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## **Of Coups and the Constitution**

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# OF COUPS AND THE CONSTITUTION

Glenn Harlan Reynolds\*

Military coups are, for the most part, outside the American political tradition. Talk of military coups, however, tends to surface at times when politics are divided and the nation is under stress. Such talk has resurfaced during the recent election season and a YouGov poll of Americans even found that support for a military coup, while perhaps not actually *strong*, was certainly stronger than many might hope.<sup>1</sup> This talk has gained increased salience after the recent failed coup attempt in Turkey.<sup>2</sup>

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1. Ellen Brait, *Poll Finds Almost a Third of Americans Would Support a Military Coup*, THE GUARDIAN (Sept. 12, 2015), <http://www.theguardian.com/us-news/2015/sep/11/military-coup-some-americans-would-vote-yes> (the actual question asked if respondents could imagine supporting a military coup. The number rose to 43% when respondents were asked if they would “hypothetically support the military stepping in to take control from a civilian government which is beginning to violate the constitution.”); see also *Shaun King Foresees U.S. Getting a Helping of Turkey if Trump’s Elected*, TWITCHY.COM (July 16, 2016), <http://twitchy.com/dougp-3137/2016/07/16/shaun-king-foresees-us-getting-a-helping-of-turkey-if-trumps-elected/> (Black Lives Matter activist Shaun King, after the July coup attempt in Turkey, foreseeing that something similar will happen in the United States if Donald Trump wins the election); James Kirchick, *If Trump Wins, a Coup Isn’t Impossible Here in the US*, L.A. TIMES (July 19, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-kirchick-trump-coup-20160719-snap-story.html> (Jamie Kirchick arguing the same thing). This talk continued after the election, not only on fringe sites like InfoWars, (*Will Coup d’Etat Overturn Trump?*, INFOWARS (Dec. 17, 2016), <http://www.infowars.com/will-coup-detat-overturn-trump/>), but also in respectable publications like The Spectator. See Paul Wood, *Will Donald Trump Be Ousted In A Coup Or Just Impeached*, THE SPECTATOR (Jan. 21, 2017), <http://www.spectator.co.uk/2017/01/will-donald-trump-be-assassinated-ousted-in-a-coup-or-just-impeached/> (quoting an unnamed “national security intellectual” at a Washington cocktail party as saying “it will end in a military coup. Tanks on the White House lawn,” and adding “He was the second person to tell me that at the party . . . . Impeachment—however far-

Although the prospect of such a change has inspired such thrillers as *Seven Days In May*<sup>3</sup> and *The Last Caesar*,<sup>4</sup> the actual risk of an American coup has always been comparatively small. This is because a number of characteristics in the American constitutional framework, and in American political culture and traditions, make such an eventuality more difficult than it might otherwise be.<sup>5</sup>

“More difficult” is not the same as “impossible,” however, and the absence of any military coup at the federal level,<sup>6</sup> or even a significant threat of one, over the nation’s more-than-two-century lifetime does not mean that such a thing could never happen. In this Article, I will briefly discuss the subject of military coups in general

fetched an idea—is not the most outlandish possibility being discussed in this town as the 45th president is sworn into office.”).

2. John Feffer, *Would Americans Ever Back a U.S. Military Coup?*, INST. FOR POLY STUD. (July 20, 2016), <http://www.ips-dc.org/americans-ever-back-u-s-military-coup/>.

3. FLETCHER KNEBEL & CHARLES W. BAILEY II, *SEVEN DAYS IN MAY* (1962).

4. EDWARD MCGHEE, *THE LAST CAESAR* (1980).

5. See *infra* pp. 12–18.

6. Although the United States has never seen a coup at the federal level, it has experienced some degrees of military unrest, including at least one coup at the state level. In the “Philadelphia Mutiny,” state militia members, angry over not being paid, occupied the Capitol where the U.S. Congress then met. This experience was one of the reasons for locating the U.S. Capitol on federal territory, outside the confines of any state. *Chasing Congress Away*, UNITED STATES HOUSE OF REPRESENTATIVES: HISTORY, ART, AND ARCHIVES (June 1, 2015), <http://history.house.gov/Blog/Detail/15032422770>. In Rhode Island’s Dorr Rebellion, opponents of the sitting state government (which operated under a pre-Revolution royal charter) set up their own state government after clashing with the charter government’s forces. Paul M. Thompson, *Is There Anything Legal About Extralegal Action? The Debate Over Dorr’s Rebellion*, 36 NEW ENG. L. REV. 385 (2003). The question of which state government was the lawful government of Rhode Island gave rise to the famous “political question” case of *Luther v. Borden*, 48 U.S. 1 (1849). In 1898, after losing an election because of heavy turnout from black voters, white Democrats in North Carolina overthrew the state government with an armed militia in what is considered the only successful coup d’état in U.S. history. *How The Only Coup D’Etat In U.S. History Unfolded*, NPR (Aug. 17, 2008), <http://www.npr.org/templates/story/story.php?storyId=93615391>. And in the famous “Battle of Athens” in 1946, returning veterans discovered that sheriffs’ deputies had absconded with ballot boxes. Fearing fraud, they broke into the National Guard Armory, armed themselves, and subsequently seized the ballot boxes from the deputies. Jennifer E. Brooks, *The Battle of Athens*, THE TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE VERSION 2.0 (Dec. 25, 2009), <https://tennesseencyclopedia.net/entry.php?rec=43>. See also *Tennessee Tragedy: The Battle of Athens*, WBIR (Nov. 5, 2014), <http://legacy.wbir.com/story/news/local/2014/11/05/tennessee-tragedy-the-battle-of-athens/18569511/> (describing the sequence of events of the Battle of Athens).

and review the features of the American polity that make them less likely here, and some danger spots to be avoided in the future. I will then suggest some steps that might help to ward off trouble.

#### COUPS D'ÉTAT, A SHORT GUIDE

A coup d'état, according to Edward Luttwak's influential treatise, consists of "the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder."<sup>7</sup> Or, in another formulation, "[a] coup d'état . . . is simply a means of seizing power quickly and effectively within an existing framework so that, once established, one can either operate within that framework or . . . slowly . . . alter it. As such, the coup d'état is favoured equally by the forces of both right and left."<sup>8</sup>

This is distinct from civil war, in which large segments of society are mobilized against one another. In the classic coup d'état the nation wakes up one morning to hear that the political leadership has been arrested or co-opted, while the radio and television stations are under the control of the new regime. The civil servants go to work as usual, just following orders from a new batch of superiors. In the face of such a *fait accompli*, few are inclined to resist, particularly if, as is usually the case, the old regime wasn't overly popular anyway.

The appeal of a coup is thus that it is comparatively inexpensive and bloodless, compared to a civil war: "[c]oups d'état are the most effective device for regime change in modern history. But why should that be the case? What makes a coup a coup is the concept of political action by a small group using force of arms."<sup>9</sup>

A coup is effective because it is fast and cheap compared to a civil war. Rather than seizing the entire nation, the plotters merely seize the levers of power. As Luttwak writes:

It can be conducted from the "outside" and it operates in that area outside the government but within the state, which is formed by the permanent and professional civil service, the armed forces, and police. The aim is to detach the permanent employees of the

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7. EDWARD LUTTWAK, *COUP D'ÉTAT: A PRACTICAL HANDBOOK* 27 (1979).

8. GREGOR FERGUSON, *COUP D'ÉTAT: A PRACTICAL MANUAL* 13 (1987).

9. DAVID HEBDITCH & KEN CONNOR, *HOW TO STAGE A MILITARY COUP: FROM PLANNING TO EXECUTION* 56 (2005) (emphasis omitted).

state from the political leadership . . . The apparatus of the state is therefore to some extent a “machine” which will normally behave in a fairly predictable and automatic matter. A coup operates by taking advantage of this machine-like behavior: during the coup because it uses parts of the state apparatus to seize the controlling levers; afterward because the value of the “levers” depends on the fact that the state is a machine.<sup>10</sup>

Or, as Gregor Ferguson observes:

A coup d'état is not a revolution, nor is it a guerrilla campaign, nor yet a simple mutiny in the armed forces. A revolution implies a mass uprising against a particular ruling class; the introduction of a new order, a catastrophic event in the nation's history. While a coup d'état may herald the start of a revolution, there is nothing “popular” about it. It is (or should be) a swift, precise operation aimed at displacing the current rulers and replacing them with oneself or one's own nominees. One reason why the coup d'état is popular is because it is so quick: A revolutionary war could take a long time . . . Besides, even a successful revolutionary war will inevitably alienate at least part of the population . . . and may result in serious long term damage to an economy upon which one soon may have to rely.<sup>11</sup>

Given the appeal of seizing power quickly and comparatively easily through a relatively modest application of force, the real question is not why coups happen, but rather, why they do not happen all the time: “Instead of asking why the military engage in politics, we ought surely ask why they ever do otherwise. For at first sight the political advantages of the military *vis-à-vis* other and civilian groupings are overwhelming. The military possess vastly superior organization. And they possess *arms*.”<sup>12</sup>

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10. LUTTWAK, *supra* note 7, at 20–21.

