligned? In Chapter 3, in a discussion of Madison’s theory of faction, I argued that identifying the national interest is a hopelessly subjective, hopelessly political endeavor, unless we define the national interest from an institutional perspective. An institutional conception to the national interest – which I derived from Madison’s institutional conception of the public interest – suggests that the national interest is best understood as the creation and maintenance of a policymaking process that ensures a reasonably close alignment of political ends and military means in a national security crisis.<sup>37</sup> A national security faction, following the same institutional logic, is an individual or group of decision-makers in the executive that attempts to disable or circumvent this process. What complicates this analogy between the public interest and the national interest, of course, is that the deliberative devices in the executive branch that are designed to control faction and improve the quality of national security decision-making are informal, and therefore remain vulnerable to factious manipulation.

Alexander George, a widely admired authority on national security and presidential decision-making, has studied the influence of factiousness in national security crises.<sup>38</sup> Policymakers, he writes, often operate with “primitive theories of questionably validity that are,

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<sup>37</sup> I argued in Chapters 2 and 3 that deliberation is the lynchpin in Madison’s constitutional system. Constitutional checks and balances are required not only to prevent interdepartmental usurpation but to improve the quality of lawmaking. Constitutional checks and balances certainly have a limited utility – deployed in excess they are as likely to degrade the quality of lawmaking and statecraft as improve them – but Madison argued that the quality of lawmaking and statecraft would be intolerably poor if lawmakers and statesmen were not to some extent *forced* to deliberate.

<sup>38</sup> The study of rationality and irrationality in decision-making is a crowded field. In national security, foreign policy and international relations, the work of Robert Jervis stands out (Robert Jervis, *Perception and Misperception in International Politics* (Princeton: Princeton University Press, 1976). For an excellent review of new work in cognitive social psychology and behavioral decision theory that has implications for national security policymaking, see J. M. Goldgeier, J. M. and P. E. Tetlock, “Psychology and International Relations Theory,” *Annual Review of Political Science* (Annual Reviews, 2001).

moreover, not well articulated.”<sup>39</sup> The policy choices that confront every executive often arouse in him “a variety of motives and interests that are in fact extraneous to the values associated with even a very broad conception of the national interest.”<sup>40</sup> No one who has studied presidential decision-making seems to doubt the massive and often irrational influence of personalities and beliefs, and yet most defense reformers nevertheless work under the assumption either that the president has the national interest at heart, or that a factious president must get what he wants, no matter how modest or inflexible his cognitive resources.

George is not a constitutional theorist by training and does not engage with Madison’s conceptual vocabulary. Nevertheless, he presents a persuasive case for why we need to extend Madison’s theory of faction to the national security state. George argues that a handful of procedural tasks are essential components of effective decision-making. The decision-making process must provide decision-makers with incisive, valid diagnoses of complex problems; ensure that all the values and interests at stake are flushed out for consideration; generate and evaluate a wide range intended and unintended consequences; remain alert to policy effectiveness; and be nimble enough to learn from experience. The national security state, I would submit, relies on forms and principles that work against all of these critical ingredients.

Here is a list of nine decision-making pathologies – all relevant to our discussion – that George and an impressively credentialed group of collaborators compiled for a study of national security decision-making:

1. When the decisionmaker and his advisors agree too readily on the nature of the problem facing them and on a response to it.

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<sup>39</sup> Alexander George, *Presidential Decisionmaking in Foreign Policy* (Westview Press, 1980), p. xiii.

<sup>40</sup> *Ibid.*, p. 3.

2. When advisors and policy advocates take different positions and debate them before the executive, but then disagreements do not cover the full range of relevant hypotheses and alternative options.
3. When there is no advocate for an unpopular policy option.
4. When advisors to the executive hash out their disagreements over policy without the executive knowing and confront him with a unanimous recommendation.
5. When advisors agree privately among themselves that the executive ought to face up to a difficult decision, but no one is willing to alert him to the need to do so.
6. When the executive, faced with an important problem to decide, is dependent upon a single channel of information.
7. When the key assumptions and premises of a plan which the executive is asked to adopt have been evaluated only by advocates of that option.
8. When the executive asks advocates for their opinions on a preferred course of action but does not request a qualified group to examine more carefully the negative judgments offered by one or more advisors.
9. When the executive is impressed by the consensus among his advisors on behalf of a particular option but fails to ascertain how firm the consensus is, how it was achieved, and whether it is justified.<sup>41</sup>

If aligning political ends and military means were not so important, we would not need to worry about executive-branch faction. And if this very important process were not vulnerable to most if not all of the decision-making pathologies listed above, we would not need to question our fidelity to the doctrine of absolute civilian control of the military. But these pathologies are primarily pathologies of dependence, I would suggest, and they draw our attention to precisely

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<sup>41</sup> Ibid, p. xi. Partly why we shifted from the JCS committee system to a strong chairman was to address decision-making pathology number four. The committee system was criticized for presenting the president with unanimous recommendations that were “unanimous” only because they reflected the least common denominator of the disparate positions held by the respective service chiefs. As for the other eight pathologies, most military historians and defense reformers would probably check off many if not most of them as accurate descriptions of the decision-making processes that have authorized the use of force in American over the last sixty-five years. H. R. McMaster and Thomas Ricks, to mention two widely read studies, argue that sub-par outcomes in Vietnam and Iraq respectively can be partly attributed to the fact that civilian and military leaders did not engage in a productive deliberative process in the lead up to war. See H.R. McMaster, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, The Joint Chiefs of Staff, and the Lies that Led to Vietnam* (Harper Perennial, Reprint Edition, 1998); and Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (Penguin Books, 2006).

the kind of governance problems that the tools of constitutional theory are uniquely qualified to address.<sup>42</sup>

After a republican government is able to control the people, it must be able to control itself. The structural innovation that contributed the most to solving this problem was our separation of powers system. Because parchment barriers – in our case, informal deliberative bodies – do not offer protection against the encroachment and usurpation, political actors in a republican government must be equipped with the constitutional means and personal motives to defend their constitutional powers. Powers must not only be separated but creatively mixed. In the absence of these kinds of constitutional checks and balances, the spirit of faction will dominate the individual departments of government and threaten the permanent and aggregate interests of the community.<sup>43</sup>

Madison teaches us that constitutional checks and balances improve the quality of lawmaking and statecraft: in addition to obstructing factious projects and discouraging such projects through the threat of obstruction, they improve the quality of lawmaking and statecraft by forcing lawmakers and statesmen to deliberate. What we cannot learn directly from

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<sup>42</sup> An additional decision-making pathology familiar to students of national security: most statesmen are not the most sophisticated military historians. See, for example, Ernst R. May, *“Lessons” of the Past* (Oxford University Press, 1978); and David Petraeus, “Lessons of History and the Lessons of Vietnam,” *Parameters*, Vol. XVI, No. 3 (Autumn 1986). Military leaders may not be much better at learning the lessons of military history than their civilian counterparts, but integrating the perspectives of civilians and soldiers through a formal deliberative separation of power would at least minimize the impact of misinterpretations of this history on the use of force. A deliberative process is especially in this context because, as Max Hastings reports, “Even in the twenty-first century, a depressingly small number of societies seek honesty to examine their own pasts, in war or peace” (Max Hastings, “Germans Confront the Nazi Past,” *New York Review of Books*, February 26, 2009). Let me also mention here that even a president who has the national interest at heart when she enters office will find it rather difficult to retain her distance and objectivity when bombarded in office by problems and pressures (including public calls for action) that connect more immediately with her emotions than her intellect.

<sup>43</sup> A separation of powers system, as I explained in Chapters 2 and 3, has to do two seemingly contradictory things well: first, it has to ensure the independence of each department, in order to control faction; second, it needs to promote inter-department deliberation, in order to secure the permanent and aggregate interests of the community.

Madison, however, is how to incorporate a deliberation separation of powers into the executive branch. To answer this question, we need to turn to Hamilton's eleven essays in *The Federalist* on the constitution of the executive branch. Hamilton's defense of the particular features of the executive department suggests both how a deliberative separation of power would work in theory, and why we have good reason to believe it would perform as intended.

