The Separation and Overlap of War and Military Powers

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Absent from war-powers scholarship is an account of when war and military powers separate and when they overlap. Making arguments sounding in text, structure, and history, this Article supplies such a theory. Numerous English statutes and practices help identify the meaning of the Constitution’s war and military powers. Additional insights come from the Revolutionary War and the half-dozen or so wars fought in the three decades after 1789. In those early years, Congress micromanaged military and wartime operations. Presidents (and their advisors) acquiesced to these congressional assertions of power, expressing rather narrow understandings of presidential power over war and military matters. Using early history as a guide, this Article argues that the Constitution grants Congress 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. Military authorities not granted exclusively to Congress vest concurrently with the President and Congress, meaning that either can exercise such powers. In this area of overlap, where congressional statutes conflict with executive orders, the former always trumps the latter. Tempering Congress’s ability to micromanage military operations are significant institutional and constitutional constraints that typically make it impossible for Congress to control military assets on a far-off battlefield. In sum, the Constitution creates a powerful Commander in Chief who may direct military operations in a host of ways but who nonetheless lacks any exclusive military powers and is thus subject to congressional direction in all war and military matters.

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I. Introduction

War-powers scholarship, focusing as it does on the decision to go to war,\(^1\) has lavished attention on the Declare War\(^2\) and Commander in Chief Clauses.\(^3\) Perhaps an unstated assumption of these works is that making sense of these clauses yields the key to deciphering the Constitution’s allocation of war and military powers. One extreme supposes that the Commander in Chief power grants the President vast and illimitable powers over the military, including the authority to start any number of wars.\(^4\) The other extreme supposes that the Declare War power firmly establishes the primacy of Congress over all war matters.\(^5\)

This scholarly focus on the decision to go to war has distorted our perception of the Constitution’s war and military powers. Most of the Constitution’s other war and military powers remain relatively unexamined.


2. U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power “[t]o declare war”).

3. U.S. CONST. art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .”).

4. See, e.g., Yoo, The Continuation of Politics, supra note 1, at 173–74 (arguing that the Constitution empowers the President to start wars).

5. See, e.g., REVELEY, supra note 1, at 63–64 (concluding that the Declare War and Marque and Reprisal authorities “almost certainly [were] intended to convey control over all involvement of American forces in combat”).
Yet many of these powers may be just as important, if not more so, in understanding the separation of powers. Existing conceptions of the Declare War and Commander in Chief powers may well change based upon a more complete understanding of other constitutional clauses. Moreover, the fixation on these two powers may have led scholars to imagine that congressional and executive powers do not overlap. Many might have supposed that only Congress may decide whether the nation should wage war and that only the Commander in Chief may decide how to wage the war that Congress has declared. Yet consideration of other war and military powers may suggest different answers—answers that envision areas of overlap. Where certain powers are concerned, maybe the metaphor of complete separation is rather inapt.

The want of a comprehensive account of war and military powers has become somewhat embarrassing, as recent events have brought to the fore seemingly basic separation-of-war-powers 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 provides a theory of the separation and overlap of war and military powers. Drawing upon English statutes and practices, the Article reveals that almost

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9. Professors David Barron and Martin Lederman discuss why such questions have come to the fore. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 698–720 (2008).

10. This Article provides an account of the original meaning of the Constitution's separation and overlap of war and military powers. Although this Article’s claims will appeal to originalists, many non-originalists may find much of interest as well, particularly the English and American antecedents of phrases and terms found in the Constitution. For those who believe that the Constitution's meaning evolves over time, some appreciation of the original framework makes it possible to discern the extent to which the living Constitution has mutated. Moreover, those who reject originalist readings of the Constitution may wish to better grasp what they are casting aside.

The claims made here relate to the constitutional authorities of the President and Congress. Whether Congress may delegate various war and military powers to the President, the degree to which the states may exercise various war and military powers, and the extent to which treaties may regulate or constrain the war and military powers of the President and Congress are matters beyond the scope of this Article. Finally, the Article says nothing about the separation and overlap of foreign-affairs powers. For a discussion of that distinct but related topic, see generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001).
all of our Constitution’s provisions have precursors that shed light on their meanings. England experienced controversies about soldier deployment and enacted 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 what it means to be a “commander in chief.”

Additional insights come from the Revolutionary War and the half-dozen or so largely obscure wars waged in the nation’s first three decades. The dozens of statutes enacted in the nation’s early years reveal sweeping congressional control over war and military powers and provide a sense of what it means to regulate and govern the armed forces, what a “commander in chief” is, and who may deploy troops. Contrary to the modern view that the Commander in Chief enjoys exclusive operational authority, early legislators systematically regulated military operations. For instance, Congresses dictated where warships might sail in wartime, how soldiers would march and fire arms, crew composition on vessels, and the appropriate enemy targets in wartime. This list only scratches the surface of the vast body of legislation regulating how the Commander in Chief could (and could not) use the military. In the face of these laws, early Commanders in Chief saluted smartly, consistently deferring to Congress and never doubting the constitutionality of legislative micromanagement.

A surprising number of the specific questions debated today were answered in the nation’s early years. To take but one example, early Congresses regulated the treatment of enemy prisoners. Sometimes laws required the Executive Branch to see to their safekeeping. Other times, early Congresses required the Commander in Chief to implement the “law of retaliation” and torture or kill enemy prisoners in retaliation for any mistreatment meted out to American prisoners. There is no evidence that anyone in the Executive Branch suggested that such statutes were unconstitutional or that statutes authorizing mistreatment were superfluous.

11. See infra text accompanying notes 211–12.
12. See infra text accompanying notes 374–75.
13. See infra text accompanying notes 237–45. This Article draws lessons from statutes, case law, and executive practice—recognizing that post-ratification material sometimes may yield a distorted sense of the Constitution’s original meaning. See Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 558–59 (1994) (suggesting that possibility of distortion, especially when examining only one branch’s materials on a question of separation of powers). In this particular context, that concern seems unwarranted. Given that material from all three branches points in the same direction and that these sources confirm earlier English and American understandings of war and military powers, the potential for distortion from an examination of post-ratification statutes, practices, and judicial opinions seems rather minimal.
14. See infra Parts III and IV.
Where war and military powers are concerned, the Constitution establishes areas of separation and other areas of concurrent sway. Some authorities—such as the powers to declare war, raise and fund the military, and establish a system of military justice—rest exclusively with Congress. In contrast, the Commander in Chief 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 authorities. When congressional statutes conflict with presidential orders within this area of overlap, the former always trumps the latter. All told, the Constitution creates a powerful Commander in Chief who is authorized to direct military operations, but who is nevertheless subject to congressional direction in all war and military matters.  

17. Recently, a handful of scholars have examined a few of the questions discussed in this Article. David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, A Constitutional History]; see Barron & Lederman, supra note 9; Wuerth, supra note 6.

This Article differs from these recent works in significant respects. In contrast to the claims made here, Professor Wuerth’s scholarship does not identify the meaning of various war and military powers. Instead, she argues that international law can be used as a means of understanding the scope of the President’s power as Commander in Chief. Wuerth, supra note 6, at 64–65. This Article does not address that possibility; instead it provides an originalist account of the separation and overlap of war and military powers.

Professors Barron and Lederman maintain that the President has no preclusive (exclusive) military powers by virtue of being Commander in Chief. See Barron & Lederman, supra note 9, at 696 (“[N]otwithstanding recent attempts to yoke the defense of executive defiance in wartime to original understandings, there is surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it.”). They assert that at the Founding and for over a century and a half after, it was well understood that Congress might regulate the President’s command of the military. See id. at 697. They do not offer an account of what substantive powers the President has as Commander in Chief, saying only that the President may superintend the armed forces and militia. Id. at 696–97, 770 (discussing the President’s superintendence prerogative and disclaiming any attempt to list the President’s war and military powers). Nor do they discuss in any systematic way the portions of the Constitution that authorize Congress to direct military operations. See id. at 772 (claiming that the text grants Congress “plausible claims to authority” but not articulating why that is so). Indeed, their section discussing constitutional text and structure says virtually nothing about congressional power, focusing exclusively on the Commander in Chief Clause. Id. at 767–72. The few times they discuss sources of congressional power elsewhere, the treatment is somewhat conclusory and mostly in footnotes. See, e.g., id. at 733, 735 n.143, 742 n.167, 754 n.195, 780, 788 (discussing Congress’s power to govern and regulate the armed forces).

In contrast to the Barron and Lederman articles, this Article offers a comprehensive account of all war and military powers, coupled with claims about where such powers overlap and where they are exclusive. As such, it necessarily discusses much more than the question of whether the President has any exclusive military powers by virtue of being Commander in Chief. In particular, it offers a positive account of the scope of presidential power, arguing that the President has powers beyond the “superintendence prerogative” that Barron and Lederman discuss. See id. at 696–97, 770 (explaining the President’s superintendence prerogative). Moreover, this Article also makes assertions about the scope of congressional power over military and war powers, something outside the focus of the Barron and Lederman articles.

One might say that it is impossible to conclude that the President lacks any exclusive war and military powers without also making concrete claims about the scopes of various presidential and congressional powers—something Barron and Lederman never do. After all, if one concludes that
Despite the sweeping nature of congressional power, a number of constraints—institutional and constitutional—effectively limit Congress’s ability to direct particular military operations. To begin with, Congress almost always will lack real-time information of the sort it would need to properly direct battlefield assets. Congress cannot sensibly order a regiment to retreat if legislators lack data about the regiment and the enemy forces it faces. Moreover, fast-moving battlefield events will almost always moot the glacial lawmaking process. For instance, a bill ordering a platoon to capture a hill often will be rendered irrelevant by intervening events long before the bill becomes law and is conveyed to the platoon.

Finally, the Presentment Clause enables the President to delay and, in most cases, defeat legislation meant to direct particular military operations. The President may delay the effective date of such a bill by at least ten days, making it even more likely that its constraints become irrelevant. Furthermore, the President may veto a bill directing military operations and thereby typically thwart the attempted micromanagement because mustering a super-majority in both chambers to override the veto often will prove impossible. In sum, though Congress has sweeping war and military powers, the President’s veto and Congress’s inability to gather information and act quickly all but ensure that most operational decisions will be left to the President and his generals and admirals.

Part II of this Article considers why ascertaining areas of separation and overlap is challenging. Part III considers war and military powers that rest

the President has a power over a subject matter and that Congress does not, then the President would have an exclusive and absolute power, not because he was Commander in Chief, but because Congress has no concurrent power over the subject matter. Barron and Lederman focus on whether the phrase “Commander in Chief” implies some nonregulable power; however, they never provide an account of the scope of the President’s power as Commander in Chief or discuss why and how Congress has overlapping authority. Indeed, the very phrase they use to discuss whether the President has any absolute, indefeasible powers (“preclusive powers”) implies a focus on whether the Commander in Chief power itself is meant to be exclusive, thereby shunting aside the equally crucial question of whether Congress has overlapping power. By examining only one side of the equation (presidential power), by failing to provide an account of the scope of presidential power, and by largely assuming that the Constitution grants Congress authority over the same matters (rather than making a sustained argument for such a proposition), Barron and Lederman’s analysis is somewhat incomplete.

18. See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed The House of Representatives and the Senate, shall, before it become a Law, be presented to the President .... If any Bill shall not be returned by the President within ten Days ...., the same shall be a Law ....”).

19. Id.

20. In a symposium essay, I tentatively sketched out possible theories concerning the overlap and separation of congressional and executive powers over war and military matters. See Saikrishna Prakash, Regulating the Commander in Chief: Some Theories, 81 IND. L.J. 1319, 1320–22 (2006) (outlining the “Separation Thesis,” in which congressional and presidential powers have no overlap; the “Coterminous Thesis,” under which power is shared and Congress’s rules govern in the case of a conflict; the “Partial Overlap,” in which some power is shared and some is exclusive; and a fourth theory, under which the President has “all the powers that Congress has and more,” and the President’s rules govern in the case of a conflict). This Article reflects a more thorough exploration of English and American understandings of the various war and military powers.
exclusively with Congress, including the powers to declare war, regulate captures, and establish a system of military justice. Only Congress can decide that the nation will wage war, that private parties may seize enemy property, and that members of the armed forces will face courts-martial when they are accused of violating military law.

Part IV addresses concurrent powers belonging to Congress. Arising out of its power to regulate and govern the armed forces, Congress has sweeping authority over the military. 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 wartime, Congress can dictate what military assets will be fielded, whether to escalate (or de-escalate) warfare, and the war’s overall objectives. Congressional power over war and military matters is sweeping, subject only to cross-cutting constraints, such as those in Article I, Section Nine, and the Bill of Rights.

Part V argues that the President has the same powers discussed in Part IV, albeit derived from the Commander in Chief authority. The President’s military powers are residual in two senses. First, the powers are residual in the sense that the President cannot exercise any powers granted exclusively to Congress. Second, the powers are also residual in the sense that the President’s exercise of military powers is always subordinate to contrary congressional rules. Indeed, Part V explains why, in situations where powers overlap, congressional rules trump the inconsistent rules issued by other branches. Finally, Part V explains why the Commander in Chief power does not grant the President any exclusive power over military operations. In sum, the President has a residual power over the military, with Congress enjoying horizontally concurrent power,21 which may be used to trump any of the Commander in Chief’s directives.

II. 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 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 where the Constitution expressly grants a particular branch certain powers, no one else may exercise those powers. 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 make all decisions that commanders in chief might make? Under this view, the

Constitution's specific grants of war and military powers not only empower a particular branch, but also simultaneously deny those powers to other entities. James Madison seemed to articulate something like this view when he argued in 1793, "[T]he same specific function or act, cannot possibly belong to the two departments [Executive and Legislative], and be separately exercisable by each."\textsuperscript{22}

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,\textsuperscript{23} everyone supposes that members of Congress can do the same. Similarly, many assume that Congress can demand opinions of the department heads, even though the Opinions Clause specifically vests that power with the President.\textsuperscript{24}

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. Sometimes a grant of power is expressly made "exclusive," such as the congressional power over the national capital and federal military bases.\textsuperscript{25} Other times, the Constitution expressly denies power to some entity or entities. For instance, though Article I, Section Eight of the Constitution grants Congress the power to issue letters of marque and reprisal,\textsuperscript{26} Section Ten bars the states from granting such letters.\textsuperscript{27} We are left wondering whether the absence of similar provisions applicable to other powers means that

\textsuperscript{22} James Madison, Letters of Helvidius, No. II (Aug. 28, 1793), reprinted in \textit{6 THE WRITINGS OF JAMES MADISON} 151, 155 (Gaillard Hunt ed., 1906). Madison argued that only Congress could declare neutrality and that this was not a power shared with the President.

\textsuperscript{23} \textit{U.S. Const. art. II, § 3} ("He shall from time to time ... recommend to their Consideration such Measures as he shall judge necessary and expedient ... ").

\textsuperscript{24} \textit{Id. art. II, § 2} (providing that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

\textsuperscript{25} See \textit{id. art. I, § 8, cl. 17} (granting Congress the power to "exercise exclusive Legislation in all Cases whatsoever, ... over such District ... as may ... become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased ... for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings ").

\textsuperscript{26} \textit{Id. art. I, § 8}.

\textsuperscript{27} \textit{Id. art. I, § 10}. The Articles of Confederation helpfully provided that the Continental Congress had the "sole and exclusive right and power" over many war and military powers. \textit{ARTS. OF CONFEDERATION art. IX} ("The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, ... granting letters of marque and reprisal in times of peace ... of making rules for the government and regulation of the said land and naval forces, and directing their operations."). This "sole and exclusive" language, repeated twice in the Articles, was a federalism provision meant to specify which powers could not be exercised by the states because they rested exclusively with the Continental Congress. For an extended discussion of the Constitution's foreign-affairs federalism, see \textit{RAMSEY, THE CONSTITUTION'S TEXT}, supra note 1, at 259–320.
some or all of these other powers are not exclusive and are concurrently vested with other entities.

For all these reasons, we should not quickly infer that certain powers rest exclusively with one entity whenever the Constitution expressly grants powers to one entity. Instead, we ought to consider the possibility of separation and overlap on a narrower basis—that is to say, clause by clause. This more particularized consideration requires an assessment of three factors. First, we must ask whether the Constitution empowers a branch to exercise a particular power. If Congress's many legislative powers grant it authority over matters that the Constitution also specifically vests with the President, then congressional and presidential powers overlap. Likewise, if the Commander in Chief authority subsumes a power to declare war, there would be concurrent authority.

The second key to discerning areas of overlap and separation is a somewhat speculative consideration of why the Constitution expressly grants a 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 create and maintain a navy in part to deny such authority to the President, that conclusion 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. These materials supply evidence about when war powers overlap and when they rest solely with one branch. If we learn that commanders in chief generally were understood to have the power to make rules for the training of armies 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 a power to make capture rules, then we have good reason to suppose that only Congress can make such rules.

Considering these three factors, Part III concludes that various war and military powers, including the power to declare war, rest exclusively with Congress. Despite his Executive power and status as Commander in Chief, the President lacks any constitutional authority over an important set of martial powers.

III. Exclusive Congressional Powers

The Constitution authorizes Congress to declare war, issue letters of marque and reprisal, raise and supply the Army and Navy, regulate

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29. Id.
30. Id. cl. 12.
31. Id. cl. 13.
captures, and provide for summoning the militia. These powers rest exclusively 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 decide to wage war, how many Army divisions to fund, and whether private parties may take foreign property.

In a bid to discover the meanings of various war and military powers, this Part and the ones that follow consider statutes and practices from England and early America. English statutes and practices serve as both a template and a foil. The English precedents serve as a template; the American Constitution borrows phrases, powers, and offices from the English, thereby making it reasonable to infer that they borrowed English understandings as well. English precedents serve as a foil because in many (but not all) respects, the federal Constitution departs from English allocations of particular war and military powers. The framers decided against vesting many war and military powers with the Executive Branch, preferring to vest them with Congress. In a similar way, American practices, both before and after the Constitution's ratification, shed light on the meaning of the Constitution's seemingly cryptic phrases and help bring the Constitution's separation of war and military powers into focus.

For ease of explication, this Part is divided into war powers and military powers. War powers relate to the commencement of warfare and the special legal rules that exist during wartime. Military powers concern the creation, regulation, funding, and dissolution of the military, and the summoning, regulation, and funding of the militia, without regard to whether the nation is at war or peace. Whether the distinction between war powers and military powers holds up upon closer examination is of no moment. However one chooses to categorize these various powers, what matters are their meanings and the claim that they belong exclusively to Congress.

A. War Powers

Congress has certain exclusive powers relating to the commencement and conduct of wars, namely the Declare War, Marque and Reprisal, and Capture powers. Notwithstanding the Executive Power Clause and the authority implied in the title "Commander in Chief," the President enjoys none of these powers.

1. To Declare War.—Scholars rightfully have 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 supply an incomplete and inadequate sense of that power. The common hunch is that because Congress may declare war,
the Constitution must grant Congress broad war powers. The evidence often used to bolster that intuition comes almost exclusively from ratification and post-ratification statements. Various founders claimed that Congress would decide if the nation should go to war, and hence it must be so.\textsuperscript{34}

Lost in such claims is any sense of how the power to “declare war” actually grants Congress control of the decision to go to war. To see why the Declare War power cedes Congress broad powers over a war, we must garner a sense of the functions that war declarations served.

In the eighteenth century, the principal function of a declaration of war was that it signaled a nation’s decision to fight a war. That is to say, a declaration of war indicated that a nation had resolved to wage war. Because a declaration of war primarily evinced a decision that a nation had chosen to wage hostilities, any formal or informal signal that revealed that a nation had chosen to go to war was a declaration of war.

To contemporary readers, formal declarations are the most familiar signals that nations have elected to wage war—so much so that if a formal denunciation does not mark the onset of modern hostilities, many regard it as an “undeclared war.”\textsuperscript{35} Though formal declarations existed in the eighteenth century, they were rather rare and hardly ever marked the onset of hostilities.\textsuperscript{36} The dearth of formal declarations did not mean that almost all eighteenth-century wars were undeclared or that these wars lacked declarations of war, however.

Eighteenth-century individuals adopted a functional approach to declarations, in which rather informal words and actions could constitute declarations of war. What mattered was whether the words or actions reflected a decision to wage hostilities. If they did, those words or actions were a declaration of war, no less than a formal declaration. Sometimes a

\textsuperscript{34} See Ramsey, Textualism and War Powers, supra note 1, at 1549–50 (noting and criticizing this tendency).

\textsuperscript{35} See, e.g., Phillip Bobbitt, War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath, 92 Mich. L. Rev. 1364, 1384 (1994) (noting that the Korean War and the French Naval War were conducted “without benefit of a declaration of war” despite the fact that both “were, by any standard, substantial national engagements”); Mark E. Brandon, War and American Constitutional Order, 56 Vand. L. Rev. 1815, 1819 (2003) (classifying the French Naval War, the First Barbary War, the Second Barbary War, the Civil War, the Korean War, the Vietnam War, the Persian Gulf War, the Balkan intervention, and the current operations in Afghanistan and Iraq as undeclared wars); J. Gregory Sidak, To Declare War, 41 Duke L.J. 27, 40 (1991) (identifying the Korean War and Vietnam War as undeclared wars).

verbal or written statement dripping with enmity served as an informal declaration of war because such sharp words signified that a nation had chosen to wage war. The Declaration of Independence's vituperation of the English Crown marked it as an informal declaration of war. Likewise, France's treaty of alliance with the rebellious Americans (and the allegedly disrespectful notification of it) was an informal declaration of war against England.

The commencement of hostilities was the "strongest declaration of war" because in fighting a war, a nation obviously had chosen to declare it. It was not only the strongest, it also was the most common, with most eighteenth-century wars first informally declared via the "Mouths of Cannons." Indeed, numerous monarchs, legislators, and diplomats described the commencement of hostilities as a declaration of war. For instance, John Adams noted that by attacking each other during the Revolutionary War, both France and England had declared war.

Besides revealing a decision to wage hostilities, declarations served many other functions. Among other things, war declarations directed 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 extant treaties with the enemy state. Because Congress may declare war, Congress may decide whether the United States will wage war and which functions the nation's declarations of war will serve. In a way, the Declare

37. See Yoo, The Continuation of Politics, supra note 1, at 246–47 (describing the Declaration of Independence as a declaration of war).

38. See, e.g., THE ANNUAL REGISTER, OR A VIEW OF HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1779, at 411 (London, J. Dodsley 1796) (describing the announcement of France's treaty of alliance as a "true declaration of war" on the part of the French); see also Letter from George Washington to the Continental Congress (May 12, 1778), available at http://rs6.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw110371)) (describing the notification of the French alliance with the Americans as "conceived in terms of irony and derision, more degrading to the pride and dignity of Britain, than any thing she has ever experienced").


