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*Editor's Note: This issue opens with a four-part dialogue between **Robert Turner** and **Lou Fisher** concerning the authority of Congress with respect to the continuation of U.S. military involvement in Iraq. This dialogue is the first in a series that we will be presenting to you in these pages in the coming months. We are also proud to present in this issue an essay by **Jason Mazzone** discussing constitutional grounds for federal commandeering of state and local resources during emergencies; **Craig LaMay**'s review of Daniel Gerstein's new book on strategic leadership; and **Colonel Kelly Wheaton**'s essay describing the strategic advantages of lawfare for the U.S.*

The Power of Congress to Restrain the President's Exercise of Military Force

Robert F. Turner

The current debate over the constitutional power of Congress to block a presidential decision to deploy reinforcements from a rear area during a period of authorized hostilities reveals a tragic ignorance of national security law. The Founding Fathers gave both Congress and the President important powers related to war, but the role of each branch was distinct and the specific powers were not in any meaningful sense "shared" (other than that both branches have important roles in the process). Congress, for example, must "raise and support" an army before the President may exercise his "commander in chief" power. Without appropriations, no major armed conflict can be long sustained; and Congress can "make rules for the Government and Regulation of the land and naval forces," "make Rules governing Captures on Land and Water," and "define and punish . . . offenses against the Law of Nations." (By this last power, for example, Congress may criminalize inhumane treatment of detainees by U.S. military or intelligence personnel.)

Space will not permit a serious discussion here of the scope of the power "to declare War," but it cannot be understood without appreciating that it was viewed as an "exception" to the general "executive Power"

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Democratic Checks on Presidential Wars

Louis Fisher

The framers closely studied the war power models fashioned by such prominent writers as John Locke and William Blackstone, who placed all of foreign affairs and the war power solely in the hands of the executive. In his *Commentaries*, Blackstone defined the king's prerogative broadly to include the right to declare war, send and receive ambassadors, make war or peace, make treaties, issue letters of marque and reprisal, and raise and regulate fleets and armies.

Creating a Republic

The model of government fashioned by the framers placed sovereign power with the people, not with a monarch or aristocracy. The foreign policy theories of Locke and Blackstone were thoroughly repudiated. Not a single one of Blackstone's prerogatives was granted to the President. Those powers are either assigned entirely to Congress (declare war, issue letters of marque and reprisal), raise and regulate fleets and armies) or shared between the Senate and the President (appointing ambassadors and making treaties).

The framers vested the war power in Congress because their study of history convinced them that

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The Power of Congress...

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vested in the President by Article II, Section 1 of the Constitution. As Louis Henkin observed, the term "executive power" was not defined because it was understood by the framers from their reading of Locke, Montesquieu, and Blackstone. All of these writers placed the control of what Locke called "war, peace, leagues and alliances" exclusively in the hands of the executive. As Jefferson explained in 1790, "the transaction of business with foreign nations is executive altogether," and "exceptions" vested in the Senate are to be "construed strictly." Washington recorded in his diary that James Madison and Chief Justice John Jay shared Jefferson's view, concluding that the Senate had "no Constitutional right to interfere" in this business beyond its constitutional negative over treaties and nominations. Jefferson's great rival of the day, Alexander Hamilton, observed as *Pacificus* three years later that because "the power of the Legislature to declare war" was an *exception* "out of the general 'executive power' vested in the president," it was to be "construed strictly, and ought to be extended no further than is essential to [its] execution."

When the Constitution was written, formal declarations of war were associated only with major offensive (what today we would call "aggressive") initiations of armed conflict. As Hugo Grotius explained in 1620, "no declaration is required when one is repelling an invasion, or seeking to punish the actual author of some crime." Strictly construed, that power is as much an anachronism today as the power given Congress in the same clause to "grant Letters of Marque and Reprisal" – a means of authorizing "privateers" to engage in warlike acts that was outlawed by the 1856 Treaty of Paris. The kinds of war associated with formal declarations were outlawed by the 1928 Kellogg-Briand Treaty and again by the 1945 UN Charter – and no government has clearly issued such a declaration since the Charter entered into force. (This is not to suggest that it is not a prudential practice for presidents to seek formal statutory authorization from Congress before sending U.S. forces into major combat, as was done in connection with Vietnam, Desert Storm, the war on terror, and Operation Iraqi Freedom.)

A major focus both at the Philadelphia Convention and in the state ratification conventions was the importance of separating the "power of the sword" from the "power of the purse." On June 6, 1789, George Mason explained: "The Executive power ought to be well secured ag[ain]st Legislative usurpations on it. The purse & the sword ought never to get into the same hands (whether Legislative or Executive.)" On July 17, Madison noted the tendency of state legislatures to usurp all powers of government, adding that "[i]f no effectual check be devised for restraining the instability & encroachments of" the legislature, "a revolution of some kind or other would be inevitable." Writing to Madison about the new Constitution from his diplomatic post in Paris later that year, Thomas Jefferson added that "the tyranny of the legislature" was of far greater concern to him than abuse by the executive.

The biggest problem today may be the perception that in a republic there can be no "unchecked" powers and thus Congress must carefully monitor and control the activities of the executive. That this was not the understanding of the Founding Fathers is evident from the behavior of all three branches of our government. In the landmark 1803 case of *Marbury v. Madison*, Chief Justice John Marshall noted that the Constitution

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had invested the president with important discretionary powers, adding:

[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Just last June, writing for the Court majority in the *Hamdan* case, Justice Stevens quoted with favor this 1866 language by Chief Justice Chase in *Ex parte Milligan*: "[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns . . . ."

Consider also this excerpt from a 1922 Senate floor debate over a proposed resolution directing the president to bring American soldiers in Germany back to the United States. The legendary Senator William Borah – a famed isolationist who had led the fight to block U.S. membership in the League of Nations (a legitimate Senate power), and who admitted he wished the troops would be brought home – told first-term Senator James Reed:

We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.

