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The Separation and Overlap of War and Military Powers

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War powers scholars have focused on the issue of who may decide whether the United States will wage war. Perhaps for this reason, war powers scholarship has tended to center on the meanings of the declare war and commander in chief powers. Missing from this scholarship is a general account of where war and military powers separate and overlap. Making arguments sounding in text, structure, and history, this Article provides such an account. First, numerous English statutes and practices help identify the meaning of many constitutional provisions relating to war and military powers. Second, additional insights about the scope of such powers come from the Revolutionary War and the almost half-dozen obscure wars fought after 1789. Congress exercised broad authority over the military and the conduct of wars, essentially micromanaging war and military policies. Third, Presidents (and their advisors) acquiesced to these congressional assertions of power, often expressing rather narrow understandings of presidential power over war and military matters. The Article concludes that Congress has complete control over all war and military matters. Some authorities, such as the powers to declare war and establish a system of military justice, rest exclusively with Congress. In contrast to Congress, the President lacks any exclusive war or military powers. Instead, military authorities not granted exclusively to Congress are vested concurrently with the President and Congress, meaning that either can exercise such authority. In this area of overlap, when executive orders conflict with congressional statutes, the latter always trumps the former. In short, the Constitution creates a powerful Commander in Chief authorized to direct military operations in a number of ways who is nevertheless subject to congressional direction in all war and military matters.

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The Separation and Overlap of War and Military Powers

Introduction

War powers scholarship has tended to focus on the meaning of the Declare War and Commander in Chief Clauses. Perhaps an unstated assumption of these works is that if one makes sense of these two Clauses, one holds the keys to understanding the Constitution's allocation of war and military powers. On one view, the commander in chief power grants the President vast and illimitable powers over the military, including the authority to start any number of wars. On another view, the declare war power establishes the primacy of Congress over war and military powers.

This scholarly focus has distorted and hampered our understanding of the Constitution's war and military powers. First, most of the other war and military powers mentioned in the Constitution receive little scholarly attention. Yet many of these powers may turn out to be just as important, if not more so, in understanding our separation of powers. Indeed, existing conceptions of the declare war and commander in chief powers may well change based upon a more complete understanding of other powers.

Second, perhaps even less attention has been paid to the many powers that the Constitution does not specifically mention, such as the powers to escalate and de-escalate warfare and to imprison enemy soldiers. Scholars tend not to consider such seemingly unallocated powers because we are caught up in debates about the meaning of the declare war and commander in chief powers.

Third, the fixation on these two powers may have led scholars to the reasonable conclusion that congressional and executive powers over the war and military do not overlap. For instance, one might suppose that while Congress has a monopoly on the decision of whether to go to war, the President has a monopoly on war decision making after Congress has declared war. But consideration of other war and military powers might suggest a different answer, one that envisions areas of substantial overlap. When it comes to certain war and military powers, maybe the metaphor of complete separation is inapt.

In short, because scholars are obsessed about who may start a war, we have neglected the task of developing a more comprehensive account of the separation and overlap of war and military powers. We lack a treatment that sketches what each of the Constitution's war and military provisions means and whether they allocate powers exclusively to a particular branch.

The want of a comprehensive account of war and military powers has become somewhat embarrassing, as recent events have brought to the surface seemingly basic separation of war power questions. Some insist that Congress can regulate the treatment of prisoners and others maintain that this matter is left wholly to the Commander in

Chief's discretion. Some claim that Congress can order a military withdrawal from Iraq while others argue that Congress cannot. Other examples are not wanting.

Making arguments sounding in text, structure, and history, this article seeks to provide a comprehensive theory of the separation and overlap of war and military powers.¹ Drawing upon English statutes and practices, the article reveals that many of our Constitution's provisions had antecedents that help us identify their meaning. England had controversies about soldier deployment and had statutes regulating military discipline and the treatment of prisoners. England had multiple commanders in chief, all subordinate to the Crown, an arrangement that sheds light on the authority of the federal Commander in Chief.

Additional constitutional insight comes from the Revolutionary War and the almost half-dozen obscure wars fought in the wake of the Constitution's ratification. These wars provide crucial insight into what it means to regulate and govern the armed forces, what it means to be a commander in chief, and who may deploy troops. Presidents (and their advisors) reached numerous conclusions about the division of war and military powers, positions that were quite deferential to Congress. Consistent with this pattern of presidential deference, Congress passed dozens of war and military statutes, laws that reveal sweeping congressional control over war and military powers.

A surprising number of the questions debated today were actually answered in the late eighteenth century. To take but one example, early Congresses regulated the treatment of prisoners, requiring the executive branch to see to their safekeeping. At the same time, early Congresses infrequently authorized the Commander in Chief to make use of the "law of retaliation." That is to say Congresses authorized Presidents to torture and execute prisoners in retaliation for the mistreatment meted out to American prisoners. No one in the executive branch suggested that statutes requiring the safekeeping of prisoners were unconstitutional or that statutes authorizing torture and execution were superfluous.

This article concludes that where war and military powers are concerned, the Constitution establishes areas of concurrent authority and areas of separation. Some powers, such as the powers to declare war, fund the military, and establish a system of military justice, rest exclusively with Congress. The President cannot exercise any of these powers. In contrast, the President lacks any exclusive war or military powers. Instead, military authorities not granted exclusively to Congress are vested concurrently with the President and Congress, meaning that either can exercise such authority. In this area of overlap, when presidential orders conflict with congressional statutes, the latter always trumps the former. Put another way, the Constitution creates a powerful Commander in

¹ The claims made here relate to the constitutional authorities of the President and Congress. Whether Congress may delegate various war powers to the President, the degree to which the states may exercise various war powers, and the extent to which treaties may regulate or impinge upon the war powers of the President and Congress are matters beyond the scope of this paper.

Chief authorized to direct military operations in a number of ways who is nevertheless subject to congressional direction in all war and military matters.

Part I briefly discusses why determining areas of separation and overlap is so difficult. It also highlights the materials and questions worth examining in that undertaking. Part II considers powers that rest exclusively with Congress, including the powers to declare war power, to regulate captures, and to establish a system of military justice. Only Congress can decide that the nation will wage war, that private parties can seize enemy property, and that armed forces personnel will face military justice when they are accused of violating the law.

Part III considers concurrent powers belonging to Congress. Arising out of its powers to declare war and to fund and regulate the armed forces, Congress has sweeping authority over the military and the militia and any wars they may wage. Among other things, Congress may decide where to station troops and hardware, how troops ought to train, and how military personnel will treat enemy prisoners. In time of war, Congress can determine what military assets will be used to fight the war, whether to escalate (or de-escalate) warfare, and the war's overall objectives. More generally, there are no subject matter limits constraining the Congress's power to regulate war and military powers. In other words, congressional power over war and military matters is complete and subject only to cross-cutting constitutional constraints, such as those found in Article I, section 9 and the Bill of Rights.

Part IV argues that the President has the same powers discussed in Part III, albeit derived from his authority as Commander in Chief. Significantly, the President's military powers are residual and default. His powers are residual in the sense that he cannot exercise any powers granted exclusively to Congress. His powers are default in the sense that his exercise of military powers is always subordinate to contrary congressional rules. Indeed, Part IV clarifies why, in situations of overlapping powers, congressional rules trump the inconsistent rules issued by other branches. Finally, Part IV explains why the commander in chief power does not grant exclusive authority over military operations.

I. The Problem of Separation and Overlap

The Constitution grants various war and military powers, some to the President and some to Congress. Yet it never specifies which such powers are forbidden to either branch. One might imagine that the Constitution lacks such prohibitions because it implicitly ordains that all specific grants of war and military power are necessarily exclusive. In other words, one might suppose that if the Constitution expressly grants a particular branch certain powers, no one else may exercise that power. After all, why grant Congress the power to issue letters of marque and reprisal unless one also wishes to deny such authority to all other entities? Likewise, why bother making the President the Commander in Chief if Congress can establish its own statutory commander? Under this view, the

Constitution's specific grants of war and military powers not only empower a particular branch, they are simultaneously meant to deny those powers to other entities. James Madison seemed to articulate something like this view when he argued in 1793 "that the same specific function or act, cannot possibly belong to the two departments [executive and legislative], and be separately exercisable by each."²

Yet this reasonable hypothesis about the exclusivity of specific power grants is not without its difficulties. In some situations, specific grants of power to one branch are certainly not thought to be exclusive. Though the Constitution expressly empowers the President to propose legislation, everyone supposes that members of Congress can do the same.³ Similarly, many assume that Congress can demand opinions of the department heads even though the Opinions Clause specifically vests that power with the President.⁴

Moreover the Constitution contains several power-denying provisions that, when taken together, suggest that grants of power to one entity have no necessary implications for the powers properly exercisable by other entities. Notwithstanding the grant of various war and military powers to Congress, Article I, section 10 denies some of the same powers to the states.⁵ For instance, though the Constitution grants Congress the power to issue letters of marque and reprisal, section 10 bars the states from granting such letters.⁶ In a similar way, congressional power over the national capital and federal military bases is described as "exclusive."⁷ Such power-denying provisions necessarily raise a question: Does the absence of similar exclusivity provisions applicable to other powers mean that these other powers are not exclusive and are concurrently vested with other entities? In other words, when a constitution provides that some powers are exclusive and does not say the same about other powers, the difference may suggest that the powers not so labeled are not meant to be exclusive.

Put simply, we should not quickly infer that certain powers rest exclusively with one entity whenever the Constitution expressly grants powers to one entity. Rather than apply this kind of general presumption, we ought to consider the matter of separation and overlap on a narrower basis, that is to say, clause by clause. This kind of careful consideration arguably requires examination of three factors. First, the general question to be answered in all these situations of potential overlapping power is whether the Constitution empowers a branch to exercise a particular power. If Congress's many

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⁵ My colleague Michael Ramsey has discussed our Constitution's foreign affairs federalism in his articles and in his recent book. Cites.

⁶ Cite. The Articles of Confederation helpfully provided that the Continental Congress had the "sole and exclusive right and power" over many war and military powers. Cite. Among other things, Congress had the sole power to "determine on war and peace" (Cite) and regulate the military. Cite. This "sole and exclusive" language was a federalism provision meant to specify which powers could not be exercised by the states because they rested exclusively with the Continental Congress.

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legislative powers grant it authority over matters that the Constitution also specifically vests with the President, than perhaps congressional and presidential powers overlap. Likewise, if the President's commander in chief authority arguably includes war and military powers granted to the Congress, there is a potential power overlap.

To discover the meanings of various war and military powers, the Article considers statutes and practices from England and early America. English statutes and practices serve as a foil and a template. The English precedents serve as a foil because the federal Constitution departs in important respects from the English allocations of war and military powers. Yet because many of the war and military powers are the same, we can understand what the various grants of power in the Constitution mean by considering what they meant in England. Similarly, national statutes and practices, both from before and after the Constitution's ratification, shed light on the meaning of various war and military powers.

The second key to discerning areas of overlap and separation is a speculative consideration of why the Constitution expressly grants a particular power to a branch. The reasons for such grants may yield clues about whether the power rests exclusively with one entity. For instance, if one concludes that the Founders granted Congress the power to provide and maintain a navy in part to deny such authority to the President, that conclusion obviously suggests that one ought to read the Constitution as denying the President a concurrent power to create and equip a navy.

The third factor consists of an examination of founding era statements, statutes, and practices. When coupled with a sense of what various powers mean, these materials supply evidence about when war powers overlap and when they rest solely with one branch. So if we learn that commanders in chief generally were understood to have the power to make rules for the training of the army and that early Congresses likewise made such rules, then we have reason to believe that the power to make rules for the armed forces is, in some sense, a concurrent power. Or if we discover that early Presidents disclaimed an ability to make capture rules, then we have sound reason to suppose that only Congress can make such rules.

Considering these three factors, Part II concludes that various powers, such as the power to declare war, rest exclusively with Congress. Notwithstanding the President's executive power and his authority as Commander in Chief, the President lacks any constitutional authority over a certain set of war and military powers.

II. Exclusive Congressional Powers

The Constitution authorizes Congress to declare war, issue letters of marque and reprisal, raise and supply the army and navy, regulate captures, and provide for summoning the militia. These powers are best read as exclusively resting with Congress because, as discussed below, the President's various powers are best read as not granting him any authority over such matters. Hence only Congress can declare war; lay down rules which

provide for the execution of treacherous soldiers; and decide how many army divisions to fund and how many frigates to construct.

For ease of explication, this section is divided into war powers and military powers. War powers relate to the initiation of wartime hostilities and the legal regime that exists during wartime. Military powers relate to the creation, regulation, funding, and dissolution of the military, without regard to whether the nation is at war or peace. Whether the distinction between war and military powers holds up upon closer examination is of no moment. However one regards these powers, what matters is the scope of these powers discussed and the claim that they belong exclusively to Congress.

A. War Powers

By virtue of the Constitution's text, Congress has certain powers that might be said to relate to war powers, namely the declare war power, the marque and reprisal power, and the power to regulate captures. Each of these war powers rests exclusively with Congress.

1. "To declare war"

Scholars have rightfully supposed that the declare war power is crucial in understanding the Constitution's allocation of war powers. However, many of these scholars have too often relied on intuitions and evidence that provide an incomplete sense of that power. The intuition typically traded upon is that because the Constitution grants Congress the declare war power, the Constitution somehow must grant Congress broad powers over wars. The evidence often used to back that intuition comes almost exclusively from ratification and post-ratification statements. Various ratifiers, early statesmen, and judges claimed that Congress would decide whether the nation would go to war.⁸

Lost in such claims is any sense of why the declare war power itself might actually grant Congress control of wars. To see why the declare war power grants Congress broad powers over a war, we must garner a more complete understanding of the functions that war declarations served.

The principal function of a declaration of war was the decision to go to war. Via declarations of war, nations decided to fight a war against another nation. Indeed, in the eighteenth century, to "declare war" was to decide to go to war. One might declare war (and hence go to war) via formal and informal means. Infrequently, these declarations consisted of formal denunciations of war that preceded the start of actual warfare. These are the declarations of war most familiar to the modern mind. Indeed, if a formal declaration of war does not mark the onset of war today, many are likely to condemn the war as an "undeclared war."

⁸ Cite Ramsey's article.

The eighteenth century had a more functional approach to declarations of war. As hinted at earlier, anything indicating a decision to wage war was a declaration of war. Indeed, any number of hostile signals might serve as a declaration of war. Sometimes a verbal or written statement dripping with hostility would serve as an informal declaration of war because such sharp words signified, no less than a formal declaration, that a nation had chosen to wage war. Given its harsh words for the English Crown, the Declaration of Independence was seen as a declaration of war against England. Likewise, the French treaty of alliance with the rebellious Americans (and the allegedly disrespectful notification of it) was widely seen as France's informal declaration of war against England.

The commencement of warfare was itself the strongest declaration of war because by fighting a war, the nation obviously had chosen to declare it. Indeed, most 18th century wars were first informally declared via the commencement of warfare itself.⁹ For instance, John Adams noted that both France and England had declared war during the Revolutionary War by attacking each other. Similarly, Europeans, including monarchs and parliamentarians, described the commencement of warfare as a declaration of war.

Besides a means of going to war, declarations served many other functions. Among other things, declarations commanded the use of military force, commanded or authorized the civilian population's participation in the war, enumerated rules for trading with the enemy, stated the rights and status of enemy residents, and declared the status of treaties with the enemy state. Hence the power to declare war enabled Congress to control many war related matters besides the decision concerning whether to go to war. In a way, the declare war power resembles the Constitution's grant to the President of a generic executive power. Just as the Executive Power Clause grants subsidiary executive powers to the President, the Declare War Clause grants a number of subsidiary war-related powers to Congress.

Because Congress may declare war under the Constitution, Congress may decide both whether the United States will wage war and the content of America's declarations of war. The question is whether Presidents have a concurrent power to decide to wage war and to issue declarations of war. Such a concurrent power might arise from two sources. First, Article II's vesting of executive power might be understood as a grant of all the powers traditionally associated with chief executives, even when such powers are likewise granted to another branch. Because the power to declare war was part of the "executive power," as that phrase was commonly understood in the late eighteenth century, the President might enjoy a parallel power to declare war. Second, the Commander in Chief Clause might be understood to convey those authorities that were traditionally associated with commanders in chief. Much like the creation of a "judge," without more, would imply the ability to exercise common judicial functions, the creation of a commander in chief arguably implies the ability to exercise the various military functions associated with

⁹ See Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, __ *Cornell L. Rev.* __ (2007).

being a commander in chief. If eighteenth century commanders in chief had the power to declare war, then the President might have that power as well, notwithstanding the conspicuous grant of the same authority to Congress.

There are many reasons to doubt the notion that the Constitution grants Congress and the President parallel powers to declare war. First, it seems rather unlikely that the creators of a constitution would choose to grant concurrent powers to declare war to two different entities. Many people suppose that the decision to go to war should be taken only as a last resort. Assuming that this view is generally shared, and has deep historical roots, it suggests that constitution makers (from the eighteenth century or otherwise) would draft a constitution that makes it somewhat difficult to go to war. One way of making it difficult to go to war is to require some societal consensus before declaring war. The often cumbersome and deliberate process of bicameralism and presentment goes some way to ensuring that wars are waged only when a general societal consensus favors war.