40. See supra note 36.

41. See, e.g., Letter from King George III to Frederick North (Letter 512) (July 18, 1778), in 2 THE CORRESPONDENCE OF KING GEORGE THE THIRD WITH LORD NORTH FROM 1768 TO DECEMBER 1783, at 205 (W. Bodham Donne ed., London, John Murray 1867) (claiming that, by its engagement in a skirmish with the British Navy, France had "cast off the mask and declared war"); see also J.F. MAURICE, HOSTILITIES WITHOUT DECLARATION OF WAR 44 (London, Her Majesty's Stationery Office 1883) (quoting Czar Alexander of Russia's claim that "Napoleon, by a sudden attack on our troops at Kowno, has declared war").

42. Letter from John Adams to Samuel Adams (Feb. 14, 1779), in 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 47, 48 (Francis Wharton ed., Washington, Gov't Printing Office 1889) (noting that war between England and France was "sufficiently declared by actual hostilities in most parts of the world").

43. For a more complete account of the numerous functions served by declarations, see Prakash, Moribund Declaration of War, supra note 1, at 119–31.
War power resembles the Constitution's grant to the President of a generic executive power. Just as the Executive Power Clause is best read as granting a host of executive powers to the President, the Declare War Clause is best understood as conveying a number of war-related powers to Congress.

Nothing said thus far necessarily precludes the President from enjoying a concurrent power to declare war and from issuing declarations of war. Such a concurrent power might arise from two sources. First, Article II's vesting of the Executive power might be a grant of all the powers traditionally associated with chief executives, even when such powers are expressly granted to another branch. Because the power to declare war was part of "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 convey those powers that were long associated with commanders in chief. Much like the creation of a "judge," without more, would imply the ability to exercise standard judicial functions, the creation of a commander in chief arguably implies the ability to exercise the various military functions associated with being a commander in chief. If eighteenth-century commanders in chief could declare war, then maybe the President can as well, notwithstanding the conspicuous grant of the same authority to Congress.

Whatever the surface plausibility of a concurrent Declare War power, no one should doubt that Congress has an exclusive power. 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.

44. See U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

45. For a discussion of the domestic- and foreign-affairs powers granted to the President by virtue of the grant of the Executive power, see generally, Calabresi & Prakash, supra note 13; Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. ILL. L. REV. 701; and Prakash & Ramsey, supra note 10.

46. Though the Crown could declare war, early eighteenth-century Parliaments constrained this power. In the Act of Settlement, the English Parliament made it possible for a foreign prince to sit on the English throne. Concerned that English soldiers might be forced to defend foreign soil, the Act also provided that should a foreigner assume the throne, 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 England, without the consent of parliament." Act of Settlement, 1700, 12 & 13 W. & M. 3, c. 2, § 3 (Eng.). In 1703, the Scottish Parliament enacted a more significant restraint, providing that "no person being king or queen of Scotland and England, shall have the sole power of making war with any prince, potentate or state whatsoever without consent of Parliament, and that no declaration of war without consent aforesaid shall be binding on the subjects of this kingdom . . . ." Act Anent Peace and War, X1 (1703), in ENGLISH HISTORICAL DOCUMENTS, 1660–1714, at 677, 677 (Andrew Browning ed., 1995). To underscore the point, the statute went on to provide that "everything which relates to treaties of peace, alliance, and commerce, is left to the wisdom of the sovereign, with consent of the Estates of Parliament who shall declare the war . . . ." Id. (emphasis added).

47. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1166, at 60–61 (n.p. 1833) (noting that the founders chose to make declarations of war difficult by vesting the power to make
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 clogging the wheels of war is to require some political consensus before declaring it. The cumbersome and deliberate process of bicameralism and presentment goes some way to ensuring that wars are begun only when a general societal consensus favors war.

Conversely, vesting a concurrent Declare War power with one person—the President—would make it far easier for the nation to go to war because the President could decide to wage war without having to secure the assent of anyone. Moreover, if we assume that chief executives are more prone to exercise unilateral powers vigorously (as opposed to powers where the consent of others is required), then executive war declarations might become quite common. Finally, constitution makers might imagine that the path to executive glory lies in military victories.  

James Madison said as much when he wrote, “The constitution supposes, what the History of all Gov[ernments] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, and most prone to it.”

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. Many regarded the grant of the Declare War power to Congress as a transfer of a traditional executive power to the Legislature from the Executive. Madison, quoted above, went on to assert that the Constitution “with studied care vested the question of war in the Legis[lature].” Similarly, Thomas Jefferson extolled the Constitution for providing “[an] effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body.” There would be no relocation of power, however, if the President enjoyed the right to declare war notwithstanding the grant of such power to Congress. More
famously, the debate at the Philadelphia Convention about the Declare War power (the oft-discussed change from “make war” to “declare war”) witnessed numerous delegates claiming that the proposed grant made clear that the President would not be able to declare war.

Third, during the Constitution’s creation, individuals said that the grant of the Declare War power to Congress was a salutory feature of the Constitution precisely because it would ensure that no one person could take the nation to war. James Wilson’s observation that “[i]t 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” is well-known. But Wilson was hardly alone, for others said similar things. 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. Though numerous nations—including France, Tripoli, and various Indian tribes—declared war against the United States in formal and informal ways, presidents never believed that they could declare war in retaliation. They understood that only Congress could do so. Consider George Washington’s views. Writing to South Carolina Governor William Moultrie, President Washington noted that he hoped to launch an “offensive expedition” against the Creek Nation, who had previously declared war, “whenever Congress should decide that measure to 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

empowered to wield various war powers. For a discussion of the Continental Congress’s executive powers over war and foreign affairs, see Prakash & Ramsey, supra note 10, at 272–78.

53. Compare ELY, supra note 1, at 5 (positing that the change from “make war” to “declare war” evidences an original understanding of limited presidential war powers), with John Yoo, War, Responsibility, and the Age of Terrorism, 57 STAN. L. REV. 793, 797–98 (2004) (criticizing Ely’s reading of the historical record and arguing for expansive presidential war powers).

54. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 1911) (recording the statements of five convention delegates expressing their understanding that the Declare War Clause gives Congress the sole authority to declare war).


56. See, e.g., Rufus King & Nathaniel Gorham, Response to Elbridge Gerry’s Objections, Post-31 October, in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 186, 190 (John P. Kaminski & Gaspare J. Saladino eds., 1997) (applauding the fact that the Constitution requires the consent of both branches of Congress together with the President in order to declare war because “as war is not to be desired and always a great calamity, by increasing the Checks, the measure will be difficult”).
subject, and authorized such a measure." Washington had plenty of company. Early scholars, politicians, and successive Congresses agreed that presidents could not declare (and therefore could not take the nation to) war.

Though there are vigorous scholarly disputes about the meaning of the power to declare war, there are sound reasons why no one supposes that Congress and the President have concurrent powers here. Everyone reads the grant of the 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 (much as Thomas Jefferson's "Dog of war" comments suggest), thereby ensuring that the President cannot declare war.


58. See, e.g., JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 66 (Fred B. Rothman & Co. 1991) (1795) ("[W]ar can only be commenced by an act or resolution of [C]ongress."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 109, 109–10 (Philadelphia, Philip H. Nicklin 2d. ed. 1829) ("The power of declaring war... forms the next branch of powers exclusively confided to [C]ongress."); 3 STORY, supra note 47, § 1166, at 60–61 (noting that the founders chose to make declaration of war difficult by vesting the power to declare war with Congress); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, app. at 270 (Philadelphia, W.Y. Birch & A. Small 1803) (explaining that the President's veto power means "it may be in the power of the executive to prevent, but not to make, a declaration of war").

59. See, e.g., Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON, supra note 22, at 311, 312 (asserting that because history had revealed executive branches to be the "most interested in war," the Constitution "with studied care, vested the question of war" in Congress); Letter from Henry Knox to William Blount (Oct. 9, 1792), excerpted in 11 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, AUGUST 1792–JANUARY 1793, at 213 n.3 (Christine Sternberg Patrick ed., 2002) [hereinafter THE PAPERS OF GEORGE WASHINGTON] (instructing a military commander to "confine all your operations to defensive measures" until after "[t]he Congress which possess the powers of declaring War" had assembled); Letter from Henry Knox to Henry Lee (Oct. 9, 1792), excerpted in THE PAPERS OF GEORGE WASHINGTON, supra, at 214 n.3 (explaining that only members of Congress "are invested with the powers of War").

60. Early Congresses never passed resolutions explicitly stating that the President could not declare war. Yet early congressional views on this matter are discernible from statutes. When presidents sought congressional direction on whether to fight a war, see, e.g., Special Message to Congress (June 1, 1812), in 8 THE WRITINGS OF JAMES MADISON, supra note 22, at 192, 192–201, Congresses enacted declarations of war rather than informing the presidents that they could declare war on their own. See, e.g., Act of June 18, 1812, ch. 102, 2 Stat. 755, 755 (declaring war between the United States and Great Britain). If legislators had believed that the Constitution authorized the President to declare war, they would have told presidents to declare war using their own authority.

61. See Letter from Thomas Jefferson to James Madison, supra note 51, at 392, 397 (discussing the transfer of the Declare War power from the Executive to the Legislative Branch in the United States government to avoid letting the "Dog of war" loose).

62. As discussed in subsection V(A)(3)(a), Congress's Declare War monopoly does not extend to defensive measures (such as repelling an invasion) because such operations do not constitute a declaration of war. Hence, when the President orders the military to defend itself and U.S. territory, the President has not declared war and has not intruded upon an exclusive congressional power.
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.63 Such letters were originally used to authorize limited reprisals against other nations as a means of compensation for some perceived wrong.64 Hence, if a nation (or its nationals) wronged someone from another nation and failed to pay damages, the victim might request a letter of marque and reprisal from its government as a means of engaging in state-sanctioned self-help.65

By the eighteenth century, general letters of marque and reprisal often were issued to anyone willing to attack an enemy's vessels in return for a portion of the captured property.66 The grant of general letters was not a means of seeking redress for previous wrongs. Instead, the issuance 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 public ends.67 Nations often would issue general letters of marque and reprisal as an implied or informal declaration of war,68 or in conjunction with a formal declaration of war.69

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

63. See 1 WILLIAM BLACKSTONE, COMMENTARIES *237, *258-59 (defining letters of marque and reprisal as letters authorizing the subjects of one state who have been “oppressed and injured by those of another” to obtain a taking by “passing the frontiers” or to obtain “a taking in return” in satisfaction of a wrong). It may well have been that letters of reprisal originally were issued to permit the seizure of another nation’s property within the territory of the sovereign issuing the letter of reprisal. See STEVEN C. NEFF, WAR AND THE LAW OF NATIONS 78 (2005) (explaining that a letter of reprisal was “an official authorisation to the victim, by his ruler, allowing him to seize property belonging to fellow-nationals of the thief who were resident in the sovereign’s jurisdiction”). Over time, letters of marque and reprisal came to be understood as the power to seize property on the high seas. See id. at 80-81 (documenting the emergence of the term “letters of marque” to describe letters of reprisal that authorized the holder to seize property not just inside the territory of the issuing sovereign, but also on the high seas).

64. See NEFF, supra note 63, at 77-78 (explaining that letters of reprisal authorized the taking of property from the fellow nationals of a wrongdoer “[i]f satisfaction could not be obtained from the thief himself at the time of the offence” because “the wrong being remedied was not, strictly speaking, the original theft, but rather the subsequent denial of justice—a failure for which the foreign state was responsible, and, by extension, all of its members”).

65. Id. at 77-79.

66. See id. at 109 (“During [the late 1700s], the common practice of states was to issue letters of marque not, in the medieval fashion, during peacetime to a single individual as a measure of reprisal, but instead during war as a means of augmenting the issuing state’s naval capacity on short notice.”).

67. Id.


69. See, e.g., Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring war and authorizing the President to grant letters of marque and reprisal).
power to declare war. With the rupture from England, the Continental Congress assumed the power to grant letters of marque and reprisal, an exercise of power eventually made regular with the belated approval of the Articles of Confederation. The exercise of this authority by a plural body was not too much of a departure from English practice because Parliament sometimes required the Crown to issue letters of marque and reprisal.

The Constitution grants the Letters of Marque and Reprisal power to Congress and hence mirrors the eighteenth-century English constitution in ceding both the Declare War and the Marque and Reprisal powers to one entity. At one extreme, Congress can authorize only those who actually have suffered a loss to retaliate in some proportionate way against a recalcitrant nation (and its citizens). At the other, it can draw upon the profit motive of private parties who are willing to use their ships as a means of inflicting damage on the enemy in the hopes of securing a substantial profit.

Is the power to grant letters of marque and reprisal a concurrent power, such that the Constitution simultaneously empowers the President to grant letters unilaterally as well? As a matter of structure, there is little reason to suppose that constitution makers would empower two entities to issue licenses to seize foreign property. Because letters of marque could be seen either as informal declarations of war or as provocations justifying war, there would be sound reasons for vesting this power in one entity only. After all, if presidents could authorize the capture of foreign property, they would have a backdoor means of plunging the nation into war—the very thing the founders sought to avoid by granting Congress the sole power to declare war.

Consistent with this hunch, no one from the Founding Era ever suggested that the President could issue licenses to seize foreign ships and their cargoes. To the contrary, in our nation’s early wars, presidents sought congressional direction about which war measures were appropriate, indicating that these presidents understood that they could not grant letters of

70. 1 BLACKSTONE, supra note 63, at *257–59. Indeed, Blackstone argued that the power to issue letters of marque and reprisal “is nearly related to, and plainly derived from, that other of making war.” Id. at *258.

71. See 4 JOURNALS OF THE CONTINENTAL CONGRESS 250, 251–54 (Worthington Chauncery Ford ed., 1906) (entry for Apr. 3, 1776) (resolving that blank commissions of marque and reprisal be sent to states for distribution). Several volumes of the Journals of the Continental Congress are cited in this Article; each has been reproduced by the Library of Congress and is available at http://lcweb2.loc.gov/ammem/amlaw/lwjclink.html.

72. ARTS. OF CONFEDERATION art. IX (“The United States in Congress assembled, shall have the sole and exclusive right and power, ... of granting letters of marque and reprisal in times of peace.”).

73. See 1 BLACKSTONE, supra note 63, at *258 (“[O]ur 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 ... .”).

74. U.S. CONST. art. I, § 8, cl. 11.

75. While Parliament could compel the Crown to issue letters, see 1 BLACKSTONE, supra note 63, at *258, the Crown still had to actually grant them. As far as I know, the Parliament never asserted that it could grant letters via statute.
marque. Moreover, early Congresses enacted statutes authorizing the President to issue letters of marque. Legislators evidently supposed that only they could authorize the issuance of letters of marque, for had they believed that the President enjoyed concurrent authority, Congress would not have passed laws that conveyed authority that the President already possessed under the Constitution.

But the case for exclusivity does not rest upon mere inference. In 1798, Secretary of War James McHenry sought Alexander Hamilton’s advice about what measures President John Adams could take in response to the unremitting French seizure of American merchant ships. Explicitly limiting himself to a discussion of constitutional authority, Hamilton asserted that the President could order the Navy to do nothing more than convoy American ships and patrol American waters. He denied that Adams could sanction the capture of French ships, saying that any such power “must fall under the idea of reprisals” and required legislative sanction. Hamilton understood that only Congress could license the seizure of foreign property.

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 cargo. This constraint parallels the implied limits on presidential power over the Navy. Just as the President cannot augment the Navy’s size, so too is he barred from granting letters of marque and reprisal in a bid to enlarge the maritime forces of the United States.

76. See, e.g., 11 ANNALS OF CONG. 12 (1801) (reporting that President Jefferson left it to Congress to decide how to respond to Tripoli’s declaration of war); James Madison, Special Message to Congress (June 1, 1812), in 8 THE WRITINGS OF JAMES MADISON, supra note 22, at 192, 192–200 (reporting James Madison’s request for direction from Congress on whether the United States should wage war with Great Britain).

77. See, e.g., Act of June 18, 1812, ch. 102, 2 Stat. 755 (granting the President the power to issue letters of marque and reprisal); Act of Feb. 6, 1802, ch. 4, § 3, 2 Stat. 129, 130 (granting the President the power to grant special commissions to private armed vessels to “subdue[e], seiz[e], tak[e], and bring[] into port, any Tripolitan vessel, goods or effects”).


79. Id.

80. Id.

81. When Congress declares war but fails to authorize the capture of enemy property, interesting questions arise about whether the President unilaterally can authorize such seizures. Perhaps in declaring war, Congress implicitly and inevitably grants the President the authority to use the military to capture enemy property, whether it is owned by the enemy government or by private parties. Whether the President can authorize private parties to capture enemy property after Congress has declared war seems more difficult. 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. 12 U.S. (1 Cranch) 110, 128–29 (1814). Justice Joseph Story dissented on the grounds that once Congress declared war, the President could take any measure not barred by Congress to defeat the enemy, including capturing enemy property and authorizing citizens to capture it as well. Id. at 146–48, 151–52 (Story, J., dissenting).
3. *To Make Rules Concerning Captures on Land and Water.*—The power in Article I, Section 8, Clause Three of the Constitution relates to the legal regime surrounding the private seizure and conversion of enemy property. Pursuant to this power, Congress may enact laws regulating the taking of enemy property. As such, the Capture power is clearly related to

Whether Marshall or Story had the better argument in *Brown* does not matter for our purposes. Neither supposed that the President had a constitutional right to capture foreign property or to regulate such captures. They were merely arguing over the train of implied authority that may follow 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, both agreed that the President had no constitutional power to regulate or authorize captures.

82. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201–02 (2004) (arguing that history, legal precedent, and international law indicate that Article I, Section Eight, Clause Eleven was meant to apply to the taking of property generally, but did not extend to people); see also *BOUVIER'S LAW DICTIONARY* 150 (William Edward Baldwin ed., Banks–Baldwin Law Pub’g Co. 1934) (1839) (defining capture as “taking of property by one belligerent from another”).

This congressional power is not, as some imagine, a power concerning the capture of enemy soldiers or sailors generally. This becomes clear when one consults treatises of the era, which discuss the capture of enemy property and the treatment of enemy prisoners in different chapters. For instance, Cornelius Bynkershoek wrote quite a bit about the capture of enemy property. His discussion of prisoners precedes his discussion of captures. *Id.* at 26–31. In that short discussion, he considers how nations swap, ransom, and sometimes enslave prisoners of war. *Id.* Vattel has the same dichotomy, discussing prisoners in Chapter Eight of Book III and then discussing captures in Chapter Nine. See Emer de Vattel, *The Law of Nations* 346, 364 (London, G.G. & J. Robinson 1797) (discussing rights against enemy combatants and then, separately, rights against enemy property).

American capture treatises also focus on property and not on prisoners generally. See, e.g., Richard Lee, *A Treatise of Captures in War* (London, Clarke & Sons, 2d ed. 1803) (1759) (reviewing the rules surrounding wartime capture of enemy property); Wheaton, *supra* note 68 (speaking on capture of enemy property without discussing rules surrounding the capture of prisoners); see also 1 James Kent, *Commentaries on American Law* 100–16 (John M. Gould ed., Boston, Little, Brown, & Co. 1896) (1826) (discussing property subject to capture). Finally, early congressional statutes that established capture law created rules related to the capture of property but created no rules related to the capture of prisoners. See 21 JOURNALS OF THE CONTINENTAL CONGRESS 1151, 1153–58 (Gaillard Hunt ed., 1912) (entry for Dec. 4, 1781) (delineating the rules surrounding capture of enemy property on the seas, but making no mention of rules surrounding capture of enemy soldiers).

The only time the Capture power would permit the regulation of the capture of people is when a state treated those captured as slaves or where captors were required to take custody of enemy nationals found with the captured property. Yet this ability to regulate the individuals taken in conjunction with property does not imply a power to regulate the capture of enemy nationals generally. As should be obvious, not all captures of enemy military personnel would take place in conjunction with the capture of enemy property. When a nation’s military captured enemy personnel without also seizing property, the power to regulate the capture of enemy property would not permit the regulation of the capture of enemy soldiers.

In any event, as discussed in Part III, Congress has power to regulate the treatment of captured enemy military personnel pursuant to its power to regulate the United States armed forces. So while the Capture power does not grant Congress the power to control the treatment of captured enemy personnel, Congress has that power pursuant to its authority over the government and regulation of the military.

83. See, e.g., Act of June 25, 1798, ch. 60, 1 Stat. 572 (authorizing private merchant vessels to seize French armed vessels).
the power to issue letters of marque and reprisal (and the more significant power of declaring war).

Capture law established what sorts of enemy and neutral property could be captured and converted. It also regulated the disposition of American property captured by the enemy and subsequently recaptured by other Americans, particularly how to divide recaptured property between the original owners and the privateers (those authorized to capture enemy property). Moreover, capture rules set limits on the means of capturing property, such as requiring privateers to maintain records of the captured ship as a means of ensuring that the capture was made pursuant to the capture rules. Crucially, capture law established how the spoils would be divided up between the government and privateers. To convert the seized property, privateers had to go to court, which would apply the rules to judge whether the capture was legal and to divide the spoils of war.

Capture rules were crucial because privateers, in their haste to profit, were prone to overstepping boundaries. Nations established complex capture rules because they wanted to safeguard the rights of neutrals and make sure that privateers disgorged ships and property that were improperly captured. After all, privateers who violated the rights of neutrals might embroil their nation in avoidable squabbles that could mushroom into full-fledged war.

Once again, it seems clear that the Constitution does not grant the President the power to make capture rules. While early Congresses created capture rules, no early president ever claimed a concurrent power to make such rules. More generally, at the Founding, the Executive lacked the constitutional power to make law. Nothing about capture law makes it a more fitting subject of executive lawmaking than any other area of the law.

84. See Lee, supra note 82, at 64, 124 (describing what types of property—enemy and neutral—might be captured in wartime).

85. See Act of June 25, 1798, ch. 60, 1 Stat. at 572 (discussing division of recaptured American property); 21 Journals of the Continental Congress, supra note 82, at 1151, 1155–56 (entry for Dec. 4, 1781) (discussing the recapture of property).

86. See, e.g., 4 Journals of the Continental Congress, supra note 71, at 250, 254 (entry for Apr. 4, 1776) (requiring that the capturing party keep all documents and hand them over to a court).