Senator Reed began his response: "I wish to change my statement. We could not make him do it . . . ."

As I listen to the modern congressional debates on this issue, I realize how poorly our law schools have educated our current crop of legislators. They have already fulfilled whatever remains of their power to "declare War" by enacting the 2002 AUMF. They certainly have the power to defeat the efforts of our forces by denying them additional bullets and food, or refusing to authorizing the raising of additional forces. But they may not tell the Commander in Chief in the midst of an authorized war that he may not move reserve forces from a rear area to the battle zone (the so-called "surge"), nor can they set a specific date for withdrawal of whatever forces they have created or tell the president when he may or may not attack a specific target. That would give Congress control of the purse and the sword.

As for the outrage that this president fails to inform Congress about his military plans, one can only wonder how some of these legislators would have reacted had they been in office sixty-three years ago to not having been briefed in advance about FDR's "surge" in U.S. forces on the European mainland that began on D-Day, June 6, 1944 – a "secret" operation that in that single day claimed more than *twice* the number of American lives than have been lost as a result of hostile action in Iraq in the past four years. And those figures would likely have soared even higher had Congress and the media exposed our government's "lying to the people" and deception efforts in Operation Fortitude South – by which General George S. Patton used bogus radio traffic and a fictitious army to persuade German intelligence that the Normandy invasion would instead take place at Pas de Calais. Thank goodness in those days Congress respected the separation of power and understood, in the words of John Jay in *Federalist* No. 64, that the Constitution had left "the business of intelligence" to be managed by the President "as prudence might suggest."

Professor Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He chaired the Standing Committee from 1989-1992 and edited the Report *until 1999. His testimony on this issue before the Senate Judiciary Committee is posted at: www.virginia.edu/cnsl/pdf/Turner-SJC-testimony30Jan2007.pdf .*

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executives, in their quest for fame and glory, had too great an appetite for war and little care for either their subjects or the long-term interests of their country. John Jay warned in Federalist No. 4 that "absolute

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monarchs will often make war when their nations are to get nothing by it" and are prone to engage in wars "not sanctified by justice or the voice and interests of his people." Substituting an elected President for an absolute monarch did not prevent the United States from engaging in such ruinous wars as Vietnam and the current military operation in Iraq.

Joseph Story, who served on the Supreme Court from 1811 to 1845, similarly wrote about the importance of placing in the legislative branch the decision to go to war. As he said in his *Commentaries*, the power to declare war "is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation" because war "never fails to impose upon the people the most burthensome taxes, and personal sufferings." He found war "sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead."

Offensive and Defensive Actions

The framers understood the need to have the President take certain defensive actions, such as having "the power to repel sudden attacks." Otherwise, the commitment to war was reserved to lawmakers elected by the people. With the exception of Pierce Butler, the framers were unanimous in stripping the President of any authority to initiate or commence war. George Mason, for example, spoke "agst giving the power of war to the Executive, because not [safely] to be trusted with it." In 1793, James Madison warned that war was "the true nurse of executive aggrandizement."

Until President Truman went to war in Korea in 1950, without ever coming to Congress for authority, all Presidents understood that the branch of government empowered by the Constitution to take the country from a state of peace to a state of war was Congress. That fundamental principle was understood by all three branches. In *Little* v. *Barreme* (1804), Chief Justice John Marshall ruled that when a presidential proclamation in time of war conflicted with statutory policy, the statute prevailed. Ruled a circuit court in the 1806 *Smith* case: "The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids." Does the President "possess the power of making war? That power is exclusively vested in congress."

Those who promote unilateral and plenary power for the President in matters of war frequently cite *The Prize Cases* (1863), which upheld Lincoln's blockade of rebellious states. However, Justice Grier carefully limited presidential power to defensive actions, noting that the President "has no power to initiate or declare a war against a foreign nation or a domestic State." During oral argument, Richard Henry Dana, Jr., who was representing the President, acknowledged that Lincoln's actions had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*." That is vested only in Congress."

Commander in Chief Clause

Advocates of executive power argue that the title "Commander in Chief" empowers the President to initiate military operations against other countries and dictate the scope and purpose of combat. It does no such thing. Such a reading would destroy the system of self-government, separation of power, and checks and balances established by the framers.

The President is Commander in Chief "of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Congress, not the President, does the calling. Article I gives Congress the power to provide "for calling forth the Militia" and empowers Congress to raise and support armies and navies, make rules for the regulation of the land and naval forces, and provide for organizing, arming, and disciplining the militia.

The Commander in Chief Clause provides for unity of command, but the President's authority to bring unity of purpose does not deprive Congress of its duty to monitor war and decide whether to restrict or terminate military operations. The legislative judgment to take the country to war carries with it a duty *throughout the conflict* to determine that military force remains in the national interest. As with any other statute, Congress is responsible for monitoring what it has set in motion. Congress never loses control.

The title "Commander in Chief" is a crucial means of preserving civilian supremacy. The person leading the armed forces would be a civilian President, not a military officer. Just as military officers are subject to

the direction and command of the President, so does the principle of civilian supremacy make the President subject to the direction and command of members of Congress. They are the representatives of a sovereign people.

Democratic Controls

Much of the resistance to congressional debate on the Iraq War is premised on an attitude that makes presidential wars immune to democratic checks. Critics of Congress argue that any type of legislative challenge will "embolden the enemy" and "damage troop morale." Those assertions make it impossible to reexamine a war, even if it undermines national security and weakens the war on terrorism. The merest objection by anyone, in public or private life, would be disallowed.

