Commander of Militia

"The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States."

This Commander-in-Chief Clause gives the President the supreme right of command of the nation's military forces. These forces included not only the regular army and navy, but also the militia when called forth for national purposes. The Framers had no conception of modern reserve forces; they expected that the militia would be the nation's primary military reserve. When called into federal service, the President would have the same right of command over the militia that he had over the regular army and navy.

A dispute over control of the militia was a precipitating cause of the English Civil War. In England, principal control over the country's military forces remained in the Crown. But Parliament feared that King Charles intended to overthrow Parliament using the army, and Parliament responded by claiming that Parliament, not the Crown, controlled the militia.[1]

In the colonies, the militia remained decentralized, each colony having its own separate militia. The commander-in-chief of these forces was generally the executive of the state, although state constitutions sometimes required the executive to consult another body, such as a privy council.[2] The existence of thirteen separate militias produced serious inconveniences during the Revolutionary War. These forces had difficulty fighting alongside one another[3] and disputes arose over which officers had the right of command.[4] To remedy these defects, the delegates at the Constitutional Convention sought to partially nationalize control over the militia. (See Militia Organization Clause.)

During the Constitutional Convention, the least controversial aspect of this nationalization was to place the militia under the command of the President when called into federal service. Among the powers that the Committee on Detail listed was that the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States."[5] On August 27, the Convention amended the provision by adding "when called into the actual service of the United States."[6] The provision made clear that the President was the supreme commander of the militia when the militia was called forth; otherwise, principal command of the militia rested with the state commanders-in-chief.

The Constitution heavily circumscribed presidential power over the militia. The Constitution gave Congress the power to provide for militia organization and for calling out the militia.[7] The President, thus, has no inherent power either to organize militia forces or to call them into federal service. He may only act pursuant to the authority of Congress, although the Supreme Court has upheld the power of Congress to delegate its power to the President.[8] In the *Federalist Papers*, Alexander Hamilton explained that the President "will have only the occasional command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union."[9] This restricted power, Hamilton argued, gave the President less power than either "[t]he King of Great-

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[1] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 325–26 (Cambridge Univ. Press 1911).

[2] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb-Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 781–82 & n.299. (2008)

[3] JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 36 (1983).

[4] JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 5 (1997).

[5] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172 (Max Farrand ed., 1911) [hereinafter "Records"].

[6] *Id.* at 422.

[7] U.S. Const. art. I, § 8, cls. 15-16.

[8] Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[9] The Federalist No. 69, at 465 (Jacob E. Cooke ed., 1961).

Britain and the Governor of New-York" who "have at all times the entire command of all the militia within their several jurisdictions."[10]

During the War of 1812, governors in Connecticut, Massachusetts, and Rhode Island hotly contested the president's authority to call forth the militia pursuant to the delegated authority of Congress.[11] Anticipating an invasion from Great Britain, the federal government sought to have the militia enter federal service to provide for defense. The governor of Connecticut responded that he would not allow the Connecticut militia to enter federal service because the United States had neither been invaded nor was in imminent danger.[12] Massachusetts similarly refused to place their militia into federal service.[13] An advisory opinion of the Massachusetts Supreme Judicial Court held that the Constitution reserved to the "commanders in chief of the militia of the several states" the authority to determine whether a military exigency existed requiring the militia to be placed in federal service.[14]

Federal officials widely condemned the states' actions after the war. Secretary of War James Monroe sent the Senate Military Affairs Committee a detailed letter rebuking the states' position. He noted the power to call forth the militia was vested in Congress and that the militia would be useless if the federal government had to negotiate with each state's governor individually to get the forces transferred to federal control.[15] In his *Commentaries on the Constitution*, Justice Story argued that if the Massachusetts Supreme Judicial Court were right, "the public service must be continually liable to very great embarrassments in all cases, where the militia are called into the public service in connexion with the regular troops."[16] And in *Martin v. Mott*, the Supreme Court held that the president had sole and unreviewable discretion to call forth the militia pursuant to the authority given to him by Congress.[17]

A second question that arose during the War of 1812 was whether the Commander-in-Chief provision meant that the president had to command militia forces personally. The advisory opinion from the Massachusetts Supreme Judicial Court denied that the federal government had the power to place the militia under the command of regular army officers.[18] Because militia officers are to be appointed by the states, the Massachusetts court concluded that only the President and militia officers could command the militia when called into federal service.[19]