87. See 21 Journals of the Continental Congress, supra note 82, at 1151, 1156–58 (entry for Dec. 4, 1781) (ordering a small fraction of the spoils to the government and the rest to be divided by rank among the crew).

88. See Lee, supra note 82, at 216 (emphasizing the importance of courts in evaluating whether property was captured legitimately); see also Act of Feb. 6, 1802, ch. 4, § 4, 2 Stat. 129, 130 (providing that courts would adjudge whether capture occurred according to the rules).

89. For instance, Congress provided rules for property jointly owned by enemy nationals and the nationals of other states. 21 Journals of the Continental Congress, supra note 82, at 1151, 1155 (entry for Dec. 4, 1781) (mandating that in most cases such property be sold and proceeds divided proportionally between the non-enemy owner and the U.S. Treasury).


91. See, e.g., Prakash & Ramsey, supra note 10, at 340–45 (citing various examples of the lack of legal enforcement of President Washington's Proclamation of Neutrality).
To the contrary, it would make little sense to suppose that even though Presidents could not authorize the capture of foreign property, they nonetheless had constitutional power to create rules regulating how such property might be taken after Congress first sanctioned its capture. For all these reasons, capture law is the exclusive province of Congress.

B. Military Powers

Although one might imagine that the President has a greater claim over military powers, at least some military powers rest exclusively with Congress. Only Congress can raise and fund the armed forces. Congress alone can provide for calling forth the militia. Congress has the sole power to create military law, or a system of military justice. Notwithstanding the Executive Power Clause, the Commander in Chief cannot create military offices, much less create an army or navy. Nor can the President summon the militia, even in the face of an actual invasion. Finally, the Chief Executive lacks the legislative power to create military offenses, prescribe punishments, and authorize a system of military courts.

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.” Originally, the Crown relied upon the militia and military tenures to defend the realm. But military tenures were abolished under Charles II, and the militia could not be used in overseas wars. In response to these constraints, the Crown raised its own standing army. What started out as a palace guard of some fifty men in the time of Henry VII had grown to a professional standing army of 30,000 under James II. The Crown decided the size and strength of the army, subject to its ability to fund the army’s salaries, supplies, and equipment.

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 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 though the Crown could raise an army, it could not station...
any part of it in England during peacetime without Parliament’s approval.
Essentially, the Crown had a power to create an overseas army with
Parliament maintaining a veto over the creation of a domestic army.\textsuperscript{101}
Second, the Crown had become dependent upon Parliament to fund the army
because the Crown could not fully finance it using its own revenue.\textsuperscript{102}
It is little wonder that some Americans believed that Parliament, rather than the
Crown, had the power to “raise and keep up” the army.\textsuperscript{103}
Alexander Hamilton perhaps had a more accurate understanding, noting that England
had a prohibition against a standing army’s “being raised or kept up by the
mere authority of the executive magistrate.”\textsuperscript{104}

The Constitution expressly grants Congress the powers to raise and
supply the armed forces.\textsuperscript{105}
The first Congress established the maximum
number of soldiers; organized them into regiments, battalions, and
companies; and provided their pay and rations.\textsuperscript{106}
In 1794, Congress authorized the President to secure six ships to form a navy to protect American
commerce from Algerian corsairs.\textsuperscript{107}
The statute dictated the ships’ fire-
power as well as the size, composition, pay, and rations of their crews.\textsuperscript{108}
A later statute granted the President flexibility to vary crew size and
composition, confirming that prior statutes specifying these matters were
obligatory.\textsuperscript{109}

Early statutes also reveal that Congress’s powers to raise and support an
army and navy include the powers to disband and defund. Having decided to
create an army, Congress is under no obligation to continue it. Indeed, the
constitutional prohibition on Army funding beyond two years is meant to
require Congress periodically to reexamine the desirability of a standing

\textsuperscript{101}. In its Mutiny Acts, Parliament kept a chokehold on the army by authorizing a domestic
army for one year only. Thereafter, Parliament annually revisited the question of whether to continue a domestic army. See John Childs, The Restoration Army 1660–1702, in THE OXFORD ILLUSTRATED HISTORY OF THE BRITISH ARMY 48, 54 (David Chandler ed., 1994) (“[T]he Mutiny Act gained importance during William III’s reign as parliament found it a convenient device for annually regulating the affairs and abuses of the army.”). Americans were well aware that Parliament determined whether there would be an army within England. See THE FEDERALIST NO. 41 (James Madison), supra note 36, at 259 (describing Parliament’s power over the army); James Iredell, Marcus, Answers to Mr. Mason’s Objections to the Constitution, in 3 THE FOUNDERS’ CONSTITUTION 145, 146 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[I]t is... in the power of Parliament to authorize the keeping up of any number of troops for an indefinite time.”).

\textsuperscript{102}. See Childs, supra note 101, at 48, 55 (“[Charles II] had very little money and the English constitution insisted that the Crown could only raise additional revenue through parliament.”).

\textsuperscript{103}. The Federal Farmer No. 18 (Jan. 25, 1788), in 3 THE FOUNDERS’ CONSTITUTION, supra
note 101, at 154, 154.

\textsuperscript{104}. THE FEDERALIST NO. 26 (Alexander Hamilton), supra note 36, at 169.

\textsuperscript{105}. U.S. CONST. art. I, § 8, cls. 12–13 (“The Congress shall have the Power... To raise and
support Armies... [and] To provide and maintain a Navy... .”).

\textsuperscript{106}. Act of Apr. 30, 1790, ch. 10, 1 Stat. 119 (repealed 1795).

\textsuperscript{107}. Act of Mar. 27, 1794, ch. 12, 1 Stat. 350.

\textsuperscript{108}. Id.

\textsuperscript{109}. Act of June 30, 1798, ch. 64, § 5, 1 Stat. 575, 576.
army.\textsuperscript{110} If Congress were to provide no funding for the Army, the Army would effectively cease to exist. Consistent with this understanding, an early Congress specifically provided that soldiers would be discharged after three years unless sooner discharged by law,\textsuperscript{111} making it clear that Congress could disband the Army. Similarly, Congress has the same authority over the Navy, as the first naval statute provided for the Navy’s termination should peace be reached with Algiers.\textsuperscript{112} Whether the Army or Navy is expressly disestablished by statute or implicitly disbanded by the failure to appropriate funds is of little consequence.\textsuperscript{113}

Congress’s affirmative grants of power are best viewed as both empowering Congress and implicitly forbidding the President from raising and supplying the armed forces. Despite the Constitution’s grant of the Executive power and notwithstanding the President’s position as Commander in Chief, 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.”\textsuperscript{114} 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 armed forces lacking officers. An army and navy without subcommanders under the Commander in Chief would hardly be useful, much less a deterrent to potential enemies.

The Constitution strongly hints that only Congress can fund the Army when it provides that no Army appropriation shall appropriate funds for longer than two years.\textsuperscript{115} 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.\textsuperscript{116} 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 power to fund the Army while simultaneously leaving the President at liberty to finance the Army for decades. The far better view is that the Constitution expressly

\begin{enumerate}
  \item U.S. CONST. art. I, § 8, cl. 12.
  \item Act of Apr. 30, 1790, § 1, 1 Stat. at 119.
  \item Act of Mar. 27, 1794, § 9, 1 Stat. at 351.
  \item 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.
  \item U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . .”).
  \item See U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power “[t]o raise and support Armies,” but also providing that “no Appropriation of Money to that Use shall be for a longer Term than two Years . . .”).
  \item U.S. CONST. art. I, § 9, cl. 7.
\end{enumerate}
restricts Congress's ability to fund the Army because it supposes that only Congress may finance the armed forces.

At the Founding, individuals recognized that the power to raise and fund an army and navy rested exclusively with Congress. In Federalist No. 24, Alexander Hamilton noted that the "whole power of raising armies was lodged in the legislature, not in the executive." Similar comments were made in the state conventions. Upon assuming office, President Washington understood that Congress would have to authorize the Army. He likewise left it to Congress to re-create and fund a navy. Much later, Justice Joseph Story noted in his Commentaries on the Constitution that only Congress could raise and support the Army.

Early statutes reflect the view that the President cannot create a private army or navy, a sort of imperial guard. These statutes expressly authorized the President to accept naval vessels as gifts and authorized him to accept "volunteers." Such authorization would have been superfluous if the President had a concurrent power to raise and equip armed forces on his own. Congressional action was necessary precisely because the Constitution barred the President from raising or supplying a military force in the absence of congressional authorization.

The most important implication of the congressional monopoly on creating and equipping the armed forces is that although the Constitution makes the President Commander in Chief, the President may find that there are neither soldiers nor sailors to command. Hence, whether the Commander in Chief Clause will convey more than a hollow title is left to the utter discretion of Congress.

2. To Provide for Summoning and Arming the Militia.— Prior to the English Civil War, the Crown could call out, organize, and discipline the

117. THE FEDERALIST NO. 24 (Alexander Hamilton), supra note 36, at 158. In Federalist No. 26, Hamilton noted that state constitutions had the same schema. See id. No. 26, at 170 ("The power of raising armies at all under [state] constitutions can by no construction be deemed to reside anywhere else than in the legislatures themselves.").

118. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 497 (providing George Nicholas's comments "that the army and navy were to be raised by Congress, and not by the President"); 4 id. at 107–08 (reporting the comments of James Iredell that Congress, not the President, has the power to declare war and raise armies).


120. See Act of Mar. 27, 1794, ch. 12, 1 Stat. 350 (providing for the Navy).

121. See 3 STORY, supra note 47, § 1178, at 62; § 1486, at 342 (noting that the power to raise and fund an army rests exclusively with Congress).

122. E.g., Act of June 30, 1798, ch. 64, § 3, 1 Stat. 575, 576.

123. E.g., Act of May 28, 1798, ch. 47, § 3, 1 Stat. 558, 558.
militia.  

During the Civil War, Parliament claimed the sole right to call out and regulate the militia.  

With the Monarchy's restoration, Parliament conceded 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 Houses of Parliament cannot nor ought to pretend to the same."  

Despite this apparent bow to royal prerogative, Parliament exercised considerable authority over the militia.  

Besides explicitly barring the militia's use outside the Kingdom without its consent, Parliament enacted laws that limited the means by which the militia might be disciplined and called into service.  

Parliament also dictated the equipment militia members had to bring with them during their training.  

Still, the Crown could issue "commissions and instructions" to the militia and hence had real power over it.  

The Constitution marks an advance in Whiggish principles. Here, the legislature has complete control over when the militia will serve the federal government.  

Put another way, by vesting Congress with the power to call out the militia, the Constitution implicitly bars the President from doing so. The Constitution itself hints at this when it provides that the President is the Commander in Chief of the militia only when "called into the actual Service of the United States." If the President had the sole discretion to use the militia, there perhaps would have been no need to speak of it being "called into" federal service.

124. This power partly arose from statute and from custom, making it unclear the extent to which the Crown had constitutional power to call out the militia. See 1 BLACKSTONE, supra note 63, at *411 (describing the Monarchy's power over the militia).

125. See id. at *412 (describing the historical debate of the limits of the Monarchy's militia power).

126. 1661, 13 Car. 2, c. 6, § 1 (Eng.).

127. See Joyce Lee Malcolm, Charles II and the Reconstruction of Royal Power, 35 HIST. J. 307, 323 & n.67 (1992) (discussing the limitations on the King's power over the militia as evidenced by the militia acts passed by Parliament in 1661, 1662, and 1663).

128. See 1661, 13 Car. 2, c. 6, § 2 (Eng.) (providing that the "advice and consent" of Parliament is required to exercise the "militia and land forces" of England); see also 1662, 13 & 14 Car. 2, c. 3, § 7 (Eng.) (codifying a maximum five-shilling fine or twenty-day imprisonment for each instance that a soldier does not perform his duties).

129. See 1663, 15 Car. 2, c. 4, § 7 (Eng.) (providing specific munitions that "musqueteers" and horsemen must bring to "every muster, training and exercise"); 1662, 13 & 14 Car. 2, c. 3, § 26 (dictating the "offensive arms," "defensive arms," and "furniture for the horse" that must be brought to every muster and exercise).

130. See 1661, 13 Car. 2, c. 6, § 2 (Eng.) (providing that the militia should be "ordered and managed, according to such commissions and instructions as they formerly have, or from time to time shall receive from his Majesty").

131. See U.S. CONST. art. I, § 8, cl. 1, 15 ("The Congress shall have Power . . . [t]o provide for calling forth the Militia . . . ").

132. See id. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ").
Our nation's earliest years bear out this understanding. In various militia statutes, Congress provided when the President could call forth the militia. Washington followed the first militia statute to the letter when he called forth several state militias to suppress the Whiskey Rebellion. His proclamation calling out the state militias carefully recited the facts necessary to justify the summons under federal law. Had the Commander in Chief thought that he had a concurrent power to summon the militia, his proclamation would have been far more concise because he could have ignored the detailed statutory scheme.

As with the professional military, Congress may fund and equip the militia. Congress may appropriate monies for paying militia personnel. And it may outfit the militia with guns, uniforms, and other military paraphernalia. The general bar on executive appropriations applies equally to the funding of the militia. Just as the President cannot fund and equip the Army and Navy, he likewise cannot finance and supply 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.” To some extent, this power over bases overlapped with the Crown’s limited power over the armed forces.

At the end of the Revolutionary War, the Continental Congress ordered American troops to occupy British military forts. These troops were necessary to protect America's frontiers from Indian attacks. Under the Constitution, the new Congress used its “exclusive” power to govern forts,

133. See, e.g., Act of Nov. 29, 1794, ch. 1, 1 Stat. 403, 403 (noting that the President is authorized by Congress to call forth the militia if, in his judgment, the militia is needed to "suppress unlawful combinations, and to cause the laws to be dutifully executed").


135. See U.S. CONST. art. I, § 8, cl. 16 (granting Congress power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

136. 1 BLACKSTONE, supra note 63, at *262; see also 1661, 13 Car. 2, c. 6, § 1 (Eng.) (“[T]he sole supreme government, command and disposition of the militia, and of all forces sea and land, and of all forts... is... the undoubted right of his Majesty.”).

137. See 27 JOURNALS OF THE CONTINENTAL CONGRESS 529, 538 (Gaillard Hunt ed., 1928) (entry for June 3, 1784) (reporting that "a body of troops, to consist of seven hundred non-commissioned officers and privates" was “immediately and indispensably necessary for taking possession of the western posts”)

138. See Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 (repealed 1790) (stating that the militia was sent to the frontier "for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians").
arsenals, and federal property\textsuperscript{139} to continue the Army’s occupation of these frontier military posts.\textsuperscript{140} Later Congresses authorized the President to “fortify[\textit{y}]” several ports and harbors and made it “lawful” for the President to garrison soldiers and marines in such fortifications.\textsuperscript{141}

Congress’s military-base power extends beyond the mere location of military installations. Congress also has the express power to pass all legislation with respect to bases.\textsuperscript{142} For instance, Congress can regulate the use of military hardware and munitions found in military fortifications, say, by enacting rules to prevent accidental explosions. More generally, Congress can regulate all acts on military bases, in much the same way that Congress can regulate activities of private parties within federal territory. Congress took such a step in 1790, when it criminalized “willful murder” and manslaughter on a military base.\textsuperscript{143} Similarly, Congress in 1800 enacted penalties for workmen who, while on a military base, damaged gun-making tools or materials.\textsuperscript{144} In theory, Congress could enact detailed criminal and civil statutes that rivals the regimes that states enact for their own territories.

No matter how substantial his objections to congressional basing decisions, the President can neither decide that certain military bases should remain unoccupied nor decide that additional military bases should be erected. If Congress failed to construct military bases along the border with a hostile neighbor, the President could not erect bases relying upon his constitutional authority. This implied constraint arises not only from the express power granted to Congress but also from the President’s inability to expend federal funds without a congressional appropriation.\textsuperscript{145}

Similarly, regulating conduct on bases also rests exclusively with Congress in the sense that only Congress can create crimes and civil fines applicable to the conduct of military and civilian personnel on military bases. Nothing in the Constitution suggests that the President has any sort of

\textsuperscript{139.} See \textit{U.S. Const.} art. I, § 8, cl. 17 (granting Congress the power to “exercise exclusive Legislation in all Cases whatsoever, . . . over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ”); \textit{id.} art. IV, § 3, cl. 2 (stating that Congress can make all rules “respecting the . . . Property belonging to the United States”).

\textsuperscript{140.} See \textit{id.} (authorizing the President to call forth the militia to protect inhabitants of the frontiers); Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121 (repealed 1795) (authorizing the President to call forth the militia to help the troops currently in service).

\textsuperscript{141.} See Act of May 9, 1794, ch. 25, 1 Stat. 367 (providing for the fortification of additional harbors); Act of Mar. 20, 1794, ch. 9, §§ 1–2, 1 Stat. 345, 345–46 (allowing the President discretion to fortify certain harbors and garrison troops there); see also Act of July 11, 1798, ch. 72, § 6, 1 Stat. 594, 596 (permitting the President to station marines in harbor forts and garrisons).

\textsuperscript{142.} \textit{U.S. Const.} art. I, § 8, cl. 17.

\textsuperscript{143.} Act of Apr. 30, 1790, §§ 3, 7, 1 Stat. at 112, 113.

\textsuperscript{144.} Act of May 7, 1800, ch. 46, § 3, 2 Stat. 61, 62.

\textsuperscript{145.} \textit{U.S. Const.} art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ”).
legislative power to make rules that impose civil liability and criminal punishment, whether the underlying activity occurs on military bases or otherwise. 146

4. To Establish a System of Military Justice.—Once again, one cannot grasp the Constitution’s allocation of this vital power without first understanding the English system. Because the army and navy originally were the Crown’s creations, the Crown had an ancient prerogative to regulate and govern its own creatures. 147 Yet this power was rather limited. While the Crown could enforce its articles of war overseas, it could not enforce them on soldiers within England. 148 Within England, the articles of war “could only function as the rules of a private club,” with soldiers only prosecutable before military courts during periods of martial law. 149 During periods of peace, the worst that could be done to misbehaving soldiers was a stoppage of pay, suspension, or dismissal. 150 This state of affairs was unsatisfactory, for it meant that soldiers based in England often could not be punished at all for purely military offenses, such as peacetime desertion. 151

Over time, Parliament asserted authority over military justice. As early as 1648, Parliament entered the field of military discipline enacting rules for the British Navy. 152 These articles were remarkably detailed, requiring Anglican prayers, regulating drunkenness, proscribing treasonous statements, forbidding desertion, and so forth. 153 In 1661, with the coronation of Charles II, Parliament gave the Crown the legal power to enforce discipline in the navy, but this power was subject to restrictions. 154 Since then, Parliament has provided an extensive and detailed code of naval justice.

Parliamentary regulation of the army would not occur until 1688 with the passage of an annual Mutiny Act. 155 This law proscribed only a few acts,
such as mutiny and desertion. The Parliament did not authorize the Crown to issue articles of war for the army, but because the Crown had been doing so and because they were necessary, the Act implied that the Crown could continue to do so. Eventually, Parliament authorized the Crown to apply its articles of war and the court-martial system to offenses, wherever committed. The Crown's dependence upon Parliament became evident when the Mutiny Act lapsed for about four years, for there was no legal means of maintaining discipline within the army. Without the Mutiny Act (or some statutory substitute), the Crown could do no more than withhold pay, or suspend or remove soldiers who violated the articles of war.

In America, legislative control over discipline was complete from the beginning. Early on, the Continental Congress regulated military discipline, creating articles of war for both the Army and the Navy. Among other things, Congress forbade mutiny, desertion, the destruction of enemy papers, and even cowardice. The Articles of Confederation eventually legitimized this regulation by providing that Congress could "mak[e] rules for the government and regulation of the said land and naval forces."

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 create a separate 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

156. Id. (entitled "An act for punishing officers and soldiers who shall mutiny or desert their Majesties service . . . ").
157. See Mark A. Thompson, A Constitutional History of England 1642 to 1801, at 293 (1938) ("[T]he Act was in some respects vague. It made no mention of the King's power, if any, to issue articles of war, although it was necessary that he should do so if discipline was to be maintained.").
158. See id. at 295-96 (describing how, over time, Parliament granted the Crown greater powers over soldier discipline and the authorization to apply the articles of war).
159. See Thompson, supra note 157, at 294 ("During the interval [when the Mutiny Act lapsed] the Army was kept under tolerable discipline, but how it was done is a mystery."); Childs, supra note 101, at 48, 54 (explaining that because the Mutiny Act gave legal recognition to the army and its courts-martial, the lapse of the Act meant the army was no longer recognized under the law, thus limiting the army's punishments to stoppage of pay, suspension, or dismissal). In the American colonies, governors could execute the "law martial" only in times of war and, even then, only with the consent of their executive councils. See, e.g., Evarts Boutell Greene, The Provincial Governor in the English Colonies of North America 99 (Longmans, Green & Co. 1907) (1898) ("The [Massachusetts] governor . . . was not . . . permitted . . . to declare martial law except in time of war, and then only with the advice and consent of the council.").
160. See 3 Journals of the Continental Congress 378, 378 (Worthington Chauncey Ford ed., 1905) (entry for Nov. 28, 1775) (creating rules for the "Regulation of the Navy"); 2 id. at 111, 111-12 (entry for June 30, 1775) (creating articles of war for the Army).
161. See 3 id. at 378, 381 (entry for Nov. 28, 1775) (prohibiting desertion and the destruction of enemy papers and requiring courageous fighting); 2 id. at 113, 116 (entry for June 30, 1775) (outlawing mutiny and desertion).
162. Arts. of Confederation art. IX, § 4.
creating uniquely military crimes, military personnel can suffer loss of life, liberty, or property only via the ordinary civilian courts using generic statutes applicable to all.

Put another way, the President cannot inflict punishments on soldiers and sailors in the absence of a statute authorizing such punishments. If Congress should fail to enact a system of military discipline, the President is powerless to erect one of his own. Fortunately, Congress always has seen the wisdom of providing a parallel system of military justice. In the earliest days of the new government under the Constitution, Congress created articles of war that established military rules and the court-martial system.¹⁶³

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’s more complicated and uncertain division 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 create military rules to discipline its armed forces.

Yet these powers were far less substantial than one might have supposed. Though the Crown could declare war, it would typically seek parliamentary approval, 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 restrictions on the use of the militia overseas and the placement of the army on English soil. Finally, the Crown’s ability to regulate the armed forces was substantially hampered by its inability to impose meaningful punishments on soldiers located in England.