Supporters of the Iraq War say that any challenges to it show a lack of support to U.S. troops, even putting them in greater danger. In fact, what places soldiers in harm's way is a war that was never justified initially and is not justified now. Legislative action can redeploy soldiers and place them in more secure locations. Once war has a declining value or purpose, it is the constitutional responsibility of Congress to rethink and reshape a military commitment.

The framers did not put their trust in monarchs, aristocrats, elites, or experts. They placed their faith in republican government: the belief that people can govern themselves through elected officials. Over its history, Congress has often enacted legislation to restrict and limit military operations, relying on appropriations bills and language placed in authorizing legislation to impose a variety of conditions, constraints, and limitations.

Much attention has been devoted to Justice Jackson's concurrence in the Steel Seizure Case, where he spoke of three categories and how they describe the scope of presidential power. He offered the categories as "a somewhat over-simplified grouping." Of much greater significance is what Jackson said toward the end of his opinion, where he returns to basic constitutional principles: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." That is the Constitution we inherited. It is the one we need to preserve.

Louis Fisher is a Specialist in Constitutional Law at the Law Library of the Library of Congress, and the author of, among others, Presidential War Power (2d ed. 2004).

Turner Replies

As is clear from my original piece, the Framers did *not* reject Locke or Blackstone — or for that matter Montesquieu, who also viewed war and foreign affairs as part of the "executive" power and whom Madison in *Federalist* 47 referred to as the "celebrated . . . oracle" who was always consulted and cited on separation of powers. Jefferson called Locke's treatise on civil government "perfect," and Blackstone was repeatedly cited with approval by the Framers.

Congress was *not* given "the war power." On August 17, 1787, Madison successfully moved (with but a single negative vote) to narrow the power of Congress from to "make war" to "declare War," and recorded in his *Debates* that a key consideration was that "make war" might be understood to "conduct" it, which was an "executive function." Declaring war was a formality exercised (rarely, in practice) *prior* to the start of an all-out *aggressive* war – and involved no role in the conduct (or ending) of war. One might draw a parallel to the Senate's power of "advice and consent" over cabinet appointments, which Madison persuaded Congress in 1789 (as an "exception" to the president's "executive Power") included no power over the *removal* of those officers.

Lou is equally mistaken about Truman's behavior in Korea. As I pointed out in a 1996 article in the *Harvard Journal of Law & Public Policy*, once top-secret records show that Truman repeatedly asked to address a joint session of Congress on Korea, and that he actually had Acheson draft an AUMF. When various congressional leaders told him to "stay away from Congress" and assured him he had authority to go to war under the UN Charter and the Constitution, Truman acquiesced.

Little v. Bareme involved a statute regulating "captures . . . on water," one of the expressed "exceptions" to the President's "executive Power" vested in Congress by Article I, Section 8. Similarly, the Steel Seizure case did not involve the President's power to fight a war, but rather was (as both Black for the majority and Jackson in his concurrence repeated emphasized) an issue of "internal affairs" and "domestic" policy. Truman had authorized the seizure of

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private property in this country without the "due process of law" required by the Fifth Amendment. Indeed, in footnote 2 Jackson distinguished *Youngstown* from *Curtiss-Wright*, noting *Curtiss-Wright* "does not solve the present controversy. It recognized internal and external affairs as being in separate categories . . . ."

The Supreme Court has repeatedly noted that the legislative and executive branches are co-equal representatives of the American people. Lou would anoint Congress king, asserting "the principle of civilian supremacy make[s] the President subject to the direction and command of members of Congress." Jefferson complained in his *Notes on Virginia* that the legislature had usurped all governmental powers, which was "precisely the definition of despotic government." There was no safety in vesting all power in an elected legislature, Jefferson reasoned, as "173 despots would surely be as oppressive as one."

Fisher Replies

Bob Turner begins by claiming that "the term 'executive power' was not defined because it was understood by the framers from their reading of Locke, Montesquieu, and Blackstone. All of these writers placed the control of what Locke called 'war, peace, leagues and alliances' exclusively in the hands of the executive." Bob correctly summarizes the executive-centered model of those writers but neglects to mention that the framers plainly repudiated that model. Not a single one of the external powers and prerogatives that Blackstone vested exclusively with the king ended up with the President. Not one.

Jefferson's explanation in 1790 about "the transaction of business with foreign nations is executive altogether" does not help Bob. First, Jefferson was writing about a very narrow dispute concerning the Senate's role in the appointment of ambassadors and consuls. Jefferson had no cause to address the larger role of Congress or the particular prerogatives of the House, such as the power to grant or withhold legislation and appropriations. He knew enough of those powers to persuade President Washington not to try to circumvent the House when entering into a treaty with Algiers.

Second, the passage speaks of "transactions," which means some form of communication between two parties. Read Jefferson's language as expansively as you like and it fails to give the President primacy over foreign affairs, much less a foothold to use military power unilaterally. At best it says that whenever Congress and the President act jointly to formulate foreign policy, it is the President who communicates, transmits, and explains that policy to other nations. Obviously Jefferson never believed in the Locke/Blackstone model, for otherwise he would not have told Congress in 1801 that as President he had taken certain actions in the Mediterranean against Barbary pirates but he was "unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense." He knew that any military operation of an offensive nature was to be decided by Congress.

Bob claims that James Madison, John Jay, Jefferson, and Washington concluded that the Senate had "no Constitutional right to interfere" in treaties and nominations other than its constitutional negative. Bob totally ignores the rich and unbroken history of lawmakers being actively involved in the drafting and negotiation of treaties and in the pre-nomination process. It is fanciful to suggest that Senators sit passively and inert until a treaty or a nomination is presented to them.

Finally, Bob relies on *Marbury* v. *Madison* to suggest that Chief Justice John Marshall recognized that "no power" can control the discretionary acts of the Executive when the "subjects are political." The decision of the executive in this area "is conclusive." Correct. But Bob then ignores what Marshall said about *non*-political acts: "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." Executive officers owe certain duties to the President. They owe other duties to the law.

