

HARVARD LAW REVIEW

© 2008 by The Harvard Law Review Association

ARTICLE

THE COMMANDER IN CHIEF AT THE LOWEST EBB —
A CONSTITUTIONAL HISTORY

David J. Barron & Martin S. Lederman

TABLE OF CONTENTS

I. INTRODUCTION944

II. FROM RATIFICATION THROUGH THE ANTEBELLUM PERIOD951

 A. *The Backdrop of the Laws of War*.....952

 B. *The Washington Administration: Organization of the Military Establishment
 and the Calling Forth of the State Militia*.....955

 1. Statutory Regulation of the Use of Military Force955

 2. Statutory Regulation of the Military Establishment956

 (a) The Nature of Congressional Regulations of the Military Establishment957

 (b) Executive Branch Responses to Detailed Congressional Regulation of
 the Military Establishment958

 3. Statutory Regulation of the Use of the Militia961

 4. Conclusion964

 C. *The Adams Administration and the Quasi-War with France*964

 1. Legislative Action in the Run-up to the Quasi-War965

 2. The Supreme Court Enforces the New Legislation967

 3. Additional Legislative Restrictions Arising Out of the Quasi-War970

 4. Conclusion972

 D. *The Jefferson Administration*973

 E. *The War of 1812*977

 F. *The Antebellum Era*.....980

 1. Continued Legislative Regulation981

 2. Antebellum Constitutional Treatises.....981

 3. Executive Branch Views in the Antebellum Period984

 (a) Preclusive Superintendence Prerogatives984

 (b) Preclusive Substantive Powers986

 (c) Fillmore’s Equivocal Discussion of Preclusive Substantive Powers988

 4. The 1852 Troop Deployment Debate in the House of Representatives.....991

 5. Conclusion993

III. THE CIVIL WAR AND ITS AFTERMATH.....	993
A. <i>The Laws of War and the Lieber Code</i>	994
B. <i>Lincoln's Assertion of Executive Prerogatives in the Spring of 1861</i>	997
1. Suspension of the Writ.....	998
2. Expending Unappropriated Funds To Raise Troops.....	1001
3. Secret and Unauthorized Expenditures to Private Persons To Raise Troops.....	1002
4. Conclusion.....	1003
C. <i>The Habeas Corpus Act of 1863</i>	1005
1. Congress Gives the President Less than He Wants.....	1005
2. The President Responds and the Supreme Court Weighs In.....	1006
D. <i>The Great Congressional Debate over the Confiscation Act of 1862</i>	1009
1. The Run-up to the First Confiscation Act.....	1009
2. The First Confiscation Act and the Fremont Affair.....	1009
3. The Second Confiscation Act.....	1010
4. The Debate Over the Second Confiscation Act.....	1011
5. Lincoln's Response.....	1015
E. <i>Regulating Military Dismissals and Tribunals</i>	1017
F. <i>After Lincoln: The Emergence of the Preclusive Power Argument</i>	1018
1. The Chase Dictum.....	1018
2. Pomeroy's Treatise.....	1019
3. Political Branch Practice in the War's Aftermath.....	1022
G. <i>Conclusion</i>	1024
IV. FROM POST-RECONSTRUCTION THROUGH THE GENEVA CONVENTIONS	
OF 1949.....	1025
A. <i>The Increasing Importance of Treaty-Based Constraints</i>	1028
B. <i>From Reconstruction to the Progressive Era</i>	1031
1. Statutory Regulations of Appointment, Promotion, and Dismissal.....	1031
2. Regulations of the Use of Military Force.....	1032
C. <i>Political Branch Practice from 1900 to 1939</i>	1034
1. The Theodore Roosevelt Presidency.....	1035
2. Early Twentieth-Century Opinions of the Attorney General.....	1037
3. (Former) President Taft Weighs In.....	1039
4. The Wilson Administration and the Era of Isolationism.....	1040
D. <i>The Administration of Franklin Roosevelt and World War II</i>	1042
1. The Torpedo Boats and the Destroyers Deal Before the War.....	1043
2. The Deployment to Iceland Before the War.....	1048
3. <i>Ex Parte Quirin</i>	1051
E. <i>Conclusion</i>	1055
V. THE MODERN ERA.....	1056
A. <i>The Truman Administration</i>	1059
1. Preclusive Powers Concerning Deployment of Forces.....	1060
2. Military Impoundments.....	1062
B. <i>Nixon, Ford, and the War in Indochina</i>	1064
1. Congress's Restrictions on the Use of Force in Indochina.....	1065
2. President Nixon's Legal Response.....	1067
3. The War Powers Resolution.....	1070

4. President Ford and the Rescues in Southeast Asia.....	1071
5. The Ford Administration, Angola, and FISA	1074
C. <i>The Carter Administration and FISA</i>	1077
D. <i>The Reagan Administration</i>	1079
1. Restrictions on the Use of Force in Lebanon and the War Powers Resolution.....	1080
2. Regulation of Covert Actions and the Iran-Contra Affair	1081
E. <i>Bush 41: Aggressive Expansion of Preclusive Claims</i>	1084
1. Objections to Regulations Concerning National Security Information	1085
2. Objections to Statutes Regulating the Manner of Deploying the Armed Forces.....	1086
F. <i>The Clinton Administration</i>	1088
1. Acceptance of Congressional Restrictions.....	1089
2. Invocations of Preclusive Powers.....	1091
(a) The U.N. Command Legislation	1091
(b) Legislation Regulating Foreign Deployments.....	1093
G. <i>The George W. Bush Administration</i>	1095
H. <i>Conclusion</i>	1098
VI. BRINGING OUR CONSTITUTIONAL TRADITION TO BEAR ON DISPUTES AT THE LOWEST EBB.....	1099
A. <i>The Superintendence Prerogative</i>	1102
B. <i>The Substantive Preclusive Prerogatives of the Commander in Chief</i>	1106
VII. CONCLUSION	1111

THE COMMANDER IN CHIEF AT THE LOWEST EBB —
A CONSTITUTIONAL HISTORY

David J. Barron* & Martin S. Lederman**

Over the past half-century, discussions of constitutional war powers have focused on the scope of the President's "inherent" power as Commander in Chief to act in the absence of congressional authorization. Professors Barron and Lederman argue that attention should now shift to the fundamental question of whether and when the President may exercise Article II war powers in contravention of congressional limitations, when the President's authority as Commander in Chief is at its "lowest ebb." This Article is the second part of a two-part effort to determine how the constitutional argument concerning such preclusive executive war powers is best conceived.

In the companion Article, Professors Barron and Lederman described the structural forces responsible for this shift in the ground of debate and demonstrated that evidence from the Founding era does not reveal an original understanding that the Commander in Chief enjoyed preclusive authority over matters pertaining to warrmaking. In this Article, they move the story forward and systematically examine how the three branches have actually considered and treated this issue from 1789 to the present day. They examine those cases in which the President has asserted or relied upon a claim of preclusive war powers. They also review the discussions of this issue that have appeared in Supreme Court opinions; in major debates on the floor of Congress; and in the leading constitutional and war powers treatises, articles, and books of the past two centuries.

This historical review shows that the view embraced by most contemporary war powers scholars — namely, that our constitutional tradition has long established that the Commander in Chief enjoys some substantive powers that are preclusive of congressional control with respect to the command of forces and the conduct of campaigns — is unwarranted. In fact, Congress has been an active participant in setting the terms of battle and the conduct and composition of the armed forces and militia more generally, while the Executive (at least until recently) generally has accepted such legislative constraints as legitimate. Although history is not dispositive of the constitutional question, legislators and executive branch actors should not abandon two hundred years of historical practice too hastily, and should resist the new and troubling claim that the Executive is entitled to unfettered discretion in the conduct of war.

I. INTRODUCTION

The Administration of George W. Bush has boldly argued that the President, in his capacity as Commander in Chief, has the constitutional authority to disregard many laws that impinge upon his discretion to prosecute armed conflicts in the manner he deems best. This contention has precipitated as serious a separation of powers conflict as any in recent decades. Many critics have responded incredu-

* Professor of Law, Harvard Law School.

** Visiting Professor of Law, Georgetown University Law Center.

lously to the President's assertion. Others have argued that it accords with the views of the Framers and the practices of Chief Executives throughout our history. In consequence, the key issue in the debate over constitutional war powers is no longer — as it had been for the second half of the twentieth century — the extent of the President's authority to act when Congress has been silent. War powers disputes now increasingly turn on the constitutional issues raised when Congress imposes limitations and, as Justice Jackson famously opined in his concurrence in the *Steel Seizure Case*, the President's authority is at its "lowest ebb."¹

In a companion Article, we described many of the structural forces responsible for this shift in the ground of debate.² Collectively, they strongly suggest that the prevailing paradigm of congressional abdication — developed at a time when bold claims of presidential authority to act without express legislative approval occasioned all the attention — no longer illuminates the main battle lines in constitutional struggles over the exercise of war powers. Among the most important of these forces is the peculiar nature of the war on terrorism. Its unusual entwinement with the home front, its heavy focus on preemptive action and intelligence collection, and its targeting of a diffuse, non-state enemy, all guarantee that presidential uses of force are likely to be conducted for years to come in a context that is thick with statutory restrictions. But even beyond the war on terrorism, the "lowest ebb" issue is likely to take on added significance, if only because of the increased willingness of Presidents to deploy force abroad. There is mounting evidence that the reduction in legislative participation at the front end of these conflicts is being counterbalanced to some extent by a legislative willingness to intervene at the back end if the campaign goes poorly or if the public begins to doubt certain of the President's decisions about how it should be prosecuted.

Once the question of the constitutionality of statutory limitations on executive war powers takes center stage, a paradox immediately presents itself. As we explained in our previous Article, the Bush Administration's striking assertions of preclusive powers³ are ultimately predicated on a basic proposition that even its critics have generally taken for granted. There is a venerable scholarly consensus that Congress is constitutionally disabled from using its Article I war powers to limit the President's "tactical" options in wartime, or, put otherwise, to "interfere[] with the command of the forces and the conduct of cam-

¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

² 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, 712–20 (2008).

³ We explain our use of the adjective "preclusive" in *id.* at 694 n.6.

paings.”⁴ In order to properly assess the justification for, and possible limits of, executive branch assertions of preclusive war powers, we argued, one must undertake a more careful and less reflexive examination of that key premise.

In taking up that challenge, we have focused our efforts on filling a striking gap that exists in the literature. The common historicist framing of war powers scholarship over the past half-century has overwhelmingly focused on a single question: it has exhaustively parsed the meaning of more than two centuries’ worth of public utterances and actual constitutional practices pertaining to the President’s authority to use force and otherwise deploy troops abroad without legislative pre-approval.⁵ In stark contrast, history has largely been neglected — or, at most, invoked only superficially — as a source of guidance in determining the extent of the President’s preclusive power to act in *contravention* of legislative restrictions on his authority as the Commander in Chief. We set forth in these two Articles, therefore, a comprehensive examination of this issue.

Our previous Article showed how a full accounting of the Founding era’s view of the issue points against the notion that such a preclusive power inheres in the office of a “Commander in Chief.” Aside from the President’s prerogative of superintendence over the armed forces and the federally conscripted militia, the evidence does not reveal an original understanding that the Commander in Chief enjoyed preclusive authority over matters pertaining to warmaking. Indeed, some of this evidence reflects an understanding that Congress could control the Commander in Chief by statute even as to such clearly tactical matters as the movement of troops.

In this Article, we move the story forward and systematically examine how the political branches have actually considered and treated the legislature’s power to regulate the President’s “command of the forces” and the “conduct of campaigns,” from 1789 to the present day. We examine every instance we could find in which the President has purportedly asserted or relied upon a claim of preclusive war powers. We also review the discussions of this issue that have appeared in Supreme Court opinions and in major debates on the floor of Congress.⁶ Finally, we consider the treatment of such preclusive powers in the

⁴ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) (“[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns” (first omission in original) (quoting *Milligan*, 71 U.S. (4 Wall.) at 139)).

⁵ For a collection of sources operating within this framework, see Barron & Lederman, *supra* note 2, at 699 n.20.

⁶ There have been numerous such legislative debates, but we have restricted our focus to those occasions where the debate was joined in some substantial degree.

leading constitutional and war powers treatises, articles, and books of the past two centuries. This approach leads us to discuss the constitutional law of war powers in a wide range of military conflicts, stretching from the Washington Administration through the current Bush Administration.⁷

The story that emerges, which we set forth chronologically, is hardly a simple tale of invariant agreement among the relevant actors or of clear progression in favor of the authority of either the President or the Congress. Nevertheless, a fairly coherent, yet we believe only dimly understood, narrative emerges. This history warrants much closer attention than it has traditionally received. That is not only because it contains fascinating and long-forgotten stories of how Presidents, executive branch legal advisors, legislators, Justices, and scholars thought about parallel struggles that now recur in modern dress. The narrative also casts the current debates in a much fuller context and exposes the limitations of many of the claims and assumptions that often structure them.

Specifically, the history shows that the legislative abdication paradigm is not only ill-suited to the present moment but severely overdrawn insofar as it purports to describe longstanding practice. As much as Congress may have ceded ground over the last two centuries when it comes to the President's unilateral power to use military force and deploy troops, Congress has been an active participant in setting the terms of battle (and the conduct and organization of the armed forces and militia more generally), to an extent that war powers scholarship has not fully acknowledged. However familiar may be the adage that the legislature may not "interfere[] with the command of the forces and the conduct of campaigns," Congress historically has not *acted* in accord with it. Throughout its history, Congress has in effect rejected the idea that "[w]ar is too difficult to plan for with fixed, antecedent legislative rules,"⁸ and has even tried to manage the conduct of particular wars once they were under way by enacting statutes that were, in effect, attempts to second-guess or pretermite the President's judgments. If anything, the congressional willingness to enact such laws has only increased during the very period in which the abdication paradigm has taken hold. Thus, to the extent post-Founding practices of the political departments supply "the gloss which life has

⁷ Because our focus is on the "lowest ebb" question, rather than on the development of constitutional war powers in general, we do not discuss every military conflict in that span. We touch only fleetingly, for example, on such major conflicts as World War I and the Spanish-American War, because it appears that no great issue concerning Congress's powers to restrict the Commander in Chief arose during those engagements.

⁸ John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 592 (2007).

written” upon the open-ended textual cues of the Constitution,⁹ those practices do not reveal a consensus in Congress that there is an infeasible Commander in Chief prerogative respecting the direction of military force and the conduct of campaigns. Indeed, in sharp contrast with Congress’s substantial acquiescence to the assertion of some executive power to employ military force unilaterally, the legislature has not acceded, pragmatically, to the Executive’s preferred resolution of the separation of powers disputes concerning control of the actual conduct of campaigns.¹⁰

In addition to offering important guidance concerning the congressional role, our historical review also illuminates the practices of the President in creating the constitutional law of war powers at the “lowest ebb.” Given the apparent advantages to the Executive of possessing preclusive powers in this area, it is tempting to think that Commanders in Chief would always have claimed a unilateral and unregulable authority to determine the conduct of military operations. And yet, as we show, for most of our history, the presidential practice was otherwise. Several of our most esteemed Presidents — Washington, Lincoln, and both Roosevelts, among others — never invoked the sort of preclusive claims of authority that some modern Presidents appear to embrace without pause. In fact, no Chief Executive did so in any clear way until the onset of the Korean War, even when they confronted problematic restrictions, some of which could not be fully interpreted away and some of which even purported to regulate troop deployments and the actions of troops already deployed.

Even since claims of preclusive power emerged in full, the practice within the executive branch has waxed and waned. No consensus among modern Presidents has crystallized. Indeed, rather than denying the authority of Congress to act in this area, some modern Presidents, like their predecessors, have acknowledged the constitutionality of legislative regulation. They have therefore concentrated their efforts on making effective use of other presidential authorities and insti-

⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

¹⁰ Of course, even where the political branches have long embraced a practical understanding, that would not necessarily settle the constitutional question, as the *Steel Seizure Case* itself indicates. *See id.* at 588–89 (majority opinion) (“It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution ‘in the Government of the United States, or any Department or Officer thereof.’”). The Supreme Court has suggested, for example, that if the pattern of practice is one of “recent vintage,” it is generally much less probative of the Constitution’s meaning. *See Printz v. United States*, 521 U.S. 898, 917–18 (1997); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) (stating that the Court’s constitutional inquiry “is sharpened rather than blunted” when a questionable practice of the political branches is “appearing with increasing frequency”).

tutional advantages to shape military matters to their preferred design.¹¹ In sum, there has been much less executive assertion of an inviolate power over the conduct of military campaigns than one might think. And, perhaps most importantly, until recently there has been almost no actual defiance of statutory limitations predicated on such a constitutional theory.

This repeated, though not unbroken, deferential executive branch stance is not, we think, best understood as evidence of the timidity of prior Commanders in Chief. Nor do we think it is the accidental result of political conditions that just happened to make it expedient for all of these Executives to refrain from lodging such a constitutional objection. This consistent pattern of executive behavior is more accurately viewed as reflecting deeply rooted norms and understandings of how the Constitution structures conflict between the branches over war. In particular, this well-developed executive branch practice appears to be premised on the assumption that the constitutional plan requires the nation's chief commander to guard his supervisory powers over the military chain of command jealously, to be willing to act in times of exigency if Congress is not available for consultation, and to use the very powerful weapon of the veto to forestall unacceptable limits proposed in the midst of military conflict — but that otherwise, the Constitution compels the Commander in Chief to comply with legislative restrictions.

In this way, the founding legal charter itself exhorts the President to justify controversial military judgments to a sympathetic but sometimes skeptical or demanding legislature and nation, not only for the sake of liberty, but also for effective and prudent conduct of military operations. Justice Jackson's famous instruction that "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations"¹² continues to have a strong pull on the constitutional imagination.¹³ What emerges from our analysis is how much pull it seemed to

¹¹ See *Youngstown*, 343 U.S. at 652–54 (Jackson, J., concurring) (explaining that the President's "real" powers in wartime are vast, as a result of, inter alia, statutory emergency powers conferred on him, his unique prestige and "access to the public mind," his leverage over those who are supposed to check his power, and his being head of a political party in an increasingly partisan system).

¹² *Id.* at 655.

¹³ Justice Jackson's theme has obvious echoes in Justice Kennedy's concurrence in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799–2800 (2006) (Kennedy, J., concurring in part), in which he wrote that even in a time of armed conflict it is important under our constitutional scheme that the Executive should adhere to such "standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms":

Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the

have on the executive branch itself for most of our history of war powers development.

Thus, as future administrations contemplate the extent of their own discretion at the “lowest ebb,” they will be faced with an important choice. They can build upon a practice rooted in a fundamental acceptance of the legitimacy of congressional control over the conduct of campaigns that prevailed without substantial challenge through World War II. Or they can cast their lot with the more recent view, espoused to some extent by most — though not all — modern Presidents, that the principle of exclusive control over the conduct of war provides the baseline from which to begin thinking about the Commander in Chief’s proper place in the constitutional structure.

We conclude that it would be wrong to assume, as some have suggested, that the emergence of such preclusive claims will be self-defeating, inevitably inspiring a popular and legislative reaction that will leave the presidency especially weakened. The more substantial concern is the opposite one. The risk is that the emergence of such claims will subtly but increasingly influence future Executives to eschew the harder work of accepting legislative constraints as legitimate and actively working to make them tolerable by building public support for modifications. Over time, the prior practice we describe could well become at best a faintly remembered one, set aside on the ground that it is unsuited for what are thought to be the unique perils of the contemporary world. Our hope, therefore, is that by presenting this longstanding constitutional practice of congressional engagement and executive accommodation as a workable alternative, such forgetting will be far less likely to occur.

Part II reviews the history of the “lowest ebb” issue from 1789 through the Civil War. Part III concentrates on the disputes over this question that arose in the Civil War and its immediate aftermath. Part IV examines the developments occurring in the executive branch, the Congress, and the courts through World War II. Part V takes the story from Truman through the Clinton and Bush Administrations. In Part VI, we explain why, in our view, the history matters, and summarize what it shows regarding Congress’s constitutional authority to regulate the conduct of campaigns. We also discuss some of the remaining puzzles with respect to the “superintendence” prerogative that the Commander in Chief Clause establishes. Part VII is a brief conclusion.

political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. *The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.*

Id. at 2799 (emphasis added).

II. FROM RATIFICATION THROUGH THE ANTEBELLUM PERIOD

The practices of the political branches during the first decades after the Constitution's ratification offer important insights into the founding generation's understanding of the structure of the new government. This is especially true with respect to the very first Congress, which included no fewer than twenty delegates to the Constitutional Convention.¹⁴ More broadly, the entire period from ratification to the Civil War is important for what it shows about the "practical exposition" of constitutional war powers during the new nation's first confrontations with war and the first emergence of a standing military establishment.¹⁵ The initial seventy years are also important for understanding what immediately followed. Those first seven decades of constitutional development established the legal tradition on which President Lincoln and the Civil War Congress relied in formulating their own war powers views. Because those views are so often invoked in contemporary executive war power controversies, their intellectual lineage merits a thorough examination.

A review of constitutional practice between 1789 and the Civil War suggests that the Founding-era understanding of the Commander in Chief's ultimate subjection to statutory control continued to hold sway. Although the primary focus of war powers questions and debates in this period lay elsewhere (such as on whether certain conduct complied with international law), the question of a preclusive Commander in Chief power, particularly as to troop deployments, was not unknown. Some legislators occasionally raised constitutional concerns in congressional debates about proposed statutory restrictions; but this did not reflect the existence of a well-accepted view that the President possessed such preclusive powers. Certainly Congress did not act during the first few decades as if it assumed the President enjoyed unchecked authority in the field, even in wartime. And whereas the legislature often afforded the President substantial discretion as to how troops could be used, it also occasionally regulated ongoing military operations in quite specific and detailed ways in these early years. A review of the decades that followed, moreover, reveals no important signs of a different legislative practice emerging. The occasional constitutional concern was still voiced in the course of congressional debates, but the legislature continued to enact, albeit only on occasion, important and

¹⁴ See *Bowsher v. Synar*, 478 U.S. 714, 723–24 & n.3 (1986); *Myers v. United States*, 272 U.S. 52, 174–75 (1926) (citing cases).

¹⁵ See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 408, at 392 (Boston, Hillard, Gray & Co. 1833) ("[T]he most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits.").

constraining statutory measures both while hostilities were underway and in advance of their outbreak.

Perhaps even more importantly, with one possible and equivocal exception during the Fillmore Administration, the Executive itself does not appear to have argued during the whole of the pre-Civil War period for such preclusive authority. Presidents would sometimes construe apparent restrictions in favorable ways, but they also complied with statutes even when it seems clear that they would have preferred not to. To be sure, there does not appear to be any case in which a President expressly acknowledged that because he lacked a preclusive constitutional power, he was bound by a statute he thought to be severely detrimental to the national interest. It is almost certainly the case, therefore, that considerations of politics and policy played a key constraining role independent of legal judgment. But it is striking nonetheless that throughout this period — again, with one cryptic exception — Presidents did not act or speak as if they possessed the constitutional authority to disregard attempts by Congress to impose restrictions on their powers over the military, in war or peace. Their actual posture, at least formally, was much more accepting of congressional power, and in fact, some administrations during this period issued legal opinions that conceded the constitutional plan precluded them from taking a more defiant stance.

A. *The Backdrop of the Laws of War*

The first seven decades of constitutional practice were not marked by a surfeit of legislative action specifically restricting the President's manner of engaging the enemy during battle. This was not the product of a consensus that the Commander in Chief must be unfettered in dealing with the enemy. It is better attributed to two other factors. First, Congress often made the unsurprising policy judgment that the President should be afforded broad discretion in deciding how to fight wars. In addition, and of more direct relevance for present purposes, the political branches, as well as courts and scholars throughout the period, shared the belief that the President was appropriately bound in his conduct of military operations by a body of widely accepted international legal norms — namely, the “laws and usages” of war.

The laws and usages of war were customary, but they were still understood to constitute a critical component of the legal structure within which the President exercised his war powers. Indeed, there was a virtual consensus among the actors in the political branches, as well as the courts, concerning their binding force.¹⁶ Thus, notwith-

¹⁶ See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting) (“[W]hen the legislative authority . . . has declared war in its most unlimited manner, the executive

standing recent suggestions that the Framers wished to ensure maximum executive flexibility and discretion in war,¹⁷ it is a mistake to think that they envisioned the President would be acting in a law-free zone when employing military force. Precisely because war was at issue, it was understood that the President would be operating in a context that was quite substantially legalized.

The broad acceptance of this legal framework no doubt tempered the legislative impulse to impose independent strictures by statute.¹⁸

authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent; *but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.*" (emphasis added). As early as the second Washington Administration, even Alexander Hamilton, writing in support of strong inherent executive powers in foreign affairs, acknowledged that the President was bound to apply the "laws of Nations," expressly referring to them as the "law of the land." In fact, this was one of the few important points of agreement between Hamilton and James Madison in their famous *Pacificus/Helvidius* debate. See Alexander Hamilton, *Pacificus No. 1* (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 40 (Harold C. Syrett ed., 1969) ("The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws."); *id.* at 43 ("The President is the constitutional Executor of the laws. Our Treaties and the laws of Nations form a part of the law of the land."); see also James Madison, *Helvidius No. 2* (1793), reprinted in 15 THE PAPERS OF JAMES MADISON 80, 86 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985) ("[T]he executive is bound faithfully to execute the laws of neutrality . . . as of all other laws internal and external, by the nature of its trust and the sanction of its oath . . ."). Professor David Golove argues that the binding nature of the laws of war was not understood during this period merely as some sort of roaming, exogenous, international law constraint. Rather, it was commonly understood, at least up through the Civil War, that the scope of the political branches' constitutional war powers — particularly those of the President — was defined in the first instance by the laws and usages of war. Those norms were, in other words, viewed as a component of the constitutional war powers themselves. See David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363 (2003) [hereinafter Golove, *Military Tribunals*]; David Golove, *The Commander-in-Chief and the Laws of War* (2007) (unpublished manuscript, on file with the Harvard Law School Library).

There is a substantial modern literature debating whether the President is constitutionally bound to comply with customary international law generally. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 844–46 (1997); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985); Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930 (1986); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1226–30 (2007); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1245–51 (2005). We do not engage this debate here; our more discrete focus is on the fact that a particular subset of customary international law — the laws of war — was uncontroversially understood as binding in the first century of constitutional practice.

¹⁷ See, e.g., JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 119–20 (2006).

¹⁸ On occasion, early statutes expressly provided that such law-of-war norms would govern the conduct of the military. See, e.g., Act of Mar. 3, 1813, ch. 61, § 1, 2 Stat. 829, 829–30 (authorizing retaliation for British violations of the laws of war against U.S. citizens, provided it be made "according to the laws and usages of war among civilized nations"). More often, Congress, as well

The prospect of additional restrictions likely raised the understandable concern that they might unilaterally tie the hands of the young nation in its conflicts with belligerents in a manner that would not be reciprocated by our enemies. That makes it all the more striking that Congress enacted so much additional legislative regulation during this period and in subsequent decades, as we explain below.

At the same time, there was great concern in the young republic about the nation's taking actions that, under customary international law, might provoke an actual war.¹⁹ Accordingly, throughout this period Congress was careful to exercise its legislative power so as to ensure that the Executive would not, in the course of protecting the national defense, unnecessarily engage in conduct that would, under the laws of war, justify other nations to make war against the United States. Courts seemed to share this concern. In prominent cases, the Supreme Court treated the question of whether a given executive action complied with the laws and usages of war as if it were inseparable from the question of whether Congress, in authorizing the particular military conflict at issue, had intended to free the President to exercise the full complement of powers that customary international law would sanction in the case of a war. In this regard, early constitutional analysis often proceeded as if there were a deep interrelationship between congressional power to define the terms of battle and the customary international laws of war, at least in part in order to ensure

as the other two branches, assumed that these baseline international norms sufficed to cabin the Commander in Chief's conduct of war — and thus to codify them in statutory law would have been superfluous. *Cf. Patton v. Nicholson*, 16 U.S. (3 Wheat.) 204, 207 n.a (1818) (explaining that whereas the Court had already decided in several cases that, pursuant to the laws of war, “the use of a license or passport of protection from the enemy constitutes an act of illegality which subjects the property sailing under it to confiscation in the prize court,” two federal statutes (Act of Aug. 2, 1813, ch. 57, 3 Stat. 84 (repealed 1815), and Act of July 6, 1812, ch. 129, § 7, 2 Stat. 778, 780–81 (repealed 1815)) prohibiting the use of licenses or passes granted by the authority of the government of the United Kingdom of Great Britain and Ireland “were merely cumulative upon the pre-existing law of war”). The Court's recent decisions in the war on terrorism reflect a similar assumption that Congress's war authorizations are informed by, and tethered to, the laws of war. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (“[W]e understand Congress' grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.” (emphasis added)); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774, 2778 n.31, 2794 (2006) (construing the Uniform Code of Military Justice to require that military commissions comply with the laws of war); *id.* at 2799, 2802–03 (Kennedy, J., concurring in part) (same).

¹⁹ *See, e.g.,* ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801*, at 10–11, 22–23 (1966) (discussing efforts to ensure that war was not needlessly precipitated with France); *see also* Stewart Jay, *Essay, The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821 (1989).

that the power to declare a full-fledged war would remain with the Congress.²⁰

*B. The Washington Administration:
Organization of the Military Establishment
and the Calling Forth of the State Militia*

With this crucial background in place, we can now examine the first phase of the history of the statutory regulation of the federal military forces — a period coextensive with the Washington Administration. The young nation did not engage in military conflicts with foreign nations during Washington's tenure as President; the most prominent war powers questions of the time concerned whether Congress had in fact approved specific offensive actions (in particular, against the Wabash Indians on the western frontier). There were therefore no prominent debates about whether Congress could impose limits on the President's constitutional war authorities. Nevertheless, this initial period of constitutional practice offers some evidence on three matters that shed light on attitudes about the extent (or existence) of the President's preclusive war powers. In each case, the evidence tends to reinforce what appears to have been the assumption of permissible statutory control, even as to the conduct of campaigns, that ran through the Founding era.

1. *Statutory Regulation of the Use of Military Force.* — The very first statute Congress enacted to continue the military establishment from the preconstitutional system is instructive. It specified that U.S. troops "shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established."²¹ In other words, the new Congress did not signal a desire to leave the President free of statutory encumbrances in exercising his powers of command in battle. Instead, it imposed on the armed forces themselves the rules promulgated in the Articles of War that the preconstitutional Congress had enacted in 1775 and 1776.²²

For the most part, those preexisting Articles of War did not materially constrain the Commander in Chief himself, at least not in the conduct of war. Two other pieces of evidence from this period, however, suggest there was at least some comfort with the notion that Congress also had the authority to set forth legislative regulations concerning

²⁰ See, e.g., *Brown*, 12 U.S. (8 Cranch) at 125–26; *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28–29 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.).

²¹ Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96 (repealed 1790).

²² See The American Articles of War of 1775, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 953 (2d ed. 1920); The American Articles of War of 1776, reprinted in WINTHROP, *supra*, at 961.

operational military judgments that pertained directly to how the Executive could use force.

Specifically, in the Third Congress, during a debate over a bill to continue and regulate the military establishment, no less an authority than James Madison proposed an amendment providing “that the troops should only be employed for the protection of the frontier,”²³ although the House ultimately voted down the proposed geographic restriction.²⁴

There is also some important early evidence of executive branch acceptance of congressional power to exercise detailed control over how force would be used, at least at the outset of specific conflicts. Beginning in 1785, the pirates of Algiers embarked on a campaign of attacks on American ships in which they seized U.S. nationals in order to demand ransom. In a 1790 report, after Algerian pirates had captured eleven U.S. ships and more than 100 prisoners, Secretary of State Jefferson acknowledged that the legislature controlled not only the general question of whether to offer a military response at all, but also the nature of any such response: “If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the cooperation of other Powers.”²⁵

2. *Statutory Regulation of the Military Establishment.* — For the very early years of constitutional practice, we have only these fragmentary indications of legislative and executive attitudes about the legitimacy of regulating the use of force by statute. The sparseness of the record may be due, in part, to the absence of anything like a modern military establishment during this period — a lack for which Congress was largely responsible. Because the founding generation was wary of standing armies and expected that most national military functions could and would be performed by state militia in the service of the federal government, Congress kept the military establishment in the early years very modest. In September 1789, for example, Congress passed a law “recognizing” the military establishment of about 700 troops that had remained from the preconstitutional system.²⁶ And al-

²³ 4 ANNALS OF CONG. 1221 (1795). This foreshadowed a controversial measure from the years before the Second World War that prohibited the use of draftees outside the Western Hemisphere. See *infra* pp. 1048–51.

²⁴ 4 ANNALS OF CONG. at 1221.

²⁵ Thomas Jefferson, *Report of the Secretary of State Relative to the Mediterranean Trade* (1790), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 104, 105 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1833), available at <http://memory.loc.gov/ammem/amlaw/lwsp.html>.

²⁶ Act of Sept. 29, 1789, § 1, 1 Stat. at 95–96 (recognizing troops raised by Resolve of Congress, Oct. 3, 1787, in 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 603 (Roscoe R. Hill ed., 1936)).

though Congress did gradually increase the size of the military,²⁷ there would be no significant buildup until the prospect of war with France during the Adams Administration.

This circumstance gave Congress a powerful measure of de facto control. So long as the President lacked a significant non-militia force to command, he would necessarily be dependent on legislative approval for the conduct of most military affairs abroad, even at the operational level. To launch an attack by sea, for example, he might have no choice but to spell out to Congress just what battle plan he envisioned, if only in order to specify the funding and supplies the legislature would have to allow him to raise in order to implement such a battle plan. To be sure, Congress signaled early on that it had no general interest in policing tactical decisions in this way, and it enacted a number of statutes that expressly recognized the President's broad discretion over the use of the (limited) troops under his command.²⁸ But that did not mean the legislature resisted altogether the temptation to impose direct and detailed constraints on the military establishment it was slowly fortifying.