11. FERGUSON, *supra* note 8, at 13.

12. SAMUEL E. FINER, *THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS* 5 (2002).

In fact, coups are quite common. According to research by Naunihal Singh, a majority of countries in the world experienced at least one coup attempt in the second half of the twentieth century. Between 1950 and 2000 there were 471 coup attempts in independent countries with populations over 100,000, of which slightly more than half (238) succeeded. Among non-Western countries, there were at least 30% more coup attempts than democratic elections for the executive office. In some countries, he notes, one might fairly say that coup attempts are the basic mechanism for changes in administration.<sup>13</sup>

Coups are less common than they might be because for a coup d'état to succeed, the government being overthrown, and the polity in which it operates, must possess certain characteristics. It is the point of this Article that the American Constitution, along with traditional American political culture in general, tends to operate against those characteristics, and to make the American polity more resistant to a coup than most. It is also notable, however, that some changes in the Constitution and in political culture may tend to reduce that resistance, and for that reason should be viewed warily. This Article will briefly describe the nature of coups d'état, look at the constitutional and cultural traits that make the United States a poor target, discuss the ways in which those traits may be changing over time, and then suggest some actions calculated to make the United States more, rather than less, coup-resistant.

#### Characteristics of Coup-Resistance

Stereotypically, nations subject to coups d'état tend to be comparatively small, centralized, and underdeveloped, though this is not always the case. By contrast, nations that are large, decentralized, and developed are more resistant. In his survey of coups d'état, *The Man On Horseback*, Samuel Finer divides nations into four categories, descending from those at the highest level of political development (the United States, Britain, the Scandinavian countries, etc.) down to those in which the political culture is so undeveloped that governments (and coup plotters) can ignore public opinion because the populace is so weak or apathetic that it just doesn't matter.

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13. NAUNIHAL SINGH, SEIZING POWER: THE STRATEGIC LOGIC OF MILITARY COUPS 51–58 (2014).

Those countries that Finer regards as having a “mature political culture” are, it will be noticed, largely of northern European geography or culture. (I think that it is fair to consider such Anglosphere nations as Australia and New Zealand, which Finer includes in his first rank, as such.) Countries in his second category—Germany from the Empire to the rise of Hitler, Japan during the interwar period, France after the Third Republic, the former Soviet Union—are called countries of a “developed political culture.” In such countries, public resistance to a coup would be significant, and something the military would have to reckon with. Countries in the third category, places like Turkey, Egypt, Argentina, etc. are deemed to possess a “low political culture,” with public resistance to a coup likely to be small. And in countries of the fourth category, “minimal political culture” (e.g., Haiti) the opinion of the masses is unimportant.<sup>14</sup> Finer writes:

As long as the listed characteristics persist in such societies, the legitimation of military rule would be unobtainable in the first group, resisted in the second, fluid in the third, unimportant in the fourth.<sup>15</sup>

One might thus assume that the United States—being large, decentralized and politically developed enough to anchor Finer’s first category—is immune to a coup d’état, rendering the question unimportant. And I suspect that’s precisely what most people do think, supposing that they even give the question any thought at all.

But Finer’s categorization is by no means permanent. When *The Man On Horseback* was originally published in 1962, South Korea was included in the same category as Egypt.<sup>16</sup> Today, however, it has almost certainly risen at least to category two. It is difficult to imagine a military coup in Seoul today proceeding with the ease of yesteryear. Likewise, Germany today is likely far more resistant to a coup than the Germany of 1932.

But if countries can move up in coup-resistance, then it must also be the case that they can move down. Anglo-American traditions of democracy, civilian control of the military, and the orderly transition of power are not written in stone. Nor is America (or, for

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14. FINER, *supra* note 12, at 88–89.

15. *Id.* at 89.

16. *Id.*

that matter, England) as culturally Anglospheric as it was several decades ago.

None of which is to say that the United States is on the verge of a coup d'état today. But to the extent that the United States is more resistant to such than many other nations, it's worth looking at the characteristics, both constitutional and political-cultural, that make it so. Changes to those characteristics may also have the consequence of lowering that resistance, perhaps weakening the body politic sufficiently that an opportunistic infection (the seizure of power by military or civilian plotters after a coup) might set in.

### CONSTITUTIONAL CHARACTERISTICS

Given that the Framers intended for the Constitution to make it difficult for any one person or group to gather all power into their hands,<sup>17</sup> it is perhaps not surprising that many aspects of the Constitution function to make a coup much more difficult. Among these are the separation of powers among the three branches, the division of power between the states and the federal government, and the various provisions of the Bill of Rights. In addition, various other provisions may serve as inhibitors, if not to a coup itself, then to post-coup consolidation of power. By making such consolidation more difficult, of course, they also function as deterrents to some degree.

#### Separation of Powers

Under the Constitution, powers are parceled out to the Executive, the Legislature, and the Judiciary. Of these, the grant of power to the Executive is the stingiest: Though the President is granted executive power,<sup>18</sup> that power consists mostly in executing tasks, and making use of powers, delegated by Congress. When presidents step outside the sphere of legislatively authorized action, their powers are much smaller.<sup>19</sup>

Of course, capturing the Executive branch is generally the goal of coup-plotters. As the Framers realized, the Executive is the

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17. THE FEDERALIST, NO. 47 (James Madison) ("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.").

18. U.S. CONST. art. II, §§ 1–2.

19. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).



branch possessed of energy and the ability to act.<sup>20</sup> Thus, any coup would need to neutralize, or control, the presidency.

But control of the Executive is not enough. For the government to act with even a semblance of legitimacy,<sup>21</sup> the Executive must be executing laws passed by Congress, and those acts must be upheld by the judiciary.<sup>22</sup> Control of Congress, whose members are dispersed throughout the DC metropolitan area when it is in session, and across the nation when it is not, would be considerably more difficult. Control of the Supreme Court might not be especially difficult, but the geographic dispersal, and independent tendencies, of the lower federal courts would make it likely that many acts by the coup-perpetrators would be declared illegal by some court, providing a basis for resistance. Thus, to the extent that separated powers obtain, a coup becomes more difficult, and the follow-up to an initial seizure of power more challenging.

### Federalism

The division of power between the federal government and the states provides a much stronger barrier to a successful coup. The essence of a successful coup d'état is speed and economy of force: seizing control of the parts of government where power is concentrated before anyone who might contest that control has a

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20. THE FEDERALIST No. 70 (Alexander Hamilton) (discussing energy in the Executive).

21. This need for legitimacy stems from the fact that direct military rule, even in countries that frequently experience coups, seldom works well. Instead, the military government is usually replaced, often quite quickly, by a civilian government that is ultimately controlled by the coup-perpetrators. FINER, *supra* note 12 at 4–5. As Luttwak writes:

An element in our strategy after the coup is half-way between the information and the political campaign; the problem of 'legitimizing' the coup. Clearly, the coup is by definition illegal, but whether this illegality matters, and whether it is possible to counteract its effects, will depend on the total political environment of the country in question.

LUTTWAK, *supra* note 7, at 172.

22. In Edward McGhee's THE LAST CAESAR, this need for Congressional legitimation—and amnesty—provides the Vice President with an opportunity for a daring counter-coup, though (not to give too much away) things don't end especially well. MCGHEE, *supra* note 4, at 224–26.

chance to act; and doing so with a small enough group of conspirators that word doesn't leak out ahead of time. But the federal structure of the United States means that, entirely independent from the dispersal of power among the branches of the federal government, each state is itself a distinct, detached power center. State governors control their own military forces, National Guard and State Guard units of not-inconsiderable capability,<sup>23</sup> as well as state law enforcement agencies and state bureaucracies generally. Under existing law, of course, state National Guard units<sup>24</sup> (though not the distinct State Guard<sup>25</sup> units) are subject to federalization by presidential order. Should state governors choose to ignore such orders and instead deploy their forces to oppose a coup, however, this legality would be of little use to the plotters.

In addition, state legislatures and even state judiciaries constitute significant centers of potential resistance. In times of division and confusion, they might have substantial influence over the behavior of their constituents and local officials. Coup plotters might want to suborn or neutralize such figures—at least the governors of the most important states—but expanding a covert plot to include so many disparate individuals will almost certainly result in exposure. At some point, the plot to overthrow the government grows big enough that it constitutes a revolution, or perhaps the opening round of a civil war; a move that is far more daunting given the great expense of civil wars and revolutions.

### The Bill of Rights

As Akhil Amar has noted, the Bill of Rights itself has structural features,<sup>26</sup> some of which are of relevance here. The First

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23. There are approximately 445,000 National Guard members serving (approximately 340,000 Army National Guard members and 105,000 Air National Guard member). U.S. DEP'T OF DEF., SELECTED RESERVE PERSONNEL BY RESERVE COMPONENT AND RANK/GRADE (UPDATED MONTHLY): (SEPT. 2016), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp).