Contrariwise, vesting a concurrent declare war power with one person, the President, would make it far easier for the nation to go to war for it would create two parallel means of going to war. Moreover, if we assume that chief executives are likely to vigorously exercise unilateral powers, then executive war declarations might become quite common. James Madison referenced such suspicions when he wrote that “[t]he constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war to the Legislature.”¹⁰

Second, when we turn to the circumstances surrounding the Constitution’s creation, the same doubts about a concurrent declare war power come to the fore. The grant of the power to Congress was seen by many as a transfer of a traditional executive power to the Congress from the Executive. Thomas Jefferson extolled the Constitution for providing “one effectual check to the Dog of war, by transferring the power of letting him loose from the executive to the Legislative body.”¹¹ There would be no transfer of power, however, if the Executive retained the right to declare war notwithstanding the grant of such power to Congress.¹² More famously, the discussion at the Philadelphia Convention about the declare war (the famous change from “make war” to “declare war”) was made in the context of speakers claiming that because of the proposed grant to Congress, the President would not be able to declare war.

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¹¹ Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd, ed, 1958).

¹² The proper constitutional baseline for determining whether there was a real transfer is obscure. If one used the British Constitution as a baseline, the Constitution could be described as transferring the declare war power from a unitary executive to a legislature, as Jefferson described it. But if one used the Articles of Confederation as the baseline, there was no transfer of war power at all, because the Continental Congress (a plural executive) already had the power to determine on war and peace. Indeed, one could argue that for purposes of war powers, the Constitution replicates the plural executive empowered to wield various war powers.

Third, during the Constitution's creation individuals said that the grant of declare war power to Congress was a salutary feature of the Constitution precisely because it would ensure that no one man could take the nation to war. The most famous such claim was voiced by James Wilson at the Pennsylvania ratifying convention. "It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large. . . ." Such claims read the Constitution as never authorizing the President to declare war.

Finally, it bears noting that no one in the nation's early years—not even Alexander Hamilton—claimed that the President could declare war. Indeed, even though various nations—France, Tripoli, Indian tribes—declared war against the United States in formal and informal ways in our nation's early years, Presidents never believed that they could declare war in response. They understood that only Congress could declare war. Consider George Washington's views in this regard in the wake of a declaration of war by the Creek Indians. Writing to South Carolina Governor William Moultrie, President Washington noted that he hoped to launch an "offensive expedition" against the Creek Nation, "whenever Congress should decide that such measure be proper and necessary. The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken" against the "refractory part of the Creek Nation until after [Congress] shall have deliberated upon the subject, and authorized such a measure."¹³ Not surprisingly, commentators,¹⁴ politicians,¹⁵ and successive Congresses¹⁶ agreed that Presidents could not declare war.

Though there are vigorous scholarly disputes about the significance of Congress's power to declare war, there are good reasons why no one supposes that Congress and the President have concurrent powers to declare war. Everyone reads the grant of declare war power to Congress as implying that the President lacks any such power. One might say that the grant of such power to Congress creates an implied exception to the President's executive power.¹⁷

¹³ Letter from George Washington to William Moultrie (August 28, 1793) found at [http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw330067\)\)](http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw330067))).

¹⁴ St. George Tucker's *Blackstone*, App. 269-72 (noting that President can veto but cannot make a declaration of war); James Kent, *Commentaries* 53 (noting that war cannot be commenced without an act of Congress); William Rawle, *A View of the Constitution of the United States* 109-110 (noting that declare war power rests exclusively with Congress); 3 Joseph Story, *Commentaries on the Constitution* §§1166 (noting that founders choose to make declarations of war difficult by vesting it with Congress and implying that President cannot declare war), 1172 (noting that Congress has exclusive power).

¹⁵ 6 Writings of James Madison 312-314 (Apr. 2, 1798) (Madison noting that Constitution vested "question of war" with Congress and not President); Letter from Henry Knox to William Blount (Oct. 9, 1792) quoted in 11 *id.* at 213, 214; Letter from Henry Knox to Henry Lee (Oct. 9, 1792) quoted in 11 *id.* at 214.

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¹⁷ As discussed at greater length in Part III, the declare war power does not grant Congress the right to order non-war related uses of force, such as the use of the military to rescue citizens and attack pirates. No

2. “To grant letters of marque and reprisal”

A letter of marque and reprisal is an official document authorizing a private party to operate beyond a nation’s territory in order to search, seize, and eventually convert property belonging to a foreign national or a foreign government.¹⁸ Such letters were originally used to authorize limited reprisals against other nations as a means of compensation for some perceived wrong. Hence if a nation (or its nationals) committed some wrong to a particular party from another nation and failed to pay compensation, the party aggrieved might request a letter of marque and reprisal from its government as a means of engaging in congressionally authorized self-help.¹⁹

By the eighteenth century, general letters of marque and reprisal sometimes were issued to anyone willing to attack the enemy’s vessels in return for a portion of the captured property. The issuance of general letters was not a means of seeking redress for some previous wrong. Instead, the use of general letters was a relatively cheap and effective means for a nation to augment its naval forces, as private avarice was harnessed to serve the nation’s ends. General letters of marque and reprisal often would be issued as an informal declaration of war²⁰ or in conjunction with a formal declaration of war.

In England, the Crown had the power to issue letters of marque and reprisal, an entirely fitting allocation given that the Crown had the related power to declare war.²¹ With the break from England, the Continental Congress assumed and exercised the power to grant letters of marque and reprisal,²² a exercise of power eventually made regular with the belated ratification of the Articles of Confederation.²³ That the Continental Congress exercised this authority was not much of a departure from English practice because Parliament sometimes required the Crown to issue a letter of marque and reprisal.²⁴

The Constitution conspicuously grants the letter of marque and reprisal power to Congress,²⁵ and hence mirrors the eighteenth century English Constitution in giving both the declare war and marque and reprisal powers to one entity.²⁶ At one extreme, Congress can authorize limited retaliation against a recalcitrant nation (and its citizens). At the

less than Congress, the President may order the use of military force, where such force does not rise to the level of a declaration of war.

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²² See 4 Journals of the Continental Congress 251-254.

²³ Art. of Confed., Art. VI. (quote).

²⁴ Blackstone’s Commentaries (“Our laws have in some respects armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand.”).

²⁵ Cite and quote US const.

²⁶ While the Parliament could compel the Crown to issue letters, see supra note ?, the Crown still had to actually grant them. The Parliament never asserted that it could grant letters via statute.

other, it can draw upon the avarice of private Americans who might not wish to serve their country directly but who are willing to use their private ships as a means of inflicting losses on the enemy in the hopes of securing a profit.

Is the power to grant letters of marque and reprisal a concurrent power? Once again, there is little reason to think that constitution makers would empower two entities to issue licenses to seize property belong to foreigners. As such letters could be seen as provocations justifying war or as an implied declaration of war, there were sound reasons for vesting this power only with Congress.

Consistent with that intuition, during the Constitution's creation and its early implementation, no one ever suggested that the President could issue licenses to seize foreign ships and their cargo. Indeed, in four separate wars, the Congress enacted statutes granting the Presidents the power to issue letters of marque.²⁷ Members of Congress clearly supposed that only Congress could grant or authorize the issuance of letters of marque. If they had supposed that the President had concurrent authority to issue letters, they perhaps would have left the question to the President. Moreover, in each of these wars, the incumbent President asked Congress to decide what measures ought to be taken, suggesting that these Presidents understood that they could not grant letters of marque.

Interestingly, in 1798 Alexander Hamilton was asked what measures President John Adams could take in response to the continuous French seizure of American ships. Explicitly limiting himself to a discussion of the President's constitutional authority, Hamilton asserted that the President could use the navy to do nothing more than convoy American ships and patrol American waters. He specifically denied that Adams could authorize the capture of French ships, saying that any such power "must fall under the idea of reprisals" and required congressional sanction.²⁸ Hamilton understood that only Congress could authorize reprisals.

Hence if private ships are to serve either as a means of securing redress or as a means of waging war, Congress must so decide. The President does not have the constitutional power to authorize private citizens to take enemy ships and property. This constraint parallels the implied limits on presidential power over the navy. Just as the President cannot augment the official navy's size, so too is he barred from granting letters of marque and reprisal in a bid to enlarge the armed maritime forces of the United States.

3. "To make rules concerning captures on land and water"

²⁷ See §1, An Act . . . , 1 Stat. 572; §1, An Act . . . , 1 Stat. 579; See §3, An Act . . . , 2 Stat. 132, 133; See An Act declaring War . . . , 2 Stat. 755.

²⁸ See Letter from Alexander Hamilton to James McHenry (May 17, 1798) in *Naval Documents Relating to the Quasi War with France* 75, 76.

This power relates to the taking of enemy property.²⁹ Pursuant to this power, Congress may enact laws authorizing and regulating the taking of enemy property. As such, the capture power is clearly related to the power to issue letters of marque and reprisal (and the more significant power of declaring war). Yet it goes beyond the marque and reprisal power because it covers captures of property on land and because it covers captures by private parties and by military personnel.

Capture law was crucial for it established what sorts of enemy and neutral property could be captured and converted. It also provided rules that courts could apply when they condemned the captured property and divided up the spoils arising from the captures. Finally, capture law set limits on the means of capturing property and required the capturer to maintain various records of the captured ship to ensure that the capture was made pursuant to the legal regime created by Congress.

Capture law was particularly useful as a means of regulating the conduct of privateers (those granted letters of marque) who were often prone to overstepping boundaries. Nations established complex capture rules because they wanted to make sure that privateers disgorged ships and property that were improperly captured and because they wanted to safeguard the rights of neutrals. After all, privateers who violated the rights of citizens of neutral states might embroil their nation in disputes that might lead to war.

Once again, it seems fairly clear that the Constitution does not grant the President the power to capture or authorize the capture of alien property. As one might imagine, there was very little discussion of the power to regulate captures during the Constitution's creation.³⁰ Post-ratification, however, there were incidents suggesting that it was widely understood that only Congress could authorize the capture of enemy property. As recounted above, Alexander Hamilton expressly denied that the Constitution empowered the President to authorize the capture of French ships, many of which were, at the time, attacking and capturing American ships.³¹ Moreover, when the John Adams administration ordered the extrastatutory taking of French ships by the navy, the Supreme Court, in *Little v. Barreme*, held that such captures were illegal. Congress had authorized certain captures and not others, the implication being that statutorily unauthorized captures were unauthorized and hence forbidden.³² If the President had a concurrent power to order the capture of enemy property, however, the navy's capture would have been legal precisely because the President had ordered such captures. In other words, if the President had a concurrent power to order the capture of enemy property, the case

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³⁰ This is not to say that there was none. But the little there was fails to illuminate the breadth of the capture power.

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should have been decided in favor of the naval officers. For these reasons, the President lacks a constitutional power to authorize the taking of enemy property in times of peace.³³

B. Military Powers

Several military powers likewise belong to Congress exclusively. Only Congress can raise and fund the armed forces. Moreover, only Congress can summon and fund the militia. Finally Congress has the sole power to create a system of military justice. Despite his executive power, the Commander in Chief President lacks such constitutional authority. The President cannot create military offices, much less create an army or navy. Nor can the Commander in Chief summon the militia, even in the face of an actual invasion. Finally, the Constitution never grants the President any power to make withdrawals from the Treasury and hence he cannot fund the army, navy, or the militia.

1. “To raise and support Armies” and “To provide and maintain a navy”

The English Crown had the “sole power of raising . . . fleets and armies.”³⁴ Originally, the Crown relied upon the militia and military tenures to defend the realm.³⁵ But military tenures were abolished under Charles II and the militia could not be used in overseas wars.³⁶ In response to these constraints, the Crown raised its own standing army. What started out as a palace guard of some 50 men in the time of Henry VII had grown to a professional standing army of 30,000 by the times of James II.³⁷ The Crown decided the size and strength of the armed forces, subject to its ability to fund the salaries, supplies, and equipment necessary for the armed forces. To fund the armed forces, the Crown relied upon hereditary revenue plus the civil list appropriated by Parliament.³⁸

³³ There are interesting questions about what happens if Congress declares war but fails to specifically authorize the capture of enemy property. When Congress declares war, perhaps it implicitly grants the President the authority to use the armed forces to capture enemy property, whether owned by the enemy government or by private parties. There is also the related question of whether the President can authorize private parties to capture enemy property. In *Brown v. United States*, Chief Justice Marshall argued that because Congress had not authorized the capture of British property during the war of 1812, the seizure of such property by private citizens was unauthorized. See 8 Cranch 110 (1814). Justice Joseph Story dissented on the ground that once Congress declared war, the President could take whatever measures not barred by Congress to defeat the enemy, including capturing enemy property. Story argued that once Congress declared war, the executive could surely capture enemy property itself. That being the case, he did not see why the executive could not authorize the capture of enemy property by citizens.

Whether Marshall or Story had the better argument in *Brown* is of little moment. Neither supposed that the President had a *constitutional* right to either capture foreign property or the right to regulate such captures. They were merely arguing over the train of implied authority that may arise from a generic congressional declaration of war. In the absence of any statute that could be read as possibly authorizing the President to capture enemy property, the President had no power to regulate captures.

³⁴ 1 Blackstone 254.

³⁵ 1 Blackstone 399.

³⁶ 1 Blackstone 399-400.

³⁷ 2 James Burgh, *Political Disquisitions* 341-49 (1774).

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By the eighteenth century, the Crown's authority to raise and finance the army and navy was subject to rather severe statutory and institutional constraints. First, the English Bill of Rights of 1689 provided that the Crown could not keep a standing army in England in peacetime without the consent of Parliament. So while the Crown could raise an army, it could not choose to station any part of it in England during peacetime without Parliamentary approval. Essentially, the Crown had a power to create an overseas army with Parliament maintaining a veto over the creation of a domestic army.³⁹ Second, the Crown could not fully finance the armed forces using its hereditary revenue. The Crown thus became dependent upon Parliament, because the army could not be maintained without the assistance of Parliament. Little wonder that some Americans believed that Parliament had the power to "raise and keep up" the army.⁴⁰ Alexander Hamilton had a more accurate understanding, noting that England had a "prohibition [against a standing army] being raised or kept up by the mere authority of the executive magistrate."⁴¹

The Constitution expressly grants Congress the powers to raise and supply the armed forces.⁴² These grants are best viewed as both empowering Congress and implicitly denying the President the power to raise and supply the professional military. Despite his grant of executive power, the President cannot create or fund the armed forces.

The Constitution supplies a clue that only Congress can create an army and navy when it provides that the President shall appoint to offices created "by law."⁴³ The implication is that only Congress can create offices, civilian and military. If the President cannot create military offices, it seems quite likely that the President cannot create an army or navy. After all, the most he could do would be to create an officer-less armed forces.

The Constitution also suggests that only Congress can fund the army when it provides that no army appropriation shall appropriate funds for longer than two years.⁴⁴ This is a limit on Congress, for as the Constitution elsewhere provides, appropriations must be made by law prior to money being withdrawn from the Treasury.⁴⁵ If one supposed that the President could fund the army as he saw fit (either using Treasury funds or his own personal wealth), then the Constitution would have checked Congress's ability to fund the army and left the President at liberty to fund the army as he saw fit. Most will

³⁹ Parliament kept a chokehold on the army by limiting the authorization for a domestic army to one year. That way, Parliament would have to revisit the question of whether to continue a domestic army every year. See James Iredell, Marcus, Answers to Mr. Mason's Objections to the Constitution in 4 *The Founders Constitution* 145, 46; *The Federalist* No. 41 (James Madison) (same).

⁴⁰ See *The Federal Farmer* No. 18 in 4 *The Founders Constitution* 154.

⁴¹ *The Federalist* No. 26.

⁴² U.S. Const. Art. I, § 8, cl. 12-13 (quote both).

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⁴⁴ U.S. Const. Art. I, § 8, cl. 12 (quote).

⁴⁵ U.S. Const. art. I, §9, cl. 7 ("No money shall be drawn from the Treasury but in consequence of appropriations made by law")

be inclined to the view that the Constitution restricts Congress's freedom to fund the army because it supposes that only Congress may finance the armed forces.

At the founding, it was well understood that the power to raise and fund the army and navy rests exclusively with Congress. In the FEDERALIST NO. 24, Hamilton noted that "whole power of raising armies was lodged in the legislature, not in the executive."⁴⁶ Similar comments were made in the state conventions.⁴⁷ Upon assuming office, President Washington understood that Congress would have to authorize the continued existence of the army.⁴⁸ He likewise left it to Congress to recreate and fund the navy.⁴⁹ And much later, Justice Joseph Story noted in his COMMENTARIES ON THE CONSTITUTION that only Congress could raise and support the army.⁵⁰

Using its authority to create and fund an army, the first Congress established the maximum number of army soldiers, organized them into regiments, battalions, and companies, and provided their pay and rations.⁵¹ In 1794, Congress authorized the President to secure six ships to form a navy to protect American commerce from Algerian corsairs. The statute dictated the ships' firepower as well as crew size, composition, pay, and rations.⁵² A latter statute would grant the President flexibility to vary crew size and composition, confirming that prior statutes specifying these matters were obligatory.⁵³

As early statutes reveal, Congress's power to raise and support the army and navy implies complementary powers to disestablish and defund. Having once decided to create an army, Congress is under no obligation to continue it. Indeed, an early Congress specifically provided that soldiers would be discharged after three years, unless sooner discharged by law,⁵⁴ making it clear that Congress could decide how long to have an army. Indeed, the constitutional prohibition on army funding beyond two years is meant to require Congress to periodically reexamine the desirability of a standing army. If Congress provides no funding for the army, the army effectively ceases to exist. Likewise, there can be little doubt that Congress has the same powers over the navy, as the first navy statute provided for the navy's termination upon a peace with Algiers.⁵⁵ Whether the army or

⁴⁶ In Federalist No. 26, Hamilton noted that the state constitutions had the same schema. Only the state legislatures could raise armies at all.