Underneath these issues are two fundamentally different visions about the nature of the militia. The Massachusetts Supreme Judicial Court treated the militia as state military forces. These forces may be allied with the regular military of the United States, but they may not be fused with them.[20] In contrast, the Madison Administration considered the militia, when in federal service, as a constitutive part of the national military establishment. In peacetime, usual control of the militia resides with the states. But once the militia was called into federal service during defensive conflicts, the President could command both the regular forces and militia in the manner most conducive to successful prosecution of the war. This included the power to delegate operational control to subordinate commanders, whether army or militia.

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[10] *Id.*
[11] Marcus Armstrong, *The Militia: A Definition and Litmus Test*, 52 ST. MARY'S L.J. 1, 28 (2020).
[12] *Id.* at 28–29
[13] *Id.* at 31–32.
[14] Op. of the Justices, 8 Mass. (8 Tyng) 548, 550 (1812)
[15] Letter from James Monroe, Sec'y of War, to Senate Military Affairs Comm. (Feb. 11, 1815), *in* 1 American State Papers: Military Affairs 604–06 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).
[16] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1210 (Boston, Hilliard, Gray & Co. 1833).
[17] Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).
[18] 8 Mass. at 550–51.
[19] *Id.*
[20] *Id.* at 551.

The difficult legal questions that arose during the War of 1812 have never been firmly settled. The federal government found much of the militia system unworkable and sought to bypass it by seeking temporary war volunteers under the control of the regular army. Beginning in the 20th century, the federal government used conscription, dual enlistment, and its Spending Clause authority to wrest operational control of nonprofessional forces from the states. (See Armies Clause and Militia Organization Clause for more information.) As a result, the federal government exercises virtual plenary control over all nonprofessional forces. The Supreme court upheld this arrangement in the *Selective Draft Law Cases*[21] and *Perpich v. Department of Defense*.[22]

The Commander-in-Chief of the Militia Clause has received only occasional academic attention, usually in relation to inherent presidential power over the military. Modern scholarship has heavily debated whether the President has preclusive powers to make war without congressional authorization or to direct the military notwithstanding congressional acts attempting to regulate the Armed Forces.[23] Some who deny that the president has such inherent power point to the militia provision as an example where the President's right to command is subordinate to the regulations made by Congress.[24]

Finally, although the President is generally commander-in-chief of the militia only when called into federal service, he is commander-in-chief of the militia of the District of Columbia at all times.[25] The status of the District's militia has caused occasional scholarly inquiry. William Winthrop argued that "the authority for and legal status of the District militia are not clear. It is no part of the militia referred to in the Constitution, which evidently contemplates a militia of the *States.*"[26] Again, this objection gets to the nature of the militia. If the militia is a state military force, this objection may have merit because the District is not a state. But if the militia is the able-bodied citizenry who may be called into temporary military service, then the District has militiamen just like the states do. In this case, the president's plenary commander-in-chief power over the District's militia comes from his authority as president to command the militia in federal service and by Congress's authority to exercise exclusive power over the District.[27]

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[21] Arver v. United States (*Selective Draft Law Cases*), 245 U.S. 366 (1918).

[22] 496 U.S. 334 (1990).

[23] *See, e.g.*, Saikrishna Prakash, *Deciphering the Commander in Chief Clause*, *forthcoming* ___Yale L.J. ___ ; Zachary S. Price, *Congress's Power over Military Offices*, 99 Tex. L. Rev. 491 (2021); John Yoo, *Transferring Terrorists*, 79 N.D. L. Rev. 1183, 1202 (2004); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008); Barron & Lederman, *supra* note 2; Robert J. Delahunty & John C. Yoo, *Making War*, 93 CORNELL L. REV. 123 (2007); JOHN C. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2010).

[24] *See, e.g.*, Richard A. Epstein, *Executive Power, The Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317 (2005).

[25] D.C. CODE § 49-409.

[26] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 56 n.67 (2d ed. 1920) (citation omitted).

[27] U.S. Const. art. I, § 8, cl. 17, art. II, § 2, cl. 1; *see* Robert Leider, *Deciphering the "Armed Forces of the United States,"* 57 WAKE FOREST L. REV. 1195, 1208 n.72 (2022).