24. Rod Powers, *Military Reserves Call Up Authority*, THE BALANCE, (Sep. 8, 2016) <https://www.thebalance.com/military-reserves-federal-call-up-authority-3332677> (describing the statute that authorizes federalization of National Guard units by presidential order); *see also* *Perpich v. Dept. of Def.*, 496 U.S. 334 (1990) (explaining dual state/federal role of National Guard troops).

25. 32 U.S.C. § 109 (2012).

26. Akhil Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131, 1132 (1991) (arguing that the structure is as important to the interpretation of the Bill of Rights as the language of the individual rights).

Amendment,<sup>27</sup> through its guarantee of free communication, will make it more difficult for coup-plotters to seize control of information and communications, always a vital part of seizing power.<sup>28</sup> Though constitutional litigation is unlikely to be of much relevance, constitutional norms may well be: Commands emanating from the government (or, post-coup, the “government”) may be ignored, especially in the crucial early hours or days, by citizens used to speaking freely and unaccustomed to complying with orders not to do so.

Such resistance may not persist in the face of soldiers with guns, but the coup-plotters can’t send soldiers with guns everywhere, or even to very many places at once. These problems are vastly complicated by the Internet, which may overshadow traditional sources of communication like television and radio in importance. There may be technical solutions to the Internet problem (more on this later), but one cannot simply seize a few studios, broadcast pro-coup propaganda, and assume that the masses will remain ignorant of what is actually going on. Other First Amendment norms, like freedom of assembly (plotters can declare a curfew, but if 10,000 people show up, will they really order them shot? Will troops obey orders to do so?) and freedom of religion (churches form alternate power centers, with their own internal organization, which is no doubt why some regimes distrust them) may also pose problems.

The Second Amendment,<sup>29</sup> which plays a major anti-coup role in popular lore, may also come into play. The armed citizenry of the United States forms a potentially enormous military force: Tens or hundreds of millions of people with weapons.<sup>30</sup> Some of those people are quite expert, and some of the civilian-owned weapons are quite sophisticated. (The official “state rifle of Tennessee,” the Barrett .50 caliber, is effective at ranges of more than a mile and can take out

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27. U.S. CONST., amend I.

28. See, e.g., Luttwak, *supra* note 7, at 168–72 (describing the importance of a “monopoly of communication.”).

29. U.S. CONST. amend. II.

30. Though numbers are uncertain, it is estimated that one in three Americans owns a gun. Given that many gun owners own multiple guns, it’s entirely possible that there are more guns in America than people. At the very least, this one-in-three figure suggests over one hundred million armed individuals. Maggie Fox, *One In Three Americans Own Guns*, NBC NEWS (June 29, 2015), <http://www.nbcnews.com/news/us-news/one-three-americans-own-guns-culture-factor-study-finds-n384031>.

aircraft or thin-skinned armored vehicles.<sup>31</sup>) On the other hand, that citizenry is unorganized, and it's unclear whether it might stir itself in time to provide effective resistance. A million people with rifles, unorganized, are not an army: that takes discipline, organization, and some degree of direction. Absent some sort of pre-planning (e.g., a group of citizens makes plans in advance to show up at the federal building with guns if the Internet goes down) or some sort of organizational framework (if I were a coup plotter, I might worry about the Veterans of Foreign Wars or other groups consisting of people with military experience), they are unlikely to act before a coup is complete.

To be fair, this *might* not be true. The State of Virginia alone has approximately 2.44 million citizens who own guns (29% of its population),<sup>32</sup> all of whom live within a few hours' drive of Washington, DC. If even one percent of them, over 24,000 people, decided to drive to Washington and overturn the new government, the coup-plotters would not stand a chance. And that does not account for additional numbers from nearby states like West Virginia, Maryland, Pennsylvania, etc. But a successful coup d'état is about organizational superiority on the part of the plotters, and unless such an armed "flash mob" formed very quickly, it would be too late. An armed populace might serve as a substantial deterrent to overbearing government after a coup, but without some sort of advance preparation, it probably wouldn't react fast enough to stop or overturn a coup in the crucial opening hours.<sup>33</sup>

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31. Christopher Ingraham, *Tennessee's New Official State Rifle Is So Powerful It Can "Destroy Commercial Aircraft"*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/26/tennessees-new-official-state-rifle-is-so-powerful-it-can-destroy-commercial-aircraft/>.

32. Andy Kiersz & Brett LoGiurato, *Here's Where You're Most Likely to Own a Gun*, BUSINESS INSIDER (July 3, 2015), <http://www.businessinsider.com/gun-ownership-by-state-2015-7>.

33. In a piece written shortly after his *Coup of 2012* essay (discussed *infra*), Col. Charles J. Dunlap expressed skepticism that armed citizens could successfully revolt against the United States government should it become tyrannical. The scenario Dunlap addresses is considerably different from the one describe here, though I would suggest that the last twenty years of, at best, mixed results against lightly-armed irregulars suggest that the United States military might not perform as well as Dunlap believes. Charles J. Dunlap, *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 676 (1995).

### Other Constitutional Norms

Beyond the First and Second Amendments, other constitutional norms may play a role, not so much in the early hours of a coup attempt, as in the later days in which a regime attempts to consolidate power. Again, these provisions may not be judicially enforced—or, more likely, attempts at judicial enforcement will be uneven at best—but they will establish a baseline against which the regime’s legitimacy is assessed, and which will form the basis for possible legal actions or prosecutions in later days if the coup regime fails (or, perhaps, even if it succeeds).

Thus, for example, constitutional requirements like the Fourth Amendment’s warrant requirement,<sup>34</sup> the Fifth Amendment’s requirement for indictment by a grand jury,<sup>35</sup> the Fifth Amendment’s protection against self-incrimination<sup>36</sup> and the Sixth Amendment’s right to trial in the district where the crime was committed (which, in the event of resistance to the coup, is likely to contain quite a few potential jurors sympathetic to the resistance),<sup>37</sup> and the Eighth Amendment’s protection against cruel and unusual punishments,<sup>38</sup> as well as Article I Section 9’s protection of the writ of habeas corpus,<sup>39</sup> will limit the actions of a post-coup regime that aspires (as most are likely to do) to some claim of constitutional legitimacy. Such limits may be overridden to a degree (as Lincoln did, by suspending the writ of habeas corpus by executive fiat)<sup>40</sup> but they will nonetheless be constraints. And, to the extent that these limits are ignored, that will be a rallying cry for coup opponents that is likely to have considerable force in a nation as legalistic as America.

Additionally, in countries where coups are frequent, the armed forces often position themselves (or are positioned by the countries’ political traditions) as protectors of the constitution or political order who are themselves located outside of politics as

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34. U.S. CONST. amend. IV.

35. U.S. CONST. amend. V.

36. U.S. CONST. amend. V.

37. U.S. CONST. amend. VI.

38. U.S. CONST. amend. VIII.

39. U.S. CONST. art. I, § 9.

40. See generally Bruce Ragsdale, *Ex Parte Merryman and Debates on Civil Liberties During the Civil War*, FEDERAL JUDICIAL CENTER (2007), [www.fjc.gov/history/docs/merryman.pdf](http://www.fjc.gov/history/docs/merryman.pdf).

usual.<sup>41</sup> In such countries, looking for the armed forces to step in when civilian government is out of hand is, in a sense, not extraconstitutional at all.

The United States, however, as befits a legalistic nation, has its own institution that serves this purpose: The United States Supreme Court. Though the Supreme Court isn't really outside of politics (but then, neither is the Argentinian Army), it is outside the day-to-day grind of politics as usual, and, having a different schedule of personnel rotation and a different institutional character and constituency, it too serves as a check outside of day to day politics. Thus in America, when things seem out of kilter, people often look to the Court. To the extent that the Court fills this role (or is seen to), the ability of the military to claim legitimacy on this basis is much reduced. (In addition, perhaps, the removal procedures in the 25<sup>th</sup> Amendment, which provide for the removal of a president upon certification of a majority of the Cabinet that he/she is unable to serve, provide an additional safety valve).

#### CONSTRAINTS WITHIN POLITICAL CULTURE

Aside from the Constitution's specific provisions, many aspects of American political culture—both civilian and military—that promote accountability and limited government powers also militate against a coup. Their efficacy in doing so, of course, depends on how deeply and widely the culture is embedded. And, to the extent that political culture changes, they may be less effective in the future.

Most significantly, of course, is the tradition of civilian control over the military. This was a major concern of the Framers, who viewed standing armies with deep concern. (One commentator describes the Framers as possessing an "almost panic fear" of a standing army).<sup>42</sup> It is for this reason that the civilian president is

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41. See FINER, *supra* note 12 at 35–39 (discussing notion of "custodianship" in numerous countries).

42. JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 143 (1994). "Professional armies had no 'permanent and perpetual' role in America until 1763. Rather, the settlers' jealousy of their personal right to have weapons was magnified by what one historian characterized as their 'almost panic fear' of a standing army, a legacy handed down from generation to generation by forbears 'who, if they were Southern Cavaliers recalled Cromwell and his major-generals, and if they were New Englanders the attempts of the Stuarts to raise regular armies and govern through their sanction.'" (quoting KATHARINE CHORLEY, *ARMIES AND THE ART OF REVOLUTION* 216 (1973)).

made commander-in-chief of the armed forces and that appropriations for the Army (which poses a greater threat to domestic liberty) are limited to two years, while those for the Navy (which does not) are under no such limitation.<sup>43</sup> It is also the reason for the (now mostly, but not entirely, obsolete) reference to the (civilian) militia as “necessary to the security of a free state” in the second amendment.<sup>44</sup>

But these constitutional provisions merely underpin a larger cultural tradition. When President Harry S. Truman fired General Douglas MacArthur, General MacArthur—despite the title of one of his biographies,<sup>45</sup> and the near-Imperial splendor of his rule in Occupied Japan—simply retired. Nor was that outcome in serious doubt, though powerful and popular generals in many other nations might have acted otherwise.<sup>46</sup>

And “civilian control” does not simply mean “presidential control.” To the extent that the commander-in-chief issues orders that are clearly illegal or unconstitutional, members of the armed forces are expected to refuse to obey, a point recently reiterated by General Michael Hayden, in response to campaign statements by candidate Donald Trump:

Referring to Trump’s suggestion to torture suspected terrorists and kill their families, Gen. Michael Hayden told TV host Bill Maher, “If he were to order that once in government, the American armed forces would refuse to act.”

“You’re required not to follow an unlawful order. That would be in violation of all the international laws of

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43. U.S. CONST. art. I, § 8, cl. 12–13.

44. See generally, Glenn Harlan Reynolds, *A Critical Guide To The Second Amendment*, 62 TENN. L. REV. 461, 466–482 (1995) (describing classical conception of militia). See also Glenn H. Reynolds & Brannon P. Denning, *How To Stop Worrying And Learn To Love The Second Amendment*, 91 TEX. L. REV. 89, 94–97 (2013) (“If a well-regulated militia is ‘necessary to the security of a free state,’ then it follows, presumably, that a state lacking such a militia is either insecure or unfree.”).

45. WILLIAM MANCHESTER, *AMERICAN CAESAR* (2008).

46. *Id.* at 644–47 (describing MacArthur’s acceptance of his removal). Popular reaction, on the other hand, was fierce, described by Richard H. Rovere and Arthur M. Schlesinger Jr. as “so violent and spontaneous a discharge of political passion. . . there has been nothing to match it since the Civil War. . . Appearing at Griffith Stadium, Truman was booed—the first public booing of a President since 1932.” *Id.* at 648.

armed conflict,” Hayden said. “I would be incredibly concerned if a President Trump governed in a way that was consistent with the language candidate Trump expressed during the campaign.”<sup>47</sup>

Though television host Bill Maher characterized such an action as “a coup,” Hayden noted, correctly, that refusing to follow an illegal order is not a coup.<sup>48</sup>

This refusal to follow illegal or unconstitutional orders means that, even if the office of the presidency were seized in a successful coup, many members of the armed forces might refuse to follow any orders from an unconstitutional office-holder; that would be doubly

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47. Sylvan Lane, *Ex-CIA chief: Armed forces would have to disobey Trump*, THE HILL (Feb. 27, 2016), <http://thehill.com/blogs/ballot-box/271061-ex-cia-chief-armed-forces-would-have-to-disobey-trump>.

48. Nick Gass, *Ex-CIA Director: Armed Forces Would Ignore Trump*, POLITICO (Feb. 27, 2016), <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/cia-director-armed-forces-ignore-trump-219918#ixzz41QYEOGUa>; see also Mathison Hall, *I Swear I Will Not Commit War Crimes*, USA TODAY (Mar. 23, 2016), <http://www.usatoday.com/story/opinion/2016/03/23/brussels-attacks-belgium-war-crimes-trump-column/82125068>. Hall writes:

When I raised my right hand and took the oath of office as a commissioned officer in the United States military, I swore to defend the Constitution of the United States against all enemies, foreign *and* domestic, and that I would bear true faith and allegiance to the same.

I did not swear to follow all orders given to me. I did not swear allegiance to the president of the United States or to any other leader. I swore allegiance to an ideal that, while certainly imperfect and at times unevenly implemented, defines us as a people and a nation. My years of training and education highlighted two additional key precepts of this republic and its incredibly powerful military: the armed forces are subordinate to civilian leadership, and members of the military are obligated to disobey unlawful orders. In other words, while we are subordinate to the civilian leaders elected by the people, we are also bound by our oaths of office to disobey orders which conflict with the Constitution and the laws of the land.

Hall is writing about unconstitutional actions aimed at foreign citizens. Presumably this duty to disobey illegal and unconstitutional orders would be felt more deeply if those orders targeted fellow-citizens.



true, of course, if the orders themselves seemed to be illegal. In this regard, Luttwak's characterization of the governmental apparatus as a "machine" that will reliably operate so long as the person at the top pulls the levers,<sup>49</sup> breaks down. Where the "machine" is made up of individuals who can be expected to refuse to obey when the levers are pulled by the wrong person, or in the wrong way, the coup becomes much more difficult.

The duty to disobey illegal orders is, as noted, part of military training. The civilian bureaucracy, alas, is generally not so instructed. Nonetheless, the general culture of civilian supremacy, and orderly legal transitions of power, might make a coup more difficult here, too. This is perhaps particularly true within the paramilitary law enforcement and intelligence bureaucracies, where many members have military backgrounds, or at least a military *ethos*.

Add to this a general hostility to military government and a sense that military coups are things that lesser nations do, not things that should happen here, and those plotting a coup in the United States face a steeply uphill battle. At least, they face such a battle today. But what of tomorrow, and years hence? And therein lies the problem.

#### Law, Culture, and Change

In the earlier sections of this Article, I have laid out briefly why it is that a coup d'état has never been a serious possibility in the United States. But the characteristics of the United States that make a coup impossible are not themselves immutable. As America changes, it may change in ways that make a coup more, rather than less, likely. Some of these changes may be deeply unfortunate in themselves; others may be desirable for other reasons, but may nonetheless make the seizure of the government by a band of plotters more plausible. I will discuss these, and then conclude with some suggestions for changes that might make America more coup-resistant in the future. In short, these trends that promote centralization, lack of accountability, and government control of communications are more dangerous. Trends in the opposite direction, on the other hand, tend to make a coup less likely. From this perspective, the present picture is not altogether comforting.

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49. LUTTWAK, *supra* note 7, at 20–21.

### Separation of Powers

The civics-book statement of American government is that Congress passes laws that must be signed by the President (or passed over a veto), and that those laws must be upheld by the judiciary to have effect. In practice, today's government operates on a much more fluid basis, with administrative agencies issuing regulations that have the force of law—or, all too often, “guidance” that nominally lacks the force of law but that in practice constitutes a command—which are then enforced via agency proceedings. To the extent that administrative agencies have more power, and operate under less scrutiny and with less need for explicit delegations from Congress, control of the Executive branch becomes much more significant, and Luttwak's machine is more likely to be responsive to those who pull on its levers.

As Charles Cooper writes, since the effective demise of the non-delegation doctrine and the rise of the Chevron doctrine, in which courts defer to agency interpretations of their own statutes, administrative agencies have become largely independent of congressional, judicial, and at times even presidential control:

The bottom line is that our constitutional order has been subverted, perhaps irreversibly: First, the administrative state is free to exercise legislative power, delegated by Congress, over virtually every aspect of life, and Congress need not provide even so much as an “intelligible principle” to constrain its regulatory discretion. Second, the administrative state has the last word, binding even on the Supreme Court, on what ambiguous statutory provisions mean, including on the jurisdictional question of whether Congress actually authorized it to interpret the statute in the first place. And, finally, the administrative state has executive power to enforce its laws, as it alone has interpreted them, liberated from any meaningful review by the courts and often from any meaningful control by the president. It can truly be said that, in the main pursuits of everyday life, we are ruled by a one-branch government. And the “experts” who run it are accountable to no one:

They are not elected, nor are they controlled by those who are elected. And they certainly are not angels.<sup>50</sup>

Furthermore, it seems likely that to the extent that civilians, law enforcement, and others become used to obeying bureaucratic *diktats* that lack a clear basis in civics-book-style democratic processes, the more likely they are to go along with other *diktats* emanating from related sources. This tendency to go along with instructions without challenging their pedigree would seem to make a coup more likely to succeed, just as a tendency to question possibly unlawful or unconstitutional requirements would tend to make a coup less likely to succeed. A culture whose basis is “the law is what the bureaucrats say it is, at least unless a court says different,” is in a

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50. Charles J. Cooper, *Confronting the Administrative State*, NATIONAL AFFAIRS (Fall 2015); see also *Appalachian Power v. EPA*, 208 F. 3d 1015, 1020 (D.C. Cir. 2000):

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. In the age of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. “It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.” Richard J. Pierce, Jr. *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 85 (1995). The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

This is a far cry from what most people think is involved in our system of “checks and balances,” and to the extent this behavior has been normalized, it makes rule by decree considerably less likely to create a backlash.

different place than one whose starting impulse is “it’s a free country.”