⁴⁷ See 3 Elliot's Debates 497-98 (comments of George Nicholas); 4 id. at 107-08 (comments of James Iredell).

⁴⁸ See Letter from Washington to House and Senate, August 10, 1789 in 1 Journal of the House of Representatives 76.

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⁵⁰ See 3 Joseph Story, Commentaries on the Constitution section 1178, 1485-86 (noting that the power to raise and fund army rests exclusively with Congress).

⁵¹ See generally, An Act regulating the Military Establishment of the United States, 1 Stat. 119.

⁵² See An Act to provide a Naval Armament, 1 Stat. 350.

⁵³ See §5, An Act supplementary . . . , 1 Stat. 575, 576.

⁵⁴ See §1, An Act for regulating the Military Establishment of the United States, 1 Stat. 119.

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navy is expressly disestablished by statute or implicitly disestablished by the failure to appropriate funds is of little moment for our purposes.⁵⁶

Because the Congress has exclusive power to raise and support the army and navy, the President cannot create, fund, or equip an army or navy. The most important implication of congressional exclusivity is that while the Constitution makes the President Commander in Chief, he may find that he has neither soldiers nor sailors to command. The President has no constitutional right to an army or navy under his control. It is for Congress to supply either, if at all.

Relatedly, the President cannot create a private army or navy, a sort of imperial guard. He can neither pay such an army or navy using government or private funds, nor can he accept volunteers. Early statutes evince this understanding by authorizing the President to accept naval vessels as gifts⁵⁷ and by authorizing him to accept militia “volunteers.”⁵⁸ Such authorization would have been unnecessary had the President a concurrent power to raise armed forces on his own. Hence, whether the Commander in Chief Clause will convey more than an empty title is left to the discretion of Congress.

2. “To provide for calling forth the militia” and “To provide for organizing [and] arming . . . the militia”

Under the English system as it existed prior to the English Civil War, the Crown could call out the militia and could organize and discipline the militia itself.⁵⁹ During the English Civil War, the Parliament and the Crown warred with each other, with the former asserting the sole right to call out and regulate the militia.⁶⁰ With the monarchy’s restoration, Parliament declared that the “sole Supreme Government Command and Disposition of the Militia . . . ever was the undoubted Right of His Majesty . . . and that both or either of the House of Parliament cannot nor ought to pretend to the same.”⁶¹

Despite this seeming bow to royal prerogative, the Parliament exercised a great deal of authority over the militia. Besides explicitly barring the transport of the militia outside the Kingdom without its consent, the Parliament enacted a series of statutes that limited the means by which the militia might be disciplined and called into service.⁶² For instance, the militia could be trained no more than 14 days per year. Likewise, there were statutory requirements about what equipment militia members had to bring with them during their

⁵⁶ Of course, Congress may take intermediate steps short of disestablishment. Congress can reduce the size and strength of both the army and navy. The constitutional prohibition on army financing beyond two years implies not only a power to increase or end such funds, but also a power to decrease such funds.

⁵⁷ See §3, An Act supplementary . . . , 1 Stat. 575, 576.

⁵⁸ See §8, An Act . . . , 1 Stat. 222, 223; §3, An Act authorizing . . . 1 Stat. 558.

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⁶¹ 13 Car. 2, ch. 6

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training.⁶³ Still, the Crown had the power to issue “commissions and instructions” to the militia and hence had some real power over the militia.⁶⁴

The Constitution marks an advance in Whiggish principles. Here the legislature controls when the militia will serve the federal government.⁶⁵ Put another way, by vesting with Congress the power to call out the militia, the Constitution implicitly bars the President from doing so. He has no constitutional power to call out the militia. The Constitution itself hints at this when it provides that the President is commander in chief of the militia only when “called into federal service.”⁶⁶ If the President could use the militia at his sole discretion, there perhaps would have been no need to speak of it being “called into federal service.”

Our nation’s earliest years bear this understanding out. In various militia statutes, Congress provided when the President could call forth the militia.⁶⁷ Washington followed the first militia statute to the letter when he called forth several state militias to suppress the Whiskey Rebellion. Indeed, his Proclamation calling out the militia carefully recites the facts necessary to justify the summons under federal statute.⁶⁸ Had Washington thought that he had a concurrent power to summon the militia, his proclamation would have been far more concise for he could have ignored the detailed statutory scheme.

As with the regular military, Congress may fund and equip the militia. Congress may appropriate funds for paying militia personnel. And it may equip the militia with guns, uniforms, and other military paraphernalia. The general principle of no executive appropriations that applies to all areas of constitutional law applies to the funding of militia as well. Just as the President cannot fund and equip the army and navy, he likewise cannot fund and equip the militia.

3. “To exercise exclusive Legislation . . . over Forts, Magazines, Arsenals, dock-Yards and other needful Buildings”

According to William Blackstone, the Crown had the “sole prerogative” of erecting, manning, and governing “forts and places of strength.”⁶⁹ Indeed, the Militia Act of 1689 said much the same.⁷⁰ Hence the Crown could decide where to erect military bases and could exercise some legislative power over the operation of these bases and all the personnel, civilian and military, within these bases. To some extent, this power over military bases overlapped with the Crown’s power to regulate the armed forces.

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Under the Constitution, the Congress has “exclusive” power to legislate over forts, arsenals, and federal property more generally. Given that Congress already has the power to regulate the armed forces (more on this later), this further authority presumably permits Congress to do several additional things. To begin with, Congress can establish the location of semi-permanent military bases. For example, Congress can erect army bases in Iowa and Nebraska, places far removed from potential ground conflict. Likewise, Congress can establish a naval base in Alaska and not one in California or Florida. And Congress can certainly require the stationing of troops, sailors, and hardware at these installations so that they are truly military bases as opposed to unoccupied military buildings.

In this respect, Congress’s authority mirrors that of its immediate predecessor. The Continental Congress had previously determined that American troops would occupy the British military forts left unoccupied after the peace treaty ending the Revolutionary War.⁷¹ These troops were necessary to protect America’s frontiers from Indian attacks. With the ratification of the Constitution, Congress in 1789 implicitly confirmed the army’s occupation of military forts along on the frontiers.⁷² Later Congresses ordered the President to “fortify[]” several ports and harbors and made it “lawful” for the President to garrison soldier and marines in such fortifications.⁷³

No matter how substantial his objections to congressional basing decisions, the President can neither decide that certain military bases should remain unoccupied nor that additional military bases should be erected. If Congress failed to build military bases along the border with a hostile neighbor, the President could not rectify the mistake by unilaterally erecting bases. This implied constraint not only arises from the power granted to Congress but also from the President’s inability to expend federal funds without an appropriation.⁷⁴ Hence, the power to locate military bases rests exclusively with Congress.⁷⁵

Congress’s military base power goes beyond the mere location of military installations. Congress also has the express power to pass all appropriate legislation with respect to the base. Presumably this means that Congress can regulate the use of military hardware and munitions found within these military bases. For instance, Congress can regulate the storage of munitions to prevent their accidental explosion. To that end, Congress can decree that certain munitions cannot be used on bases at all or that certain hardware can only be stationed and used at particular bases. Or Congress could provide that certain types of training cannot take place on particular bases, as it did with Vieques in Puerto Rico. Finally, Congress can presumably regulate activities on military bases, in much the same way that Congress can regulate activities of private parties while they are in

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⁷² 1 Stat. 95, 96. See also 1 Stat. 119, 121 (authorizing President to call forth militia to help soldiers to protect frontiers).

⁷³ See §§1-2, An Act to provide . . . , 1 Stat. 345, 346; An Act . . . , 1 Stat. 367 (same).

⁷⁴ Cite Constitution’s prohibition on spending money without appropriation; An Act, 1 Stat. 594, 596 (permitting President to garrison Marines in harbor forts and garrisons)

⁷⁵ Indeed, the Military Base Commission legislation that led to the shuttering of so many bases was built on the supposition that Congress had exclusive authority over where to base the army and navy.

a federal territory. Congress took such a step in 1789, when it criminalized “willful murder” and manslaughter on a military base.⁷⁶ In 1800, Congress enacted penalties for workmen who break or destroy tools or materials for making guns.⁷⁷ In theory, Congress might enact a detailed criminal and civil regime that rivals the regimes that states enact for their own territory and that the Congress could enact for U.S. territory generally.

Regulating conduct on bases rests exclusively with Congress in the sense that only Congress can create crimes and civil fines applicable to the conduct of military and civilians on military bases. Nothing in the Constitution suggests that the President has a legislative power to make rules that impose civil liability and/or criminal punishment.⁷⁸

4. To establish a system of military justice

Once again, one cannot understand the Constitution’s allocation of this vital power without first understanding the English system that preceded it. Because the army and navy originally were the Crown’s creations, the Crown had an ancient prerogative to regulate and govern its own creatures.⁷⁹ The Crown essentially exercised a legislative power over the life and liberty of its soldiers and sailors.⁸⁰ Using its prerogative, the Crown enacted Articles of War that were often perceived as quite harsh.⁸¹ Military personnel could lose life or limb pursuant to quick and sometimes arbitrary proceedings. In an era where the Crown’s prerogatives were under constant assault, the Crown’s power over military life and limb was a cause of much consternation.⁸²

As early as 1649, Parliament entered the field by enacting detailed Articles of War for the English navy.⁸³ These Articles were remarkably detailed, requiring Anglican prayers, regulating drunkenness, proscribing treasonous statements, forbidding desertion, and so forth.⁸⁴ Ever since then, the Parliament has continued to provide an extensive and detailed code of naval justice. Parliamentary regulation of the army would not occur until 1689 with the passage of the Mutiny Act. This law proscribed a few acts (such as mutiny, desertion, and treasonous statements) and laid down the means of securing a conviction (a trial by a jury composed of military officers).⁸⁵ Though the Parliament typically would pass annual mutiny acts for the army, these acts were never as detailed as the naval

⁷⁶ §§ 3, 7, 1 Stat. 112, 113.

⁷⁷ §3, 2 Stat. 61, 62.

⁷⁸ As discussed in the next Part, however, the President probably has the right to create supplementary rules regulating conduct on military bases, so long as no punishment attaches for failure to adhere to these rules.

⁷⁹ Blackstone.

⁸⁰ Blackstone

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counterpart.⁸⁶ Moreover, the mutiny acts recognized the Crown's power to issue additional Articles of War that supplemented Parliament's statutory regulation.⁸⁷

The gradual accretion of parliamentary power likely arose from a concern about leaving the fate of soldiers and sailors to military justice. The Crown had exercised a unilateral legislative power over soldiers and sailors and could decide questions of life and liberty without familiar procedural safeguards. Indeed, mutiny acts typically had a preamble declaring that "no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm,"⁸⁸ thereby indicating a distaste for the relatively unfettered executive justice that had preceded parliamentary legislation. Nonetheless, the Parliament adopted a lighter regulatory touch with respect to the army that lasted until 1803.⁸⁹ Hence the Crown retained much authority over the army, much to the consternation of Englishmen, including Blackstone.⁹⁰

In America, the Continental Congress regulated the armed forces. The Articles of Confederation legitimized this regulation by providing that Congress could "mak[e] rules for the government and regulation of the said land and naval forces."⁹¹ Using its government and regulation power, the Congress enacted Articles of War regulating the army and navy in the earliest years of independence.⁹² Among other things, Congress regulated mutiny, desertion, the destruction of enemy papers, and even cowardice.⁹³

By granting the new Congress authority over the regulation and government of the armed forces, the Constitution continued the system in place under the Articles: Only Congress can provide a system of military justice. Without statutory Articles of War (or their equivalent), military personnel may not be punished via military justice. That is to say, in the absence of Articles of War authorizing the use of military courts and creating uniquely military crimes, military personnel can only suffer loss of life, liberty, or property by the ordinary civilian courts using ordinary civilian law. The exclusive congressional control of military penal justice carried the concerns of English reformers to their logical conclusion because it barred a system whereby the executive might exercise legislative power and punish members of the military for violations of that executive law.

C. The Logic of Exclusivity

The Constitution's allocation of certain war and military powers exclusively to Congress marks an improvement over the English Constitution more complicated division

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⁹¹ Art. of Confed. Art. IX.

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of powers. As a formal matter, the Crown could declare war and could raise an army and navy. The Crown also had rights to revenues that could be used for, among other things, financing the army and navy. Finally, the Crown could call forth the militia.

Yet these powers were far less substantial than one might have supposed. Though the Crown could declare war, it would typically seek parliamentary approval for its wars knowing full well that it would need to secure parliamentary funding for its war. Likewise, the Crown's ability to fight wars was constrained by Parliament in a host of ways, including statutory prohibitions of various sorts such as the use of the militia overseas and the placement of the army on English soil.

The American Constitution arguably perfects features of the English Constitution. By granting Congress the complementary powers to declare war, grant letters of marque and reprisal, and raise and fund the military and militia, the Constitution established a more coherent framework for making the decision to go to war. Congress can decide whether to wage war *and* how large and well-equipped the army, navy, and militia will be when they fight the war. The American Constitution makes the specter of warfare without adequate legislative support a more remote proposition because the legislature has the constitutional authority to dominate decisions about whether and how to wage a war.

The Constitution also admirably focuses responsibility on the legislative branch for the exercise of the powers to declare war, fund the military, *etc*, because it implies that the President has no constitutional claim over such powers. In other words, the Constitution is best read as ceding to Congress all such powers, leaving nothing left to be granted to the President via the vesting of the executive power. As Chief Justice John Marshall said in *Talbot v. Seeman*, “[t]he whole powers of war . . . , by the constitution of the United States, [are] vested in congress.”⁹⁴ Similarly, in an opinion authored for President Washington, Henry Knox, Thomas Jefferson, and Alexander Hamilton agreed that Congress enjoyed “the powers of war.”⁹⁵

While certain powers are exclusive, it does not follow that all war and military powers should be so understood. The next two Parts discuss the more controversial claim that various military powers reside concurrently with Congress and the President. In other words, we transition from areas of separation to areas of overlap.

III. Concurrent Power: Congress

Besides the powers to declare war, create a system of military justice, and erect capture rules, Congress enjoys many other military and war related powers. This part discusses those other powers, arguing that Congress's power to regulate the armed forces

⁹⁴ *Id.* at 28.

⁹⁵ Letter from Henry Knox to George Washington (Oct. 8, 1792) in 11 PAPERS OF GEORGE WASHINGTON, *supra* note 160, at 212.

cedes it broad authority over those forces. Among other things, Congress can regulate the training of the armed forces, how the armed forces will treat prisoners, can order certain uses of military force, and can dictate how a war must be fought. More generally, one might say that Congress has plenary power over the military and may micromanage it in times of war and peace. This part reveals the sweeping nature of congressional power via an examination of British precedents and early congressional statutes.

To foreshadow what lies ahead, Part IV discusses why the President's commander in chief power grants him the same powers discussed here. The President also may order certain uses of force, may regulate the armed forces in a manner of speaking, and may decide how to fight a war that Congress has declared. Part IV also considers the claim that the conception of congressional power advanced in Part III is too broad on the ground that it impinges upon the President's commander in chief power.

A. Regulation of the Armed Forces and Militia

As noted earlier, Congress has the power to govern and regulate the military and therefore can establish a system of military justice. Yet this seemingly unremarkable power to govern and regulate allows Congress to do far more. Long ago, *Gibbons v. Ogden* observed that "regulate," in the Commerce Clause context, meant "to prescribe the rule by which commerce is to be governed,"⁹⁶ and hence was a broad grant of power to Congress.

Because Congress has a parallel government and regulation power over the military and the militia, Congress may prescribe the rules by which the armed forces and militia are to be governed. Or more broadly, Congress may direct, control, manage, and rule the armed forces and militia. In particular, the government and regulation power authorizes Congress to enact a whole host of rules, covering training and tactics, the positioning of military hardware and personnel, the use of military force, and the treatment of prisoners by military personnel. Statutes dealing with such matters provide "rules for the government and regulation" of the military.

1. Training and Tactics

As part of the government and regulation authority provided by the Articles of Confederation, the Continental Congress regulated training and tactics. For the army and the militia, the Continental Congress enacted Baron von Steuben's REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES.⁹⁷ The 150-page plus manual regulated marching, military formations in battle, the firing of guns, the care of wounded soldiers, military camps, and a host of other subjects.⁹⁸ The comprehensive

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⁹⁷ See 13 Journals of the Continental Congress 384, 385; XX JCC XXX (same for militia).

⁹⁸ See Baron Von Steuben's Revolutionary War Drill Manual (1794) (1985 Dover Publications).

manual also supplied standing instructions for various members of the army from the commandant of a regiment to the foot soldier.⁹⁹

Under the auspices of the new Constitution, the Congress reimposed Von Steuben's manual on the army¹⁰⁰ and the militia.¹⁰¹ Thus the Congress asserted the right to prescribe in minute detail the manner in which the army would function on a daily basis. This was no small assertion of authority for one might have supposed that the Commander in Chief had exclusive authority over operational details like military training and tactics.

2. Deployments

There are a number of reasons to suppose that Congress can direct military deployments, that is direct the placement of military assets. Textually, Congress may regulate the placement of military assets under its government and regulation power. To say where the armed forces and the militia will patrol or be stationed is to make rules for their government and regulation, in much the same way that to dictate where commerce must flow is a regulation of commerce.¹⁰² Moreover, Congress can dictate the location of military bases, thus giving it some express powers over the location of the armed forces. If Congress can determine the location of military bases, one might suppose that Congress enjoys the power to dictate where the army, navy, and militia will patrol as well.