2. *Energy and the constitution of the executive branch, reconsidered.* In a national security crisis, the quality of decision-making in our republic presently hinges on the productivity of a relationship – the relationship between top civilian and military leaders – that, from an institutional perspective, privileges power and dependency over judgment and stability.<sup>44</sup> Military leaders serve at the pleasure of the president. As a result of the preeminence of the pleasure-principle in the constitution of the executive branch – as a result of the uncompromisingly hierarchical structures it stipulates – the civil-military decision-making nexus has evolved into a kind of “vortex” in which civilians now play the role of an unchecked legislature and the military plays the role of an executive department that lacks both the constitutional means to defend itself against “encroachment” and the ability to improve the quality of crisis decision-making. This dynamic may be a less than ideal situation that is nevertheless our only viable alternative. This is certainly the argument most defense reformers and constitutional theorists would make.<sup>45</sup> Democracy has an Achilles Heel. And the wish for

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<sup>44</sup> Other relationships are of course very important in a national security crisis – those between, for example, the legislature and the executive, members of the cabinet, and various executive agencies and departments – but our last line of defense against the senseless use of violence is the relationship between civilian and military leaders in the upper echelon of the military chain of command.

<sup>45</sup> I. M. Destler, for example, acknowledges that presidents are partisan politicians who do fall far short of the “rational ideal of the wise, unbiased decision-maker.” He quotes a former Johnson aide who likened the president to a monarch: he is “treated with such deference and so insulated from the political give-and-take which once served to sharpen his political judgment and sensitivity that he is almost bound to blunder badly on critical issues.” But to such monarch-like partisans he nevertheless defers: “Ultimately,

immortality – a constitutional system without flaws – is, as Greek poetry and drama teaches us, a dangerous ambition.<sup>46</sup> What I will argue in this section is that introducing a deliberative separation of powers into the executive branch to improve the quality of crisis decision-making need not put in jeopardy other values, principles and objectives that deserve to be weighted more heavily in its constitution. It is possible, in other words, for a constitutional system to exert greater control over intra-executive faction without compromising the energy of the executive department or the safety of the republic.

Hamilton, as I mentioned in Chapter 4, was strongly in favor of a single executive. Whereas a legislature is “best adapted to deliberation and wisdom,” only a single hand is capable of exercising the kind of energy without which a political community will flounder. Energy is essential for “the protection of the community against foreign attacks”; “the steady administration of the laws”; “the protection of property”; and “the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”<sup>47</sup> Given the privileged position of executive energy in Hamilton’s constitutional theory, the first issue we must explore is whether the high level of energy he endorses in *The Federalist* would be compromised by a tightly circumscribed deliberative separation of power.

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however, one comes back to the fact that there is no other choice” (I. M. Destler, *Presidents, Bureaucrats, and Foreign Policy* (Princeton University Press, 1972), pp. 86-88).

<sup>46</sup> As evidence of my impartiality in controversial matters (the poetry-philosophy divide), let me add that, as Peter Euben explains, Socratic philosophy and politics both emphasize “our need for others to compensate for our one-sidedness and incompleteness, which is what philosophical dialogue and political deliberation ideally accomplish.” Socrates argues that people who claim to possess the truth, “both in the sense of exclusivity and finality, are, like the sophists, presumptively wise but actually ignorant. Knowledge is not an object that can be finished or completed. To suppose otherwise is to embrace those tyrannical impulses that transform politics into command and obedience and wisdom into abstract knowledge” (Peter Euben, *The Tragedy of Political Theory* (Princeton University Press, 1990), pp. 210, 214).

<sup>47</sup> Hamilton, No. 70, Paragraphs 1, 6.

The answer at first appears to be obvious: energy in the executive can be destroyed “either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others in the capacity of counselors to him.”<sup>48</sup> The danger of a plural executive is the potential for rivalry: if rivalry leads to dissension, and dissension assails the executive magistracy, it might “impede or frustrate the most important measures of the government in the most critical emergencies of the state.” Even worse, they might “split the community into the most violent and irreconcilable factions.”<sup>49</sup> Hamilton is convinced that “no favourable circumstances palliate or atone for the disadvantages of dissension in the executive department.” Dissension merely serves to “embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it.”<sup>50</sup>

A deliberative separation of power inside the executive would indeed involve a breach of unity – hence our instinctive discomfort with such a constitutional device. But would a chairman of the JCS, armed only with a limited veto – a limited veto over a tightly circumscribed power – be a magistrate of “equal dignity and authority”? Would such an official combine with the president to form the kind of “executive council” that destroys energy and judgment? I do not mean to suggest that the great liability of pluralism – the kind of bitter dissension that can “impede and frustrate the most important measures of government in the most critical emergencies of state” – would never characterize civil-military relations if the chairman were granted a degree of independence. In any separation of powers system – any collaborative human project, for that matter – friction, irritability and dissension are inevitable. The purpose of a deliberative separation of power would not be to eliminate civil-military friction. The

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<sup>48</sup> Hamilton, No. 70, Paragraph 8.

<sup>49</sup> Hamilton, No. 70, Paragraph 11.

<sup>50</sup> Hamilton, No. 70, Paragraph 13.

purpose would be to reduce it to a level that facilitates the alignment of political ends and military means. In this spirit – in Madison’s spirit of controlling rather than eliminating faction<sup>51</sup> – my claim is simply that our national security system is far more likely to split the executive into “violent and irreconcilable factions” as presently constituted.<sup>52</sup> Constitutional theory teaches us that human nature is compatible with popular self-government only when the institutional dynamics of a regime suppress certain impulses and channel others. Given the present constitution of the executive branch, I would suggest, we have no reason to believe that the spirit of faction will not have an adverse impact on civil-military relations or that “violent and irreconcilable” factions will not continue to diminish the contribution to our national security of essential decision-making processes.<sup>53</sup>

Hamilton ends his defense of the constitution of the proposed executive department with a rhetorical question. Although he insists on the necessity of an energetic executive, he

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<sup>51</sup> Let me return to a subject I introduced in Chapter 6. The political theory of *The Federalist*, I pointed out, was less influential at the “constitutional convention” of 1787-1789 than various forms of management and administrative theory. I argued that both sets of ideas should be consulted by defense reformers. Vincent Ostrom captures the fundamental difference between the two styles of thought: “The controlling principle in Wilson’s political theory – ‘the more power is divided the more irresponsible it becomes’ – is in basic contradiction to Madison’s principle that opposite and rival interests hold those who exercise the prerogatives of government accountable to a public trust” (Ostrom, Vincent, *The Political Theory of the Compound Republic* (Institute for Contemporary Studies Press, 1987), p. 183). Administrative theory – or “reform theory” – is problematic when consulted in *isolation* because it largely ignores the argument that faction cannot be eliminated and must therefore be controlled.

<sup>52</sup> Hamilton, No. 70, Paragraph 11. Let me remind the reader that all constitutional “solutions” to complicated problems – a political problem that requires a constitutional solution is almost complicated by definition – are liable to objections (I borrow this linguistic formulation from George Mason: at the Constitutional Convention, Mason argued that the executive should be elected by the legislature and should serve a single seven-year term. This was not a perfect solution to the election-duration-eligibility puzzle, he explained, but it was the least objectionable of the proposals then under consideration). As we revisit the arguments in favor of the present constitution of the executive branch – as we extract principles and forms that might contribute to a solution to the ends-means problem – the question we must ask ourselves is not, what is the ideal solution to a particular problem, but, which among a handful of proposed solutions is liable to the fewest objections?