### Federalism

As mentioned earlier, the states continue to be an important counterweight to federal authority. The presence of so many independent power centers, with state governors commanding non-trivial amounts of military force and with state politicians often enjoying substantial bases of support within their own states (and occasionally outside of them), makes the process of consolidating power much more troublesome for coup plotters. This remains true.

Though states are in some ways less independent than they were a century, or even a half-century, ago, they are in other ways more independent. The revitalization of state governments during the latter half of the 20<sup>th</sup> century has probably increased their political base of support, as state governments have modernized and have become more representative post *Baker v. Carr*.<sup>51</sup>

### The Bill of Rights

The First Amendment used to be parodied by the famous statement that “freedom of the press belongs to the man that owns one.” Though in colonial times, a printing press represented a relatively small investment, and newspaper production was virtually (and sometimes literally) a cottage industry, changes in technology and efficiencies of scale in production, distribution, and newsgathering meant that by the mid-19<sup>th</sup> century, newspapers were fewer in number, and more concentrated in ownership—a trend that continues to the present day.<sup>52</sup>

Broadcasting too—in part for technical reasons, and in part as the result of regulatory choices<sup>53</sup>—has always been an industry in which the number of outlets was comparatively limited and in which control was comparatively narrow. Unlike some other nations, the United States does not have government-controlled broadcast media

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51. *Baker v. Carr*, 369 U.S. 186, 235–36 (1962).

52. See GLENN REYNOLDS, *AN ARMY OF DAVIDS* 89–114 (2006) (describing concentration of traditional media and flourishing of alternative Internet news sources).

53. See generally L.A. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987) (describing development of broadcasting industry in the United States, and the structural consequences of regulatory choices).

along the lines of the British Broadcasting Corporation, but the American broadcast field has nonetheless been relatively concentrated and fairly uniform in ideology.<sup>54</sup> Furthermore, until late in the 20<sup>th</sup> century, telephony was a tightly controlled monopoly. It is not a coincidence that a key element in Knebel & Bailey's coup novel, *Seven Days In May*<sup>55</sup> involved control of a key long-distance telephone exchange in Utah, and of a switch allowing the President (or whoever controlled it) to take over broadcasts of the three major TV networks.

In the era of the Internet, cable TV, and assorted other communications, it would take more than a few squads of soldiers at crucial locations to seize control of communication. Even if the major broadcast networks were taken over, citizens would still have many other ways of receiving news (in fact, if the major broadcast networks were taken over or shut down, it is entirely possible that most people would find out about it first via Facebook, Twitter, or talk radio).<sup>56</sup> If an important part of staging a successful coup involves establishing a monopoly over mass communications and blocking potential opponents from communicating in order to organize, then the current environment does look unfavorable.

On the other hand, persistent calls for a government-controlled "Internet kill switch"<sup>57</sup>—justified, ostensibly, by the needs

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54. PEW RES. CTR., POLITICAL POLARIZATION AND MEDIA HABITS: FROM FOX NEWS TO FACEBOOK, HOW LIBERALS AND CONSERVATIVES KEEP UP WITH POLITICS 9–11 (2014) (indicating a relatively concentrated ideology in the audience of news outlets).

55. KNEBEL & BAILEY, *supra* note 3.

56. During the July 2016 Turkish coup attempt, Turkish President Recep Erdogan used Facetime to bypass the coup plotters' control of state media. Sean McMeekin, *A Coup In Facetime*, THE AMERICAN INTEREST (July 16, 2016), <http://www.the-american-interest.com/2016/07/16/a-coup-in-facetime/> ("In Ed Luttwak's next edition of *Coup d'état: A Practical Handbook*, he may wish to add: make sure to confiscate your enemy's iPhone."). See also Emre Kizilkaya, *Facetime Beats WhatsApp in Turkey's Failed Coup*, AL MONITOR (July 24, 2016), <http://www.al-monitor.com/pulse/originals/2016/07/turkey-coup-attempt-whatsapp-facetime.html> ("If this coup attempt had occurred in the 1970s, the plotters could have sent a few soldiers to raid the public broadcaster and the largest private media outlets to control the flow of information. Thanks to current technology, that wouldn't work today.").

57. Declan McCullagh, *Renewed Push to Give Obama an Internet Kill Switch*, CBS NEWS (Jan. 24, 2011), <http://www.cbsnews.com/news/renewed-push-to-give-obama-an-internet-kill-switch/>; see also Dana Liebelson, *The Government's Secret Plan To Shut Off Cellphones And The Internet, Explained*, MOTHER JONES (Nov. 26, 2013), <http://www.motherjones.com/politics/2013/11/internet-phone-kill->

of cyber defense or anti-terrorism—could undercut that advantage. If whoever controlled the government could shut down the Internet, or, more insidiously, filter its content to favor the plotters’ message and squelch opposition while presenting at least a superficial appearance of normality, then things might actually be worse than they were in Knebel & Bailey’s day. At the very least, such a degree of Internet control would vitiate the advantages listed above.

In addition, where we used to talk about “the Internet” as a means of massive citizen-to-citizen communication, we now talk about social-media platforms like Facebook and Twitter. These platforms have their advantages—for example, it is much easier for a citizen to subscribe and post opinions and news using such platforms than it was (or is) for a citizen to set up his/her own website. But they are also much easier to control. Taking Facebook or Twitter down, or filtering their content (already controlled by algorithms that users seldom understand),<sup>58</sup> is much easier than taking down hundreds or thousands of independently run blogs, chatrooms, and websites. So, to the extent that Internet communications architectures become de facto corporate monocultures, the benefits of Internet mass communication become less significant.

Naunihal Singh characterizes a coup as primarily a “coordination game” within the military: everyone wants to end up on the winning side, since a civil war is so expensive, and the penalties for being on the losing side are so severe.<sup>59</sup> He suggests that social media is less important than traditional Big Media, in part, because social media communicates less information about who is winning: if the coup plotters have captured control of major broadcasting stations, or the government retains it, that is in itself, a data point that others can use to assess how the coup is going. Social media posts are more uncertain in their provenance or reliability.<sup>60</sup> It may be that social media is more effective at undercutting claims made by coup-plotters, as when Turkish President Erdogan demonstrated via Facetime that he was still alive and independent, than at promoting them. On the other hand, Singh notes,

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switch-explained (describing the mechanics and genesis of the existing “kill switch”).

58. Glenn Harlan Reynolds, *Could Facebook Swing An Election?*, USA TODAY (Apr. 18, 2016), <http://www.usatoday.com/story/opinion/2016/04/18/facebook-mark-zuckerberg-criticism-donald-trump-h1b-visas-technology-column/83181214/>.

59. SINGH, *supra* note 13, at 222.

60. *Id.* at 224–25.

Because of the anonymity of the Internet, one person could send out multiple tweets and even faked photos from a variety of different Potemkin identities purporting to show the challengers are strong and in control of a variety of different symbolic targets. Such dissimulation could be persuasive for a few days, long enough to have an impact on the coup attempt.<sup>61</sup>

On the Second Amendment front, the number of guns in civilian hands is, as noted, very large.<sup>62</sup> In addition, though the overall number of Americans with military training has probably declined since the end of conscription, the number of Americans who compete in shooting sports, including “practical shooting” events such as IPSC or three-gun competitions, is undoubtedly higher, since most of those events are of recent vintage. As a result, there would probably be roughly as many Americans equipped to resist a coup with force today as in past years.<sup>63</sup>

On the other hand, as noted, trends toward social fragmentation and disconnection<sup>64</sup> mean that those Americans would, to an uncertain but large degree, tend to be disorganized. A comparatively small number of armed civilians who could turn out to oppose a coup on short notice is more likely to make a difference than a significantly larger number who might turn out days or weeks after it is completed. An America in which more citizens were engaged in various high-trust social groups and networks is likely to be more resistant to a coup than one in which citizens tend to be atomized and out of touch.

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61. *Id.* at 227.

62. *See supra* note 32.

63. The International Practical Shooting Confederation (IPSC) was founded in 1976 and has grown since then. INTERNATIONAL PRACTICE SHOOTING COMPETITION, <http://www.ipsc.org/> (last visited Jan. 24, 2017). Further, the National Rifle Association now “sanctions over 11,000 shooting tournaments and sponsors over 50 national championships each year.” COMPETITIVE SHOOTING PROGRAMS, <http://competitions.nra.org/> (last visited Jan. 24, 2017).

64. *See generally* CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010* (2013) (discussing the evolution of American society since 1963 that lead to the formation of classes and ultimately arguing that the divergence into classes “will end what has made America America”); ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001) (reviewing trends in social and civic engagement and arguing that Americans need to reconnect with each other).

### Political Culture and Social Capital

Despite all the factors laid out above, the most significant barrier to a coup d'état over American history has probably stemmed simply from the fact that such behavior is regarded as un-American. Coups are for banana republics; in America, we do not do that sort of thing. This is an enormously valuable sentiment, so long as the gap between "in America" and "banana republics" is kept sufficiently broad. But it is in this area, alas, that I fear we are in the worst shape.

When it comes to ideological resistance to coups d'état, there are two distinct groups whose opinions matter: the military and civilians. Both are problematic.