History helps confirm the intuition. To begin with, Parliament regulated deployment. As noted earlier, under the English Bill of Rights, the Crown could not keep a standing army in England during peacetime without parliamentary approval.¹⁰³ This famous limitation essentially meant that the army could be stationed on English soil only with the Parliament's assent. Moreover, in the Act of Settlement, Parliament declared that if a foreigner ever assumed the Crown, the "nation [was] not obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of

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¹⁰⁰ §4, An Act to recognize and adopt to the Constitution of the United States the establishment of Troops raised under the Resolves of the United States in Congress assembled, and for other purposes therein mentioned, 1 STAT. 95, 96 ("said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled").

¹⁰¹ The 1792 Militia Act subjected the militia to the same rules as the army and hence incorporated the Von Steuben Manual. See § 4, An Act for Calling Forth the Militia (May 2, 1792), 1 STAT. 264. A later act, passed less than a week later, expressly incorporated the Von Steuben Manual, but also permitted deviations from the rules insofar as except such deviations from the said rules, as may be rendered necessary by the requisitions of the Act, or by some other unavoidable circumstances. See §7, An Act for more Effectually Providing for the National Defense (May 8, 1792), 1 STAT. 271, 273.

¹⁰² See U.S. Const. art. I, § 9, cl. 6 (providing that no preference shall be given by any regulation of commerce to the ports of one state over ports in other states and thereby indicating that Congress otherwise would have had power to steer commerce to certain ports as part of Commerce Clause).

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England, without the consent of Parliament.”¹⁰⁴ This was a deployment constraint as it limited the ability of a foreign-born monarch to defend non-English territory.

More importantly for our purposes, early Congresses regulated deployment. Consider the army. Early acts authorizing and reauthorizing the army limited its use to the frontiers as a defense against Indian attacks on settlements. Though these acts did not expressly limit the President’s ability to move the army away from the frontiers, the acts clearly contemplated that the army would be deployed along the frontier, as it had been prior to the Constitution’s ratification.¹⁰⁵ Indeed, when President Washington sought a larger army to defend the frontier, Congress acquiesced for “the protection of the frontiers.” Rather than just granting more forces, Congress specified their purpose.¹⁰⁶

Subsequent statutes also directed the deployment of the army soldiers and material. When Congress authorized the fortification of harbors in 1794, it permitted the President to place soldiers in these new fortifications, perhaps confirming that all existing soldiers previously had been limited to the frontiers.¹⁰⁷ In the same statute, Congress also authorized the placement of various sized cannons in these fortifications, suggesting that Congress, if it chose to, could dictate the location of armaments.¹⁰⁸ Later, when Congress authorized the creation of a corps of artilleryists and engineers, it specifically authorized the President to place them “in the field, on the frontier, or in the fortifications.”¹⁰⁹

Congress’s regulation of naval deployment was more frequent. In authorizing the navy’s creation, Congress not only specified crew composition and armament, it also authorized the President to man and deploy the vessels.¹¹⁰ It thereby asserted authority over whether naval vessels would be deployed at all. Eventually, Congress loosened its constraints, by granting the President flexibility on crews and armaments.¹¹¹

Congress also regulated the positioning and use of vessels. When a statute authorized the President to use revenue cutters (ships enforcing customs laws) for martial purposes, the statute specified that the cutters could only be “employed to defend the sea

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¹⁰⁵ Sometimes particular sections made this clear; other times the title of the acts made it clear where the army was to be stationed. See §1, 5, An Act to recognize . . . , 1 Stat. 96, 97 (adopting army establishment put in place by Continental Congress along the frontier and noting that militia could be used to protect inhabitants of frontier); § 16, An Act to . . . , 1 Stat. 119, 121 (authorizing President to use militia “for purpose of aiding the troops now in service . . . in protecting the inhabitants of the frontiers of the United States”); An Act for raising . . . and for making farther provision for the protection of the frontiers, 1 Stat. 222; An Act for making further an more effectual Provision of the Frontiers of the United States

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¹⁰⁷ An Act to provide for the Defence . . . , 1 Stat. 345, 346.

¹⁰⁸ §2, An Act . . . , 1 Stat. 346. Sometimes Congress explicitly conferred authority upon the President to dictate the placement of weapons. See statute on guns.

¹⁰⁹ §6, An Act . . . , 1 Stat. 366, 367.

¹¹⁰ See §1, An Act . . . , 1 Stat. 523, 524.

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coast and to repel any hostility to their vessels and commerce.”¹¹² Similarly, Congress provided that galleys were to be stationed in the United States.¹¹³ Congress thereby prohibited the use of cutters and galleys on the high seas or elsewhere. After the naval war with France ended, Congress ordered that certain vessels “shall be laid up” in port to be reactivated when needed. They were given skeletal crews and confined to port, presumably until a statute provided otherwise.¹¹⁴

Finally Congress also regulated the use and placement of the militia. Early acts limited the use of any particular militia member’s services to a maximum of three months per year.¹¹⁵ Another act dictated militia placement when it permitted 2500 militiamen to be “stationed in the four western counties of Pennsylvania” in order to suppress the Whisky Rebellion.¹¹⁶

In sum, by granting Congress the government and regulation power, the Constitution empowers Congress to direct the deployment of the armed forces and the militia. Consistent with this reading of congressional power, early Congresses directed the placement of all three in numerous ways.

3. Use of Force

As noted in Part I, because only Congress can declare war, Congress has a monopoly on uses of force that constitute an informal declaration of war. Given this monopoly over the use of certain force, one might suppose that the Constitution simultaneously confers upon the Commander in Chief a complementary monopoly on all uses of force that do not rise to the level of a declaration of war. Put another way, one might imagine that while Congress has the exclusive power to order more significant uses of force such as invasions, bombings, *etc.* (because they amount to informal declarations of war), the President has the sole authority to command less significant uses of military force used in rescuing hostages, attacking pirates, and defending the border.

While such a conception of constitutional powers is certainly possible, nothing in the Constitution or its early history suggests that the Commander in Chief has the

¹¹² §12, An Act . . . , 1 Stat. 523, 525. See also §1, An Act . . . 1 Stat. 569 (noting that revenue cutters were to be used “near the sea coast”).

¹¹³ §2, An Act . . . , 1 Stat. 555, 556.

¹¹⁴ § 2, An Act . . . , 2 Stat. 110. Less than a year later, Congress made it lawful for the President to equip, officer, man, and employ all naval vessels to protect against Tripolitan deprivations. See §1, An Act . . . , 129, 130. Presumably this included all vessels previously laid up at the direction of Congress.

¹¹⁵ §4, An Act to provide for calling forth the Militia . . . , 1 Stat. 264; see also §4, An Act . . . , 1 Stat. 367-68.

¹¹⁶ §1, An Act . . . , 1 Stat. 403. This statute was enacted because the prior act limited the time the President might call forth the militia and hence a new statute was required to permit the continued federal use of the militia. See President Washington’s Sixth Annual Message found at <http://www.yale.edu/lawweb/avalon/presiden/sou/washs06.htm>.

exclusive power to order more minimal uses of military force.¹¹⁷ Early practice suggests that Congress, no less than the Commander in Chief, may order the military to use force that does not rise to the level of a declaration of war.

Congress's power to order the use of military force arises from the Congress's government and regulation power. As noted earlier, the power to make rules for the "government" and "regulation" of the armed forces suggests that Congress may direct, control, manage, and rule the armed forces. When Congress orders the armed forces to engage in hostilities, Congress governs and regulates those armed forces.

Consistent with this reading of constitutional text, early Congresses ordered the use of military force quite a bit. Early Congresses ordered the military to enforce American neutrality,¹¹⁸ to enforce embargoes,¹¹⁹ to capture vessels engaged in the slave trade,¹²⁰ to occupy parts of disputed territory in Florida,¹²¹ to cause foreign vessels to depart when their presence violated international law or a treaty,¹²² to force foreign armed vessels to only dock in certain ports,¹²³ and to capture pirates.¹²⁴

Congress's ability to order military force might be particularly useful when the President, for whatever reason, seems reluctant to use force. For instance, if a President evinced a reluctance to defend American territory from attack, say because he felt that such force was unnecessary, Congress might order the Commander in Chief to use the military to defend American soil. Likewise, Congress might order the President to rescue American hostages should Congress feel the President's negotiation strategy has little chance of securing the release of the hostages.

This ability to order the use of military force complements Congress's power to order military force in time of war. As noted earlier, one of the ever-present features of a declaration of war is the command to use military force. Hence Congress can order the use of force in times of war by formally or informally declaring war. Given its power to govern and regulate the armed forces, Congress can likewise order the use of military force in times of peace by passing a statute dictating as much.

4. Treatment of Prisoners

¹¹⁷ Part III.A. argues that the President may order the use of force that does not rise to the level of an informal declaration of war.

¹¹⁸ §6, An Act, 1 Stat. 381, 384.

¹¹⁹ §1, An Act . . . , 1 Stat. 372; §1, An Act . . . , 2 Stat. 528; §12, An Act . . . , 3 Stat. 92 and § 2, An Act . . . , 2 Stat. 708.

¹²⁰ §7, An Act . . . , 2 Stat. 426, 428.

¹²¹ §2, An act . . . , 3 Stat. 472.

¹²² §§6, 8, 9, An Act . . . , 2 Stat. 447, 449

¹²³ §2, An Act. . . . , 3 Stat. 597.

¹²⁴ §2, An Act . . . , 3 Stat. 511, 513.

In recent debates about the treatment of prisoners, some have asserted that the Constitution specifically empowers Congress to regulate the conditions of confinement under the Article I, section 8 power to regulate captures. Because Congress has the power to regulate captures and because war prisoners are captured, Congress may regulate the treatment of captured prisoners, or so the argument goes.¹²⁵

As a matter of original meaning, this reasonable argument is mistaken. “Capture,” as used in the legal writings of the era, was a term of art referring to the seizure and conversion of enemy property. Indeed, capture treatises¹²⁶ and capture case law¹²⁷ considered the capture of property and not prisoners. Hence when people of the era discussed captures, they were speaking of enemy property and not the enemy themselves.

Though the capture power does not generally authorize Congress to regulate the taking and treatment of prisoners, Congress has such power nonetheless. Using its government and regulation power, Congress can order the armed forces to take and secure prisoners. Using the same power, Congress can prescribe the terms of confinement and can make failure to follow its prisoner rules a court-martiable offense. Likewise, Congress can regulate the prisoners taken from ships that privateers capture. The Congress’s power to regulate the capture of enemy property includes the power to regulate the treatment of persons found aboard or with captured enemy property.

Interestingly enough, as early as 1661, the Parliament passed a statute that provided some protections for prisoners taken from prizes.¹²⁸ The 1749 revision of the naval Articles of War provided more unequivocal protections for such prisoners.¹²⁹ The titles of these acts suggested that Parliament was drawing upon the power to govern and regulate the armed forces, a power the Constitution commits to Congress.

Early Congresses clearly believed that they could regulate the treatment of enemy prisoners.¹³⁰ During the naval war with France, Congress ordered private Americans who

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¹²⁶ For instance, Cornelius Bynkershoek wrote quite a bit about the capture of enemy property. Only much later in his *Questions of Public Law* did he discuss prisoners. In that short discussion, he considers how nations swap, ransom, and sometimes enslave prisoners of war. Vattel has the same dichotomy, discussing prisoners first and then discussing captures in a wholly separate section of his *The Law of Nations*.

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¹²⁸ The British Articles of War adopted for the navy in 1661 had a similar provision. See Article 9, An Act for the Establishing of Articles and Orders for the Regulateing and better Government of his Majesties Navies Ships of Warr and Forces by Sea, found at <http://www.british-history.ac.uk/report.asp?compid=47293>.

¹²⁹ See Article 9, 1749 Articles of War found at <http://pdavis.nl/NDA1749.htm>

¹³⁰ The Continental Congress regulated the treatment of prisoners as early as 1776 when it instructed privateers not to mistreat prisoners. See 4 *Journals of the Continental Congress* 254 (barring killing or maiming in “cold bold,” torturing, and mistreating prisoners “cruelly, inhumanely, and contrary to the common usage and the practice of civilized nations”). Congress apparently did not impose similar constraints on the regular navy or army. The failure might have reflected a sense that neither was likely to

captured French sailors to turn them over to closest collector of customs who “shall take suitable care for the restraint, preservation and comfort of such persons . . . until the pleasure of the President” shall be made known.¹³¹ Another act made it “lawful for the President” to cause prisoners captured by the American navy to be “confined in any place of safety, in such manner as he may think the public interest may require.”¹³² A third act required customs collectors, marshals, and any civil or military officer to take custody of French prisoners and to take “charge for their safe keeping and support.”¹³³ Finally, in a stand-alone statute, the Congress “authorized” the President to “exchange or send away” French prisoners as he “may deem proper and expedient.”¹³⁴ This last authorization may have been necessary because prior statutes arguably required that prisoners be kept and not released. Even if the President could release and exchange prisoners by virtue of his Commander in Chief authority, Congress arguably had previously circumscribed that authority by statute. With the passage of the last act, however, Congress had loosened prior restrictions and thereby permitted the President to exchange and release prisoners.

Towards the end of the naval war with France, Congress adopted a more aggressive posture. Congress made it “lawful for the President . . . to cause the most vigorous retaliation to be executed on any such [captured] citizens of the French Republic.”¹³⁵ The Congress thereby allowed the President to mistreat French prisoners in retaliation for Americans whom the French had imprisoned “with unusual severity,” dismembered, or put to death.¹³⁶ This act was enacted in the wake of a French decree announcing that citizens of neutral countries found on board English vessels would be treated as pirates.¹³⁷ The decree presumably meant that Americans found on board English ships would not be accorded prisoner of war status and hence might be executed.

mistreat enemy prisoners. As discussed *infra*, Congress would require retaliation in response to British mistreatment of prisoners.

¹³¹ An Act to authorize the defence of the Merchant Vessels of the United States against French depredations, 1 Stat. 572, 573. Whether this meant that the President could decide to confine them in difficult conditions or whether the Congress was hinting at any exchange of prisoners (or something else) is unclear.

¹³² An Act in addition to the act more effectually to protect the Commerce and Coasts of the United States, 1 Stat. 574, 575.

¹³³ An Act further to protect the Commerce of the United States, 1 Stat. 578, 580.

¹³⁴ An Act concerning French citizens that have been, or may be captured and brought into the United States, 1 Stat. 624.

¹³⁵ An Act vesting the power of retaliation, in certain cases, in the President of the United States, 1 Stat. 743.

¹³⁶ *Id.* A little more than a year later, Congress provided in its new naval Articles of War that “[n]o person in the navy shall strip of their clothes, or pillage, or in any manner maltreat persons taken on board a prize, on pain of such punishment as a court martial shall adjudge.” Art. IX, An Act . . ., 2 Stat. 45, 46. This statute arguably precluded the use of navy personnel to retaliate, leaving open the possibility that army and civilian personnel could retaliate against French citizens should the President use his authority under the statute permitting retaliation.

¹³⁷ Thomas Jefferson to Archibald Stewart (Feb. 13, 1799), in *The Works of Thomas Jefferson* (Paul Leicester Ford ed.).

During the War of 1812, Congress trod the same path. It initially authorized the President “to make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he [may] deem expedient.”¹³⁸ The act thereby implied that English prisoners were to be treated well. But upon hearing that England would treat as traitors former Englishmen who had become naturalized Americans, Congress assumed a more aggressive stance. Should England commit “any violations of the laws and usages of war” against Americans, the President was “authorized to cause full and ample retaliation to be made, according to the laws and usages of war among civilized nations.” Likewise, should Indians allied to England commit “any outrage or act of cruelty or barbarity” upon Americans, the President was “to cause full and ample retaliation to be done or executed on British subjects, soldiers, seaman or marines, or Indians” allied with Britain.¹³⁹

These acts partially illustrate the breadth of Congress’s power to regulate the taking and treatment of prisoners. Congress sometimes vaguely instructed the executive branch to keep prisoners well or safe. Other times Congress authorized retaliation. There is no reason to suppose that members of Congress believed that the Constitution somehow forbade Congress from regulating prisoners in other ways. For instance, Congress might have expressly barred retaliation and required the tenderest care for prisoners, even in the face of enemy atrocities. Or Congress might have ordered the mistreatment of prisoners in any number of ways. In short, Congress’s early statutes regulating prisoner treatment indicate a congressional power to dictate the terms of enemy incarceration.¹⁴⁰

B. Regulation of the Conduct of Wars

Though early Congresses regulated the armed forces in a host of ways, some might imagine that such regulation was *only* appropriate during peacetime. In wartime, perhaps the Constitution authorizes Congress to do little more than specify against whom the nation will wage war, leaving all subsidiary war decisions to the Commander in Chief. In support of this theory, one might argue that the entire breadth of the declare war power can be exercised in a short sentence that says nothing more than that the “United States declares war against” another nation. For some, this narrow conception of the declare war

¹³⁸ An Act for the safekeeping and accommodation of prisoners of war, 2 Stat. 777.