The federal Constitution arguably perfects these 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 hostilities and how large and well-equipped the Army, Navy, and militia will be when they fight the war. The Constitution also admirably focuses responsibility on the legislature because it implies that the President has no constitutional claim to such powers. In other words, the Constitution is best read as ceding

¹⁶³. See Act of July 1, 1797, ch. 7, § 8, 1 Stat. 523, 525 (providing that sailors and marines shall be governed by rules established by the Continental Congress in 1775); Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96 (providing that the articles of war created by the Continental Congress would continue to apply to the Army under the new Constitution). In 1794, Congress authorized the construction of six vessels. Act of March 27, 1794, ch. 12, 1 Stat. 350. Three years later, a new statute was needed to continue construction. See Act of July 1, 1797, § 1, 1 Stat. at 523 (giving the President the authority to man and employ Navy ships). By the time the naval vessels came online, Congress had created articles of war to regulate naval discipline.
to Congress all such powers, leaving nothing left to be granted to the President via the vesting of the Executive power or the President’s authority as Commander in Chief. As Chief Justice John Marshall said in *Talbot v. Seeman*, 164 “The whole powers of war . . ., by the constitution of the United States, [are] vested in congress.” 165 Members of George Washington’s Cabinet concurred, with Henry Knox, Thomas Jefferson, and Alexander Hamilton agreeing that Congress enjoyed “the powers of war.” 166

While certain powers rest exclusively with Congress, it does not follow that all war and military powers should be so understood. The next two Parts contend that various military powers reside concurrently with Congress and the President, which means that we transition from areas of separation to areas of overlap.

IV. Concurrent Power: Congress and the Direction of Military Operations

The constitutional power to “make Rules for the Government and Regulation of the land and naval Forces” 167 not only grants Congress a power to create a system of military justice, it also cedes Congress sweeping military authority, enabling it to direct military operations. Among other things, the federal Legislature can regulate the training of the armed forces, dictate how the military will treat prisoners, order uses of force, and specify how a war must be fought. Again, the sweep of congressional power becomes clear via an examination of British and early American precedents.

To give a glimpse of what lies ahead, the Part V discusses why the Commander in Chief has the same authority over military operations. The President also can order certain uses of force, regulate the armed forces in a manner of speaking, and decide how to employ wartime discretion that Congress chooses not to exercise. Part V also considers whether the broad reading of the Government and Regulation power advanced here is mistaken on the grounds that it intrudes upon the Commander in Chief’s authority.

A. Regulation of the Armed Forces and Militia

Congress’s seemingly unremarkable power to govern and regulate the armed forces permits Congress to do more than establish a system of military justice with uniquely military crimes and courts. A dictionary of the era defined “govern” as “to rule, manage, look to, take care of” and defined “regulate” as “to set in order, to govern, direct, or guide . . . to determine or decide.” 168 Early case law helps define these terms as well, as when *Gibbons*

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164. 5 U.S. (1 Cranch) 1 (1801).
165.  *Id.* at 28.
168.  N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 25th ed. 1783). As one might expect, the dictionary definitions of “government” and “regulation” parallel
v. Ogden observed that in the Commerce Clause context, “regulate” meant “to prescribe the rule by which commerce is to be governed.”

Because Congress may govern and regulate the military and the militia, it may prescribe rules to direct, manage, and take care of these entities. In particular, the Government and Regulation power authorizes Congress to enact a whole host of rules, covering training and tactics, the positioning of assets, the use of military force, and the treatment of prisoners by military personnel. Statutes dealing with such matters undoubtedly provide “Rules for the Government and Regulation” of the military.

1. Training, Procedures, and Maneuvers.—Using its government-and-regulation authority conferred in the Articles of Confederation, the Continental Congress regulated training, procedures, and maneuvers. 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. The 150-plus-page manual regulated all manner of military operations, providing “some invariable rules for the order and discipline of the troops.”

The manual began by specifying the arms each soldier would have and the proper positioning of soldiers within a company and a regiment on the battlefield. It proceeded to regulate marching, military formations in battle, the loading and firing of guns, the care of wounded soldiers, military camps, and a host of other operational matters. To get a sense of the manual’s detail, consider a passage on the “Manner of entering a Camp”:

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the definitions of “govern” and “regulate.” Samuel Johnson’s dictionary had much the same meanings for these words. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 7th ed. 1783) (defining “govern” as “[t]o regulate; to influence; to direct; . . . [t]o manage; to restrain” and “regulate” as “[t]o adjust by rule or method; . . . [t]o direct”).


170. Id. at 196.

171. I treat the congressional power to organize, arm, and discipline the militia, see U.S. CONST. art. I, § 8, cl. 16, as providing much the same power that Congress has under its power to “make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cl. 14.


176. Regs. for the Order and Discipline of Troops of the U.S., chs. 5, 18, 23, at 10–30, 82–87, 117–71 (providing specific and explicit examples of marching orders and firing commands, and instructions for a host of other disciplines to be instilled in the militia).
The head of the column arriving at the entrance of the camp, the commanding officer of the first battalion will command “Carry–Arms!” On which the men carry their arms, and the drums beat a march; and the officers will see that their platoons have their proper distances, close the ranks and files, and each dress the flank on which his platoon is to wheel, with the same flank of the platoon preceding. The other battalions observe the same directions, and keep their proper distances from each other.\textsuperscript{177}

This material only forms the introduction to the chapter; instructions for entering camp occupy another two pages. The instructions for loading and firing rifles are similarly detailed,\textsuperscript{178} presumably with the aim of increasing firing frequency. Soldiers who could load and fire more often than the enemy would have a decided advantage in battle.

The comprehensive manual also supplied standing instructions for various members of the Army, from the commandant of a regiment to the common foot soldier.\textsuperscript{179} Commandants were told to attend to the health and cleanliness of their soldiers, to keep men under constant supervision, and to choose noncommissioned officers wisely.\textsuperscript{180} Privates in the Army were instructed to practice marching to “acquire a firm step and proper balance,” to know the names of those on either side of them in formation, and to keep their knapsacks at the ready, should the camp be attacked.\textsuperscript{181}

Under the auspices of the new Constitution, Congress reimposed von Steuben’s manual on the Army\textsuperscript{182} and the militia.\textsuperscript{183} This was no trivial assertion of authority, for the new Congress assumed the right to prescribe in minute detail the manner in which the Army would function on a daily basis.

2. Deployments.—Congress can order military deployments—that is, it can 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.\textsuperscript{184}

\begin{itemize}
  \item \textsuperscript{177} Id. ch. 17, at 80–81.
  \item \textsuperscript{178} Id. ch. 5, at 26–28.
  \item \textsuperscript{179} Id. ch. 25, at 128–54.
  \item \textsuperscript{180} Id. ch. 25, at 128–29.
  \item \textsuperscript{181} Id. ch. 25, at 151, 151–52.
  \item \textsuperscript{182} Act of Sept. 29, 1789, ch. 27, § 4, 1 Stat. 95, 96 (“[S]aid troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled . . .”).
  \item \textsuperscript{183} The 1792 Militia Act subjected the militia to the same rules as the Army and hence incorporated the von Steuben manual. See Act of May 2, 1792, ch. 28, § 4, 1 Stat. 264, 264. An act passed less than a week later expressly incorporated the von Steuben manual, but also permitted deviations from the rules. See Act of May 8, 1792, ch. 33, § 7, 1 Stat. 271, 273.
  \item \textsuperscript{184} The constitutional prohibition on preferential port regulations in Article I, Section Nine illustrates the point. Including such a provision implies that the Commerce Clause power would
\end{itemize}
Moreover, as we have seen, Congress can dictate the location of military bases, thus giving it some specific power over the location of the armed forces. If Congress can determine the location of military bases, one might suppose that Congress likewise enjoys the related power to dictate where the Army, Navy, and militia will patrol as well.

History confirms the assumption. To begin with, Parliament regulated deployments. As noted earlier, under the English Bill of Rights, the Crown could not keep a standing army in England during peacetime without parliamentary approval. This limitation essentially meant that the army could be stationed on English soil only with 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 England, without the consent of parliament.” This was a deployment constraint because it limited the ability of a foreign-born monarch to defend non-English territory. Finally, the Parliament occasionally imposed constraints meant to limit army influence on civilian life, as when it restricted the ability of soldiers to come near towns during elections.

More significant for our purposes, early Congresses regulated deployment. 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. Indeed, after Washington sought a larger Army as a means of better defending the frontier, Congress enacted a law have otherwise permitted Congress to direct commerce to certain ports. Compare U.S. Const. art. I, § 8, cl. 3, with id. § 9, cl. 6.

186. Act of Settlement, 1700, 12 & 13 W. & M. 3, c. 2, § 3 (Eng.).
188. Sometimes particular statutory sections made this evident; other times the title of the acts made it clear where the Army was to be stationed. See Act of Mar. 5, 1792, ch. 9, 1 Stat. 241, 241 (entitled “An Act for making farther and more effectual Provision for the Protection of the Frontiers of the United States” and providing that regiments authorized by the Act shall “be discharged as soon as the United States shall be at peace with the Indian tribes”); Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121 (authorizing the President to use the militia “for the purpose of aiding the troops now in service, ... in protecting the inhabitants of the frontiers of the United States”); Act of Sept. 29, 1789, ch. 25, §§ 1, 5, 1 Stat. 95, 95–96 (adopting the Army establishment put in place by the Continental Congress along the frontier and noting that the militia could be used to protect the inhabitants of the frontier).
specifying the purpose as "the protection of the frontiers," thereby denying the President carte blanche to use the additional troops as he saw fit.

Subsequent statutes also directed the deployment of 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 soldiers previously had been limited to the frontiers. In the same statute, Congress also authorized the placement of various-sized cannons in these fortifications, indicating that Congress, if it chose to, could dictate the location of armaments. Later, when Congress authorized a corps of artillerists and engineers, it permitted the President to place them "in the field, on the frontiers, or in the fortifications.

Congress's regulation of naval deployment was perhaps more robust. In creating the Navy, Congress not only specified crew composition and armament, it also authorized the President to man and deploy the vessels. It thereby asserted authority over whether naval vessels would be deployed at all. Later, Congress granted the President flexibility on crew composition and armament, thereby relaxing the previous constraints.

Congress also directed the positioning and use of vessels. When a statute authorized the President to use revenue cutters (ships enforcing customs laws) for martial purposes, it specified that the cutters only could be "employed to defend the sea coast, and to repel any hostility to their vessels and [American] commerce." Similarly, Congress provided that naval galleys were to be stationed in the United States. In these statutes, Congress implicitly prohibited the use of cutters and galleys on the high seas or elsewhere. After the end of hostilities with France, Congress in 1801 ordered that certain vessels "shall be laid up" in port. These vessels had skeletal crews and were confined to port, presumably until a future act provided otherwise.

189. See Act of Mar. 3, 1791, ch. 28, 1 Stat. 222, 222 (dedicating an entire session-law chapter to raising and adding another regiment to the Army to improve frontier protection and declaring explicitly that the additional regiment was "for the protection of the frontiers").

190. See Act of Mar. 20, 1794, ch. 9, § 1, 1 Stat. 345, 346, 345-46 (allowing the President to fortify the harbors "at such time or times, as he may judge necessary").

191. See id. § 2, 1 Stat. at 346 (proclaiming that it "shall be lawful" to provide armaments to the harbor fortifications).

192. Act of May 9, 1794, ch. 24, § 6, 1 Stat. 366, 367.


194. See Act of Apr. 27, 1798, ch. 31, § 1, 1 Stat. 552, 552 (authorizing the President to arm, fit out, and man vessels at his discretion).

195. Act of July 1, 1797, § 7, 1 Stat. at 525; see also Act of June 22, 1798, ch. 55, § 1, 1 Stat. 569, 569 (noting that revenue cutters were to be used "near the sea coast").


198. Act of Mar. 3, 1801, ch. 20, § 2, 2 Stat. 110, 110. Less than a year later, Congress made it lawful for the President to equip, man, and employ all naval vessels to protect against Tripolitan...
Finally, Congress also regulated the militia's use and placement. Early acts limited the use of any particular militia member's services to three months per year. Another act dictated militia placement when it permitted 2,500 militiamen to be “stationed in the four western counties of Pennsylvania” in order to suppress the Whiskey Rebellion.

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 repeatedly directed placement of both.

3. Limited Uses of Force.—As noted in Part III, because only Congress can declare war, Congress has a monopoly on uses of force that constitute informal declarations of war. 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 and bombings (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 a monopoly on minimal uses of military force. Early practice indicates that Congress, no less than the Commander in Chief, may order 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 its Government and Regulation power. As noted earlier, Congress may direct, control, and manage 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 frequently. Early Congresses ordered


199. Act of May 2, 1792, ch. 28, § 4, 1 Stat. 264, 264; see also Act of May 9, 1794, ch. 27, § 4, 1 Stat. 367, 367–68 (limiting tours of duty for the drafted militia to three months after their arrival at the place of rendezvous).

200. Act of Nov. 29, 1794, ch. 1, § 1, 1 Stat. 493, 493. 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 Washington, supra note 134, at 165 (encouraging Congress to act quickly to consider extending the rapidly approaching deadline for employment of the militia).

201. Section IV(A)(3) argues that the President may order the use of force that does not rise to the level of an informal declaration of war.

202. See supra note 171.
the military to protect American neutrality, to enforce embargoes, to capture vessels engaged in the slave trade, to occupy parts of disputed territory in Florida, to cause foreign vessels to depart when their presence violated treaties or international law, to force foreign armed vessels to dock in certain ports, and to capture pirates.

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 was hesitant to defend American territory from attack, say because that President felt that 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 it believe that a negotiation strategy has little chance of succeeding.

This power to order the use of military force in peacetime complements Congress's power to order military force in wartime. As noted earlier, one of the inevitable features of declarations of war was a command to use military force. Hence, by formally or informally declaring war, Congress can order the use of force. Given its Government and Regulation Power, Congress likewise can command less consequential uses of military force, such as the use of the military against pirates.

203. See Act of June 5, 1794, ch. 50, §§ 5, 7; 1 Stat. 381, 384 (repealed 1818) (forbidding any person within the jurisdiction of the United States from “provid[ing] or prepar[ing] the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace” and authorizing the President to use the armed forces and militia to prevent neutrality violations).

204. See Act of Mar. 1, 1890, ch. 24, § 1, 2 Stat. 528, 528 (empowering the President to “compel” ships to depart a particular harbor where they violate the embargo); Act of Dec. 17, 1813, ch. 1, § 13, 3 Stat. 88, 92 (authorizing “public and private armed vessels of the United States to capture and seize on the high seas or elsewhere any ship or vessel which shall have violated any of the provisions of this [embargo] act”); Act of Apr. 14, 1812, ch. 55, § 2, 2 Stat. 707, 708 (granting the President the authority to “employ any part of the land or naval forces, or militia of the United States or of the territories thereof. . . for the purpose of detaining, taking possession of, and keeping in custody, any such ship or vessel” found in violation of the embargo); Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372 (authorizing the President to “lay an embargo on all ships and vessels in the ports of the United States, or upon ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require”).

205. See Act of Mar. 2, 1807, ch. 22, § 7, 2 Stat. 426, 428 (authorizing seizure of vessels “having on board any negro, mulatto, or person of colour, for the purpose of selling them as slaves” within the jurisdiction of the United States).

206. See Act of Feb. 12, 1813, ch. 1, § 1, 3 Stat. 472, 472 (granting the President authority “to occupy and hold all that tract of country called West Florida”).

207. See Act of Apr. 20, 1818, ch. 88, § 9, 3 Stat. 447, 449 (enabling the President to “compel any foreign ship or vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States”).

208. See Act of May 15, 1820, ch. 110, § 1, 3 Stat. 597, 597 (limiting foreign vessels from docking in all ports of the United States except those enumerated in the section).

209. See Act of Mar. 3, 1819, ch. 77, § 2, 3 Stat. 510, 512-13 (authorizing the President “to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat . . . which shall have attempted or committed any piratical aggression”).
4. Treatment of Prisoners.—In recent debates about the treatment of enemy prisoners, some scholars have asserted that the Constitution specifically empowers Congress to regulate the conditions of confinement under the Article I, Section Eight power to regulate captures. Because Congress may regulate captures and because war prisoners are captured, Congress may regulate the treatment of captured prisoners, or so the argument goes.\textsuperscript{210}

As a matter of original meaning, this argument is mistaken. As noted earlier, the term “capture” as used in the legal writings of the era was a term of art referring to the seizure and conversion of enemy property.\textsuperscript{211} Indeed, capture treatises focused on the capture of property and not prisoners.\textsuperscript{212} Hence, when people of the era discussed captures in a legal sense, they spoke of enemy property and not enemy personnel. This made sense, for the property (the vessel and cargo) was the “prize.” The sailors and officers of the prize were mere burdens.

Congress’s comprehensive power to regulate the capture of prisoners comes from two sources. First, Congress can regulate the capture of prisoners taken during the course of capturing enemy property. Although the Capture power is not a generic power to regulate the capture of enemy personnel, it does permit the regulation of prisoners captured along with enemy property. So Congress can provide that when privateers capture a foreign vessel, they must safeguard the personnel on the ship. Second, Congress can regulate the capture of prisoners by the armed forces, in whatever context, by virtue of its broad power to govern and regulate the armed forces. 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 make the failure to follow its prisoner rules an offense subject to court-martial.

As early as 1661, Parliament provided some protections for prisoners taken from prizes.\textsuperscript{213} The 1749 revision of the naval articles of war provided stronger protections for such prisoners.\textsuperscript{214} These acts indicate that Parliament was governing and regulating the navy, a power the Constitution commits to Congress.\textsuperscript{215}

\begin{itemize}
\item[210.] See Barron & Lederman, supra note 9, at 733 (claiming that the Capture power includes the power to regulate prisoners).
\item[211.] See supra note 82.
\item[212.] Id.
\item[213.] See 1661, 13 Car. 2, c. 9, § 9, (Eng.) ("If any foreign ship or vessel shall be taken as prize, that shall not fight or make resistance, that in that case, none of the captains, masters or mariners being foreigners, shall be stripped of their clothes, or in any sort pillaged, beaten or evil intreated, upon pain . . . .").
\item[214.] See The 1749 Naval Act, 22 Geo. 2, c. 33, available at http://www.pdavis.nl/NDA1749.htm ("[N]one of the [crewmembers] on board [a prize ship] shall be stripped of their Cloaths, or in any way pillaged, beaten, or evil intreated . . . .").
\item[215.] See Art. II of 1749 Naval Act, 22 Geo. 2, c. 33 (Eng.) (creating rules “for the regulating and better government of his Majesty’s navies, ships of war, and forces by sea”); 1661, 12 Car. 2, c.
Early Congresses repeatedly regulated the treatment of enemy prisoners. During the Naval War with France, Congress ordered private Americans who captured French sailors to turn them over to the nearest 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." Another act made it "lawful for the President" to cause prisoners captured by the American Navy to be "confined in any place of safety within the United States, in such manner as he may think the public interest may require." 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." Finally, in a stand-alone statute, Congress "authorized" the President to "exchange or send away" French prisoners as he "may deem proper and expedient." 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 the Commander in Chief authority, Congress arguably had circumscribed that authority. With the passage of the last act, however, Congress relaxed prior restrictions and thereby permitted the President to exchange and release prisoners.

Toward the end of the Naval War with France, Congress adopted a more aggressive posture. Congress "required [the President] to cause the most rigorous retaliation to be executed on any such [captured] citizens of the French Republic." Congress thereby commanded the President to mistreat French prisoners in retaliation for Americans who might be imprisoned "with unusual severity," dismembered, or put to death. Congress passed this act in the wake of a French decree announcing that citizens of neutral
countries found on board English vessels would be treated as pirates. The decree presumably meant that Americans found onboard English ships might be executed because they would not be granted prisoner-of-war status. During the War of 1812, Congress trod a similar 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.” The act thereby required the Executive to treat English prisoners well. But upon learning that England would regard 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, seamen or marines, or Indians” allied with Britain.

These acts illustrate the breadth of Congress’s subsidiary power to regulate the taking and treatment of prisoners. Congress sometimes vaguely instructed the Executive Branch to treat prisoners well. Other times Congress authorized or compelled retaliation. In short, early Congresses acted as if the Constitution granted Congress complete authority over the treatment of prisoners.

225. See Act of Mar. 3, 1813, ch. 61, 2 Stat. 829 (authorizing the President to retaliate via war).
226. Id. at 829–30.
227. Id. at 830. These 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 19 JOURNALS OF THE CONTINENTAL CONGRESS 25, 28 (Gaillard Hunt ed., 1912) (entry for Jan. 5, 1781) (ordering the Commander in Chief to treat British prisoners as American prisoners were being treated by the British); 5 JOURNALS OF THE CONTINENTAL CONGRESS 531, 539 (Worthington Chauncey Ford ed., 1906) (entry for July 10, 1776) (noting congressional resolutions authorizing the Commander in Chief to retaliate against the British). Likewise, the Continental Congress authorized the Commander in Chief to enter into a prisoner exchange agreement with the British. 13 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 173, at 272, 280 (entry for Mar. 5, 1779).
228. Though I later argue that the President has the constitutional power to capture and incarcerate enemy soldiers, see infra subpart V(A), the statutes from the early nineteenth century could be read as suggesting that the President had no such power. Because the statutes "authorized" the Executive Branch to secure prisoners, the statutes could be read as suggesting that in their absence, the President had no ability to make prisoners of enemies.
B. Regulation of the Wartime Operations

Congress may not only decide whether the nation will go to war, but also how the military will wage it. Congress can dictate the type of war to be fought, decide whether to escalate or de-escalate a war, and set a war's objectives. The affirmative case for congressional power is relatively straightforward and is made here; the argument that the President's power as Commander in Chief does not preclude congressional regulation of warfare is more complicated and is considered at length in Part V.

1. Types of War.— When Congress does nothing more than declare war against a nation, it allows the President to decide what type of war America will wage. Under such circumstances, the Commander in Chief may decide whether a naval war, a land war, or an aerial campaign best serves the war effort. Most formally declared wars have adhered to this template, 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 lead 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 commanded a nation's forces to wage war against the enemy "by sea and land." Somewhat less common, a formal declaration could order citizens to attack the enemy and its nationals.

Orders to attack were crucial, for without such orders it would be unclear whom the war declarant (the entity declaring war) was directing to fight the war. As German diplomat and jurist George Martens explained, "[E]ven 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."

229. See infra Part V.
230. See, e.g., Act of June 18, 1812, ch. 102, 2 Stat. 755, 755 (declaring war between "the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories" and generally authorizing the use of the armed forces without any constraints).
232. See French Declaration of War Against England, in NAVAL AND MILITARY MEMOIRS, supra note 231, at 44, 45 (ordering citizens to attack the subjects of the King of England).
234. Id.
Those lacking authorizations were treated as bandits.\footnote{235}{See \textit{id.} at 287–88 (describing the consequences of hostile action without proper authorization).} For a privateer, a letter of marque and reprisal was crucial precisely because it precluded the enemy from treating them as pirates subject to summary punishment.\footnote{236}{\textit{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 grants this authority to Congress. 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 previously declared.