The military satire site Duffelblog recently ran an item entitled: *General Mattis Crosses Potomac With 100,000 Troops; President, Senate Flee City*. The piece opened:

In an unprecedented turn in American history, retired Marine Gen. James Mattis, several years after being dismissed by the President and exiled to his estate in the countryside, marched on the national capitol early Tuesday morning with an army over one hundred thousand strong.

This number includes at least ten infantry legions, several aviation and artillery legions, and multiple cavalry cohorts.

"I come in peace, by myself, in order to hand-deliver a Memorandum of Concern to the Commander in Chief and the Senate," said Mattis in a press conference. "I am moving on foot at a leisurely pace, with no ill will. If these American citizens choose to take a stroll with me, then who am I to turn down their companionship?"

The contents of the so-called memorandum are unknown, but are rumored by Mattis' close advisors to contain paragraphs addressing unconstitutional acts by the administration and the Senate. Alarmed by the amassing of troops sympathetic to Mattis over the last week at Fort Myer, the Senate, the President, and



various generals attempted to recall various combat divisions to Washington to defend the city.

These included the 101st Airborne, 82nd Airborne, 10th Mountain, and 3rd Infantry Divisions, in addition to the 2nd Marine Expeditionary Force.

“We even attempted to contact NAVSURFLANT and SUBLANT,” confided one Senate aide as he packed his Datsun to flee northward. “All we got was laughter and then static.”

The summoned units all either ignored their movement orders, or by the next morning had joined forces with Mattis’ ad-hoc command.

Mattis was apparently done waiting, and crossed the Potomac on landing craft, escorted by an honor guard from MARSOC.

After setting fire to the National Archives and sabotaging key infrastructure, the cabinet and most members of the Senate fled north toward New York and Boston in cars, vans and whatever other vehicles they could commandeer.<sup>65</sup>

This scenario, with its obvious allusions to the end of the Roman Republic, is not very likely, though the enthusiasm with which many online commenters received it is perhaps troubling.<sup>66</sup>

Yet in a way, it distills the concern. General Mattis may be the most respected and revered military officer living; he has even been spoken of as a potential Presidential candidate.<sup>67</sup> Were things to

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65. *General Mattis Crosses Potomac With 100,000 Troops; President, Senate Flee City*, DUFFLEBLOG (Dec. 24, 2013), <http://www.duffelblog.com/2013/12/general-mattis-crosses-potomac-100000-troops-president-senate-flee-city/>.

66. Though if the sentiments of Internet commenters are the tool of assessment, civilization is already doomed. Or, perhaps, has already suffered its doom.

67. Tim Mak, *The Secret Movement To Draft General James Mattis for President*, DAILY BEAST (Apr. 8, 2016, 1:15 AM), <http://www.thedailybeast.com/>

look bad enough, would the military actually back him—or a comparable figure at some later date—in large numbers? This question is perhaps more salient given that Mattis is now serving as President Trump’s Secretary of Defense.

The answer to that question depends on military culture and at present the answer is certainly “no.” Yet there are some troubling trends in civilian/military relations that suggest that we should be more worried about this subject in the future than we have been in the past.

And I am not the first to notice this. Back in the 1990s, Col. Charles Dunlap published a piece that, though still fictional, was far less whimsical than the Duffelblog piece quoted earlier. Dunlap’s piece, *The Origins Of The American Military Coup of 2012*,<sup>68</sup> was published not in a satirical webzine, but in *Parameters: The Journal of the Army War College*. Dunlap’s piece was not a piece of satire, nor an ignored dissent from a disgruntled officer, but the winner of a National Defense University essay competition. Col. Dunlap was honored by then-Gen. Colin Powell at the awards ceremony.<sup>69</sup>

Dunlap’s essay looked ahead to a military worn out and disgusted after decades of being given tough jobs by its civilian masters, while those masters behaved irresponsibly. In Dunlap’s fictional future history, the armed forces, being far more trusted and (apparently) effective than other government organizations, were handed more and more civilian jobs at home, and more and more non-military jobs (humanitarian missions, drug interdiction, etc.) abroad. The result was a military better suited to non-military tasks than to actually fighting enemies abroad. A disastrous defeat at the hands of Iran in the Persian Gulf led a military humiliated abroad and abused at home to decide that seizing power was the only way to go.<sup>70</sup>

As Thomas Ricks wrote in *The Atlantic*,

Like all science fiction, Dunlap’s essay is really about the present. His coup entices the reader to his real

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articles/2016/04/08/the-secret-movement-to-draft-general-james-mattis-for-president.html.

68. Charles J. Dunlap, *The Origins of The American Military Coup of 2012*, *PARAMETERS* 2 (Winter 1992–93).

69. Thomas E. Ricks, *Colonel Dunlap’s Coup*, *ATLANTIC MONTHLY* (Jan. 1993), <http://www.theatlantic.com/past/politics/defense/coldunl.htm>.

70. Dunlap, *supra* note 68.

subject: the worrisome drift of the U.S. military into civilian affairs.

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Dunlap does what a good essayist should do: he makes his reader see familiar phenomena in a new light. As my newspaper's Pentagon correspondent, I pick up the Defense Department's "Early Bird" compendium of newspaper clippings and, since reading Dunlap, almost every day find myself taken aback. . . . Is "The Origins of the American Military Coup of 2012" something to be taken seriously? Yes, it is, even if one may be skeptical about just how likely to occur the developments that Dunlap points to really are.<sup>71</sup>

Happily, we made it past 2012 without a coup; though unhappily, the years between 1992 and 2012 were more warlike than Dunlap—who wrote at the end of the Cold War and the dawn of the evanescent "peace dividend"—foresaw.<sup>72</sup> Nonetheless, Dunlap identifies a number of concerns, most of which fall into the political/cultural, rather than the strictly constitutional, category.

Among these concerns are:

- A "societal malaise," with most Americans thinking that the country was on "the wrong track."
- A "deep pessimism about politicians and government after years of broken promises," leading to an "environment of apathy" among voters that scholars regard as a precursor to a coup.

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71. *Id.*

72. Dunlap's 1992 essay foresaw a world sufficiently peaceful that the military found itself occupied primarily with peacetime civilian missions, and becoming slack in terms of actual war-fighting skills. *Id.* In fact, the history since his essay was published has been one of almost nonstop military action by the United States, from the Kosovo intervention under President Bill Clinton, to interventions in Iraq, Syria, Libya, Afghanistan, and elsewhere under Presidents George W. Bush and Barack Obama. *See generally* Therese Pettersson & Peter Wallensteen, *Armed Conflicts, 1946-2014*, 52 *J. PEACE RES.* 536 (2015).

- A strong belief in the effectiveness and honor of the military, as contrasted to civilian government.
- The employment of military forces in non-military missions, from humanitarian aid to drug interdiction, to teaching in schools and to operating crucial infrastructure.
- The consolidation of power within the military—with Congressional approval—into a small number of hands. In particular, Dunlap notes the consolidation of armed services into a single body for reasons of “efficiency.”<sup>73</sup>
- A reduction in the percentage of the officer corps from places outside the major service academies. “Academy graduates, along with graduates of such military schools as the Citadel, Virginia Military Institute, and Norwich University, tended to feel a greater homogeneity of outlook than, say, the pool of ROTC graduates at large.”<sup>74</sup>
- A general insulation of the military from civilian life. “[W]ell-meaning attempts at improving service life led to the unintended insularity of military society,

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73. “Eventually, that consideration, and the conviction that ‘jointness’ was an unqualified military virtue, led to unification. But unification ended the creative tension between the services. Besides rejecting the operational logic of separate services, no one seemed to recognize the checks-and-balances function that service separatism provided a democracy obliged to maintain a large, professional military establishment. The Founding Fathers knew the importance of checks and balances in controlling the agencies of government: ‘Ambition must be made to counteract ambition.’ . . . Ambition is a natural trait of military organizations and their leaders. Whatever might have been the inefficiencies of separate military services, their very existence served to counteract the untoward desires of any single service . . . . Additionally they served to ensure that unscrupulous designs by a segment of the military establishment were ruthlessly exposed. Once the services were unified, the impetus to do so vanished, and the authority of the military in relation to the other institutions of government rose.” Dunlap, *supra* note 68, at 113–14. Whether Congress’s failure to make such a change was influenced by Dunlap’s article is unclear, but it is entirely possible that Dunlap had some impact.

74. *Id.* at 114–15.

representing a return to the cloistered life of the pre-World War II armed forces. Military bases, complete with schools, churches, stores, child care centers, and recreational areas, became never-to-be-left islands of tranquility removed from the chaotic crime-ridden environment outside the gates . . . . Thus, a physically isolated and intellectually alienated officer corps was paired with an enlisted force likewise distanced from the society it was supposed to serve. In short, the military evolved into a force susceptible to manipulation by an authoritarian leader from its own select ranks.”<sup>75</sup>

Some of Dunlap’s predictions came true and others did not. The great reduction in crime that took place beginning in the mid-1990s made the contrast between the orderliness of military bases and the “chaos” of the outside world less striking. And Congress has not, so far, consolidated all the armed services into one for reasons of efficiency, though the emphasis on “jointness” remains strong.