¹³⁹ An Act vesting in the President of the United States the power of retaliation, 2 Stat. 829, 830. The acts permitting retaliation and prisoner exchanges had precursors during the Articles of Confederation, when the Continental Congress ordered the Commander in Chief to engage in acts of retaliation against British soldiers if the British put to death, tortured, or otherwise mistreated American prisoners or hostages. See 5 Journals of the Continental Congress 539. See also 19 *id.* at 28 (ordering Commander in Chief to treat British prisoners as American prisoners were be treated by British). Likewise, the Continental Congress authorized the Commander in Chief to enter into a prisoner exchange agreement with the British. See 13 *id.* at 280.

¹⁴⁰ Though I later argue that the President has the constitutional power to capture and incarcerate enemy soldiers, the statutes passed by Congress in the early 19th century could be read as suggesting that the President had no such power. Because the statutes “authorized” the executive branch to secure enemy prisoners, the statutes could be read as evincing the notion that in the absence of the statutes, the President had no ability to make prisoners of enemies. In other words, there would be no need to “authorize” imprisonment if the President already had the authority.

power might suggest that the Commander in Chief has the sole constitutional power to decide when, where, and how that congressionally authorized war will be waged. Put another way, one might imagine that when Congress declares war against another nation, the Constitution requires that Congress leave all matters related to the war's conduct to the Commander in Chief. In support of this theory, some might quote THE FEDERALIST NO. 74's observation that the "direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority."¹⁴¹

This theory of exclusive presidential authority over the conduct of a war adopts an unduly narrow reading of the declare war power and congressional war powers generally. Congress may not only decide whether the nation will go to war, but the manner in which it will do so. As argued below, Congress can dictate the type of war to be fought, a war's objectives, and whether to escalate or de-escalate a war. In short, there are no wartime limits on congressional powers over the military and the conduct of warfare.

1. Types of War

As discussed in Part III, should Congress do nothing more than declare war against a nation, it thereby allows the President to decide what type of war America will wage. As Commander in Chief, the President may decide whether a naval war, a land war, or an aerial campaign best serve the war effort. Formally declared wars have had this pattern, with Congress declaring war or declaring that a state of war exists and then authorizing the President to use all branches of the armed forces.

Yet Congress may decide the type of war to be fought, no less than the President. Several congressional powers point to this conclusion. Consider the declare war power. One of the crucial elements of a declaration of war was the order to wage hostilities against the enemy. In the eighteenth century, a formal declaration typically ordered a nation's forces to wage war against the enemy "by land and by sea." Somewhat less common, a formal declaration of war could order a nation's citizens to attack the enemy.

Orders to attack were crucial, for without such orders it would be unclear whom the war declarant (i.e., the entity declaring war) was directing to fight the war. As German diplomat and jurist Georg Martens explained, "even after war has been declared" not every individual is allowed "to fall upon the enemy." Soldiers and citizens who have express permission "may lawfully exercise hostilities" and are treated as "lawful enemies." Those lacking authorizations were treated as banditti.¹⁴² Hence privateers needed letters of marque and reprisal, because only these commissions authorized them to attack the enemy.¹⁴³

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¹⁴² See George F. Martens, *A Compendium on the Law of Nations* 287-88 (1802).

¹⁴³ *Id.*

By ordering certain hostilities and not others, the war declarant could decide what type of war to wage. Whereas monarchs generally exercised this authority in Europe, the Constitution granted this authority to Congress when it vested Congress with the declare war power. For instance, Congress might choose to declare war “by land” only and order army commanders to fight while remaining silent about the use of the navy.

Congress’s powers to raise and fund the armed forces also suggest a power to decide the type of war to be waged. If Congress declares war and has created no navy, Congress effectively has decided that the nation will fight a land and air war. Alternatively, after declaring war, Congress might cut off army funding and leave the other branches as the sole means of waging the war that Congress declared.

Wars fought in the early decades following the Constitution’s ratification reveal that Congress could control the type of war the United States would wage. In those early years, the United States fought wars against various nations. These conflicts (and the litigation they generated) reveal that early Congresses, Presidents, and Justices agreed that the Constitution permitted Congress to determine what type of war to wage.

Consider the nation’s first war, the offensive war against the Wabash Indians. As Abraham Sofaer recounts, at the request of President George Washington and the Governor of the Northwest Territory, Congress in the fall of 1789 declared war (albeit implicitly) against the Wabash Indians.¹⁴⁴ Congress’s first war authorization was limited, however, because while it permitted the use of the army and the militia against the Wabash,¹⁴⁵ there was no navy that could be used to wage war against the Wabash. Moreover, unlike the practice of some European states, the Congress never authorized civilians to participate in this war in any way, other than as members of the militia.¹⁴⁶ Hence the first offensive war was limited to a land war fought by the army and the militia.

In contrast, Congress authorized naval wars against France, Tripoli, and Algeria. In the case of France, in 1798 Congress passed statutes that authorized a limited maritime war against French armed vessels. The President could not use the army against France at all, even against France’s North American possessions. Instead, Congress “authorized” the President to “instruct” naval commanders to “subdue, seize, and take any armed French vessel.”¹⁴⁷ Obviously, unarmed French vessels were not proper targets. Moreover, French armed vessels could be attacked only on the high seas and in the waters of the United States. Finally, the navy could not attack French harbors and territory.

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¹⁴⁶ The absence of civilian participation in the war made sense because the civilians most likely to participate were the ones most likely to inflame the Indian invaders and make peace treaties impossible.

¹⁴⁷ §1, An Act further to protect the Commerce of the United States . . . , 1 Stat. 578. Congress granted further authority to the President to order the capture of French ships, but these details do not change the limited nature of the war.

In 1802, Congress authorized a much broader naval war against Tripoli. The Congress made it “lawful for the President . . . to instruct the commanders . . . to subdue, seize and make prize of all [Tripolitan] vessels.” Congress also provided that it shall be “lawful” for the President to “employ” the navy to protect American commerce and seaman and to take “acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.”¹⁴⁸ In 1815, Congress authorized the same type of war against Algeria.¹⁴⁹ By authorizing the navy’s use (and the marines on board naval vessels) and by failing to permit the army’s use, the Congress barred the army’s participation in these wars.

The 1812 declaration against Great Britain, regarded by many as America’s first formal declaration of war, contained the first generic authority to use the armed forces. After declaring war, the Act “authorized” the President “to use the whole land and naval force of the United States to carry the [war] into effect.” The Congress thereby empowered the President to use the army and the navy in the war. A broad authorization was by no means assured as the Senate came within one vote of authorizing a naval war only.¹⁵⁰ Relatedly, Congress never authorized all Americans to attack the people of England.¹⁵¹ Instead, Congress authorized the President to issue letters of marque and reprisal and heavily regulated who could obtain these letters.¹⁵²

Members of the Supreme Court agreed that Congress could decide the type of war America would fight. When the Adams administration instructed the navy to go beyond the statutory limits set by Congress in the naval war with France, the Supreme Court in *Little v. Barreme* concluded that the orders were *ultra vires*. Per Chief Justice John Marshall, the Court held that the navy’s capture of a ship was statutorily unauthorized and hence the owner of the ship could sue the naval commander for trespass. Because the Congress had authorized certain seizures of ships and not others, all other seizures were implicitly forbidden because they were unauthorized.¹⁵³ Clearly the Supreme Court recognized that Congress could limit the type of war and that the President did not have an indefeasible constitutional authority to decide what type of war America would fight.

Likewise in *Bas v. Tingy*, Supreme Court Justices noted that Congress could decide the extent of America’s warfare. Justice Samuel Chase observed that “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If . . . a partial war is waged, its extent and operation depend on our municipal laws.”¹⁵⁴ Justice Oliver Patterson similarly observed that “[a]s far as congress

¹⁴⁸ §§1, 2, An Act . . . , 2 Stat. 129.

¹⁴⁹ §2, An Act, 3 Stat. 130.

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¹⁵¹ Cf. *Bas v. Tingy*, ((Chase, J.)) noting that Congress had not authorized individuals to attack French citizens during the Quasi War against France).

¹⁵² A later statute heavily regulated the issuance of letters of marque and reprisal, making it clear that not every American with a ship could attack and seize English property.

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tolerated and authorised the war on our part, so far may we proceed in hostile operations. [The current war] is a maritime war, a war at sea as to certain purposes.”¹⁵⁵

Congress never specified which power it was drawing upon in enacting statutes regulating these wars. Early statutes do not say that their limitations on the type of war fought are justified by reference to the declare war, the government and regulation, or the commerce Clauses. Still, what matters for our purposes is that Congress clearly regulated the type of war the Executive would wage in the context of a Constitution that is best read as authorizing such congressional regulation of warfare.

2. Escalation and De-escalation of Wars

Congress can not only decide the type of war to be fought, Congress can also decide the level of force brought to bear in a war. Congress can begin by authorizing the minimal use of force against an enemy and then gradually ratchet up the use of force by passing new use of force statutes. Likewise, Congress can begin a war by commanding maximal warfare, perhaps even going so far as to require all civilians to commit acts of hostilities against the enemy. Thereafter, Congress might deauthorize the use of military and civilian force and thereby curb America’s participation in the war.

Congress’s power to escalate and de-escalate can be seen most clearly in the naval war with France. In that war, fought at the conclusion of the 18th century, Congress gradually escalated the use of the armed forces against France. Congress arguably began the nation’s participation in the war with a statute ordering the capture of French ships that came and remained in American ports.¹⁵⁶ Thereafter Congress permitted American merchant vessels to capture French vessels who attempted to search, assail, or capture American merchant vessels.¹⁵⁷ A short while later, Congress authorized the navy and privateers to capture armed French vessels found on the high seas or in the territorial waters of the United States.¹⁵⁸ In this way, Congress gradually escalated hostilities, all the while constraining the use of naval force. Congress never authorized the capture of all French armed vessels wherever they might be found, let alone all French vessels. As noted earlier, Congress never permitted the President to use the army or the navy to attack either France or its colonies.

Just as Congress can escalate a war, so too can it elect to de-escalate warfare.¹⁵⁹ One way for Congress to de-escalate a war is to repeal prior statutory commands (or

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¹⁵⁹ Why would Congress choose to de-escalate a conflict it authorized? One can imagine Congress authorizing the use of the army and navy and subsequently deciding that it might be prudent to limit the use of the army as a means of signaling (or furthering) a possible conciliation. Or one can imagine that Congress no longer approves of the conflict it sanctioned, either because members of Congress have had a change of heart or because the conflict has become unpopular.

authorizations) to use the military and any statutes relating to the use of civilians to engage in acts of hostility (such as statutes relating to letters of marque and reprisal). As noted earlier, formal declarations always contained authority to conduct hostilities. Indeed, Congress has consistently authorized warfare either in its informal or formal declarations. Because the authority to use force takes the form of a statute or resolution, Congress may repeal such authority, just as it may repeal or modify any statute or resolution it enacts. When Congress repeals authority to use force, the President can no longer use such force.

Another way Congress may de-escalate a war would be to enact new statutory constraints on the use of military force. For instance, Congress might decide that the navy which had hitherto waged war against the vessels of the enemy without any geographical restrictions should now only commit hostilities near the coast of the United States. Once one recognizes that Congress could have imposed the restraints in its declaration of war, one can reasonably conclude that Congress may impose restraints after the onset of war.

A third means of de-escalation would be to create statutory triggers that automatically constrain the war upon the occurrence of certain events. For instance, in declaring war, Congress might provide that should peace negotiations begin in earnest, offensive land and naval operations should pause during the negotiations. Or Congress might provide that should the navy destroy certain crucial enemy ports, the navy's operations ought to terminate.

A final means of de-escalation would be to wholly or partially defund a war. Because the President clearly has no right to access the treasury to conduct a war, the President is wholly dependent upon Congress for war funds. By limiting appropriations for the war, Congress indirectly de-escalates the conflict. Fewer soldiers will be fielded and/or fewer vessels will be able to engage the enemy than before, making the prosecution of the war less vigorous.

In the early years, Congress authorized the limited use of force and adopted measures meant to constrain war making. For instance, Congress in 1794 authorized the creation of a navy for the protection of American vessels against Algerian corsairs but also provided that the navy would be disestablished should peace ever break out between Algeria and the United States.¹⁶⁰ When America signed a treaty with Algiers the next year, a new Act was required to continue the naval buildup.¹⁶¹ Similarly, during the French naval war, Congress authorized the President to suspend acts of hostilities should he believe a "commercial intercourse [with France] may be safely renewed."¹⁶² In other words,

¹⁶⁰ The act is best read as implicitly authorizing the President to use the expected navy against the Algerians.

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¹⁶² §6, An Act to further suspend. . . , 2 Stat. 7. Alexander DeConde has argued that all American military operations "were to expire when the commanders of the French ships stopped their depredations against American commerce." DeConde, *supra* note ? at 126. DeConde exaggerates because not all quasi-war statutes provided as much. But this clearly was a general sense of Congress as reflected in at least some of its statutes.

Congress essentially authorized the President to de-escalate the war.¹⁶³ That Congress chose to authorize the President to de-escalate the conflict suggests that Congress might have done so itself.¹⁶⁴ The more general point is that even after authorizing or commanding certain hostilities, Congress always may adopt a new perspective and augment, modify, or repeal the authority to use military force.

In sum, rather than merely having a power to make a binary, one-time decision about whether to wage war, the Congress actually has the ability to adjust the use of force against an enemy. Put in more colloquial terms, one might say that Congress's power over a war is more like a dimmer switch than it is like a simple on/off switch. Congress not only may turn the war "on" and "off," it also may decide the level of intensity, *e.g.*, what means will be used in the war and where and how long the war will be fought. To borrow from the First Amendment's jurisprudence, one might say that Congress has the power to determine the time, place, and manner of how the war it declares will be fought.

3. Objectives of War

The Constitution authorizes Congress to determine a war's ultimate objectives. Concerned about a nation's predations on American commercial vessels, Congress can decide to declare war for the specific purpose of eliminating threats to American commerce. Pursuing dreams of so-called manifest destiny, Congress may declare that the nation goes to war as a means of acquiring new territory. Modern Congresses might wish to establish regime change and democratic nation-building as the goals of a war.

By establishing a war's ultimate goals, the Congress limits the President's war fighting freedom. If Congress wishes to eliminate threats to American vessels and correspondingly constrains the use of military force, the President cannot eliminate the enemy's naval threat and continue offensive operations with the goal of securing the enemy's unconditional surrender. Likewise, if Congress wishes to acquire certain territory from the enemy, the President cannot attempt to seize all enemy territory.¹⁶⁵

¹⁶³ Using this authority, the President actually permitted trade with the French colony of Santa Domingue on the grounds that the governor had agreed to protect American shipping and no longer allow any privateers to operate their.

¹⁶⁴ It should be noted that early Congresses never de-escalated a general declaration of war. However since there was only one such declaration—the 1812 declaration of war—the absence of such de-escalations is hardly telling.

¹⁶⁵ Given that the President is always free to negotiate a peace treaty with the declared enemy nation, the Congress cannot require the President to meet any particular war objective. The President might pursue congressional war objectives for a time and then negotiate and (with the Senate's consent) ratify a treaty that fails to satisfy all the objectives that Congress had sought. Hence Congress's power to set objectives should best be viewed as the power to set maximum objectives and not the power to force the President to fulfill any one of the congressional objectives. In deciding whether to leave congressional objectives unfulfilled, the President will have to gauge whether the Senate is willing to accept less concessions from the enemy than Congress initially sought in the declaration of war.

A number of considerations bolster the claim that Congress may set a war's objectives. First consider its ability to issue conditional declarations of war, a declaration that promises hostilities should another nation fail to satisfy certain conditions.¹⁶⁶ Congress might declare that should England continue to prey upon American shipping and impress American sailors into the English navy, the Congress will declare war. If England failed to halt such practices, Congress might then order the army and navy to engage English forces.

Given that Congress may threaten war upon failure to satisfy conditions, it should likewise be able to decide when the nation will cease to fight a war because its conditions have been met. Suppose that Congress issues a conditional declaration that threatens war if Canada fails to hand over certain territory. Assuming that Canada does not acquiesce, Congress might declare war to secure the disputed territory. Because Congress can make a conditional declaration of war and thereby give Canada a chance to avoid war, it should likewise be able to set a war's ultimate goal in its declaration of war and provide that the attainment of the goal would halt the war. Hence if the President seized the territory that Congress claims or if Canada ceded it to the United States, the warfare would end.

Second, Congress's funding power points to the same conclusion. To borrow the example from above, one can imagine Congress providing that no funds shall be used for offensive military operations once the armed forces of the United States have ousted foreign forces from disputed territory. Hence after the ousting of Canadian forces from the disputed territory, the Executive would have no funds with which to continue offensive expeditions against the Canadians. Given that Congress can do this, it should likewise be able to limit the President's ability to wage war in the declaration of war itself by also specifying wartime objectives, the satisfaction of which will end offensive operations.

Finally, Congress's power to de-escalate suggests a power to establish a war's maximum objectives. As noted earlier, Congress might provide for the contingent de-escalation of a war, say by providing that once the armed forces have destroyed another nation's military, the statutory authority to use force would automatically lapse, thereby terminating offensive operations. This is functionally indistinguishable from a declaration of war that establishes objectives and thereby fixes the limits on offensive operations.

In short, the power to issue conditional declarations of war, the power to defund a war, and the power to de-escalate the conflict all suggest a complementary power to set the maximum objectives of any declared war. The ability of Congress to specify the objectives of a war makes good sense. When Congress decides to go to war, it usually will decide *why* the United States should go to war. Specifying the objects of a war in a declaration merely specifies what is perhaps often implicit in the declaration of war. Just like someone who decides to build a house decides what specific functions that house will serve, so too may someone who declares war decide what objectives a war will serve.