Federal Commandeering in Times of Emergency

Jason Mazzone

Our federal system of government divides powers and responsibilities between the national government and the governments of the states. Emergencies confound these divisions. Emergencies traverse geographic and political boundaries, rendering unclear which government is meant to respond. Many emergencies require contributions by local, state, and national government but getting the parts of the system to work together can be difficult.

The more serious the emergency, the greater the problem federalism presents. When emergencies are of a kind and a degree that they overwhelm localities and states, an effective response requires national intervention. However, in implementing its response, the national government remains largely dependent on state and local government workers because they vastly outnumber federal civil personnel and are in the immediate vicinity of an emergency when it occurs. Federalism can prohibit the national government from exercising control over state and local responders: the Supreme Court has held that in carrying out its programs the national government cannot simply "commandeer" the operations of state and local government.

Katrina and Federalism

Hurricane Katrina vividly demonstrated how federalism gets in the way of emergency response. Despite ample warning about Katrina's arrival and likely impact, no government—national, state or local—adequately prepared vulnerable communities and their populations. Post-landfill, the government's response remained sluggish and disorganized. Even after Katrina had destroyed large swaths of the Gulf States and overwhelmed state and local response capacities, federalism concerns prevented the national government from quickly taking charge. Homeland Security Secretary Michael Chertoff, whose department delayed deployment of federal resources, took the position that: "Under the Constitution, state and local authorities have the principal first line of response obligation." At the same time, officials in the Gulf region, though desperate for assistance, also actively resisted federal overreaching and refused to yield control of state resources. As a result, federal and state personnel mounted largely independent responses to Katrina's aftermath, working without the benefits of a single command structure. While people perished in New Orleans and other towns, governmental officials argued about who was in charge.

A Military Response?

In the wake of Katrina, some federal officials proposed their own dramatic solution to the problems federalism presents in times of emergency: During an emergency, the federal government should bypass civilian workers entirely and deploy the national military in their place. This proposal would end the dependence on state and local personnel, by sending

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in their place federal troops. The President considered this possibility during Katrina and he soon called on Congress for specific executive authority to mount a military response to future domestic emergencies. Not surprisingly, states do not favor this approach. Governor Jeb Bush of Florida warned: "Federalizing emergency response to catastrophic events would be a disaster as bad as Hurricane Katrina." Critics caution that the use of troops in domestic emergencies, prohibited in many circumstances under the Posse Comitatus Act of 1878, could produce order at the price of liberty.

In October 2006, Congress adopted a compromise measure. As part of a military appropriations bill, Congress authorized the President to deploy military forces, including National Guard units under federal command, to states and localities following a natural disaster or other emergency. The statute limits the President's authority to instances where troops are needed to implement law and order because state government is unable to maintain control and federal rights are put in jeopardy or there is opposition to the enforcement of federal laws. It remains to be seen how these new executive powers will be used and the results of military deployment.

A Third Way

The framers of the Constitution did not leave us to choose between an inadequate civilian response and an oppressive military. Instead, in provisions largely forgotten in modern times, the Constitution authorizes the federal government to commandeer state and local personnel in periods of emergency. Emergency commandeering is a power the national government can make good use of today.

In the eighteenth-century, the principal personnel of state government were the state's militiamen: militia units, operating under the authority of the state, were responsible for maintaining security, keeping order, quelling disturbances, and enforcing the state's laws. By the time of the constitutional convention, it had become clear that in certain emergency situations, a state's own militia, operating alone, would be inadequate to the task of mounting a response. Disturbances like Shays' Rebellion highlighted the need for a federally coordinated response to the most serious emergencies arising within the states. At the same time, the revolutionary generation deplored the idea of allowing the federal government to maintain and deploy large numbers of federal troops (or other federal professionals). The result of these competing concerns was that the 1789 Constitution permitted the federal government to take command of and deploy on a temporary basis state militiamen in order to deal with three kinds of emergencies: invasions, insurrections, and opposition to federal law. Article I of the Constitution authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article II makes the President "Commander in Chief of the Militia of the several States, when called into the actual Service of the United States." So as to ensure those militiamen are trained and equipped when called into periods of federal service, Article I further gives Congress power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." Together, these provisions authorized the federal government to respond to emergencies, and gave it the necessary resources to do so, without the need to deploy the national military or other federal personnel in large numbers.

In accordance with these constitutional provisions, the early Congress put in place the statutory mechanisms for national commandeering of militiamen in order to respond to emergencies in any part of the country. Congress specified with great care how militiamen were to be trained and equipped and the circumstances under which they could be called into federal service. In the ensuing decades, in responding to emergencies—including defending frontiers, putting down insurrections, and quelling opposition to federal laws—the national government regularly relied upon state militiamen under temporary federal command.

Modern Implications

Though the militia units of 1789 no longer exist, these constitutional provisions should be understood to encompass the modern emergency response personnel of state and local government: police, firefighters, emergency medical technicians, urban search and

rescue teams, and public health specialists. The Constitution does not define the term "militia," and, in exercising its powers, the early Congress itself determined which inhabitants of a state comprised the militia for constitutional purposes. Notably, it is wrong to think of the National Guard, part of the professional federal military structure, as equivalent to the old militia, which comprised the entire body of the people. Federal law on the books already makes "all able-bodied males" between 17 and 45 members of the militia. Congress is permitted to further specify that states' emergency responders fall within the Constitution's militia provisions.

Congress should authorize the federal government to call into periods of mandatory federal service the emergency response personnel of a state in which an emergency occurs and, where necessary, emergency response personnel from other states. During emergencies, these state employees would serve with compensation under the command of the President as Commander in Chief. With power to place in federal service these state and local personnel, the federal government would be able to direct the response effort without being stymied by the vagaries of state and local bureaucracies. Once the emergency was over, the basis for calling into service the state and local personnel would evaporate, and they would return to their regular employ in state and local government.

