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CONTROL OVER ARMED FORCES

I

In the evolution of popular rule no question has been of more vital significance than this: "Shall the army be subordinate to or independent of the representative government?" A German scholar has said that the true test to determine the essential character of a state is to answer the question, "Whom does the army obey?" When the doctrine of divine right was in full flower on the continent of Europe, the sovereign considered the army as a personal tool, a dynastic possession. The absolute control and indestructible fidelity of the army was looked upon as one of autoocracy's mightiest assets. It was a personal heritage transmitted from father to son, from generation to generation. While in most of the European countries, by the beginning of the twentieth century, the doctrine of divine right had lost its force, in Germany as late as 1914, the Kaiser in a Proclamation to the Army of the East declared, "On me as German Emperor the spirit of God has descended. I am his Weapon, his Sword and his Viceregent." A few years before William II said, "The soldier and the army, not parliamentary majorities, have welded together the German empire—my confidence is placed in the army."

II

An examination of the governments of the world at the time the Constitution of the United States was adopted will disclose that in every country the power to declare war was vested in the Executive branch. The framers of our Constitution desired to break away from the beaten path. They intended that the most popular and most representative body in the new government they were establishing should have discretion in this all important matter. Madison summed up the matter by saying, "The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war and most prone to it. It has accordingly, with studied care, vested the question of war in the legislature."¹ Such is the status of this power from the standpoint of constitutional theory.

¹ Writings—Hunt Edition, VI, 312.

But as a matter of actual practice, the situation is entirely different. It would be correct to generalize and say that in our four foreign wars, Congress has only exercised the formal power of legalizing war as a status after the President has created a situation which has made the fact of war inevitable.² The reason for the failure of this attempt to vest in the broadly representative legislative branch the discretionary power of declaring is not to be found in any ambiguity in the formulation of the constitutional provision. Article 1, section 8, clause 11, is as concise and definite as it can be written. It reads, "Congress shall have the power to declare war." Our constitutional practice has frustrated the theory and intent of the framers because of the President's dominating position as director of foreign affairs and as commander-in-chief of the army and navy.

Mr. Gerry in the Constitutional Convention expressed the orthodox view when he averred that he "never expected to hear in a republic a motion to empower the executive alone to declare war"³ but suppose that power had been given. Can any one who is familiar with our history contend that we would have had any more or any less foreign wars, if the power of declaring war had been specifically vested in the executive branch? The attempt on the part of the framers to clog rather than facilitate the declaration of war has been a signal failure. By virtue of the growth of Presidential power the executive so manages the diplomatic affairs that Congress can do no more and no less than to occupy the position that the President has put the country into. Our legislative body, in respect to the important power of declaring war, has virtually been reduced to a legitimizing agency, subservient to the President, deprived of initiative and discretion. Its only function is to clothe a de facto situation with de jure habiliments and thus give it respectability.⁴

III

The Constitution of the United States in article 2, section 2, clause 1, that "The President shall be commander-in-chief

²For detailed discussion of this point see the author's article, "The Declaration of War," in 61 American Law Review 410 (1921).

³Journal of Constitutional Convention—Hunt Edition 11, 188.

⁴See author's article "The Theory of the War Power Under the Constitution", 60 American Law Review 31.

of the army and navy of the United States when called into the actual service of the United States." What is the nature and extent of this power?

First, it should be noted that there are no express limitations on the President's power as commander-in-chief of the army and navy. But although the framers of the Constitution gave the President this apparently unlimited power, they gave him no army and navy to command. For that he must come to Congress.⁵

Second, with reference to the militia of the several states the Constitution expressly limits the President's command in several respects. (a) He has command of the militia only "when called into the actual service of the United States."⁶ In *McCall's* case a United States District Court declared that "whether a man is lawfully in military service must always be a *judicial* question. It is peculiarly a question for decision under habeas corpus."⁷ (b) The President cannot, upon his own authority, order the militia into the "actual service of the United States." That power is *expressly* given to Congress.⁸ (c) Moreover, when the militia is in "the actual service of the United States," the President is limited in the purposes for which he may use the said militia. Article 1, section 8, clause 15, provides that Congress can call forth the militia for three purposes: "to execute the laws of the Union, to suppress insurrection and to repel invasion."