Consistent with this constitutional claim, early Congresses sometimes established a war's objectives. Recall that Congress, in its limited declarations of war against France, authorized hostilities against France but also signaled that at least some of those hostilities were to halt if France halted her attacks on American commercial vessels. This provision arguably set the free flow of American commerce as the overall goal of the war. Indeed, the statute authorizing the capture of French armed vessels was entitled "an Act further to protect the Commerce of the United States" making clear that the aim was not to acquire French territory. Similarly, the limited declaration of wars against Tripoli and Algeria were meant to protect "the commerce and seaman" of the United States against Barbary predations.¹⁶⁷ Occasionally, subsequent Congresses have specified a war's objectives,¹⁶⁸ including the most recent authorization to use force against Iraq.¹⁶⁹

C. Congressional Power Reviewed

Congress has many powers that bear on the use and regulation of the military. Congress may declare war; create, fund and regulate the armed forces; and fund and regulate the militia. These powers are best read as granting Congress complete control over the military, in peace and wartime. Using these authorities, Congress can regulate the means of warfare, establish the objectives of war, and escalate and de-escalate hostilities. Moreover, Congress can order limited hostilities, dictate soldier training regimes and wartime tactics, and regulate the treatment of prisoners. In short, there appears to be no subject matter limits to congressional powers over the military.

Still we have yet to consider whether the President's powers over the military might somehow compel a narrower reading of congressional power. The next part examines presidential power over the military, arguing that while the President has significant concurrent authority over the military, he lacks any exclusive military powers. Any military authority the President has, the Congress enjoys as well by virtue of its various military and war powers. The only constraint is that Congress cannot infringe upon the President's commander in chief power. What this means in practice is that Congress cannot create

¹⁶⁷ Cites. Early declarations of war did not always specify a war's objectives. While Congress often limited the means of prosecuting a war, it did not always enumerate the war's aims. This ambiguity was sound because at a war's outset, Congress cannot foresee the course of the war. Goals that might seem realistic at the outset might seem implausible a few months into a war; other seemingly distant objectives might seem more obtainable only as the American military racks up a series of victories. Moreover, if one reveals a war's strategic goals in a declaration of war, one makes it more difficult to obtain that objective as it enables the enemy nation to adopt measures designed to thwart the satisfaction of that objective. The enemy can concentrate its efforts and ignore its other vulnerabilities, recognizing that they will not be exploited.

¹⁶⁸ For instance, a day after it declared war against Spain, Congress enacted the Teller Amendment which provided that the United States had no territorial ambitions for Cuba. See § 4, of the Teller Amendment.

¹⁶⁹ See § 3(a)(2), Authorization for use of Military Force Against Iraq Resolution of 2002 (Oct. 16, 2002), Pub. L. 107-243, 116 Stat. 1501 (authorizing President to defend the nation against Iraq and to enforce Security Council resolutions).

independent soldiers, sailors, or military units because in so doing, Congress would be vitiating the grant of commander in chief authority to the President. After all, the President would not be Commander in Chief of the entire armed forces if certain portions of it were not answerable to him. Perhaps a better way of putting the point is that though the commander in chief power does not grant or guarantee the President any operational autonomy or independence, it requires that Congress reserve for the Commander in Chief all military decisions that Congress leaves undecided or unresolved.

IV. Concurrent Power: The President

One of the most contentious disputes of modern separation of power scholarship concerns the reasonable claim that the Commander in Chief grants the President a certain amount of infeasible, exclusive power. In other words, there is a sphere of military matters that the Constitution leaves entirely with the President, with Congress having no concurrent authority. Because Congress certainly has its own exclusive sphere, it seems plausible to suppose that the President might have similar authority over some matters. For instance, many might suppose that the President has a constitutional monopoly on military operations. Under this theory, Congress cannot decide how many troops to use in a war, what equipment to deploy, or where to fight. Nor can Congress micromanage the battlefield, say by ordering advances, flanking movements, and retreats.

While reflecting a plausible reading of the Constitution, this conception of the Commander in Chief Clause seems mistaken. As we have seen, congressional power over the military and wars does not seem so limited. In fact, early Congresses regulated operational matters all the time, deciding such mundane matters as training and tactics and deciding such important matters as the type of war to fight and the men and material that could be used to wage war. Congress did not seem to respect any notion that the Constitution barred congressional regulation of military operations.

Rather than providing some sphere of exclusive authority, the Commander in Chief Clause is susceptible to an equally plausible reading, one that harmonizes with early congressional legislation. This reading recognizes that the Commander in Chief has significant constitutional authority over the military without supposing that certain military matters are reserved for the President. No less than Congress, the President may order the use of force and deploy the armed forces, so long as such uses and deployments do not constitute informal declarations of war. And though he cannot sanction members of the armed forces, the President can regulate their conduct by threatening to remove them for failure to adhere to any supplementary disciplinary and training rules that he imposes.

This system of concurrent power over a host of military matters invites the question of whose rules or orders prevail when there is a conflict. As argued below, considerations of text, structure, and history suggest that where congressional and presidential rules conflict, congressional rules prevail. This system of concurrent powers coupled with a

principle of congressional primacy when rules conflict renders the Commander in Chief power a residual, default power. Whatever concurrent authority Congress chooses not to exercise and not to restrain, the President may exercise as Commander in Chief.

A. The Scope of the President's Military Powers

The Constitution grants the President two relevant powers. Article II, section 1 vests the President with “[t]he executive Power.” Article II, section 3 makes the President the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States” Of these two authorities, the Commander in Chief power is the key because the Executive Power Clause grants no additional military authority to the President.¹⁷⁰ The latter Clause, while quite significant in other respects, is best read as neither vesting the President with any war powers nor granting him any additional military powers beyond those already part of the Commander in Chief power. In fact, the Commander in Chief power is best read as a *limitation* on authority that otherwise would be granted more fulsomely by the Executive Power Clause. In particular, in the absence of the Commander in Chief Clause, the President arguably would have total control of the army, navy, and militia, without regard to whether the militia was called into federal service.¹⁷¹ In any event, the Commander in Chief Clause is the crucial provision for it marks the metes and bounds of presidential power over the military.

By making the President the Commander in Chief, the Constitution grants him significant military powers. The Constitution does not merely convey an empty title bereft of any real authority. Indeed, the very title implies the power to “command” in much the same way that the title “firefighter” implies a power to fight fires. Consistent with this intuition, we know that commanders of smaller units of the armed forces no doubt have the power to command their units, such as the power to direct their operations and to create rules of conduct and discipline. A 1778 military dictionary defined “General of an army” as he “that commands in chief” and went on to observe that a general “is to regulate the march of the army, and their encampment, to visit the posts, to command parties for intelligence, to give out the orders . . . in day of battle, he chuses the most advantageous ground, makes the disposition of his army, posts the artillery, and sends his orders At a siege, he orders the making of [defensive fortifications] and making the attacks.”¹⁷²

The Commander in Chief has similar power over the entire army, navy, and, when summoned for federal service, the militia. We might profitably divide the discussion into residual war powers, military regulation, and the use of military force.

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¹⁷¹ Indeed, one might say that the express grant of Commander in Chief power also makes clear something that might be disputed and hence was arguably added out of an abundance of caution—*ex abundanti cautela*.

¹⁷² A MILITARY DICTIONARY, EXPLAINING AND DESCRIBING THE TECHNICAL TERMS USED IN THE SCIENCE OF WAR E3 (1778).

1. Residual Wartime Authority

Though the President cannot declare war, he has the constitutional authority to prosecute the war Congress has declared. Operating within the confines of the discretion left by statutes, the President may decide what type of war to fight, whether to escalate or de-escalate, and what objectives to pursue. In other words, the more general the declaration of war and accompanying statutes, the more authority Congress leaves for the President. The more detailed these enactments are, the less wartime discretion the President enjoys.

When Congress does no more than declare war and permit the use of the armed forces, the President can decide which branches to use in the war and how to use them. Congresses took this path in the declared wars against England and Mexico, leaving a large reservoir of wartime authority for Presidents James Madison and James Polk. These Presidents decided whether to fight a land and/or naval war. These Presidents decided when to escalate hostilities and when de-escalation was more prudent. They also determined whether the objective was the acquisition of territory or a reversion to some favorable status *quo ante*.

If Congress authorizes a naval war and indicates that protection of commerce and seamen is the goal, as it did in the Tripolitan and Algerian naval wars, the President may decide how best to deploy the navy to fight the war and secure those objectives. The President may decide to use the navy to aggressively convoy American commercial vessels, hoping to protect commerce. Or he may decide that commerce can best be protected by devastating the enemy's navy and privateers and then negotiating a favorable peace treaty. In the extreme, if he doubts that the present regime will stay true to any treaty commitments, perhaps he can use the navy as a means of securing regime change. And, of course, the President can decide to escalate hostilities if he believes that would best secure congressional objectives, just as he may decide to step down hostilities if he believes that doing so might further peace negotiations meant to secure a commercial and general peace.

Even if Congress declares a rather limited naval war, of the type declared against France in the twilight of the 18th century, Congress will leave much discretion to the President. In that war, Congress only authorized the destruction and capture of armed French vessels as a means of securing American commerce. Despite the circumscribed nature of the war, Congress still left the President much discretion. President John Adams could have decided which French armed vessels to attack and which to evade (e.g., attack only lightly armed merchant vessels). He might have authorized attacks only when American naval vessels had superior firepower. He might have directed attacks only in certain geographical locations or ordered indiscriminate attacks on French armed vessels.

In short, the Commander in Chief can decide the various war details that Congress leaves undecided, in much the same way that a general can determine the details left undecided by the Commander in Chief. Where Congress has spoken, however, the

President cannot issue contrary orders because when Congress regulates military matters, or otherwise exercises its constitutional powers, congressional rules trump any contrary presidential ones.¹⁷³

2. “Regulatory” Authority

Notwithstanding Congress’s express government and regulation power over the armed forces and militia, the President has something approaching a regulatory power as well. Subject to important constraints, he can regulate military discipline, training and tactics, and deployments.

First, as Commander in Chief, the President can create his own disciplinary rules. In the absence of any congressional regulation of discipline, the President may create his own general orders and rules. The President may decree that soldiers and sailors not divulge information to the enemy. He may require officers and enlisted men to obey the orders of superiors within the chain of command. Even where Congress has enacted a system of military discipline and justice, the President may supplement congressional regulation with his own rules. For example, the President might enact more stringent rules relating to the display of cowardice, as a means of maintaining high morale.¹⁷⁴

Second, notwithstanding Congress’s ability to regulate military training and tactics, the Commander in Chief has concurrent authority. If Congress fails to regulate training, the Commander in Chief can establish his own training regime. Even, if Congress requires certain training—say a minimum of two weeks a year—the President may require additional training. Likewise, the President may enact standing battlefield rules for the armed forces and the militia relating to advances, firing, and retreats.

Third, the Commander in Chief can use his regulatory power to order military deployments, at least where not prohibited by Congress. While the President cannot use the armed forces so as to informally declare war, no one doubts that the Commander in Chief can determine where to position the army and navy. For instance, he can order the army to patrol America’s border. Likewise, the President can decide whether to send out an aircraft carrier group or some smaller flotilla to send a reassuring signal to some ally.

Fourth, the Commander in Chief can regulate prisoners in the same way that Congress can, i.e., by giving orders to military personnel that capture and hold prisoners. Should another nation attack the United States, the President surely has the authority to order military personnel to detain and secure the attacker’s soldiers and sailors. Moreover,

¹⁷³ See *infra*.

¹⁷⁴ It is also worth noting that the President may pardon all federal offenses, including offenses committed by military personnel. Moreover, the President has the same ability to decline to prosecute that he enjoys in the civilian context. For instance, the President may decide that a military trial would serve no purpose because a deserting soldier had already suffered enough obloquy.

when Congress declares war against another nation, the declaration implicitly authorizes the President to kill or capture the enemy.¹⁷⁵ As part of the latter implied power, the President may decide the terms of their confinement. The President can require that prisoners be segregated, interrogated, etc.¹⁷⁶

The crucial difference between presidential power to create military rules related to tactics, training, and prisoners and the broader congressional power to regulate the armed forces is that the President cannot fine, imprison, or execute military personnel who violate his rules. His sole means of enforcing his rules is to oust personnel who disobey them. Such a power in no way invites comparison to the Crown's power to punish soldiers because the President wholly lacks the powers that caused such consternation in England. In England the concern was about soldiers losing life and limb outside the regular system of justice; that is not possible in America, even with a President with limited regulatory power. The most that the President could do is dismiss armed force personnel who refuse to follow his rules and orders.

This system of parallel presidential disciplining of the armed forces mirrors what the President may do with respect to civilian officers. Under the Constitution, only Congress can enact punishments for civilian officers, namely fines, imprisonment, and capital punishment. The Chief Executive cannot impose these sanctions as a means of controlling his civilian executive officers. Nonetheless, the President can create supplementary rules relating to the conduct of his civilian officers and enforce those rules by removing those who disobey his orders and policies. The ability to remove officers at pleasure is a useful means to discipline and therefore regulate officers, civilian and military alike.

More generally, we might say that the President might issue rules or orders to members of the military, and in so doing, regulate those members. This ability to issue interstitial rules that fill in the gaps left by higher order rule makers is an ability that exists with respect to all commanding officers, whatever their rank. Lieutenants likely have a similar power over the platoon under their command; colonels have comparable power over their regiments; and a general over a larger group still. The President has such interstitial regulatory authority over the entire armed forces and the militia, even as the military is wholly subject to congressional direction and even as the President's rules are subject to congressional override.

3. Use of Force

We have seen that Congress may order the use of force, either in a war or outside that context. The question considered here is whether the President has any constitutional authority to order the use of force. It makes sense to suppose that commanders, of whatever sort, might use military force in limited ways. Should a battalion be attacked, the

¹⁷⁵ See Hamdi.

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battalion commander presumably could decide that the battalion should use force to defend itself. Should a naval vessel come across pirates, it seems natural to suppose that the captain might order the vessel into action to neutralize the pirates. More generally, the power to command military forces, of whatever size, seems to imply the power to use force. This intuition applies equally to the Commander in Chief, suggesting that the President can order uses of military force.

This does not imply that the President can order any use of military force. As we have seen, only Congress may declare war and hence only Congress can order those uses of military force that constitute an informal declaration of war. Yet not all uses of military force were seen as declarations. For instance, an unsanctioned use of force by errant military officers could be disavowed and no one would regard such a use of military force as a declaration of war. Likewise, limited self-defense on the part of military forces was not regarded as a national declaration of war. One might say that while the Constitution grants Congress a monopoly on the power to declare war monopoly, it does not grant Congress a broader monopoly on all uses of force.

This subpart argues that the President can order certain uses of military force, including the repelling of attacks, offensive measures against pirates, and rescuing overseas Americans. Hence Congress and the Commander in Chief have concurrent authority over such matters.

a. Repelling Attacks

The records of the Philadelphia convention suggest that the Commander in Chief might repel invasions notwithstanding the proposed grant of declare war authority to Congress. The very proponents of the “declare war” language, James Madison and Elbridge Gerry, said that even though Congress would have the power to “declare war,” the President could still “repel sudden attacks.”¹⁷⁷ Another delegate opposed their amendment, preferring “make war” to “declare war” but agreed that the President should “be able to repel and not to commence war.”¹⁷⁸ Apparently, no one disagreed with the idea that the Commander in Chief should be able to repel attacks. More generally, delegates did not believe that the constitutional language they were debating, either the original language or the amendment, somehow granted Congress a monopoly on the use of force.

This same understanding carried into the Washington administration. When the Creek and Chickasaw tribes each declared war in 1792-1793, governors wrote to the federal Executive seeking authority to take the fight into Indian territory. Washington and his cabinet agreed that only Congress could authorize offensive measures because only Congress could declare war. At the same time, Washington and his cabinet concluded that defensive measures designed to repel attacks were entirely appropriate because such

¹⁷⁷ 2 Records of the Federal Convention 318.

¹⁷⁸ *Id.*

measures did not usurp Congress's power to declare war.¹⁷⁹ This conclusion reflected the view that Congress lacked a monopoly on the use of force. Because not every use of force was a declaration of war, not every use of force trenched upon a congressional monopoly.

Instructions given to naval officers during France's predations on American shipping likewise indicate that Presidents could order the military to defend American property and territory. Alexander Hamilton and the Secretary of War, James McHenry, advised that the President might order naval vessels to convoy and protect American merchant ships from attack. Consistent with this advice, President John Adams instructed naval officers that it was appropriate for them to repel attacks on American shipping, whether the attacking ships were plying along the coast or on the high seas.¹⁸⁰ At the time, Congress had not authorized the navy to convoy and defend American merchant vessels.¹⁸¹

We might draw some generalizations from these episodes. The Commander in Chief may issue standing orders to United States troops and sailors to repel any attacks made upon them and upon U.S. territory. When the armed forces do no more than defend themselves or U.S. territory, they neither declare war nor do they usurp some other exclusive congressional power. Hence should another nation's naval vessel accost a United States naval vessel, the latter may respond with force as a means of defending itself. Likewise, Presidents may order troops to repulse an attack on American soil.

b. Attacking Pirates and Banditti

May the President ever do more than repel attacks on U.S. territory and the U.S. armed forces? In particular, may the Commander in Chief order the military to launch the first blow, to engage in offensive operations? With respect to pirates and banditti, the answer is yes. Once again, as Commander in Chief, the President may order the use of military force, except where the Constitution grants Congress exclusive authority over certain uses of force. The Constitution grants Congress exclusive authority over declarations of war, whether formal or informal. Likewise, the Constitution grants Congress exclusive control over captures of enemy property. When the President orders the navy to attack pirates on the high seas, however, the President has not thereby declared war or authorized the capture of property belonging to any other nation. Likewise when the President orders the use of force against roving banditti, he has not declared war. Instead he has merely ordered the use of lethal military force against criminals, albeit highly armed and organized criminals.