Finally, the power to make rules for the government and regulation of the armed forces has continued relevance in times of war. As noted earlier, when Congress imposes rules related to the permissible uses of force in times of war, it has made rules for government and regulation of the armed forces. So if Congress provides that certain vessels should only patrol in particular areas, Congress has made a rule for the regulation of the Navy.

Wars fought in the decades following the Constitution's ratification confirm that Congress may control the type of hostilities the United States will wage. These conflicts (and the litigation they generated) reveal that Congresses, presidents, and Supreme Court Justices agreed that the Constitution permitted Congress to determine the type of war that the nation would wage.

Consider the nation's first war, the war against the Wabash Indians. Abraham Sofaer recounts that at the behest of President George Washington and the Governor of the Northwest Territory, Congress authorized a war against the Wabash Indians in the fall of 1789.\footnote{237}{\textit{Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power} 122–23 (1976).} Congress's first war authorization was limited, however, because while it permitted the use of the Army and the militia against the Wabash,\footnote{238}{\textit{Id.}} there was no navy that could be used to wage war. 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.\footnote{239}{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.}
In contrast, Congress authorized naval wars against France, Tripoli, and Algeria. In the case of France, in 1798 Congress passed laws 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.”240 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,241 meaning that Congress implicitly had barred the Navy from waging war on French harbors and coastal settlements.

In 1802, Congress authorized a far broader naval war against Tripoli. Congress made it “lawful for the President...to instruct the commanders...to subdue, seize and make prize of all [Tripolitan] vessels.”242 Congress also provided that it shall be “lawful” for the President to “employ” the Navy to protect American commerce and seamen and to take “all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.”243 In 1815, Congress authorized the same type of war against Algeria.244 By authorizing the use of naval vessels in these wars (and thereby permitting the use of sailors and marines on board) and by conspicuously failing to permit the Army’s use, Congress barred the Army’s participation in these wars.

The 1812 declaration against Great Britain, 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.”245 A broad authorization was by no means assured, as the Senate came within one vote of authorizing a naval war only.246 Nor did Congress ever authorize all Americans to attack the people and property of England.247

240. Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578–79. Congress granted further authority to the President to grant private ships special permissions to capture French ships, but these details do not change the limited nature of the war. Id. § 2, 1 Stat. at 579.
241. Id. § 1, 1 Stat. at 578.
243. Id. §§ 1–2, 2 Stat. at 129–30.
246. See 5 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 154, 154–56 (1821) (entry for June 12, 1812) (indicating a tied Senate vote on a motion to replace the proposed declaration of war with a more limited authority to use naval vessels to wage war).
Instead, Congress authorized the President to issue letters of marque and reprisal and heavily regulated who could obtain these letters. 248

Members of the Supreme Court agreed that Congress could decide the type of war the United States 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 249 concluded that the orders were ultra vires. 250 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. 251 Because Congress had authorized certain seizures of ships and not others, all other seizures were implicitly forbidden because they were unauthorized. 252 The Supreme Court thereby recognized that Congress could limit the type of war fought and that the President lacked any exclusive constitutional authority to decide what type of war America would fight.

Likewise, in Bas v. Tingy, 253 Supreme Court Justices noted that Congress could regulate America’s warfare. Justice Samuel Chase observed, “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.” 254 Justice Oliver Paterson similarly noted, “As far as congress 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.” 255

Even executive officers realized that Congress could decide the type of war that America would fight. When a territorial governor sought approval for an offensive expedition against an Indian tribe that already had declared war against the United States, President Washington’s Secretary of War, Henry Knox, instructed that only Congress could authorize offensive operations because it alone had the power to declare war. 256 Should Congress authorize hostile measures, the President would faithfully execute them.

248. See generally Act of June 26, 1812, ch. 107, 2 Stat. 759 (requiring that applicants for letters of marque and reprisal file a detailed written application with the Secretary of State and surrender a bond of at least five thousand dollars to the United States).

249. 6 U.S. (2 Cranch) 170 (1804).

250. Id. at 177–78.

251. Id. at 179.

252. Id. at 177–78.

253. 4 U.S. (4 Dall.) 37 (1800).

254. Id. at 43 (opinion of Chase, J.).

255. Id. at 45 (opinion of Paterson, J.).

256. FISHER, supra note 1, at 15 (quoting Letter from Henry Knox to William Blount (Nov. 26, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 220, 221 (Clarence Edwin Carter ed., 1936)) (“[The President] does not conceive himself authorized to direct offensive operations against the Chickamagas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with powers of War.”).
Referring to Congress, Knox stated, "Whatever they direct, will be executed by the Executive."  

Similarly, Secretary of State Thomas Jefferson wrote in a report that Congress would decide both whether war was appropriate and, if war were declared, "how far our own resources shall be called forth." Like Knox, Jefferson seemed to acknowledge that Congress could decide the extent to which the President would be able to use the armed forces to wage the war that Congress might declare.

Early Congresses never specified whether the power to regulate the type of war America would fight arose from the Declare War power or the Government and Regulation power. Nonetheless, what matters for present purposes is that Congress indisputably regulated the types of war the nation waged in the context of a Constitution that, for numerous reasons, is best read as authorizing such congressional regulation of warfare.

2. Escalation and De-escalation of Wars.—Congress not only can decide the type of war to be fought, but also can decide the level of force brought to bear in a war. Congress can begin by authorizing only minimal hostilities against an enemy and then gradually ratchet up the use of force by passing new statutes. Alternatively, 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 de-authorize the use of military and civilian forces and thereby curb or terminate 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 eighteenth 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 to and remained in American ports. Thereafter, Congress permitted American merchant vessels to capture French vessels that attempted to search, assail, or capture American merchant vessels. A little later, Congress authorized the Navy and privateers to capture armed French vessels found on the high seas or in United States territorial waters. In this way, Congress gradually escalated hostilities, all the while maintaining some constraints on 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. Likewise, 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 de-escalate a war.\textsuperscript{263} One way for Congress to de-escalate a war is to repeal prior statutory commands (or 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). Indeed, Congress has consistently authorized warfare in its informal and formal declarations of war.\textsuperscript{264} Because the authority to use force takes the form of a statute or resolution, Congress may repeal such authority, just as it may repeal any statute or resolution that does not create vested rights. When Congress repeals authority to use force, the President can no longer rely upon the repealed statutes to justify continued uses of 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 henceforth commit hostilities only near the coast of the United States. If Congress could have imposed the restraints in its declaration of war, Congress may impose restraints after the war’s onset.

A third means of de-escalation would be to create statutory triggers that automatically constrain warfare 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 dictate that should the Navy destroy certain ports, the Navy’s offensive operations must cease.

A final means of de-escalation would be to partially or wholly defund a war. Because the President clearly has no right to access the Treasury to conduct a war, the President is completely dependent upon Congress for funds. By trimming war appropriations, Congress indirectly de-escalates the conflict because fewer soldiers and vessels will be able to engage the enemy. Of course, a total cutoff of funds makes prosecution of a war impossible.

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 the Navy for the protection of American

\textsuperscript{263} One might wonder why Congress would choose to de-escalate a conflict it previously authorized. After declaring war, Congress might think it prudent to limit the use of the Army as a means of signaling (or furthering) a possible conciliation. Or Congress might no longer approve of the conflict it previously sanctioned, either because legislators have had a change of heart or because the conflict has become unpopular.

\textsuperscript{264} See, e.g., Act of Mar. 3, 1815, ch. 90, 3 Stat. 230 (informally declaring war against Algeria); Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring war against the United Kingdom and authorizing the President to grant letters of marque and reprisal).
vessels against Algerian corsairs but also expressly provided that the Navy would be disestablished should peace ever break out between Algeria and the United States. After America signed a treaty with Algiers the next year, a new act was required to continue the naval buildup. Similarly, during the French Naval War, Congress authorized the President to suspend certain acts of hostility should he believe a “commercial intercourse [with France] may be safely renewed.” In other words, Congress essentially authorized the President to de-escalate the war. That Congress chose to authorize the President to de-escalate the conflict suggests that Congress might have done so itself. The more general point is that even after authorizing or commanding certain hostilities, Congress may adopt a new perspective and augment, modify, or repeal the statutory authority to use wartime force.

Congress’s power to de-escalate has parallels in English history. In February of 1782, General Henry Conway, a member of the House of Commons, introduced a resolution to the effect that “the house would consider as enemies to his majesty... all those who should advise or by any means attempt the further prosecution of offensive war, on the continent of North-America, for the purpose of reducing the colonies to obedience by force.” This resolution spelled the death knell for the war because the British military stopped offensive operations. Besides obliquely threatening impeachment, Parliament might have constrained the war’s prosecution by withholding funds—the lifeblood of war making.

In sum, rather than merely having a power to make a binary, one-time decision about whether to wage war, Congress may 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, what means will be used in the war, and where and how long the war will be fought. To borrow from First

265. Act of Mar. 27, 1794, ch. 12, 1 Stat. 350. The act is best read as implicitly authorizing the President to use the expected Navy against the Algerians.
267. Act of Feb. 27, 1800, ch. 10, § 6, 2 Stat. 7, 10, 9–10. 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 197, at 126. DeConde exaggerates, because not all war statutes provided as much. But clearly there was a general sense that Congress wished for a cessation of hostilities should France stop its attacks on American vessels.
269. Id. at 303–04.
270. Washington subsequently noted that British commanders in America “are in a manner tied down by the resolves of their House of Commons to a defensive War only...” Letter from George Washington to the Count de Rochambeau (Aug. 16, 1782), in 10 THE WRITINGS OF GEORGE WASHINGTON 63, 64 (Worthington C. Ford ed., New York, G.P. Putnam’s Sons 1891).
Amendment case law, Congress has the power to determine the time, place, and manner of how the war it declares will be fought.\textsuperscript{271}

3. Objectives of War.—The Constitution authorizes Congress to set a war's goals. If Congress is concerned about attacks on American commercial vessels, it may declare war in a bid to eliminate threats to American commerce. If Congress is pursuing dreams of so-called Manifest Destiny, it may declare that the nation goes to war to acquire new territory. Modern Congresses might establish regime change and democratic nation-building as war goals.

By establishing goals, Congress implicitly limits the President's wartime discretion. If the federal Legislature wishes to eliminate threats to American vessels and correspondingly constrains the use of military force, the Commander in Chief 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 only certain territory from the enemy, the President cannot attempt to seize all enemy territory.\textsuperscript{272}

A number of factors help establish the claim that Congress may set a war's objectives. Consider its ability to issue conditional declarations of war—declarations that promise hostilities should another nation fail to satisfy certain conditions.\textsuperscript{273} Given that Congress may threaten war upon failure to satisfy conditions, it should likewise be able to decide when the nation will halt a war because another nation has satisfied its conditions. 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 and give Canada a chance to avoid war, Congress could provide, in its declaration, that the satisfaction of certain goals would halt offensive measures. Hence, if the President seized


\textsuperscript{272} Given that the President is always free to negotiate a peace treaty with a declared enemy nation, Congress cannot require the President to meet any particular war objective. \textit{See} U.S. CONST. art. II, § 2, cl. 2 (giving the President, with the advice and consent of the Senate, the authority to make treaties). 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 sought. Hence, Congress's power to set objectives should be regarded as the power to set maximum objectives, 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 fewer concessions from the enemy than Congress initially sought in its declaration of war.

\textsuperscript{273} \textit{See, e.g.}, 3 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 253 (Kessinger Pubb'g 2004) (1625) (contrasting "absolute declarations" with conditional declarations); \textit{see also} NEFF, \textit{supra} note 63, at 105–06 (discussing conditional declarations).
the territory that Congress claimed, or if Canada conceded it, offensive actions would end.

Congress's funding power points to the same conclusion. For instance, Congress might provide that no funds shall be used for offensive military operations once the military has ousted Canadian forces from disputed territory. Hence, after the departure of Canadian forces from the disputed territory, the Executive would have no funds with which to continue offensive expeditions against Canada.

Finally, Congress's power to de-escalate suggests a power to establish a war's maximum objectives. As noted earlier, Congress might enact a 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 indistinguishable from a declaration of war that establishes objectives and thereby fixes the limits on offensive operations.

In short, the powers to issue conditional declarations, to defund a war, and to de-escalate hostilities all suggest a generic power to set a war's objectives. The ability of Congress to specify a war's objectives makes eminent sense. When Congress decides to declare war, it usually will decide why the United States should wage war. Specifying a war's objects merely enumerates what is perhaps often implicit in the declaration of war. Just like someone who decides to build a house may determine what specific functions that house will serve, so too may someone who declares war decide what objectives that war should further.

Early Congresses occasionally 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 would cease if France were to halt its 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 statute's aim was not to acquire French territory. Similarly, the limited declarations of war against Tripoli and Algeria were meant to protect "the commerce and seamen" of the United States against Barbary predations. Occasionally,
subsequent Congresses have specified a war's objectives, including the most recent authorization to use force against Iraq.278

C. Concluding Thoughts on the Scope of Congressional Power

Congress has many powers that bear on 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 in wartime. Using these powers, Congress can regulate the means of warfare, establish a war's goals, and escalate and de-escalate hostilities. Moreover, Congress can order limited hostilities, dictate soldier training regimes and maneuvers, and regulate the treatment of prisoners. In sum, no subject-matter limits exist on congressional powers over wars and the military. Indeed, legislative power extends to routine operational matters such as the best methods for loading and firing guns.

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 considers that question, arguing that while the President has significant concurrent authority over the military, the President lacks any exclusive military powers. Any military authority the President has, Congress enjoys as well by virtue of its various military and war powers.

One basic constraint on congressional power is that Congress cannot infringe upon the Commander in Chief power. Specifically, Congress cannot create independent soldiers or sailors because such autonomy would vitiate the Commander in Chief's authority. After all, the President would not be Commander in Chief of the entire armed forces if certain segments were not subject to his commands. Put another way, though the Commander in Chief power does not grant the President any exclusive military powers, the Commander in Chief may control all military discretion that Congress chooses not to exercise.

V. Concurrent Power: The President and the Direction of Military Operations

One recurring claim found in separation-of-powers scholarship is the reasonable assertion that Commander in Chief enjoys a realm of military...
autonomy—an area of exclusive power.\textsuperscript{279} In other words, some assert that there is a sphere of military matters that the Constitution leaves entirely with the President, with Congress having no concurrent authority.\textsuperscript{280} For instance, one might imagine that Congress cannot micromanage battlefield assets and enact rules related to advances, flanking movements, and retreats.

This robust conception of presidential power certainly reflects a plausible reading of the Constitution's text when read in isolation. Yet when we broaden the inquiry and use text, structure, and early history as guideposts, we see that this robust conception is mistaken. As Part IV revealed, early Congresses regularly regulated operations, deciding such mundane matters as training and tactics, and such vital questions as the type of war to fight and the men and material that could be used to wage war. Legislators apparently did not believe that the Constitution left all operational details to the sole discretion of the Commander in Chief.

Rather than providing a sphere of exclusive authority, the Commander in Chief Clause is susceptible to an equally plausible reading, one that better harmonizes with post-ratification legislation \textit{and} with early, more limited conceptions of commanders in chief. This reading recognizes that the federal Commander in Chief may direct military operations without supposing that certain military matters rest exclusively with 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 declarations of war. Moreover, though the President has no constitutional power to punish members of the armed forces, the President can "regulate" their conduct, in a manner of speaking, by removing them for violating any supplemental rules that he imposes.

This system of concurrent power over military operations naturally raises the question of whose rules prevail in cases of conflict. Considerations of text, structure, and history suggest that when congressional and presidential rules clash, the former prevails. This system of concurrent powers, coupled with a principle of congressional primacy when rules conflict, renders the Commander in Chief power a residual power. Whatever concurrent constitutional authority Congress chooses not to exercise and not to restrain, the President may exercise as Commander in Chief.

\textbf{A. The Scope of the President's Military Powers}

The Constitution grants the President two powers that might be relevant. Article II, Section One vests the President with the Executive power.\textsuperscript{281} Section Two makes the President the "Commander in Chief of the Army and

\textsuperscript{279} See, e.g., Barron & Lederman, \textit{supra} note 9, at 750–51 (discussing the assertion that there is a level of tactical discretion and autonomy left solely to the President).
\textsuperscript{280} Id.
\textsuperscript{281} U.S. CONST. art. II, § 1.
Navy of the United States, and of the Militia of the several States."\(^{282}\) Of these two authorities, the Commander in Chief power is the key to understanding presidential power over the military because the Executive Power Clause grants no additional military authority to the President. In fact, the Commander in Chief power is best read as a \textit{limitation} on authority that otherwise would be granted more fulsomely by the Executive Power Clause. In the absence of the Commander in Chief Clause, the President might have had complete control over the militia, without regard to whether Congress had provided that the militia could be called into federal service.\(^{283}\) Hence, the Commander in Chief Clause is the crucial provision because it marks the metes and bounds of presidential power over the military.

What is a "commander in chief"? Apparently, the office originated in mid-seventeenth-century England and referred to the topmost military officer in the British Army—someone who had authority over all British Army units wherever stationed.\(^{284}\) The early Commander in Chief was something of a general of generals—that is to say, one who could superintend the actions of other generals. For instance, the commission of one early Army Commander in Chief noted that all Army officers and soldiers were to obey the Commander's orders.\(^{285}\) Although the office is most closely associated with the British Army, there were early naval commander in chiefs as well.\(^{286}\)

\begin{footnotes}
\footnoteref{282}\footnotetext{Id. § 2.}
\footnoteref{283}\footnotetext{Under this view, the Commander in Chief Clause makes clear that despite having the Executive power, the President has no power to control the militia until it is called into federal service. As James Madison noted, it was entirely "natural" and "common" to grant power via a "general phrase, and then to explain and qualify it by a recital of particulars." \textsc{The Federalist} No. 41 (James Madison), supra note 36, at 263.}
\footnoteref{284}\footnotetext{See \textsc{Wormuth & Firmage}, supra note 1, at 107 (explaining that Charles I introduced the term into English law with the appointment of the Earl of Arundel in 1639).}
\footnoteref{285}\footnotetext{Monck's Commission as Captain-General (Aug. 3, 1660), \textit{in 2 Daniel Mackinnon, Origins and Services of the Coldstream Guards} 239, 247 (London, Richard Bentley 1833). Wormuth and Firmage argue that the English Commander in Chief's authority was not absolute because the Commander could not move a corporal without a countersignature from the Secretary of War. \textsc{Wormuth & Firmage}, supra note 1, at 107. But the quote Wormuth and Firmage provide for that proposition is from the mid-nineteenth century. \textit{Id.} (citing 2 \textsc{Charles M. Close, The Military Forces of the Crown: Their Administration and Government} 761 (London, John Murray 1869)). The earliest Commanders in Chief appeared to have more unilateral power, subject to control by the Crown. Over time, Parliament eroded the Commander's unilateral power, subjecting them to civilian and military checks. \textsc{See David Gates, The Transformation of the Army 1783–1815, in The Oxford History of the British Army} 132, 146 (David G. Chandler & Ian Beckett eds., 2003) (asserting that the devolution of the Commander in Chief's responsibilities occurred in large part because of the repeated attempts of a suspicious Parliament to control the power of the military).}
\footnoteref{286}\footnotetext{See, e.g., 1778, 15 Geo. 3, c. 6 (Eng.) (noting that Augustus Keppel was Commander in Chief of a fleet); 2 \textsc{A Collection of Treaties Between Great Britain and Other Powers} 376–77 (George Chalmers, ed., London, John Stockdale 1790) (reprinting a 1716 peace treaty, which noted that Vice-Admiral John Baker was "Commander in Chief" of the Crown's ships in the Mediterranean); 2 \textsc{Arthur Collins, The Peerage of England} 165 (London, W. Innys et al. 3d ed. 1756) (noting that in 1737, George Clinton served as "Commander in Chief" of the fleet in the Mediterranean).}
\end{footnotes}
Over time, the phrase came to be associated with any military office with control over a subunit of an army or navy. For instance, a 1778 military dictionary defined “[g]eneral of an army” as he “that commands it in chief,” and the dictionary went on to observe:

[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 [sic] 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.287

The same dictionary also 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.”288 A colonel was “commander in chief of a regiment, either horse, foot, or dragoons.”289 Clearly “commander in chief” was a title attached to many military offices and merely described an officer’s control over particular units in an army or navy.290

Colonial governors, as regional administrators of the British Empire, had significant authority over their colonies’ militias.291 Governors generally had the power to “arm, muster, and command all persons residing within his province; to transfer them from place to place; to resist all enemies, pirates, or rebels; if necessary, to transport troops to other provinces in order to defend such places against invasion; to pursue enemies out of the province.”292 The Crown eventually appointed commanders in chief for the entire British Army in North America, thus creating a continent-wide commander in chief to command the colonial commanders in chief.293

With the transition from colonies to states, a number of state constitutions made their governors commanders in chief without specifying the precise contours of the office.294 Two constitutions, the Massachusetts and New Hampshire constitutions, did more. These constitutions seemed to

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288. Id. at C5.
289. Id. at C6.
290. The prior citations of commanders in chief of particular fleets make clear that the title was used for subunits of the Navy. See supra note 286.
291. GREENE, supra note 159, at 99, 105, 110.
292. Id. at 98–99.
294. E.g., DEL. CONST. of 1776, art. IX; GA. CONST. of 1777, art. XXXIII; N.J. CONST. of 1776, art. VIII; N.Y. CONST. of 1777, art. XVIII; N.C. CONST. of 1776, art. XVIII; PA. CONST. of 1776, § 20; S.C. CONST. of 1776, art. III; VT. CONST. of 1777, ch. 2, § 11.
borrow language found in the commissions of royal governors. The governor, as commander in chief, could "train, instruct, exercise, and govern the militia and navy." The commander also could repel, pursue, kill, and seize the property of those attacking the state.

The federal Constitution eschewed the examples of Massachusetts and New Hampshire. Instead, it tersely conveyed the office upon the President, thereby drawing upon existing understandings of what it meant to be a commander in chief. Given the office's ubiquity and familiarity, a recitation of particular powers was unnecessary.