<sup>53</sup> History provides plenty of anecdotal evidence to support constitutional theory’s predictions, but I am not a military historian and do not want to base my argument for a deliberative separation of power in the executive department on evidence that some historians would undoubtedly argue was selectively assembled.

also argues that executive energy in our constitutional system does not come at the expense of safety. The president is elected by the representatives of the people; he can be impeached and removed from office for bad or criminal behavior; and those powers that might otherwise have been subject to abuse by the executive have been intermixed in a manner such that they are subject to partial control by the legislature. “What more could be desired by an enlightened and reasonable people?”<sup>54</sup>

What I want to point out here is that Hamilton’s seemingly disarming question smuggles in a great deal of complexity. He and his co-founders were confident that the proposed executive branch combined the requisites to energy and safety in the right proportion because they were recommending a constitutional system for a particular republic at a particular moment in time in world history. In a nation as privileged by history and geography as America was in 1787, there might not have been much else an enlightened and reasonable people could desire, in terms of additional constitutional precautions to protect the people from an energetic executive. We are still privileged by history and geography, but our relationship to the rest of the world has changed in dramatic, once-unimaginable ways. Hamilton argues in *The Federalist* that a vote for disunion would amount to an act of collective suicidal. Disunion, I would suggest, is a fairly accurate description of our present state of affairs. Not literally, of course, but in the sense that we now combine the “means of revenue” and the “science of finance” with a sense of “constant apprehension.”<sup>55</sup> We have a standing army and remain in a permanent state of readiness for war, and this has led, as Hamilton feared, to a strengthening of the executive arm of government at the expense of the legislative authority. We are certainly not among the nations of the world that have been compelled by circumstance to “resort for repose and

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<sup>54</sup> Hamilton, No. 77, Paragraph 11.

<sup>55</sup> Hamilton, No. 8, Paragraph 5.

security to institutions which have a tendency to destroy their civil and political rights.”<sup>56</sup> But are we no longer the beneficiaries of a felicitously “insular situation.” An extensive military establishment – which Hamilton and Madison both considered a threat to liberty – is now necessary for our security, irrespective of the particular ends for which we think it should be deployed. As a result of this radical reorientation with respect to the rest of the world, what we have to fear from the power and energy of the executive branch is not that we will fall “victim to the absolute power of a single man,” but that the power of single man inside the executive branch is a serious impediment to quality decision-making in a national security crisis.<sup>57</sup>

My claim here is that the potential violence of executive-branch faction in a non-insulated state demands that we consider a minor departure from the principle of unity. When lives and treasure are at stake to the degree they are today – when the consequences of ends-means disharmony as are profound as they are – it is more important to reconcile differences of opinion between civilians and soldiers than to suppress dissent. Formalizing what is presently an informal deliberative body, I would suggest, would also be more likely to promote clarity and judgment than confusion and embarrassment; to discourage the formation of cabals that “distract” and “enervate” a system of administration than engender them; and to improve the quality of crisis decision-making than be a mere “clog” upon the president’s good intentions.

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<sup>56</sup> Hamilton, No. 8, Paragraph 4. There are of course numerous scholars and political commentators who have argued that civil liberties have been sacrificed when our nation has been at war, be it during World War II or our more recent war on terror. As egregious as some think these infringements were, however, I would suggest they still fall short of the kind of tyranny that worried the founders.

<sup>57</sup> Critics and supporters of executive power agree that the president has gained in power relative to the legislature as a result of the emergence of the modern administrative state. In *The Executive Unbound: After the Madisonian Republic*, conservative legal scholars Eric A. Posner and Adrian Vermeule argue that a legally unbound executive need not worry us because executive power is in fact checked sufficiently by existing political restraints. In a review piece that reflects the general liberal point of view, David Cole sharply disagrees (“Are We stuck with the Imperial Presidency,” *New York Review of Books*, June 7, 2012). I find Cole’s arguments more persuasive than Posner and Vermeule’s, but both sides of the debate ignore the central problem this dissertation explores.

3. *Safety and the constitution of the executive branch, reconsidered.* The constitution of the executive department that Hamilton defends in *The Federalist* is designed to balance energy and safety in an insulated state – to simultaneously promote administrative excellence and curtail the abuse of executive power. In a non-insulated state, I would suggest, at least one additional safeguard is necessary to counter the factiousness of the chief executive.

At this point in my defense of a new deliberative separation of power, a leap of faith is required. A constitutional theorist cannot predict how new constitutional mechanisms will work in practice, no matter how compelling they may be in theory, and no matter how familiar we may be with their performance in other contexts.<sup>58</sup> I happen to believe the leap required is a small one, and that it demands a greater leap of faith to assume that the system we presently have in place will perform adequately in the future. Readers will have to decide for themselves which path they believe represents the lesser gamble. What I will argue in this section is that the best way to rebalance the requisites to energy and safety in the executive branch is to create an “energetic” chairman of the JCS.<sup>59</sup> A military leader, in other words, who is not entirely dependent on his civilian counterparts.

Hamilton argues that two basic ingredients contribute to the people’s safety against a tyrannical executive: a dependence on the people and a due responsibility. Both of these safety

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<sup>58</sup> As Martin Diamond writes, “Institutions are subtle and recalcitrant things. They are not neutral with respect to human purposes; rather each institution and process has its peculiar propensity to produce certain outcomes and not others.” And, unfortunately, it is neither “easy to know these propensities,” nor to determine “which institutions and processes are best suited for what ends” (Martin Diamond, “The Ends of Federalism,” *Publius*, Vol. 3. No. 2 (Autumn 1973), p. 129.)

<sup>59</sup> It not only strikes me as the most logical and persuasive constitutional solution to the ends-means problem, but it would also require only a modest departure from the system we already have in place, which is an additional strength of any reform proposal, both because it represents the path of least resistance and because it recognizes that there are many things our present system does well. As Charles Stevenson argues, “Any effort to make major changes in this 60-year-old law must recognize its enduring strength and overall success. The “flawed” provisions still allowed successive leaders to make bold decisions and implement widely varying policies” (Charles Stevenson, “Underlying Assumptions of the National Security Act of 1947,” *Joint Force Quarterly*, Vol. 48, No. 1 (2008), p. 129).

mechanisms would be eroded by a pluralistic arrangement, he argues, despite the republican maxim that suggests power is safer in the hands of numerous men.

It is evident from these considerations that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power: first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.<sup>60</sup>

A dependence on the people and a due responsibility are realized through three constitutional devices: presidential elections, presidential term limits, and the ability of the legislature to remove the president for bad behavior. These safeguards have proven largely successful at protecting the people from domestic tyranny without diminishing the power and status of the president, I would suggest, but they have not proven nearly as successful at promoting high-quality deliberative decision-making in a national security crisis. They do not do so in practice, and were never designed to do so in theory.<sup>61</sup>

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<sup>60</sup> Hamilton, No. 70, Paragraph 18. A council in the executive disables the power of public opinion by making it harder for the appropriate authorities to identify which public servants are guilty of misconduct. A single man, in contrast, is “more narrowly watched and more readily suspected” (No. 70, Paragraph 22.)

<sup>61</sup> Would a minor departure from the principle of unity “deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power”? The specificity of the power I suggest should be intermixed, I would suggest, would increase rather than decrease transparency, and therefore clarify lines of responsibility. As to how clear they are at present, Allan Millett argues that unity in the executive department is not always as generative of responsibility as Hamilton assumed it would be. “Much of the organizational complexity [of the defense department] is a façade, created in part to give a false sense of rationality and legitimacy to official actions, and accepted in part because it tends to diffuse responsibility for decisions gone wrong” (Allan Millett et al., *The Reorganization of the Joint Chiefs of Staff* (Pergamon and Brassey’s International Defense Publishers, 1986), p. 13).

The need for a chairman of the JCS who is not entirely subordinate to the president – the need for an additional safeguard in the executive department to protect against the tyranny of misalignment – presents us with a classic design question. How do we create a military officer who would be powerful enough to promote a process of ends-means alignment in a national security crisis without being so powerful that he would weaken civilian control of the military? To address the decision-making pathologies I discussed in the previous section, the chairman would have to possess sufficient “energy” to force his civilian counterparts to participate in a deliberative process. How much trust should we place in such a military figure? For a separation of powers system to work, Hamilton argues, each department must be furnished with the “constitutional arms for its own defense.”<sup>62</sup> What, then, is the minimum amount of weaponry the military leadership would need to perform its “advisory” role effectively? A chairman should only be independent enough – “energetic” enough – to defend the nation against the tyranny of misalignment.<sup>63</sup>

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<sup>62</sup> Hamilton, No. 73, Paragraph 5.