(a) *The Nature of Congressional Regulations of the Military Establishment.* — During the first years of constitutional practice, Congress imposed numerous specific rules for the organization and government of the armed forces, concerning matters large and small. The comprehensive statute of 1790 providing for a permanent military establishment is the most telling example. It described the sorts of men who would constitute the armed forces (“able-bodied men,” between the ages of eighteen and forty-six, “not under five feet six inches in height”), divided them into regiments and battalions, prescribed remuneration and rations, and once again directed that the preexisting Articles of War were to govern conduct until statutory amendment.²⁹

Also striking were several enactments creating and providing for naval armaments, which specified precisely how many guns would be on each ship and how many warrant officers of every stripe would be employed, from yeoman of the gun room to carpenter's mates to

²⁷ See, e.g., Act of May 9, 1794, ch. 24, § 1, 1 Stat. 366, 366 (repealed 1802) (requiring engagement of 764 noncommissioned officers, privates and artificers); Act of Mar. 5, 1792, ch. 9, § 1, 1 Stat. 241, 241 (repealed 1795) (“complet[ing]” two regiments to 960 soldiers each); Act of Mar. 3, 1791, ch. 28, § 1, 1 Stat. 222, 222 (repealed 1795) (requiring the raising of an additional infantry regiment of 912 noncommissioned officers, privates, and musicians); Act of Apr. 30, 1790, ch. 10, §§ 1, 3, 1 Stat. 119, 119 (repealed 1795) (authorizing the raising of an infantry regiment of 1216 troops for three years).

²⁸ See, e.g., Act of May 30, 1796, ch. 39, § 1, 1 Stat. 483, 483 (providing that the military establishment shall be “armed and accoutred in such manner as the President of the United States may direct”); Act of Apr. 30, 1790, § 16, 1 Stat. at 121 (authorizing the President to call into service “such part” of the state militia “as he may judge necessary” for aiding troops and protecting inhabitants of frontiers).

²⁹ Act of Apr. 30, 1790, §§ 1–13, 1 Stat. at 119–21.

cooks.³⁰ Those statutes even prescribed weekly menus for the ships: on Tuesdays, the ration included potatoes or turnips, and pudding; on Thursdays, a half-pint of peas or beans.³¹

Congress also used the power of the purse to delimit what would otherwise be the Commander in Chief's broad discretion to command and structure the military establishment, and its specifications for military-related disbursements were often quite detailed.³² Such intrusive and detailed regulations reflected a general assumption that Congress had the power to restrict at least *some* of the authorities that the Commander in Chief would otherwise be constitutionally entitled to exercise in the absence of statutory limits. That is to say, Congress did not appear to regard the constitutional powers established by the Commander in Chief Clause as *necessarily* preclusive of conflicting statutory regulation. This early legislative practice also suggests that Congress did not labor under the view that it was subject to an overarching constraint against regulating the military in too detailed a fashion, at least during peacetime. It clearly assumed it possessed the constitutional authority to impose quite niggling restrictions on the organization, action, and composition of the armed forces. How else to explain its decision to establish by statute the precise menu for the meals that sailors were to be served? As these restrictions were imposed outside the context of war, however, one cannot know for certain whether some allowance for greater constitutionally infeasible executive discretion might have been accepted in the event actual hostilities were underway.

(b) *Executive Branch Responses to Detailed Congressional Regulation of the Military Establishment.* — Even though Congress imposed detailed regulations on the budding military establishment in peacetime, the executive branch was hardly pleased by many of them. In consequence, there was no shortage of interbranch disputes with regard to legislative control of the military establishment and militia. In fact, the Washington, Adams, and Jefferson Administrations were marked throughout by pitched struggles over how much leeway the executive branch enjoyed to use appropriations as it thought most efficacious, and many of these fights concerned military appropriations in particular.³³ To avoid what appeared to be statutory limits on appro-

³⁰ See, e.g., Act of July 1, 1797, ch. 7, 1 Stat. 523; Act of Mar. 27, 1794, ch. 12, 1 Stat. 350.

³¹ See Act of July 1, 1797, § 7, 1 Stat. at 524; Act of Mar. 27, 1794, § 8, 1 Stat. at 351; see also, e.g., Act of May 30, 1796, §§ 10–11, 1 Stat. at 484.

³² See, e.g., Act of Dec. 23, 1791, ch. 3, § 4, 1 Stat. 226, 228.

³³ The most comprehensive treatment of this extended struggle is in LUCIUS WILMERDING, JR., *THE SPENDING POWER* 20–49 (1943) (discussing the Washington and Adams Administrations); and *id.* at 50–76 (discussing the Jefferson Administration). See also GERHARD CASPER, *SEPARATING POWER* 79–93 (1997).

priations, the executive branch during this period resorted to “various compensatory devices” that allowed it to “formally admit[] the principle of Congressional control” while at the same time “relaxing the severities of its application.”³⁴

These practices were especially common in the context of military spending, where the Treasury Department concluded that broad, general grants for the War Department could be “issued according to exigencies” when “requisite for the public service.”³⁵ This “practical” application of the appropriations laws regularly provoked the ire of many in Congress, especially Representative (and future Treasury Secretary) Albert Gallatin, who viewed the practice in the military and naval establishments, in particular, as “making the law a mere farce, since the officers of the Treasury did not consider themselves as at all bound by the specific sums.”³⁶

Significantly, however, as far as we have been able to determine, the executive branch never once asserted any *constitutional* prerogative to disregard any of these statutory limits, let alone any such authority under the Commander in Chief Clause. Although some modern Presidents, beginning with Truman,³⁷ have used the Commander in Chief power to justify disregarding spending requirements set forth in military appropriations, the first President’s Administration never did. Instead, the Treasury Department (headed first by Alexander Hamilton and then, after 1795, by Oliver Wolcott) consistently engaged in what it called a “practical interpretation” of the appropriations laws, a construction that would avoid “absurd, or mischievous

³⁴ WILMERDING, *supra* note 33, at 19. Those devices included, inter alia, shifting funds between appropriations, commingling funds, spending in anticipation of future appropriations (which were always forthcoming), and transferring funds between accounts in a particular appropriation (for example, using general heads of appropriation to supplement functions that were themselves subject to an express statutory funding prescription). See also *id.* at 28 (describing executive practice as uniform throughout the late eighteenth century and as maintained despite variations in the wording of laws and the efforts of some in Congress to upset it).

³⁵ Letter from Oliver Wolcott, Jr., Sec’y of the Treasury, to Rep. Thomas Fitzsimons (Feb. 25, 1795), in OLIVER WOLCOTT, ADDRESS TO THE PEOPLE OF THE UNITED STATES 13, 14 (Boston, Russell & Cutler 1802). Most dramatically, and most pertinently for present purposes, in 1794 Congress had given Washington the authority to call forth the state militia to suppress the Whiskey Rebellion in western Pennsylvania, but it had failed to appropriate funds to pay for the militia’s services. The heads of the executive departments conferred on the question, and all but Secretary of State Randolph concurred that the statutory sums appropriated for the general use of the War Department could be “properly applied to defray the expenses of the militia.” WOLCOTT, *supra*, at 12–13. The question (along with Randolph’s legal doubts) was brought to the attention of certain members of Congress, who apparently did not object, and thereafter the War Department funds were disbursed to pay for the militia. *Id.* at 13; see also WILMERDING, *supra* note 33, at 28. Only after the fact did Congress pass a law specifically designating funds for the specified military endeavor. See Act of Dec. 31, 1794, ch. 6, § 1, 1 Stat. 404, 404–05.

³⁶ 6 ANNALS OF CONG. 2322 (1797).

³⁷ See *infra* pp. 1062–63.

consequences” and that would not render any *substantive* acts of Congress “unsusceptible of execution.”³⁸ Wolcott explained that Gallatin’s efforts to micromanage the executive branch through “minute subdivisions of appropriations” would have “continually tended to . . . paralyze every branch of the public service.”³⁹ Thus, it was the *duty* of the Treasury, wrote Wolcott, “so to interpret the Laws, as to counteract this tendency as much as possible.”⁴⁰ This form of statutory interpretation, in Wolcott’s view, was not only “reasonable” but, just as importantly, “*at all times publickly avowed, and well understood, and deliberately sanctioned by Congress.*”⁴¹

Some of these interpretations were extremely aggressive, which suggests that the line between constitutionally based defiance and creative construction may have been thin when it came to influencing what funds would be available to the President and for what purposes. But when Congress effectively foreclosed this sort of creative construction, the executive branch had not laid any legal predicate for asserting a constitutional trump.⁴² No executive officials, as far as we are aware, ever espoused any constitutional theory under which Congress would not have the last word if it chose to impose it — not even as a background constitutional principle that might bolster the strained interpretations being pressed.

³⁸ WOLCOTT, *supra* note 35, at 9, 24. Wolcott offered a justification for this practice at great and eloquent length after the Republican-led House of Representatives had begun to inveigh against the spending practices of the previous administrations. Nowhere in his elaborate justification, however, did he invoke any constitutional prerogative.

³⁹ *Id.* at 11.

⁴⁰ *Id.*

⁴¹ *Id.* at 11–12. Wolcott, along with the rest of the Executive department, understood Congress to have ratified the laws’ “practical” construction, albeit often in the form of “tacit approbation, which may be inferred from [Congress’s] silence” over several years in the face of creative, sometimes audacious executive interpretations of the laws. *Id.* at 25–26.

⁴² Most prominently, in 1797 Gallatin succeeded in having Congress rein in the Executive by enacting a provision of an appropriations act — actually signed by Washington on his next-to-last day in office — specifying that the sums prescribed therein “shall be solely applied to the objects for which they are respectively appropriated.” Act of Mar. 3, 1797, ch. 17, § 1, 1 Stat. 508, 509; see CASPER, *supra* note 33, at 87–89. Although there is some indication that certain Executive branch officials contrived a way around even this seemingly absolute prohibition in a handful of cases, see WILMERDING, *supra* note 33, at 44–45, Wolcott and other high officials did not express the view that they could simply ignore the restriction. Wolcott complained to Hamilton, his predecessor, that “the management of the Treasury becomes more & more difficult. The Legislature will not pass laws in gross. Their appropriations are minute. Gallatin, to whom they all yield, is evidently intending to break down this department, by charging it with an impractical detail.” Letter from Oliver Wolcott, Jr., to Alexander Hamilton (Apr. 5, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 396, 397 (Harold C. Syrett ed., 1974). Wolcott did not, even in this private correspondence, broach the notion of overriding Congress’s will. The remedy, instead, was statutory amendment: Congress specifically voted to omit Gallatin’s limiting phrase in the next fiscal year’s appropriations bill, an about-face that Wolcott interpreted as Congress’s “expressly and understandingly sanction[ing] the construction and practice of the Treasury.” WOLCOTT, *supra* note 35, at 23–24 (emphasis omitted).

3. *Statutory Regulation of the Use of the Militia.* — Important though regulation of the national military establishment was, the size and scope of that establishment remained modest. As a result, throughout the Washington Administration, war powers debates often centered on the President's use and control of the state militia. These were the military forces that the Framers assumed would be the principal means of serving the national government, in the absence of the sort of standing armies that they discouraged.⁴³ The Constitution provides that Congress has the power both to call forth the state militia into federal service "to execute the Laws of the Union, suppress Insurrections and repel Invasions,"⁴⁴ and "[t]o provide for organizing, arming, and disciplining the Militia, and for governing" them when they are employed in federal service.⁴⁵ And yet, of course, the Commander in Chief Clause also assigns the President the command of the militia once they are called into federal service. In form, then, the structure of control over the militia that confronted the early departments was not unlike that established by the Constitution for the land and naval forces. Congress could raise them and provide for their governance, organization, and discipline. The President would "command" them. Beyond those basic assignments of authority, a range of questions remained as to the extent of Congress's power to circumscribe the President's command discretion.

From the outset, Congress chose to exercise its "calling forth" power largely by delegating it to the President. That choice reflected a general acceptance of the President's central role in the conduct of military affairs. At the same time, the relevant statutes specified categories of cases (mostly emergencies) in which the delegated authority could be exercised. They thus inaugurated a practice that would become even more common in the subsequent decades as to the use of military force more generally: Congress would enact a measure triggering the President's constitutional "command" authorities, but its delegation to the President to exercise such authorities would be confined so as to ensure they were exercised in a manner consistent with whatever objectives and directives Congress had expressly or implicitly prescribed. Sometimes, moreover, those authorities would even be constrained by quite detailed delineations of the scope of the discretion conferred.

⁴³ See THE FEDERALIST NO. 29, at 182–83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴⁴ U.S. CONST. art. I, § 8, cl. 15.

⁴⁵ *Id.* art. I, § 8, cl. 16. Section 8, Clause 16 reserves to the States the power to appoint officers within the militia, *id.*, which would "always secure to [the States] a preponderating influence over the militia." THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 43, at 186.

The first such statutes were designed to protect settlers on the western frontier from attacks by the Wabash Indians. Congress delegated to President Washington the authority to call forth the militia of the states "as he may judge necessary for the purpose" of "protecting the inhabitants of the frontiers . . . from the hostile incursions of the Indians."⁴⁶ A few years later, Congress authorized Washington to call forth the militia and station them "in the four western counties of Pennsylvania" for the purpose of suppressing unlawful combinations there and helping to enforce the laws.⁴⁷ Even though these and other laws put a military force at Washington's disposal, he did not think to use it other than as Congress had instructed — although this reticence might be explained in part by the view, common at the time, that the President did not enjoy an "inherent" constitutional power to initiate "offensive" action without legislative preapproval.⁴⁸

Even more interestingly, two of Congress's early general delegations of its "calling forth" power placed further conditions on the President's use of the militia for even statutorily prescribed purposes. For example, the Militia Act of 1792 provided that in cases where the President called forth the militia to stop an insurrection, he had to first "forthwith, . . . by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time."⁴⁹ Similarly, although that law gave Washington virtually unlimited authority to call forth the state militia "as necessary to repel such invasion," and to issue orders to officers of the militia "as he shall

⁴⁶ Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 (repealed 1790); *see also* Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121 (repealed 1795) (authorizing the President to call into service such part of the militia "as he may judge necessary" for aiding troops and protecting inhabitants of frontiers); *cf.* Act of Mar. 3, 1791, ch. 28, § 7, 1 Stat. 222, 223 (repealed 1795) (authorizing the President to offer "allowances" to encourage "a body of militia" to serve as cavalry in a statute described as an "Act . . . for making farther provision for the protection of the frontiers").

⁴⁷ Act of Nov. 29, 1794, ch. 1, § 1, 1 Stat. 403, 403.

⁴⁸ *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 119–27 (1976). Most famously, when Governor Moultrie of Georgia requested that Washington initiate operations against the Creek Nation, Washington declined on the ground that "[t]he Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure." Letter from President George Washington to Gov. William Moultrie (Aug. 28, 1793), *in* 33 THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940); *accord* Letter from Henry Knox, Sec'y of War, to Gov. William Blount (Nov. 26, 1792), *in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 220, 220–21 (Clarence Edwin Carter ed., 1936) ("Whatever may be [President Washington's] impression relatively to the proper steps to be adopted, he does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War."); Letter from Timothy Pickering, Sec'y of War, to Gov. William Blount (Mar. 23, 1795), *in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra*, at 386, 389 ("Congress alone are competent to decide upon an offensive war [against the Creeks], and congress have not thought fit to authorize it.").

⁴⁹ Act of May 2, 1792, ch. 28, § 3, 1 Stat. 264, 264 (repealed 1795).

think proper,”⁵⁰ it permitted him to use the militia to execute domestic laws only upon certification by an Associate Justice or district judge that the wrongdoers were “too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals.”⁵¹ This restriction in effect imposed a neutral arbiter between the President and the force that would otherwise be available to him.⁵²

Congress eliminated this judicial certification requirement in the Militia Act of 1795,⁵³ but retained at least two important limitations on the President’s control over the militia, each of which indicated that the legislature did not believe its constitutional authority to regulate the use of that force ceased the moment the militia were actually called into service. The first limitation provided that the militia could be used to help enforce domestic laws only until thirty days after the commencement of the next session of Congress.⁵⁴ It thus presaged a statutory approach to regulating ongoing military operations reflected in the modern War Powers Resolution.⁵⁵ The second limitation continued to require the President to issue the dispersal proclamation when he called forth the militia to stop an insurrection, although it no longer required that the proclamation occur *before* the militia were called forth.⁵⁶ In other words, Congress did not view its calling forth power as a simple on/off switch, by which it could either put the militia under presidential command or keep them reserved to state control. Instead, it felt no compunction about detailing how the President could use the militia even once they had been called forth and were under his command.

4. *Conclusion.* — The first eight years of constitutional practice established that the Commander in Chief was a powerful actor, properly entrusted with broad discretion in exercising his powers of command.

⁵⁰ *Id.* § 1.

⁵¹ *Id.* § 2.

⁵² Washington complied with this very requirement in 1794. Before calling forth the militia to suppress the Whiskey Rebellion in Pennsylvania, he waited to receive the requisite certification from Supreme Court Justice James Wilson that the statutory criteria were satisfied. See Letter from Justice James Wilson to President George Washington (Aug. 4, 1794), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 85 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834), available at <http://memory.loc.gov/ammem/amlaw/lwsp.html> (“From evidence which has been laid before me, I hereby notify to you that, in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district.”).

⁵³ Act of Feb. 28, 1795, ch. 36, § 10, 1 Stat. 424, 425. See generally Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 159–63 (2004) (comparing the two militia statutes).

⁵⁴ Act of Feb. 28, 1795, § 2, 1 Stat. at 424.

⁵⁵ See *infra* pp. 1070–71.

⁵⁶ Act of Feb. 28, 1795, § 3, 1 Stat. at 424.

Indeed, he was even given the authority to determine the circumstances in which the main forces at his disposal, the state militia, could be called into service. There is no evidence that Congress attempted to wrest control from him of discrete tactical decisions on the basis of its own view as to how a particular battle should be handled. But these early years also showed that the Commander in Chief was constrained not only by political realities but also by law. In addition to the laws and usages of war, which figured prominently, there was a growing and detailed statutory landscape. It set terms by which the actual military establishment could be organized and supplied in quite particularized ways, and it carefully regulated the ways in which the President could use the state militia that he had been delegated the power to call forth, sometimes imposing limitations applicable even after those forces had been deployed. Nevertheless, it was not until the Adams Administration that the first direct confrontation with the precise constitutional question of the President's control over the conduct of campaigns actually occurred, as it was not until these years that the nation encountered its first brush with something akin to a full-fledged war.

*C. The Adams Administration
and the Quasi-War with France*

In reaction to the United States's declaration of neutrality in the war between Great Britain and France, American ships became a target of French vessels. A wave of anti-French sentiment spread across the nation, fueled in part by the interparty political contests for popular favor. In consequence, by 1797, possible war with France loomed on the horizon, and Congress sprang into action.⁵⁷ As with its delegations of the power to call forth the militia, Congress once again looked to the President to carry out military operations and sought to empower him in ways that would permit him to be successful. In May of 1798, Congress enacted a law authorizing the President, "in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion," to raise an army of up to 10,000 men to serve for as many as three years.⁵⁸ Less than two months later, Congress authorized the President to raise an additional twelve infantry regiments and six troops of light dragoons, "to be enlisted for and during the continuance of the existing differences between the United States and the French

⁵⁷ See, e.g., DECONDE, *supra* note 19, at 59-73, 89-98.

⁵⁸ Act of May 28, 1798, ch. 47, § 1, 1 Stat. 558, 558.

Republic.”⁵⁹ A further delegation to the President of power to increase the size of the army came the following year.⁶⁰

Of course, the very fact that the military establishment was significantly expanded made it possible for the President to assert a greater measure of command authority, rooted in his powers as Commander in Chief, once an armed conflict had commenced — at least *if* he were not limited by statute. But what if he were? Such limits were not simply a theoretical possibility, notwithstanding the broad discretion Congress had permitted him to exercise. Although Congress had enacted statutes that permitted the President to move the nation to a war footing against France, it was careful to avoid formally declaring war against that country. There was a great fear of engendering a conflict that could be disastrous for such a young nation. Congress instead passed a series of statutes that both triggered the President’s constitutional war powers and calibrated just what sort of force could be exercised on behalf of the United States. The legislature acted, moreover, not in one fell swoop at the very outset of hostilities, but instead over a number of years, thereby changing the rules of engagement over time through a series of limited measures. The result was that, for the first time, constitutional questions concerning the extent of Congress’s power to regulate the conduct of campaigns were presented to all three branches of the nascent government.

1. *Legislative Action in the Run-up to the Quasi-War.* — In 1797 and 1798, at the very outset of the conflict with France, the House of Representatives played host to an instructive set of debates over proposed conditions on the use of naval vessels. Proposed statutory language would have restricted such ships to U.S. waters and prohibited their use for convoys (which were thought likely to provoke war with France).⁶¹ Unlike Madison’s similarly restrictive proposal concerning the use of the militia during the Washington Administration,⁶² these limitations would have affected regular forces, and they precipitated what was perhaps the most extensive legislative debate on the preclusive power question until 1862.⁶³ To be sure, most of the Representa-

⁵⁹ Act of July 16, 1798, ch. 76, § 2, 1 Stat. 604, 604 (repealed 1802).

⁶⁰ Act of Mar. 2, 1799, ch. 31, §§ 1, 6–9, 1 Stat. 725, 725–26 (repealed 1802).

⁶¹ 7 ANNALS OF CONG. 360 (1797).

⁶² See *supra* p. 956.

⁶³ For a similar, but much shorter and less elucidating, discussion in Congress, see 29 ANNALS OF CONG. 1371–72 (1816). Most other legislative debates on the constitutional question prior to the Civil War were more perfunctory and not terribly instructive. In 1810, for example, the House debated a resolution that would have requested that the President provide the House with information on the number of troops stationed at each frontier garrison or fort. 20 ANNALS OF CONG. 1255, 1255–57 (1810). Representative John Dawson, who thought the resolution a bad idea because it might “expos[e] the situation of our frontiers,” also suggested that it was a subject that “did not properly come within the cognizance of the House,” because the Commander in Chief had the authority to make disposition of troops “as he thought proper.” *Id.* at 1256. Repre-

tives who spoke against the conditions did so for policy or prudential reasons.⁶⁴ A number, however, argued that once Congress appropriated funds to provide for certain ships, it was not completely free to instruct the President on how to use them.⁶⁵ Other Representatives, particularly Gallatin, strongly opposed such a notion, arguing that the power to dictate the use of ships was ancillary to Congress's powers to provide funding for the ships in the first instance.⁶⁶ And somewhere between these two polar positions, Representative Harrison Gray Otis at first suggested that although Congress could impose certain limits on the *objects* for which the ships could be used, it could not prescribe precise instructions on how those objects should be advanced, such as by limiting the ships to U.S. waters.⁶⁷ Otis later indicated that although in his view Congress *could* direct the particular permitted and proscribed uses of the ships (for example, not as convoys), it would not be expedient for the legislature to do so.⁶⁸

sentatives Thomas Newton and Benjamin Tallmadge immediately responded that of course it was a subject within the cognizance of Congress, which provides appropriations for the army. *Id.* Tallmadge successfully moved to make the request even *more* specific, and a great majority of the House voted for the resolution. *Id.* at 1256–57.

Four years later, the House debated a resolution that would have instructed the House Military Affairs Committee to inquire into army rules for furloughs and leaves of absence. 26 ANNALS OF CONG. 866–71 (1814). Representative George Troup objected to the resolution on the ground that the power of controlling military movements was exclusively executive and “could not properly be legislated upon.” *Id.* at 868. Representative James Fisk responded that Congress had the power to make rules for the government of the army, and that therefore the subject was appropriate for congressional inquiry. *Id.* at 870. The resolution was laid on the table with little further discussion. *Id.* at 871.

⁶⁴ See, e.g., 8 ANNALS OF CONG. 1477 (1798) (reporting remarks of Rep. Allen); 7 ANNALS OF CONG. at 360–61 (reporting remarks of Rep. Sitgreaves); *id.* at 360, 362 (reporting remarks of Rep. W. Smith); *id.* at 363 (reporting remarks of Rep. Brooks); *id.* (reporting remarks of Rep. Williams); *id.* at 366 (reporting remarks of Rep. Dana).

⁶⁵ See, e.g., 8 ANNALS OF CONG. at 1454–55 (reporting remarks of Rep. Dayton); 7 ANNALS OF CONG. at 364 (reporting remarks of Rep. Harper); *id.* at 367 (reporting remarks of Rep. Kittera).

⁶⁶ See, e.g., 8 ANNALS OF CONG. at 1456–57 (reporting remarks of Rep. Gallatin); *id.* at 1459 (reporting remarks of Rep. Nicholas); 7 ANNALS OF CONG. at 362–63 (reporting remarks of Rep. Nicholas); *id.* at 363, 366 (reporting remarks of Rep. Gallatin); *id.* at 365–66 (reporting remarks of Rep. Macon).

⁶⁷ See, e.g., 7 ANNALS OF CONG. at 290, 365.

⁶⁸ 8 ANNALS OF CONG. at 1460–61. Judge Sofaer, after summarizing these debates, see SOFAER, *supra* note 48, at 147–54, concludes that some of the pro-presidential statements “are strikingly similar at first reading to more recent assertions that the President can use any military force provided by Congress in any manner he sees fit to protect the interests of the United States, and that Congress lacks power to control him.” *Id.* at 165. He concludes, however, that the issue was effectively resolved in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), which reveals that Congress is “the ultimate source of authority on whether and how the nation would make war,” and that Congress’s right of control extends even over a subject that might come within the President’s authority in the *absence* of legislative regulation: “Both branches could act, in other words, but Congress had the final say.” SOFAER, *supra* note 48, at 165–66. We discuss *Little* further *infra* at pp. 968–70.

Notwithstanding the various positions (constitutional and otherwise) articulated in this debate, as the actual outbreak of armed conflict approached, Congress appeared to resolve it in practice by asserting its lawmaking authority to define the terms of battle in relatively detailed fashion. French seizure of U.S. vessels prompted Congress to enact several distinct statutes authorizing the use of military force, particularly against French naval vessels. The statutes in question — which established what would become known as the “undeclared war,” or “Quasi-War,” with France — each triggered the President’s authority to use the armed forces in a manner permitted for a belligerent party, but only for particular sorts of actions against French vessels, in particular locations, for particular purposes.

The first such law, enacted in May 1798, authorized the President to direct the commanders of U.S. armed vessels to seize — and to bring into a U.S. port for proceedings “according to the laws of nations” — French armed vessels that had committed “depredations on the vessels” of U.S. citizens or that were “hovering on the coasts of the United States” for that same purpose.⁶⁹ A follow-up statute one month later provided for the forfeiture and condemnation of goods and effects found on those seized French ships, with a proviso that forfeiture would *not* extend to any property of any citizen or resident of the United States that had been taken by the French crew.⁷⁰ Then, on July 9, 1798, Congress enacted yet another statute that eliminated the restriction on the types of armed French vessels that could be seized. This law authorized seizure of *any* armed French vessel found within the jurisdictional limits of the United States or elsewhere on the high seas.⁷¹ These and related statutes meaningfully limited the sort of actions that the Commander in Chief could undertake in fighting France. He was *not* at liberty to do whatever he thought wisest to defeat the enemy. In particular, he was limited to a *naval* war — he could not, for instance, decide to take the army to France — and one that was circumscribed in particular ways.

2. *The Supreme Court Enforces the New Legislation.* — The highly reticulated framework established by these and other statutes produced a number of legal disputes. The most significant for present purposes led the Supreme Court, in the case of *Little v. Barreme*,⁷² to address whether executive action in the conduct of military operations conformed to statutory bounds. Even before the decision in *Little*, however, the Court indicated that it was likely to regard these limited authorizing statutes not only as having empowered the President to

⁶⁹ Act of May 28, 1798, ch. 48, 1 Stat. 561, 561.

⁷⁰ Act of June 28, 1798, ch. 62, § 1, 1 Stat. 574, 574.

⁷¹ Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578.

⁷² 6 U.S. (2 Cranch) 170 (1804).

exercise his war powers, but also as having restricted what he could do with them. In *Bas v. Tingy*,⁷³ for example, the Court was asked to decide which of two statutes enacted in this period determined the amount of salvage that would be due for the recapture of an American ship. The question led the Court to canvass the international laws and usages of war in some detail, as the case hinged on what was meant by the statutory term “enemy.”⁷⁴ The Court concluded that the ship, if taken from the French, was taken from the “enemy,” and in explaining that conclusion Justices Samuel Chase and Bushrod Washington described the nature and effect of Congress’s statutory scheme.⁷⁵ By enacting the series of statutes concerning military engagement with French vessels, Justice Chase explained, Congress had “authorised hostilities on the high seas by certain persons in certain cases,” but had not given the President the authority “to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port.”⁷⁶ What Congress had in effect done, in other words, was to authorize a “limited” or “partial” war against France — a type of war that, in the words of Justice Washington, was “confined in its nature and extent; being limited as to places, persons, and things.”⁷⁷ Justice Washington noted, in apparent accord with Justice Chase’s understanding, that in such conflicts those authorities “who are authorised to commit hostilities . . . can go no farther than to the extent of their commission.”⁷⁸

The full impact of this notion — that included within Congress’s authorizations for the use of military force in an undeclared war are implied statutory *limitations* on the Commander in Chief’s war powers that must be followed — was revealed a few years later in *Little*. Several of the Quasi-War statutes authorized the interdiction and capture of certain ships. One aimed to restrict commerce with France by barring vessels owned, hired, or employed by U.S. residents, in whole or in part, from sailing to the territory of the French Republic or the West Indies, and prohibiting their employment in any traffic or commerce with a French resident.⁷⁹ In order to enforce this latter provision, the law authorized the President to instruct commanders of public armed vessels to examine ships that were suspected of violating the Act, and imposed a duty on commanders to seize any ship that ap-

⁷³ 4 U.S. (4 Dall.) 37 (1800).

⁷⁴ See, e.g., *id.* at 39.

⁷⁵ See *id.* at 43–45 (opinion of Chase, J.); *id.* at 42–43 (opinion of Washington, J.).

⁷⁶ *Id.* at 43 (opinion of Chase, J.) (emphasis omitted).

⁷⁷ *Id.* at 40 (opinion of Washington, J.).

⁷⁸ *Id.* Judge Sofaer relates that, in fact, the orders President Adams and his Secretary of the Navy issued to U.S. ships were “carefully limited to statutory authority explicitly conferred.” SOFAER, *supra* note 48, at 159.

⁷⁹ Act of Feb. 9, 1799, ch. 2, § 1, 1 Stat. 613, 613–14.

peared to be “bound or sailing to any port or place within the territory of the French Republic, or her dependencies.”⁸⁰

The Secretary of the Navy thereafter issued orders to public armed ships, but those orders were not limited, as were the words of the statute, to interdiction of ships bound *to* ports within the French Republic. They instead instructed the naval forces to “do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the *United States* and those of *France* and her dependencies.”⁸¹ More specifically, they directed American ships “to be vigilant that vessels or cargoes really *American*, but covered by *Danish* or other foreign papers, and bound to, *or from*, *French* ports, do not escape you.”⁸² In conformity with this order, Captain George Little, commander of the U.S. frigate *Boston*, seized the *Flying Fish*, a ship believed to be a U.S.-owned vessel sailing *from* a French port, and sought condemnation.⁸³ That seizure precipitated a court challenge. The circuit court held the seizure unlawful and assessed damages for trespass against Little, whose quite reasonable defense was that liability would be unfair because he was merely following presidential orders.⁸⁴ Yet the Supreme Court affirmed the judgment of the court below, in a unanimous opinion by Chief Justice Marshall.

Chief Justice Marshall held, in effect, that even though the President might well have had the inherent constitutional power to issue such an order in the absence of a statute,⁸⁵ that did not matter because federal statutory law had *prohibited* the seizure by implication. By providing the Executive with “authority [to seize] vessels bound or sailing *to* a *French* port,” he concluded, “the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound *to* a *French* port.”⁸⁶ In other words, a statute authorizing seizure of ships heading in one direction implicitly *restricted* what might otherwise have been the Commander in Chief’s constitutional authority to seize ships going in the *opposite* direction. And while Chief Justice Marshall was plainly troubled by his ultimate conclusion that the officer following the commander’s orders enjoyed no good faith immunity from liabil-

⁸⁰ *Id.* § 5, 1 Stat. at 615.

⁸¹ Little v. Barreme, 6 U.S. (2 Cranch) 170, 171 (1804) (first emphasis added).

⁸² *Id.*

⁸³ *Id.* at 176.

⁸⁴ *Id.*

⁸⁵ See *id.* at 177 (“It is by no means clear that the president of the *United States* . . . who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce.”).

⁸⁶ *Id.* at 177–78.

ity,⁸⁷ there is no suggestion in his opinion, or that of any Justice of the Court — and no evidence that any of the parties, including the Executive, argued — that Congress could not limit the President’s tactical flexibility in this respect.⁸⁸

3. *Additional Legislative Restrictions Arising Out of the Quasi-War.* — Although the obvious aim of the statute at issue in *Little* was to bring a cessation to transactions between United States persons and the French that were thought to give aid to the enemy, it did not directly regulate military engagement with the enemy itself. It concerned instead how force could be deployed against *American* ships operating in an active combat zone. But during this same conflict with France, Congress did pass laws dealing specifically with the treatment of enemy personnel.

One such statute was a retaliation measure enacted on March 3, 1799. The act “empowered *and required*” the President to “cause the most rigorous retaliation to be executed” on French citizens legally captured by the United States, if it were proven to the President that France had killed, or employed corporal punishment on, or “imprisoned with unusual severity,” any U.S. citizen who had been impressed by the French.⁸⁹ This statute imposed what appeared to be a significant limitation on President Adams’s discretion over how best to engage the French. It also set forth an affirmative rather than restrictive

⁸⁷ See *id.* at 178–79.