Read against this prevailing background understanding, one can say with confidence that a commander in chief of an entire army and navy has all the powers associated with generals and admirals, the only difference being that such a commander has authority with respect to all soldiers and sailors and not just a portion of the army or navy. Similarly, when the militia is federalized, the federal Commander in Chief has the same relationship to state commanders in chief that British North American Commanders in Chief had to regional, colonial commanders in chief. The President, no less than a general or admiral, may "regulate the march of the army [and the sailings of the navy], . . . [and] give out the orders . . . in day of battle," and "train, instruct, exercise, and govern the militia and navy." We can divide the Commander in Chief's authority into three categories: residual war powers, military regulation, and limited uses of military force.

1. Residual Wartime Authority.—Though the President cannot declare war, the President must prosecute the war Congress has declared. Operating within the confines of the discretion left by law, the President may decide what type of war to fight, whether to escalate or de-escalate hostilities, and

295. See, e.g., Commission to Virginia Governor, Sir Thomas West, Lord La Warr, in GREENE, supra note 159, at 207, 211–12 (granting the Virginia Governor authority to exercise specified wartime powers as needed); Draft Commission to New Jersey Governor Francis Bernard, in GREENE, supra note 159, at 230–31 (granting the New Jersey Governor authority to exercise specified wartime powers as needed).

296. MASS. CONST. of 1780, ch. II, § 1, art. VII. It is not clear whether the omission of the army was an oversight or not. The New Hampshire Constitution contained a virtually identical provision. N.H. CONST. of 1784, pt. 2 (amended 1968).

297. MASS. CONST. of 1780, ch. II, § 1, art. VII.

298. Barron and Lederman claim that there was "no consensus as to what substantive authorities" rested with a commander in chief. Barron & Lederman, supra note 9, at 781. In support of this claim, they cite constitutions that placed constraints on their commanders in chief. Id. at 781 n.300. Yet varying restrictions on the powers of commanders in chief cannot prove a lack of a general consensus as to the powers associated with this ancient and familiar office. Once again, the use in many constitutions of an existing and widely used phrase, without any explication of it, suggests that the phrase had a common meaning.

299. Cf. MASS. CONST. of 1780, ch. II, § 1, art. VII (providing that the commander in chief has all the powers of the captain, general, and admiral).

300. MILITARY DICTIONARY, supra note 287, at E3.

301. See supra note 296.
what objectives to pursue. The more open-ended the declaration of war and accompanying statutes, the more authority Congress leaves for the President. The more detailed and precise these enactments, the less discretion the President enjoys.

When Congress does no more than declare war and permit the general use of the armed forces, the President can decide which forces to use in the war and how best to deploy them. Congresses took this path in the declared wars against Britain\textsuperscript{302} and Mexico,\textsuperscript{303} leaving a rather large reservoir of wartime authority for Presidents James Madison and James Polk. These Presidents decided what type of war to fight, be it land, naval, or both. They also decided when to escalate and de-escalate hostilities.

If Congress authorizes a naval war and indicates that protection of commerce is the goal, as it did in the Tripoli and Algerian Naval Wars,\textsuperscript{304} the President may decide how best to deploy the Navy to fight the war and secure those congressionally prescribed objectives. The President may order naval vessels to convey American commercial vessels. Or the President may decide that commerce can best be protected by search-and-destroy missions designed to devastate the enemy’s navy and privateers. Finally, the President may escalate hostilities under the belief that it would best secure congressional aims, just as the President may curb offensive operations under the belief that such limits might further negotiations meant to safeguard American commercial vessels.

Even when Congress declares a circumscribed naval war, of the type waged against France at the end of the eighteenth century,\textsuperscript{305} the President still enjoys a great deal of discretion. In the French Naval War, Congress only authorized the destruction and capture of armed French vessels as a means of protecting American commerce.\textsuperscript{306} Despite the War’s limited scope, President John Adams could have decided which armed vessels to attack and which to evade. He might have permitted attacks only on lightly armed merchant vessels. Or he might have authorized attacks only when American naval vessels had superior firepower.

In sum, the Commander in Chief can resolve war matters that Congress leaves undecided, in much the same way that an admiral can exercise discretion that the Commander in Chief chooses not to exercise. Where Congress has spoken, however, the President cannot issue contrary orders

\textsuperscript{302} See Act of June 18, 1812, ch. 102, 2 Stat. 755 (generally authorizing the use of armed forces to wage war against the United Kingdom).

\textsuperscript{303} See Act of May 13, 1846, ch. 16, 9 Stat. 9 (authorizing the use of armed forces and militia to wage war against Mexico).

\textsuperscript{304} See Act of Mar. 3, 1815, ch. 90, 3 Stat. 230 (authorizing the use of the armed forces against Algerian cruisers for the protection of United States commerce); Act of Feb. 6, 1802, ch. 4, 2 Stat. 129 (authorizing the use of the armed forces against Tripolitan cruisers for the protection of United States commerce).

\textsuperscript{305} See supra text accompanying notes 215–21.

\textsuperscript{306} Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578–79.
because when Congress exercises its constitutional powers, congressional rules trump any contrary presidential ones.307

2. "Regulatory" Authority.—Notwithstanding Congress's express Government and Regulation power over the armed forces, the President has something approaching a regulatory power as well. First, as Commander in Chief, the President can create military disciplinary rules. In the absence of any congressional regulation of discipline, the Commander in Chief may create general orders and rules.308 The President may decree that soldiers and sailors not divulge information to the enemy.309 The President may require officers and enlisted men to obey the orders of superiors within the chain of command.310 Even where Congress has enacted a system of military discipline and justice, the President may supplement congressional regulation with his rules. For example, the President might enact more stringent rules relating to the display of cowardice, as a means of ensuring high morale.

Second, despite Congress's ability to regulate military training and tactics, the Commander in Chief has concurrent authority.311 Once again, if Congress fails to regulate training, the Commander in Chief can establish a training regime.312 Even if Congress requires certain training—say by mandating exercises three days a week—the President may impose additional training. Likewise, the President may enact standing battlefield rules for the armed forces relating to advances, firing, and retreats.

Third, the Commander in Chief's regulatory power can be used 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

307. See infra subpart V(C).
308. See MILITARY DICTIONARY, supra note 287, at E3 (noting that a general, someone who "commands in chief," may issue orders); see also MASS. CONST. ch. II, § 1, art. VII (providing that the Massachusetts commander in chief may instruct the navy and militia).
309. See, e.g., George Washington, General Orders (July 31, 1776) (on file with the George Washington Papers at the Library of Congress), available at http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw050315)) (providing new rules for the giving of parole and countersign, and admonishing individuals not to give either code to unauthorized individuals). Parole and countersign are code words used to identify who is authorized to pass at night. JAMES A. MOSS, MANUAL OF MILITARY TRAINING 269–70 (George Banta Publ’g Co. 1914).
311. Cf. MASS. CONST. ch. II, § 1, art. VII (expressly providing that the commander in chief may train the navy and militia).
312. Before Congress enacted von Steuben's manual, Washington periodically issued training instructions. See, e.g., George Washington, General Orders (July 6, 1777) (on file with the George Washington Papers at the Library of Congress), available at http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw080309)) (chronicling Washington's concern with the lack of discipline amongst the military's officers and as a result, ordering them to attend a parade and exercise).
doubts that the Commander in Chief can deploy, in various ways, military assets. For instance, the President may 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 the 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, when Congress declares war against another nation, the declaration implicitly authorizes the President to kill or capture the enemy. 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, and the like.

The crucial difference between presidential power to create military rules and the broader congressional power to regulate the armed forces is that the President lacks the power to fine, imprison, or execute military personnel who violate presidentially created rules. The sole means of enforcing those rules is to suspend or oust personnel who disobey them. Just as the Crown had the constitutional power to withhold pay from, suspend, or remove soldiers who violated the Crown's articles of war, so too may the President suspend or oust those who disobey the President's orders. By the same token, just as the Crown lacked the power to punish soldiers on English soil, so too the President lacks such power. While the Crown had a legislative power over military personnel stationed overseas, the President cannot make and impose a "martial law" because actual law is the province of Congress.

This system of modest presidential power to discipline 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 imposing fines, imprisonment, and capital punishment. The President cannot impose these sanctions as a means of controlling his civilian executive officers. Nonetheless, the President can create additional rules relating to the conduct of his civilian officers and enforce those rules by

313. Cf. Mass. Const. ch. II, § 1, art. VII (providing that the commander in chief may seize all those who attack Massachusetts).

314. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 587 (2004) (Thomas, J., dissenting) (citing Moyer v. Peabody, 212 U.S. 78, 84 (1909)) (asserting that congressional legislation allowing the President to use necessary force against enemies authorizes the President to use any force, including deadly force, to accomplish his objective).

315. For a discussion of the President's power to remove, see generally Saikrishna Prakash, Removal and Tenure in Office, 92 Va. L. Rev. 1779 (2006).

316. See supra text accompanying note 158.

317. President Washington certainly regarded himself as having the authority to remove soldiers. See Carl R. Fish, Removal of Officials by the Presidents of the United States, in Annual Report of the American Historical Association for the Year 1899, at 67, 69 (1900) (noting that President Washington had removed military officers).

318. See U.S. Const. art. I, § 8, cl. 14 (granting Congress the authority to make rules governing and regulating the Army and Navy).
removing those who disobey them.\textsuperscript{319} The ability to remove officers at pleasure is a useful means to discipline and therefore regulate officers—civilian and military alike.

All told, the President may issue rules or orders to the military and thereby "regulate" it, in a manner of speaking. The President’s ability to issue rules is interstitial in nature, limited as it is by congressional statutes. The power to issue interstitial rules that fill in the gaps left by higher-order rule makers is an ability that all commanding officers enjoy. Lieutenants have a similar power over the platoon under their command; colonels have a comparable power over all the platoons in their regiments; and generals have that power 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.\textsuperscript{320}

3. **Limited Uses of Force.**—We have seen that Congress may order the use of force, either in a war or outside that context.\textsuperscript{321} Does the President have concurrent constitutional authority? Intuitively, it makes sense to suppose that commanders, of whatever sort, might use military force in limited ways. Should a battalion be attacked, its commander presumably could order its soldiers to defend themselves. Should a naval vessel come across pirates, it seems natural to imagine that its captain might have the authority to order the vessel into action to subdue the pirates. More generally, the power to command military forces seems to imply the power to use those forces, albeit in narrow ways. This intuition applies equally to the Commander in Chief.

Yet there are constraints on the President’s ability to order the use of force. As we have seen, only Congress may declare war, and hence only it can order those uses of force that constitute declarations of war. Yet not all uses of military force constitute declarations.\textsuperscript{322} For instance, an unsanctioned use of force by errant military officers could be disavowed and no one would regard such uses of force as a declaration of war. Likewise, acts of self-defense were not informal declarations of war. One might say that though the Constitution grants Congress the sole power to declare war, it does not grant Congress a broader monopoly on all uses of military force.\textsuperscript{323}

\begin{itemize}
\item \textsuperscript{319} See generally Prakash, supra note 315 (discussing the President’s removal powers).
\item \textsuperscript{320} A defense of the principle of limited horizontal supremacy can be found in subpart V(C).
\item \textsuperscript{321} See supra sections III(A)(1) and IV(A)(3).
\item \textsuperscript{322} See Prakash, What the Constitution Means, supra note 1, at 117 ("Early American history indicates that the President might order the armed forces to defend themselves against attack without such orders themselves constituting a declaration of war."").
\item \textsuperscript{323} See id. (noting that not all uses of force constitute a declaration of war).
\end{itemize}
a. Repelling Attacks.—Debates at the Philadelphia Convention suggest that the Commander in Chief might repel invasions notwithstanding the grant of Declare War authority to Congress. The proponents of the "declare war" language, James Madison and Elbridge Gerry, claimed that even though Congress would have the power to "declare" war, the President could still "repel sudden attacks." 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." Apparently, no one disagreed that the Executive 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.

When the Creek and Chickasaw tribes declared war on the United States between 1792 and 1793, various governors wrote to the President seeking authority for offensive operations against the tribes. 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 permissible because such measures did not usurp Congress's Declare War power. This conclusion reflected the view that while Congress had a monopoly on the power to declare war, Congress lacked a monopoly on all decisions to use military force. Because defensive uses of force were not declarations of war, the Executive could order defensive measures without running afoul of the congressional monopoly on declaring war.

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 Secretary of War James McHenry advised that the President might order naval vessels to convoy and protect American merchant ships. Consistent with this advice, President John Adams instructed naval officers that they could repel attacks on American shipping, whether the attacking ships were plying along the coast or on the high seas. At the time, Congress had not authorized the Navy to convoy and defend American merchant vessels.

Drawing lessons from these early episodes, the Commander in Chief may issue standing orders to troops and sailors to repel any attacks made upon them or United States territory. When the armed forces do no more

324. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 54, at 318.
325. Id.
326. See Prakash, A Two-Front War, supra note 1, at 100 (discussing letters from two governors requesting authority to conduct offensive operations).
327. Id. at 98–99.
328. Id. at 98–100.
329. See SOFAER, supra note 237, at 155 (noting advice from McHenry); Letter from Alexander Hamilton to James McHenry, supra note 78, at 461, 461–62.
330. Id. at 156.
than defend themselves or United States territory, they neither declare war nor usurp some other exclusive congressional power. American understanding of the status of defensive measures was consistent with international practice, for no one thought that a nation declared war when all it did was fend off an attack. After all, a nation that merely defended itself had not made a decision to wage war.

b. Attacking Pirates and Bandits.—Are there any circumstances in which the Commander in Chief may order the military to launch the first blow—in other words, to engage in offensive operations? With respect to pirates and bandits, the President may strike first. As noted earlier, the Commander in Chief 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,\(^3\)\(^3\)\(^1\) whether formal or informal. Likewise, the Constitution grants Congress exclusive control over the capture of enemy property.\(^3\)\(^3\)\(^2\) When the President orders the Navy to attack pirates on the high seas or orders the use of force against bandits, the President has not thereby declared war nor authorized the capture of property belonging to any other nation. Instead, he has merely ordered the use of lethal military force against highly armed and organized criminals.

The predations of pirates and bandits have long been distinguished from the military actions of nation-states. The Romans argued that pirates were the common enemy of all and could be attacked without any declaration of war.\(^3\)\(^3\)\(^3\) In a similar vein, international law scholar Emmerich de Vattel noted that nations may exact summary justice on pirates because they were “enemies of the human race.”\(^3\)\(^3\)\(^4\) Writing for the Supreme Court, Justice Story observed, “Pirates 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.”\(^3\)\(^3\)\(^5\) Story’s point was that public and private ships could attack and subdue pirates.

Early episodes confirm that the President may order attacks on pirates. Consider presidential instructions issued before Congress authorized a limited naval war with France. John Adams ordered the Navy to seize attacking ships that sailed without the authority of commissions on the

\(^{331}\) U.S. CONST. art. I, § 8, cl. 11.

\(^{332}\) Id.

\(^{333}\) See NEFF, supra note 63, at 18 (noting that the Romans considered the pirates “the common foe of all” and that “the formal process of declaring war was employed only against foreign states, not against barbarians, brigands, pirates or the like”).

\(^{334}\) VATTEL, supra note 82, at 108, 451; see also id. at 319, 319–20 (distinguishing formal, legitimate wars from the illegitimate, informal wars, which were fought by pirates and bandits “solely with a view to plunder”).

\(^{335}\) The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40 (1826).
grounds that they were mere pirates.\textsuperscript{336} Similarly, Thomas Jefferson approved attacks on 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.\textsuperscript{337} In 1807, Jefferson retroactively approved the seizing of a pirate vessel.\textsuperscript{338} There was no statutory authority for any of these uses of military force against pirates.\textsuperscript{339} Apparently, both Adams and Jefferson believed that the Constitution itself permitted the President to use force against pirates.\textsuperscript{340}

c. Rescuing Citizens Abroad.—From time to time, presidents have ordered the military to rescue citizens abroad.\textsuperscript{341} Without venturing into an extended consideration of each of these uses of the military, 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 seems not to have encroached 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 lead another nation 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.\textsuperscript{342}

At the same time, presidents who order such rescues must realize that should hostilities become fierce, prolonged, and widespread, it may become necessary to secure legislative approval because those operations may

\textsuperscript{336} SOFAER, supra note 237, at 156. 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.


\textsuperscript{338} Letter from Thomas Jefferson to Robert Smith (Sept. 3, 1807) (on file with the Thomas Jefferson Papers at the Library of Congress), available at http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj100206)).

\textsuperscript{339} In 1789, Congress made piracy a crime. Act of Apr. 30, 1790, ch. 9, §§ 8–12, 1 Stat. 112, 113–15. Not until 1819, however, did Congress affirmatively authorize the President to use the Navy to combat pirates. Act of Mar. 3, 1819, ch. 77, 3 Stat. 510.

\textsuperscript{340} 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. See Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), available at http://avalon.law.yale.edu/19th_century/jeffmes1.asp (noting that the President could not order offensive measures against Tripoli). 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 that had declared war. Id. Hence, Jefferson either regarded the Tripolitan corsairs as privateers or elements of the Tripolitan Navy. Because they were not true pirates, Jefferson understood that he lacked the constitutional authority to authorize offensive action against them.

\textsuperscript{341} See SOLICITOR, U.S. DEP’T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 34 (1929) [hereinafter RIGHT TO PROTECT CITIZENS] (listing several incidents of “[s]imple protection of American citizens located in disturbed areas”).

\textsuperscript{342} See Prakash, What the Constitution Means, supra note 1, at 117 (giving examples of other military actions that are not meant to indicate a nation’s decision to wage war).
constitute an informal declaration of war. The key question is how best to characterize the use of force. Has the United States gone to war against another nation, or has it merely engaged in a 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.343

This often obscure dividing line has some 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 rescue operations. The decision to do no more than rescue imperiled Americans does not seem like a decision to wage war. Yet if a President should seek to overthrow a government, acquire territory, or seek indemnity or punishment for American losses,344 then the use of military force crosses the line. In such situations, 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 employed to secure these broader objectives.

4. Limits on the President’s Military Powers.—Having described the President’s military powers at some length, it seems necessary to say more about the limits on the Commander in Chief power. Earlier discussions touched upon these restraints, but it seems useful to say something more systematic here. A good place to start discerning those limits is the Continental Congress’s resolution ceding George Washington “dictatorial powers.”345 In December of 1776, Congress granted the Commander in Chief of the Continental Army a long list of temporary powers, including the power to raise Army units; to set pay for all of these new soldiers; to call forth the militia from the several states; to displace and appoint all officers under the rank of brigadier general; to take any private property with reasonable compensation; and, finally, to arrest and confine those opposed to the Revolution as well as those who refused to take continental currency as payment.346 The grants of authority are notable not only because they shed light on the Revolution’s perilous state, but also because they reveal

343. See id. at 116–19 (discussing the difficult dividing line between permissible uses of force and informal declarations of war).

344. Presidents have ordered the use of military force to punish those who perpetrated acts of violence against Americans. See RIGHT TO PROTECT CITIZENS, supra note 341, at 34–35 (listing examples of prior uses of military force meant to punish for violence and insults directed against American citizens).


346. 1 RAMSAY, supra note 268, at 316.
something about the powers of a commander in chief prior to the Constitution's creation.

The emergency resolution made clear that the Commander in Chief previously lacked the powers to take property, raise armies, appoint and displace officers, and arrest traitors. There is no other way to make sense of the facts that Congress felt the need to pass the resolution and that the powers would expire in six months. Subsequent congressional resolves renewed some of these authorities, albeit with new constraints. For instance, Congress reconveyed the powers to take property with compensation and to secure property that might fall into enemy hands. Yet these powers were only granted for sixty days and only exercisable within seventy miles of Army headquarters.

A subsequent renewal of authority was also limited in duration.

The President has some of these authorities, not due to his status as Commander in Chief, but because other constitutional provisions grant such powers. The Constitution specifically grants the power to appoint, subject to a Senate check. It grants the power to remove via the grant of the Executive power. Likewise, the President may arrest traitors under his authority to execute the law, part of the Executive power.

The Commander in Chief lacks other extraordinary powers, including the powers to raise armies, set military personnel pay, or take property. As noted earlier, the Constitution's grant of power to Congress to raise and support armies is best read as granting this power exclusively to Congress, with the President having no concurrent power. Just as the Continental Army's Commander evidently lacked the power to raise and support armies absent legislative authorization, so too does the Constitution's Commander in Chief lack the power to raise and support armies.

The power to take property is more interesting. Had the Justices in the famous Steel Seizure Case been aware of the Continental Congress's resolve granting dictatorial powers to the Continental Commander in Chief, it might have made resolving the case far easier; it would have been clear that commanders in chief did not have the power to do whatever they deemed necessary to prosecute a war successfully. In particular, it seems apparent that members of the Continental Congress did not believe that commanders in chief had the power to take property from loyal citizens during wartime by

348. Id.
351. Id. art. II, § 1, cl. 1.
352. See supra note 45 and accompanying text.
353. See supra section III(B)(1).
virtue of the office. If that relatively narrow conception of the office was common during the Revolution, one would suppose that the conception also was predominant at the Founding.355

5. Why the President Lacks Exclusive Power Over Military Operations.—Though we previously considered Congress’s broad authority over military operations and the President’s concurrent authority, we must belatedly consider questions long deferred: Can Congress micromanage all aspects of the military, including when the Army will advance or retreat, or does the President have some sphere of exclusive, absolute authority over military operations? After sketching a robust conception of exclusive, absolute Commander in Chief powers, a theory that has its undoubted attractions, this section attempts to refute that conception. Although the President has significant military authority, the office of Commander in Chief does not imply any exclusive powers. Though the President may direct military operations, he lacks exclusive operational control because Congress may supplant any orders that the President might issue.

a. The Case for Exclusive Presidential Power Over Military Operations.—As noted in the Introduction, many have supposed that Congress cannot make certain decisions relating to military operations. For instance, many scholars have imagined that Congress cannot order battlefield advances and retreats.356 Likewise, some have suggested that Congress cannot prohibit interrogation techniques.357 In short, some scholars maintain that Congress cannot micromanage warfare or battlefield operations more generally. Put another way, they seem to believe that the Constitution grants absolute operational control of the military to the Commander in Chief.

This argument not only has an intuitive appeal, but it also has some textual, structural, and historical support. As a matter of text, one might suppose that the Constitution affirmatively conveys upon the President some operational autonomy. First, one might imagine 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

355. Obviously, Justices who examine practice to gauge whether history has added a gloss to the words in the Constitution would look beyond the Founding. See id. at 610–11 (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

356. For a long list of such claims, see Barron & Lederman, supra note 9, at 751 n.191.

357. See Memorandum from Jay S. Bybee to Alberto R. Gonzales, supra note 7, at 172, 207 (claiming that Congress cannot “dictate strategic or tactical decisions on the battlefield”).
soldier, subject to a constant stream of petty directives from a host of superiors.