Under this scenario, during Katrina the President would have been able to federalize emergency response personnel in Louisiana and Mississippi. There would have been no need for the governors of those states or for local officials to consent to federalization: the order would have issued directly to the chiefs of police, fire and other departments. In addition, the national government could have deployed to the Gulf region law enforcement and other emergency response personnel from other states. Again, the order would have issued directly to the police department in Arkansas, the leader of the search and rescue team in Texas, and so on.

Constitutional limits

Federal power is not unlimited. The Constitution specifically restricts commandeering to times of invasion, insurrection, and opposition to federal law. Some kinds of emergencies—for example, a terrorist attack—clearly fall within these parameters. Other emergencies—for example, a forest fire—are less obviously within the scope of national power. Still, many emergencies will trigger the commandeering power because of their secondary effects. As events in New Orleans following Katrina showed, natural disasters frequently produce riots and other forms of lawlessness that undermine federal interests (including in federally protected rights) and satisfy the Constitution's conditions for federal deployment of state personnel.

Recognizing the federal government's commandeering power allows for a national response to emergencies while preserving the roles of state and local government. This approach also sensibly leaves the response to most emergencies in the hands of civilian workers. Some emergencies might still necessitate military deployment: detonation of a nuclear device in an American city, for instance, would almost certainly trigger use of soldiers. However, an emergency for which commandeering of state and local personnel is an inadequate response will be the exception.

Given the choice between local militia units and professional soldiers, our predecessors always chose the militia. We should make an analogous choice and, in times of emergency, opt for federal commandeering of state and local responders over the domestic deployment of military forces. A renewed understanding of the Constitution's emergency commandeering provisions offers a way to enhance the nation's ability to respond effectively to many kinds of emergencies, without the need to send the national military into our towns and onto our streets.

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Book Review: Leading at the Speed of Light: New Strategies for U.S. Security in the Information Age, by Daniel M. Gerstein (Washington, DC: Potomac Books, 2006)

Reviewed by Craig L. LaMay

It takes patience to read a book about leadership. It must be hell to write one.

For one thing, leadership is most easily described in the negative – what *not* to do. All of us have known the boss, the commander, the coach, the captain or the teacher whose position of authority seems inexplicably to owe to character traits that are most demoralizing to those of us in the ranks. Alternatively, writes Daniel Gerstein, author of *Leading at the Speed of Light: New Strategies for U.S. Security in the Information Age*, leadership is like pornography: "I'll know it when I see it."

Perhaps for these reasons leadership is a well-plowed and heavily fertilized field. Many respectable universities now offer undergraduate degrees in "leadership studies," and virtually all professional schools have something to say on the subject. And then there is the steady drizzle of popular books on leadership, most of them the indulgences of former chief executives, generals or university presidents with enough name recognition to sustain a marketing campaign. Fortunately, no one actually has to read any of these books. Short summaries are available on CD. Check the back of your airline magazine for ordering details.

All in all, not an encouraging picture for books on leadership. One could do better by studying philosophy.

But there is one institution, the military, for which leadership is the core of the enterprise. Without it, soldiers and civilians die, and according to Gerstein, a distinguished 26-year Army veteran, the nation's current military and civilian leadership do not have the capability, even in some cases the will, to meet the security challenges of the new century. Globalization is the context for those challenges, and the cost of miscalculation is global disaster. The technologies of change are the same as they were in antiquity: communications, transportation and money. Today the scope, speed and magnitude of those changes are the problem: they increase risk exponentially. As Gerstein points out, the 9/11 attacks depended for their success on the international electronic transfers of cash and information combined with the utter routine of transcontinental jet travel. Such an operation would have been much more difficult a decade earlier.

The current period of globalization is the picture of chaos theory, in which imperceptibly small events in one place can have cataclysmic consequences elsewhere. Gerstein's book is about leadership in the face of that fact. The major security issue for the United States, he writes, is not terrorism or China or intergovernmental bodies impinging on our sovereignty, but the failure of our own government, at all levels, to understand the "human dimension" of globalization and its consequences for effective leadership. By itself this is a hugely refreshing change from the "flat earth" or "clash of cultures" approach to globalization taken by other writers on the subject. Gerstein correctly sees the world as much more complex and even dangerous, and his book is worth reading for that reason alone.

The traditional way of calculating security issues has been to evaluate means, ways and ends against risks. To that equation Gerstein adds "environment," "the external forces and the actors" that are the objects of security strategy. But the truly critical thing, he writes, is seeing the environment *from the perspective of those who live in it*. Without that perspective, he says, the leader really does not understand the environment at all. In this, Gerstein's thinking is very similar to that of David Kilcullen, the Australian military officer whose many writings on effective counter-insurgency have gained influence among some notable Army officers, among them David Patraeus (on whose staff Kilcullen now serves as an advisor). Like Kilcullen, Gerstein believes that in the information age "demands for complex thinking are being placed on leaders at lower and lower levels of command." Leaders, in other words, depend more than ever before on the knowledge and ability of those they lead.

Also like Kilcullen, Gerstein believes that in asymmetric conflict – the norm for warfare for the foreseeable future – advantage lies with those who dominate "in the public domain in the war of ideas for the hearts and minds of populations." To win that war, he says, the

United States "cannot have too many allies."