On the other hand, distrust in the civilian government and bureaucracy is very high. A 2016 Associated Press/National Opinion Research Center poll found that more than six in ten Americans have “only slight confidence—or none at all” that the federal government can successfully address the problems facing the nation. And, as the Associated Press noted, this lack of confidence transcends partisan politics: “Perhaps most vexing for the dozen or so candidates vying to succeed President Barack Obama, the poll indicates widespread skepticism about the government’s ability to solve problems, with no significant difference in the outlook between Republicans and Democrats.”<sup>76</sup>

As a troubling companion to this finding, the YouGov poll on military coups mentioned earlier also found a troubling disconnect between confidence in civilian government and confidence in the

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75. *Id.* at 115.

76. Bill Barrow & Emily Swanson, *Poll: Low Confidence in Government*, ASSOCIATED PRESS (Jan. 23, 2016), <https://www.yahoo.com/news/ap-poll-public-doubts-washingtons-problem-solving-ability-152224966--election.html?ref=gs>; see also Ron Fournier & Sophie Quinton, *How Americans Lost Trust In Our Greatest Institutions*, THE ATLANTIC (Apr. 20, 2012), <http://www.theatlantic.com/politics/archive/2012/04/how-americans-lost-trust-in-our-greatest-institutions/256163/> (that loss of trust also extends to other institutions, like churches, local governments, and newspapers).

military: “Some 71% said military officers put the interests of the country ahead of their own interests, while just 12% thought the same about members of Congress.”<sup>77</sup> While such a sharp contrast in views about civilian government and the military is not itself an indicator of a forthcoming coup, it is certainly bad news. Also troubling are polls finding that a minority of voters believes that the United States government enjoys the consent of the governed.<sup>78</sup> This degree of disconnection and disaffection, coupled with much higher prestige on the part of the military, bodes ill.

In his essay, Dunlap quotes historian Andrew Janos, who said:

A coup d'état in the United States would be too fantastic to contemplate, not only because few would actually entertain the idea, but also because the bulk of the people are strongly attached to the prevailing political system and would rise in defense of a political leader even though they might not like him. The environment most hospitable to coups d'état is one in which political apathy prevails as the dominant style.

“However,” Dunlap writes, “when Janos wrote that back in 1964, 61.9 percent of the electorate voted. Since then voter participation has steadily declined.”<sup>79</sup>

Voter participation aside, politics in America has probably become more personalized since 1964, and fewer voters are “strongly attached to the prevailing political system,” perhaps because fewer and fewer voters actually understand the Constitution and how the American system of government is supposed to work.<sup>80</sup> And although

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77. Rob Quinn, *Poll: 29% of Americans Could Back Military Coup*, NEWSER (Sept. 14, 2015), <http://www.newser.com/story/212734/poll-29-of-americans-could-back-military-coup.html>.

78. See, e.g., *22% Believe Government Has Consent Of Governed*, RASMUSSEN REPORTS (June 16, 2012), [http://m.rasmussenreports.com/public\\_content/politics/general\\_politics/june\\_2012/22\\_believe\\_government\\_has\\_consent\\_of\\_governed](http://m.rasmussenreports.com/public_content/politics/general_politics/june_2012/22_believe_government_has_consent_of_governed) (reviewing poll data on citizens' opinion about popular consent for government rule).

79. Dunlap, *supra* note 68, at 109.

80. Sohrab Amari, *The Civics Crisis, Books & Culture*, CITY JOURNAL (Nov. 4, 2011), <http://www.city-journal.org/html/civics-crisis-9687.html>; see also TEACHING

American politics is certainly full of sound and fury, that sound and fury overlays a curious degree of apathy regarding actual policy issues and outcomes as Americans lose trust not only in government, but in almost everything else.<sup>81</sup> On social media sites like Twitter, this shows up as ironic posts tagged #lolnothingmatters. Such a culture is not, I suspect, one in which righteous yeomen rise up to defend a political system they embrace even in defense of a political leader they abhor.

Civilians' lack of commitment does not matter, of course—in this context, at least—so long as the military remains committed to constitutional government. Here there is less obvious cause for concern, but the situation cannot be described as entirely rosy. Indeed, some are saying that the civilian-military divide is the deepest it has been in some time. “Service members and veterans feel more disconnected from civilians than ever before. As the percentage of Americans who have served has decreased to just 7% with only 1% currently serving, fewer civilians are able to relate to their experiences . . . . ‘Veteran populations feel misunderstood and unappreciated.’”<sup>82</sup>

Though conscription has many disadvantages (aside from its questionable morality), it produces a military full of people who otherwise would not have joined. An all-volunteer force may, in general, be superior in motivation and esprit de corps, but it is also

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AMERICA: THE CASE FOR CIVIC EDUCATION (David Feith ed. 2011) (describing widespread ignorance of civics and American government).

81. Fournier & Quinton, *supra* note 76 (discussing Americans' lack of confidence in institutions ranging from banks and big business to media to public school and organized religion).

82. Sarah Sicard, *Civilian-Military Divide Continues To Grow As Force Size Shrinks*, TASK & PURPOSE (Mar. 30, 2016), <http://taskandpurpose.com/civilian-military-divide-continues-grow-force-size-shrinks/>; *see also* Mary L. Dudziak, *A Growing ‘Civilian-Military’ Gap, And Its Consequences*, BALKINIZATION (Nov. 25, 2011), <http://balkin.blogspot.com/2011/11/growing-civilian-military-gap-and-its.html> (describing a report that found that more than three-quarters of adults ages 50 and older reported having an immediate family member who had served in the military, compared to only one third of adults ages 18–29); Thomas E. Ricks, *The Widening Gap Between Military And Society*, THE ATLANTIC (Mar. 1997), <http://www.theatlantic.com/magazine/archive/1997/07/the-widening-gap-between-military-and-society/306158/> (analyzing a variety of factors that have led to the military becoming increasingly separated from civilian society).

self-selected and likely—especially over time—to look different in many ways from the nation as a whole.

A famous photo from Ramadi in 2007 featured a bit of whiteboard graffiti that read, “America is not at war. The Marine Corps is at war; America is at the mall.”<sup>83</sup> Though bitter humor has undoubtedly been a staple of soldiers since before the Roman legions, this division is somewhat different, particularly since, unlike the Roman legions, our soldiers and Marines are instruments of a democracy and are themselves citizens.

A professionalized military—like other professions—tends to see things through the lens of its own professionalism, and, as in other professions, this professionalism inevitably tends to set its members apart from society as a whole. A professional, volunteer military is likely to be a superior organization in combat, but it is, I think, also likely to be less connected to the society that it defends and more likely to hang together in times of political strife.

An army of conscripts, on the other hand, is likely to be militarily inferior because it is composed of a large number of people who have no particular desire to be in the military, have no special loyalty to it as an institution, and who turn over regularly. Thus, a less professional and specialized military, though probably less formidable on the battlefield, may also pose less risk of a coup at home.

In fact, this phenomenon was displayed in the French “Four Generals” plot in 1961.<sup>84</sup> On April 22, 1961, Generals Challe, Zeller, Jouhad and Salan, unhappy that the French government might withdraw from Algeria, seized first Algiers, then Oran and Constantine. Given that the greater part of the French Army was in Algeria (and the remainder, mostly in Germany, was “only doubtfully loyal,”)<sup>85</sup> it appeared to some that the government was doomed to fall. In fact, however, the government (under General DeGaulle, whom the Army had installed after a threatened, but not quite launched, coup in 1958) embarked upon a political attack, with DeGaulle ordering soldiers not to obey the generals. In particular, the conscript troops who made up most of the forces in Algeria listened to DeGaulle, not to

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83. *America: At War Or At The Mall?*, MURDOC ONLINE (Feb. 22, 2007), <http://www.murdoconline.net/archives/4584.html>.

84. See generally FINER, *supra* note 12, at 96–98.

85. *Id.* at 97.



their commanders.<sup>86</sup> Troops with a stronger loyalty to their service, or their officers, might not have responded this way.

At present, there's enough separation to be the cause of considerable discussion. Writing recently in *The Atlantic*, James Fallows observed:

This reverent but disengaged attitude toward the military—we love the troops, but we'd rather not think about them—has become so familiar that we assume it is the American norm. But it is not. When Dwight D. Eisenhower, as a five-star general and the supreme commander, led what may have in fact been the finest fighting force in the history of the world, he did not describe it in that puffed-up way. On the eve of the D-Day invasion, he warned his troops, “Your task will not be an easy one,” because “your enemy is well-trained, well-equipped, and battle-hardened.” As president, Eisenhower's most famous statement about the military was his warning in his farewell address of what could happen if its political influence grew unchecked.

At the end of World War II, nearly 10 percent of the entire U.S. population was on active military duty—which meant most able-bodied men of a certain age (plus the small number of women allowed to serve). Through the decade after World War II, when so many American families had at least one member in uniform, political and journalistic references were admiring but not awestruck. Most Americans were familiar enough with the military to respect it while being sharply aware of its shortcomings, as they were with the school system, their religion, and other important and fallible institutions.

