

# The Commander-in-Chief



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James P. Terry



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*For Michelle*



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# Foreword

I was honored to be asked to write this; however, I have to caution the reader that this is very much a “personal” foreword. I’m a fan of the author. I have known Colonel Jim Terry for more decades than either of us cares to admit and through the years I’ve learned more from Jim’s professional writings than from any other single person. *The Commander-in-Chief* is another example of the accumulation of knowledge and perception that Jim has garnered through a lifetime of service to the nation.

As a junior marine officer, Jim observed firsthand the exercise of command authority in Vietnam. As a Marine Judge Advocate, he served in virtually every type of position available, gaining experience in all facets of military life. As a senior officer, he both observed and advised on the execution of command policy as the Legal Adviser to the Chairman of the Joint Chiefs of Staff. Along the way, he gained an LL.M in International Law and Comparative Legal Systems (with Highest Honors) and, while working full time in one of the busiest offices in the Pentagon, obtained the somewhat rare Doctor of Juridical Science in International Law.

A student of, and an expert on, national security law and policy, Jim has written extensively on legal issues relating to conflict, national security legal regimes, terrorism, executive authority, international coercion control and even the misuse of international of international law norms to further political policies. His clear perception of real-world issues was recognized some 30 years ago when he was one of those instrumental in developing what were then called the Peacetime Rules of Engagement (PROE) for the Department of Defense. He also subsequently contributed to the policy decision to declassify the policies behind the PROE so that world powers would never be in doubt of what would be expected of our military commanders.

The author of numerous scholarly articles and books, Jim continues this important vein of scholarship with *The Commander-in-Chief*, in which he calls on decades of real-world experience to illustrate how the real world—as opposed to an academic world—has actually functioned in times of cri-

sis. It is important to understand that this is not merely a scholarly book—it is the accumulation of years of experience brought forth to explain a vitally important, and often misunderstood subject.

Perhaps as important as anything in this book is the clear illustration that regardless of how much academics might want to believe that Congress and the President are co-equals in the sphere of crisis management, necessity breeds action. Presidents, in their role as Commander-in-Chief, have consistently through the years defined and expanded Article II powers as necessity required.

However, the book does not treat Congress lightly and it is clear that Congress has vital roles to play when there is a crisis, whether of a humanitarian or conflict variety. The confluence of Executive and Congressional authority is particularly clear when the crisis does not directly affect national interests—as in humanitarian assistance or actions taken pursuant to United Nations authority.

A keen observer of the reality of Article II authorities, Jim has produced a book that lays out in a clear logical format the frequent need of the Commander-in-Chief unilaterally and expeditiously to exercise the inherent powers of the office. There have been frequent concerns through the years about the role of Congress, vis-à-vis the President in conflict. This book does much to lay to rest many of those concerns by explaining roles of the Commander-in-Chief and reasons for his actions taken in accord with the demands of the real world.

However, what may be the most important aspect of this book is the carefully organized landscape of the narrative illustrating that, historically, the unilateral exercises of Commander-in-Chief powers related in the book normally have been exercises of statesmanship rather than the politician's desire to usurp any real or imagined Congressional powers. The Commander-in-Chief is, after all, more than the politician who won an election—he is always the leader of the nation.

M. E. (Spike) Bowman  
Captain, USN (ret.)

# Preface

The Presidency of the United States is a unique position of power. It represents a consolidation of European constructs from the seventeenth and eighteenth centuries, and the very personal experiences of early American leaders in addressing the Crown before the Revolutionary War with Great Britain.

This text explores the Constitutional considerations reflective of the varying views of a more expansive versus a more restrictive Presidency, especially in the focused context of the President's role as Commander-in-Chief. It is to that end that this text is dedicated. The role of the President as Commander-in-Chief engenders considerations of inherent Constitutional authority under Article II, the devolution of authority through Presidential action and national experience, and the aggregation of authority at the expense of Congressional interests through necessity, especially in time of crisis.

The President's modern role as Commander-in-Chief is multi-faceted, with the responsibility to provide for the defense of the United States requiring a legal and political context largely unforeseen at the time of the nation's founding. In the pages that follow, the author navigates the turbulent waters of congressional challenges to Presidential action, the role of the Courts in restricting Executive action, and the President's considerable inherent authority to rise above these constraints and prevail with policies that best serve the American people.

The far-reaching and successful initiatives reflective of our Presidents writ large are exemplified in this text through an examination of our nine war-fighting Presidents, and those who were tested in periods short of war in response to terrorist violence, humanitarian crises, and in defense of U.S. nationals on foreign territory. This broad canvas also reviews critical preemptive initiatives directed successfully by our recent Presidents in the protection of critical infrastructure and in the negotiation of important arms control agreements. Anyone with a keen interest in the historical and legal context underlying the actions of our Commanders-in-Chief will gain valuable insights in reading this text.



# About the Author

James Terry, a native of East Brookfield, Massachusetts, received his undergraduate and graduate degrees from the University of Virginia (1968, 1976), his JD from Mercer University (1973), and his LLM and SJD (1980, 1982) degrees in International Law from the National Law Center at The George Washington University. He is Senior Fellow in the Center for National Law at the University of Virginia School of Law. He completed, in June 2011, a six-year term as Chairman of the Board of Veterans Appeals in the Department of Veterans Affairs. He previously served as Principal Deputy Assistant Secretary and Deputy Assistant Secretary of State, as Deputy Director, Office of Hearings and Appeals in the Department of the Interior with responsibility for all Administrative Law Judges within the Department, as a Judge on the Board of Land Appeals, Department of the Interior, and for four years as Legal Counsel to the Chairman of the Joint Chiefs of Staff under General Colin Powell and General John Shalikashvili. A retired Marine Corps colonel who served 27 years on active duty, with tours in Vietnam as an infantry officer with 1st Battalion, 3d Marines, and with III MEF as its Staff Judge Advocate during the 1st Gulf War, he is the author of more than 40 articles and three volumes. One of his works, *The Regulation of International Coercion*, was published by the Naval War College Press in 2005. He is married to the former Michelle Joan Lambert of Long Beach, California, and they reside in Annandale, Virginia.