Second, contrary to the claims made earlier, one might imagine that the Constitution's grant of the Executive power affirmatively conveys operational autonomy. In particular, perhaps the grant of the Executive power somehow makes clear that some or all of the President's powers as Commander in Chief are exclusive. Put another way, even if ordinary commanders in chief might not have any exclusive powers, the grant of the Executive power means that some (or all) powers the President has by virtue of being Commander in Chief are exclusive.

Those moved by intertextual arguments can make an additional 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." Though the Constitution replicates 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 Constitution's failure to grant to Congress the power to direct military operations suggests that Congress lacks such power. Indeed, the Supreme Court has claimed that "[w]here the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it." Because commanders in chief certainly may direct military operations and because Congress lacks such power (at least under this argument), the power to direct military operations rests exclusively with the Commander in Chief. To consider the most cited example, one could believe that Congress simply lacks the legislative power to order a battlefield advance (or retreat). Or one might believe that Congress cannot require (or prohibit) battlefield tactics, such as the famous island-hopping tactic employed in World War II. Finally, one might suppose that Congress cannot dictate where an invasion will take place, say, by choosing Calais over Normandy. Hence, though Congress can govern and regulate the military, it cannot direct operations because that power rests with the President alone.

Finally, someone desirous of upholding some sphere of presidential autonomy in military matters might grudgingly concede that Congress can make generic rules related to military operations. For example, someone might admit that Congress could enact a general rule providing that soldiers must march and shoot in a particular way. Such rules are appropriate exercises of the Government and Regulation power precisely because they are generally applicable rules not meant to apply only to particular battlefield

358. See supra subpart IV(B).
359. ARTS. OF CONFEDERATION art. IX.
situations. Yet they might go on to argue that what Congress cannot do is direct the military in the manner that a corporal or lieutenant might, say, by ordering military units to retreat or advance in particular campaigns. When Congress dictates tactics on a particular battlefield, it does not make generic rules for the government and regulation of the armed forces; instead it makes specific decisions that clearly lack the rule-like quality of generality. For instance, should Congress enact a statute during a war that “directs the 101st Airborne Division of the Army to lapd in Teheran,” this statute would not enact anything resembling a rule (at least under this view). Rather, Congress does nothing more than dictate the details for a particular operation, something not true of a generic rule.

Moving to considerations of constitutional structure, one might contend that if Congress may direct military forces, the Constitution creates 535 commanders in chief rather than one.362 This would make the President something of a military figurehead—an errand boy for Congress rather than a true commander in chief. Along the same lines, 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.”363 In other words, military operations are not properly susceptible to sound advanced legislative regulation because standing laws lack the needed wartime flexibility.

Lastly, one might cite history to support the idea that the President has exclusive control over military operations. Numerous founders said that the President could direct military operations. At the Philadelphia Convention, the New Jersey Plan would have granted the Executive the power to “direct[]... all military operations.”364 Delegate Pierce Butler spoke of the need for a unitary Executive, for a plural Executive might have to delegate the power “to direct... military operations.”365 Many speakers in the state conventions spoke in similar terms. James Iredell noted that the “secrecy, despatch, and decision, which are necessary in military operations, can only be expected from... [t]he President [who] is to command the military forces.”366 Charles C. Pinckney, a delegate to the Philadelphia Convention

362. See Lloyd N. Cutler, Op-Ed., Our Piece of the Peace; Sending Troops to Bosnia: Our Duty, Clinton’s Call, WASH. POST, Nov. 26, 1995, at C1 (“Congress needs to recognize that we cannot have 535 commanders-in-chief.”).


364. 1 RECORDS OF THE FEDERAL CONVENTION, supra note 54, at 300. Similarly, Alexander Hamilton apparently proposed that the Executive should “have the direction of war when authorized or begun.” Id. at 292. Robert Yates, his fellow New York delegate, quotes Hamilton as providing that the Executive would have the “sole direction of all military operations.” Id. at 300.

365. Id. at 92.

366. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 107; see also id. at 108 (noting that the President may command the militia when Congress summons it).
and a former general, noted that presidents ought to be eligible for reelection so that they might continue to "direct our military operations."\(^{367}\)

*Federalist Papers* authored by Alexander Hamilton repeatedly confirmed that the President would direct the military. *Federalist No. 69* observed that the 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."\(^{368}\) *Federalist No. 72* noted that "the arrangement of the army and navy, [and] the direction of the operations of war," fall within the Executive's purview.\(^{369}\) *Federalist No. 74* similarly claimed 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."\(^{370}\)

On this point, Anti-federalists agreed with their opponents, noting that the President would control the military and sometimes grumbling that the President might abuse his authority. George Mason objected that the Commander in Chief was "to command without any control."\(^{371}\) Robert Miller of North Carolina complained that the President would have great influence over the military "and was of [the] 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."\(^{372}\) One Anti-federalist, "Tamony," claimed that the President's "command of a standing army [would be] unrestrained by law or limitation."\(^{373}\)

The final historical claim might consist of the observation that early Congresses never directed military operations. One might insist that early Congresses 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 early Congresses understood that the Constitution nowhere authorizes Congress to direct particular military operations. In other words, early Congresses acted as if members

\(^{367}\) 2 id. at 315, 315–16.

\(^{368}\) THE FEDERALIST NO. 69 (Alexander Hamilton), supra note 36, at 417–18.

\(^{369}\) Id. No. 72, at 436.

\(^{370}\) Id. No. 74, at 447.

\(^{371}\) 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 498. Curiously, Mason previously said it was appropriate for the President to have "a general superintendency" of the armed forces, but he was worried about the President's ability to command in person. See id. at 496. For the same complaint voiced by another Philadelphia delegate, see Letter from Luther Martin to Thomas Cockney Deye, Speaker of the House of Delegates of Md. (1787), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 344, 378.

\(^{372}\) 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 114.

\(^{373}\) Tamony, To the Freeholders of America, VA. INDEF. CHRON., Jan. 9, 1788, reprinted in 8 RATIFICATION OF THE CONSTITUTION BY THE STATES 287 (John P. Kaminski & Gaspare J. Saladino eds., 1988).
understood that the direction of military operations rested exclusively with the President, or so one might assert.

B. The Case Against Exclusive Presidential Power Over Military Operations.

Despite the appeal of such arguments, they are unconvincing. The principal textual argument—insisting that the "Commander in Chief" must enjoy exclusive operational control—is belied by a host of materials. In the seventeenth and eighteenth centuries, there were hundreds of commanders in chief, none of whom had any exclusive powers.

First, as discussed earlier, England had numerous commanders in chief, none of whom had any exclusive military authority. To begin with, the President does not succeed to the Crown's military powers because the Crown was not known as the "Commander in Chief." Rather, the President enjoys authority akin to the English Commander in Chief of the British Army, an officer who was subservient to the Crown and Parliament. Indeed, by the eighteenth century, the Commander in Chief of the British Army lacked absolute control because Parliament had provided that the Commander in Chief needed to exercise authority in conjunction with civilians and other generals.\(^374\) Hence, the English Commander in Chief was not only subservient to the Crown, he sometimes needed the assent of others to make certain decisions. Moreover, the British Army had numerous sub-commanders in chief. It had regional commanders in chief for various theaters (for example, commander in chief for North America, commander in chief for Asia);\(^375\) it had colonial commanders in chief (e.g., Colonel George Washington, commander in chief of the Virginia militia in the French and Indian War);\(^376\) and finally, it had unit commanders in chief. As noted earlier, the phrase "commander in chief" was used to describe the highest officer within a particular Army unit. A "captain" was a "commander in chief of a company" of foot soldiers, horsemen, or dragoons.\(^377\) A colonel was "commander in chief of a regiment, either horse, foot, or dragoon[]."\(^378\) If all officers were commanders in chief of their units, it seems evident that commanders in chief were not regarded as enjoying any exclusive powers. After all, no one could imagine that a commander in chief of a regiment or

\(^374\). See THE OXFORD HISTORY OF THE BRITISH ARMY, supra note 285, at 146 (observing that the Commander in Chief shared military responsibilities with other officials and operated as principal military advisor to the Crown).

\(^375\). See id. at 364 (discussing the role of commanders in chief in India, Bengal, and Madras); Henry P. Beers, The Papers of the British Commanders in Chief in North America, 1754–1783, 13 MIL. AFF. 79, 79–82 (1949) (detailing the succession of the commanders in chief in colonial North America).


\(^377\). MILITARY DICTIONARY, supra note 287, at C5.

\(^378\). Id.
company would have any exclusive military powers, especially given the number of superior officers who might order (or countermand) them in any number of ways. More generally, all English commanders in chief lacked a sphere of independence because each was wholly subordinate to the Crown.

Second, during the Revolutionary War, America had numerous commanders in chief wholly subordinate to other entities, thus making it clear that Americans of that era did not regard commanders in chief as enjoying any exclusive power. The most famous commander in chief, George Washington, was subject to congressional direction throughout the War. Indeed, however much authority the Continental Congress conveyed to Washington, it never conveyed any authority not subject to correction and override. Washington was not the only Continental Army Commander in Chief, however, for Congress also created regional Army commanders in chief, who were subordinate to Washington and Congress, and a Naval Commander in Chief, who was subordinate to Congress. As with General Washington, Congress directed Commodore Ezek Hopkins in a host of ways. Congress, dissatisfied with the Commodore’s service, eventually

379. See SOFAER, supra note 237, at 20–21 (noting the Continental Congress’s instruction of Washington).

380. George Washington’s commission as Commander in Chief provided that he was “to regulate [his] conduct in every respect by the rules and discipline of war, . . . and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies.” 2 JOURNALS OF THE CONTINENTAL CONGRESS 96, 96 (Worthington Chauncey Ford ed., 1905) (entry for June 17, 1775).

381. See 7 JOURNALS OF THE CONTINENTAL CONGRESS 217, 218 (Worthington Chauncey Ford ed., 1907) (entry for Apr. 2, 1777); id. at 250, 252 (entry for Apr. 9, 1777) (both directing the commanders in chief to ensure soldiers and officers are fully compensated); 6 JOURNALS OF THE CONTINENTAL CONGRESS 962, 966 (Worthington Chauncey Ford ed., 1906) (entry for Nov. 19, 1776) (requiring commanders in chief to provide compensation for injured or sick officers); id. at 787, 799 (entry for Sept. 20, 1776); id. at 589, 599 (entry for July 22, 1776) (both directing commanders in chief to make prisoner exchanges, and making the commanders in chief answerable to the Continental Congress for neglectful behavior); 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 379, at 111, 112 (entry for June 30, 1775) (giving commanders in chief the option to discharge or retain soldiers and officers who do not subscribe to the rules and regulations of the Continental Army). Letters referenced these regional commanders in chief as well. See, e.g., Letter from Board of War to the Executive Committee (Feb. 7, 1777), in 6 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 229, 229 (Paul H. Smith ed., 1980) (describing General Philip Schuyler as commander in chief of the Northern Department); Letter from John Hancock to Philip Schuyler (July 24, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, supra, at 533, 533–34 (referencing the commander in chief of the Northern Department and noting that Congress authorized each of the commanders in chief to negotiate prisoner exchanges); Letter from Henry Laurens to Benjamin Lincoln (Nov. 16, 1778), in 11 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, supra, at 219, 219 (referencing the commander in chief of the “Southern Department”).

382. See 3 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 160, at 443, 443 (entry for Dec. 22, 1775) (naming Ezek Hopkins as Naval Commander in Chief on December 22, 1775); see also id. at 378, 378 (entry for Nov. 18, 1775); 20 JOURNALS OF THE CONTINENTAL CONGRESS 709, 711 (Gaillard Hunt ed., 1912) (entry for June 21, 1781); 21 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 82, at 1151, 1157 (discussing the Naval Commander in Chief). Since the Navy was quite small, at least initially, Hopkins’s office had a rather limited jurisdiction.

383. See, e.g., I GARDNER W. ALLEN, A NAVAL HISTORY OF THE AMERICAN REVOLUTION 128 (1913) (noting the Continental Congress’s instruction of the Naval Commander in Chief).
cashiered him, underscoring that he was not a free agent. Regarding state constitutions, Professors Barron and Lederman point out that many expressly made the state commanders in chief subject to legislative control. Apparently no state commander in chief was ever thought to have any exclusive, absolute military powers. Taken together, these materials from the Continental Congress and the states fairly prove that prior to the Constitution, there was no general sense that the various commanders in chief enjoyed any exclusive military powers. Instead, every American commander in chief prior to the Constitution's creation was subject to direction by other entities, be they superior commanders in chief, state legislatures, or the Continental Congress.

Third, the Constitution itself contemplates subordinate commanders in chief when it makes the President the Commander in Chief of the national militia. If the President called forth the militia pursuant to some statute, he would call forth the state militias, many of which already had commanders in chief. In creating a system where multiple state commanders in chief would be subordinate to the federal Commander in Chief, the Constitution itself incorporates the prevailing notion that the office of Commander in Chief does not necessarily include a sphere of exclusive power.

Fourth, Congress recognized that commanders in chief did not have any exclusive or absolute powers and could be subject to the orders of superiors. In the Militia Act of 1792, Congress recognized that the states had (and would continue to have) commanders in chief, all subject to the control of the federal Commander in Chief when their militias were summoned. Similarly, other federal statutes reference subcommanders in chief in the

384. Id. at 188.
385. See Barron & Lederman, supra note 9, at 780–85 (discussing how state commanders in chief had to exercise their functions subject to legislative direction).
386. Id. at 782.
387. See DEL. CONST. of 1776, art. IX (stating that the state president may act as "commander-in-chief" of the militia); GA. CONST. of 1777, art. XXXIII (stating that the Governor "shall be captain-general and commander-in-chief over all the militia"); MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. VII (stating the Governor shall be "the commander-in-chief of the army and navy, and of all the military forces of the State"); N.H. CONST. of 1784, pt. 2 (stating that "[t]he president of this . . . shall be commander in chief of the army and navy"); N.J. CONST. of 1776, art. VIII (stating that the Governor shall act as commander in chief of all the militia); N.Y. CONST. of 1777, art. XVIII (stating that the Governor shall be commander in chief of all the militia); N.C. CONST. of 1776, art. XVIII (stating that the Governor shall be commander in chief of the militia); PA. CONST. of 1776, § 20 (stating the state president shall be commander in chief of the "forces of the state"); S.C. CONST. of 1776, art. III (describing the state president also as the commander in chief); VT. CONST. of 1777, ch. 2, § 18 (stating that the "Governor shall be commander-in-chief of the forces of the State").
388. See Act of May 8, 1792, ch. 33, §§ 4, 6, 10, 1 Stat. 271, 272–74 (detailing the organization of state militias under the control of state commanders in chief but noting a duty to report to the President of the United States).
Army and Navy, each of whom must have been under the control of the Constitution’s Commander in Chief.

Fifth, President John Adams expressly made George Washington “Commander in Chief of all the armies” in 1799 as a means of revitalizing the Army for a possible land war against France. Neither Washington nor Adams supposed that the latter had thereby conferred upon the former any autonomy from the constitutional Commander in Chief. Washington’s commission provided that he served at Adams’s pleasure and that he was to “observe and follow such Orders and Directions from time to time, as he shall receive” from Adams and any future President.

In sum, early American usage and practice conformed to usage and practice in the mother country, with Americans quite familiar with multiple commanders in chief in a single branch of the military, each lacking a sphere of exclusive military powers. The President is Commander in Chief of the Army, Navy, and federalized militia in the same way that revolutionary commanders in chief, including Washington, served under the control of the Continental Congress and in the same way that English commanders in chief served under the Crown’s control. Though the Commander in Chief undoubtedly could direct the operations of the Army, Navy, and the militia, there is no support for the notion that the office of Commander in Chief necessarily includes exclusive military power.

The second textual argument rests on the claim that the vesting of the Executive power makes the President’s powers over the military exclusive. Though the best reading of Article II’s Vesting Clause recognizes that the grant of the Executive power cedes the President authorities beyond those vested in the remainder of the Article, there is no reason for supposing that

389. See Act of Mar. 2, 1799, ch. 24, §§ 6, 11, 1 Stat. 709, 716, 716–17 (discussing prize money to go to commanders in chief and rules or regulations made by “any commander in chief”); Act of Mar. 3, 1797, ch. 16, § 4, 1 Stat. 507, 508 (noting that the commander in chief is entitled to double the rations).


391. Id.

392. This more modest but still significant conception of the Commander in Chief authority continues. Until October 2002, the United States followed the British practice of having regional commanders in chief. See ROWAN SCARBOROUGH, RUMSFELD’S WAR: THE UNTOLD STORY OF AMERICA’S ANTI-TERRORIST COMMANDER 134 (2004) (noting that Defense Secretary Donald Rumsfeld banned the use of “commander in chief” to describe regional commanders because he asserted that the Constitution provided that there could be only one Commander in Chief). Notwithstanding their titles and their considerable regional authority, no one could have thought that these regional commanders had any autonomy vis-à-vis the Constitution’s Commander in Chief.

393. U.S. CONST. art. II, § 1, cl. 1.

394. For discussions of how best to read the Vesting Clause, see generally Calabresi & Prakash, supra note 13; Prakash, supra note 45; and Prakash & Ramsey, supra note 45.
it cedes the President any additional military powers or that it somehow ensures the exclusivity of the Commander in Chief’s military powers.

To construe the grant of the Executive power as ceding additional military powers or as transforming otherwise nonexclusive powers into exclusive powers is akin to reading the grant of the Executive power as ceding the President a general pardon power extending to impeachments, even though the specific pardon provision in Article II is clearly more limited.\(^\text{395}\) Perhaps more relevantly, it is akin to reading the grant of the Executive power as making the President the Commander in Chief of the militia at all times, even though the Commander in Chief Clause itself suggests that the President is Commander in Chief of the militia only when the latter is called into federal service.\(^\text{396}\) While it is common and natural to grant a power and then explain and qualify it with particular clauses,\(^\text{397}\) it is neither common nor natural to read a general grant of power as nullifying constraints found in provisions that are meant to refine and limit the general grant. To construe the Executive Power Clause as granting the Commander in Chief some measure of autonomy is to imagine that the Constitution conveys a familiar and limited power in one clause and simultaneously expands it beyond all recognition in another.

One should keep in mind that, although numerous individuals read the grant of the Executive power as a source of law-execution and foreign-affairs authorities,\(^\text{398}\) no one from the Founding Era claimed that the Executive power granted the President additional military powers beyond those implicit in the title Commander in Chief. This was true during the ratification fight and during the early post-ratification years. For all these reasons, the grant of the Executive power neither enlarges the President’s control over the military nor converts the Commander in Chief power that was traditionally subject to control and direction into an exclusive power.

The intertextual claim, the one that stresses Congress’s apparent loss of the power to “direct[] [military] operations,” seems powerful.\(^\text{399}\) Yet if we conclude that Congress may direct the military’s operations via its other powers, then it does not matter that the Constitution does not specifically
repeat this authority. In other words, the crucial question is whether Congress has the power to direct military operations via some other power that the Constitution grants. The power to make "Rules for the Government and Regulation of the land and naval Forces" subsumes a power to direct military operations. As we have seen, the terms "govern" and "regulate" indicate the powers to direct, manage, and rule. Hence, when Congress directs military operations, it is making rules for the government and regulation of the armed forces. This reading of the Government and Regulation power strongly suggests that the phrase "directing [military] operations" was seen as redundant. As such, it likely was not regarded as worth duplicating in the Constitution.

There are other minor differences between how powers are expressed in the Constitution and the Articles of Confederation—differences that should not be construed as implying a diminution of congressional power. Under the Articles, the Continental Congress had the power of "exacting such postage on the papers passing thro[ugh] the [post office] as may be requisite to defray the expenses of the said office." This grant of power is not found in the Constitution. Nonetheless, everyone understands that the power to create post offices and post roads includes such authority. In other words, the broader power of creating post offices and post roads includes the lesser power of charging postage for the delivery of mail. Likewise, Congress undoubtedly enjoys the power "of regulating the alloy of coins it mints, even though the Constitution omits that phrase found in the Articles of Confederation. The overarching point is that one must consider the scope and meaning of the powers that the Constitution affirmatively grants to Congress in order to discern whether the Congress continues to enjoy some power that the Articles of Confederation specifically conveyed upon the Continental Congress. When one does this, it becomes clear that Congress, as the successor of sorts to the Continental Congress, continues to have the power to direct military operations as part of its general power to make rules for the government and regulation of the armed forces.

The last textual argument suggests that though Congress can make generic military rules, that power differs greatly from the power to direct particular military operations. This argument supposes that "rules" must be of general applicability, while decisions involving the direction of military operations often will involve narrow judgments relevant only to particular operations, with no rule generated that would apply to future operations.

401. See supra text accompanying notes 170–71.
402. ARTS. OF CONFEDERATION art. IX.
403. See U.S. CONST. art. I, § 8, cl. 7 (granting Congress the power to "establish Post Offices and post Roads").
404. ARTS. OF CONFEDERATION art. IX.
405. See U.S. CONST. art. I, § 8, cl. 5 (granting Congress the power to "coin Money, regulate the Value thereof, and of foreign Coin").
Though this distinction between generally applicable military rules and particularized military directions has some appeal, it imposes no meaningful limits on congressional power. It seems unlikely that the Constitution implicitly would embrace a distinction that serves little or no real purpose.

To begin with, any attempt to distinguish between regulation of operations and the direction of operations seems rather elusive. When Congress precluded the use of galleys outside the United States,\(^{406}\) was that a permissible naval regulation or an unconstitutional attempt to direct particular operations? Likewise, when Congress limited the President's ability to call the militia into service for an extended tour,\(^{407}\) was that an appropriate regulation of the manner in which the militia could be called forth, or was it an unconstitutional encroachment on operational matters committed to the Commander in Chief? These questions suggest that there is no separate category of particularized operational control vested exclusively with the President.

Even if we were inclined to place faith in the distinction between generally applicable rules and particularized directions, we face rather severe difficulties in the real world. Consider the following situations. Congress wishes to prevent an Army division from retreating from a particular battlefield. If it quickly passes a statute that does no more than order the division to stand its ground, then the statute would be unconstitutional because it lacks the rule-like quality of generality. The statute does not apply to enough situations to be a rule, or so the argument goes. But suppose that Congress passes a categorical rule against all retreats that clearly applies to the situation that Congress is aware of and also applies to all manner of future battlefield scenarios. Under the distinction between rules and particularized directions, this statute is a permissible general rule relating to the government and regulation of the Army.