<sup>63</sup> In *Soldiers, Statesmen, and Cold War Crisis*, Richard Betts analyzes the institution of the JCS and examines its record as military advisor to our civilian leadership. Two themes animate his research. The first theme: that the bellicose stereotype of the military man is unfounded. This stereotype, he believes, comes from the tendency of laymen and national security experts alike to conflate the military’s passion for preparedness with a strong desire to actually engage in conflict. The popular image of a “belligerent chorus of generals and admirals intimidating a pacific civilian establishment” is not supported by the evidence. The second theme that permeates his work relates to the military’s attitude toward the use of force. Whereas generals are usually more cautious than civilian leaders when it comes to the initial decision to send troops into battle, once the decision to engage an adversary has been made, they prefer to use “force quickly, massively, and decisively to destroy enemy capabilities rather than rationing it gradually to coax the enemy to change his intentions” (p. 5). Military leaders have tended to be “more conservative and cautious” than their civilian counterparts, he argues, because of their “sensitivity to the operational complications implicit in any scenario of possible conflict and their responsibility for implementing any tactical operation” (p. 37). I support a deliberative separation of powers in this dissertation not because I assume that all civilians will be military activists or that all soldiers will be reluctant warriors. My claim is simply that a deliberative separation of powers in the executive – intermixing the power to determine if political ends and military means are properly aligned – would increase the odds that problem of consistency receives the attention it deserves.

The ingredients that constitute energy in the executive department, in addition to unity, are duration, adequate provision for its support, and competent powers.<sup>64</sup> Let me briefly touch on the first two ingredients before engaging in a more substantial analysis of the last. What I want to emphasize here are the characteristics of an executive – of a particular kind of public servant – that these ingredients are designed to inhibit or enhance. A substantial duration in office increases personal firmness. An insubstantial term, in contrast, produces feebleness and irresolution and an aversion to the kinds of inconveniences and hazards that define good leadership. Eligibility for reelection promotes stability and continuity, while ineligibility would lead to constant turnover in subordinate stations and excessive instability. A substantial term and re-eligibility combined provide the president – and would likely provide a chairman of the JCS with a limited veto, I would suggest – with “the inclination and the resolution to act his part well.”

Among the powers vested in the president by the Constitution – the qualified power to negate legislation; the power to direct war as commander-in-chief; the power to make treaties with the advice and consent of the Senate; the power to nominate subordinate officers, again with the advice and consent of the Senate; and the power to issue reprieves and pardons – the first four are particularly relevant to our discussion.

Here is what Hamilton has to say about the merits of a qualified negative:

It not only serves as a shield to the Executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects

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<sup>64</sup> Adequate provisioning is also one of the four main ingredients of energy, but it is more of a fixed variable than viable tool in institutional design (no one would recommend inadequate or volatile provisioning).

of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.<sup>65</sup>

A qualified veto is essential in our constitutional system not because a single executive will likely possess superior wisdom than a numerous legislature, but because the latter will not be infallible, and because the love of power “may sometimes betray it into a disposition to encroach upon the rights of other members of the government.” Hamilton worries that “a spirit of faction may sometimes pervert its deliberations,” and that “impressions of the moment may sometimes hurry it into measures which itself, on mature reflection, would condemn.”<sup>66</sup>

Is there a danger that a qualified negative would be as likely to prevent good laws as prohibit bad ones? This objection, Hamilton argues:

Will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.<sup>67</sup>

Would a limited veto be vulnerable to other kinds of abuse?

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<sup>65</sup> Hamilton, No. 73, Paragraph 6.

<sup>66</sup> Hamilton, No. 73, Paragraph 8.

<sup>67</sup> Hamilton, No. 73, Paragraph 9.

The superior weight and influence of the legislative body in a free government, and the hazard to the Executive in a trial of strength with that body, afford satisfactory security that the negative would generally be employed with great caution; and there would oftener be room for a charge of timidity than of rashness in the exercise of it.<sup>68</sup>

Hamilton argues that the power of the president to make treaties with the support of two-thirds of the senators present is one of “the best digested and most unexceptional parts of the plan.”<sup>69</sup> The power of making treaties, he argues, is not strictly legislative or executive. A treaty is neither a rule for the regulation of society nor a law in need of execution. The power seems to belong to a distinct department.

The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.<sup>70</sup>

Those who object to the principle of intermixed powers, Hamilton writes, are indulging in a “trite topic.” Treaty making requires both the agency of the chief magistrate – “indispensible in the movement of foreign relations” – and the trust and credibility bestowed upon such actions when they are supported by a significant portion of the legislature. What I want to emphasize here – again, with civil-military relations in mind – is why Hamilton argues that an executive is unqualified to exercise the treaty-making power alone.

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<sup>68</sup> Hamilton, No. 73, Paragraph 10.

<sup>69</sup> Hamilton, No. 75, Paragraph 2.

<sup>70</sup> Hamilton, No. 75, Paragraph 3.

The history of human conduct does not warrant that exalted opinion of human virtue which could make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.<sup>71</sup>

If treaty-making is too delicate and momentous a power to trust to a single magistrate, what should we conclude about the power to align political ends and military means in a national security crisis?<sup>72</sup>

The final power vested in the president is the power to appoint, with the advice and consent of the Senate, ambassadors, ministers, consuls, judges and all other inferior officers whose appointments fall outside the provisions of the Constitution. Hamilton suggests there are two basic ways to apportion the power of appointment. It could be vested either in “a single man, or in a select assembly of moderate number; or in a single man with the concurrence of such an assembly.”<sup>73</sup> In our system the power of nomination is assigned to the president because the “sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”<sup>74</sup> The participation of the legislature in the appointment process is required to serve as a powerful check on the spirit of what Hamilton here calls favoritism, but we could also call faction.<sup>75</sup>

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<sup>71</sup> Hamilton, No. 75, Paragraph 4.

<sup>72</sup> Richard Morris argues that it is reasonable to infer from Hamilton’s unwillingness to commit such delicate and momentous interests to the president that, “regardless of how Hamilton would feel in the coming years, when he urged President Washington to take the field against the Whisky rebels, or when later he served as second-in-command of the army, Hamilton in 1788 was not prepared to interpret the President’s powers as commander in chief as extending beyond the defense against invasion absent legislative sanction” (Richard B. Morris, “The Origins of the Presidency,” *Political Science Quarterly*, Vol. 17, No. 4 (Fall 1987), p. 680).

<sup>73</sup> Hamilton, No. 76, Paragraph 3.

<sup>74</sup> Hamilton, No. 76, Paragraph 5.

<sup>75</sup> The consent of the legislature provides the president with a strong incentive to choose his political appointees responsibly. A president would needed such public consent would be too concerned with his

A discussion of the power to appoint naturally raises the question of how to distribute the power to remove. In Hamilton's last essay on the constitution of the executive department, he makes an argument that seems at odds with his reputation as one of our most bullish advocates of executive power. The Senate, he argues, is as valuable in the displacement process as in the appointment process. If the power to remove were vested in the President alone, the nation would be prone to violent and destabilizing revolutions in administration every four years.

Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.<sup>76</sup>

The president needs to be discouraged from removing officers of the government simply because he would prefer more agreeable subordinates. The preferences of the president – despite our contemporary understanding of the subject – cannot be wholly indulged in these administrative matters because what is best for the president is not always best for the nation.<sup>77</sup>

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reputation to risk displaying for the public a spirit of favoritism. He would be "ashamed and afraid" to propose a candidate for a distinguished station whose only real merit was "possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure" (Hamilton, No. 76, Paragraph 9).

<sup>76</sup> Hamilton, No. 77, Paragraph 1.