⁸⁸ Chief Justice Marshall’s opinion, in adopting an expansive view of Congress’s powers of limitation, is perfectly consistent with his speech on the floor of the House of Representatives, just four years earlier, arguing that the President was the “sole organ” of the United States in external relations. See 10 ANNALS OF CONG. 613 (1800). Although the “sole organ” turn-of-phrase eventually made its way into the opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), where Justice Sutherland stated that this was a “plenary” presidential power, *id.* at 319–20 — which has led many to invoke the “sole organ” notion in support of the proposition that the President’s foreign affairs role must be unencumbered by statute — the actual topic of Marshall’s speech was whether President Adams had the independent power, in the *absence* of statutory authority, to extradite to Britain one Thomas Nash (also known as Jonathan Robbins), who was suspected of murder on a British ship. Marshall did not suggest that Adams was unbounded by positive law. The principal point of Marshall’s speech, instead, was that Adams had the constitutional responsibility to *execute* (rather than to disregard) the terms of Article 27 of the Jay Treaty, see Treaty of Amity, Commerce and Navigation, U.S.–Gr. Brit., art. 27, Nov. 19, 1794, 8 Stat. 116, 129, even though the “particular mode of using the means” to “perform the object” of the treaty “ha[d] not been prescribed.” 10 ANNALS OF CONG. at 614. Moreover, Marshall specifically explained that Adams had the authority to determine how to implement the treaty *only in the absence of statutory direction*: “Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, *till this be done*, it seems the duty of the Executive department to execute the contract by any means it possesses.” *Id.* (emphasis added). See generally H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511–28 (1999); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 333–53 (1990).

⁸⁹ Act of Mar. 3, 1799, ch. 45, 1 Stat. 743 (emphasis added).

command that was apparently contrary to Adams's preferred mode of dealing with the issue.⁹⁰

In the course of establishing the legal framework for the conduct of the Quasi-War with France, Congress also enacted statutes that sought to temper the degree of coercion that could be brought to bear upon prisoners and other detainees.⁹¹ And in March 1799, Congress enacted rules and regulations for the government of the navy, which included an article making it unlawful for any person belonging to a ship or vessel of war in U.S. service, when on shore, to "plunder, abuse, or maltreat any inhabitant, or injure his property in any way."⁹² That law also provided more generally that every navy commander in chief and captain, in making specific rules and regulations for his charges, "shall keep in view also the custom and usage of the sea service most common to our nation."⁹³ There is no evidence that any of these measures gave rise to constitutional concerns, notwithstanding their seemingly intrusive regulatory features, and we have found no record

⁹⁰ See 9 ANNALS OF CONG. 3046 (1799) (reporting remarks of Rep. Gallatin) ("[R]etaliatio[n] would be repugnant to [the President's] feelings . . ."). Professor John Yoo contends that the statute was permissive and that the word "required" was in essence a scrivener's error, a "vestige" of an earlier version of the bill that had been deleted in the final amendment approved on the House floor. He does not, however, cite any evidence to support that assertion. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1210 (2004). Professor Yoo also writes that "[h]ad Congress actually purported to require the President to retaliate against prisoners whom he held by virtue of his authority as Commander in Chief, the provision could have constituted an unconstitutional interference with presidential prerogatives." *Id.* But again, Professor Yoo cites no authority in support of this conclusion, nor any evidence that any members of Congress, or the President, thought there was a constitutional problem. See, e.g., 9 ANNALS OF CONG. at 3051 (reporting remarks of Rep. Otis) ("Congress had clearly the power, from those words of the Constitution which say 'they shall grant letters of marque and reprisal' . . ."). Professor Yoo also thinks it "worthy of note" that "most members of Congress seemed to accept that the President would not be legally bound to engage in retaliation." Yoo, *supra*, at 1210 n.99. But Professor Yoo does not cite evidence that a majority in Congress thought the President would not be bound; he cites only the comments of two Representatives who expressed skepticism that President Adams would, in fact, find that the prerequisites for retaliation had been satisfied, and who discussed the prospect that the President might not do so for humanitarian reasons. See 9 ANNALS OF CONG. at 3046 (reporting remarks of Rep. Gallatin); *id.* at 3049 (reporting remarks of Rep. Dana). This hardly shows that Congress felt the President would not be legally bound to act if the prerequisites were met.

⁹¹ For example, the Act of June 28, 1798, discussed earlier, *see supra* p. 967, authorized the President to cause the officers and crews of seized French ships "to be confined in any place of safety within the United States, in such manner as he may think the public interest may require." Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575. The seizure act passed a few days later required that such French persons found on captured armed vessels be delivered to the custody of the marshal or another civil or military officer of the United States, "who shall take charge for their safe keeping and support, at the expense of the United States." Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580. A statute enacted the next year authorized the President, "as he may deem proper and expedient," to "exchange or send away . . . to the dominions of France" any captives who were French citizens. Act of Feb. 28, 1799, ch. 18, 1 Stat. 624.

⁹² Act of Mar. 2, 1799, ch. 24, § 1, art. 45, 1 Stat. 709, 713 (repealed 1800).

⁹³ *Id.* § 11, 1 Stat. at 716-17.

of President Adams complaining that these statutes were inconsistent with the imperative of conducting the military conflict in an appropriate manner.

Finally, in the midst of all this legislative action — some of a general framework variety, some much more detailed and conflict-specific — Congress passed the Alien Enemies Act of 1798.⁹⁴ That measure authorized the President in a time of war or invasion to detain and remove male natives, citizens, denizens, or subjects of the hostile nation, age fourteen and upward, found in the United States.⁹⁵ This Act, which is still in force in modified form,⁹⁶ was passed in anticipation of war with France. It was first employed against British aliens during the War of 1812. The Act not only empowered the Executive, but also restricted it by requiring the President to give most deportable aliens time to recover, dispose of, and remove their goods and effects, either by the terms of a governing treaty or “according to the dictates of humanity and national hospitality.”⁹⁷

4. *Conclusion.* — The Quasi-War with France resulted in a de facto rise in executive war authority, if only because it precipitated a massive expansion of the military establishment and thus of the amount of force at the President’s disposal. But that was not the only consequence of this first major military contest of the new nation. Perhaps because the conflict never resulted in a declaration of war, its parameters remained confined and carefully delineated by statute. Congress, far from simply authorizing the use of force and then leaving matters to the Executive, from the very onset of the hostilities with France asserted direct (and, as it turned out, ongoing) statutory control over many matters — from the rules of engagement at sea to the treatment of enemies at home. Although occasional voices in Congress expressed concern that some of these statutory measures infringed on inviolable executive powers, neither the Congress as a whole, the executive branch, nor the Supreme Court suggested at any point in these years that such a concern was well-founded.

D. *The Jefferson Administration*

By the time Jefferson took office, the Quasi-War with France had ended. Jefferson therefore proposed a return to a peacetime posture, with reliance principally on the state militia rather than on the standing army.⁹⁸ Congress responded in 1802 by enacting a law reducing

⁹⁴ Act of July 6, 1798, ch. 66, 1 Stat. 577.

⁹⁵ *Id.* § 1, 1 Stat. at 577.

⁹⁶ See 50 U.S.C. §§ 21–24 (2000). The Act has not been used since the Second World War.

⁹⁷ Act of July 6, 1798, § 1, 1 Stat. at 577.

⁹⁸ See Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in *THE ESSENTIAL JEFFERSON* 55, 57 (Jean M. Yarbrough ed., 2006) (describing “a well-disciplined militia, our best re-

the size of the regular army from 5500 to approximately 3300 troops.⁹⁹ Congress then generally enacted statutes that afforded the new President wide discretion to use the military force that remained under his charge as he deemed necessary, such as to respond to naval attacks from Tripoli.¹⁰⁰ Indeed, in 1807, in the wake of the Burr conspiracy, Congress even authorized the President to employ the land or naval forces, as he judged necessary, to respond to *domestic* insurrections or obstructions of the laws in any case where the Militia Act of 1795 had previously authorized him to use the militia for such purposes.¹⁰¹ And although this law, the Insurrection Act of 1807, did require the President to “first observe[] all the prerequisites of [the Militia Act of 1795],”¹⁰² including the requirement that the President issue a proclamation that “insurgents” should “disperse, and retire peaceably to their respective abodes, within a limited time,”¹⁰³ it reflected a growing acceptance of both the existence of a standing army and the President’s quite substantial role in overseeing it.

Notwithstanding these broad grants of discretion to the President, and even though no great armed conflict loomed that would prompt a flurry of statutory activity akin to that accompanying the Quasi-War, the question of when the President could act in conflict with statutory requirements in military matters arose in Jefferson’s Administration in the context of a possibly unauthorized expenditure. As a general matter, appropriations and spending practices did not raise the constitutional question of a Commander in Chief override. Even though Albert Gallatin was now Jefferson’s Treasury Secretary, appropriations practice in the Jefferson Administration soon became “largely indistinguishable from practice during the Federalist period.”¹⁰⁴ No matter how appropriations statutes were designed, it seemed, executive officials construed them flexibly, sometimes by reading them to allow gen-

liance in peace and for the first moments of war till regulars may relieve them,” as one of the “essential principles of our Government . . . which ought to shape its Administration”); Letter from Thomas Jefferson to Elbridge Gerry (Jan. 26, 1799), in *THE ESSENTIAL JEFFERSON*, *supra*, at 190, 190 (“I am for relying, for internal defence, on our militia solely, till actual invasion . . .”).

⁹⁹ See Act of Mar. 16, 1802, ch. 9, §§ 1–3, 2 Stat. 132, 132–33 (“fixing the military peace establishment of the United States”).

¹⁰⁰ See, e.g., Act of Feb. 6, 1802, ch. 4, §§ 1–2, 2 Stat. 129, 130 (authorizing the President to instruct commanders of public vessels “to cause to be done all such other acts of precaution or hostility as the state of war [with the Barbary pirates] will justify, and may, in his opinion, require”). As Judge Sofaer relates, there were also some cases in which Congress rejected proposals to increase the President’s discretionary powers, including a bill that would have given Jefferson authority to expel British warships from U.S. harbors. See SOFAER, *supra* note 48, at 174–75.

¹⁰¹ See Act of Mar. 3, 1807, ch. 39, 2 Stat. 443. For a discussion of the 1795 Militia Act, see *supra* p. 963.

¹⁰² Act of Mar. 3, 1807, 2 Stat. at 443.

¹⁰³ Act of Feb. 28, 1795, ch. 36, § 3, 1 Stat. 424, 424.

¹⁰⁴ SOFAER, *supra* note 48, at 170.

eral funds to be used to supplement specific statutory limits, other times by adjudging that they permitted “anticipatory” spending for essential functions authorized by Congress. Importantly, as was true during the Washington Administration,¹⁰⁵ such creative construction was not rooted in a claim of *constitutional* authority on the part of the President. Instead, the interpretive practice rested on policy-based arguments about the importance of affording the President flexibility in administration of an expanding bureaucracy, and on the contention (no doubt in part fanciful) that Congress itself should be deemed to have been legislating with such practicalities in mind.¹⁰⁶

But a military crisis in 1807 prompted Jefferson in one case to incur financial obligations for the nation without purporting to justify them by creative statutory construction.¹⁰⁷ Significantly, however, even in this outlier case, Jefferson’s argument did *not* rest on the notion that Congress lacked the power to regulate decisions regarding military operations generally, nor even on the claim that the conduct of military campaigns is vested solely in the President by virtue of his designation as Commander in Chief. Instead, the Jefferson Administration’s defense was premised on the far different, and conceptually much more limited, notion of temporary necessity — an argument that, in this case at least, does not appear to have been a constitutional trump at all.

On June 22, 1807, while Congress was in recess, the British warship *Leopard* attacked the American frigate *Chesapeake* as it was leaving port at Hampton Roads, Virginia. It was widely believed this aggressive action might precipitate a war with England. The next month, Jefferson’s cabinet voted to purchase on credit timber for about 100 gunboats, along with hundreds of tons of saltpeter and sulphur — the requisites for gunpowder.¹⁰⁸ Apparently no one in the executive branch thought the existing appropriations laws or any other statutes could be stretched to authorize such purchases, but Jefferson entered into the contracts anyway, “on the presumption that Congress will sanction it.”¹⁰⁹

The legal literature has traditionally treated the *Chesapeake* incident as a classic example of the Commander in Chief making an expenditure that could not be defended on even the most creative inter-

¹⁰⁵ See *supra* pp. 958–61.

¹⁰⁶ See WILMERDING, *supra* note 33, at 50–76.

¹⁰⁷ See generally SOFAER, *supra* note 48, at 172–73; WILMERDING, *supra* note 33, at 9; Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 105–07 (1998).

¹⁰⁸ See SOFAER, *supra* note 48, at 172.

¹⁰⁹ Thomas Jefferson, Informal Memorandum (July 28, 1807), in 1 THE WORKS OF THOMAS JEFFERSON 415, 415 (Paul Leicester Ford ed., 1904).

pretation of appropriations statutes.¹¹⁰ We question whether this is the best understanding of the incident. It is not clear that Jefferson transgressed any statute, or even that he violated the constitutional prohibition on drawing money from the treasury except “in Consequence of Appropriations made by Law”;¹¹¹ it appears instead that Jefferson merely incurred an obligation on behalf of the United States, not that he expended any funds.¹¹² Be that as it may, when Congress reconvened the following October, Jefferson did not argue that the existing statutes authorized the contract. Instead, he asserted a particular claim of limited necessity:

The moment our peace was threatened, I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us; and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done, if then assembled.¹¹³

As this passage reveals, Jefferson did not claim any constitutional power to ignore Congress’s will *simpliciter*, or even to spend (or incur obligations) in violation of statute when Congress was sitting — let alone a broader Commander in Chief prerogative to deal with military crises as he saw fit. At most, his claim was that the President can act as necessity demands in times of great crisis, where it is reasonable to anticipate that an authorizing statute will be forthcoming and when it would be infeasible to call upon the Congress for *ex ante* authorization. Of course, if the Jefferson Administration had actually expended funds, then as a practical matter the legislature would have been hard-pressed to *divest* the President of the power that he claimed necessity

¹¹⁰ In addition to the sources cited *supra* in note 107, see, for example, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 38–39 (1994); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 24 (Mariner Books 2004) (1973).

¹¹¹ U.S. CONST. art. I, § 9, cl. 7.

¹¹² It was not until thirteen years later that Congress would make it unlawful for the Secretaries of State, War, the Treasury, and the Navy to make any contracts “except under a law authorizing the same, or under an appropriation adequate to its fulfillment.” Act of May 1, 1820, ch. 52, § 6, 3 Stat. 567, 568. A similar limitation appears today in the Anti-Deficiency Act. See 31 U.S.C. § 1341(a)(1)(A)–(B) (2000) (making it unlawful for executive officials to “make or authorize an expenditure or obligation exceeding an amount available in an appropriation” or to involve the government “in a contract or obligation for the payment of money before an appropriation is made unless authorized by law” (emphasis added)).

¹¹³ Thomas Jefferson, Annual Message to Congress (Oct. 27, 1807), in 17 ANNALS OF CONG. 14, 17 (1807).

had entitled him to exercise. But the significance of Jefferson's justification is that he set forth such a narrow view of the predicate for executive resort to action based on necessity in the first instance. Jefferson appeared to assert such a power because Congress was not actually available — a circumstance that, to be sure, was not infrequent in that day, but one that also had a certain practical institutional justification underlying it. As we will see, Lincoln used this same limited theory of emergency power to justify unauthorized expenditures in Congress's absence at the outset of the Civil War.¹¹⁴

For its part, Congress seemed intent on both recognizing and defining the bounds of the necessity defense that Jefferson had invoked. Congress promptly enacted an appropriation to pay for the obligations Jefferson had incurred.¹¹⁵ More interesting, perhaps, is what happened next. In 1809, on the final day of Congress's session and the penultimate day of Jefferson's second term, Congress passed an appropriations law for the Treasury, War, and Navy Departments that included a variation of Gallatin's old restrictive clause from the 1797 Act¹¹⁶: "[T]he sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated . . ."¹¹⁷ But Congress also included a proviso that effectively codified an "emergency" exception akin to that Jefferson had invoked in the *Chesapeake* affair, although dealing only with actual expenditures: the Act authorized the President *during a congressional recess*, and "on the application of the secretary of the proper department, . . . to direct . . . that a portion of the monies appropriated for a particular branch . . . in that department, be applied to another branch of expenditure in the same department" if, in the President's opinion, such a transfer was "necessary for the public service."¹¹⁸ Congress thus did more than ratify what Jefferson had done; it stressed that disregard of appropriations limitations would be unwarranted in circumstances in which Congress *was* available to consider and address the emergency.¹¹⁹

¹¹⁴ See *infra* pp. 1001–02. These claims are to be distinguished from bolder and broader assertions suggested by Jefferson and Lincoln — claims that they apparently never acted upon — that the President has an obligation to actually *violate* a law in the rare event that it is essential to do so for the preservation of the nation itself. We discuss and distinguish these two sorts of "emergency" arguments in Barron & Lederman, *supra* note 2, at 745–48.

¹¹⁵ See Act of Dec. 18, 1807, ch. 4, § 2, 2 Stat. 451.

¹¹⁶ See Act of Mar. 3, 1797, ch. 17, § 1, 1 Stat. 508, 509. For discussion of this Act, see *supra* note 42.

¹¹⁷ Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535, 535.

¹¹⁸ *Id.* § 1, 2 Stat. at 535–36.

¹¹⁹ One other incident in the Jefferson Administration is also worth brief mention, involving the prosecution in *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806). The defendant in *Smith* was alleged to have organized a hostile expedition against Spanish territory, in violation of the Neutrality Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381, 384, which prohibited "any person"

E. The War of 1812

The War of 1812 constituted the first full-fledged military engagement of the young nation. It was a controversial war, occasioning passionate debate in Congress over whether the declaration of war was itself constitutional, the objection being that there had not been a sufficient predicate of hostile British action.¹²⁰ Nevertheless, and perhaps because Congress issued a formal declaration, the war did not, as the Quasi-War had done, produce a raft of legislation purporting to define operational limits on how force could be used. Congress did pass several statutes dealing with the specific issue of prisoners of war, authorizing the President to make such regulations and arrangements for their safekeeping and support “as he may deem expedient,” but only “until the same shall be otherwise provided for by law.”¹²¹

Despite this relative paucity of congressional action, the War of 1812 does offer an important piece of evidence relating to Congress’s constitutional authority to restrict executive war powers. It comes from the Supreme Court’s decision in *Brown v. United States*.¹²² The U.S. Attorney in Massachusetts had filed an action to condemn over 500 tons of timber in the United States that had belonged to British subjects. The circuit court condemned the timber as enemy property forfeited to the United States. The Supreme Court, in an opinion by Chief Justice Marshall, reversed, holding that the seizure required statutory authorization that Congress had not provided. The Chief

within the United States from undertaking such an expedition against the territory or dominions of any state with which the United States was at peace. Smith’s defense was that President Jefferson had authorized his hostile actions, and he sought to subpoena Secretary of State Madison and other federal officials to testify about this alleged authorization. Counsel for the government strenuously argued, however, that the requested evidence was irrelevant, because the President had no legal authority under the Constitution to authorize violation of the Neutrality Act. See *Smith*, 27 F. Cas. at 1203–04. Justice Paterson, sitting on circuit, agreed and denied the motion. See *id.* at 1229–31. *Smith* is certainly relevant to rebut the notion that the President has an inherent “foreign affairs” authority to act in violation of statutes. See Barron & Lederman, *supra* note 2, at 743–44. However, at the time of *Smith* itself, the notion that the case had any bearing on the question of how to interpret the *Commander in Chief Clause*, in particular, would have seemed far-fetched: even if Jefferson had authorized Smith to attack Spanish concerns, it is unlikely the President would have then been understood as acting in his capacity as Commander in Chief, given that Smith was not part of the armed or naval forces or the militia.

¹²⁰ See SOFAER, *supra* note 48, at 268.

¹²¹ Act of July 6, 1812, ch. 128, 2 Stat. 777 (repealed 1817); see also Act of June 26, 1812, ch. 107, § 7, 2 Stat. 759, 761 (providing that prisoners found on captured vessels be delivered to the custody of the marshal or another civil or military officer of the United States, “who shall take charge of their safe keeping and support, at the expense of the United States”). The following year, Congress enacted yet another retaliation act, this one merely authorizing (not requiring) the President to retaliate for British violations of the laws of war against U.S. citizens — but expressly providing that such retaliation be made “according to the laws and usages of war among civilized nations.” Act of Mar. 3, 1813, ch. 61, § 1, 2 Stat. 829, 829–30. Judge Sofaer reports that this statute was enacted at President Madison’s request. SOFAER, *supra* note 48, at 270.

¹²² 12 U.S. (8 Cranch) 110 (1814).

Justice agreed with the government that the laws of war generally permitted a sovereign to confiscate enemy property in its own territory during war, but he held that the power was the *legislature's* to exercise, thereby in effect denying the President the power to seize enemy property within the United States in the absence of separate statutory authority distinct from a declaration of war.¹²³

In light of this holding, one could read the case solely as a construction of the scope of the President's inherent, or Category Two, powers (referring to the taxonomy Justice Jackson developed a century and a half later in *Youngstown Sheet & Tube Co. v. Sawyer*¹²⁴). But the real significance of the case, we think, inheres in what it reveals about early constitutional understandings of the extent of the President's subjection to statutory control. And the key to excavating that understanding is in Justice Story's fascinating dissenting opinion.

Justice Story insisted that because the laws of war permit the *sovereign* to seize enemy property in the United States during a declared war, the President can make such a seizure as Commander in Chief, "as an incident of the office," even if Congress has not separately authorized the seizure by statute.¹²⁵ For Justice Story, that is to say — here, disagreeing with the majority — the President had the constitutional authority, the "discretion vested in him," to capture enemy property within the United States during a declared war, to the extent consistent with the law of nations.¹²⁶ But significantly, in so arguing, Justice Story emphasized the congressional role both in triggering and in limiting the exercise of such presidential power. As Justice Story explained, the reason for the President's capacity to exercise such power in the first place was that "the legislative authority . . . has declared war in its most unlimited manner."¹²⁷ In other words, rather than emphasizing inherent executive authority, Justice Story stressed that the scope of the President's war powers was vast because of Congress's declaration of war.¹²⁸

¹²³ See *id.* at 128–29. It is an interesting question whether this holding is still good law. Dicta in the *Prize Cases* suggest that the President may impose a blockade — and seize vessels that violate the blockade — even without prior approval from Congress. See 67 U.S. (2 Black) 635, 669–70 (1863); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 104 (2d ed. 1996).

¹²⁴ 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹²⁵ *Brown*, 12 U.S. (8 Cranch) at 145, 147, 152–53 (Story, J., dissenting).

¹²⁶ *Id.* at 153.

¹²⁷ *Id.*

¹²⁸ Indeed, Justice Story went so far as to state that when Congress declares war, the President "is bound to carry it into effect." *Id.* This raises the interesting but ultimately academic question of whether the President could refuse to prosecute a declared war. In the waning days of his second term in early 1897, President Cleveland is reported to have rebuffed members of Congress who related that they were prepared to vote for war against Spain, saying that although the Constitution gives Congress the power to declare war, "it also makes me Commander-in-Chief, and I

Moreover, Justice Story emphasized repeatedly that although the President had the power to seize domestic enemy property in a declared war, Congress had the authority to pass laws limiting or prohibiting such constitutional authority. Ordinarily, Justice Story explained, the President is vested with a “discretion . . . as to the manner and extent” of prosecuting a declared war.¹²⁹ Thus, where the legislature has *not* further defined “the powers, objects or mode of warfare,” reasoned Justice Story, the only law limiting the Commander in Chief’s authority is “the law of nations as applied to a state of war.”¹³⁰ However, “[i]f, indeed, there be a limit imposed as to the extent to which hostilities may be carried by the executive, I admit that the executive cannot lawfully transcend that limit.”¹³¹ That is to say, Justice Story explained, if any of the acts permitted by the laws of war “are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him.”¹³²

The Chief Justice’s majority opinion, having concluded that under the laws of war the President could not confiscate the property absent specific statutory authorization, had no occasion to discuss whether a statute could *limit* such a hypothetical exercise of the Commander in

will not mobilize the army.” 2 ROBERT MCELROY, GROVER CLEVELAND: THE MAN AND THE STATESMAN 249–50 (1923) (recounting a story told by Cleveland’s friend, A.B. Farquhar). Louis Fisher and Clinton Rossiter construe this to have been simply a veto threat by Cleveland. See LOUIS FISHER, PRESIDENTIAL WAR POWER 52 (2d ed. 2004); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 66 n.1 (rev. ed. 1976). Such a threat would, in effect, preclude the constitutional question, because as Professor Clarence Berdahl explained, the notion that two-thirds of both houses would ever declare war over the President’s veto “cannot be imagined,” for “[t]he successful prosecution of a war would be impossible without the hearty cooperation of that department of the government which has in its sphere the actual direction and management of the war.” CLARENCE ARTHUR BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 96 (1921). *But cf.* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 724–29 (1997) (arguing for the view that a declaration of war is not subject to a presidential veto).

¹²⁹ *Brown*, 12 U.S. (8 Cranch) at 153 (Story, J., dissenting); see also *id.* at 147 (contending that without further specification from Congress, “the war may be carried on according to the principles of the modern law of nations, and enforced when, and where, and on what property the executive chooses”).

¹³⁰ *Id.* at 149; see also *id.* at 153 (“[H]e cannot lawfully transcend the rules of warfare established among civilized nations.”).

¹³¹ *Id.* at 147 (emphasis added).

¹³² *Id.* at 149. Justice Story referred repeatedly to Congress’s power to constrain the Commander in Chief’s ordinary discretion. See *id.* at 145 (arguing that Congress has the right to make war and declare “its limits and effects”); *id.* (arguing that the Executive may authorize the capture, “there being no limitation in the act”); *id.* at 153 (“In general, these acts [passed during the war, respecting alien enemies and prisoners of war] may be deemed mere regulations of war, limiting and directing the discretion of the executive; and it cannot be doubted that Congress had a perfect right to prescribe such regulations.” (emphasis added)); *id.* at 154 (arguing that the legislature can limit the “effects” or “nature” of war).

Chief power. But there is certainly nothing in Chief Justice Marshall's opinion to suggest otherwise, and his earlier opinion in *Little v. Barreme* is consistent with Justice Story's view.¹³³ Of course, *Brown* did not formally address the question that *Little* addressed and that *Bas* discussed in dicta — that is, whether an existing statute imposed a constraint on the President's exercise of discretionary constitutional war powers. Nevertheless, like its precursors, *Brown* accords with the notion that those “who are authorised to commit hostilities . . . can go no farther than to the extent of their commission.”¹³⁴ This time, however, the discussion of that issue had occurred in the context of a case that involved the prospect of congressional restrictions being imposed in an actual declared war.

F. The Antebellum Era

As the preceding discussion indicates, although the question of the Commander in Chief's possible preclusive authority was not extensively considered in our early constitutional history, it was not utterly unknown to political actors. The idea that Congress might minutely manage the conduct of war did seem odd to at least some legislators — disfavored, at the very least, and possibly even constitutionally dubious. But there was certainly no consensus shared by the branches that such regulation was beyond Congress's constitutional ken or that Founding-era assumptions about the Commander in Chief's subjection to statutory regulation had broken apart on the shoals of lived experience.

The final decades leading up to the Civil War, moreover, do not indicate any dramatic shift. The Executive's assertion of war powers in advance of legislative authorization became more aggressive in this period, establishing an important historical predicate for the claims of broader executive powers to deploy forces abroad that modern Presidents regularly assert.¹³⁵ But as much as the President often seized the initiative in this period, there was little indication that Congress was forfeiting whatever restrictive powers it assumed it possessed (or had already exercised) in the years up to and including the War of 1812. With one possible exception, moreover, the Executive continued its practice of accepting the limitations Congress imposed or, at most, relying on creative modes of statutory interpretation rather than assertions of preclusive constitutional war powers to respond to those statutory limits that were of practical concern.

¹³³ See *supra* pp. 969–70.

¹³⁴ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.).

¹³⁵ See *infra* pp. 1056–57.

1. *Continued Legislative Regulation.* — In the years following the Jefferson Administration, Congress continued to enact statutes giving the President limited and specified authorizations to engage in hostilities or to take possession of particular contested territories,¹³⁶ directing where troops were to be stationed,¹³⁷ and even providing that no Marine Corps officer “shall exercise command over any navy yard or vessel of the United States.”¹³⁸ Nor was it unprecedented for Congress, as part of a law regulating trade with the Indian tribes in 1834, to prescribe certain treatment for Indian detainees.¹³⁹ In short, right up to the Civil War itself, the legislative branch showed no signs of having developed a newfound hesitancy, let alone any serious constitutional self-doubt, about its authority to cabin what would otherwise be the Commander in Chief’s constitutional discretion. And for the most part, there was little indication that the legislature was out of step with prevailing sentiment in so thinking.

2. *Antebellum Constitutional Treatises.* — The nineteenth century marked the beginning of the age of constitutional treatises in the United States. Although such works do not, strictly speaking, provide clear evidence of understandings within the political branches, they do offer some insight into general legal understandings of the day. As we will see, by the early part of the twentieth century, academic discussions of the extent of the President’s preclusive authorities to deploy troops and direct campaigns, brief though they often were, constituted a staple element of the genre’s treatment of war powers and of the Commander in Chief Clause in particular.¹⁴⁰ But in the antebellum

¹³⁶ See, e.g., Act of Mar. 3, 1819, ch. 93, § 1, 3 Stat. 523, 523–24 (authorizing the President to take possession of and occupy East and West Florida, to remove and transport officers and soldiers of Spain to Havana, and, for those purposes, to employ the army, navy, and militia); Act of Feb. 12, 1813, §§ 1–2, 3 Stat. 472, 472 (authorizing the President to occupy West Florida and to employ the military and naval forces to occupy the territory and afford protection to the inhabitants thereof); Act of Jan. 2, 1812, ch. 11, § 1, 2 Stat. 670, 670 (authorizing the President to raise up to six companies of rangers to serve on the frontier in the event of actual or threatened invasions by Indian tribes); Act of Jan. 15, 1811, § 1, 3 Stat. 471, 471 (authorizing the President to occupy territory lying east of the Perdido River, and south of the state of Georgia and the Mississippi territory, if an arrangement for such had been made with the local authority of the territory, and to employ the army and navy for the purpose of taking possession and occupying and maintaining U.S. authority there).

¹³⁷ See, e.g., Act of May 14, 1836, ch. 62, § 5, 5 Stat. 29, 30 (appropriating \$50,000 to remove troops from Fort Gibson to “some eligible point on or near the western frontier line of Arkansas, and to cause a fort to be built upon the point so selected . . . for the better defence of the Arkansas frontier”).

¹³⁸ Act of June 30, 1834, ch. 132, § 4, 4 Stat. 712, 713.

¹³⁹ See Act of June 30, 1834, ch. 161, § 23, 4 Stat. 729, 733 (decreeing that the military detention of persons apprehended in Indian country was to last no more than five days, and that officers and soldiers were to treat detainees “with all the humanity which the circumstances will possibly permit,” with punishment by court-martial for cases of maltreatment).

¹⁴⁰ See *infra* pp. 1019–21, 1025–26.

era, notwithstanding the legislative regulation that had by then become familiar, what Justice Jackson later identified as the “lowest ebb” issue was not one that scholarly commentators seemed to have much in view. Indeed, some of the major treatises of the day did not discuss it even in passing.¹⁴¹

The leading scholarly work, Justice Joseph Story’s *Commentaries on the Constitution*, contained extensive discussions of Congress’s and the President’s war powers¹⁴² and indicated that the Commander in Chief’s *superintendence* prerogative was preclusive.¹⁴³ But Justice Story’s treatise did not quite engage the “lowest ebb” question directly.¹⁴⁴ Justice Story explained that “the direction of war” in particular necessitates a “single hand” but, as in *The Federalist*, the rejected alternative was not statutory control but rule by a plural executive.¹⁴⁵ Indeed, in discussing Congress’s power to raise armies, Justice Story indicated that it would encompass means “unlimited in every matter essential to its efficacy,” including the “formation, direction, and support of the national forces.”¹⁴⁶ Moreover, Justice Story specified that Congress’s power to declare war may be used to authorize “general hostilities, in which case the general laws of war apply to our situation; or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed.”¹⁴⁷ While Congress followed the former course in 1812, Justice Story explained, “[t]he latter course was pursued in the qualified war of 1798 with France, which was regulated by divers acts of congress, and *of course* was confined to the limits prescribed by those acts.”¹⁴⁸ Still, despite this en-

¹⁴¹ See, e.g., BLACKSTONE’S COMMENTARIES (St. George Tucker ed., Philadelphia, Birch & Small 1803); JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halsted 1830). The sixth edition of Kent’s *Commentaries*, published in 1848, added this single sentence in a footnote, without much elaboration: “Though the constitution vests the executive power in the President, and declares him to be Commander-in-Chief of the Army and Navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress.” 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 92 n.a (New York, William Kent, 6th ed. 1848).

¹⁴² 3 STORY, *supra* note 15, §§ 1163–1210, 1484–1486, at 59–95, 340–42.

¹⁴³ Justice Story explained that at the ratifying conventions, “[t]he propriety of admitting the president to be commander-in-chief, *so far as to give orders, and have a general superintendency*, was admitted.” *Id.* § 1486, at 341 (emphasis added). Justice Story also discussed another question that had been prominent at the Framing — whether the President could command the military in person. See *id.*

¹⁴⁴ Instead, his main concerns were with issues relating to the laws of war and the President’s unilateral powers, that is, what the President could do without ex ante legislative approval, as well as concerns about standing armies and the President assuming personal command despite a lack of military expertise.

¹⁴⁵ *Id.* § 1485, at 340–41 (citing THE FEDERALIST NO. 74 (Alexander Hamilton)). See Barron & Lederman, *supra* note 2, at 796–99 (discussing Hamilton’s *Federalist* accounts).

¹⁴⁶ 3 STORY, *supra* note 15, § 1178, at 68.

¹⁴⁷ *Id.* § 1169, at 62.