Indeed, the essential missing ingredient in current U.S. security strategy, Gerstein says, is "soft power," the "non-physical" or humanistic components of American might so scorned by senior officials in the Bush administration in the aftermath of 9/11. Thus far, Gerstein writes, "the most important shot fired in the global war against extremism was the deployment of the mobile army surgical hospital into Pakistan to provide relief to survivors following the devastating earthquake in 2005 that killed perhaps eighty thousand people and left hundreds homeless…This interaction in the social domain came at a time when most of the U.S. dialogue with the Islamic world was perceived to be in the physical domain with the use of force, thus improving the perception of the United States abroad."

To develop America's soft power capability further, Gerstein argues, the country should establish a mandatory system of national service and, second, commit to promoting the benefits of globalization much more widely in the developing world. In a country where about 1 percent of the population provides for the nation's security, he says, a system of national service would promote a "common sense of purpose and belonging [and] contribute to the development of community." For Gerstein, strengthening civil society is not merely a democratic virtue, but a security necessity: We need to look out for one another.

Gerstein's discussion of how to mitigate the disruptive effects of globalization is weak (omitting entirely, for example, the role that transnational corporations play in setting standards in vital industries like chemicals and computers, or in undermining local and national laws by insisting on outside arbitration) but it hits home on the critical point that in a world where half of the population lives on $2 a day or less, the United States' national security begins abroad. "It is not possible for America to build robust enough defenses to defend and secure America against all threats," Gerstein writes. "We must follow the leadership of Wilson and Roosevelt to search for a better world in which America will continue to lead and thrive." Gerstein's argument is made more persuasive by the fact that he clearly is unimpressed by the rhetoric that flows out of Washington on this subject. He is a realist, not a romantic.

Some of Gerstein's other observations are more unsettling. He openly questions whether the United States' system of constitutional government, bound as it is by endless checks on power – and particularly on executive power – is adequate to an age in which many of the most serious security threats provide little or no time for legislative deliberation or judicial review: "Globalization and the emergence of the Information Age mandate a re-evaluation of certain principles," he says. "The Founding Fathers certainly could not have foreseen the technological enhancements that facilitate the diminishing of privacy. Additionally, it would be interesting to see how they would have balanced the right to privacy with the inherent responsibility of the government to secure its people."

Gerstein's concern is a legitimate one, and unfortunately it could be said of almost *any* democratic government. The dilemma he identifies is at the heart of multiple ongoing conflicts between the Bush administration and civil liberties defenders at home and abroad, including the governments of some of our European allies. The issue has also been treated much more thoughtfully elsewhere by scholars and even by the administration's own advisory commissions. Perhaps the most extensive exploration of the privacy issues Gerstein raises, for example, is the 2004 report of the Technology and Privacy Advisory Committee (TAPAC), a Department of Defense review of a proposed national data mining program. More generally, other scholars have criticized the Constitution as antiquated, but from an opposite point of view, finding it too *un*democratic – too sensitive to minority interests, unable to rid itself of incompetent and capricious executives, and, to Gerstein's concern, unable to ensure continuity of government in the aftermath of a catastrophic attack.

Perhaps the most curious omission in Gerstein's otherwise useful book is the role of education in his vision of soft power and national security. America's existing system of primary and secondary education system sends a relatively small number of people on to college, but more and more of them arrive unprepared to do college work, and many require remedial instruction. And of course in the United States the quality of public education a person receives is a function of the local tax base, and so is grossly

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inequitable and uneven. Gerstein at one point in his book urges a form of national identification to replace the myriad state and local ID's we all carry, but nowhere does he propose a remedy for an educational system whose disparities are so vast and whose outcomes are so consistently mediocre.

Here the remedy is not philosophy but a little history. In the mid-19th century – indeed in the midst of the Civil War – Congress created the system of land-grant colleges that made the United States the world leader in agricultural production and, coupled with the 1944 GI Bill, established the foundation upon which the nation's defense, diplomacy and economic competitiveness relied on through the Cold War. Gerstein to his credit does emphasize the need for "continuous learning" for leaders in any profession, but how to do this effectively and much more broadly is the question, especially if we are all in this together. Today, as in 1861, the United States has another opportunity to convert a public resource – the electromagnetic spectrum – into an asset for transforming American education, but so far Congress has done nothing. If Gerstein is right about the war of ideas, this is the greatest and most neglected national security issue of all.

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The War on Terrorism, the War of Ideologies, and the Strategic Legal Advisor: Using Lawfare to Our Advantage?

Colonel Kelly D. Wheaton

Our national leadership has clearly recognized that the war on terror is a war of ideas. It is a clash between U.S. values, ideas, and culture, which are being spread rapidly through globalization, and the reactionary beliefs of radical Islamists who desire to replace the globalization of western beliefs with a radical Islamist world order. This clash is inevitable given that the United States is a values-based country with a values-based government and we are facing an enemy whose avowed purpose is to eradicate our fundamental values.

That the war on terrorism is a war of ideas has been frequently emphasized in both scholarly and popular writing. Henry Kissinger, former Secretary of State, for example, has written that the phenomenon of radical Islam "is an ideological outpouring by which Islam's radical wing seeks to sweep away secularism, pluralistic values and Western institutions wherever Muslims live."

Numerous analysts have emphasized the importance of ideas to defeat an ideology. For example, one analyst states that Al Qaeda is an insurgency appealing to the Islamic world with the revolutionary vision of strict Islamist governments replacing current moderate or secular Islamic regimes.

To win the war against terrorism the United States must offer more appealing opportunities than Al Qaeda. Although the United States possesses great military and economic power, it is at a disadvantage in the war of ideas because its very power is threatening. Fundamentally, to someone outside the United States, the scope of U.S. power makes it difficult to determine if the U.S. rhetoric of democracy and freedom is only that—rhetoric. Thus, it can be difficult to determine what the United States must do to win the war of ideas.

While much attention has been paid to the impact of information operations or strategic communications, the actual actions of the United States may speak more loudly. For example, a strong case can be made that the teachings of the radical Islamists are significantly strengthened by the large number of authoritarian regimes in the mostly Muslim countries of the world, U.S. support for those regimes, and the perception of imbalance in the global distribution of power invited by recent U.S. actions.