<sup>77</sup> Jeremy Bailey points out that although Hamilton is associated with an expansive interpretation of executive power, most advocates of executive power conveniently overlook or dismiss his claim in *The Federalist* that the Senate should share the appointment and removal powers. "Hamilton's initial argument for energy in the executive, even with its surprising praise of the Roman dictator, suggested that unity could complement and even perfect republican liberty. However, in his argument connecting unity to duration, Hamilton went out of his way to warn against the republican tendencies of a president who would have a fixed term and be eligible for reelection. Because each president would want to curry favor with "his constituents" by removing executive officials associated with the repudiated ex-president, unity and republican principles would conspire against stability and thus steer the republican government

A partial restraint “would be salutary at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate.”<sup>78</sup> Hamilton is convinced that intermixed powers will produce a result more favorable to the nation than concentrating these powers in the hands of a single man.<sup>79</sup> Most defense reformers and constitutional theorists would argue that the influence civilians wield over their military counterparts must be unlimited, and that undue influence is a misnomer, a rhetorical gimmick (even though the normative ideal is for close collaboration and mutual respect). But even Hamilton – archenemy of pluralism – thought it unwise for the executive to be the “sole disposer of offices.”<sup>80</sup>

What can we conclude from the totality of Hamilton’s arguments on the constitution of the executive department? What can we learn from focusing on all eleven essays in *The*

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toward traditional republican vices” (Jeremy D. Bailey, “The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton,” *The American Political Science Review*, Vol. 102, No. 4 (Nov., 2008), pp. 460-461).

<sup>78</sup> Hamilton, No. 77, Paragraph 4.

<sup>79</sup> Charles Thach argues that “nothing is more vital than the relations of the executive head to the chief officers of the administrative departments, and the relations of the latter to the legislature. And yet the Constitution furnishes no final and authoritative decision on the question” (*Creation of the Presidency*, p. 124). The precise organization of the departments of war, foreign affairs and the treasury were left to the first session of the first Congress. Twelve of the eighteen members of the Convention serving in the legislature at this time adopted the position that the president was “the head of all the administrative departments,” and that it was the right of the chief executive “to act through the instrumentality of agents subject to his choice and direction” (p. 142). Madison, whose opinion is obviously very relevant to our discussion, concurred: “It is one of the most prominent features of the constitution, a principle that pervades the whole system, that there should be the highest degree of responsibility in all the executive officers,” he explained to his colleagues. This makes all executive officers “responsible to the great executive power, and makes the President responsible to the public for the conduct of the person he has nominated and appointed to aid him in the administration of his department.” The chain of dependence “therefore terminates in the supreme body, namely in the people, who will possess, besides, in aid of their original power, the decisive engine of impeachment” (Quoted in Thach, p. 130-131). Madison clearly argued for placing the removal power solely in the hands of the executive, but he did so, we need to remember, in a constitutional order in which he expected the legislature to predominate. What Madison does not address is the subject of this dissertation and Hamilton’s great implicit question: when we lose the advantages of being an insulated state and presidential elections and the threat of impeachment are no longer sufficient safeguards against the abuse of executive power, what changes to the constitution of executive department might have to be made?

<sup>80</sup> Hamilton, No. 77, Paragraph 1.

*Federalist*, rather than merely on No. 70? A degree of independence on the military side of the civil-military equation may be required if we want to promote a greater consistency between political ends and military means.<sup>81</sup> What M. J. C. Vile has to say about the executive is suggestive: “if the executive was to be more than an errand boy he must have some independence of the legislature.”<sup>82</sup> The constitutional theory Hamilton defends in *The Federalist* suggests that if we want our top military leader to act his part – to exhibit personal firmness and resolution and contribute judgment and constancy to matters of war and peace – he cannot serve merely at the pleasure of the president. It also suggests that a power tightly circumscribed is not particularly vulnerable to abuse.

4. *Civil-military relations, reconsidered.* There is an important question – one that has probably been on the minds of readers at various points in this dissertation – I have yet to address

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<sup>81</sup> Why is independence so important? For two reasons: first, to combat the pathologies of dependence; and, second, to bring a degree of steadiness and impartiality to crisis decision-making. The judiciary is obviously not an appropriate model for the military, but the logic behind an independent judiciary is relevant to our discussion. Judicial power is separated from legislative and executive power in our constitutional system in order to ensure the independence without which justices would not be impartial and punishments would therefore not be meted out fairly. The standard of good behavior for a chairman of the JCS would be, as it is for members of the judiciary, the “best expedient which can be devised in any government to ensure a steady, upright, and impartial administration of the laws.”<sup>81</sup> A wholly dependent military – a chairman with no independent authority – is no more likely to bring impartiality and judgment to civil-military relations as a member of the judiciary who needs the support of the executive to remain in office. To assume that any public servant, no matter how decorated on the battlefield, is immune to personal considerations such as professional status and job security is as naïve as assuming that presidents and justices would not succumb to obsequiousness if the legislature had a discretionary power of their salary and emoluments. A lack of immunity to such mundane pressures surely goes a long toward explaining why “no service chief or field commander in the postwar era ever” resigned in protest over disagreements with his civilian counterparts (Betts, p. xii). MacKubin Owens may be right that “Senior officers have a constitutional responsibility to ensure that a military voice is heard,” and that, “if the civilian leadership chooses not to accept military advice it is the duty of any commissioned officer to carry out the resulting policy or tender his resignation,” but this is a normative ideal in which a constitutional theorist would not place much faith (“Civilian Control: A National Crisis?” p. 83).

<sup>82</sup> See M.J.C. Vile, “Chapter 6: The Doctrine in America,” in *Constitutionalism and the Separation of Powers* (Liberty Fund, 1998). I would not go so far as to argue that our most decorated soldiers have been reduced to errand boys, but I do believe their positive contribution to crisis decision-making has been less than it would have been had a deliberative separation of power been in place.

explicitly. Would a chairman of the JCS armed with a limited veto weaken civilian control of the military?<sup>83</sup> Civilian control of the military is obviously a fundamental principle in republican theory and unquestionably a condition that must be met for a republic to flourish.<sup>84</sup> It is also a fairly nebulous concept that contemporary scholars have struggled to define.<sup>85</sup> Military coups and certain acts of insubordination are easy to identify and condemn, but determining precisely which institutional or societal developments are related to a strengthening of civilian control, and which a weakening of civilian control, appears to be a task that only scholars with strong political and ideological preferences can perform with confidence.<sup>86</sup>

The traditional concern of students of civil-military relations was a direct seizure of political power by military officers.<sup>87</sup> The military had to be strong enough to protect the

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<sup>83</sup> To be more specific: a chairman with a limited veto over a single, tightly circumscribed power who served two or four-year terms on good behavior.

<sup>84</sup> Perhaps one could argue that in certain unusual circumstances in the history of a republic a loss of civilian control could serve a republic well, but this kind of hypothetical question is beyond the scope of this dissertation.

<sup>85</sup> See, for example, Nielsen, Suzanne C. and Don M. Snider, eds., *American Civil-Military Relations: The Soldier and the State in a New Era* (Johns Hopkins University Press, 2009).

<sup>86</sup> I am aware that Samuel Huntington made a seminal contribution to civil-military relations theory. He certainly brought the subject to the attention of political scientists and sociologists. But his personal beliefs about the Cold War and the inadequacy of a liberal society in the face of a totalitarian threat suffuse even his most theoretical arguments. Objective civilian control – the idea that civilian leaders should be responsible for determining the political goals for which the military was required, and then let military leaders identify the means of achieving these stated objectives – was his ideal for civil-military relations because he was already committed ideologically to the view that a liberal society with too much control over the military would indulge its liberal values and, by underestimating foreign threats and underfunding the military, put America's long-term security in jeopardy. Here is the crux of his argument: Military personnel are mostly conservative, civilian leaders are mostly liberal, and this divergence in values and attitudes (in light of Huntington's conservative understanding of the realities of international politics) is dangerous, if civilians exercise too much control over defense policy. His writing is provocative, in other words, but only as a point of departure for scholars who come to the subject without an ideological agenda. I should also point out here that a noted critic of Huntington's, Morris Janowitz, argued that although there was a clear difference in values and attitudes between most soldiers and civilians, civilian control of the military would be enhanced if they converged, and that this convergence should be encouraged because, in a world of nuclear weapons and limited war, closer collaboration between civilian and military decision-makers would be required. See Samuel P. Huntington, *The Soldier and the State* (Harvard University Press, 1957); and Morris Janowitz, *The Professional Soldier* (Free Press, 1960).