Third—It follows as a corollary from what has been said that the President is not commander-in-chief of the *citizens* of the United States, not in the army, navy or organized militia.

Fourth—No President has ever assumed actual personal command in the field.

IV

The Constitution contemplates a dual control and a restricted use of the militia. Elihu Root, in his report as Secretary of War declared that "the relations of the militia to the federal government have never been defined or settled."⁹ At

⁵ Art. I Sec. 8. Clauses 12 and 13.

⁶ Art. 2, Sec. 2. Clause 1.

⁷ 15 Federal Cases 1225-1231.

⁸ Art. 1 Sec. 8. Clause 15.

⁹ Annual Report of Secretary of War 1899-1903; p. 283.

one time the vital issue was, which government shall decide who shall be included in the militia? A state court finally passed upon this ambiguity and decided that Congress had exclusive power to determine who shall compose the militia.¹⁰ At another time the question was foremost, who determines whether an "insurrection" or "invasion" exists, the states or the federal government? The Supreme Court of the United States in *Martin v. Mott* decided that the federal government had the power to make this determination.¹¹

In an early case Justice Story said, "It is almost too plain for argument that the power given to Congress over the militia is of a *limited* nature.¹² The very wording of the provision indicts that the militia is not to be used outside the country." "Insurrections" and "invasions" naturally refer to *internal* disorders and the "laws of the Union" have no extraterritorial effect.¹³ Woodrow Wilson in four speeches delivered in January and February, 1916, at New York, Cleveland, Omaha and Topeka stated that the militia could not be sent out of the country. But the Conscription Act of May 18, 1917, provided for the drafting of the National Guard into the "military service of the United States." It may be argued that the militia *as such* was not sent outside of the United States, because of the change in nomenclature resulting from the Congressional act.

V

The power of Congress to raise and support armies is expressly conferred by Article 1, section 8, clause 12. This grant of power is limited expressly by the provision that "no appropriation of money to that use shall be for a longer term than two years." This obviously is an attempt to provide a democratic control over the army. It will be of little avail, however, unless the right of Congress to discuss the aims and objects of a war is recognized while the war is in progress.

Does Congress have an unlimited choice of *means* in the

¹⁰ Opinions of the Justices 80 Mass. 614 (1858).

¹¹ 12 Wheaton 19, 29.

¹² *Houston v. Moore*, 5 Wheaton 51.

¹³ See Pomeroy, Constitutional Law p. 387; 29 Opinions of Attorney General p. 322-324; Upton, Military Policy of U. S. 196-197; Von Holst Constitutional Law p. 107; Ordonaux—Constitutional Legislation in the United States 501-502; Leonard Wood, Our Military History 63-64.

carrying out of this grant of power? When read in the light of English history and in connection with the militia clauses it would seem that the power conferred upon Congress was the power to raise armies by the ordinary English method of voluntary enlistment. The use of money is the only instrumentality provided for that purpose.¹⁴ But the Supreme Court of the United States has held otherwise.¹⁵

VI

Although the attempt of the framers of the Constitution to provide a democratic control over the army has not been wholly successful, let it be said to their credit that they have made a remarkable contribution toward that end. The reader should refer to several cases decided by the Supreme Court of the United States that stand out as landmarks in the great struggle against arbitrary power: *ex Parte Milligan*, 4 *Wallace* 2; *Mitchell v. Harmony*, 13 *Howard* 115; *United States v. Lee*, 106 *U. S.* 196. There should be no room in American constitutional law for the dogma, "Inter arma silent leges," or the doctrine of executive prerogative. The "war power" and the President's power as commander-in-chief, when rightly understood, are *constitutional* powers. The advocates of unlimited power in war-time have failed to glean from the pages of history that the strict subordination of the military to the civil power is at the foundation of freedom and that the first object of a free people is the preservation of their liberty, and that under a constitutional system such as ours liberty can be preserved, not by a blind reliance on the benevolence of temporary majorities in power, but by effectively maintaining constitutional restraints.

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¹⁴ Speech of Senator Hardwick, Hearing before Senate Committee on Military Affairs; 65 Congress 1 Session, Sept. 27, 1917 p. 6.

¹⁵ Selective Draft Cases 245 *U. S.* 366—See author's article, *Conscription for Foreign Service* 60 *American Law Review* p. 206.