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86. As Gregor Ferguson writes about the Four Generals, “[B]ecause they had apparently gained no moral ascendancy over either the French conscripts in Algeria or the government who sent them there, the conscripts (or, rather, the officers in those line regiments staffed mainly by conscripts) did not join the putsch.” Ferguson also notes the sudden surge in patriotic sentiment at home: “The people of France, like the conscript soldiers, whose apathy and indifference kept them out of the coup, simply didn't care about Algeria. They cared enough about France, however, to prove to the coup's leader, General Challe, that he could never succeed, and so he surrendered.” FERGUSON, *supra* note 8, at 124.

Now the American military is exotic territory to most of the American public. As a comparison: A handful of Americans live on farms, but there are many more of them than serve in all branches of the military.<sup>87</sup>

Fallows interviewed Charles Dunlap,<sup>88</sup> who observes that the separation goes both ways:

“It’s becoming increasingly tribal,” Dunlap says of the at-war force in our chickenhawk nation, “in the sense that more and more people in the military are coming from smaller and smaller groups. It’s become a family tradition, in a way that’s at odds with how we want to think a democracy spreads the burden.”

People within that military tribe can feel both above and below the messy civilian reality of America. Below, in the burdens placed upon them, and the inattention to the lives, limbs, and opportunities they have lost. Above, in being able to withstand hardships that would break their hipster or slacker contemporaries.

“I think there is a strong sense in the military that it is indeed a better society than the one it serves,” Dunlap said. “And there is some rationality for that.” Anyone who has spent time with troops and their families knows what he means. Physical fitness, standards of promptness and dress, all the aspects of self-discipline that have traditionally made the military a place where misdirected youth could “straighten out,” plus the spirit of love and loyalty for comrades that is found in civilian life mainly on sports teams.<sup>89</sup>

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87. James Fallows, *The Tragedy of The American Military*, THE ATLANTIC (Jan./Feb. 2015), <http://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516/>.

88. Dunlap’s career probably wasn’t harmed by his *Coup of 2012* article; Fallows notes that he retired as a Major General and now teaches at Duke Law School. *Id.*

89. *Id.*

Even those who disagree with Fallows echo some of his concerns, as Mark Seip writes:

First, there is an emotional disconnect, as Fallows alludes. While he primarily focuses on why civilians don't connect with troops, he neglected to articulate what drives the emotional divide from those in service. From the military side, many of us feel that we are unique to our generation in our calling; that we rose above the self-absorbed stereotype often associated with both Gen Xers and Millennials to protect our nation. We accept significant time away from our families, often subpar working conditions compared to our civilian counterparts, and average pay in relation to the skills we possess in order to wear the uniform. Moreover, as our nation's warrior corps we assume a level of risk since time immemorial, that our occupation entails a distinct possibility of loss of life. Our service therefore requires a level of confidence and self-assurance to do our jobs and take the risks required. However, this mentality can easily lead to pride and arrogance in relation to those who choose not to or are unable to serve, and a distrust of decisions made by civilian leadership who have not faced those same risks.

Second, the widening gap is a function of exposure, both in numbers and in proximity. As Fallows points out, 2.5 million served in either Iraq or Afghanistan. To provide context, according to an NPR study 8.7 million served in some capacity in Vietnam. Furthermore, during Vietnam the majority of the generation at that time had fathers and mothers who served in some capacity either in WWII, Korea or both. Today, however, the actual number and/or the tangential family tie to the military is lower, reinforcing the distance between those in service and the rest of the nation.

Military bases within the United States are trending towards two extremes. The first are those that are isolated, due to either the need for access to large training spaces (for example NAS Lemoore and its strike fighters in central California) or that the

national security mission requires it (Minot AFB and its nuclear arsenal in North Dakota), inhibiting a broader interaction. The second trend is towards consolidated basing regions. With the drive for greater efficiencies through the base realignment and closure process, more military personnel are being relocated into specific locations such as Norfolk for the Navy and San Antonio for the Air Force, creating cities of like-minded active duty or retired military. Add to all of this what retired Lt. Gen. David Barno calls the “gated community” mentality of bases themselves, with housing, household shopping and recreational activities located on or near the various facilities. As a result, military and nonmilitary personnel have fewer chances to interact and understand one another.<sup>90</sup>

These observations sound perilously close to those made in Col. Dunlap’s future history almost 25 years ago. The picture is not a dreadful one, but it is not a rosy one either. At a time when, as I think most would agree, our civilian political culture has become coarser and less moored to the Constitution or civil-society political traditions, our military feels more separate from the civilian political culture, and from civilian society in general, than it has in living memory.

#### REMEDIES

So what is to be done? This is the point at which authors traditionally whip out a sure-fire policy proposal intended to remedy the problem they have spelled out. Alas, I have no such nostrum. (What would it be? An Anti-Coup Amendment to the Constitution?) But I do have some thoughts.

The most important thing—and this is really my reason for writing this Article—is to be aware of the problem. As mentioned in the beginning, Americans tend to regard the prospect of a military coup as so unthinkable that, in fact, they don’t really think about it at all. To some degree, this is a good thing. It’s better to live in a nation where a military coup is almost unthinkable than to live in a nation

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90. Mark Seip, *What Falls Missed About the Military-Civilian Gap*, DEFENSE ONE (Jan. 15, 2015), <http://www.defenseone.com/ideas/2015/01/what-falls-missed-about-military-civilian-gap/103014/>.

where it is thought about all the time. But perhaps we should think about the subject at least a little.

As we make changes in the political and constitutional order, and in the structure of the armed forces, and—to the extent we have any control over this—in the political culture, it may be useful to bear in mind that some changes make a military coup more or less likely. We may be willing to make some changes even if they marginally increase the (comparatively small) risk we face now, but we should at least think about that risk and weigh it with other factors. And sometimes there's no tradeoff involved.

In particular, decentralization is both strongly protective against the seizure of power by small, well-organized groups, and beneficial for other reasons. Setting ambition to counteract ambition is a remedy that goes back to *The Federalist*, and—as in Dunlap's recommendation to avoid unifying the services—is one that has particular resonance here. Likewise, strong state governments exercising a degree of independent military force are also protective; we should be very reluctant indeed to make changes there. We might also want to ensure that important parts of the federal government—the President, the Congress, the Supreme Court—are protected by different agencies, to make it harder for a small group to seize control. (Interestingly, this is the case now, though whether by accident or design is unclear).

And, hardest to quantify, or even to describe accurately, but probably most important of all, is the spirit of the citizenry. We should strive to maintain—or, perhaps return to—the spirit described by Andrew Janos, in which people are “strongly attached to the prevailing political system and would rise in defense of a political leader even though they might not like him.”<sup>91</sup> More than anything else, the sense that the country wouldn't stand for such a thing serves as a preventive not only for coup attempts, but even for the contemplation thereof. It is my sense that we could do a lot better in this particular regard, and I suspect that it is the single most important consideration. A proper public attachment to the Constitution not only makes a coup unlikely, but would also give legitimacy to the rare—but not unthinkable—military coup that is actually justified,<sup>92</sup> under circumstances sufficiently horrible to make

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91. Dunlap, *supra* note 68, at 109.

92. Coups are generally a bad thing, but they aren't always evil or wrong. The plot to kill Hitler, after all, was part of a military coup, and in the event of a

it the best alternative in spite of the damage that it would do to our political system.<sup>93</sup>

Such an attachment is more likely, of course, when those in positions of political and cultural leadership display a prominent attachment to the Constitution themselves. To the extent that constitutional limits on governmental action are treated as outmoded and unimportant when they interfere with goals of existing political elites, those limits are also likely to be seen as less significant when they act to protect existing political elites from extraconstitutional governmental change. In general, an elite that is principled and self-disciplined is in a better position to forestall a coup than one that is not—or perhaps it is that a nation whose elite is principled and self-disciplined is simply not ripe for a coup. Those characteristics are more likely to be displayed by elites if they are demanded by voters, and by intermediary organizations like political parties, interest groups, and the press. There is no small room for improvement in this department.

#### CONCLUSION

In this comparatively short Article, I have noted popular concerns about polls relating to a military coup, and noted the ways in which such a military takeover can occur. I have also surveyed the various ways in which the United States Constitution, and American political culture, make the likelihood of a military coup (a successful one, at least) smaller than in many other countries.

My goal is not to convince readers that the United States teeters on the brink of such a takeover now. Despite election-year hyperbole, I do not think a military coup looms large in America's future. But should that ever cease to be the case, and should such an event become likely in the near future, then it will be too late for law review articles to do any good. One does not take up jogging, or statins, because one fears having a heart attack tomorrow; rather, those are low-cost remedies taken to reduce the risk of a major problem in the indefinite, possibly distant future. I urge a similar approach here.

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rogue president, a coup might be seen as a better alternative than a dictatorship or a civil war in a nation possessing nuclear weapons.

93. FINER, *supra* note 12, at 18 (explaining that one of the worst consequences of a coup is “a succession of further coups by which new contenders aim to displace the first-comers”).