¹⁴⁸ *Id.* (emphasis added).

dorsement of the principle set forth in *Bas* and applied in *Little*, Justice Story never conclusively declared which department would have the final word in the event of an interbranch conflict on such matters in an actual declared war, or just how broad Congress's regulatory powers were even in a more limited conflict.¹⁴⁹

William Rawle's 1825 treatise came closer to addressing the question, albeit in a brief and less-than-illuminating manner. Rawle specifically recognized broad legislative powers as to the military in peacetime, appearing to leave little outside the legislative ambit.¹⁵⁰ As to "the emergencies of a war," however, Rawle noted that exigencies could justify

the president . . . in preferring the execution of his constitutional duties, to the literal obedience of a law, the original object of which was of less vital importance than that created by the exigencies of the moment, and there can be no doubt, that this necessary power would extend to the erecting of new fortresses, and to the abandoning of those erected by order of congress, as well as to the concentration, division or other local employment of the troops, which in his judgment or that of the officers under his command, became expedient from circumstances.¹⁵¹

Although this passage would appear to argue for entrusting the President with substantial wartime power as a practical matter, even to ignore "the literal obedience of a law" in exigent circumstances, Rawle expressly disclaimed the idea that he was defending a President's right to defy congressional will: "This would not be a violation of the rules laid down in the preceding pages" requiring executive compliance with statutes pursuant to the President's duty to take care that the laws be faithfully executed, Rawle explained, "since the obligation of the law is lost in the succession of *causes that prevent its operation*, and the constitution itself may be considered as thus superseding it."¹⁵² In other words, Rawle appeared to be explaining that in war, a preexisting statutory limitation might be properly construed not to continue to have its full peacetime force and effect. Rawle said nothing directly, however, about what should happen in the event the President and the

¹⁴⁹ See also *id.* § 1171, at 92 (explaining that the people's representatives "have a right to be consulted as to [war's] propriety and necessity," and that because the Executive is to "carry . . . on" the war, he "therefore should be consulted as to its time, and the ways and means of making it effective").

¹⁵⁰ See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 139 (Philadelphia, H.C. Carey & I. Lea 1825) (explaining that Congress could direct the "manner of employment" of the army; direct when and where forts shall be built, and the specific number of troops that shall garrison them; and station troops in peacetime "in particular parts of the United States, having a view either to their health and easy subsistence, or to the security of distant and frontier stations").

¹⁵¹ *Id.*

¹⁵² *Id.* at 139–40 (emphasis added).

Congress disagree as to whether the President must abide by a restriction that *is* properly construed to apply to the conduct of war.

The evidence from the treatises of the time, therefore, is fairly inconclusive. The most one can say with confidence is that there appeared to be a general understanding that Congress could exercise control over the armed forces at least in peacetime; that the function of the Commander in Chief Clause itself was, as Justice Story suggested, to establish a hierarchical guarantee within the military establishment; that the teachings of *Bas* and *Little* were endorsed; and that there was no consensus about a broad or unqualified preclusive executive power over the deployment of troops or the conduct of campaigns such as would come to dominate the views expressed in similar compendiums published in the decades following Reconstruction.

3. *Executive Branch Views in the Antebellum Period.* — Although Congress continued to regulate military matters throughout the period, the Supreme Court had no occasion to weigh in on this issue in the decades following *Brown*. But interestingly, just as the judiciary had less reason to address the issue, the Executive appeared to have more. In fact, some of the earliest and most significant statements of the extent of Congress's authority to regulate the Commander in Chief were offered during this time period. They touched on the full range of issues that concern us, from the existence of a preclusive power of superintendence over the armed forces to the extent of the Congress's authority to curb the President's substantive war powers.

(a) *Preclusive Superintendence Prerogatives.* — As the antebellum period drew to a close, President Buchanan endorsed the indefeasible or preclusive power of superintendence over the military¹⁵³ in the fascinating case of Captain Meigs and the Washington Aqueduct.¹⁵⁴ In 1852, before Buchanan had taken office, Montgomery C. Meigs, a brilliant and eccentric captain in the Army Corps of Engineers, was assigned to survey the water supply for the cities of Washington and Georgetown and eventually to oversee the War Department's construction of an aqueduct along the Potomac River. Meigs's subsequent report recommended that an aqueduct be built just above Great Falls, north of Washington. Congress approved that recommendation, and the Department of War began work on the aqueduct, led by Meigs himself. For several years, things ran very smoothly. In the Buchanan Administration, however, Meigs's relationship with Secretary of War John Floyd turned sour: Floyd dismissed Meigs and made sure the Administration's proposed budget included no funds for work on the

¹⁵³ See Barron & Lederman, *supra* note 2, at 767–70.

¹⁵⁴ See generally RUSSELL F. WEIGLEY, QUARTERMASTER GENERAL OF THE UNION ARMY: A BIOGRAPHY OF M.C. MEIGS (1959); HARRY C. WAYS, THE WASHINGTON AQUEDUCT, 1852–1992 (1996).

aqueduct. Meigs himself, a beloved figure on Capitol Hill, then successfully lobbied Congress for a bill appropriating half a million dollars for the aqueduct to be spent “according to the plans and estimates of Captain Meigs, *and under his superintendence.*”¹⁵⁵

In his signing statement to this appropriations bill, President Buchanan wrote that if Congress had meant to give Meigs discretionary authority to determine how the aqueduct project would proceed, it would interfere with the President’s “right . . . *to be* Commander in Chief.”¹⁵⁶ Buchanan concluded, therefore, that it was “impossible that Congress could have intended to interfere with the clear right of the President to command the Army” by “withdraw[ing] an officer from the command of the President and select[ing] him for the performance of an executive duty.”¹⁵⁷ Buchanan thus construed the statutory “condition” as precatory rather than as mandatory.¹⁵⁸ The Secretary of War thereafter permitted Meigs to superintend the project, but denied him any discretionary authority by refusing to permit Meigs to be chief engineer of the Washington Aqueduct. Meigs complained to the President that this was in clear violation of the statute, and that the aqueduct had to be built not only according to his designs but, more importantly, under his superintendence — a power that Meigs understood to give him control over all discretionary decisions. This prompted an opinion of Attorney General Jeremiah Black to the President, affirming the constitutional inviolability of the army chain of command. Black agreed with the President that if the statute were construed to give Meigs the power to build the aqueduct “without accounting to his superior officers” and “according to his own uncontrolled will,”¹⁵⁹ it would be constitutionally dubious: Congress could not make Meigs “independent of [the President],” even as a condition on an appropriation rather than through an outright requirement.¹⁶⁰ Therefore the Attorney General rejected such a construction: “This clause of the appropriation bill was not intended to appoint Captain Meigs chief engineer of the aqueduct, nor was it meant to interfere with your authority over him or any other of your military subordinates.”¹⁶¹

(*b*) *Preclusive Substantive Powers.* — The Meigs case is sometimes cited in support of the theory of a *substantive* preclusive power of

¹⁵⁵ Act of June 25, 1860, ch. 211, 12 Stat. 104, 106 (emphasis added).

¹⁵⁶ James Buchanan, Message to the House of Representatives (June 25, 1860), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3128, 3129 (James D. Richardson ed., 1917) [hereinafter MESSAGES AND PAPERS] (emphasis added).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Memorial of Captain Meigs, 9 Op. Att’y Gen. 462, 468, 471 (1860).

¹⁶⁰ *Id.* at 469.

¹⁶¹ *Id.* at 468–69.

presidential command.¹⁶² But neither Attorney General Black's opinion nor President Buchanan's signing statement adverted to any prerogative of the Commander in Chief to disregard substantive statutory commands, nor did the statute even concern actions during wartime. At most, Buchanan and Black were arguing that if Congress chooses to assign a certain function to the army, even outside the context of war, Congress may not assign discretionary aspects of that function to a lower-level officer to be carried out "according to his own pleasure,"¹⁶³ with complete independence from presidential supervision or control.¹⁶⁴

¹⁶² See, e.g., U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006) [hereinafter DOJ WHITE PAPER], reprinted in David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1374, 1404-05 (2006).

¹⁶³ Memorial of Captain Meigs, *supra* note 159, at 472.

¹⁶⁴ If Congress had directed that the aqueduct be constructed not by the Army Corps of Engineers, but instead under the supervision of a particular office within, say, the Department of the Interior, the constitutionality of the statute — substantively no different from the enactment in the Meigs case — would be entirely unaffected by the Commander in Chief Clause. In that case, the law would be evaluated under the standards the Court has developed for evaluating the constitutionality of statutory limitations on executive supervision of administrative officials, most recently announced in *Morrison v. Olson*, 487 U.S. 654 (1988).

With respect to the Commander in Chief Clause, in particular, Attorney General Black also wrote:

As commander-in-chief of the army it is [the President's] right to decide according to [his] own judgment what officer shall perform any particular duty, and as the supreme executive magistrate [he has] power of appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution.

Memorial of Captain Meigs, *supra* note 159, at 468; see also Buchanan, *supra* note 156, at 3129 (stating that the President had "absolute authority to order Captain Meigs to any other service [the President] might deem expedient"). The Department of Justice recently cited this passage as support for a *substantive* preclusive Commander in Chief power, including over the "actual conduct of a military campaign." DOJ WHITE PAPER, *supra* note 162, at 1404 & n.15. It is not clear exactly what Black intended by the statement in question, but we doubt he meant to suggest any such substantive Commander in Chief prerogative. Indeed, it is unlikely Black even intended to imply that Congress could not assign particular military functions to particular *offices*. As Black himself wrote a few months later, with respect to the Commander in Chief authority and other presidential powers and their relation to statutes:

[W]here the mode of performing a duty is pointed out by statute, that is the exclusive mode, and no other can be followed. . . . If, therefore, an act of Congress declares that a certain thing shall be done by a particular officer, it cannot be done by a different officer. The agency which the law furnishes for its own execution must be used to the exclusion of all others. For instance, the revenues of the United States are to be collected in a certain way, at certain established ports, and by a certain class of officers. *The President has no authority, under any circumstances, to collect the same revenues at other places, by a different sort of officers, or in ways not provided for.*

Power of the President in Executing the Laws, 9 Op. Att'y Gen. 516, 519 (1860) (emphases added). This is the case even within the armed forces, at least as to certain internal functions apart from the conduct of war. So, for example, as early as 1820, the Attorney General had opined that in light of his "military sovereignty" as Commander in Chief, the President "may suspend, modify, or rescind, at pleasure, any order issued by . . . any . . . subordinate officer, *except where a direct au-*

In fact, Black took an expansive view of congressional power to define the extent of substantive Commander in Chief powers in response to a subsequent request for an opinion on the subject from President Buchanan:

To the chief executive magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed. That he may be able to meet this duty with a power equal to its performance, he nominates his own subordinates, and removes them at his pleasure. For the same reason the land and naval forces are under his orders as their commander-in-chief. But his power is to be used only in the manner prescribed by the legislative department. He cannot accomplish a legal purpose by illegal means¹⁶⁵

Indeed, with the possible exception discussed below, we have been unable to find any suggestion during the seventy years between ratification and Lincoln's election that the executive branch ever invoked any constitutional objections to statutory constraints on the Commander in Chief's tactical discretion or substantive command authorities, either in wartime or in peacetime. To be sure, such quiescence does not necessarily imply acceptance. But a series of antebellum-era Attorney General opinions affirm that the Executive's authority was subject to statutory supersession — even in areas where the President had extensive independent authority to regulate the operations and government of the armed forces, including questions respecting command structure.¹⁶⁶

thority has been given by Congress to an officer to perform any particular function — for example, for a commanding officer to order courts-martial in certain cases.” Power of the Secretary of the Navy over the Marine Corps, 1 Op. Att’y Gen. 380, 381 (1820) (emphasis added).

Perhaps Black was instead adverting to another possible problem with the Meigs provision, namely, that Congress was assigning superintendence not to an existing executive *office* (such as the “Captain of the Corps of Engineers”), but to a particular *named person*. This might have raised a distinct constitutional concern: if the superintendence provision were deemed to create a new federal office, the statutory designation of Meigs as the superintendent would have been akin to a congressional appointment of a particular individual to a federal office, which would likely violate the Appointments Clause. *See, e.g.*, Promotion of Marine Officer, 41 Op. Att’y Gen. 291, 292 (1956); Civil-Service Commission, 13 Op. Att’y Gen. 516, 521, 523 (1871).

¹⁶⁵ Power of the President in Executing the Laws, *supra* note 164, at 518–19. Black’s 1860 opinion did not deal with questions related to war, as such. The primary question at hand was the extent to which Buchanan could use the army and navy to enforce the laws in the southern states that had seceded. Black explained that the Commander in Chief was strictly limited by the terms of the 1795 Militia Act and 1807 Insurrection Act. *See id.* at 521–23.

¹⁶⁶ *See, e.g.*, Brevets in the Marine Corps, 1 Op. Att’y Gen. 578, 579–83 (1822) (explaining that because Congress has the power to raise the army, it can “mould and modify it at their pleasure”; therefore, when Congress had by statute eliminated the office and rank of major in the Marine Corps, the President could not appoint an officer to that rank, even if that would have been the fair and equitable thing to do: he was required to “execute [the law] as it stands, and not as he would wish it”); Brevet Pay of General Macomb, 1 Op. Att’y Gen. 547, 549 (1822) (opining that the President had authority to issue regulations establishing pay for certain commanders *in the absence* of positive legislation to the contrary).

To be sure, these opinions did not deal with wartime tactical decisions, as such, but they are express in endorsing general constitutional assumptions regarding the supremacy of statutes over what would otherwise be a Commander in Chief's constitutional discretion. Moreover, in setting forth broad propositions about the Executive's subjection to statutory control, these opinions make no effort (as contemporary executive branch opinions frequently do) to exempt tactical judgments from their scope.¹⁶⁷

(c) *Fillmore's Equivocal Discussion of Preclusive Substantive Powers.* — The possible exception to this pattern occurred in 1851, in a law enforcement — not war — setting. President Fillmore contemplated using both the militia and the armed forces to help enforce the Fugitive Slave Act against groups in Boston trying to rescue slaves from return to servitude. The Senate passed a resolution requesting information from Fillmore about the incident, the means he had adopted to deal with the issue, and whether, in his opinion, “any additional legislation is necessary to meet the exigency of the case, and to more vigorously execute existing laws.”¹⁶⁸ In a letter to the Senate the next day, Fillmore explained that he had the power to deal with the issue under the 1795 Militia Act and the 1807 Insurrection Act, which respectively authorized the President to call forth the militia, and to use the armed forces, to enforce domestic laws.¹⁶⁹ Recall that the 1795 Act provided that “the President shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time,” and the 1807 Act appeared to incorporate by reference this “pre-requisite[.]” of an advance dispersal warning to insurgents.¹⁷⁰

Fillmore wrote that there was “some doubt” whether the proclamation requirement of those older statutes applied when the militia and armed forces were called forth for purposes of *executing the laws*, as opposed to suppressing insurrections. He urged Congress to clarify that there was no early-notice requirement in such situations. “Such a proclamation in aid of the civil authority,” he argued, “would often defeat the whole object by giving such notice to persons intended to be arrested that they would be enabled to fly or secrete themselves.”¹⁷¹ Fillmore further suggested that he had a preexisting *constitutional* power to use the extant armed forces to enforce domestic laws, in

¹⁶⁷ Cf. *Brevets' Pay and Rations*, 2 Op. Att'y Gen. 223, 232 (1829) (endorsing congressional power to “specify a certain number of military stations for the peace establishment”).

¹⁶⁸ CONG. GLOBE, 31st Cong., 2d Sess. 596 (1851).

¹⁶⁹ Millard Fillmore, Message to the Senate (Feb. 19, 1851), in 6 MESSAGES AND PAPERS, *supra* note 156, at 2637, 2640–41.

¹⁷⁰ See *supra* pp. 963, 973.

¹⁷¹ Fillmore, *supra* note 169, at 2641.

which case the proclamation requirement would be a statutory condition imposed on the exercise of the Commander in Chief's Article II authority. Fillmore therefore wondered whether Congress's 1807 incorporation-by-reference of the proclamation prerequisite had been inadvertent. He insinuated that insofar as the 1807 law *were* construed to require advance warning of the use of the armed forces, and not just the militia, such a construction might raise constitutional questions:

[I]t appears that the Army and Navy are by the Constitution placed under the control of the Executive; and probably no legislation of Congress could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the Army and Navy. . . .

Congress, not probably advertent to the difference between the militia and the Regular Army, by the act of March 3, 1807, authorized the President to use the land and naval forces of the United States for the same purposes for which he might call forth the militia, and subject to the same proclamation. But the power of the President under the Constitution, as Commander of the Army and Navy, is general, and his duty to see the laws faithfully executed is general and positive; and *the act of 1807 ought not to be construed as evincing any disposition in Congress to limit or restrain this constitutional authority.*¹⁷²

Fillmore was not clear as to the source of his constitutional objection — whether it derived from the Commander in Chief Clause, from the Take Care Clause, or from some combination of the two. In any case, Fillmore suggested that Congress could not disable the President from fulfilling his constitutional obligation to ensure that federal statutes were faithfully executed. Indeed, as to the question of whether Congress could add to or diminish his powers of control over land or naval forces already raised, Fillmore was notably equivocal, averring only that such legislation would “probably” be unconstitutional.¹⁷³ In any event, he seemed to base that judgment not on any idea that wartime tactics or operational judgments on the battlefield were for the President alone, but rather on the much more sweeping and seemingly indefensible ground that all decisions pertaining to the armed forces are beyond statutory control.¹⁷⁴

¹⁷² *Id.* at 2640–41 (emphasis added). This argument was particularly bold in that it depended on the unorthodox view that the power to use the military for domestic law enforcement was incidental to the Commander in Chief's inherent constitutional authority. This understanding of Article II would have implied that the statutory authorization of the 1807 Insurrection Act was unnecessary in the first place. Fillmore conceded that certain members of his own cabinet rejected this view. See Letter from President Millard Fillmore to Sen. Daniel Webster (Oct. 28, 1850), in 7 THE PAPERS OF DANIEL WEBSTER 172 (Charles M. Wiltse & Michael J. Birkner eds., 1986).

¹⁷³ Fillmore, *supra* note 169, at 2641.

¹⁷⁴ As we have indicated, *see supra* pp. 986–87, nine years later President Buchanan's Attorney General would reject any such notion, concluding instead that the Commander in Chief power can be used — at least for law enforcement purposes — “only in the manner prescribed by the

Whatever Fillmore meant to assert, Congress can hardly have been said to have acceded to it, either in direct response or in debates shortly thereafter. A few weeks after the question of statutory amendment was referred to the Senate Judiciary Committee, the committee reported that, in light of the 1795 and 1807 statutes “and the experience of the past,”¹⁷⁵ “further legislation is not essential to enable the President to discharge, . . . with fidelity, his high constitutional duty to see that the laws are faithfully executed.”¹⁷⁶ In so acting, the committee did not respond directly to Fillmore’s request that it clarify whether the 1807 Act required an advance warning to lawbreakers that the President was about to use the armed forces.¹⁷⁷ Senator Andrew Butler did write separately, fearing that the committee’s silence with respect to that question might otherwise be viewed as “a tacit recognition” of Fillmore’s constitutional argument.¹⁷⁸ Butler appeared to reject Fillmore’s suggestion that Congress could not condition the President’s use of the armed services, but his reasoning was a bit ambiguous:

For the specific and sometimes delicate purposes indicated [by statute], I think Congress has the direction of the President. When actually in command, for repelling invasion or for any other purpose, he must exercise his own judgment, under his constitutional discretion. In one sentence, I deny that the President has a right to employ the army and navy for suppressing insurrections, &c., without observing the same prerequisites prescribed for him in calling out the militia for the same purpose.

. . . I would regard it as a fearfully momentous occasion to see the Army called out to shoot down insurgents without notice or proclamation.¹⁷⁹

legislative department.” Power of the President in Executing the Laws, *supra* note 164, at 518. Thus, Attorney General Black advised that if the President wished to use the armed forces to execute the law in the South, he had to do so in strict conformity to the 1795 and 1807 Acts (although he did not discuss the advance-warning requirement in particular). *Id.* at 521–23.

¹⁷⁵ In one case soon after the 1807 Act was enacted, for instance, Jefferson had given a dispersal warning to insurgents in the Lake Champlain region who were “combining and confederating” against the Embargo Act. See FREDERICK T. WILSON, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787–1903, S. DOC. NO. 57-209, at 51 (1903); see also *id.* at 57 (describing a similar proclamation issued by President Jackson); *id.* at 68 (noting that President Tyler reported to Congress that he had ordered a similar proclamation to be issued if necessary).

¹⁷⁶ CONG. GLOBE, 31st Cong., 2d Sess. 828 (1851) (emphasis omitted).

¹⁷⁷ A plain reading of the proclamation requirement in the Act of Feb. 28, 1795, ch. 36, § 3, 1 Stat. 424, 424, indicates that it applied only in cases of insurrection (“shall . . . command such insurgents to disperse”). The requirement was therefore inapposite to the question Fillmore raised in 1851 concerning use of the army for purposes of law enforcement.

¹⁷⁸ CONG. GLOBE, 31st Cong., 2d Sess. at 828.

¹⁷⁹ *Id.* at 829. The second sentence is unclear as to whether such presidential discretion, when the Chief Executive is “actually in command,” trumps contrary statutory requirements or merely may be exercised in their absence. In any event, Butler’s references to use of the army to suppress insurrections, and to “shoot down insurgents,” suggests that perhaps he was construing the proclamation requirement *not* to apply in those cases that concerned Fillmore, that is, when the army

Thus, although it is difficult to know quite what to make of the Senate committee's silence on the constitutional question, the legislature's refusal to amend the statute surely does not suggest that Congress assented to Fillmore's suggestion of constitutional difficulties.¹⁸⁰

4. *The 1852 Troop Deployment Debate in the House of Representatives.* — In a revealing 1852 debate in the House of Representatives about legislative direction of actual *troop deployment*, legislators expressed opposition to what would have been the broadest version of Fillmore's constitutional claim. Six years earlier, Congress had enacted a law raising a regiment of riflemen, ostensibly to protect emigrants to Oregon from the Native Americans in the area, although the law did not specifically instruct the President to station the troops in Oregon and instead only mentioned that purpose in its title.¹⁸¹ When President Polk used the regiment in the Mexican War instead and then later assigned it to California, Delegate Joseph Lane, of the Oregon territory, introduced a resolution *requesting* the President to send the rifle regiment to Oregon, "the service for which said troops were created."¹⁸² The debate that ensued marked the most serious and extensive discussion of Congress's powers to restrict the Commander in Chief in more than half a century.¹⁸³ Although it did not result in the enactment of a new legislative restriction, the debate indicates that the legislature had by no means suffered a general loss of confidence in its powers.

Representative Thomas Bayly opposed the resolution on the ground that the House had no power to direct the Commander in Chief's chosen troop movements,¹⁸⁴ an assertion that Representative Cyrus Dunham remarked was "so strange, so novel, and so important, that I do feel it ought not to pass unnoticed."¹⁸⁵ In Dunham's view, such a theory would in effect "neutralise the power which Congress

was used to enforce laws. On the other hand, if the proclamation requirement were constitutional for purposes of responding to insurgencies, there would appear to be no reason why it would not also be constitutional if applied in the context of "mere" law enforcement, where the President's inherent constitutional power was less certain.

¹⁸⁰ A similar dispersal proclamation requirement remains a part of federal law to this day. See 10 U.S.C.A. § 334 (West 2006) ("Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time."). We are unaware of any subsequent constitutional objection by the Executive.

¹⁸¹ See Act of May 19, 1846, ch. 22, 9 Stat. 13.

¹⁸² CONG. GLOBE, 32d Cong., 1st Sess. 507 (1852).

¹⁸³ See *supra* pp. 965–66 (discussing the 1797–1798 debates).

¹⁸⁴ CONG. GLOBE, 32d Cong., 1st Sess. at 509.

¹⁸⁵ *Id.* at 517.

has to declare war.”¹⁸⁶ Representative David Cartter likewise called Bayly’s doctrine “extraordinary” and “alarming,” because it would “throw the whole safety of the empire into a single man’s hands.”¹⁸⁷ The President’s designation as “Commander in Chief,” said Cartter, means simply that he “is the drill officer of your forces.” “With the detailed disposition of the Army he does hold the sovereign command, but that disposition must be subordinate to and resolved within the legislative purpose declared in creating the force, and disposing the point of defense.”¹⁸⁸ Representative James Brooks then emphasized a central point as to which no rejoinder was made — the difference between the President being subject to control by one or both houses of Congress and the President being subject to control by *statute*. Like Bayly, Brooks, too, thought the resolution would be construed as directory and as such would be unconstitutional, but only because it *was not in the form of an enacted law*. Brooks did not deny that “the legislative power of the country” could control the direction of the army,¹⁸⁹ but he argued that the House of Representatives, standing alone, could not exercise such control — for then we would have not one Commander in Chief, “but two hundred and thirty-odd Commanders-in-Chief.”¹⁹⁰ Nor could the two Houses of Congress collectively control the President’s direction of the army: “It not only requires the assent of both Houses, but it must have the approval of the Executive before that control can be had.”¹⁹¹ Disposition of the army “is altogether in the Executive,” Brooks explained, “when *legislation* has done with it.”¹⁹²

5. *Conclusion.* — The decades following the War of 1812 were marked by presidential assertions of a limited unilateral authority to use force abroad. But even as the military establishment grew, and battles were being fought over whether the Congress’s formal authority to declare war was being whittled away (as occurred with respect to the Mexican War and the Florida war),¹⁹³ no notion of preclusive

¹⁸⁶ *Id.* Representative James Meacham interjected that President Polk had frequently moved portions of the army without congressional authorization before the Mexican War — but Representative Dunham properly responded that such movements were not in the teeth of a statute raising the troops for a particular purpose. If Congress actually passed a *law* raising troops expressly for a particular war, the Commander in Chief could not send them elsewhere. The Commander in Chief could then “give direction to the troops in detail,” but only pursuant to the purpose and direction of the statute, “in carrying out the law of Congress.” *Id.* at 517–18.

¹⁸⁷ *Id.* at 515.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 517.

¹⁹⁰ *Id.* at 514.

¹⁹¹ *Id.* at 517.

¹⁹² *Id.* at 514 (emphasis added).

¹⁹³ See generally HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829–1901, at 1–172 (1984).

executive power over the conduct of campaigns took root. Constitutional treatises of the era did not endorse it. Congress did not act in accord with it. And executive branch opinions, the Fillmore statement notwithstanding, consistently endorsed views inconsistent with it.

III. THE CIVIL WAR AND ITS AFTERMATH

As with important aspects of the current conflict against al Qaeda, the Civil War occurred on U.S. soil, and the Union's prosecution of the war had a direct impact on U.S. citizens and residents, including those aligned with the enemy. Moreover, President Lincoln's actions, especially in the first weeks of the war, and then again in issuing various orders to suspend the writ of habeas corpus and in promulgating the Emancipation Proclamation, are generally understood to be the historical high-water mark of assertions of broad, unilateral executive war powers. Defenders of the Bush Administration's assertions of Commander in Chief prerogatives, therefore, often invoke Lincoln as an important historical precedent. For these reasons, the understanding of the Commander in Chief power during the Civil War and its aftermath is especially relevant to the current debate. This period is therefore the centerpiece of our historical survey.

During and immediately after the Civil War, the argument for a preclusive, substantive Commander in Chief power first emerged in earnest. That argument did not, however, come from the source one might expect — President Lincoln. Lincoln himself never once asserted a broad power to disregard statutory limits, not even during his well-known exercise of expansive executive war powers at the onset of hostilities or when confronted with statutes that challenged his own tactical choices later in the war. He did draw upon certain claims of necessity, but he never made the broader contention at which Fillmore had hinted. The claim of a preclusive Commander in Chief prerogative, instead, found its first real flowering in three other sources: first, a series of impassioned speeches by Illinois Senator Orville Browning during the Senate's debate over the Confiscation Act of 1862; second, a dictum in Chief Justice Chase's concurrence in the postwar case of *Ex parte Milligan*;¹⁹⁴ and third, the first edition of Professor John Norton Pomeroy's influential treatise, *An Introduction to the Constitutional Law of the United States*, published in 1868. The latter two sources have been invoked by proponents of similar claims throughout the remainder of our constitutional history. The actual conduct and understandings of Congress, the President, and the Court during the Civil War and its aftermath, however, accorded much more with the seventy

¹⁹⁴ 71 U.S. (4 Wall.) 2 (1866).

years of prior constitutional practice than with these purported summations of constitutional wisdom.

A. *The Laws of War and the Lieber Code*

Like Presidents during the antebellum period, President Lincoln did not consider himself free to execute war in any manner he might choose, even in the absence of statutory limitations. He shared the traditional assumption¹⁹⁵ that the Commander in Chief's war powers were constrained by the laws of war, an assumption that continued to be unquestioned across all three branches. In fact, Lincoln resolved to memorialize the laws and usages of war in military regulations so that Union forces might better understand and honor them: in May 1863, the Adjutant General's Office issued what became colloquially known as the Lieber Code.¹⁹⁶

Of course, even after this codification, the precise contours of the *jus belli* were not entirely clear, especially on the question of what constituted military "necessity." This ambiguity afforded Lincoln and other military commanders considerable interpretive discretion.¹⁹⁷

¹⁹⁵ See *supra* pp. 952–55.

¹⁹⁶ See General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in 2 FRANCIS LIEBER, CONTRIBUTIONS TO POLITICAL SCIENCE 245, 247–74 (1881). When Professor Francis Lieber prepared to draw up a written code for the Union army, he acknowledged that there was "no guide, no ground-work, no text-book"; "nearly everything was floating." Letter from Prof. Francis Lieber to Major Gen. Henry Halleck (Feb. 20, 1863), in George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13, 20 (1907). Therefore, over the course of 157 detailed articles, Lieber's Code specified the "limitations and restrictions," Lieber Code, *supra*, art. 30, on all manner of warfare, including, for example, prescriptions relating to martial law of an invading or occupying army; retaliation; espionage; pillage; flags of truce; stealing; seizure; confiscation and destruction of private property; treatment of inhabitants of enemy nations; burning of private homes; protection of religion, science, and the arts; desertion; traitors; plunder; covert action ("clandestine or treacherous attempts to injure an enemy," *id.* art. 101); assassination; armistice; and insurrection. Certain provisions of the Lieber Code have obvious parallels in the current controversies about treatment of enemies. For example, the Code included an elaborate explanation of what is permitted in the name of "military necessity," *id.* arts. 14–16, which it noted

does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Id. art. 16; see also *id.* art. 11 (stating that the law of war "disclaim[s] all cruelty").

¹⁹⁷ See Lieber Code, *supra* note 196, art. 14 (stating that military necessity "consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war"). On Lincoln's evolving understanding of what military "necessity" permitted, see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 215–27 (1998).

Nevertheless, Lincoln assumed, along with everyone else who opined on the subject, that his armed forces were constrained by those customary laws, the contents of which were not a product of the commander's own judgments but were, rather, determined by internationally accepted norms developed independent of any particular commander's discretionary choices.¹⁹⁸ It is not surprising, therefore, that, once again, many of the great war powers debates (as in the Quasi-War with France) turned on questions regarding whether Lincoln's chosen means of prosecuting the war — such as the blockade of Southern ports and the Emancipation Proclamation — were consistent with the international laws of war.¹⁹⁹

¹⁹⁸ For example, in the *Prize Cases*, 67 U.S. (2 Black) 635, 665–74 (1863), the first question the Court discussed at length was whether the President had “a right to institute a blockade of ports . . . on the principles of international law.” *Id.* at 665. Most strikingly, in his dissent in *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870), Justice Field explained that the federal war powers, including even those of Congress, were “necessarily” limited by the law of nations as a matter of constitutional law:

The power to prosecute war granted by the Constitution . . . is a power to prosecute war according to the law of nations, and not in violation of that law. . . . Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done, and nothing more.

Id. at 315–16 (Field, J., dissenting). The government did not argue otherwise; instead, it merely contended that the statute in question in *Miller* (a confiscation law we will discuss shortly, *see infra* pp. 1009–16) complied with the laws of war. *See Miller*, 78 U.S. (11 Wall.) at 291 (argument for the United States and the purchasers of the property sold under the decree). The majority of the Court in *Miller* agreed with the government that the laws of war were satisfied, and therefore specifically declined to address whether Congress could violate the laws of war, “for it is not necessary to the present case.” *Id.* at 305–06 (majority opinion).

For similar views within the executive branch itself, see, for example, Brief for the United States and Captors at 22, *The Prize Cases*, 67 U.S. (2 Black) 635, in 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 495 (Philip B. Kurland & Gerhard Casper eds., 1975–) [hereinafter LANDMARK BRIEFS]; Military Commissions, 11 Op. Att’y Gen. 297, 299–300 (1865) (“[T]he laws of war . . . are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. . . . When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations.”); and Letter from President Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 406, 408 (Roy P. Basler ed., 1953) (defending the Emancipation Proclamation on the ground that “the constitution invests its commander-in-chief, with the law of war, in the time of war”). *See generally* Golove, *Military Tribunals*, *supra* note 16, at 385–90.

¹⁹⁹ *See, e.g., The Prize Cases*, 67 U.S. (2 Black) at 635–36, 665–71. Even to this day, heated debate continues as to whether at least one major Union initiative — Sherman’s unannounced bombarding of Atlanta and (especially) his subsequent evacuation and burning of the city in the autumn of 1864 — complied with the laws of war. Some have argued that Sherman’s failure to announce the bombarding of the city cannot be reconciled with Article 19 of the Lieber Code. *See, e.g., J.M. SPAIGHT, WAR RIGHTS ON LAND* 171 (1911). But the Lieber Code itself specified that “it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.” Lieber Code, *supra* note 196, art. 19. And when Confederate General John Hood offhandedly criticized Sherman for failing to give notice, “which is usual in war among civilized nations,” Letter from Gen. J.B. Hood to Major Gen. W.T. Sherman (Sept. 12, 1864), in 2 WILLIAM TECUMSEH SHERMAN, MEMOIRS OF GENERAL W.T. SHERMAN 489, 490 (Michael Fellman ed., Penguin Classics 2000) (2d ed. 1886), Sherman responded curtly that his conduct was

Important as the laws of war were, however, a striking feature of the Civil War is the role that statutory enactments played, both in setting the terms of battle and in generating constitutional decisions and opinions concerning war powers. As with the war on terrorism, this was a military conflict that was being fought in a legal context thick with potentially applicable statutory provisions. That was in part because, as might be expected of any war taking place on American soil, there were seemingly relevant preexisting measures already in place (such as the habeas provision of section 14 of the Judiciary Act of 1789²⁰⁰). But it was also a function of the fact that there was an aroused Congress that was in important respects much more aggressive in its view of how the war should be prosecuted than was the chief commander himself. As we shall see, however, the Executive's constitutional arguments in response to this legal reality were significantly different from those made in recent years.