<sup>87</sup> This is why the Founders were unanimous in their opposition to a large standing army. As I mentioned in Chapter 5, Hamilton believed that a large standing army would pose a danger not only to individual

country from external enemies, but a military so equipped posed a threat to the political authority that sanctioned its creation. In a democracy characterized by weak structures of governance and underdeveloped administrative capacity, the boundary between political and military authority is vulnerable to transgression.<sup>88</sup> But even critics of the size and influence of the American military do not think it poses a threat to political authority. As Douglas Kinnard puts it, in the post-World War II period “the question of civilian supremacy over the military, which so occupied the Founding Fathers at Philadelphia and other political thinkers through the last century, is no longer an issue.”<sup>89</sup> I do not think it is wise to completely dismiss the danger of political usurpation, but I am convinced we can improve the productivity of the relationship

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liberty but to the very existence of a republic. An executive with a large standing army at his disposal, quite simply, cannot be trusted to make wise choices about the use of force in domestic or international affairs. A weakness of contemporary defense reform is that many reformers write about the use of force in international affairs as though we were still an insulated state. Peter Feaver writes that, “Like an automobile’s airbag, then, the military primarily exists as a guard against disaster” (Peter Feaver, “The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control,” *Armed Forces and Society*, Vol. 23, No. 2 (Winter 1996), p. 152). This may have been what the Founders had in mind – that we could trust a strong, unitary executive in our constitutional system because he was expected only to guard the nation against urgent and unambiguous threats – but American military power has clearly been used for much more creative purposes in the twentieth and twenty-first centuries.

<sup>88</sup> Samuel Finer studied civil-military relations in the less developed, less democratic world, and concludes that political instability coupled with weak structures of governance and a minimal administrative capacity create conditions favorable for military activism and increase the likelihood of a coup d’etat (Samuel E. Finer, *The Man on Horseback: The Role of the Military in Politics* (Westview Press, 1988). See also Samuel Decalo, *Coups and Army Rule in Africa: Studies in Military Style* (Yale University Press, 1976).

<sup>89</sup> Douglas Kinnard, “Civil-Military Relations: The President and the General,” *Parameters*, Vol. XV, No. 2 (Summer 1985), p. 19. His explanation for this development is that the United States found itself in a new role after the war, and this role “required the US to support substantial military forces in being, and necessitated a sustained and active involvement in world affairs no previously part of the American experience. Given this new situation, the manner in which foreign and security problems were conceived, and the processes by which policies were developed and implemented to meet these problems, would have to be different from before the Second World War” (p. 19). I include this passage here because it speaks to the distinction I have been emphasizing in this dissertation between insulated and non-insulated states, and the implications of this distinction for constitutional theory. On the negligible chance of an openly insubordinate military, see also Michael Desch, *Civilian Control of the Military* (Johns Hopkins University Press, 1999), p. 30.

between civilians and military decision-makers in a national security crisis without increasing the probability of such an occurrence.<sup>90</sup>

Let me return to the question with which I opened this section. Would a limited veto in the hands of the chairman of the JCS weaken civilian control of the military? In order to answer this question, it is important to keep in mind that effective civilian control of the military is not synonymous with absolute civilian control of the military. “The best indicator of the state of civilian control,” Michael Desch argues, “is who prevails when civilian and military preferences diverge. If the military does, there is a problem; if the civilians do, there is not.”<sup>91</sup> This is an indicator not of civilian control of the military, I would suggest, but of absolute civilian control of the military. And absolute civilian control is problematic. As Richard Betts argues, “undiluted military autonomy” and “unbridled presidential ambition” both have serious drawbacks.<sup>92</sup>

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<sup>90</sup> Sociological debates that derive from the two-cultures understanding of the military and society dominate the scholarly literature on civilian control. Here the question is less about the military encroaching on political authority than the military imposing its distinct values on a more liberal society. See, for example, Richard H. Kohn, “Out of Control: The Crisis in Civil-Military Relations.” *The National Interest*, No. 35, (Spring 1994); and, for a rebuttal, Colin Powell, et al. “An Exchange on Civil-Military Relations.” *The National Interest*, No. 36 (Summer 1994). For a more scholarly collection of essays, see Peter D. Feaver and Richard H. Kohn, eds., *Soldiers and Civilians: The Civil-Military Gap and American National Security*, (MIT Press, 2001). Andrew Bacevich was among the many scholars who responded to Kohn’s “crisis” piece. “The Cold War legacy,” he wrote, “invests the military with a capacity to tilt the debate in ways that advance its interests but do not necessarily serve the common good.” As a consequence of the military’s supposedly excessive influence on national policy, we need to “reinvigorate civilian control,” by which he means, if I am not mistaken, recommit our nation to the ideal of objective civilian control of the military. This is why he concludes that, “Although returning to the era of George Marshall may be impossible, a fresh and stringent delineation of allowing military prerogatives is in order” (*JFQ*, Autumn / Winter 1994-1995, p. 79). This recommendation expresses a firm understanding of the politics of national security decision-making, but the ideal of objective civilian control of the military, I argue in this section, is not only an antiquated ideal but an obstacle to thinking constitutionally about how to ensure political ends and military means are more closely aligned in a national security crisis.

<sup>91</sup> Michael Desch, *Civilian Control of the Military* (Johns Hopkins University Press, 1999), p. 5.

<sup>92</sup> Richard Betts pursues several very interesting questions in his research, one of which is pertinent here: How should presidents choose and organize their military advisors? Ideally, presidents would find the right balance in their appointments of military officers between “maximizing professionalism and expertise and maximizing executive political control.” Betts calls these two extremes modes of appointment routine-professional and exceptional-political. The former, though preferred by the military and Congress, is uncommon because executives are usually interested in having allies and spokesmen as military advisors. “Exceptional-political appointments, on the other hand, derogate traditional

Another prominent student of civil-military decision-making, Lawrence Korb, insists that “civilian control must not be exercised in such a manner that military opinions and expertise are excluded or downgraded within the decisionmaking process.”<sup>93</sup> Mackubin Thomas Owens makes the same point with greater conviction. Civilian control of the military “is not merely bureaucratic control of senior officers by DOD officials,” he argues. The idea that the military “should not debate a policy advanced by bureaucrats, no matter how bare-brained it may be,” is not how we should understand civilian control.<sup>94</sup> There is also no evidence to suggest that absolute civilian control is necessary to preserve civilian control of the military or that it improves national security decision-making.<sup>95</sup> Allen Millett, a military historian whose approach to defense reform is an excellent point of departure for a constitutional theorist, proposes four tests for effective civilian control of the military.<sup>96</sup> Civilians can be said to exercise control of the military if the following conditions are met:

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professional standards of leadership selection and maximize executive leverage over military leaders.” The ideal would be a compromise between the two methods of appointment. A compromise method is desirable because “the danger implicit in either high autonomy or military alienation are greater than traditionalists or objective control theory admit and less than bureaucratic revisionists fear” (Betts, p. 74). A compromise – as is often the case in politics – is the *ideal*. The government surely needs a measure of both expertise and political control. But in the absence of a constitutional intervention, I would suggest, there is no way to bring this ideal closer to reality.

<sup>93</sup> Lawrence Korb, *The Joint Chiefs of Staff* (Indiana University Press, 1976), p. 223.

<sup>94</sup> Mackubin Thomas Owens, “Civilian Control: A National Crisis?” *Joint Force Quarterly*, No. 66 (Autumn / Winter 1994-1995).