One way that the United States can positively influence this war of ideology is by its choices relating to the international order. This conclusion is clearly recognized in U.S. national strategy documents. The President's 2002 National Security Strategy (NSS), states

that the United States must stand for liberty and justice, the rule of law, and the limit of absolute power of the state. To achieve the goals of the NSS, the United States will "develop agendas for cooperative action with other main centers of global power." In developing agendas for cooperative action, consultation and common action are necessary. The United States' strategic precepts are based on an American internationalism reflecting U.S. values combined with U.S. national interests in a globe that is increasingly united by common values and interests. The 2005 National Defense Strategy (NDS)—the Secretary of Defense's implementation of the NSS—states that international partnerships are a principal source of the strength of the United States and the United States must play a leading role on issues of common international concern. Two strategic objectives of the NDS are strengthening alliances and partnerships and establishing conditions conducive to a favorable international system. Thus, the United States must use international partnerships as a principal source of strength, act collectively, and play leading roles in international fora and on international issues.

The law – in the broadest sense – is a fundamental component of this war of ideas. What U.S. law says, how it is observed and upheld, how violations are dealt with, and how the U.S. interacts with other nations in a legal regimen and in the international legal order all play a part in how the U.S. is perceived abroad and has a direct impact on the war of ideas, yet the intersection of law and warfare, and its impact on military operations, is becoming increasingly complex.

In the past few years there has been a rapid growth of legal issues impacting warfare and the military, substantive international law has become increasingly more complex, law has inexorably become a tool of war. The latter phenomenon has spawned a new term: "lawfare." A functional definition of lawfare is the use of law as a weapon of war. Lawfare includes use of asymmetrical methods of warfare that violate the Law of Armed Conflict (LOAC), for example, the use of human shields and attacks from protected places. Lawfare also includes actions in peacetime by nations, international groups, and service organizations to restrict the activities of other countries' military through international treaties, conventions, international and national courts, and other applications of international law. Thus, lawfare includes the long-used tactic, sometimes called "soft balancing," of nations collectively acting to create restrictive international conventions and then pressuring hegemonic nations to be bound by those restrictions as a means of limiting the hegemon's power. As the widely-recognized sole global hegemon, the United States must be concerned with lawfare in this form.

The course of U.S. policy regarding the Rome Statute of the International Criminal Court (Rome Statute), of which the U.S. is not a party, is exemplary of the difficulties arising from the interdependent nature of warfare, the law, and the War on Terrorism as a war of ideas.

The International Criminal Court (ICC) is a permanent, treaty-based criminal court with international jurisdiction. The ICC was established by the Rome Statute on 17 July 1998 and went into force on 1 July 2002. It is independent of the UN. State parties to the Rome Statute and the UN Security Council may refer situations to the ICC for investigation. Absent referral, the ICC prosecutor may initiate an investigation based on reliable information. Under this circumstance, the prosecutor must obtain judicial review and approval by two judges of a three-judge panel before issuing an

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Standing Committee Programs at ABA Annual Meeting

Standing Committee on Law and National Security will host two programs during the ABA Annual Meeting in San Francisco this year. On Friday morning, August 10, a panel of national security experts will look at The Global War on Terrorism (GWOT) and the global struggle against violent extremism (SAVE).

On Saturday morning, August 11, the Committee will again host a 'careers in national security law,' program with 'ask the experts' availability. Watch the Committee website – www.abanet.org/natsecurity - for full details, including time and hotel location in downtown San Francisco.

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arrest warrant for the suspect. The Rome Statute also establishes the Assembly of States Parties, which includes all parties to the Rome Statute and provides oversight to the Court. The ICC has jurisdiction over all crimes that are recognized under the Rome Statute and occur in a state party's territory or are committed by a state party national. Thus, the ICC has jurisdiction over accused nationals from nations that are *not* parties to the Rome Statute if the alleged crime occurs in the territory of a state party. By the terms of the Rome Statute, the ICC will investigate and prosecute only if a state is unwilling or unable to effectively prosecute. Under Article 98 of the Rome Statute, the ICC may not request the surrender of a person if doing so would require the requested state to violate an international agreement.

The United States participated in the development of the Rome Statute. President Clinton signed the treaty on 31 December 2000, but, in a letter to the UN dated 6 May 2002, the United States formally notified the UN that the United States did not intend to become a party to the Rome Statute. The U.S. decision to not become a party to the Rome Statute is based on several stated flaws. Ultimately, the United States contends that accountability for war crimes should be obtained primarily by relying on national judicial systems and international tribunals appropriately established by the UN Security Council within the UN framework. The U.S. does not intend to become a party to the ICC and continues to maintain its objections to the ICC because the ICC's jurisdiction over non-party state nationals "strikes at the essence of the nature of sovereignty." Additionally, U.S. policy maintains that military members must be protected from prosecution before the ICC absent express consent from the United States or a referral from the UN Security Council.

Responding to significant concerns about the Rome Statute and the ICC, Congress passed the American Servicemembers' Protection Act (ASPA) as part of the 2002 Emergency Supplemental Appropriations Act. The ASPA, among other things, prohibits U.S. military assistance to countries that are parties to the International Criminal Court and have not signed Article 98 agreements. Countries that are not a party to the Rome Statute are not affected by the ASPA.

The U.S. decision not to become a party to the Rome Statute appears contrary to the NSS's approach of cooperative action and sustaining common principles and the NDS's conclusion that international partnerships are "a principal source" of U.S. strength. Additionally, non-membership appears to run contrary to the NDS objectives of "strengthen[ing] alliances and partnerships" and establishing conditions "conducive to a favorable international system." If the U.S. does not participate in the ICC then the U.S. cannot act in a leadership role to this growing international body—which fails to exploit a strength of the United States.