*B. Lincoln's Assertion of Executive
Prerogatives in the Spring of 1861*

When the Confederacy initiated the war in April 1861, the federal armed forces were hardly a powerful fighting force. Moreover, Congress was not in session. The newly elected President thus found himself alone in Washington, with no obvious way to meet the impending challenge but also no legislative branch positioned to countermand him. It therefore should not be surprising that in the twelve weeks between the firing on Fort Sumter and Congress's return to Washington,

consistent with the laws of war as set forth in the canonical texts of the time: "I was not bound by the laws of war to give notice of the shelling of Atlanta, a 'fortified town, with magazines, arsenals, founderies, and public stores;' you were bound to take notice. See the books." Letter from Major Gen. W.T. Sherman to Gen. J.B. Hood (Sept. 14, 1864), in *SHERMAN'S CIVIL WAR* 710, 711 (Brooks D. Simpson & Jean V. Berlin eds., 1999). The more difficult question is whether Sherman's subsequent evacuation and destruction of Atlanta violated the laws of war as understood at the time. See Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 VA. J. INT'L L. 353, 378 (1999) (citing Vattel, Lieber, and Halleck). What is important for our purposes, however, is that neither Sherman nor anyone else in the Lincoln Administration suggested that the Union commanders had any power to disregard those laws. Sherman inquired with Henry Halleck, the Chief of Staff of the Union Armies and one of the leading contemporary scholars on the laws of war, who approved Sherman's orders, explaining that although he would not approve the "barbarous" practice of "uselessly destroying private property," Sherman was "justified by the laws and usages of war in removing these people"; indeed, it was his

duty to [his] own army to do so. . . . The safety of our armies, and a proper regard for the lives of our soldiers, require that we apply to our inexorable foes the severe rules of war. We certainly are not required to treat the so-called non-combatant rebels better than they themselves treat each other.

Letter from Major Gen. G.W. Halleck to Major Gen. W.T. Sherman (Sept. 28, 1864), in 2 *SHERMAN*, *supra*, at 496, 496-97.

²⁰⁰ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

Lincoln exercised several controversial unilateral executive war powers. The President's first order of business was to invoke his authority under Article II, Section 3, to convene Congress back into session — but only effective July 4, 1861, at which time he delivered a now-famous message to the legislature explaining his conduct in the intervening period.²⁰¹ The delay was perhaps justifiable in light of the rioting in Maryland and the prospect that Washington, D.C. (and Congress) might soon be behind enemy lines.²⁰² What is certain is that Congress's absence in the interim allowed Lincoln to act unilaterally and with dispatch, without the need to have his decisions debated and ratified (and possibly amended or barred) by Congress.

Most of what Lincoln did during those twelve weeks would today be viewed as falling within the first two of Justice Jackson's *Youngstown* categories. Lincoln immediately issued a proclamation calling for the blockage of Southern ports and for the states to supply 75,000 new militia. As to each of these, Lincoln explained in his July 4 message to Congress, his action "was believed to be strictly legal,"²⁰³ by which Lincoln presumably meant to refer to the statutory delegations to the President in the Militia Act of 1795 and the Insurrection Act of 1807.²⁰⁴ (The Supreme Court would later hold in the *Prize Cases* that those statutes authorized the blockade.²⁰⁵) *Without* statutory authorization, Lincoln dispatched war ships to Fort Sumter and instructed them to return fire if attacked,²⁰⁶ but there was no contention that such action conflicted with any statute.

Three other of Lincoln's actions, however, might fairly be said to have transgressed statutory limits. We discuss Lincoln's explanation of each of them in turn. As we shall see, Lincoln and his Administration repeatedly avowed that Congress, by statute, retained the final word as to not only these three matters but others. Lincoln also refrained

²⁰¹ See Abraham Lincoln, Special Session Message (July 4, 1861) [hereinafter Lincoln Message], in 7 MESSAGES AND PAPERS, *supra* note 156, at 3221.

²⁰² See DANIEL FARBER, LINCOLN'S CONSTITUTION 16–17 (2003); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 722 (2003). Lincoln would later write:

Immediately [after Fort Sumter], all the roads and avenues to this city were obstructed, and the capital was put into the condition of a siege. The mails in every direction were stopped, and the lines of telegraph cut off by the insurgents; and military and naval forces, which had been called out by the Government for the defense of Washington, were prevented from reaching the city by organized and combined treasonable resistance in the State of Maryland. There was no adequate and effective organization for the public defense. Congress had indefinitely adjourned. There was no time to convene them.

CONG. GLOBE, 37th Cong., 2d Sess. 2383 (1862).

²⁰³ Lincoln Message, *supra* note 201, at 3225.

²⁰⁴ See *supra* pp. 963, 973.

²⁰⁵ The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

²⁰⁶ See FARBER, *supra* note 202, at 116.

from ever asserting any authority to disregard statutes regulating the conduct of the war. Indeed, on April 18, 1861, six days after the attack on Fort Sumter, one day after Virginia's secession, and just a day before the naval blockade, Attorney General Edward Bates wrote a formal opinion to Lincoln disclaiming that very authority. The opinion concluded that the President could not establish a separate Bureau in the War Department to supervise and regulate the newly called-up militia.²⁰⁷ Bates explained that, as Commander in Chief, the President did have what we have been calling a "superintendence" prerogative: he could appoint the Secretary of War as his "regular organ" to promulgate rules and orders as the acts of the Executive, "binding on all within the sphere of his just authority."²⁰⁸ That hierarchical authority was not, however, supplemented by a *substantive* preclusive prerogative, as Bates explained in the very next sentence: "But this power is limited and does not extend to the repeal or contradiction of existing statutes . . ."²⁰⁹

1. *Suspension of the Writ.* — Beginning in April 1861, Lincoln authorized army generals to "suspend the writ of habeas corpus for the public safety" where necessary — first between Philadelphia and Washington (in response to rioting occurring in Maryland), and later in other locations, reaching as far north as Maine.²¹⁰ Of course, the army generals were hardly in a position to "suspend" the statutory power of courts to issue writs, and no effort was made to use military force to compel judges to refuse to entertain habeas petitions. The notion of executive "suspension," then, is something of a misnomer. What Lincoln's order allowed was for army generals to detain persons without conforming to the procedural requirements otherwise applicable by

²⁰⁷ See Power of the President to Create a Militia Bureau in the War Department, 10 Op. Att'y Gen. 11, 14-16 (1861).

²⁰⁸ *Id.* at 14.

²⁰⁹ *Id.* Most of Bates's opinion was devoted to arguing that Lincoln did not have any unilateral constitutional (*Youngstown* Category Two) authority to establish a Militia Bureau at a time when the state militia had not yet been called forth to federal service. But Bates also opined that for Lincoln to pay a supplemental salary to the chief of such a new bureau

would be in violation of several acts of Congress which expressly provide that no officer in any branch of the public service, whose pay or emoluments is or are fixed by law and regulation, shall receive any extra allowance or compensation in any form whatever for the performance of any other services, unless the said extra allowance or compensation be authorized by law and explicitly set forth.

Id. at 16.

²¹⁰ See Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861), in 6 MESSAGES AND PAPERS, *supra* note 156, at 3219; Abraham Lincoln, Proclamation (May 10, 1861), in 7 MESSAGES AND PAPERS, *supra* note 156, at 3217; Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (July 2, 1861), in 7 MESSAGES AND PAPERS, *supra* note 156, at 3220; Abraham Lincoln, Executive Order to Lieutenant-General Winfield Scott (Oct. 14, 1861), in 8 MESSAGES AND PAPERS, *supra* note 156, at 3240.

virtue of constitutional or statutory requirements that usually govern such deprivations of liberty.²¹¹ At the limit, the suspension orders even supplied a basis for refusing to produce detainees when ordered to do so by courts. Indeed, Lincoln went so far as to permit his officers to disregard actual judicial orders granting habeas relief, including one from Chief Justice Taney, sitting as a circuit judge, in the famous case of *Ex parte Merryman*.²¹² To ignore such judicial orders was to scoff at an executive obligation that was arguably contemplated by statutory law²¹³ and to render the 1789 statute essentially meaningless insofar as its prime function had been to check unlawful executive detentions. In this sense, the “suspension” issue presented as serious a Category Three case as one could conjure.

In his July 4 message to Congress, Lincoln defended his action in “suspending” the writ with his famous remark suggesting that a President might choose to violate a single law lest “all the laws but one . . . go unexecuted.”²¹⁴ But in making this statement, the President was *not* asserting a general constitutional power as Commander in Chief to pick and choose among statutory mandates regulating the conduct of war. He was instead remarking on the President’s responsibility to take action on an emergency basis when doing so is necessary *to preserve the nation*.²¹⁵ Even here, Lincoln was careful to insist that Congress retained ultimate control, and he readily conceded that his bold initiatives, including those regarding the suspension of habeas, were subject to statutory qualification or override: “Whether there shall be any legislation upon the subject, and, if any, what, is submitted entirely to the better judgment of Congress.”²¹⁶ In other words, Lincoln was arguing that so long as a power resided in the Congress, and the Congress was unable to act because it was not in session at a moment of emergency or crisis, the President could, in effect, act so as to preserve the nation. Although such initial executive action would clearly shift the burden of inertia sharply in the Executive’s favor, Lincoln did not challenge Congress’s authority to countermand the President’s emergency actions.

²¹¹ See Lincoln Message, *supra* note 201, at 3225–26 (explaining that to “suspend” the writ of habeas corpus was, “in other words, to arrest and detain *without resort to the ordinary processes and forms of law* such individuals as [the general] might deem dangerous to the public safety” (emphasis added)).

²¹² 17 F. Cas. 144 (C.C.D. Md. 1861). Nor was Lincoln willing to comply when Chief Justice Taney filed a contempt citation, although Merryman’s release followed soon afterward. See JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 161–62 & n.43 (rev. ed. 1964).

²¹³ See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

²¹⁴ See Lincoln Message, *supra* note 201, at 3226.

²¹⁵ We discuss the argument for such an emergency responsibility in greater detail in Barron & Lederman, *supra* note 2, at 745–48.

²¹⁶ See Lincoln Message, *supra* note 201, at 3226.

But as much as Lincoln made reference to necessity, he ultimately rested his legal position on an even more technical and bounded ground, albeit one that was and is still quite controversial. Lincoln argued that the Suspension Clause itself empowers the President to suspend the privilege of the writ of habeas corpus in cases of rebellion or invasion, at least when Congress is not in session.²¹⁷ In other words, Lincoln was claiming that the Suspension Clause authorized both Congress *and* the President to render the habeas statute ineffective in cases of emergency, making this particular exercise of emergency executive power especially legitimate as a legal matter. This may not have been the strongest reading of the Suspension Clause — Chief Justice Taney certainly did not think so²¹⁸ — but it was a far cry from a claim of a general power pursuant to the Commander in Chief Clause to defy statutes regulating the conduct of war.²¹⁹

2. *Expending Unappropriated Funds To Raise Troops.* — On May 3, 1861, Lincoln issued a proclamation in which he “call[ed] into the service of the United States 42,034 volunteers to serve for the period of three years, . . . to be mustered into service as infantry and cavalry,” and in which he “direct[ed]” that the army “be increased by the addi-

²¹⁷ See *id.* (“Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.”).

²¹⁸ See *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861).

²¹⁹ Indeed, the day after Lincoln’s July 4 speech to Congress, in his defense of the President’s habeas decision, Attorney General Bates suggested that the power to detain prisoners, and to ignore judicial writs for production of such detainees, was in *accord* with statutory authority given to the President in the Militia Act of 1795 and the Insurrection Act of 1807 — that is, that the habeas suspension was a *Youngstown* Category One case. See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74, 83–84, 90–91 (1861) (discussing those statutes and *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), and *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), which dealt with the questions of the President’s broad discretion under those statutes). Of course, Lincoln’s argument that the suspension was constitutional under the Suspension Clause does not explain why Lincoln could ignore a court order that actually rejected the President’s constitutional authority to suspend the privilege of the writ, and that granted a habeas petition. Did not the existing Habeas Act, in conferring jurisdiction on the courts, see *Judiciary Act of 1789*, ch. 20, § 14, 1 Stat. 73, 81–82, suggest that Congress meant for the court rather than the President to be the arbiter of the court’s own jurisdiction, at least in cases where the claim to jurisdiction was not so without basis as to be risible? As it happens, Lincoln and his lawyers said almost nothing in direct defense of the defiance of the court order, contenting themselves with merely defending their position that the Executive was entitled to suspend the writ (perhaps implying that the exercise of this alleged Article I executive prerogative was peculiarly immune from judicial review). The Attorney General did refer, however, to the notion that each department of the government is entitled to its own constitutional views in exercising its constitutionally assigned functions, see *Suspension of the Privilege of the Writ of Habeas Corpus*, *supra*, at 77; that position, however, appears to be at odds with Lincoln’s own oft-stated views in other contexts and, in any event, is one that would be quite extraordinary if not bounded in some way.

tion of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery, making altogether a maximum aggregate increase of 22,714 officers and enlisted men," and that the navy enlist an additional 18,000 seamen.²²⁰ These increases in the army and navy did not, perhaps, transgress any express specific statutory limits; but they did violate the implied limit established by Congress's existing appropriations statutes. Therefore this conduct could fairly be viewed, as some have portrayed Jefferson's unilateral conduct in the *Chesapeake* incident in 1807,²²¹ as an executive initiative that violated a statutory restriction — in addition to violating the *constitutional* directives that "[n]o Money shall be drawn from the Treasury, but in consequence of appropriations made by law,"²²² and that it is for Congress to raise the army and provide and maintain a navy.²²³

In defending this action in his July 4 address, Lincoln did not invoke any notion of a preclusive power over the conduct of a campaign, not even to suggest that Congress would be powerless to preclude him from using the troops now that they were under his command. He instead took a tack akin to the one Jefferson had taken after the *Chesapeake* incident. Lincoln mounted a bounded necessity defense, owing to Congress's absence at a moment of crisis. He explained that he had acted only because Congress was not available and because he was confident that he was a surrogate of the legislature, in effect acting in trust for it. In this sort of case, Lincoln argued, technical compliance with existing statutes might not be compelled: "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting, then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."²²⁴

3. *Secret and Unauthorized Expenditures to Private Persons To Raise Troops.* — The third of Lincoln's apparent statutory transgressions is the least remarked upon but perhaps the most important for our purposes. On April 20, 1861, just eight days after the attack on Fort Sumter, Lincoln authorized naval commandants to purchase or charter, and arm, several steamships for public defense; directed the Secretary of War to authorize two New Yorkers (including the Governor) to make arrangements for the transportation of troops and munitions; and directed the Secretary of the Treasury to advance two million dollars to three New Yorkers — John Dix, George Opdyke, and

²²⁰ Abraham Lincoln, Proclamation (May 3, 1861), in 7 MESSAGES AND PAPERS, *supra* note 156, at 3216, 3217.

²²¹ See *supra* pp. 974–77.

²²² U.S. CONST. art. I, § 9, cl. 7.

²²³ See U.S. CONST. art. I, § 8, cls. 12–13.

²²⁴ Lincoln Message, *supra* note 201, at 3225.

Richard Blatchford — “to be used by them in meeting such requisitions as should be directly, consequent upon the military and naval measures, necessary for the defense and support of the Government.”²²⁵ These expenditures were inconsistent with Congress’s appropriations. The private contracts also appear to have violated an existing statute that prohibited the Secretaries of State, Treasury, War, and the Navy from making any contract “except under a law authorizing the same, or under an appropriation adequate to its fulfillment.”²²⁶ They were also effected in secret, putatively because Lincoln was afraid the executive branch contained many disloyal employees who could not be trusted in such matters.²²⁷

Notably, Lincoln omitted mention of these expenditures in his July 4, 1861, speech to Congress. They were not publicized until the following April, after the House of Representatives had censured former War Secretary Simon Cameron for, among other things, having involved the government in some of those private contracts.²²⁸ Four weeks after the censure — more than one year after the events took place — Lincoln wrote to Congress to explain that Cameron had acted with the approval of the President and the entire cabinet, all of whom had convened on April 20, 1861 and unanimously decided to take such extraordinary steps. Consistent with his apparent notions of constitutional restraint, Lincoln did not attempt to justify his undisclosed extrastatutory actions on the ground that, like Jefferson before him, he had all along acted only on the assumption that he was doing what Congress would have wanted and that he was happy to have Congress inform him otherwise. He had, after all, kept the matter secret and waited well past the moment of exigency and the return of Congress to even disclose it. Perhaps for that reason, Lincoln confessed that some of these measures “were without any authority of law,” but claimed they were justified nonetheless because they were needed to ensure that “the Government was saved from overthrow.”²²⁹ Lincoln did not claim that his actions were legal, let alone that he had a constitutional prerogative to disregard Congress’s will as expressed in statutory di-

²²⁵ CONG. GLOBE, 37th Cong., 2d Sess. 2383 (1862).

²²⁶ Act of May 1, 1820, ch. 52, § 6, 3 Stat. 567, 568.

²²⁷ See CONG. GLOBE, 37th Cong., 2d Sess. at 2383.

²²⁸ See *id.* at 1888. Interestingly, the House’s complaint was not that Cameron had acted unlawfully, but that his contracting practices had been “highly injurious to the public service.” Cameron was notoriously corrupt, and some of the contracts apparently involved self-dealing. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 324 (2003); EDWARD K. SPANN, *GOTHAM AT WAR: NEW YORK CITY, 1860–1865*, at 47–48 (2002). Moreover, Congress’s August 1861 post hoc ratification statute, see Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, probably rendered these expenditures lawful after the fact — although in this case, Congress was unaware of what it was ratifying.

²²⁹ CONG. GLOBE, 37th Cong., 2d Sess. at 2383 (message from the President to the Senate and House).

rectives. Instead, he confessed to being responsible for “whatever error, wrong or fault was committed.”²³⁰ Such a confession of error suggests Lincoln’s unwillingness to articulate any notion that wartime decisions are constitutionally committed to the President alone. For if he had rested on that alternative sort of argument (a version of which Fillmore had obliquely hinted at years before²³¹), Lincoln could have cloaked all of his actions (including these) in the cover of the Constitution. And yet Lincoln did not invoke that argument.

4. *Conclusion.* — When Lincoln made his speech to Congress on July 4, 1861, he had good reason to believe Congress would ratify most of his decisions. And one month later, Congress did just that, as to virtually all of Lincoln’s unilateral conduct *other than* the suspension of the habeas writ, which it did not address until 1863 (more about which below).²³² But Lincoln certainly did not suggest it was irrelevant whether he would obtain such approval from Congress; on the contrary, he portrayed himself as being subject to the legislature’s ultimate determinations.²³³ In light of the support and good will he en-

²³⁰ *Id.*

²³¹ *See supra* pp. 988–91.

²³² *See* Act of Aug. 6, 1861, § 3, 12 Stat. at 326 (“[A]ll the acts, proclamations, and orders of the President of the United States after [March 4, 1861], respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”). Congress also enacted other statutes giving Lincoln very broad authority to use the militia and the armed forces to fight the war. *See, e.g.*, Act of July 31, 1861, ch. 34, § 1, 12 Stat. 284, 284–85 (authorizing payment of volunteers called up by the President); Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281 (authorizing the President to use the militia and armed forces whenever he deemed it “necessary” to enforce the laws or to suppress rebellions).

²³³ This was clearly demonstrated in the government’s argument in the *Prize Cases* the following year. In his brief for the United States, U.S. District Attorney Richard Henry Dana argued that “[t]he function to use the army and navy being in the President, the mode of using them, within the rules of civilized warfare, and *subject to established laws of Congress*, must be subject to his discretion as a necessary incident to the use, *in the absence of any Act of Congress controlling him.*” Brief for the United States and Captors, *supra* note 198, at 22 (emphases added). Dana then proceeded to argue that “[t]here were no Acts of Congress at the time of th[e] capture (July 10, 1861) in any way controlling this discretion of the President.” *Id.*; *see also id.* at 22–27 (rebutting arguments that particular statutes prohibited the seizure, without suggesting any constitutional doubts about Congress’s powers).

It is possible that at least one officer in the Lincoln Administration did not unequivocally share this pro-congressional view. Several months before Lincoln appointed him Solicitor of War in late 1862, William Whiting published the first edition of his treatise, *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason and Slavery*. Whiting’s general view as expressed in the treatise was that in the case of a conflict, Congress’s Article I powers supersede those of the Commander in Chief:

[T]he power of Congress to pass laws on the subjects expressly placed in its charge by the terms of the constitution cannot be taken away from it, by reason of the fact that the President, as commander-in-chief of the army and navy, also has powers, equally constitutional, to act upon the same subject-matters.

joyed in Congress in July 1861, such deference to the legislature was certainly an advantageous posture for Lincoln to assume. But notably, Lincoln did not simply receive whatever authority he requested. As it happened, even after the crisis of April 1861, Congress occasionally enacted statutes that impinged on the President's discretion with respect to the conduct of the war. Although the legislature generally granted Lincoln broad discretion, in some cases Congress thought that he had gone too far in the exercise of war powers; and in other cases, not far enough. The Habeas Corpus Act of 1863 is one example of the former; the Confiscation Act of 1862 is an example of the latter.

C. The Habeas Corpus Act of 1863

The one major initiative of Lincoln's that Congress did not immediately authorize in the summer of 1861 was the suspension of habeas corpus. When Congress began a new session in late 1861, some legislators thought it imperative to provide a legal framework for the exercise of this extraordinary power. The result of their work led all three branches to weigh in, in one form or another, on Congress's power to bind the President as to his preferred means of dealing with the enemy.

1. *Congress Gives the President Less than He Wants.* — Senator Lyman Trumbull, chair of the Senate Judiciary Committee, explained

WILLIAM WHITING, *THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY* 29 (1862). And, in a footnote, he accepted that the President's "supreme" military authority must be exercised "in accordance with such rules as Congress may have passed" respecting the governance and regulation of the land and naval forces and the treatment of captures. *Id.* at 82 n.*; *see also id.* at 83 n.* (arguing that the Constitution provides that the Commander in Chief's "government and regulation of the land and naval forces, and the treatment of captures, should be according to law," and that the President must "see that the laws of war are executed"). In that footnote, however, Whiting added that "for military movements, and measures essential to overcome the enemy, — for the general conduct of the war, — the President is responsible to and controlled by no other department of government," although Congress "may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President." *Id.* at 82 n.*. To the extent that Whiting intended here to suggest that those legislative powers, and *not* statutes setting forth positive restrictions, were Congress's only means of controlling the Commander in Chief's choice of "measures essential to overcome the enemy" and "the general conduct of the war," he did not explain how such a notion could be reconciled with his statements elsewhere in the treatise, and in the same footnote, that the President's own wartime decisions "should be according to law" enacted pursuant to Congress's powers to pass rules and regulations for the government of the military and to regulate captures on land and sea. In any event, we have found no indication that the Lincoln Administration agreed with or adopted Whiting's suggestion of a limit on congressional regulation. Although the footnote in question remained in later editions of the treatise, Whiting wrote it before he was appointed Solicitor of War, and, as Whiting explained in the next edition of the treatise, the contents of his book were not even originally intended for publication, but were instead "written by the author for his private use" and published only at the urging of friends. *See* WILLIAM WHITING, *THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY*, at i (2d ed. 1862).

that although Lincoln's unilateral acts were "necessary when Congress had not assembled," once Congress convened "clothed with the power to grant whatever authority may be necessary to crush rebellion, . . . we shall be derelict in our duty if we leave our positions here without having regulated by law the action of the Executive."²³⁴ Trumbull proposed to codify, and thus to specify the terms and limitations of, the suspension of habeas that Lincoln had instituted earlier that year.²³⁵ Without such legislation, Trumbull feared, the unregulated exercise of military authority upon citizens would be a "monstrous" prospect "in a free Government."²³⁶ Thus the object of his bill was "to place the action of the Government in crushing this rebellion under the Constitution and the law, . . . the most important object that can engage the attention of Congress."²³⁷

Congress did not finally settle on habeas legislation until March 1863, when it passed the Habeas Corpus Act.²³⁸ For the most part, the Act ratified what Lincoln had done. Section 1 of the Act nominally authorized the President to suspend the writ "in any case throughout the United States" whenever in his judgment the public safety might require it.²³⁹ But significantly, sections 2 and 3 cabined some of the authority that Lincoln had been exercising. Those sections directed courts to discharge detainees, other than prisoners of war, from military custody if they were held in states where the administration of the laws had "continued unimpaired" by the war and if a grand jury had failed to indict them after their detention; section 2 also required officers having custody of such prisoners to obey such judicial orders.²⁴⁰

2. *The President Responds and the Supreme Court Weighs In.* — Lincoln raised no constitutional objections to the newly restrictive legal framework, but he did construe the exemption in sections 2 and 3 very narrowly. In particular, his Administration construed it so it would not cover "aiders or abettors of the enemy" and all other prisoners who had previously been deemed "amenable to military law,"²⁴¹ that is, "triable by military tribunals."²⁴² Three such persons to whom the Administration thought the exemption did *not* apply were William Bowles, Stephen Horsey, and Lambdin Milligan, U.S. citizens living in Indiana who had been convicted by military commission for offenses

²³⁴ CONG. GLOBE, 37th Cong., 1st Sess. 337 (1861).

²³⁵ *Id.* at 336–38.

²³⁶ *Id.* at 342.

²³⁷ *Id.*

²³⁸ Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

²³⁹ *Id.* § 1, 12 Stat. at 755.

²⁴⁰ *Id.* §§ 2–3, 12 Stat. at 755–56.

²⁴¹ Abraham Lincoln, Proclamation (Sept. 15, 1863), in 13 Stat. 734 (1863).

²⁴² RANDALL, *supra* note 212, at 167.

that included conspiring to overthrow the government, seizing munitions, and aiding the rebel army. They sought writs of habeas corpus, claiming that they should have been transferred out of military custody and tried, if at all, by the civilian courts that were open and available in Indiana.²⁴³

The Supreme Court did not decide *Ex parte Milligan* until 1866, after the war had ended and after Lincoln had been assassinated. But although the Court's decision was issued after the guns had fallen silent, the Court plainly viewed the issue as concerning the constitutional war powers of the Executive. The case is most famously recalled for the majority's holding that the detainees had a *constitutional* right to be released from military custody — that even Congress could not authorize these citizens' military detention and trial, as long as civil courts were open (a question on which the Court divided 5–4). But before reaching that constitutional question, the Court addressed the *statutory* questions of whether Lincoln had properly suspended the detainees' right to seek the writ of habeas corpus, and, if not, whether their military detention itself conformed to the statute.

The availability of habeas during the war would have been no small matter from the perspective of the Commander in Chief, especially with respect to detainees such as Milligan.²⁴⁴ The Attorney General thus strongly urged the Court to hold both that Congress had afforded the President the detention authorization in question and that the constitutional liberties available to criminal defendants in peacetime were inapplicable in war. In support of the latter argument, he wrote in his brief:

After war is originated, . . . the whole power of conducting it, as to manner and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities and duties of the occasion, their extent and duration.

During the war his powers must be without limit, because, if defending, the means of offense may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view — “to conquer a peace.” New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.²⁴⁵

²⁴³ See generally Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *PRESIDENTIAL POWER STORIES* (Christopher H. Schroeder & Curtis A. Bradley eds., forthcoming 2008).

²⁴⁴ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130 (1866) (describing Milligan's alleged offenses); see also Bradley, *supra* note 243 (manuscript at 11–14, on file with the Harvard Law School Library).

²⁴⁵ Brief in Behalf of the United States at 11, *Milligan*, 71 U.S. (4 Wall.) 2 (No. 350), in 4 *LANDMARK BRIEFS*, *supra* note 198, at 257 (citations omitted).

In pressing this broad argument about the inapplicability of traditional constitutional liberties (such as the rights to trial by jury, to be afforded a grand jury, and to confront one's accusers) because of the need for executive discretion in war, the government did not express any doubts about Congress's constitutional power to limit that discretion. Notwithstanding the Administration's claim that the Constitution of its own force imposed no such restrictions, its brief did not suggest that the Habeas Act would be unconstitutional if construed to protect the detainees.²⁴⁶ The Attorney General went on to say that the free hand of the commander that he argued for was "axiomatic in the absence of all restraining legislation by Congress."²⁴⁷ The Administration even cited approvingly Justice Story's pro-congressional-power language in *Brown*: "The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President."²⁴⁸ Such a recognition of congressional power was no problem in *Milligan* itself precisely because, the government argued, Congress had authorized the President's actions in the case when it provided for the writ's suspension in the 1863 Act.

As for the Court, prior to reaching the government's claim about the irrelevance of constitutional protections in wartime, it unanimously rejected the Executive's *statutory* argument. It held not only that the Habeas Corpus Act of 1863 had denied the President the authority to suspend habeas as to persons such as Milligan (because he was not a

²⁴⁶ As Chief Justice Chase wrote in his concurrence, "The constitutionality of this act has not been questioned and is not doubted," even though the Act "limited this authority [of the President to suspend habeas and subject detainees to military justice] in important respects." *Milligan*, 71 U.S. (4 Wall.) at 133 (Chase, C.J., concurring in the judgment); see also Brief in Behalf of the United States, *supra* note 245, at 14 (discussing the Habeas Act without suggesting that Milligan's interpretation of it would be unconstitutional); Argument of Benjamin F. Butler in Behalf of the Government at 84, *Milligan*, 71 U.S. (4 Wall.) 2 (No. 350), in 4 LANDMARK BRIEFS, *supra* note 198, at 389 (similar); *id.* at 69 (stressing that the President's proclamation suspending the writ "has not been annulled by any counter proclamation, treaty, or law, of Congress," without any suggestion that such annulment would be constitutionally problematic).

²⁴⁷ Brief in Behalf of the United States, *supra* note 245, at 11 (emphasis added). Moreover, in support of the argument quoted above about the need for broad executive discretion in war, the government cited two cases — *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), and *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) — in which the Court had construed *statutes* — the Militia Act of 1795 and Insurrection Act of 1807 — to give the President virtually unbridled discretion to determine whether the requisite exigencies were in place to call forth the militia and to use the armed forces. In both cases, the Court indicated that the discretion was a matter of legislative grace, see *Luther*, 48 U.S. (7 How.) at 45; *Martin*, 25 U.S. (12 Wheat.) at 29–32, and that if the President "shall fall into error" in the exercise of such broad power, "it would be in the power of Congress to apply the proper remedy," *Luther*, 48 U.S. (7 How.) at 45; see also *Martin*, 25 U.S. (12 Wheat.) at 32 (stating that "the watchfulness of the representatives of the nation" is a "check[]" that can "guard against usurpation or wanton tyranny").

²⁴⁸ Argument of Benjamin F. Butler in Behalf of the Government, *supra* note 246, at 70 (emphasis added) (quoting *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153–54 (1814) (Story, J., dissenting)) (internal quotation marks omitted).

prisoner of war as defined by the statute), but also that the Act prohibited the military proceedings against Milligan, and that because civil judicial proceedings had not been commenced against Milligan within the specified period, he was entitled to release.²⁴⁹ This unanimous holding is itself a strong indication of a general understanding during the Civil War era that the President did not enjoy an unbridled constitutional power to decide how best to prosecute a war, at least when it came to trial and detention of persons not immediately in the theater of combat. In addition, like the Court's decisions in *Rasul v. Bush*²⁵⁰ and *Hamdan v. Rumsfeld*²⁵¹ almost 140 years later,²⁵² and the decision in *Little* half a century earlier,²⁵³ the case provided further indication of the Court's willingness in war powers cases to construe ambiguous statutory language against the President. At the same time, however, dicta in Chief Justice Chase's concurring opinion represented the first instance in which the claim to a preclusive Commander in Chief power over tactics in wartime had been plainly endorsed in a Supreme Court opinion — a point to which we return at the close of our discussion of this era.²⁵⁴

*D. The Great Congressional Debate
over the Confiscation Act of 1862*

The Habeas Corpus Act of 1863 is the prime example of a Civil War statute that *tempered* the exercise of the President's war powers, in a case where Congress thought the Chief Executive was unduly infringing individual liberty. By contrast, one year earlier, Congress had enacted a statute largely animated by the opposite notion — that the President had been insufficiently aggressive in exercising his war powers. The Confiscation Act of 1862, or the Second Confiscation Act (SCA), is a striking example of Congress enacting legislation, in the midst of war, regulating the President's own war powers because of a sharp disagreement with the President about how best to prosecute that war against the enemy. In addition, the debate on the bill in the Senate contains what almost certainly is the most extensive and remarkable public discussion in our history concerning whether and to what extent Congress may enact legislation to regulate the exercise of

²⁴⁹ *Milligan*, 71 U.S. (4 Wall.) at 115–17 (holding that the Act authorized jurisdiction over Milligan's habeas petition); *see also id.* at 131 (holding that Milligan's detention was unlawful); *id.* at 133–36 (Chase, C.J., concurring in the judgment).

²⁵⁰ 542 U.S. 466 (2004).

²⁵¹ 126 S. Ct. 2749 (2006).

²⁵² *See* Barron & Lederman, *supra* note 2, at 762–66.

²⁵³ *See supra* pp. 969–70.

²⁵⁴ *See infra* section III.G.1, pp. 1018–19.

the President's war powers. Of further interest is Lincoln's decision not to raise any constitutional war powers objection to the legislation.

1. *The Run-up to the First Confiscation Act.* — Soon after the war began, it became clear that the conflict would not be short-lived, and many in Congress began to question the conciliatory policies of the Union. At least at first, Lincoln preferred a measured response, with a minimum of provocation. He wished to ensure a peaceful reconciliation at war's end and, perhaps more importantly, thought it essential that the border states not be given any incentive to secede. There was, however, a movement among the Republicans in Congress (Radical and otherwise) to direct the war effort in a more aggressive manner. This relatively large faction believed the legislative branch possessed quite extensive war powers. Its members began to focus attention on a series of proposed statutes to seize and confiscate rebel property, and to deny rebels their slave labor. The initiative was fueled not only by hostile Southern actions, but also by the increasingly widespread impatience with the manner in which Lincoln was prosecuting the war.²⁵⁵

2. *The First Confiscation Act and the Fremont Affair.* — The First Confiscation Act, enacted in the summer of 1861, authorized confiscation of rebel property (including slaves) that had actually been used to prosecute the war or to aid the insurrection.²⁵⁶ Lincoln is reported to have signed the Act reluctantly, fearing that it would only prompt further rebellion.²⁵⁷ His Administration implemented it only sporadically.