The predations of pirates and banditti had long been distinguished from the military actions of nation-states. The Greeks argued that pirates were the common enemy

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¹⁸⁰ He was also given the authority to seize vessels committing hostilities within the jurisdictional limits of the United States and the authority to seize pirate ships wherever found.

¹⁸¹ [This needs more work—see actual instructions and 155-58 of Sofaer].

of all and could be attacked without any declaration of war.¹⁸² Similarly, international law scholar Emmerich de Vattel noted that nations may exact “summary justice” on pirates because pirates are “enemies of the human race.”¹⁸³ Writing for the Supreme Court, Justice Joseph Story noted that “[p]irates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war.”¹⁸⁴ Story’s point was that public and private ships could attack and subdue pirates because there were no international law implications of such attacks.

Once again, early instructions issued during the war with France suggest that it was appropriate for the President to order hostilities against pirates. John Adams ordered the seizure of attacking ships that sailed without the authority of commissions on the grounds that they were mere pirates.¹⁸⁵ But Congress had not at the time authorized the seizure of armed French vessels, let alone non-French armed vessels. It merely had authorized the creation of a navy. The President could order the seizure of pirates because under international law, pirates were criminals whom any nation might apprehend and punish and because neither the Constitution nor the Congress had precluded the use of such force by the Commander in Chief.¹⁸⁶

Similarly, on two separate occasions, Jefferson’s administration ordered the navy to engage pirates. In his 1805 State of the Union address, Jefferson informed Congress that he had given orders to American naval vessels to capture pirate ships committing predations within American waters.¹⁸⁷ In 1807, Jefferson retroactively approved the seizing of a pirate vessel.¹⁸⁸ There apparently was no statutory authority for either use of force against these pirates.¹⁸⁹

c. Protecting Citizens Abroad

¹⁸² Neff 18.

¹⁸³ Vattel, Book 1, § 233, Book II, § 68, Book IV, § 52.

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¹⁸⁶ Indeed, Adams might have gone further in his instructions. He might have ordered his captains to attack and capture any known pirate ship without waiting to be attacked because such use of force would not have intruded upon any exclusive congressional power.

¹⁸⁷ See President Jefferson’s 1805 State of the Union speech found at <http://www.yale.edu/lawweb/avalon/presiden/sou/jeffmes5.htm>.

¹⁸⁸ Letter from Thomas Jefferson to Robert Smith (Sept. 3, 1807) found at [http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(tj100206\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj100206))).

¹⁸⁹ President Jefferson’s dealings with the so-called Barbary pirates are not to the contrary. Jefferson apparently did not believe he had the constitutional authority to order offensive measures against Tripolitan vessels in 1801. His belief likely stemmed from the view that these so-called pirates were really not pirates at all. Jefferson believed that the Tripolitan ships attacking American merchant vessels were authorized agents of the Tripoli government which had declared war. See Thomas Jefferson’s First State of the Union message found at <http://www.yale.edu/lawweb/avalon/presiden/sou/jeffmes1.htm>. Hence, Jefferson either regarded the Tripolitan corsairs as privateers or elements of the Tripolitan navy.

From time to time, Presidents have ordered the military to rescue citizens abroad. Without venturing into an extended consideration of these uses of force, suffice it to say that when the President does no more than order the military to protect American civilians and armed forces personnel, the President is well within his constitutional powers and has not entrenched upon the congressional prerogative to declare war. A quick airlift or naval evacuation does not rise to the level of an informal declaration of war (though such actions may justify that nation's decision to declare war on the United States). Such uses of military force do not amount to a declaration of war because they do not evince any decision to wage war.

At the same time, Presidents who order such actions must realize that should hostilities become so fierce, prolonged and geographically widespread, it may become necessary to secure congressional approval because those protracted military operations may constitute an informal declaration of war. The key question is has the United States gone to war against a nation or has it merely engaged in some limited use of military force designed to rescue Americans? While the dividing line between permissible defensive actions and impermissible informal declarations of war is hardly clear, it is a line the Constitution requires the President to respect as best as he can.

This sometimes obscure dividing line has intuitive appeal. When chaos engulfs some distant land and American citizens are endangered, no one supposes that the President has informally declared war merely by ordering the military to conduct search and rescue operations. The decision to do no more than rescue imperiled Americans does not seem at all like a decision to wage war against another nation. Yet if a President also should seek to overthrow a government, acquire territory, or seek indemnity for American losses, then his military actions lose their limited character. The President uses military force for more than just the safeguarding of civilians and seeks to accomplish objectives traditionally associated with warfare between nations. Only Congress can decide that the military ought to be used to secure these objectives.

B. Does the President have any Exclusive Military Powers?

The claim that Congress has sweeping power over the military raises the question of whether the President has any exclusive military powers. Can Congress micromanage all aspects of the military, including when the army will advance or retreat, or is there some sphere of military matters into which Congress cannot intrude? This subpart takes up this crucial question. It first outlines a fairly robust conception of Commander in Chief authority that has its undoubted attractions. It then argues that the Constitution, in creating a Commander in Chief, merely requires that the entire military establishment be under the direction and control of the President such that Congress cannot create independent soldiers or sailors. It concludes by briefly discussing the perils and promise of potentially pervasive congressional regulation of the military.

1. The Case for Exclusive Operational Control

As noted earlier, many have supposed that Congress cannot make certain decisions relating to military operations. For instance, some have imagined that Congress cannot order battlefield advances and retreats. Likewise, some have suggested that the Congress cannot prohibit interrogation techniques applicable to enemy prisoners. In short, some people maintain that Congress cannot micromanage warfare, uses of force, or battlefield operations more generally. Put another way, they seem to believe that the Constitution grants exclusive operational control of the military to the Commander in Chief.

This argument not only has a certain intuitive appeal, it arguably has textual, structural, and historical support. As a matter of text, one might suppose that the President's title—Commander in Chief—necessarily implies some autonomy. Under this argument, someone is not a “Commander in Chief” if they must take orders from someone else. If the President must obey all manner of orders from Congress, he is less an imposing commander and more like a run of the mill soldier, subject to a constant stream of petty directives from a host of superiors.

Taking the textual argument further, one might suppose that certain war powers can be exercised exclusively by the Commander in Chief because none of Congress's war powers encompass such matters. To return to the most cited example, one could believe that Congress lacks power to order a battlefield advance (or retreat) in a particular theatre. Or one might believe that Congress cannot require (or prohibit) battlefield tactics, such as the famous island-hopping tactic the military employed in World War II. Or one might suppose that Congress cannot dictate where an invasion will take place, say by choosing Calais over Normandy. In this argument, the powers to declare war, grant letters of marque and reprisal, regulate the armed forces, and so forth, do not permit Congress to make these and other military decisions because one does not declare war or regulate the army, raise the navy when one dictates battlefield and naval tactics.

Those moved by inter-textual arguments can make a final textual point. Under the Articles of Confederation, the Continental Congress not only had the power to make “rules for the government and regulation of the said land and naval forces,” it also had the power of “directing their operations.”¹⁹⁰ Though the Constitution replicated the former provision, it lacks the latter. Under the hoary rule of construction that each portion of text ought to be given a separate meaning, the failure to grant to Congress the power to direct military operations suggests that Congress no longer has the power. Since a power to direct military operations must exist in someone's hands and because the Constitution creates a Commander in Chief, that power likely rests exclusively with the Commander in Chief. Hence the Commander in Chief arguably has the exclusive power to direct military operations and, presumably, the federalized militia, or so the argument goes.

¹⁹⁰ Art. of Confed. art. IX.

As a matter of constitutional structure, one might argue that if Congress may direct the operations of the armed forces, the Constitution creates 535 Commanders in Chief¹⁹¹ rather than one. This would make the President something of a military figurehead/errand boy for Congress rather than a true Commander in Chief. Moreover, any claim that Congress may micromanage military operations must be mistaken because such an allocation of war powers might seem so obviously sub-optimal. No one with any experience in government would construct a constitution with 535 bossy, overbearing Chiefs. The result would be foolish legislative requirements and orders that would handicap the military. Finally one might cite John Locke's claim about the imprudence of legislative regulation of war and foreign affairs. He argued that war and foreign affairs powers were "much less capable to be directed by antecedent, standing, positive laws."¹⁹² In other words, wars are not susceptible to sound advanced legislative regulation because standing laws lack the flexibility necessary for wartime success.

Lastly, one might cite history to support the idea that President has exclusive control over military operations. Numerous founders said that the President could direct military operations. At the Philadelphia Convention, the Patterson or New Jersey plan would have granted the Executive the power to "direct all military operations."¹⁹³ Pierce Butler spoke of the need for a unitary executive, for a plural executive might have to delegate the power "to direct . . . military operations."¹⁹⁴ Many state convention delegates spoke in similar terms. James Iredell noted that the "secrecy, despatch, and decision, which are necessary to military operations, can only be expected from the . . . President [who] is to command the military forces."¹⁹⁵ Charles C. Pinckney noted that the President conducting a war ought to be eligible for reelection and thereby continue to "direct our military operations."¹⁹⁶

THE FEDERALIST PAPERS repeatedly confirm that the President could direct the military. THE FEDERALIST NO. 69 observed that Commander in Chief authority amounted to "the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy."¹⁹⁷ In THE FEDERALIST NO. 72, Hamilton noted "that the arrangement of the army and navy, the directions of the operations of war," falls within the Executive's purview.¹⁹⁸ THE FEDERALIST NO. 74 continues this theme in claiming that the "direction of war implies the direction of the common strength; and the power of directing

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¹⁹² John Locke, *Two Treatises of Government* (Second Treatise of Government, Chapter 11, § 147).

¹⁹³ 1 Records of the Federal Convention 300 (Max Farrand ed. 1966). Similarly, Alexander Hamilton apparently proposed that the Executive should "have the direction of war when authorized or begun." 1 *id.* at 292. Abraham Yates, his fellow New York delegate, quotes Hamilton as providing that the Executive would have the "sole direction of all military operations." 1 *id.* at 300.

¹⁹⁴ 1 *id.* at 92.

¹⁹⁵ 4 Elliot's Debates 107. See 4 *id.* at 108 (noting that President may command the militia when Congress summons them).

¹⁹⁶ 2 *id.* at 315-16.

¹⁹⁷ The Federalist No. 69 (Alexander Hamilton).

¹⁹⁸ The Federalist No. 72 (Alexander Hamilton).

and employing the common strength, forms a usual and essential part in the definition of the executive authority.”¹⁹⁹

Anti-federalists also understood that the President could control the military, sometimes grumbling about presidential direction. George Mason objected that the President, as Commander in Chief, was “to command without any control.”²⁰⁰ Robert Miller of North Carolina complained that the President would have great influence over the military “and was of opinion that Congress ought to have power to direct the motions of the army. He considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army.”²⁰¹

To top it all off, one might argue that Congress has never directed military operations. One might claim that Congress has never regulated battlefield retreats, barred the use of military hardware, or directed how a war ought to be fought. The supposed absence of such regulation perhaps suggests that members of Congress have long understood that the Constitution nowhere authorizes Congress to direct military operations. In other words, successive Congresses have acted as if members understood that direction of military operations rested exclusively with the President.

2. The Case Against Exclusive Operational Control

Despite the appeal of the above arguments, each is ultimately unconvincing. Consider the many textual arguments first. Though it might seem natural to suppose that a “Commander in Chief” necessarily must have some autonomy, there is nothing about this title that implies as much. This can be seen from a host of materials.

First, England had many commanders in chief, none of whom were autonomous. In the eighteenth century, England had a single commander in chief in charge of the entire army and it likewise had regional commanders in chief for various theaters (e.g., Commander in Chief-North America, Commander in Chief-Asia, etc). For instance, Colonel George Washington was made Commander in Chief of the Virginia militia in the French and Indian War.²⁰² Each of these commanders in chief lacked a sphere of independence because each was wholly subordinate to the Crown under the English Constitution.

Second, under the Articles of Confederation there was a Commander in Chief of the Army wholly subordinate to the Continental Congress, thus making it clear that Americans did not regard a commander in chief as necessarily enjoying some unregulable

¹⁹⁹ The Federalist No. 74 (Alexander Hamilton).

²⁰⁰ 3 id. at 497-98. Curiously, Mason previously said it was appropriate for the President to have “a general superintendency” of the armed forces, but that he was worried about the President commanding in person. See 3 id. at 496. For the same complaint voiced by another Philadelphia delegate, see Luther Martin’s Letter on the Federal Convention, in 1 id at 378.

²⁰¹ 4 id. at 114.

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autonomy. However much authority the Continental Congress conveyed to George Washington, it never conveyed any authority not subject to correction and override. Indeed, Washington was subject to congressional direction throughout the war.

Third, President John Adams made George Washington “Commander in Chief” in 1799 as a means of reviving the army for a possible land war against France. Neither Washington nor Adams supposed that Adams had thereby conferred upon Washington some measure of autonomy from the constitutional Commander in Chief. Instead, Washington was a Commander in Chief subordinate to President Adams.

Finally, a British military dictionary published in 1778 used the phrase “commander in chief” to define “captain” and “colonel.” A captain was “commander in chief of a company of foot” soldiers, horsemen, or dragoons.²⁰³ A colonel was “commander in chief of a regiment, either horse, foot, or dragoon.”²⁰⁴ Clearly the dictionary contemplated that the commanders in chief commanded their respective units, not that they had some unregulable autonomy, for both captains and colonels have many superiors that direct them with respect to their powers and duties.²⁰⁵

The President is Commander in Chief of the army, navy, and federalized militia in the same way that George Washington was Commander in Chief while serving under the control of the Continental Congress and in the same way that English commanders in chief served under the Crown’s control. As argued earlier, the President, as Commander in Chief, has constitutional authority to direct the operations of the army, navy, and militia operations. Nonetheless, he (and the forces he directs) is subject to congressional control.

The second and third textual arguments fare no better. Recall that one might argue that certain war powers can be exercised by the Commander in Chief only because none of Congress’s war powers encompass such matters. Relatedly, the failure to grant Congress the Continental Congress’s authority to “direct [the military’s] operations” might well indicate that our Congress lacks such power. Hence Congress cannot order a battlefield advance (or retreat) because the various congressional war powers do not authorize Congress to direct military operations, or so the argument goes

Despite the plausibility of such arguments, they are unpersuasive. Congress’s government and regulation power encompasses the authority to direct military operations. When Congress proscribes certain actions (such as insubordination), Congress regulates military operations. Likewise, when Congress forbids soldiers from disseminating secret military codes, it controls military operations. Finally, when Congress regulates training

²⁰³ Military Dictionary, *supra* note ?, at C5.

²⁰⁴ Military Dictionary, *supra* note ?.

²⁰⁵ This conception of commander in chief authority continues to this day. Until October 2002, the United States followed the British practice of having regional commanders in chief. Notwithstanding their titles and their considerable regional authority, no one thought that these regional commanders had any autonomy *vis-à-vis* the Constitution’s Commander in Chief.

and tactics, it certainly regulates military operations. In short, the government and regulation power permits Congress to direct military operations.

Indeed any attempt to distinguish between regulation and direction of operations seems hopelessly elusive. When Congress precluded the use of galleys outside the United States²⁰⁶ was that a permissible regulation of the navy or an unconstitutional attempt to direct naval operations? When Congress authorized a limited naval war against France,²⁰⁷ was that a permitted limited declaration of war or was it an unconstitutional attempt to direct military operations? When Congress limited the President's use of militia members to a set number of days a year,²⁰⁸ was that an appropriate regulation of the manner in which the militia is called forth or was this law an unconstitutional encroachment on operational matters committed to the Commander in Chief? The proper answers to these questions suggest that there is no separate category of operational control that is vested exclusively with the President.

This leaves us with the omission of "directing their operations" from the Constitution. Assuming the Philadelphia framers focused on the matter, perhaps they believed that duplicating the phrase was unnecessary. It was superfluous because they understood that the Government and regulation power already gave Congress the power to direct military operations. In other words, the delegates at Philadelphia might have supposed that the missing language was largely superfluous.

The historical arguments fare no better. There are numerous drafting and ratification statements that the President would direct the military, but virtually all of these do not speak to the issue of whether the Congress can check this power by regulating the armed forces and militia. They merely claim that under the Constitution the President can direct military operations, a power no one has ever denied. George Mason's more relevant claim the President would "command without any control" has its counterpart. At the same Virginia convention, George Nicholas said that though the President commands the armed forces, "the regulation of the army and navy is given to Congress. Our representatives will be a powerful check."²⁰⁹ Nicholas seemed to adopt the view of the "government and regulation power" advanced here. Robert Miller's complaint that the Constitution did not "expressly provide" that Congress could direct the army's motions²¹⁰ was answered the same day at the same convention by Richard Dobbs Spaight. Spaight argued that Congress, "who had the power of raising armies, could certainly prevent any

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²⁰⁹ 3 Elliot's Debates, *supra* note, at 391. Later, Nicholas would note that the Constitution mimicked the state constitution which granted the Governor the sole command of the militia. See 3 *id.* at 497. In fact, the state constitution noted that the Governor "shall alone have the direction of the militia, under the laws of the country." VA Const. of 1776. The latter clause—"under the laws of the country"—perhaps implied that the state legislature could direct the militia as well.