<sup>95</sup> Michael Desch argues that “civilians meddling in matters of military expertise ... is almost as bad as the military involving itself in politics,” and that the country suffers “whenever the civil-military balance is off-kilter in either direction (Desch, Michael, “Bush and the Generals,” *Foreign Affairs*, Vol. 86, No. 3 (May / June 2007)). On the lack of empirical evidence, see Allan Millett, Williamson Murray and Kenneth Watman, “The Effectiveness of Military Organizations,” *International Security*, Vol. 11, No. 1 (Summer 1986); and Suzanne C. Nielsen, “Civil-Military Relations Theory and Military Effectiveness,” *Public Administration and Management*, Vol. 10, No. 2 (Spring 2005).

<sup>96</sup> Millett brings a very unusual perspective to defense reform. As a military historian, he is as skeptical of the lessons of history as he is of the claim that history has nothing important to teach us. As a defense reformer, he is as skeptical of the motives of civilians as he is of the motives of soldiers. His consistently skeptical attitude, I would suggest, makes him a particularly reliable authority on the politics of defense reform.

- 1) The armed forces do not impose their unique values upon civilian institutions and organizations.
- 2) The armed forces have no independent access to military resources of military utility.
- 3) The policies of the armed forces on the recruitment, pay, education, training, treatment, promotion, and use of personnel are not inconsistent with basic civil liberties and individual rights (with some compromises for military discipline and combat effectiveness).
- 4) The use of military force is not determined by the values of the military establishment alone, either for or against military action, either in the conduct of foreign or domestic policies. Conversely, civilian decisions on the use of force should not disregard the relationship of policy ends and military institutional characteristics in terms of personnel, doctrine, training, equipment and morale.<sup>97</sup>

What these tests suggest is that it is a mistake to assume we either adhere to the doctrine of absolute civilian control of the military or the state will be dominated by the military. This assumption turns out to be as dogmatic as the other great either / or I criticize in this dissertation: energy or deliberation. Too much civilian control of the military may not present as grave a threat to a republic as too little, but the danger cannot be ignored. Civilian leaders should not disregard the relationship between policy ends and military institutional restraints, most defense reformers agree, and yet our institutional fidelity to the doctrine of absolute civilian control of the military, I would suggest, increases the odds that they will.

The frequency with which civilians have in fact disregarded military advice since the creation of the national security state is why so many defense reformers continue to promote the antiquated notion that civilian leaders should determine the political aims of military action and military leaders should then decide upon the most effective way to obtain these

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<sup>97</sup> Allan Millett, "The American Political System and Civilian Control of the Military: A Historical Perspective," *Mershon Center Position Papers in the Policy Sciences*, No. 4 (April 1979), p. 3.

objectives.<sup>98</sup> This is the ideal of objective civilian control of the military.<sup>99</sup> But as Eliot Cohen and other scholars argue, the shift from total to limited war in the postwar period – the emphasis on small wars and counterinsurgency operations – has made it nearly impossible to distinguish between political and military problems. Military historian William Emerson expresses a similar opinion: “In war a very narrow line separates decisions of policy, the sphere of civilian leadership, from decisions of strategy, the sphere of military commanders; the massive pressures of modern total war, furthermore, and the growing professionalization of military command have well nigh obliterated that line.”<sup>100</sup> As a result of these developments and complexities, the ideal of objective control is impractical.<sup>101</sup> The consequences for civil-military relations – more specifically, crisis decision-making – is that we need an alternative to

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<sup>98</sup> One of the original conclusions Richard Betts arrived at in his 1977 survey of the postwar role of American military leaders on decisions on the use of force was that no president in the cold war era “ever ordered an intervention when at least one top military official recommended firmly against it” (*Soldiers, Statesmen, and Cold War Crises*, p. 96). In a preface to an edition of his book that came out in 1991, he writes that “Ronald Reagan invalidated that point when he dispatched U. S. forces to Lebanon in 1982” (p. xii). The pattern that has emerged in the post-cold war era, I think most national security experts would agree, is the opposite of the one that existed during the cold war. I should also point out here that one difference between these two periods of time is that the JCS committee system was replaced by our strong chairman system, which designated the chairman as the principle military advisor to the president and secretary of defense and sharply diminished the influence of the service chiefs.

<sup>99</sup> For example, David Hendrickson writes that civilians have the “right to get rid of incompetents in the officer corps,” as well as “the duty to insist that military capabilities be consistent with political objectives.” Nevertheless, he argues, “civilian control and national security are badly served if civilians do not simultaneously recognize the importance of vesting responsibility and authority for certain matters in the officer corps – if ... they do not recognize that there are some matters that must be delegated to the military” (David Hendrickson, *Reforming Defense: The State of American Civil-Military Relations* (Johns Hopkins University Press, 1988), p. 6). Michael Desch also argues that the best solution to dysfunctional civil-military relations is to “return to an old division of labor: civilians give due deference to military professional advice in the tactical and operation realms in return for complete military subordination in the grand strategic and political realms.” (Michael Desch, “Bush and the Generals,” *Foreign Affairs*, Vol. 86, No. 3 (May / June 2007).

<sup>100</sup> William Emerson, “Franklin Roosevelt as Commander-in-Chief in World War II,” *Military Affairs*, Vol. 22, No. 4 (Winter 1958-1959), p. 182.

<sup>101</sup> As we discussed Chapter 3, it is precisely because these two spheres of activity have always been partially inseparable that Clausewitz thought a process of mutual adjustment and adaptation was necessary to ensure that war was a sensible endeavor. Bernard Brodie, a student of Clausewitz, argues that, “Unless it is in pursuit of a reasonable political objective, any nation resorting to war is simply perpetuating wanton destruction of life and goods on a vast scale.” Brodie is surely correct to argue that political objectives must be reasonable if war is to be sensible, but he is not a defense reformer or constitutional theorist and does not suggest how a republic might increase the odds of reasonableness.

the ideal of political and operational autonomy.<sup>102</sup> And we need an alternative decision-making model not only because of the kinds of wars we now fight but because there was always a debilitating assumption at work in the ideal of objective civilian control of the military: the assumption that political objectives and military means would align in the absence of a formal process of adjustment and adaptation.<sup>103</sup> Defense reformers and constitutional theorists must keep in mind that political ends and military means do not align by default; would not align with sufficient regularity even if the ideal of objective civilian control of the military were realized; and that misalignment puts lives and treasure unnecessarily at risk.<sup>104</sup> Despite the centrality of the political purpose in war – the absurdity of allowing means to act independently of political purposes – the political aim must also not be allowed to act as a tyrant. Given the present organization of the executive branch, however, the president – and, by extension, the secretary of defense, if he has the support of the president – possesses in civil-military relations in general, and decisions on the use of force in particular, the equivalent of “monarchical powers.” As Hamilton puts it, describing a king unbound by the resolutions of a constitutional council, our president is, in his relationship with the military, “the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole

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<sup>102</sup> Cohen focuses in his book on four democratic leaders who did not respect the political-operational norm: Lincoln, Clemenceau, Churchill and Ben-Gurion. I do not want to debate the details of these cases or the implications he draws from them, but I have no objection to the argument that these two spheres of activity cannot be neatly separated. See Eliot Cohen, *Supreme Command: Soldiers, Statesmen and Leadership in Wartime* (Free Press, 2002).

<sup>103</sup> I do not at all mean to suggest that civilians should defer to military judgment. My intention is to control national security factions and combat the politicization of crisis decision-making. To accomplish this goal – to at least approximate this goal – civilian leaders, who can easily subvert deliberative processes in our strictly hierarchical system if they choose to do so, must be “forced” to deliberate. See Chapter 3 on the ways constitutional checks and balances promote deliberation in a constitutional system.