Reflecting a similar concern, Lincoln required Army Major General John C. Fremont to temper his order confiscating all property of persons found in arms against the United States in Missouri, including an emancipation of their slaves. Although Fremont's action, which went beyond the terms of the First Confiscation Act, found a great deal of support in many segments of the North, the President argued that it would "alarm our Southern Union friends, and turn them against us — perhaps ruin our rather fair prospect for Kentucky."²⁵⁸ When Fremont failed to modify his order as Lincoln requested, Lincoln responded by personally amending the order to go no further than the First Confiscation Act allowed.²⁵⁹ This pleased Democrats and border-state Un-

²⁵⁵ See SILVANA R. SIDDALI, FROM PROPERTY TO PERSON: SLAVERY AND THE CONFISCATION ACTS, 1861–1862, at 76 (2005).

²⁵⁶ Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

²⁵⁷ See SIDDALI, *supra* note 255, at 91 & n.29.

²⁵⁸ Letter from President Abraham Lincoln to John C. Fremont (Sept. 2, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 198, at 506; see also SIDDALI, *supra* note 255, at 101–05; JOHN SYRETT, THE CIVIL WAR CONFISCATION ACTS 8–9 (2005).

²⁵⁹ Letter from President Abraham Lincoln to John C. Fremont (Sept. 11, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 198, at 517, 518. Lincoln did not, however, argue that the First Confiscation Act affirmatively prohibited Fremont's order, emphasizing instead only that the order was not authorized by that statute. Perhaps, then, Lincoln was

ionists, but abolitionists such as Senators Charles Sumner and Benjamin Wade saw it as a lost opportunity, and as yet further evidence that Lincoln would not be aggressive enough in prosecuting the war.²⁶⁰

3. *The Second Confiscation Act.* — With Northern newspapers clamoring for more assertive prosecution of the war, Congress reconvened at the end of 1861. A sizeable congressional contingent was now committed to bringing harsher measures to bear against the enemy, spurred in part by the Fremont affair. Most famously, Congress established the Joint Committee on the Conduct of the War to oversee the Union war efforts. The committee convened 272 meetings in its four-year existence, keeping a fire lit under Lincoln and the Union army and, in a sense, micromanaging the conduct of the war by use of the threat of negative publicity and exposure of malfeasance, rather than through statutory or other formal enforcement mechanisms.²⁶¹

Intrusive as the committee was, many of the Republicans in Congress wished to go further than the mechanisms of investigation alone would allow.²⁶² And so the first substantive bill introduced in the Senate of the 37th Congress was a stricter confiscation law. The proposed statute took several forms in the many months it was debated in Congress, but all versions of the proposed statute contained one basic requirement — that the President seize certain categories of Southern property.

In the final bill, enacted in July 1862, the power to seize was expressly described in the bill as an incident of war, an exercise of traditional belligerent authority undertaken for the purpose of prosecuting the conflict. It provided that “to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of [six classes of rebels], and to apply and use the

leaving open the possibility that an order of that kind could be issued if the President so desired pursuant to his inherent (but perhaps defeasible) war powers. It was precisely such a theory that eventually supported Lincoln’s issuance of the Emancipation Proclamation. See *infra* note 292.

²⁶⁰ See SIDDALI, *supra* note 255, at 105–09; SYRETT, *supra* note 258, at 9–10. Lincoln similarly revoked an order of Major Gen. David Hunter in May 1862 that had proclaimed the freedom of slaves in Florida, Georgia, and South Carolina, the areas of Hunter’s command. See SIDDALI, *supra* note 255, at 182–83; SYRETT, *supra* note 258, at 51–52.

²⁶¹ See generally BRUCE TAP, *OVER LINCOLN’S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR* (1998). Lincoln complained that the committee’s “greatest purpose seems to be to hamper my action and obstruct the military operations,” WARD HILL LAMON, *RECOLLECTIONS OF ABRAHAM LINCOLN, 1847–1865*, at 183 (Dorothy Lamon Teillard ed., 1911) (internal quotation mark omitted), yet his Administration cooperated in the committee’s oversight role, see TAP, *supra*, at 34–36.

²⁶² See SIDDALI, *supra* note 255, at 123 (explaining that the Republicans wanted to “find a way to exert control over military operations and over the treatment of enemy citizens, both of which they considered of paramount importance in prosecuting the war successfully,” and that they aimed “to bring the war home to individual enemy citizens and deprive them of their ability to support their army with food, slave labor, and financial assistance”).

same and the proceeds thereof for the support of the army of the United States.”²⁶³ The Act further included an *emancipation* provision in section 9, which declared that certain categories of slaves of armed rebels — those who would escape and take refuge with Union forces, those who would come under the control of the U.S. government, and those found in any territory occupied by U.S. forces — “shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.”²⁶⁴

4. *The Debate Over the Second Confiscation Act.* — The bill was under consideration for all of the second session of the 37th Congress, and “an amazing volume of oratory was poured forth in its discussion.”²⁶⁵ In addition to disputation about the wisdom of the legislation, legislators also addressed several constitutional issues. These ranged from whether the proposal conflicted with international laws and thus exceeded congressional powers;²⁶⁶ to whether the Constitution permitted Congress to free slaves, even as an incident of war;²⁶⁷ to matters concerning Fifth Amendment rights to due process and just compensation; and even to whether a *permanent* dispossession of property was consistent with the guarantee in Article III that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”²⁶⁸ But for all the constitutional debate the Second Confiscation Act sparked, and for all the scholarly parsing of it that has occurred in recent years, there has been remarkably little consideration of the discussion of the constitutional issue that is our immediate concern. Congress also engaged in a separation of powers debate concerning not whether confiscation and emancipation were permissible war tactics, but instead which branch

²⁶³ Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590 (emphases added). The persons subject to this automatic property seizure included officers of the Confederate armed forces and officials, legislators, and judges of the Confederate States of America. *See id.* The Act was slightly more permissive with respect to all others engaged in (or aiding) armed rebellion against the U.S. government — the President had a duty to seize their property too, unless they had ceased their rebellion and demonstrated allegiance to the Union within 60 days after a public warning. *Id.* § 6, 12 Stat. at 591.

²⁶⁴ *Id.* § 9, 12 Stat. at 591.

²⁶⁵ RANDALL, *supra* note 212, at 276; *see also* David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1185 (2006).

²⁶⁶ Several years later, in *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870), the Supreme Court would hold that the Confiscation Act satisfied the standards of the laws of war. *See id.* at 305–06; *see also supra* note 198.

²⁶⁷ This is the primary focus of Professor Siddali’s superb account. *See* SIDDALI, *supra* note 255.

²⁶⁸ U.S. CONST. art. III, § 3, cl. 2. These property issues are Professor David Currie’s exclusive focus, *see Currie, supra* note 265, at 1187–95, and they are comprehensively covered in DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007).

of the federal government had ultimate control over the question of whether such tactics were to be used.²⁶⁹

The issue first arose in the House of Representatives, in comments by William Sheffield of Rhode Island in late January 1862. Sheffield reasoned that if the confiscation were permissible under the laws of war, it would be for the President, not Congress, to determine whether to exercise that belligerent right, because “the execution and direction of a war is with the President.”²⁷⁰ Although the President *was* bound by the laws of war, in Sheffield’s view, Congress did not have any right to instruct the Executive *how* to discharge that duty.²⁷¹ On this view, Congress could no more require him to confiscate enemy property than it could “pass a law to-day directing the President to fight the enemy to-morrow at Manassas.”²⁷²

From there, the vast majority of the separation of powers debate took place in the Senate. The next day, Senator Edgar Cowan of Pennsylvania carried Sheffield’s theme much further, broadly asserting that Congress could not determine when, where, or how the army should fight, and averring that the contrary view was “monstrous.”²⁷³ Cowan’s themes were taken up in much more detail, and with much greater erudition and at least equal passion, in late June 1862, by Republican Senator Orville Browning, Lincoln’s close ally and friend from Illinois. Like Lincoln, Browning thought the confiscation measure was unwise, fearing that it would prolong the war. Because confiscation of enemy belligerents’ property was, Browning argued, “an object which is now fully within the constitutional power of the Executive,”²⁷⁴ it was not something that Congress could compel.

There is no indication that any Senator other than Cowan supported Browning’s constitutional argument during the late June debate. Several Republican Senators (Wade and Sumner among them), however, subjected it to a withering counterargument in support of the notion that “Congress may make all laws to regulate the duties and the powers of the Commander-in-Chief.”²⁷⁵ After canvassing in great de-

²⁶⁹ Professor Currie’s treatment of this debate relative to the other great debates over the SCA is representative of the sparse treatment it has traditionally received — he mentions it only in a footnote. See Currie, *supra* note 265, at 1189 n.298.

²⁷⁰ CONG. GLOBE, 37th Cong., 2d Sess. 502 (1862).

²⁷¹ *Id.* at 501.

²⁷² *Id.* at 502.

²⁷³ *Id.* at 516. So, for instance, Cowan argued that Congress would not have the power to tell the President that the army must proceed on horseback, or by railroad car, rather than by foot, *id.*, or to meet the enemy on a certain day or in a certain place, *id.* at 517. Cowan also argued that Congress could not enact a law prescribing either harsher or more “humane” treatment of prisoners of war, *id.* at 516, and that a law directing how the enemy shall be operated upon “is an absurdity,” *id.* at 517.

²⁷⁴ *Id.* at 2923.

²⁷⁵ *Id.* at 2966 (statement of Sen. Sumner).

tail the context in which the Commander in Chief Clause was framed, for example, Senator Jacob Howard of Michigan emphasized that the title “Commander-in-Chief” could not possibly give the President a plenary power to control war unburdened by statutory constraint. Washington was designated “Commander-in-Chief” during the Continental Congress, and yet Congress plainly had the power to control his military maneuvering, Howard emphasized.²⁷⁶ Nor, said Howard, had he found either “in the Federal convention, [or] in any State convention, one word, intimation, or hint, from any speaker in any one of these numerous bodies, affording a shadow of support for the claim now set up.”²⁷⁷ Browning responded that the example of General Washington proved exactly the opposite point. He contended that it was “the continued and repeated blundering and bungling of military operations when controlled and governed by Congress that influenced the convention to ignore the doctrine, and separate forever the direction of the Army from the control of Congress.”²⁷⁸ Browning’s ingenious argument was that the Framers subjected the chief commander to some constraints — but only those imposed by the power that appointed him to be Commander in Chief. Under the Articles of Confederation, that appointing authority was the Continental Congress; after 1789, it was the Constitution itself. Thus, in such role the President “is subject to all the restraints that the Constitution imposes upon him, and he is subject to none others.”²⁷⁹

Most significantly for our purposes, Browning’s principal tack was the syllogism that is so common in the modern debates — to reason outward from the presumption that Congress could not direct the Commander in Chief with respect to the day-to-day, specific operational and tactical decisions on the battlefield. If Congress could not regulate such “active operations in the field” — could not “direct the movements of the Army” — Browning reasoned, it necessarily followed that neither could Congress require the President to confiscate enemy property, or to perform any of the other wartime functions traditionally determined by the Commander in Chief.²⁸⁰ Senator Howard and others responded by rejecting the premise that operations in the field cannot be regulated by statute. Howard did *not* disagree with Browning that it would be absurd, and counterproductive, for Congress to enact such laws micromanaging the details of military con-

²⁷⁶ *Id.* at 2967.

²⁷⁷ *Id.* at 2968; *see also id.* at 2930 (statement of Sen. Wade) (“There never was a commander-in-chief sent out by any Government in Europe, but what acted in strict subordination to the Government at home.”).

²⁷⁸ *Id.* at 2969.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 2970; *see also id.* at 2966.

flict.²⁸¹ He explained, however, that this background presumption could be overcome in order to check military folly, or worse, “irretrievable disaster.”²⁸² Howard explained why Browning’s view could lead to disastrous results:

[S]hould the President, as Commander-in-Chief, undertake an absurd and impracticable expedition against the enemy, one plainly destructive of the national interests and leading to irretrievable disaster, or should he basely refuse to undertake one, or, having undertaken it, insist upon retreating before the enemy, and giving over the war to the manifest prejudice of the country, or should he treacherously enter into terms of capitulation with the manifest intent to give the enemy an advantage, would the Senator rise in his seat here and insist that Congress has no power to interpose by legislation and prevent the folly and the crime? And yet his doctrines as here announced would impel him to exclaim, “the country is without remedy; Congress is powerless; the Constitution furnishes no means to arrest the approaching ruin; we must not travel out of the Constitution; and we must submit our necks to the yoke. It is the will of the Commander-in-Chief, and that, and that only, in such a case is the Constitution.”

Sir, this new heresy deserves rebuke.²⁸³

Browning was taken aback by the forthrightness of Howard’s argument. He praised his adversary for “meet[ing] the question in the most direct and manly terms.”²⁸⁴ But he insisted the legislature was offered only an all-or-nothing choice: disbanding the army. Browning argued:

[W]hen the Army is raised, when the Army is supported, when it is armed, when we are engaged in war, and it is in the field marshaled for the strife, I deny that Congress, any more than the humblest individual in the Republic, has any power to say to the President, do this or do that; march here or march there; attack that town or attack this town; advance to-day and retreat to-morrow; give up a city to be sacked and burned; shoot your prisoners.²⁸⁵

5. *Lincoln’s Response.* — In the end, Browning’s view did not prevail. The Senate and the House passed the Second Confiscation Act, with Browning one of only three Republican Senators to vote against it.²⁸⁶ Browning urged Lincoln not to sign the bill because “his course upon this bill was to determine whether he was to control the aboli-

²⁸¹ *Id.* at 2969.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 2970.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 3006. The other two Republican votes against the bill were those of the Michigan Senators: Zachariah Chandler, who complained that it would be ineffective, *id.*, and none other than Jacob Howard, who, despite being the most eloquent proponent of Congress’s war powers vis-à-vis the President, nevertheless concluded that the Act would deprive property owners of due process, *id.*

tionists and radicals, or whether they were to control him.”²⁸⁷ Although Lincoln submitted a veto statement to the House offering several objections to the bill, including some of a constitutional nature (dealing with the Treason and Due Process Clauses),²⁸⁸ he conspicuously declined to raise any objections along the lines of Browning’s Commander in Chief argument. Indeed, Lincoln eventually signed the bill, after Congress passed an “explanatory” resolution clarifying that the law would be only prospective and that the forfeiture of real property would not extend beyond the offender’s natural life²⁸⁹ — restrictions that tempered the bill somewhat but still left it, on its face, stricter than its predecessor.

This compromise did not address Browning’s separation of powers concern. But it did make the bill more palatable from the Administration’s perspective. In fact, to the chagrin of the Radical Republicans,²⁹⁰ the Act proved difficult to enforce, partly because the Attorney General pointedly refused to offer guidance on its meaning to district attorneys.²⁹¹ Nevertheless, the bill was, as Browning knew, a remarkable example of a law regulating the discretion of the Commander in Chief. It dealt specifically with a tactic to be applied directly to the enemy. It imposed not a restriction, but an affirmative obligation on the President, because Congress perceived him as being insufficiently aggressive. And it was enacted not as a background, framework statute to govern all wars, but in the midst of a particular war, as a corrective to what Congress saw as an inadequate executive policy toward a particular foe. Nevertheless, as far as we have been able to discern, no executive branch official — including the President and his Attorney General — contended at any point in the extensive debate that the Act unconstitutionally interfered with the President’s constitutional war authority.²⁹²

²⁸⁷ 1 THE DIARY OF ORVILLE HICKMAN BROWNING 558 (Theodore Calvin Pease & James G. Randall eds., 1925).

²⁸⁸ See S. JOUR., 37th Cong., 2d Sess. 872–74 (1862); see also CONG. GLOBE, 37th Cong., 2d Sess. at 3379–83.

²⁸⁹ See J. Res. 63, 37th Cong., 12 Stat. 627 (1862). Professors Steven Calabresi and Christopher Yoo assert that “Lincoln refused to sign the second Confiscation Act until Congress had made certain changes to correspond with his view of executive and legislative authority.” Calabresi & Yoo, *supra* note 202, at 732 (emphasis added). But they cite nothing to support this claim, and the President’s draft veto message does not mention any separation of powers (or allocation of authority) concerns.

²⁹⁰ See HAMILTON, *supra* note 268, at 76–78.

²⁹¹ See SIDDALI, *supra* note 255, at 232–35, 245–47.

²⁹² Several months later, the President broke with his more temperate approach to the war’s prosecution and promulgated the Emancipation Proclamation, which declared that slaves “henceforward shall be[] free” in most of the territories of the Confederacy that were not yet under Union control. Abraham Lincoln, A Proclamation (Jan. 1, 1863), in 12 Stat. app. 1268, 1269. Lincoln forthrightly characterized this as an exercise of his war powers. See *id.* at 1268–69. The Proclamation does not implicate our *Youngstown* Category Three question of preclusive Com-

E. Regulating Military Dismissals and Tribunals

As the war was drawing to a close, just before Lincoln's assassination, Congress continued in its assertive posture. It enacted a law that gave a court-martial the power to rule that the President's dismissal of a military officer was "wrongful[.]" and to reverse that dismissal.²⁹³ Lincoln did not object to the bill, and when, the next year, the Secretary of the Navy asked Attorney General Henry Stanberry for a legal opinion on the measure, Stanberry wrote that it fell "within the power

mander in Chief authority, even though in some respects it went beyond the bounds of the emancipation decreed in section 9 of the Second Confiscation Act. To be sure, the statute declared the freedom only of slaves of *disloyal* Southern owners, and then only if they escaped to the North or otherwise came within the control of the Union, see Act of July 17, 1862, ch. 195, § 9, 12 Stat. 589, 591, whereas there were no such limitations in the Emancipation Proclamation. The operational significance of these differences may not have been great, in part due to the unlikelihood that any putatively "loyal" Southern owners would try to recover their escaped slaves behind Union lines. See Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 49 HOW. L.J. 313, 374-79 (2006). Yet the significance of the actual Emancipation Proclamation was well understood at the time, particularly by the slaves themselves, at least in part because it purported to affect some slaves not emancipated under the SCA. In any event, although the Emancipation Proclamation was the subject of legislative debate, nowhere in that debate did anyone suggest that the Proclamation was problematic because it was inconsistent with the Second Confiscation Act, other statutes, or congressional will more broadly. Cf. B.R. CURTIS, EXECUTIVE POWER (Boston, Little, Brown, & Co. 1862), reprinted in 4 GREEN BAG 2d 430, 432-45 (2001) (offering extensive analysis of the constitutionality of the Emancipation Proclamation, but making no mention of any constitutionally problematic inconsistency with statutes such as the Second Confiscation Act). That was probably because the President's action comported so well with the animating purpose of the Second Confiscation Act (which itself was prompted in part by the President's overruling of the emancipation order issued by General Fremont), as well as a raft of additional emancipatory legislation enacted by the 37th Congress. See, e.g., Act of July 17, 1862, ch. 201, § 13, 12 Stat. 597, 599 (decreeing that slaves owned by rebels who performed military service for the Union would be free, together with their families); Act of June 19, 1862, ch. 111, 12 Stat. 432 (abolishing slavery in the territories); Act of Apr. 16, 1862, ch. 54, 12 Stat. 376 (abolishing slavery in the District of Columbia); Act of Mar. 13, 1862, ch. 40, 12 Stat. 354 (prohibiting military officers from returning fugitive slaves). The supporters of this wave of legislation had no interest in bounding the scope of the emancipation that the Executive might decree; their mission was to realize emancipation and to weaken the South, rather than to impose obstacles to effectuation of those goals. This then appears to have been an instance in which there was a general understanding that the earlier congressional grants of wartime authority were not designed to limit by implication yet more aggressive action undertaken on the President's own constitutional initiative.

²⁹³ Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489. The Supreme Court later construed this statute not to limit the power of the President to effect removal of an officer by appointment of a replacement officer who is confirmed by the Senate. See *Wallace v. United States*, 257 U.S. 541, 545 (1922). The Court in that case also stated in passing that the validity of such a statutory restriction on the power of the President to remove both military and civil officers had been the subject of "doubt and discussion." *Id.* Four years later, in *Myers v. United States*, 272 U.S. 52 (1926), the Court would hold that removal restrictions, at least for certain categories of officers, are unconstitutional — but that holding, whatever its effect after *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1987), was not based on the Commander in Chief Clause, and thus has no special application in the context of the armed forces.

conferred on Congress, by the fourteenth clause of section 8 of article I of the Constitution, ‘to make rules for the government and regulation of the land and naval forces.’”²⁹⁴ He explained that it “proceeds upon an admission that the power of dismissal belongs to the President” and is “simply a regulation which is to follow a dismissal, providing, in certain contingencies, for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen.”²⁹⁵

To similar effect, in July 1865, Attorney General James Speed issued an opinion dealing with the question of whether the Lincoln assassination conspirators could be tried by a military commission created by presidential decree.²⁹⁶ Speed explained that in the *absence* of a statute regulating such tribunals, the President could establish them, so long as they complied with the laws of war.²⁹⁷ But he conceded at the outset that the President’s authority was interstitial and secondary to Congress’s: “Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure.”²⁹⁸ This ruling would presage the Supreme Court’s recent holding to the same effect in *Hamdan*.²⁹⁹

*F. After Lincoln: The Emergence
of the Preclusive Power Argument*

Senator Browning’s view of a preclusive Commander in Chief prerogative — a view that in 1862 appeared idiosyncratic and disfavored — received support after the war from two important sources. The first was a concurring opinion of the Chief Justice of the United States, Salmon P. Chase. The second was a prominent constitutional treatise that elaborated on the principle set forth by the Chief Justice.

1. *The Chase Dictum*. — The first source of support, Chief Justice Chase’s concurrence in *Ex parte Milligan*, was joined by three other Justices.³⁰⁰ As explained above, the Court unanimously held in *Milligan* that Congress had limited the manner in which the President could prosecute the war.³⁰¹ Chief Justice Chase’s concurrence, in particular, was an even stronger defense of the breadth of Congress’s war

²⁹⁴ Restoration of Dismissed Military and Naval Officers, 12 Op. Att’y Gen. 4, 4 (1866).

²⁹⁵ *Id.* at 5.

²⁹⁶ Military Commissions, *supra* note 198.

²⁹⁷ *Id.* at 298; *see also id.* at 299 (opining that the laws of war were of “binding force upon the departments” as a matter of constitutional law).

²⁹⁸ *Id.* at 298.

²⁹⁹ *See* Barron & Lederman, *supra* note 2, at 737–38, 762–63.

³⁰⁰ *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 134–40 (1886) (Chase, C.J., concurring in the judgment).

³⁰¹ *See supra* p. 1008.

powers.³⁰² Nevertheless, in the midst of his paean to Congress's "power to provide by law for carrying on war," the Chief Justice added the dictum that such congressional power "necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as commander-in-chief."³⁰³

Whatever the motivation for this brief aside,³⁰⁴ it was the first judicial expression of the theory of the substantive Commander in Chief preclusive power that is now the centerpiece of the Department of Justice's defense of the Bush Administration's views.³⁰⁵ Part of Chief Justice Chase's aside was also repeated with favor as dicta in *Hamdan*'s majority opinion,³⁰⁶ and it is reflexively endorsed by many contemporary war powers scholars.³⁰⁷

³⁰² Chief Justice Chase argued, contrary to the majority, that Congress *could* authorize the use of military commissions in the United States, in lieu of the civil justice system, to try U.S. citizens for conspiracy against the United States and for aiding the rebel army. *Milligan*, 71 U.S. (4 Wall.) at 136–42 (Chase, C.J., concurring in the judgment). Chief Justice Chase explained that the President's use of such a military commission in *Milligan*'s case was unlawful because Congress had actually prohibited it by statute. *Id.* at 134–36, 141.

³⁰³ *Id.* at 139 (emphasis added). Chief Justice Chase expanded on the point:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels . . .

Id. at 139–40.

³⁰⁴ We have not found any such suggestion in the briefs or oral argument in *Milligan*, nor have we found any statements by Chief Justice Chase himself explaining what led him to include this passage.

³⁰⁵ See, e.g., DOJ WHITE PAPER, *supra* note 162, at 1404 (italicizing the pertinent language from Chief Justice Chase's concurrence).

³⁰⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) ("Congress cannot direct the conduct of campaigns . . ." (quoting *Milligan*, 71 U.S. (4 Wall.) at 139–40 (1866) (Chase, C.J., concurring in the judgment)); Barron & Lederman, *supra* note 2, at 737–38, 765.

³⁰⁷ See, e.g., David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1855 (1998) (citing Chief Justice Chase's dictum to support the notion of a "robust core of exclusivity" concerning direction of troop movements, formation of military strategies, and battlefield attacks); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 170 (2004) (citing Chief Justice Chase's dictum in support of the proposition that "the Supreme Court has affirmed the principle that there are constitutional limits on congressional authority to interfere with the President's operational control of the military in wartime"); Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 YALE L.J. POCKET PART 84, 85 (2006), <http://yalelawjournal.org/2006/03/ku.html> (citing Chief Justice Chase's dictum in support of an "exclusive Commander-in-Chief power"); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 572 (1999) (citing Chief Justice Chase's dictum in support of the proposition that it is "settled" that "[t]he

2. *Pomeroy's Treatise*. — In its own time, the dictum in Chase's concurrence received a strong endorsement in one of the leading legal treatises of the day, Professor John Norton Pomeroy's *An Introduction to the Constitutional Law of the United States*. The first edition of Professor Pomeroy's treatise in 1868 used the dictum in the Chase concurrence as the jumping-off point for a remarkable exegesis on the limits the Commander in Chief Clause imposes on Congress's war powers.³⁰⁸ Importantly, Pomeroy's basic understanding of Article I and II powers was, in a fundamental respect, contrary to the modern understanding as articulated in Justice Jackson's *Steel Seizure* opinion. Pomeroy, like Senator Browning in the Second Confiscation Act debate before him, was partial to the alternative separation of powers model of the time, which insisted that legislative and executive functions were rigidly separated, rather than overlapping.³⁰⁹ This conceptualization led Pomeroy to identify "two classes of powers and duties" of the President that "should be kept distinct." On the one hand, there was the President's duty to faithfully execute statutory enactments, where he acts not as commander but "as a supreme civil magistrate." On the other, there was the President's role as Commander in Chief, in which rather than executing positive laws, "he calls other attributes into action."³¹⁰ In the latter category, Pomeroy reasoned, statutes cannot bind the President.³¹¹

Pomeroy cited virtually no authority, other than the dictum in Chief Justice Chase's concurrence,³¹² in support of the exquisite distinctions that he drew between these two types of presidential functions. Pomeroy relied on his own understanding of the "policy of the Constitution," based on what he assumed was "felt" at the Founding, that "active hostilities, under the control of a large deliberative body, would be feebly carried on, with uniformly disastrous results."³¹³ Ac-

President's power of operational control of the armed forces is . . . [not] subject to congressional regulation that interferes with the President's discretion").

³⁰⁸ JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 703, at 470 (1st ed. 1868).

³⁰⁹ For Browning, to show that a President could exercise a power of war, such as confiscation, was quite literally "to demonstrate that Congress cannot." CONG. GLOBE, 37th Cong., 2d Sess. 2920 (1862); see also *id.* ("There is not . . . a single power of the Government, so far as I am informed or believe, not one single power which may be exercised either conjointly or concurrently by different departments of the Government.").

³¹⁰ POMEROY, *supra* note 308, § 705, at 472.

³¹¹ See, e.g., *id.* §§ 703–706, at 470–73.

³¹² See *id.* § 703, at 470.

³¹³ *Id.* § 455, at 289. Here, Professor Pomeroy made the common mistake of failing to distinguish between control by *Congress*, as a body, and control by way of *statutes*. Professor Pomeroy argued that the preconstitutional practice demonstrated "that active hostilities, *under the control of a large deliberative body*, would be feebly carried on, with uniform disastrous results." *Id.* (emphasis added). But under the constitutional scheme, such hostilities are, in theory, not regulated by a deliberative body directly, but instead by statutes enacted by a bicameral legislature,

cordingly, reasoned Pomeroy (again, without the benefit of a single citation), “all *direct* management of warlike operations, all planning and organizing of campaigns, all establishing of blockades, all direction of marches, sieges, battles, and the like, are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens.”³¹⁴

Pomeroy then proceeded to attempt to explain away Congress’s seemingly overlapping Article I war powers. So, for instance, he reasoned that Congress’s power to make “Rules concerning Captures on Land and Water” entitles Congress to determine only what the President may do once a capture is made, rather than who, or what, or when to capture.³¹⁵ Likewise, Pomeroy concluded that Congress’s powers to raise and support armies and navies give the legislature the authority to determine the size, nature, and conditions of operation of the army and navy, on numerous matters large and small,³¹⁶ but that no “particular statutes” passed pursuant to these powers “can interfere with the President in his exercise of [the command of the forces raised].”³¹⁷ Similarly, Pomeroy argued that Congress’s power to enact “necessary and proper” legislation “must be supplementary to, and in aid of, the separate and independent functions of the President as commander-in-chief; they cannot interfere with, much less limit, his discretion in the exercise of those functions.”³¹⁸

Finally, and most revealingly, Pomeroy understood Congress’s Article I power to make rules for the regulation and government of the armed and naval forces to permit Congress to do a great deal³¹⁹ — even to go so far as to “adopt a system of tactics”³²⁰ — but only if it

and subject to a presidential veto, which is quite another matter entirely. Thus, even where Congress enacts many laws regulating the conduct of military operations, it is never the case, as Professor Pomeroy feared, that Congress can, or does, “assume the capacities and duties of Commander-in-Chief.” *Id.* § 703, at 471.

³¹⁴ *Id.* § 455, at 289 (emphasis added).

³¹⁵ *Id.* §§ 455–456, at 288–90.

³¹⁶ *Id.* §§ 463–465, at 293–94 (stating, for example, that “[r]aising’ armies[] includes the determination of the number of men who shall be enlisted; the different arms of the service into which they shall be separated; the number and arrangement of companies, regiments, brigades, and corps; the number and rank of officers; the time of service of men and officers, and other like matters”).

³¹⁷ *Id.* § 703, at 471. To be sure, Professor Pomeroy thought that these appropriations powers gave the people, “through their direct representatives, a complete check upon any illegal and revolutionary designs of the Executive; and even upon his ambitious or ill-considered methods of carrying on a war,” *id.* § 461, at 292–93, but apparently Professor Pomeroy had in mind the actual withholding of supplies, rather than an express statutory condition limiting what the President could order done with such supplies, *see id.*

³¹⁸ *Id.* § 455, at 289. Again, Professor Pomeroy failed to cite any authority to support this proposition.

³¹⁹ *See id.* §§ 467–470, at 295–96.

³²⁰ *Id.* § 470, at 296.

left the President free, *even in peacetime*, to “make all dispositions of troops and officers, stationing them now at this post, now at that”; to send naval vessels to “such parts of the world as he pleases”; and to distribute arms, munitions, and supplies in locations and quantities of his choosing.³²¹ In *wartime*, Pomeroy explained, the limits were even more severe, such that the statutory rules governing the military could not “interfere in any direct manner with the actual belligerent operations”; the President as Commander in Chief had to be free to conduct “warlike movements.”³²² Pomeroy attempted to reconcile these seemingly irreconcilable positions by appealing to a distinction between *rules*, as such, which Congress could impose, and “exceptional, or transitory mandates,” which were outside Congress’s authority.³²³

3. *Political Branch Practice in the War’s Aftermath.* — Notwithstanding these prominent expressions of support for a preclusive Commander in Chief power, the Reconstruction Congress was, if anything, more intent on asserting its power to control the conduct of military operations. Of course, there was, strictly speaking, no war occurring at the time, and so the statutory limits it enacted did not deal directly with the conduct of military campaigns against enemy forces. But neither was Reconstruction a period fairly characterized as peacetime. Thus, Congress’s regulation of the command authority, chiefly by way of limits on the command *structure* of the military, was striking.

Given the divide between the Congress and the President that resulted from Andrew Johnson’s ascension to office, the interbranch battle for control over the military reached new levels of intensity, culminating in the new President’s impeachment, though not conviction. But well before that climactic moment, the Republican-controlled Congress enacted several statutes designed to limit President Johnson’s ability to control Reconstruction, at least two of which implicated his Commander in Chief authorities directly.³²⁴ In each case, Congress cut

³²¹ *Id.* § 705, at 472.

³²² *Id.* § 706, at 473.

³²³ *Id.* § 468, at 296. Notably, to the extent Professor Pomeroy was suggesting that there is a constitutionally significant distinction between generally applicable rules on the one hand, and laws enacted to deal with a particular, “transitory” problem, or conflict, on the other, Professor Pomeroy would appear to have been *approving* of the sorts of framework statutes — for example, the Torture Act and FISA — that have been the subject of recent disputes. See Barron & Lederman, *supra* note 2, at 706–10.

³²⁴ Although these statutes did not deal with the conduct of war as such, they are nevertheless instructive regarding Congress’s power to regulate functions that would otherwise be left to the Commander in Chief’s discretion. In this case, the statutes instructed how the President could control the armed forces in dealing with an enemy in the aftermath of war.

back on the absolute discretion the President previously enjoyed as Commander in Chief to dismiss officers from the military service.³²⁵

The Act of July 13, 1866, forbade dismissals of army and navy officers in peacetime without a sentence by court-martial.³²⁶ This statute was in some respects a companion to the 1865 law that had given courts-martial the authority to reverse presidential orders of dismissal.³²⁷ Much more significantly, the next year Congress enacted another statute — a rider to an appropriations bill that plainly shows Congress had not taken Chief Justice Chase's dictum to heart. The Act required that all orders relating to military operations by the President or Secretary of War be issued through the General of the Army (that is, Ulysses S. Grant), who could not be "removed, suspended, or relieved from command," except at his own request, without Senate approval.³²⁸ The rider also fixed the General's headquarters in Washington, D.C. (where he would be more accessible to the legislature); prescribed that orders or instructions relating to military operations issued contrary to the statutory method be deemed void; and provided that any officer of the army who issued, knowingly transmitted, or obeyed any orders inconsistent with the provisions of the rider, would be subject to imprisonment.³²⁹

President Johnson signed the bill reluctantly, protesting that "in certain cases [it] virtually [deprived] the President of his constitutional functions as Commander in Chief of the Army" and was therefore "out of place in an appropriation act."³³⁰ Then, on February 22, 1868, in a private conversation with Army Major General William Emory, Johnson expressed the view that the rider was unconstitutional. This conversation became the basis of the Ninth Article of Impeachment against Johnson, in which the House accused Johnson of trying to thereby induce Emory, as Commander of the Department of Washington, to disregard the law by acting upon Johnson's direct orders, without Grant's participation.³³¹

³²⁵ See *Dismissal of Officer in the Marine Corps*, 15 Op. Att'y Gen. 421, 421-22 (1878) (explaining that the President had such a constitutional dismissal authority, which had been "limited" by subsequent acts).