²¹⁰ 4 *id.* at 114. Note that Miller's complaint could be read as suggesting that while Congress could direct military operations, he wished such power had been expressly mentioned.

abuse of that [commander in chief] authority in the President,” perhaps suggesting that Congress might attach restrictive conditions on the use of the army.²¹¹

The other historical claim—that Congress has never regulated military operations—does not withstand much scrutiny. As we have seen, early Congresses regulated military operations repeatedly. Congress regulated the use and placement of military hardware, the use and placement of soldiers and sailors, and the treatment of prisoners, all of which relate to the direction of military operations. In time of war, Congress decided what types of vessels to attack and where they could be attacked. Moreover, early Congresses adopted Baron Von Steuben’s manual for the army and militia. His manual had over 150 pages of instructions about, among other things, the marching of military columns, the instruction of recruits, and how to fire while advancing and retreating. While the manual lacked a truly comprehensive set of instructions—it never attempted to lay down a set of rules applicable in all circumstances—it surely regulated military operations.

Having said all this, it probably is the case that Congress has never sought to regulate certain aspects of military operations. Perhaps Congress has never ordered battlefield advances and retreats. It has never decided that General Aggressive should command on a particular battlefield while General Cautious should stick to military planning. Yet the crucial question is what accounts for the absence of this type of regulation. Rather than suggesting a constitutional limit on Congress’s military powers, the forbearance may reflect nothing more than a welcome reluctance to micromanage certain aspects of military operations.

Regardless of what the Constitution actually permits Congress to do, members may see eye to eye with John Locke. They may agree that decisions about operations are typically best left to the Executive and his military staff. Members may realize that when rules are too specific and too detailed, the rules fail to provide the flexibility necessary to deal with fluid circumstances. Military operations cannot be too scripted in advance, leaving nothing to the discretion of commanders in the field. Moreover, having enacted a detailed regime, Congress may find it rather difficult to change that regime in a timely manner. Congress is not always in session, whereas wars do not pause during congressional recesses. When you combine the disadvantages of “antecedent, standing, positive laws” with the difficulty of changing those laws in a timely manner, it seems quite plausible that Congress has not micromanaged military operations as much as it might have because members realized that such direction was fraught with pitfalls.

Moreover, some decisions are so time-sensitive that Congress cannot make them. For instance, whether to advance, hold position, or retreat on a battlefield cannot possibly be determined by a legislative body far removed from the battlefield. Indeed, such decisions will be impossible for the Commander in Chief to make, unless he is present on

²¹¹ 4 *id.* at 114. Spaight went on to suggest that the “direction of an army could not be properly exercised by a numerous body of men.” 4 *id.* at 115. Given his earlier statement, Spaight seemed to be suggesting that Congress ought not direct the army and should instead leave it to the Commander in Chief.

the battlefield. Even if it became widely accepted that there are no subject matter limits to congressional power over the military, Congress is not going to dictate that a particular army platoon advance or retreat.

The absence of more intrusive congressional regulation also may reflect presidential unwillingness to accept more micromanagement. Every regulation of the armed forces must be presented to the President for his signature or veto. Knowing this to be the case, members of Congress certainly understand that when they micromanage too much (or at least are perceived as doing so by the President), the end result may be no statute at all as the President may veto the statute containing the congressional micromanagement.²¹²

The structural arguments about the troubles associated with congressional micromanagement arguably rest on mistaken assumptions. First they assume that a congressional power to direct military operations would necessarily be suboptimal. No one with a passing familiarity with the U.S. Code can doubt that Congress might enact foolish statutes. But the possibility that Congress might unwisely employ its military powers does not mean that Congress lacks such powers. That Congress might unwisely choose to disestablish the army does not cast doubt on Congress's undoubted power to do so.

In any event, the claim about foolish decision making must be considered not against the impossible ideal of perfect decisions but against the reality of executive branch decision making. Many might deny that Congress will systematically make more foolish strategic decisions than the Executive. Every generation seems to have its Columbia Massacre, its Little Big Horn, and its Vietnam: setbacks and defeats that some might attribute to poor executive branch leadership.

Second, the structural argument supposes that Congress necessarily will exercise its government and regulation power vigorously, making all sorts of decisions best left to the military. But as noted earlier, the power to regulate need not be exercised to the fullest extent. Instead, it may be exercised in only extreme cases of perceived executive or military mismanagement. In such cases, the restrained ability to override faulty decisions or to channel executive discretion may actually be quite beneficial. Indeed, the veto power goes a long way to ensuring that congressional power is only exercised when the President agrees with the regulation in question or the executive mismanagement is so bad that supermajorities in both chambers agree that congressional override is necessary.

Lastly, allowing Congress to direct military operations does not give rise to 535 commanders in chief. When Congress acts via legislation, it speaks with one voice in the form of the legislation itself. It does not speak with a cacophony of 535 voices. For good reason, no one thinks that individual members, such as the Chair of the Senate Armed

²¹² In this regard, it should be noted that Washington's second (and last) veto of legislation consisted of a bill to disband army dragoons who were in the field. Washington thought that it was unfair and unwise to disband the dragoons since they had already been equipped and because some cavalry was necessary to deal with frontier problems.

Services Committee, can direct military operations. Hence any argument that a congressional power to direct operations necessarily means that we have 535 commanders in chief mischaracterizes how Congress actually legislates.

3. The Commander in Chief Power as a Residual, Default Power

Having spent a good deal of time discussing what powers the Commander in Chief has and what kind of authority he lacks, a review will be helpful. The Commander in Chief enjoys what one might call a residual, default military power. It is residual in the sense that despite having the Executive Power, the President cannot exercise certain war and military powers because they are granted exclusively to Congress. Hence the President cannot use the military to declare war. Nor does the President have any constitutional power to punish soldiers who disobey his orders. These powers, along with the others discussed in Part I, form no part of the residuum vested with the President by Article II, Section 1.

It is a default power in the sense that whatever concurrent military power that Congress elects not to exercise by statute rests with the Commander in Chief. For instance, should the Congress generically declare war and elect not to limit the use of heavy artillery, the President may decide whether the use of artillery would best secure victory over the enemy. Likewise, should Congress authorize a general naval war against an enemy, the President may decide how best to deploy the navy's resources to defeat the enemy. Finally, if the Congress does not bar the use of tactical nuclear weapons against an invading army, the President may decide whether the use of such weapons is warranted.

Put another way, the President lacks exclusive military powers. He lacks the sole power to decide when and how to deploy military hardware of various sorts. Nor does he have a monopoly on the decision whether to fight a land or air war. Notwithstanding the fact that the Constitution makes the President Commander in Chief, Congress can make all such decisions, overriding the President's preferred course of action.

None of this denies that there are key limits on congressional power over the military. Though there are no subject matter limits, there are important constraints nonetheless. First, Congress cannot replace the Commander in Chief. This is a serious limitation because it precludes Congress from delegating authority to a new Commander whom it better trusts to prosecute a war. Indeed, removal of the Commander in Chief was a distinct possibility during the Revolutionary War, as some members of the military conspired to have George Washington removed after he suffered a military setback. Under the Constitution, however, the nation is stuck with a Commander in Chief, until his term expires or until the Senate removes for an impeachable offense.

Second, Congress cannot create independent admirals and generals. There can be no autonomous admirals, generals, seaman, and privates because the President would not be the Commander in Chief of the entire army and navy if there were. If Congress could

make segments of the army and navy independent of the President, he would be Commander in Chief of only a portion of the army and navy, rather than the entire army and navy. Third and relatedly, Congress cannot summon the militia and allow it to remain autonomous of the President. When the militia is called into federal service, the militia must be subordinate to the President because the Constitution makes him the Commander in Chief of the entire federalized militia.

Fourth, the Congress cannot create independent military agencies that resemble the familiar (if constitutionally suspect) independent administrative agencies that crowd Washington, D.C. The Congress cannot create an independent military department or commission and vest it with the authority to decide what a war's objectives are and whether certain ships should be used in a war. Nor can an independent military department decide whether the army ought to attack or advance. Whatever concurrent war powers Congress elects not to exercise it must leave to the Commander in Chief.

In many ways, this conception of Commander in Chief authority mirrors the original understanding of the President's power as Chief Executive. Notwithstanding his grant of Executive Power and despite his undoubted constitutional status as the federal Chief Executive, the President must adhere to minute congressional micromanagement of his law execution. Congress can instruct the President that government buildings be completed on a strict schedule and that he must make progress reports to Congress. Congress can order the President to report the number of prosecutions brought each year. Congress can require the President to make certain findings prior to taking certain actions, such as a finding that there is a disaster prior to accessing federal disaster funds.

Notwithstanding such micromanagement, the President has the constitutional authority to fill in the details of law execution. When there is no micromanagement, the President can best decide how and when to construct a federal building. And even when there is some form of micromanagement, the President can fill in the law execution details that inevitably exist even when Congress tries to micromanage. A statute that requires a building be built by a certain date may annoy the President, but it still leaves many details to the discretion of the executive branch. Since the President is the Chief Executive, he may choose to fill in those details.

Needless to say, Commanders in Chief will resent congressional micromanagement of military matters. But no matter how intrusive such micromanagement is, there will always be discretion left for the Commander in Chief. Given the practical and institutional constraints on congressional regulation plus the reluctance of many members of Congress to micromanage, the Constitution virtually guarantees that the Commander in Chief will have a great deal of autonomy over most military matters. It is unlikely that Congress will erect a map room, move toy military assets across military maps, and then regularly vote to move real military assets on real battlefields.

4. The Pitfalls and Promise of Congressional Regulation

If Congress may regulate any military matter, that naturally invites discussion of how Congress might exercise its vast powers over the military. Opponents of congressional power might suppose that Congress would adopt unwise, even foolish regulations. For instance, Congress might decree that the navy must remain in dock and the army must remain on bases, even as war clouds loom. Or Congress might pass a law that was quite sensible at enactment. Yet with the passage of time, a statute's inflexibility might prove problematic as it fails to account for many unforeseen wartime circumstances.

Still, as we have seen, there are significant institutional constraints that limit Congress's ability to enact unwise military directives. Any statute must go through bicameralism, making it difficult for even determined majorities to secure legislation. Moreover, the President may choose to veto legislation that makes all manner of legislative decisions that the President believes should be left to his discretion or the discretion of his generals and admirals. The recent difficulties with trying to set statutory timelines for the withdrawal of troops from Iraq vividly demonstrate the obstacles Congress will have in attempting to micromanage military operations with ex post legislation.

Ex ante legislation seemingly offers more opportunities. In an act authorizing the use of military force, Congress might impose all manner of congressional restraints. If the President dislikes the proposed regulations, he must veto the entire bill, in which case, he loses the authority to wage war. But even here there will be constraints on the Congress ability and willingness to micromanage. As noted earlier, members of Congress may prefer an unfettered war to no war at all and hence may, after a presidential veto, strip out the regulatory provisions. Moreover, at least some members of Congress may decide that it is best not to lay down detailed rules at a war's outset because it is difficult to foresee all the events that might occur. Taken together, such congressional preferences may minimize congressional micromanagement of wars.

Any consideration of the desirability of a congressional power to micromanage the military, also must consider the possibility that Congress might be able to correct the President's unwise military decisions. Imagine a President who, after assuming office, became a proponent of pacifism.²¹³ Upon a surprise invasion of the United States, such a President might seek to dislodge the marauding invader via diplomatic negotiation. Or consider a President who insists on not using naval vessels for fear that they might be sunk. Finally think of a President who is too cautious and tentative in times of war.

In such circumstances, Congress can rectify the President's failings. Given congressional power, Congress can force the President to wage war and to use particular vessels in that war. Moreover, Congress can make decisions that the President has failed to

²¹³ This is hardly farfetched for it is more likely that one person will adopt what some might consider minority or idiosyncratic views than that a majority of large group will adopt such views. The recent case of a governor emptying death row perhaps illustrates this principle.

make. Finally, Congress may undo bad decisions made by Presidents when a determined supermajority of both chambers concludes that the President has made a mistake.

All in all, there is much to be said for a constitutional system that enables Congress to rectify presidential mistakes when a supermajority of Congress agrees that legislation would better the situation. Congress will generally choose to leave much discretion at the outset of a war; but should the President misuse his authority in some way, Congress can fix the problem. The same can be said about times of peace. Congress typically will leave tremendous military discretion with the President, always subject to congressional override.

C. Why Congress Prevails in Cases of Conflict: The Principle of Limited Horizontal Supremacy

Thus far, the discussion has assumed that when powers overlap, congressional exercise of overlapping powers trumps any inconsistent presidential exercises. Hence if the President wishes to send the navy onto the high seas and Congress forbids that deployment, Congress's statutory command prevails. Likewise, if Congress orders the army to fight and the President commands soldiers to remain in their barracks, the congressional orders take precedence. We might call this inter-branch supremacy, "horizontal supremacy" to distinguish it from the vertical supremacy that makes state constitutions and statutes subordinate to their federal counterparts. Because some might doubt this claim of horizontal supremacy, some discussion seems appropriate.

The Constitution does not clearly enunciate the principle of horizontal supremacy, but the principle has its undoubted appeal. As a matter of text, to say that Congress can legislate over matters, be it army deployment, the objectives of a war, or the treatment of prisoners, is to say that the Constitution authorizes Congress to enact laws regarding those matters. The Constitution makes these laws obligatory in two senses. First, the President must take care to faithfully execute them, which means, among other things, that he must obey them. Since such military laws are constitutional, the President has no choice but to receive them as law that binds and constrains his actions. Hence the Faithful Execution Clause requires the President enforce and abide by statutes that regulate military matters.

Second, and more significantly, the Constitution makes constitutional laws part of the Supreme Law of the Land, which means that they take precedence over all contrary constitutions, laws, proclamations, directives, rules, wherever their origin.²¹⁴ Hence even if Congress and the President have concurrent power over a particular matter, the Constitution's Supremacy Clause gives us strong reason to suppose that congressional

²¹⁴ The Constitution makes federal laws, treaties, and the Constitution supreme and then mentions certain things that are to be ignored if they conflict with the supreme law. The list of legal materials that may be trumped, which includes state constitutions and laws, is best understood as illustrative of the many legal materials that supreme law trumps.

statutes take precedence over presidential directives or rules because while the former are part of the Supreme Law of the Land, the latter are not.

Apart from the Constitution itself, English practice supports horizontal supremacy. English history is replete with statutes that regulated matters also within the purview of the Executive. Indeed, this article has discussed the Articles of War enacted by Parliament, the prohibition on the deployment of the army in peacetime England, and the bar on the use of the armed forces to defend foreign possessions of a foreign-born Crown. Each of these statutes trumped any inconsistent executive orders. And because the Crown could not alter statutes unilaterally, these statutes were binding upon the Crown.

Having incorporated various elements of English law, America likely adopted this practice. People perhaps understood that when Congress has legislative power and the Executive has a concurrent power, congressional statutes take precedence whenever there is a conflict between executive directives and congressional legislation. We see something similar in the overlap of judicial and legislative powers. Both the judiciary and the Congress can create rules relating to who may practice law before for the federal courts. But should there be a conflict between the two, the congressional statute trumps.

Consistent with these claims, early American history supports horizontal supremacy. Congress often regulated military matters where the President was understood to have concurrent power. In those situations, Congress and the President understood that congressional rules took precedence. Otherwise, we have to suppose that Congress enacted a law that could be overridden by the President's unilateral decision. Congress and the President likely recognized that once Congress decided some military matter by statute, the President had no authority to countermand that decision and was required to faithfully execute or obey the congressional law. Though the President had authority over the same subject matter, he could not exercise it in the face of a contrary law.

Horizontal supremacy does not imply that every congressional statute trumps every exercise of executive or judicial power. The crucial inquiry is whether Congress has legislative authority over a particular matter. If Congress does and it exercises that power over an issue, it does not matter whether another branch also has concurrent power and whether the other branch has actually exercised that power. One can regard this limited congressional primacy on matters of overlapping power as a limited version of the eighteenth century English parliamentary supremacy. Congress has legislative supremacy over all matters committed to it, no matter who else might have concurrent authority.

Conclusion

When it comes to war and military powers, the Constitution erects a remarkable and complex system. Certain military powers belong exclusively to the Congress such that the President has no constitutional right to exercise them. Most significantly, the President

cannot declare war. Nor can he grant letters of marque and reprisal or make capture rules. Finally, the President lacks the ability to create or fund the armed forces.

Other military powers are vested concurrently with Congress and the President. Congress can regulate the military, with very few constraints. Indeed, early Congresses passed all manner of military regulations, saying how long militia members could serve, where vessels could sail, and where soldiers should be stationed. Likewise Congress asserted itself in wartime as well. Oftentimes, Congress would dictate the type of war to be waged, the proper subjects of attack, and where attacks could take place. In short, there appeared to be no limits to congressional regulation of the military during peace and wartime.

As Commander in Chief, the President has significant military powers that overlap with the powers discussed in the previous paragraph. The one significant restraint is that congressional rules trump any inconsistent presidential rules. Hence the President has something of a residual, default military power. Residual, because the President wholly lacks many of the war and military powers associated with the executive powers. Default, because with respect to concurrent powers, Congress may enact statutes that reduce the scope of executive discretion. Give the residual, default nature of presidential military powers, one might say that the Commander in Chief is neither a military autocrat nor a cipher. Rather the Constitution creates a responsible, powerful Commander in Chief, always subject to a congressional check.