<sup>104</sup> As I argued in a previous chapter, the assumption that the doctrine of absolute civilian control of the military solves the ends-means problem has not withstood the test of time. Simply entrusting all decision-making authority to civilians in the executive department – assuming that as long as generals are fully subordinate to their civilian counterparts – does not guarantee that force will be used sensibly.

discretion.”<sup>105</sup> But the political aim must “adapt itself to its chosen means” if war is to be fought wisely and sensibly. And the only way to ensure that the process of adaptation and adjustment is respected and productive is to apply the lessons of constitution theory to the structures of our modern national security state.<sup>106</sup>

Let me end this section with a summary of my basic argument. A chairman of the JCS with a limited veto over a tightly circumscribed power would not weaken *effective* civilian control of the military. My proposal would not strengthen the chairman with respect to the legislature or, for that matter, the service chiefs, the service secretaries or combatant commanders. The position of the chairman is presently closer to that of an ambassador than a justice of the peace, meaning that and the chairman is often chosen more for his loyalty to the administration than the quality of his independent advice, and his advice, even when it is independent and of high quality, can be easily ignored. A chairman of the JCS simply cannot play a sufficiently constructive role in a national security crisis if he remains entirely dependent on his civilian counterparts. Even with a deliberative separation of power in place, the president would only “depend” on his top military advisor to the extent that he must participate in a formal deliberative process if he decides to use military means to pursue his political objectives. Despite a minor departure from the principle of unity, the decision to use military force would remain the president’s alone. No matter what the chairman advises or recommends – no matter how strongly he might disagree with the judgment of his civilian counterparts – the president would be under no obligation to use force if he thinks that doing so would be unwise or ineffective. And even with this deliberative device inside the executive department, the

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<sup>105</sup> Hamilton, No. 70, Paragraph 19.

<sup>106</sup> Betts, p. 87.

president would still be able to override the chairman's veto and remove the chairman from his office with the support of a special legislative-executive council.<sup>107</sup>

## Conclusion

Charles Stevenson, a military historian and political scientist, argues that the military's dual civilian leaders – the president and congress – have effectively exercised civilian control over strategy, rules of engagement, force size, equipment and organization.<sup>108</sup> Contrary to some

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<sup>107</sup> There are numerous possibilities for the composition of this council. As long as it were small and could convene in secrecy, it would serve its purpose as a safeguard against the abuse of the chairman's new power. Let me also mention here that there are several reasons to believe that a deliberative separation of powers would actually *strengthen* civilian control of the military. The existence of the legislative-executive council, for example, would give the legislature an oversight role that it has lacked. The absence of such oversight, one could argue, an absence that has been responsible for sharp divisions between the legislature and executive departments over the years, has weakened civilian control. A deliberative separation of power could also strengthen civilian control by decreasing the military's distrust of civilian decision-makers in the executive department. Amendments to the National Security Act of 1947, Christopher Bourne reports, "resulted in a command structure that marginalized the judgment of senior officers" ("Unintended Consequences of the Goldwater-Nichols Act," p. 102). David Petraeus argues that "while the military still accepts emphatically the constitutional provision for civilian control of the armed forces, there remain from the Vietnam era nagging doubts about the abilities and motivations of politicians." Traditional military suspicion of civilians hardened after the war "into more acute misgivings about civilian officials" ("Lessons of History and the Lessons of Vietnam," pp. 45, 48). Undoubtedly a similar hardening of suspicion has occurred as a consequence of suspect civilian decision-making in the recent wars in Iraq and Afghanistan. When General Smith asked in the 1980s, "What precise role do the civilian authorities want to retain to themselves, and give to the military?" and proceeded to argue that the office of the secretary of defense "cries for attention and improvement," he was tacitly expressing a similar set of misgivings about the performance of civilian officials (William Y. Smith, "The U. S. Military Chain of Command – Present and Future," in Robert J. Art et al., eds., *Reorganizing America's Defense* (Pergamon and Brassey's International Defense Publishers, 1985), p. 326). Christopher Gibson argues that the Bush administration employed "an onerous and invasive method of subjective control of the military not seen since the Johnson administration and the McNamara Pentagon" (*Securing the State*, p. 14). What I want to suggest here is that doubt and distrust are not just psychological burdens. At a certain level they surely have an impact on how faithfully and how effectively the military carries out its responsibilities.

<sup>108</sup> The problem with the congressional side of civilian control: "Congress has historically felt that the President should use almost any legal means and organizational scheme he deems necessary to perform his duties as Commander in Chief" (Christopher Bourne, "Unintended Consequences of the Goldwater-Nichols Act," *Joint Force Quarterly* (Spring 1998), p. 102).

prominent scholars he does not believe there is any kind of crisis in civil-military relations. He also believes that the lack of a crisis is partly due to the fact that the US military is treated by the president as having a veto over decisions on the use of force. It does not exercise this unofficial veto in a formal sense, but there is evidence to suggest that the military is “usually granted terms and conditions for the planned use of force.”<sup>109</sup> The logic behind this assertion is that presidents recognize “the prestige of the military and foresee high political risks if they disregard military advice.”<sup>110</sup>

The evidence to support the claim that the terms and conditions for the use of force recommended by the military are usually accepted, I would suggest, is ambiguous at best. Certainly there are plenty of military historians who would argue for an adverb that suggests much less regularity. But even if civilian leaders have deferred with some regularity to military judgment on operational matters, we can attribute this deference to two other factors: presidents being deliberative by nature (or by principle), and the understanding of civilians that the operational side of the ends-means equation was outside their competence. The former represents too great a gamble for constitutional theory, while the latter has not held since the old distinction between war and peace began to blur in the middle of the last century and the “chasm between pre-intervention political decision making on the one hand and expert non-political execution of decision on the other” narrowed significantly.<sup>111</sup>

My question to scholars who believe that a hypothetical veto serves an essential purpose is this: why not vest the military with a formal veto power? Why put so much faith in informal deliberative mechanisms when the constitutional theory on which our republic was founded teaches us they will not be any more effective at promoting deliberation between

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<sup>109</sup> Stevenson, p. 207.

<sup>110</sup> *Ibid.*, pp. 209-210.

<sup>111</sup> Richard Betts, p. 51.

civilian and military leaders than parchment barriers are at inspiring the three great branches of government to cooperate? We have a problem and a paradox: “In the strategic sphere, in all that concerns the structure and deployment of military forces,” William Emerson writes, “political leadership must be responsive to technical military opinion and advice, but it must, at whatever cost, shape and direct the military instrument to support and serve its own higher political purposes.”<sup>112</sup> If we want to resolve this apparent contradiction – if we want to increase the likelihood that our political leadership will be responsive to military advice and direct the military instrument to support its higher political purposes – we need to think constitutionally about civil-military relations in our modern national security state.

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<sup>112</sup> William Emerson, “Franklin Roosevelt as Commander-in-Chief in World War II,” *Military Affairs*, Vol. 22, No. 4 (Winter 1958-1959), p. 182



## 9 Conclusion

*The study of history provides no clear, certain path for understanding the future. At best its lessons are uncertain and ambiguous. No matter how sophisticated and eloquent historians may be, they can only present rough approximations of the past, much less the present or the future. Yet, history, writ large, still represents the best available laboratory mankind possesses for understanding the future.*

- Williamson Murray

*The question for a nation, particularly for a very powerful nation, is whether the necessary exercise of its virtue in meeting ruthlessness and the impressive nature of its power will blind it to the ambiguity of all human virtues and competencies.*

- Reinhold Niebuhr

*However it may be in other spheres in life – the artistic, the religious, or the pursuit of purely theoretical truth – in political thought and endeavor a man’s reward are with the living, and his work is approved not by any finality of achievement, but in terms of further tasks and problems, further efforts and anxieties, dangers and rescues, which it makes possible.*

- W. B. Gallie

Let me end this dissertation with a quote from Clausewitz. He is not only a great and provocative theorist of war, but it is his sensitivity to the politics of war that that draws our attention to a fundamental problem that was neglected by the constitutional theory upon which our republic was founded.

The first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish by that test the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature.<sup>1</sup>

This act of judgment – the first, the supreme, the most far-reaching in war and peace – is simply beyond the capacity of a single man, or a single faction within the executive branch, to perform adequately. It is a decision, a process, I would suggest, which requires a formal separation of powers between the civilian and military leaders who collectively hold the fate of our nation in their hands.

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<sup>1</sup> Carl von Clausewitz, *On War*, trans. by Peter Paret (Princeton University Press, 1976), p. 88.

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