Finally, non-participation opens the United States to international criticism as "unilateralist," hypocritical for decrying war crimes but then acting parochially to protect its nationals, and oppressive for "bullying" diplomacy by pushing for Article 98 agreements to protect U.S. military. As the war on terrorism is a war of ideologies, the United States must make a significant effort, if not its main effort, in convincing moderate Muslims that Western liberal democratic institutions, ideals, and values provide a better future than radical Islam. The United States must act consistently from a values basis. Actions that adversely affect perceptions about the nature of the United States' goals in the war on terrorism weaken United States global legitimacy, and, therefore, adversely affect the United States' ability to successfully prosecute the war on terrorism. Thus, the appearance of acting hypocritically or parochially is almost as harmful as reality. In short, not being a party to the Rome Statute may be a strategic mistake in the war on terrorism.

The NSS and the NDS explicitly and implicitly state that the United States has the right to act outside of a coalition or international organization to defend against a sufficient threat to U.S. national security. The authority and necessity to use preemptive or preventive war to defend the United States does not negate the inconsistency between the national strategies and the current U.S. policy towards the ICC. Although the NSS and the NDS display a willingness to "go it alone," they clearly and repetitively articulate that a cooperative environment is the preferred course. Additionally, the NDS identifies that the United States will be challenged by the use of "international fora,

judicial processes, and terrorism." This statement recognizes the reality of terrorist tactics. If terrorists are using "judicial processes" and "international fora" against the United States, the United States should not absent itself from this part of the strategic environment of the war on terrorism. As long as the United States is not a party to the ICC, it will have great difficulty in influencing ICC rules, policies, or application. It is absent from this battlefield in the War on Terror.

This one example demonstrates how what may be considered a legal issue can be of strategic concern and how lawyers at the strategic level need to address legal issues in terms of national security strategy. United States national security attorneys must always be cognizant that advice on the law and legal issues may move the United States closer to or farther away from realizing national strategic goals. U.S. national security lawyers must not only look to narrow legal issues but must also look to the impact of how those issues are addressed to assure that legal, moral, *and* strategically constructive decisions are reached.

Colonel Kelly D. Wheaton is a U.S. Army Judge Advocate, currently assigned as the Senior Military Counsel to the Department of Defense General Counsel. This essay is drawn from "Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level," Army Lawyer, September 2006. The opinions expressed in this essay represent the views of the author and do not necessarily reflect the views of the Department of Defense. The auhor would like to thank Mr. David Merrill Merrill for his help in preparing this essay.

Editor's Note
Coming Attractions

In the months ahead, we plan to publish a number of additional dialogues comparable to that between Bob Turner and Lou Fisher in this issue. Our goal is to do our best to account for the wide range of topics and opinion generated by the ongoing process of tailoring the law of national security. In addition, we will continue our usual practice of publishing stand-alone essays on a range of topics. Examples from the months ahead include:

• Former Senator Sam Nunn addressing the threat of proliferating fissile material.

• Professors John Yoo and Jesse Choper of Boalt Hall School of Law (Berkely) in a wide-ranging debate regarding detainees, military commissions, and other topics associated with the war on terrorism.

• The proceedings of a recent panel sponsored by the ABA Standing Commitee on Law and Security with respect to national security letters.

• An exchange of views between Professors John Radsan (William Mitchell) and Meg Satterthwaite (NYU) with respect to the topic of extraordinary renditions.

• The proceedings of a recent Committee-sponsored breakfast meeting featuring the comments of Joel Brenner, the National Counterintelligence Executive.

In Case You Missed It …

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. "In Case You Missed It…," featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at rchesney@law.wfu.edu.

- National Security Presidential Directive-51/Homeland Security Presidential Directive-20 (May 9, 2007) ("Subject: National Continuity Policy") ("This directive establishes a comprehensive national policy on the continuity of Federal Government structures and operations and a single National Continuity Coordinator responsible for coordinating the development and implementation of Federal continuity policies. This policy establishes 'National Essential Functions,' prescribes continuity requirements for all executive departments and agencies, and provides guidance for State, local, territorial, and tribal governments, and private sector organizations in order to ensure a comprehensive and integrated national continuity program that will enhance the credibility of our national security posture and enable a more rapid and effective response to and recovery from a national emergency."), available here: http://www.whitehouse.gov/news/releases/2007/05/20070509-12.html

- United States v. Vilar (S.D.N.Y. April 4, 2007) (concerning, among other things, a motion to suppress the fruits of a search conducted in the UK by UK officials (in response to a request from US officials acting under an MLAT). Though this case is not concerned with national security as such – it is a fraud prosecution – the opinion's discussion of the analytical framework for Fourth Amendment challenges to evidence provided by foreign governments to the Justice Department is very interesting from the perspective of terrorism prosecutions (not surprisingly, it discusses Judge Sand's rulings in *bin Laden*), available here: http://volokh.com/files/UNITED_STATES_v_VILAR.pdf

- United States v. Hamdan (charges of conspiracy and provision of material support have been referred against Salim Hamdan), available here: http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf.

- Senate Select Committee on Intelligence – FISA Reform Hearing. The Prepared statements of Director McConnell, Director Alexander, and Assistant AG Wainstein concerning the Administration's FISA reform bill (as well as the text of that proposal and an accompanying transmittal letter) are posted here: http://intelligence.senate.gov/hearings.cfm?hearingId=2643 SSCI also has posted statements from a number of others, including Suzanne Spaulding, David Kris, Jack Dempsey, Bruce Fein, Kevin Bankston, Kate Martin, and K.A. Taipale: http://intelligence.senate.gov/hearings.cfm?hearingid=2643&witnessId=6422