³²⁶ Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92; see also *Blake v. United States*, 103 U.S. 227, 235-37 (1880) (construing the statute not to prevent the President from replacing officers with new officers confirmed by the Senate). The statute still appears, in substantially similar form, in the United States Code. See 10 U.S.C. § 1161 (2000).

³²⁷ See *supra* p. 1017.

³²⁸ Act of Mar. 2, 1867, ch. 170, § 2, 14 Stat. 485, 486-87.

³²⁹ *Id.*

³³⁰ Andrew Johnson, Message to the House of Representatives (Mar. 2, 1867), in 8 MESSAGES AND PAPERS, *supra* note 156, at 3670; see also Andrew Johnson, Fourth Annual Message (Dec. 9, 1868), in 8 MESSAGES AND PAPERS, *supra* note 156, at 3870.

³³¹ See CONG. GLOBE, 40th Cong., 2d Sess. 1648 (1868) (Ninth Article of Impeachment). At the Senate trial, however, Emory's testimony did not reveal much more than a constitutional dis-

President Johnson's constitutional doubts about the March 1867 Act were probably well-taken, even on the narrowest reading of the Commander in Chief Clause, which recognizes what we have called the "superintendence" prerogative — namely, that because the President is the Commander in *Chief*, discretionary decisions about how to use the armed forces (at least as to certain military functions) must be subject to his control, and that no other person may be given command authority that supersedes the President's. By requiring that all orders emanate from General Grant, and by forbidding Johnson from removing Grant from office, the act *effectively* meant that Grant, and not Johnson, was at the apex of the chain of command, and that Johnson could not effectuate his own orders in cases in which Grant disapproved.³³² This striking shift of military superintendence away from the President to a subordinate official was in sharp conflict with the prior eighty years of constitutional understandings of the limits of congressional authority over the Commander in Chief.

G. Conclusion

Precisely because the legislation just described was so aggressive, going so far as to all but displace the President as Commander in Chief, it is hard to review the evidence from the Reconstruction Era, Chief Justice Chase and Professor Pomeroy notwithstanding, as a defining moment in which the notion of a *substantive* preclusive Commander in Chief authority finally won widespread acceptance. Instead, the period running through the Civil War and its aftermath is largely continuous with what came before. To be sure, Lincoln asserted theories of necessity in sweeping ways, leaving one with a sense of just how much an Executive can achieve unilaterally in a moment

cussion with the President. Accordingly, the Ninth Article of Impeachment had the least support of any of the articles at the preliminary conference of the Senate before the case was dismissed — fully a dozen Republican Senators were inclined to vote against it. See EDMUND G. ROSS, HISTORY OF THE IMPEACHMENT OF ANDREW JOHNSON 82–83, 126–28, 132 (New York, Burt Franklin 1868).

³³² To be sure, the Act of 1867 did not, by its terms, deny Johnson the power to determine how the Army would be used in Reconstruction: in theory, and as Senator George Edmunds argued during the Senate debate, see CONG. GLOBE, 39th Cong., 2d Sess. 1854 (1867) (contending that the bill "does not undertake to hedge in [the President's] authority a particle as to what he shall order, or in what way"), Grant remained subject to Johnson's control, and the law did not expressly assign Grant the power to ignore Johnson's orders. Nevertheless, transfer of de facto authority to Grant was manifestly the object, and the likely effect, of the law. See *id.* at 1852 (reporting remarks of Sen. Johnson) (complaining that the President's "right practically to take himself the command is denied"). Under modern precedents, the Act would also be unconstitutional in another respect, apart from the Commander in Chief Clause, in that it gave the Senate itself the power to approve or reject Lincoln's decision whether to reassign or remove Grant. In contemporary terms, this would be a violation of the anti-aggrandizement principle. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685–86 (1988) (discussing *Bowsher v. Synar*, 478 U.S. 714 (1986)); *Myers v. United States*, 272 U.S. 52 (1926); see also *infra* note 651.

of exigency. But the basic settlement to that point, in which the Executive assumed a posture of subjection to congressional control over war powers, was in some respects reinforced in the course of his doing so. In acceding to the Second Confiscation Act, President Lincoln prudently refused to antagonize a legislature that was clearly aroused. But it is by no means evident that Lincoln adopted merely a rhetorical stance in acknowledging congressional control. After all, Lincoln confessed unlawful actions to the Congress early on in the war, and later accepted legislation that he plainly disliked and that purported to direct him to deploy an actual tactic — the seizure of enemy property — that he had long declined to exercise. He did so, moreover, even as his ally Browning urged him to lay down a marker precisely because Congress was seized with as broad a view of legislative war powers as one could imagine.

And yet, as much as this era suggests a deep wariness about the acceptability of preclusive executive war powers, it also, by the end, marked the first time in which the notion of a preclusive Commander in Chief power had won the kinds of endorsements that might suffice to make it a viable candidate for inclusion in the conventional understanding of the constitutional plan. Whether that candidacy would prove successful was still to be determined.

IV. FROM POST-RECONSTRUCTION THROUGH THE GENEVA CONVENTIONS OF 1949

When Professor Pomeroy published his treatise in 1868, his expansive and detailed theory of the Commander in Chief's prerogatives was fairly unique.³³³ By the end of the next half-century, it was no

³³³ Professor Thomas Cooley, for example, wrote in his treatise on constitutional limitations: [W]here the governor is made commander-in-chief of the military forces of the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 138 (Boston, Little, Brown, & Co. 5th ed. 1883). Professor Cooley immediately thereafter added that, as to the legislature's power to make rules for the executive department generally, such rules must not, "under [the] pretence of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers." *Id.* This is, of course, correct, but Professor Cooley did not specify that the President had any such indefeasible prerogatives as Commander in Chief. To like effect, Justice Story's treatise, which Professor Cooley edited after the war, continued to reflect the basic but equivocal legislative supremacy presumptions that Justice Story had published in antebellum editions, *see supra* pp. 982–83; it did not, in any event, identify any substantive preclusive power of the Commander in Chief akin to that found in Pomeroy. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1168–1198, 1490–1492, at 91–114, 327–29 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891); *see also* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 99 n.b (Boston, Little, Brown, & Co. 11th ed. 1867) ("Though the constitution vests the execution power in the President, and de-

longer. Legal writers increasingly assumed — without citing much by way of authority — that there were significant limits on Congress's power to enact statutes imposing substantive restrictions on the President's command of the army and navy.³³⁴ Indeed, by the end of the First World War, Pomeroy's basic analytic structure was dogma for many scholars.³³⁵ This new wisdom was reflected most clearly in Pro-

clares him to be Commander-in-Chief of the army and navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress.”)

³³⁴ See, e.g., GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 323 (3d rev. ed. 1915) (“In the exercise of military command and in the conduct of military operations the President is not subject to legislative or judicial control.”); 1 J.I. CLARK HARE, AMERICAN CONSTITUTIONAL LAW 171–76 (Boston, Little, Brown, & Co. 1889) (explaining that the President “exercises functions which are more truly regal than those of an English monarch” and that Congress may not even end a war that it “thinks unnecessary or unjust”); H. VON HOLST, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA § 56, at 193–94 (Alfred Bishop Mason trans., Chicago, Callaghan & Co. 1887) (opining that although Congress generally “should leave the president free to act at his own discretion, especially in the more technical matters,” it has the power to “regulate by law whatever is of general importance and bears a permanent character”; “[o]n the other hand, the president alone must determine how the military force shall be employed, and he must make all provisions, temporary and not general in their nature, because, from the nature of things, these must be adapted to special circumstances”; and in war “the entire technical direction of affairs is thus incumbent upon the president” and “how the war declared by congress shall be conducted by the means granted by it is the exclusive affair of the president”); G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 17 n.3, 18 (Washington, GPO 1898) (contending that although a Commander in Chief's authority “must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department,” Congress's power over the administration of the affairs of the Army does not “include what would properly come under the head of the direction of military movements,” where “the constitutional power of the President as commander-in-chief is exclusive”); GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 76–77 (1919) (“In the actual conduct of military operations, in the field where the battles are being fought, in the movement, disposition and discipline of the land and naval forces, the Commander-in-Chief is supreme.”); 2 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION 914 (1910) (“While Congress can make rules for the Army and Navy, it can not interfere with the President's power as commander of such forces. The line between the exercise of his power as commander and that of Congress is plain, and neither can rightfully or legally invade the other.”); *id.* (quoting Chief Justice Chase's *Milligan* dictum as being a well-defined “line of demarkation”); *cf.* WESTEL W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 498 (1912) (stating that the President “has within his control the disposition of troops, the direction of vessels of war and the planning and execution of campaigns,” but remaining unclear about whether those are functions that Congress cannot regulate under its authority to lay down rules for the military, or whether instead Congress simply declines to do so in the ordinary course: “With respect to many matters of detail Congress has delegated to the President and to his executive subordinates the promulgation of administrative orders for the government of the land and naval forces which it might constitutionally itself provide, but which in fact it is either impossible or unwise for it to attempt to do.”).

³³⁵ It was not uniformly followed, however. In a prominent volume, Professor James Hart wrote that “it is not practically possible to draw a sharp and clear-cut distinction between the powers of military command and the power to regulate the forces and to govern them.” JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 240 (1925). Although he surmised that “[i]t was probably the intention of the framers” to give the

essor Clarence Berdahl's influential 1920 volume, *War Powers of the Executive in the United States*. Berdahl asserted that the President alone is to decide "how the war is to be conducted" — a "despotic power," to be sure, but one that "nevertheless must be confided by a sound political science to the President."³³⁶

Throughout this period, however, the emergent theory of presidential exclusivity remained more an article of faith of academic commentators — and one whose practical implications for existing statutes and treaties were rarely if ever considered — rather than an Executive position articulated in response to real-world circumstances. That was true even though the era witnessed two world wars, a host of lesser military engagements, and the enactment of a mass of new statutory and treaty-based regulation of the military, which grew to be as complex and detailed as most other parts of federal law. Indeed, today Title 10 of the United States Code, and several war-related treaties, establish a comprehensive legal framework for the organization and conduct of the armed forces. Although many of these laws were and are targeted at the peacetime organization and deployment of the armed forces, at least some of the statutes enacted, and treaties ratified, during these years threatened to place considerable constraints on the Commander in Chief's treatment of the enemy.³³⁷ Still other regu-

President control over such matters as the operations and maneuvers of the army and navy in war and peacetime, military policies in the conduct of campaigns, and control over occupied territory, and although he also parenthetically opined that Congress "probably has no moral right [to tie the President's hands]," Professor Hart also identified the veto as the constitutional means of realizing the intended accommodation: "[I]f the President fails, by exercise of his veto power, to prevent Congress from encroaching upon even his independent and exclusive powers, he has no redress, but must enforce the will of the legislature," for otherwise the Executive would have powers of dispensation and suspension that even the British Bill of Rights had denied the Crown. *Id.* at 239–40.

³³⁶ CLARENCE ARTHUR BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 118 (1920). What this exclusivity consisted of for Professor Berdahl, first and foremost, was control of troop movements: "As a matter of fact," Professor Berdahl wrote, "there never has been any serious doubt as to the President's constitutional power to order the regular forces wherever he may think best in the conduct of a war, whether within or without the limits of the United States . . ." *Id.* at 121–22. In addition, Professor Berdahl argued that the President "determines how the forces shall be used, for what purposes, the manner and extent of their participation in campaigns, and the time of their withdrawal." *Id.* at 122. There was no attempt here to account for Congress's powers, and no citation of authority either, other than a vague quotation attributed to a Major General in a message to his troops in Russia. Thus, for Professor Berdahl, the Commander in Chief "may do practically anything calculated to weaken and destroy the fighting power of the enemy and bring the war to a successful conclusion, subject of course to the rules of civilized warfare prescribed by international law and custom." *Id.* at 125. Professor Berdahl, like Professor Pomeroy, did not explain why international custom, but not duly enacted statute, binds the Commander in Chief.

³³⁷ In addition to the treaties discussed below, see, for example, the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. § 2241) (extending the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States"); and the Act of Aug. 29, 1916, ch. 418, § 3,

latory statutes specifically countermanded the President's military designs, particularly during the Administrations of Theodore and Franklin Roosevelt. But notwithstanding the appearance of these seemingly significant legislative obstacles, the executive branch (with one passing exception in a Supreme Court oral argument during World War II) continued to adhere to the long-prevailing political branch practice, in accord with Founding-era assumptions.³³⁸

*A. The Increasing Importance
of Treaty-Based Constraints*

As we have stressed throughout our survey, in our early constitutional history there was a general consensus that Presidents were constrained in their conduct of war by the laws and usages of war, even in the absence of statute. That same understanding remained in place in this latter period.³³⁹ The Lieber Code — Professor Francis Lieber's great codification of the laws of land warfare — for instance, remained the standard instruction for the army during the Spanish-American War, and became such a revered source of guidance at West Point that Colonel Harry Smith referred to it as “our Bible in such matters ever since the Civil War.”³⁴⁰ Until very recently the armed forces professed

³³⁹ Stat. 619, 652–53 (Articles of War 12–16) (delineating the jurisdiction of courts-martial). *See also* Rasul v. Bush, 542 U.S. 466, 480–84 (2004) (construing habeas statute of 1867 to provide jurisdiction for courts to consider habeas petitions of enemy aliens detained anywhere where the custodian can be reached by service of process); *In re Yamashita*, 327 U.S. 1, 9 (1946) (holding, over the Attorney General's objection, that the Court could entertain the habeas petitions of enemy aliens held and tried in U.S. insular possessions); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (same, as to enemies (including aliens) convicted of war crimes during a declared war and held in the United States).

³³⁸ Because the scholars cited above, *see* sources cited *supra* notes 334–335, did not attempt to reconcile this corpus of enactments with their common assumption that the conduct of war was an exclusive preserve of the President, it is difficult to know how such writers would have viewed many of the statutes that have spawned constitutional controversy in recent decades.

³³⁹ *See, e.g.*, 2 WILLIAM WINTHROP, MILITARY LAW 21–22 (1886) (citing *New Orleans v. S.S. Co.*, 87 U.S. (20 Wall.) 387, 394 (1874)) (explaining that the President's “power of military government . . . is a large and extraordinary one,” but is “subject . . . to such conditions and restrictions as the law of war” may impose); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 169 & n.47 (1922) (“[T]he courts have held that the President's power in conducting war is limited by international law and any action he may authorize contrary to that law is void. Congress alone can authorize military methods conflicting with international law . . .”).

³⁴⁰ HARRY A. SMITH, MILITARY GOVERNMENT 16 (1920); *see also* C.M. DOWELL, MILITARY AID TO THE CIVIL POWER 30 (1925) (calling General Orders 100 “probably the most important of all documents on the subject of the rules of land warfare”); Frank Freidel, *General Orders 100 and Military Government*, 32 MISS. VALLEY HIST. REV. 541, 555–56 (1941). Much of Lieber's Code remained in *Army Field Manual 27-10*, which was issued in 1940 and used as the basis for military conduct during the Second World War.

to abide strictly by the laws of armed conflict.³⁴¹ What is more, the nation's chief commanders were increasingly subject to an additional set of treaty-based constraints on their actual conduct of war. Most of those treaties were multilateral instruments involving the so-called *jus in bello*, or the conduct of a belligerent state *during* war, such as the 1907 Hague Conventions (and the 1925 Geneva Protocol to the Hague Conventions).³⁴² The Hague rules were supplemented by even more stringent restrictions in the Geneva Conventions of 1929 and 1949.³⁴³ Indeed, certain articles of the Geneva Conventions restrict what can only be described as war tactics,³⁴⁴ while others prescribe rules for the

³⁴¹ *E.g.*, U.S. Dep't of Def., Directive 5100.77, ¶ 5.3.1 (1998). *See generally* Golove, *Military Tribunals*, *supra* note 16, at 387–94. The first notable suggestions that the President might not be bound by customary international law appeared in Professor Louis Henkin's 1972 treatise on foreign affairs and then, more aggressively, in a 1989 Office of Legal Counsel opinion. *See* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 221–22 (1972) (“[T]he Constitution does not forbid the President . . . to violate international law . . .”); *see also* Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163 (1989).

³⁴² *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Fourth Hague Convention]; Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

³⁴³ *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; *see also, e.g.*, Protocol of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

The United States also became party during this period to treaties establishing *jus ad bellum*, or criteria determining when hostilities may be initiated. The Kellogg-Briand Pact of 1928 purported to outlaw war as an instrument of national policy (although the United States's understanding of the treaty was that it did not foreclose the self-defense prescribed by the Monroe Doctrine). Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. At the end of the Second World War, the United States entered into the United Nations Charter, Article 2(4) of which provides that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” U.N. Charter art. 2, para. 4. The Charter thus requires parties to seek resolution of disputes by peaceful means and requires authorization by the United Nations before a nation may initiate any use of force against another, unless circumscribed exceptions are met (such as an act of individual or collective self-defense or a police action authorized by the Security Council). *See id.* arts. 33, 37, 42, 51.

³⁴⁴ *See, e.g.*, Fourth Geneva Convention, *supra* note 343, arts. 18–19 (prohibiting attacks on civilian hospitals); *id.* art. 23 (requiring belligerents to allow free passage of medical supplies, objects necessary for religious worship, and foodstuffs for civilian use). Article 23 of the Annex to the Fourth Hague Convention, for example, prohibits the use of poisoned weapons, or any materials designed to cause unnecessary suffering, killing or wounding people who had surrendered, and destroying or seizing property, “unless such destruction or seizure be imperatively demanded by the necessities of war.” Fourth Hague Convention, *supra* note 342, Annex art. 23. Article 25 prohibits the attack of undefended towns or buildings. *Id.* Annex art. 25. Article 27 provides that “[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, build-

proper treatment of prisoners of war and other detainees in armed conflicts.³⁴⁵

These treaty-based restrictions on the President's military options would appear to raise the same issues with respect to the Commander in Chief Clause as do statutes — namely, whether and when they might impinge impermissibly on some core prerogatives of the President.³⁴⁶ Yet as far as we are aware, no one in the executive branch or the Congress during this period publicly argued that the Commander in Chief has a constitutional prerogative to act in derogation of this

ings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." *Id.* Annex art. 27. Article 28 prohibits the pillaging of a town or place. *Id.* Annex art. 28. And Article 44 forbids a belligerent from forcing the "inhabitants of occupied territory to furnish information about the army of the other belligerent, or about its means of defense." *Id.* Annex art. 44.

³⁴⁵ See generally Third Geneva Convention, *supra* note 343. Even in conflicts that are not between Geneva signatory states, "Common" Article 3 of the Geneva Conventions (so named because it appears in each of the four conventions) requires that each party to the conflict provide certain "minimum" protections to all "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause." *E.g.*, First Geneva Convention, *supra* note 343, art. 3(1). Most importantly, Common Article 3 prohibits all "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." *Id.* art. 3(1)(a). It also forbids hostage-taking; "outrages upon personal dignity, in particular humiliating and degrading treatment"; and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* art. 3(1)(b)-(d).

³⁴⁶ One can imagine an argument that the President, even apart from his function as Commander in Chief, has some sort of broader authority to disregard treaty obligations, based on the notion that the President can unilaterally terminate a treaty on behalf of the United States, or suspend its operation in response to another party's material breach. But it would seem that if the President has any authority at all to terminate or suspend a treaty without the participation of Congress, it is only to do so in accordance with the treaty's own terms (or in accord with other background international law rules for the operation of treaties). In other words, the President's unilateral termination or suspension power, if any, is the power to comply with a treaty, not to breach it. See generally Jinks & Sloss, *supra* note 307, at 154-64 (contending that Congress, and not the President, has the power to cause the United States to breach treaties that are in force); Ramsey, *supra* note 16, at 1229-35 (distinguishing between terminating a treaty in accordance with its terms and doing so in violation of them). And that power to terminate a treaty in accord with its terms obviously does not carry with it any sort of lesser included power to violate the terms of the treaty. It would appear, then, that the President must comply with treaty obligations unless they are in some way unconstitutional (such as if they impinge on a preclusive Commander in Chief authority), or if they are superseded by subsequent statute. The Bush Administration has not suggested otherwise. To the contrary, in response to a suggestion by the State Department that minor breaches would be preferable to suspension of the Geneva Conventions, the Office of Legal Counsel explained that the President's power to suspend a treaty does not encompass a power to refuse to enforce that treaty: the latter course of action would violate the Take Care Clause. Memorandum from John Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Hon. William H. Taft, IV, Legal Adviser, U.S. Dep't of State 4 (Jan. 14, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/02YooTaft.pdf>. "While it might be convenient for the President to decide to enforce parts of a treaty but not others, it would not be fully in keeping with his constitutional responsibilities." *Id.* at 5.

wide array of treaty-based restrictions on the conduct of war. Nor was any theory proposed during this time that might explain why any preclusive power the President might enjoy as Commander in Chief would be less applicable to treaties than it is to statutes.³⁴⁷ Although we do not independently address the constitutional issues raised by treaty restrictions in this Article, it is important to recognize that these additional, externally imposed constraints were fast being put in place, and apparently without occasioning any constitutional objections.³⁴⁸

B. From Reconstruction to the Progressive Era

Congress continued to impose statutory restrictions respecting the armed forces during the interwar period. None, however, provoked assertions by presidential administrations of preclusive executive war powers of the kind that the broad statements of Professors Pomeroy and Berdahl seemed to endorse. That was true even when statutes purported to regulate the mechanisms of promotion within the military, and when bills proposed to limit the use of military power for domestic law enforcement. Nevertheless, there were few statutory interventions in these years implicating wartime strategy and tactics such as those that occasioned constitutional discussion in the Quasi-War with France, or in the Civil War.

1. *Statutory Regulations of Appointment, Promotion, and Dismissal.* — As a Court of Claims decision from the end of the nineteenth century indicates, there was a general acceptance of the principle that the Commander in Chief's superintendence powers were inviolable.³⁴⁹ But executive administrations of this era understood that this preclusive power of superintendence still afforded Congress substantial room to regulate the processes of military hiring, promotion, and discharge — even when such concessions seemed at odds with Pomeroy's assumption that there are no overlapping war powers.

As noted above, Attorney General Stanberry opined in 1866 that it was constitutional for a statute to give courts-martial the power to rule that the President's dismissal of a military officer was "wrongful," and

³⁴⁷ Such treaties are also the "supreme Law of the Land," U.S. CONST. art. VI — in Justice Kennedy's words, they are "accepted as binding law," *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2802 (2006) (Kennedy, J., concurring in part) — and therefore as a general matter the President has the obligation to see that they, like statutes, are faithfully executed. *See also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (stating that "restrictions on" executive use of "armed force" can be imposed by "treaty, or legislation").

³⁴⁸ For discussion of one aspect of this question, concerning compliance with the U.N. Charter in the Clinton Administration, *see infra* note 619.

³⁴⁹ *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893) ("Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress can not take away from the President the supreme command."), *aff'd*, 165 U.S. 553 (1897).

to reverse that dismissal.³⁵⁰ In 1882, Attorney General Benjamin Brewster addressed the mirror-image question: he concluded that the President could not annul a court-martial's prior judgment that a commissioned officer should be *cashiered* and forever disqualified from holding federal office (a judgment that had at the time been confirmed by the President, in accord with statutory procedure), nor nominate the cashiered officer to the Senate for restoration to his former rank, where such reconsideration was contrary to statutory procedures.³⁵¹ In between these two opinions, Attorney General George Williams in 1873 exhaustively canvassed the history of both executive branch regulations pertaining to appointments and promotions in the military service, and statutory treatment of the same subjects. He concluded that although those functions are within the President's power in the *absence* of statutory regulation, there was a longstanding consensus between the political branches that Congress has significant superseding authority over the subject.³⁵²

³⁵⁰ In *Myers v. United States*, 272 U.S. 52 (1926), Chief Justice Taft stated that this law, along with another, had not been "tested by executive or judicial inquiry." *Id.* at 165. But in fact, the Attorney General had opined that the statute was constitutional. *See supra* p. 1017 (quoting Restoration of Dismissed Military and Naval Officers, *supra* note 294, at 4-5).

³⁵¹ Case of Fitz John Porter, 17 Op. Att'y Gen. 297 (1882). The opinion relied on several previous Attorney General opinions to similar effect. *See id.* at 300-02.

³⁵² Attorney General Williams concluded:

It may, therefore, be regarded as definitely settled by the practice of the Government, that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it deems proper in regard to making promotions or appointments to fill any and all vacancies of whatever kind occurring in the Army, provided, of course, that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs.

Appointments and Promotions in the Army, 14 Op. Att'y Gen. 164, 172 (1873). As the final sentence indicates, the Appointments Clause imposes certain limitations on the degree to which Congress can, by statute, restrict the President's discretion in appointment of constitutional officers, military or otherwise. In particular, statutory qualifications for office can be severe, but must still leave "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment." Civil-Service Commission, *supra* note 164, at 520; *accord* Relief of Fitz John Porter, 18 Op. Att'y Gen. 18, 25-26 (1884). So, for instance, statutes may not designate *specific* individuals to fill offices. *Id.* at 25. Therefore, in 1923, Acting Attorney General A.T. Seymour was correct in opining that Congress could not enact a law requiring the President to appoint a named individual to a Navy office. Restoration of Retired Naval Officer to Active List, 33 Op. Att'y Gen. 438, 440 (1923) (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40, 51 (1852)). But this conclusion did not depend on the fact that the office in question was within the military; it was based instead on the general principle applicable to all offices subject to the Appointments Clause that Congress cannot require appointment of a particular individual to such an office. *See also, e.g.*, Promotion of Marine Officer, *supra* note 164 (opining that the Appointments Clause prohibits a statute from limiting the President's choice of a Marine officer to those persons selected by a subordinate promotion board).

2. *Regulations of the Use of Military Force.* — We have already seen how the legislative impulse to regulate the President's use of force shifted course in the Civil War. Some statutes were designed to temper its use, while others sought to require it. In the late 1870s, Southern Democrats, resentful of the use of the federal military in the Reconstruction Era, were plainly in the tempering mode. They prevailed upon Congress to approve proposals restricting the use of the army for purposes of domestic law enforcement, thereby setting the stage for a possible executive branch assertion of the preclusive executive war powers theory. But no such argument was made.

The most famous such restriction was the Posse Comitatus Act, which became law in 1878.³⁵³ At the time of its enactment, as today, the statute had only a modest impact on the President's ability to use the army for law enforcement purposes, because other laws — most importantly, the 1807 Insurrection Act³⁵⁴ — expressly authorized the President to use the armed forces in case of domestic uprisings. President Hayes did, however, veto at least two bills in 1879 that would have further limited the use of the military for domestic law enforcement. Those bills would have prohibited the use of federal armed men, including from the military, to keep “peace at the polls,” except where necessary to repel armed enemies of the United States. Hayes's first veto statement was focused on the bill's restriction on the use of *civil* authorities to enforce election laws.³⁵⁵ The limitation in the second bill, however, was confined to the use of military forces at polling places. Hayes's veto message called that limit “a dangerous departure from long-settled and important constitutional principles.”³⁵⁶ This objection might be viewed as a variation on President Fillmore's earlier constitutional objection to the dispersal requirement of the Insurrection Act³⁵⁷ — an argument that the restriction would eviscerate the President's ability to exercise his duty to take care that federal law at election sites was enforced. “Under the sweeping terms of the bill,” Hayes wrote, “the National Government is effectually shut

³⁵³ Posse Comitatus Act (PCA), § 15, 20 Stat. 145, 152 (1878) (making it unlawful “to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress”). The PCA continues to appear, in substantially similar form, in current law. 18 U.S.C. § 1385 (2000). Today, as in 1878, there are several statutes that give the President powers under the exceptions clause of the PCA. *See, e.g.*, 10 U.S.C. §§ 331–333 (2000) (authorizing use of the military for certain law enforcement ends).

³⁵⁴ *See supra* p. 973.

³⁵⁵ *See* Rutherford B. Hayes, Veto Message to the House of Representatives (Apr. 29, 1879), in 9 MESSAGES AND PAPERS, *supra* note 156, at 4475, 4478–84.

³⁵⁶ *See* Rutherford B. Hayes, Veto Message to the House of Representatives (May 12, 1879), in 9 MESSAGES AND PAPERS, *supra* note 156, at 4484, 4485.

³⁵⁷ *See supra* pp. 989–90.

out . . . from the discharge of the imperative duty to use its whole executive power whenever and wherever required for the enforcement of its laws at the places and times when and where its elections are held.”³⁵⁸ Notably, however, Hayes did not make any mention of the preclusive Commander in Chief argument that Fillmore had included, albeit tentatively, some decades earlier. The gist of his argument was, instead, that Congress was putting the President to an impossible task: instructing him to take care that federal election laws were enforced, while denying him the necessary means of performing that duty.³⁵⁹

The executive branch in this period does not otherwise appear to have embraced Pomeroy’s model of nonoverlapping constitutional war powers. President McKinley, for example, asserted authority as Commander in Chief to establish a government in the Philippines in the context of the Spanish-American War. In doing so, however, he conceded that such a power would be valid only unless and until Congress acted, a balance the Supreme Court later confirmed.³⁶⁰

C. Political Branch Practice from 1900 to 1939

In the course of a Senate debate in 1909, Senator Isidor Rayner referred offhandedly to a colleague’s observation that “the President has frequently asserted, that as Commander in Chief of the Army and

³⁵⁸ Hayes, *supra* note 356, at 4488.

³⁵⁹ More recently, the Department of Justice has raised similar Take Care Clause concerns as grounds for narrowly construing the Posse Comitatus Act itself. In 1957, Attorney General Herbert Brownell advised President Eisenhower that in light of other statutory authorities, the PCA did not prohibit him from dispatching federal troops to protect the constitutional rights of blacks threatened by riots following court orders to desegregate schools in Little Rock, Arkansas. In his opinion, Brownell stated in passing that there were “grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate.” *President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders — Little Rock, Arkansas*, 41 Op. Att’y Gen. 313, 331 (1957). Several decades later, the Office of Legal Counsel construed the PCA not to have extraterritorial application. *Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. Off. Legal Counsel 321 (1989). One of the grounds for that conclusion was that the law would raise a serious constitutional question if it applied extraterritorially. Although OLC passingly cited the President’s role as Commander in Chief, and the President’s foreign affairs power, *id.* at 332, OLC’s principal reasoning was that on foreign soil and on the high seas “military personnel may constitute the only means at the executive branch’s command to execute the laws,” and therefore if such personnel were precluded from enforcing those laws, the President would lack *any* “effective means” of fulfilling his constitutional duty to execute federal criminal laws overseas. *Id.* at 334. Such reasoning is premised more on the President’s general Take Care obligation, rather than on any claim of a substantive preclusive discretion of the Commander in Chief. *See also id.* at 329 n.6 (“[E]ven in the domestic sphere, the legislators did not intend the Act to extend to situations where only the discipline and armed strength of the military could assure execution of the laws.”).

³⁶⁰ William McKinley, Message to the Secretary of State (Jan. 20, 1899), in 14 MESSAGES AND PAPERS, *supra* note 156, at 6584, 6584–85; *accord* *Santiago v. Noguera*, 214 U.S. 260, 265–66 (1909).

Navy he is not subject to the laws of Congress.”³⁶¹ It may be that the President did so in private conversations with Senators or Representatives but, if so, we have found no evidence of that.³⁶² To be sure, throughout this period, as in most other eras, there were occasional debates in Congress about the extent to which legislation could be enacted to control the discretion of the Commander in Chief.³⁶³ The executive branch, however, does not appear to have asserted the theory that scholars such as Professor Berdahl and others took to be settled. Nor did Congress act during this time as if it were the controlling constitutional rule.

1. *The Theodore Roosevelt Presidency.* — Perhaps the most assertive President of this age, Theodore Roosevelt, expressly conceded Congress’s ultimate control over executive powers even as he set forth his expansive “stewardship” theory of the presidency. Inspired by the precedents of Jackson and Lincoln, Roosevelt asserted vast independent executive powers to act for the betterment of the nation in the absence of clear statutory authority, from intervening unilaterally in Cuba and Santo Domingo to building the Panama Canal.³⁶⁴ But Roosevelt was careful to emphasize that he was ultimately bound by positive legislative enactments.³⁶⁵ Although Roosevelt did not refer directly to executive war powers in confining the scope of his stewardship theory, he complied with statutory limits imposed even in the military context, and did so even though such limits appeared inconsistent with the

³⁶¹ 43 CONG. REC. 2447 (1909).

³⁶² *But cf. supra* note 128 (recounting President Cleveland’s reported threat that he would resist a declaration of war against Spain in the final days of his Administration in 1897).

³⁶³ Most of those debates are not terribly revealing about any general legislative understanding — they tend to be all over the map, and do not have any particular correlation with the laws that Congress did, or did not, choose to enact. For example, in 1912 Representative Elihu Root, former Secretary of War, commented that although it was a terrible idea, “[d]oubtless Congress could by law forbid the troops being sent out of the country.” 48 CONG. REC. 10,929 (1912); *see also* 6 CONG. REC. 330–31, 416, 421, 423 (1877) (House voting for, and Senate against, a provision that would have required four newly recruited cavalry regiments to “be employed in the defense of the Mexican and Indian frontier of Texas,” with minimal discussion of constitutionality). Debates involving Senator William Borah, however, were more interesting, and we discuss them briefly in the text below.

³⁶⁴ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY (1913), *reprinted in* THE ROUGH RIDERS/AN AUTOBIOGRAPHY 241, 614–16, 619–22, 758–65 (Louis Auchincloss ed., Library of Am. 2004); *see also* SCHLESINGER, *supra* note 110, at 88–90; William H. Harbaugh, *The Constitution of the Theodore Roosevelt Presidency and the Progressive Era*, in THE CONSTITUTION AND THE AMERICAN PRESIDENCY 63, 65–69 (Martin L. Fausold & Alan Shank eds., 1991).