Now suppose that a week after the categorical "no retreat" rule became effective, and after it constrained the particular battlefield decision that gave rise to its enactment, Congress repeals the "no retreat" general rule. Is the former statute creating the no-retreat rule now unconstitutional merely because it did not last long enough for us to conclude that it had rule-like effects? Or suppose Congress passes a statute that, on its face, bans all battlefield retreats. But the statute also provides that it expires in a month. Is this statute not a general rule merely because it will lapse in a month?

It seems unlikely that any constitution would grant a legislature the power to direct military operations via general rules but simultaneously bar direction that occurs via a less rule-like statute. There seems little point in making this distinction, especially when Congress can circumvent it.

\(^{406}\) Act of May 4, 1798, ch. 39, § 2, 1 Stat. 556, 556.

\(^{407}\) Act of May 9, 1794, ch. 27, § 4, 1 Stat. 367, 367–68 ("[T]he said militia shall not be compelled to serve a longer time, in any one tour, than three months after their arrival at the place of rendezvous . . . .").
Perhaps more importantly, as discussed later, there is little reason to think that Congress either will be inclined or will be able to direct military operations in real time, making it unnecessary for the Constitution to bar congressional statutes that actually seek to command soldiers to retreat to certain positions and sailors to attack certain ports. In other words, because the evil of legislative micromanagement of battlefield assets is rather remote, it perhaps was unnecessary to mitigate the largely phantom problem.

The structural arguments about the difficulties associated with congressional micromanagement rest on mistaken assumptions. If the Constitution empowers Congress to direct military operations, the exercise of such authority does not give rise to 535 commanders in chief. When Congress acts via legislation, it does not speak with a cacophony of 535 voices, but rather through a single statute. For good reason, no one thinks that individual members, such as the Chair of the Senate Armed Services Committee, can direct military operations. Any argument that claims that there would be 535 commanders in chief if Congress could direct military operations mischaracterizes how Congress actually legislates.

Second, the Lockean argument against legislative regulation, one that suggests that war and military matters should not be subject to standing rules, imagines that Congress will vigorously exercise its Government and Regulation power, making all sorts of decisions best left to the military. But this power need not be exercised to the fullest extent. Members of Congress might agree with Locke’s claim and only sparingly use their power. Moreover, the argument assumes that a congressional power to direct military operations would be problematic. No one with a passing familiarity with the U.S. Code can doubt that Congress might enact foolish statutes. But the claim about potentially improvident congressional 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 systematically will 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 direction of military operations. Once we recognize that there always will be cases of executive mismanagement of wars, many might favor a congressional power to override particularly faulty decisions and to channel executive discretion.

We are left to address the historical arguments in favor of an exclusive presidential power over military operations. Undoubtedly, numerous founders noted that the President would direct the military. This should not be surprising because the Constitution makes the President the Commander in Chief, and commanders of various sorts direct military operations. But very few of these references to military operations actually speak to the issue of

408. See supra note 363 and accompanying text.
whether Congress can check or constrain this power by regulating the armed forces and militia. “Tamony’s” complaint that the Commander in Chief would be unrestrained by law and George Mason’s similar claim that the President would “command without any control” were refuted by George Nicholas. At the Virginia convention, 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.” 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 motions was answered the same day at the same North Carolina convention by Richard Dobbs Spaight. Spaight argued that Congress, “who had the power of raising armies, could certainly prevent any abuse of that [Commander in Chief] authority in the President,” suggesting that Congress might attach restrictive conditions on the operation of the army. Moreover, Miller’s complaint could be read as suggesting that while Congress could direct military operations, he wished such power had been “expressly”—that is, specifically—mentioned, as it had been in the Articles of Confederation. In other words, Miller’s complaint perhaps assumes that Congress can continue to direct military operations.

The other historical claim—that Congress has never regulated or directed military operations—does not withstand much scrutiny. As discussed at great length in Part IV, early Congresses directed military operations repeatedly. Among other things, Congress directed the use and placement of military hardware, the use and placement of soldiers and sailors, and the treatment of prisoners. In times of war, Congress decided where and what types of vessels to attack. Finally, 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

409. Tamony, supra note 373, at 287.
410. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 494–98.
411. See id. at 389–93 (arguing that the President would be given adequate control over the armed forces).
412. Id. at 391. Later, Nicholas would note that the Constitution mimicked the Virginia state constitution, which granted the Governor the sole command of the militia. See 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 because the Governor’s power was made subject to the “laws of the country.”
413. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 114.
414. Id. Spaight went on to suggest that the “direction of an army could not be properly exercised by a numerous body of men.” 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.
415. See supra subpart III(A).
416. See supra section III(B)(I).
marching of military columns, the instruction of recruits, and how to fire while advancing and retreating. No one should doubt that the manual regulated and directed military operations.

To sum up, there is no sound textual, structural, or historical basis for the conclusion that Congress lacks the power to regulate, and therefore direct, military operations. The Constitution’s text, which provides that Congress can make rules to govern and regulate the armed forces, does not create a sphere of exclusive presidential power over military operations. Similarly, structural arguments in favor of exclusive presidential control of operations are unpersuasive, in part because they mistakenly assume that Congress will vigorously exercise its power to direct military operations. Finally, the nation’s early history rather clearly demonstrates that Congress directed military operations in a host of ways.

C. Constraints on Congressional Direction of Military Operations

Though Congress directed military operations in a whole host of ways, it has never regulated certain aspects of military operations. To my knowledge, it has never ordered battlefield advances and retreats. Nor has it ever decided when soldiers ought to commence firing at the beginning of a particular military engagement. Does the absence of such micromanagement prove that Congress cannot direct at least some aspects of military operations?

Not at all. Numerous policy, institutional, and constitutional factors account for the absence of such congressional direction. To begin with, congressional forbearance likely reflects, at least in part, a welcome reluctance to micromanage certain aspects of military operations. Once again, regardless of what the Constitution actually permits Congress to do, members may see eye to eye with John Locke. They may agree that certain operational decisions are typically best left to the Commander in Chief and officers closer to the action. Legislators may realize that when rules are too detailed, they bar the flexibility necessary to deal with fluid circumstances. Military operations should not be scripted in advance, leaving nothing to the discretion of field commanders. That is true whether directions come from the White House or Capitol Hill. Moreover, should Congress enact incredibly detailed operational rules, it may find it rather difficult to change those rules in a timely manner. Congress is not always in session, whereas wars do not pause during congressional recesses. When one combines the disadvantages of “antecedent, standing, positive laws” with the difficulty of changing those laws quickly, it seems quite plausible that Congress has not micromanaged operations to a greater extent because legislators realized that detailed rules would be fraught with difficulties.

418. See supra note 363 and accompanying text.
419. LOCKE, supra note 363, at 383–84.
Of course, some decisions are so time sensitive that Congress is institutionally incapable of making them. Decisions like when to advance and when to retreat on a particular battlefield cannot possibly be determined by a legislative body far removed from the battlefield. For over two hundred years, it has been impossible for those miles from the battlefield (including presidents) to make such decisions. Even with today's technological advances, which permit almost instantaneous transmission of images and information, it would be impossible for a ponderous, bicameral legislative body to make battlefield decisions with the necessary alacrity. Congress will never be able to dictate that a particular Army platoon advance or retreat.

Consider the following illustration of the difficulties associated with congressional micromanagement. Congress comes to learn that a naval armada is about to attack an enemy port. Members conclude that the port is not a useful target, and they move Congress to enact a law barring the attack on the port. As everyone understands, enacting a law can take a good deal of time. Even if standing committees are bypassed, both chambers must agree to the exact same text. Moreover, the Presentment Clause guarantees that the President has ten days to consider any bill passed before either vetoing it or permitting it to become law. Any President who wishes to undermine congressional direction of military operations may issue contrary orders at any point from the time Congress considers the bill until the time the bill becomes law. Hence, between the time members of Congress propose a bill and the time it becomes law, almost two weeks might have elapsed.

Apart from the time necessary to pass a bill, the President's veto power makes it rather difficult for Congress to direct particular operations. Should Congress try to order a retreat on a particular battlefield, the President surely will veto the measure. The recent difficulties with trying to set statutory timelines for the withdrawal of troops from Iraq vividly demonstrate the obstacles Congress will face in micromanaging military operations. In most circumstances, a veto will preclude legislation that the President opposes because of the difficulty in securing the two-thirds support in each chamber necessary to override the veto. Rare is the case where the

422. See U.S. CONST. art. I, § 7, cl. 2. The Presentment Clause sets out the veto and veto-override procedures:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the
President will be unable to round up the support of an override-proof minority in one chamber.\textsuperscript{423}

For all these reasons, the Presentment Clause’s features make it well nigh impossible for Congress to direct military operations in real time. Its legislative powers are suited to the creation of general rules applicable to situations not yet contemplated. Those powers are rather ill-suited to deal with particular situations because the time necessary to enact rules often will preclude their application to the particular situation that led to the rules’ creation. Put another way, the more fluid the situation, the less useful legislative power will be. There arguably is no more fluid situation than a battlefield, which ensures that ongoing congressional direction of particular operations, such as battlefield advances and retreats, will be nonexistent.

Consistent with the claim that the veto power greatly constrains legislative direction of the military, George Washington’s second (and last) veto applied to a bill that sought to disband Army dragoons.\textsuperscript{424} 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.\textsuperscript{425} His view prevailed and the horse-mounted units were not disbanded.\textsuperscript{426} Washington’s veto highlights the Commander in Chief’s ability to constrain congressional direction and control of the military.

A host of constitutional provisions likewise limit Congress’s ability to direct military operations. To begin with, the Commander in Chief Clause itself limits congressional power, because Congress cannot create independent admirals, generals, or military agencies. If Congress could make segments of the Army and Navy independent of the President, the President would be Commander in Chief of only a portion of the Army and Navy, rather than the entire Army and Navy. Moreover, 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. Similarly, Congress cannot create an independent military department and vest it with the authority to decide what a war’s

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\textsuperscript{*} Recognizing that the President is likely to veto stand-alone legislation that micromanages a war, members of Congress likely will add other legislative proposals to the bill—proposals that the President favors. In this situation, the President will have to decide whether to take the bitter with the sweet.

\textsuperscript{424} See George Washington, Veto Message (Feb. 28, 1797), in supra note 134, at 211, 211 (informing Congress of the reasons motivating his veto).

\textsuperscript{425} Id.

\textsuperscript{426} See 2 JOURNAL OF THE HOUSE OF REPRESENTATIVES, supra note 119, at 727, 728–29 (entry for Mar. 1, 1797) (recording the House’s failure to override Washington’s veto by a vote of 55 to 36); see also Act of Mar. 3, 1797, ch. 17, 1 Stat. 508 (lacking a provision disbanding dragoons).
objectives will be and whether certain ships should be used in a war. Whatever concurrent military powers Congress elects not to exercise, it must leave with the Commander in Chief.

The Constitution's impeachment provisions likewise limit congressional power over the Commander in Chief because they effectively bar Congress from treating the Commander in Chief as an at-will employee. During the Revolutionary War, removal of the Army Commander in Chief was a distinct possibility, as some members of the military and Congress conspired to have George Washington removed after various military setbacks.\(^4\) Such removal would have been possible for any reason and could have occurred by a simple majority vote in the unicameral Continental Congress. Indeed, the Continental Congress actually removed the Naval Commander in Chief based on his incompetence.\(^4\) Under the Constitution, however, the only means of removing the Commander in Chief is quite daunting. The House must impeach and two-thirds of the Senate must find the Commander in Chief guilty of a high crime or misdemeanor.\(^4\)

The Appointments Clause also constrains congressional power. Under the Articles of Confederation, Congress could appoint all military officers, including all those generals who served in the Revolutionary War alongside the Commander in Chief.\(^4\) Using its authority, Congress forced Washington to work with numerous generals whom he regarded as inadequate and a number of others who were his rivals and coveted his job as Commander in Chief.\(^4\) Under the Constitution, the Commander in Chief may nominate all military offices.\(^4\) Moreover, no one can occupy a military office without the President's continued approval because the President may

\(^{427}\) Some members of Congress wished to have Washington replaced by General Horatio Gates. EDWARD G. LENGEL, GENERAL GEORGE WASHINGTON 276–78 (2005).


\(^{429}\) U.S. CONST. art. I, § 3, cl. 6; id. art. II, § 4.

\(^{430}\) See ARTS. OF CONFEDERATION art. IX (bestowing Congress with the power to appoint "all officers of the land forces, in the service of the United States, excepting regimental officers," and "all the officers of the naval forces").


\(^{432}\) In truth, the Constitution creates a default rule of presidential nomination and then appointment by the President after the Senate confirms. For so-called inferior officers, including inferior military officers, Congress may vest the appointment of such officers in the department heads, the courts of law, or the President. The Constitution specifically provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.
remove any incumbent officer. So Commanders in Chief can never be forced to work alongside subcommanders in whom they lack confidence. Unlike the Continental Congress, the current Congress cannot foist unwanted subordinates upon the Commander in Chief.

The Opinions Clause suggests something about the scope of presidential power. Though the British Commander in Chief of the late eighteenth century had to act in conjunction with civilians and other generals, Congress cannot require the President to seek the advice and consent of others prior to making decisions. The Clause itself hints that the President has the right, but not the obligation, to consult the heads of the executive departments. Moreover, the presence of certain situations where the President must receive the consent of a portion of Congress (the Senate) suggests that these are the only times that the Constitution requires the President to consult with others prior to taking some action. Should Congress try to oblige the President to consult with others prior to exercising the Commander in Chief authority, Congress would be impinging upon an implied limitation on its own ability to regulate the armed forces. This constraint on the procedures that Congress might impose upon the Commander in Chief’s exercise of his military powers eliminates the possibility that Congress might require consultation with a military council. Though George Washington believed he had to consult with a council pursuant to a Continental Congress resolve, any such requirement would be improper under the Constitution. Congress cannot displace the unitary Commander in Chief with a plural “Commander Council” that would check the President’s exercise of his military powers.

Finally, the President’s pardon power acts as a check on congressional power to punish soldiers and sailors. Under the Constitution, the President may pardon all federal offenses, including military offenses. So while Congress may criminalize certain military conduct, the President has the ability to pardon those who violate such rules. Likewise, the President has the same ability to decline to prosecute he enjoys in the civilian context. For

433. See supra notes 315–18 and accompanying text.
434. U.S. CONST. art. II, § 2, cl. 1 (providing that the President may “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices”).
435. Cf. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 55, at 110 (recording future Supreme Court Justice James Iredell’s position that the President may ask for advice but must take responsibility for any decision made).
436. See 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 379, at 100, 101 (entry for June 20, 1775) (authorizing Washington to use his discretion and suggesting that he consult with a “council of war”). Washington apparently believed that he had to consult with the council. Congress eventually said it never meant to require Washington to consult with a council of war. 7 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 380, at 196, 196–97 (entry for Mar. 24, 1777). For a general discussion of this ambiguity, see Barron & Lederman, supra note 9, at 778–80.
437. U.S. CONST. art. II, § 2, cl. 1 (“[The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).
instance, the President may decide that a military trial would serve no purpose because a deserting soldier had already suffered enough humiliation. Obviously, decisions to pardon and to decline to prosecute would tend to weaken the effects of congressional criminalization of military offenses.

All in all, the President’s other constitutional powers have a significant bearing on the President’s practical control over military operations. The President can delay and veto intrusive congressional micromanagement; can exercise tremendous influence over who gets appointed and who continues to serve as officers in the armed forces; and may mitigate any harsh punishments that Congress chooses to enact. Though these constitutional constraints do not arise from the Commander in Chief Clause, they nevertheless ensure that the President will enjoy tremendous discretion over military operations. For all these reasons, no future Commander in Chief likely will ever face the rather extreme level of micromanagement that plagued the Commander in Chief of the Continental Army.

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

Thus far, we have assumed that 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 passes laws ordering the Army to fight and the President commands soldiers to remain in their barracks, the laws take precedence. We might call this “horizontal supremacy” to distinguish it from the vertical supremacy that makes state constitutions and statutes subordinate to their federal counterparts. Because some might deny horizontal supremacy, a short justification seems necessary.

The Constitution does not clearly enunciate the principle of horizontal supremacy, but the principle has its undoubted appeal. To say that Congress can legislate over matters—be it the Army’s 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 such 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.

Second, the Constitution makes constitutional laws part of the “supreme Law of the Land,” which means that they take precedence over all contrary laws.

438. See U.S. Const. art. II, § 3, cl. 1 ("[The President] shall take Care that the Laws be faithfully executed. . .").

439. When confronted with unconstitutional laws, the President may disregard them. For a general defense of this assertion, see Saikrishna Bangalore Prakash, The Executive’s Duty to Disregard Unconstitutional Laws, 96 Geo. L.J. 1613 (2008).
constitutions, laws, proclamations, directives, and rules—whatever their origin.\textsuperscript{440} Hence, even if Congress and the President have concurrent power over a particular matter, the Supremacy Clause gives us strong reason to suppose that congressional statutes take precedence over presidential rules because while the former are part of the "supreme Law of the Land," the latter are not. No one can be punished for failure to adhere to executive orders precisely because they are not law. All the President can do is remove officers who disobey. Presidential directives and rules can have the force of law only if Congress provides that they should have such effect.

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 Branch. As we have seen, Parliament enacted articles of war, prohibited the deployment of the army in peacetime England, and barred the use of the armed forces to defend foreign possessions of a foreign-born Crown.\textsuperscript{441} Each of these statutes trumped any inconsistent executive orders. 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 principle. People perhaps understood that when Congress and the President have concurrent, overlapping powers, statutes take precedence whenever there is a conflict with executive directives. We see something similar in the overlap of judicial and legislative powers. Both the Judiciary and Congress can create rules relating to who may practice law before the federal courts.\textsuperscript{442} But should there be a conflict between the two, the congressional statute trumps.

Early American history supports this horizontal supremacy. Congress often regulated military matters where the President was understood to have concurrent power.\textsuperscript{443} In those situations, Congress and the President recognized 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. This would make the law somewhat pointless, for the President could override it with ease. 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 to countermand or overcome a statute.

\textsuperscript{440} The Constitution makes federal laws, treaties, and the Constitution supreme, and then it mentions certain things that are to be ignored if they conflict with the supreme law. U.S. CONST. art. VI, cl. 2. 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.
\textsuperscript{441} See supra text accompanying notes 125–28, 158–59.
\textsuperscript{442} Ex parte Garland, 71 U.S. (1 Wall.) 333, 379–80 (1866).
\textsuperscript{443} See supra subparts IV(A)–(B).
Horizontal supremacy hardly implies that every congressional statute trumps every exercise of executive or judicial power. The fundamental 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 has exercised a concurrent power. One can regard this limited congressional primacy on matters of overlapping power as a rather limited version of eighteenth-century English parliamentary supremacy. Congress has legislative supremacy over all matters committed to it, no matter who else might have concurrent authority.

E. The Commander in Chief Power as a Residual Power

Having spent a good deal of time discussing what powers the Commander in Chief has and what kind of authority the Commander in Chief lacks, a review will be helpful. The Commander in Chief enjoys what one might call a residual military power. It is residual in two different senses. First, 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 fine or imprison soldiers who disobey his orders. These powers, along with the others discussed in Part II, form no part of the Executive power vested with the President by Article II, Section One.

The President’s power as Commander in Chief is residual in another sense, namely that whatever concurrent military power that Congress elects not to exercise rests with the Commander in Chief. As discussed earlier, should Congress generically declare war and not limit the use of heavy artillery, the President may decide whether its use would best secure victory over the enemy. Likewise, should Congress authorize a general naval war, the President may decide how to deploy the Navy to defeat the enemy.

Put another way, the President lacks exclusive military powers. The President lacks the sole power to decide when and how to deploy military assets. Nor does the President 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 attempt to make all meaningful operational decisions, overriding the President’s preferences.

Despite the residual nature of presidential power, there remain significant constraints on congressional power over the military. As noted earlier, Congress cannot treat the Commander in Chief as an at-will employee; it cannot create independent military officers or agencies; it cannot force the Commander in Chief to use officers that lack his confidence; and it cannot require the Commander in Chief to consult others prior to exercising his constitutional powers. Finally, presentment and the veto power ensure that many potential congressional restraints on operations will never become law or will become law only after they can no longer be applied to the particular situation that moved Congress to enact a law.
In many ways, this conception of Commander in Chief authority mirrors the original understanding of the President's power as Chief Executive. Notwithstanding the Constitution's grant of the Executive power and despite the President's status as the federal Chief Executive, the President must abide by congressional micromanagement of the execution of the laws. Congress can instruct the President that government buildings be completed on a strict schedule. Congress can order the President to report the number of prosecutions brought each year. Congress can require the President to make particularized findings prior to taking certain actions, such as a finding that there is a disaster prior to accessing federal disaster funds.

Notwithstanding such micromanagement, however, the President has the constitutional authority to fill in the details of law execution. 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 to 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—the constitutional executor of the law—the President may fill in those details.

Similarly, no matter how intrusive congressional micromanagement is, there will always be a great deal of discretion left for the Commander in Chief. Given the institutional and constitutional constraints on lawmaking plus the reluctance of many members of Congress to micromanage operational matters, the Constitution virtually guarantees that the Commander in Chief will have a great deal of autonomy over most military matters. We need not lose sleep over the specter of Congress erecting a map room, moving toy military assets across military maps, and then regularly voting to move real military assets on real battlefields.

VI. Conclusion

When it comes to war and military powers, the Constitution erects a remarkable system. Certain military powers belong exclusively to Congress, such that the President has no constitutional right to exercise them. Most significantly, the President cannot declare war. Nor can the President 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 has broad power to regulate and govern the military. Indeed, early Congresses dictated how long militia members could serve, where vessels could sail, and where soldiers had to be stationed. Likewise, Congress dictated the type of war to be waged, the proper objects of attack,

and where attacks could take place. In short, there were no subject-matter limits on congressional direction of the military during peace and wartime.

As Commander in Chief, the President has significant residual military powers that overlap with the aforementioned powers. They are residual because the President lacks many of the war and military powers long associated with executive power that under the Constitution are exclusively granted to Congress. They are residual also because Congress may enact statutes that reduce the scope of executive discretion over the military. Though the President lacks exclusive control over any military subject matter, there are a number of checks, both institutional and constitutional, that limit congressional micromanagement of the military, thereby ceding the Commander in Chief a large measure of military discretion. These features of presidential military power ensure that the Commander in Chief is neither a military dictator nor a cipher. Rather, the Constitution creates a powerful Commander in Chief, who is nonetheless a servant of the law.