³⁶⁵ ROOSEVELT, *supra* note 364, at 614 (“The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. . . . My belief was that it was not only [the President’s] right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.”).

broader theory of preclusive Commander in Chief powers that was fast gaining acceptance among academics.

Roosevelt was clearly enamored of his navy, sending the “Great White Fleet” off on an unannounced around-the-world tour near the very start of his Administration. When news of the venture leaked out, there was a move in Congress to restrict appropriations needed to continue the tour due to a fear that the exercise would antagonize Japan. Roosevelt claimed no power to disregard such a funding curtailment, arguing only that he already had the money from prior appropriations and daring Congress to “try and get [the fleet] back.”³⁶⁶

Roosevelt confronted a much more serious legal problem two years later, again with respect to Congress’s control over the navy. Having concluded that navy ships should be exclusively manned by naval officers, the President issued an executive order restricting the Marine Corps to on-shore bases.³⁶⁷ Congress, however, cut off this initiative by enacting a law providing that no part of an appropriation for the Marine Corps could be expended unless there were at least eight Marines for every hundred navy enlisted men serving on all battleships and cruisers.³⁶⁸ The bill occasioned an extensive war powers debate in Congress, perhaps the most significant one since the Second Confiscation Act. The opposition to the legislation was led by Senator William Borah of Idaho. Although Borah was an isolationist who had a very narrow view of the President’s *independent* power to send troops abroad without congressional approval,³⁶⁹ he argued on several occasions that Congress had limited authority to restrict the President’s assignment of troops when doing so *was* within the President’s constitutional power.³⁷⁰ His opposition to the Marines-on-ships bill was representative of his position. Borah thought the bill would be unconstitutional because although Congress can raise, support, and regulate an army, it cannot “command” it, and therefore “Congress has not the power to say that an army shall be at a particular place at a particular

³⁶⁶ Mike McKinley, *The Cruise of the Great White Fleet*, Oct. 19, 2004, http://www.history.navy.mil/library/online/gwf_cruise.htm (internal quotation marks omitted).

³⁶⁷ Exec. Order No. 969 (1908).

³⁶⁸ Act of Mar. 3, 1909, ch. 255, 35 Stat. 753, 773–74. This was not the first time Congress had specified the relative responsibilities of the Marines and navy. In 1834, Congress passed a law providing that no Marine Corps officer “shall exercise command over any navy yard or vessel of the United States.” Act of June 30, 1834, ch. 132, § 4, 4 Stat. 712, 713.

³⁶⁹ See, e.g., 69 CONG. REC. 6754–55 (1928).

³⁷⁰ See, e.g., *id.* at 6759–61 (arguing that Congress could not enact law preventing the President from using troops to protect the lives and property of U.S. citizens in foreign countries because international law imposed an obligation on him to protect such persons and property); 64 CONG. REC. 933 (1922) (arguing that Congress could not make the President bring home troops from Germany).

time or shall maneuver in a particular instance.”³⁷¹ Borah conceded that “Congress could undoubtedly *previously* establish a rule and regulation by which the President would be controlled in these matters,” but he resisted the notion that Congress could second-guess a decision that the President had already made about the use of troops.³⁷²

Senators Albert Cummins and Joseph Dixon briefly defended Borah’s position,³⁷³ but Senators Rayner,³⁷⁴ Henry Cabot Lodge,³⁷⁵ Eugene Hale,³⁷⁶ Henry Teller,³⁷⁷ and, somewhat more equivocally, Senator Charles Fulton,³⁷⁸ all questioned or challenged it. Rayner explained that although Congress did have Article I powers to control the President’s decisions with respect to troops, this did not mean the President was entirely at the whim of Congress, because the power of the veto would prevent much regulation contrary to the wishes of the Commander in Chief. Quoting a leading authority on courts-martial, he explained that “[s]o contracted is the actual authority of the President that, *but for the protective power of his qualified veto*, his command might be so restricted by legislation as to destroy its utility.”³⁷⁹ Senator Hale added that, as a practical matter, it is “undoubted” that Congress has the power “not to abandon everything in the conduct and regulation of the army and the navy to the President, but to establish a rule that shall for the time override it.”³⁸⁰

³⁷¹ 43 CONG. REC. 2452 (1909). The only authority Borah cited was, not surprisingly, Professor Pomeroy, whom he called a “reasonably acceptable . . . commentator of the Constitution.” *Id.*

³⁷² *Id.* (emphasis added).

³⁷³ *Id.* at 2447, 2451 (statement of Sen. Cummins), 2448 (statement of Sen. Dixon).

³⁷⁴ *E.g., id.* at 2447 (arguing that “the President is absolutely subject to any rules and regulations that Congress may make”; “he has no power as the constitutional commander of the army and navy paramount to the power that is resident here in Congress to regulate the land and naval forces”; and “the authorities are all one way” on this point).

³⁷⁵ *Id.* (arguing that in the “normal and proper” course, such discretion should be left with the Commander in Chief; but if Congress chooses to provide that all Marines shall go to sea it “undoubtedly [has] the right so to provide by law”).

³⁷⁶ *Id.* at 2451.

³⁷⁷ *Id.* at 2452.

³⁷⁸ *Id.* at 2451–52. Fulton was “not prepared to say” whether Congress could pass a law prohibiting infantry from approaching within half a mile of a battery: “It is possible Congress would not have the power to do that,” he offered, because it is “purely a matter of military tactics”; but in any event, “Congress would never undertake to make any such regulation”: it is “not going to make such rules” that would operate, if carried out, “to destroy the Nation.” *Id.*

³⁷⁹ *Id.* at 2450 (emphasis added) (quoting JOHN O’BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL: WITH SUGGESTIONS FOR THEIR IMPROVEMENT 31 (1846)).

³⁸⁰ *Id.* at 2451 (“What would Senators think if, at a time of emergency, . . . a President who was . . . ignominiously for peace instead of honorable war, should order, upon the proposition that there was no danger of war, every ship of the navy into a navy-yard, to be laid up? . . . Does anybody believe that in a condition like that Congress for a moment would hesitate to take upon itself the conduct and regulation, under the Constitution, of the navy of the United States and order those ships out against the presidential mandate?”).

In the end, Congress resolved this debate by choosing to regulate — just as it had resolved the earlier debates over the constitutionality of the Second Confiscation Act and the force-restricting measures at issue in the Quasi-War with France. This is not, of course, conclusive evidence of the constitutional understanding that prevailed in this period. But it is significant that President Roosevelt, on his next-to-last day in office, signed the bill, apparently without objection. Moreover, as we explain below, the Attorney General in the Taft Administration thereafter formally opined that the Marines-on-ships requirement was constitutional.

2. *Early Twentieth-Century Opinions of the Attorney General.* — Despite the constitutional views of Senator Borah, President Taft's Attorney General, George Wickersham, concluded in his formal opinion on the Marines-on-ships legislation that he had "no doubt of the constitutionality of the provision."³⁸¹ "Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a marine corps," he explained, "it has power to create a marine corps, make appropriation for its pay, but provide that such appropriation shall not be available unless the marine corps *be employed in some designated way*."³⁸² The next year, Attorney General Wickersham similarly concluded that where a series of statutes had prescribed that a floating dry dock be located at the naval reservation in Algiers, Louisiana, the President did not have authority as Commander in Chief to move that dry dock to the naval station in Guantánamo, Cuba, even where the Executive determined that the dock would be better adapted to fulfill its object if it were moved.³⁸³ Wickersham reaffirmed this view at the end of the Taft Administration.³⁸⁴ And later that same year, President Wilson's

³⁸¹ Appropriations — Marine Corps — Service on Battle Ships, Etc., 27 Op. Att'y Gen. 259, 259 (1909).

³⁸² *Id.* at 260 (emphasis added).

³⁸³ Removal of Floating Dry Dock from Algiers, La., to Guantanamo, Cuba, 28 Op. Att'y Gen. 511 (1910). Interestingly, however, the Attorney General hinted that the question might not be so clear-cut if there were "an emergency making such action imperative for the protection of the interests of the Government, such as might arise in time of war or public danger." *Id.* at 522. This suggestion that the President could disregard a statute in an emergency situation is reminiscent of the "emergency" prerogative that both Jefferson and Lincoln had invoked, *see supra* pp. 974–76, 999–1002, although Wickersham's dictum was not expressly limited to instances in which Congress is not in session or would otherwise have no time to deliberate on the proper response to the newly exigent circumstances.

³⁸⁴ *See* Transfer of Machinery to Other Navy Yards, 31 Op. Att'y Gen. 594 (1913). Wickersham concluded that when Congress appropriated funds for machinery to be used at the navy yards at New Orleans and Pensacola, the President could not, after closing those yards, transfer such machinery to other navy yards where they might in his view be employed more effectively and economically. Wickersham conceded that the President had independent constitutional powers, based on his "general powers as head of the Navy Department," and that he was "not required to show statutory authority for everything he does." *Id.* at 596. But because Congress had "provided where the articles in question should be placed when purchased," and had not given

Attorney General, future-Justice James Clark McReynolds, opined that a navy regulation expressly approved by President Wilson, which would have permitted the commandant of the Marine Corps to determine the station and duties of Marine Corps “staff,” was invalid because it was inconsistent with a legislative expectation, implicit in a statute, that the staff would have certain functions and duties that could only be performed at headquarters in Washington.³⁸⁵

3. (*Former*) *President Taft Weighs In.* — There was one notable exception in this period to what seemed to be the prevailing view in Congress and the executive branch. It came from what might be an unexpected source: *former* President William Howard Taft, writing as a Yale Law Professor. In 1915, two years after he left the White House and six years before he would join the Supreme Court, Taft gave a series of lectures at Columbia University that are commonly recalled for their *rejection* of Roosevelt’s expansive “stewardship” theory

the President the authority to close the New Orleans and Pensacola yards permanently, the President was not permitted to transfer the machinery: “It is for Congress to determine whether the pecuniary saving which might result is a sufficient reason for their dismantling or abandonment.” *Id.*

³⁸⁵ Detail of Staff Officers of Marine Corps to Duty Outside of Washington, 30 Op. Att’y Gen. 234 (1913). Attorney General McReynolds intriguingly wrote that there remained some room for presidential deviation:

I do not intend to intimate the least doubt that the President, as Commander in Chief of the Army and Navy, may make temporary detail of staff officers away from the headquarters of their command or order them to perform temporarily additional duties in the line of their staff functions or outside of them, but the regulation in question does not purport to do this, but affects to lay down a general rule unlimited as to occasions, by which the seat of duty of these staff officers — whoever they may be — and the duties themselves are to be determined.

Id. at 237. The opinion does not indicate whether such temporary detail would be consistent with the statute, or whether the President was constitutionally entitled to deviate from the statute on a “temporary” basis. Three years earlier, and also on the question of assignment of duties, Attorney General Wickersham had suggested in dicta that the constitutional power or right of presidential command “extends as much to one portion of the Army as to any other, and includes the assignment of any portion thereof to such duty as the Commander in Chief deems best,” so that perhaps the President could assign even members of the Army Corps of Engineers “to assignment to any duty consistent with their profession,” notwithstanding statutory restriction. President — Power to Detail Officers of the Engineer Corps, 28 Op. Att’y Gen. 270, 276 (1910); *see also id.* (acknowledging that this question was not presented: “it is unnecessary for the present purpose to express any opinion as to the competency of Congress to curtail or restrict [the] power of command vested in the President as commander in chief”). Wickersham emphasized, correctly, that as Commander in Chief, the President has “no superior” in the command of the army and navy. President — Power to Detail Officers of the Engineer Corps, *supra*, at 275. But he did not explain why it follows that the President might ignore statutory restrictions when assigning duties to members of the armed forces. And in 1913, Attorney General McReynolds concluded — without any mention of constitutional doubt — that a statutory specification overlooked by Wickersham in his 1910 opinion did, in fact, limit the President’s ability to reassign members of the Army Corps of Engineers (in the particular case, to grant a leave of absence to an officer of the Corps so that he could be employed by the Interstate Commerce Commission to assist in the valuation of properties of carriers). Authority to Grant Leave of Absence to Officer of the Engineer Corps to Accept Civil Office, 30 Op. Att’y Gen. 184, 184–85 (1913).

of the presidency. Taft expressed a much less capacious view of the President's inherent powers to act unilaterally.³⁸⁶ But while this rebuke of Roosevelt's theory as an "unsafe doctrine"³⁸⁷ was the principal theme of his Columbia lectures, Taft also briefly addressed the question of what Congress could do to control the more narrowly defined constitutional powers that the President did enjoy.

For the most part, Taft acknowledged Congress's broad authority, writing that "one of the chief functions of Congress" is to "[f]ix[] the method in which Executive power shall be exercised."³⁸⁸ Like McKinley, for instance, Taft appeared to believe that although the Commander in Chief could establish rules for governance of occupied territories, that power was provisional, and could be superseded by statute.³⁸⁹ Moreover, Taft assumed that Congress could, pursuant to the Rules and Armies Clauses, provide by law a rule of eligibility for promotion in the army and navy.³⁹⁰ He did, however, identify certain limits: Congress could not, for example, attempt to prevent the President's use of the army to "defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed."³⁹¹ More to the point, Taft wrote that it is the President "who is to determine the movements of the army and of the navy."³⁹²

In his lectures, Taft suggested two ways in which Congress might impermissibly impinge on this asserted discretion to determine troop movements. First, Congress could not place that discretion "beyond [the President's] control in any of his subordinates"³⁹³ — a correct and fairly unobjectionable statement of what we have been calling the preclusive prerogative of superintendence. Second, Congress could not "themselves, as the people of Athens attempted to, carry on campaigns by votes in the market-place."³⁹⁴ Of course, if what Taft meant by his Athenian analogy was simply that Congress cannot direct the military by a simple legislative plebiscite, as it did in the preconstitutional era, then of course that is unobjectionable, too, for Congress must instead act through bicameralism *and presentment* — that is, by the passage of *statutes*. However, in a cognate 1916 Yale Law Journal article published several weeks after publication of his lectures, Taft seemed to suggest something more, adding this one-sentence paragraph: "When we come to the power of the President as Commander-in-Chief it

³⁸⁶ WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139–40 (1916).

³⁸⁷ *Id.* at 144.

³⁸⁸ *Id.* at 125.

³⁸⁹ *Id.* at 98–99.

³⁹⁰ *Id.* at 128.

³⁹¹ *Id.*

³⁹² *Id.* at 129.

³⁹³ *Id.*

³⁹⁴ *Id.*

seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.”³⁹⁵

4. *The Wilson Administration and the Era of Isolationism.* — Taft presumably intended to confine his proviso concerning the movement of troops to cases involving regulations of the military within an actual theater of war. Insofar as this limitation on Congress’s power to affect troop movements was meant to have a broader application (as Professor Pomeroy’s treatise indicated the principle should), it was soon debated in Congress. Just after World War I, President Wilson stationed troops in Siberia without prior statutory authorization, which prompted fleeting discussion in Congress about whether it would be constitutional to enact a law requiring the withdrawal of troops from a nation with which we were at peace.³⁹⁶ Representative William Mason said at a House hearing that Congress had an “absolute power” to impose such a requirement, whereas Representative Julius Kahn expressed skepticism.³⁹⁷ At that same hearing, Secretary of War Newton Baker did not take issue with Kahn, or by extension Taft, but neither was he willing to opine on anything other than the most extreme case: he testified that Congress could not make a “rule” that “all the Army . . . should live in the city of Washington and never be moved away, no matter what happens,” for that would completely “paralyze” the Commander in Chief,³⁹⁸ a view that arguably reflects a version of the Chase/Pomeroy position, albeit in an entirely academic form, without speaking to any more realistic questions, including the constitutionality of the proposed Siberia withdrawal hypothetical itself.³⁹⁹

³⁹⁵ William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916). Presumably Taft meant here to assert that Congress could not direct troop movements even by statute.

³⁹⁶ Other than this Siberia example, it does not appear that the Category Three question arose during the Wilson Administration, including during the First World War, perhaps because “as President, Wilson acted with great respect for congressional prerogative, both in deploying the armed forces and in leading the nation at war.” Arthur S. Link & John Whiteclay Chambers II, *Woodrow Wilson as Commander in Chief*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 317, 342 (Richard H. Kohn ed., 1991).

³⁹⁷ See *American Troops in Siberia: Hearings on H.R. Con. Res. 30 Before the H. Comm. on Military Affairs*, 66th Cong. 3 (1919).

³⁹⁸ *Id.* at 15.

³⁹⁹ Lest one think that Secretary Baker’s testimony signified a broader shift toward Professor Pomeroy’s position, in 1925, Attorney General John Sargent followed Wickersham in assuming broad congressional regulatory power over even trivial details of military establishment. Sargent concluded that whereas the decision whether to attach a fringe of yellow silk to the colors and standards used by troops in the field was “a matter of practical policy, to be determined, in the absence of statute, by the Commander in Chief,” other changes to the flag, as used by the armed forces, would be barred by statute. *National Flag of the United States*, 34 Op. Att’y Gen. 483, 485 (1925). Compare this to then–Assistant Attorney General William Rehnquist’s odd testimony

Although Congress took no action to compel the withdrawal of the troops from Siberia, the years between the World Wars were marked by a national legislature controlled by representatives fervently committed to avoiding U.S. involvement in European wars. This isolationist wing was able to spur the enactment of several “neutrality” statutes during this period, which to greater or lesser degrees prohibited the United States from providing assistance to belligerent states as long as the United States was a neutral party. These statutes were to figure prominently in the run-up to World War II.

*D. The Administration of
Franklin Roosevelt and World War II*

On May 1, 1937, President Franklin Roosevelt signed the Neutrality Act of 1937,⁴⁰⁰ which, among other things, imposed a strict arms embargo against states engaged in war (including the warring parties in the Spanish Civil War); a ban on loans and credits to such parties; and a prohibition on the use of U.S. ships to carry munitions to belligerents. Two years later, with European war looming, the Allied powers were desperate for aid from the United States. Roosevelt was eager to provide such assistance, which he thought critical for U.S. security purposes. He was severely limited, however, by the 1937 Neutrality Act and by a recalcitrant Congress that was not inclined to abandon its isolationist ways. Roosevelt strove to pass liberalizing legislation, but its prospects looked bleak in mid-1939. Vice President John Garner and Secretary of the Interior Harold Ickes urged Roosevelt to conclude that he had a constitutional prerogative to disregard the Neutrality Act.⁴⁰¹ Roosevelt wrote to Attorney General (and soon-to-be Justice) Frank Murphy on July 1, 1939, asking, “If we fail to get any Neutrality Bill, how far do you think I can go in ignoring the existing act — even though I did sign it?”⁴⁰² The question was vetted within the Department of Justice. Assistant Solicitor General Newman A. Townsend, Special Assistant to the Attorney General Edward

in 1971 that Congress could not by statute prescribe a particular uniform color for the armed forces. *See infra* p. 1069.

⁴⁰⁰ Joint Resolution of May 1, 1937, ch. 146, 50 Stat. 121.

⁴⁰¹ *See* Memorandum from President Franklin Roosevelt for the Att’y Gen. (July 1, 1939) (on file with the Harvard Law School Library) (“[T]he V[.]P. takes the definite position that the President should not be bound at all by legislation as such legislation offends his constitutional powers.”); Memorandum from Harold L. Ickes, Sec’y of the Interior, to President Franklin Roosevelt (July 1, 1939) (on file with the Harvard Law School Library) (“As to the Neutrality Act I still think that you would be amply justified in taking the position that the Constitution gives the Executive power to conduct foreign affairs . . . [I]s it well to ask Congress for legislation [repealing the neutrality act] . . . and thus support the claims of the Congress to power that it does not have?”).

⁴⁰² Memorandum from President Franklin Roosevelt for the Att’y Gen., *supra* note 401.

Kemp, and Assistant Solicitor General Golden Bell all concurred “that in this instance the President could not safely rely on a claim of constitutional right to justify a disregard of the Neutrality Act as a matter of law” — that “[t]o act *without authority* of Congress in the field of foreign relations is one thing,” but “[t]o *disregard* an *express* enactment of Congress . . . is quite another thing.”⁴⁰³ Professor Robert Dallek reports that Roosevelt “did not pursue the question” further.⁴⁰⁴

Thereafter, although Roosevelt repeatedly chafed at the limitations that the neutrality acts imposed,⁴⁰⁵ he pursued a dual-pronged strategy. He sought legislative amendment if possible. Where that approach seemed untenable, he sought ways to construe the existing statutes narrowly to provide him some breathing room for aiding the Allied cause.⁴⁰⁶

To be sure, the neutrality acts did not purport to regulate the conduct of war as such. They did, however, plainly curb Roosevelt’s powers to deploy forces and materiel under his command at a time when the debate between the branches concerned the proper level of preparation for potentially imminent hostilities. Although Roosevelt would have had a strong basis for arguing that he could act in the absence of a legislative limitation, we have not found any evidence that he ever invoked any substantive, preclusive constitutional power as Commander in Chief in the prewar period.

1. *The Torpedo Boats and the Destroyers Deal Before the War*.⁴⁰⁷ — On May 15, 1940, five days after Hitler’s armies had invaded northern France and Winston Churchill had been installed as British Prime Minister, Churchill sent a telegram to President Roosevelt informing him of Western Europe’s dire prospects — “The scene has darkened swiftly” — and pleading with him to take substantial steps short of war in order to assist the Allies: “You may have a com-

⁴⁰³ Memorandum from Edward Kemp, Special Assistant to the Att’y Gen., to Frank Murphy, Att’y Gen. (July 7, 1939) (on file with the Harvard Law School Library). Murphy apparently conveyed this conclusion to the President.

⁴⁰⁴ ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945, at 190 (1979).

⁴⁰⁵ Secretary of State Cordell Hull, for example, strenuously lobbied for repeal of an arms embargo, and when such efforts proved unsuccessful, he complained that the law was a “wretched little bob-tailed, sawed-off domestic statute” that “conferred a gratuitous benefit on the probable aggressors,” and that it was “just plain chuckle-headed” for Congress to leave it in place. JOSEPH ALSOP & ROBERT KINTNER, AMERICAN WHITE PAPER: THE STORY OF AMERICAN DIPLOMACY AND THE SECOND WORLD WAR 41–42 (1940).

⁴⁰⁶ The history of Roosevelt’s prolonged struggle with the isolationists is recounted in great detail in WAYNE S. COLE, ROOSEVELT AND THE ISOLATIONISTS, 1932–1945 (1983). See also WILLIAM L. LANGER & S. EVERETT GLEASON, THE UNDECLARED WAR, 1940–1941 (1968).

⁴⁰⁷ The story related in these paragraphs is the subject of at least two comprehensive treatments: PHILIP GOODHART, FIFTY SHIPS THAT SAVED THE WORLD (1965), and ROBERT SHOGAN, HARD BARGAIN (1995).

pletely subjugated, Nazified Europe established with astonishing swiftness.⁴⁰⁸ The British were desperate for the United States to loan and convey to Britain several categories of military provisions. In particular, over the next weeks and months, the British repeatedly conveyed to the Americans their “naval priorities”⁴⁰⁹ — namely, receipt of two types of ships for defense against a possible German invasion and the predations of German submarines: fifty old destroyers (which Churchill mentioned in his initial telegram) and part of a group of motor torpedo boats, or “mosquito boats,” that were then being constructed for the U.S. navy, which could be provided to England by the manufacturers if the federal government signed off on the deal.⁴¹⁰

Roosevelt at first thought the transfer of the destroyers would be infeasible because it would require new legislation from Congress,⁴¹¹ and so the British began to concentrate on obtaining the torpedo boats.⁴¹² Roosevelt brushed aside legal concerns raised by naval lawyers, and set the wheels of the transaction into motion. When isolationists in Congress got wind of the deal, they began to raise objections.⁴¹³ In a cabinet meeting on June 20, 1940, Attorney General Robert Jackson was asked about the torpedo-boats matter, and he gave Roosevelt the bad news⁴¹⁴: Jackson concluded that the transfer would violate a much earlier neutrality law, the Espionage Act of 1917, which provided that during a war in which the United States was a neutral nation, it would be unlawful to send to a belligerent nation “any vessel built, armed or equipped as a vessel of war.”⁴¹⁵ In light of Jackson’s opinion (in which the President concurred), Roosevelt abruptly cancelled approval of the sale of the torpedo boats.⁴¹⁶ “[I]t was clear from the context [of the White House statement] that the legislative bar cited by the Attorney General was the President’s

⁴⁰⁸ Telegram from Prime Minister Winston Churchill to President Franklin Roosevelt (May 15, 1940), in 2 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR* 22, 22–23 (Mariner Books 1986) (1949).

⁴⁰⁹ SHOGAN, *supra* note 407, at 86 (reporting correspondence from Arthur Purvis, Britain’s purchasing chief in Washington, to Treasury Secretary Henry Morgenthau).

⁴¹⁰ *Id.*

⁴¹¹ See Telegram from Cordell Hull, Sec’y of State, to Joseph Kennedy, U.S. Ambassador to the United Kingdom (May 16, 1940), in 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1940, at 49, 49–50 (1958) [hereinafter FOREIGN RELATIONS] (conveying a message from President Roosevelt to Prime Minister Churchill).

⁴¹² See SHOGAN, *supra* note 407, at 87–88.

⁴¹³ *Id.* at 88–93; see also ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 94 (2003).

⁴¹⁴ See JACKSON, *supra* note 413, at 94 (reporting also that Jackson’s opinion was “supported by detailed studies in the Department of Justice”).

⁴¹⁵ Act of June 15, 1917, Pub. L. No. 65–24, tit. V, § 3, 40 Stat. 217, 222; see GOODHART, *supra* note 407, at 87–89; SHOGAN, *supra* note 407, at 87–93.

⁴¹⁶ See *Torpedo Boat Sale to British Halted: President Acts on Jackson’s Opinion that 1917 Law Would Be Violated*, N.Y. TIMES, June 25, 1940, at 10.

only reason for his order."⁴¹⁷ Senator Rush Holt, a leading isolationist, was quoted as saying, "I am glad Bob Jackson looked up the law on the subject."⁴¹⁸

Roosevelt then turned his attention to the possibility of conveying the over-age destroyers to Britain. Churchill continued to plead with him to do so imminently, in order to hold the English Channel, lest Britain fall to Hitler.⁴¹⁹ Roosevelt agreed about the surpassing importance of the deal: in a cabinet meeting on August 2, 1940, there was unanimity that (in Roosevelt's own words) "the survival of the British Isles under German attack might very possibly depend on their getting these destroyers."⁴²⁰ But the neutrality acts posed a substantial impediment. In addition to the 1917 statute, isolationists led by Senator David Walsh had just enacted another statute in 1939 prohibiting transfers of armaments unless either of the service chiefs of staff had previously certified that they were not essential to the nation's defense.⁴²¹ Thus, Attorney General Jackson advised Roosevelt, and the cabinet agreed, that liberalizing legislation would be necessary, even as the proposal evolved into one involving a trade for bases rather than a flat-out sale.⁴²² Try as he might to persuade Congress to temper the statutory restrictions, however, Roosevelt was rebuffed.⁴²³

The destroyers deal was salvaged by a creative statutory construction first suggested by Benjamin Cohen, a brilliant Interior Department lawyer. Cohen's analysis, which Roosevelt originally rejected as too convoluted and unworkable,⁴²⁴ was taken up by Justice Frankfurter, who enlisted Dean Acheson and other respected lawyers to,

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* (internal quotation marks omitted).

⁴¹⁹ Germany was steadily depleting Britain's fleet of destroyers. In July 1940, Churchill wrote to Roosevelt that the "whole fate of the war may be decided by this minor and easily remediable factor," and pleaded: "Mr. President, with great respect I must tell you that in the long history of the world this is a thing to do now." Telegram from Joseph Kennedy, U.S. Ambassador to the United Kingdom, to Cordell Hull, Sec'y of State (July 31, 1940), *in* 3 FOREIGN RELATIONS, *supra* note 411, at 57, 57-58 (conveying a message from Prime Minister Churchill to President Roosevelt). The next month he pleaded that "the worth of every destroyer that you can spare to us is measured in rubies." Telegram from Joseph Kennedy, U.S. Ambassador to the United Kingdom, to Cordell Hull, Sec'y of State (Aug. 15, 1940), *in* 3 FOREIGN RELATIONS, *supra* note 411, at 66, 67 (conveying a message from Prime Minister Churchill to President Roosevelt).

⁴²⁰ Memorandum by President Franklin Roosevelt (Aug. 2, 1940), *in* 3 FOREIGN RELATIONS, *supra* note 411, at 58, 58; *see also* SHOGAN, *supra* note 407, at 161-67 (describing the cabinet meeting). Attorney General Jackson wrote that by late July, Britain alone was "the last obstacle between the United States and a powerful and malignant combination of Nazi-Fascist-Communist forces." JACKSON, *supra* note 413, at 85.

⁴²¹ Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 676, 681.

⁴²² *See* Memorandum by President Franklin Roosevelt, *supra* note 420, at 58; JACKSON, *supra* note 413, at 88-91.

⁴²³ *See* SHOGAN, *supra* note 407, at 168-75.

⁴²⁴ *See* JACKSON, *supra* note 413, at 95.

with Cohen's help, write a full-page letter to the *New York Times*, presenting an updated version of Cohen's legal analysis.⁴²⁵ Attorney General Jackson, meanwhile, referred Cohen's memo to Newman A. Townsend, a former judge serving in the Solicitor General's Office.⁴²⁶ Over the days following the publication of the *New York Times* letter, Jackson and Townsend slowly came to the conclusion that the statutes could be satisfied if there were an *exchange* of the destroyers for strategic British naval and air bases in the Atlantic. Jackson finally reasoned that the 1939 statute could be avoided based on the Chief of Naval Operations' judgment that the deal would, on the whole, be a boon to U.S. defense interests. He also concluded that the 1917 statute could be construed to bar only transfers of vessels that had been *built* with the intent or expectation that they would be transferred to belligerents — which described the torpedo boats, but not the old destroyers.⁴²⁷

According to Jackson, Roosevelt himself engaged in an extensive line-edit of Jackson's draft opinion,⁴²⁸ which Jackson issued on August 27, 1940,⁴²⁹ and the bases-for-destroyers deal was completed and announced on September 3.⁴³⁰ Jackson's imaginative reading of the statutes was sharply (although not uniformly) criticized as unpersuasive.⁴³¹ What is important for present purposes, however, is that, as Jackson himself emphasized twelve years later in *Youngstown*, the Roosevelt Administration did *not* presume to rely upon any presidential claim as Commander in Chief to supersede statutory restriction.⁴³² Roosevelt would later describe the destroyer deal as the most important action in the reinforcement of the United States's own national

⁴²⁵ *No Legal Bar to Transfers Seen*, N.Y. TIMES, Aug. 11, 1940, at 8; see also GOODHART, *supra* note 407, at 155–58; SHOGAN, *supra* note 407, at 178–92; Marko Djuranovic, *The 1940 Destroyer Deal with Great Britain: What Might Have Been*, 1 AM. UNDERGRADUATE J. POL. & GOV'T 128, 136–38 (2001).

⁴²⁶ At the time, the Office of the Solicitor General was delegated the Attorney General's function of providing legal opinions, a role more recently delegated to the Office of Legal Counsel.

⁴²⁷ See JACKSON, *supra* note 413, at 96–97; SHOGAN, *supra* note 407, at 218–19, 233.

⁴²⁸ JACKSON, *supra* note 413, at 98.

⁴²⁹ *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484 (1940).

⁴³⁰ See GOODHART, *supra* note 407, at 169–79.

⁴³¹ See, e.g., Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690 (1940); Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569 (1940); Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940, at 6, 7 (“No such dangerous opinion was ever before penned by an Attorney General of the United States.”). *But see* Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT'L L. 680 (1940) (defending Jackson's opinion).

⁴³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 n.14 (1952) (Jackson, J., concurring).

defense since the Louisiana Purchase.⁴³³ Yet at no time did he suggest a constitutional prerogative to trump congressional enactments. Indeed, through much of the summer of 1940, he had reluctantly conceded that this absolutely essential deal could not be made in the teeth of the governing law. It was only Cohen's and Jackson's creative *statutory* arguments that appeared to turn the tide.⁴³⁴ Moreover, Jackson's opinion specifically concluded that, notwithstanding the President's broad constitutional authority as Commander in Chief, he could *not* authorize transfer of the "mosquito boats" to Britain, even as part of an exchange for bases, because the 1917 act plainly proscribed such a transaction.⁴³⁵ Roosevelt's deference to statutory limits led him to

⁴³³ See SCHLESINGER, *supra* note 110, at 108.

⁴³⁴ It is noteworthy that in his 1940 Destroyers Opinion, Jackson did raise a constitutional concern about the 1939 statute — namely, that it required the Chief of Naval Operations or Chief of Staff of the Army, rather than the President himself, to certify that the vessels in question were "not essential to the defense of the United States." Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, *supra* note 429, at 490 (quoting Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 676, 681) (internal quotation mark omitted). The question did not really matter in the destroyers case, because Roosevelt and the Chief of Naval Operations were on the same page; but Jackson wrote that if this requirement were construed to "prohibit action by the constitutionally created Commander in Chief except upon authorization of a statutory officer *subordinate in rank*," it would be "of questionable constitutionality." *Id.* (emphasis added). This was a classic example of a statute implicating the hierarchical, or *superintendence* Commander in Chief prerogative: read literally, it would have given lower-level military officers the authority to supersede the President's determinations of what was essential to the national defense.

⁴³⁵ *Id.* at 496; see also *Youngstown*, 343 U.S. at 645 n.14 (Jackson, J., concurring); Overview of the Neutrality Act, 8 Op. Off. Legal Counsel 209, 216–17 (1984) (explaining the distinction drawn by Jackson in 1940 between the over-age destroyers and the mosquito boats). Even after Roosevelt had cancelled the sale of the mosquito boats in June, Churchill continued to press for them, because in his view the torpedo boats would have been "invaluable": five weeks after Roosevelt cancelled the deal, Churchill was still imploring him that it was "urgent" that the motor boats, along with the destroyers, be conveyed to Britain. Telegram from Joseph Kennedy, U.S. Ambassador to the United Kingdom, to Cordell Hull, Sec'y of State (July 31, 1940), *supra* note 419, at 57–58. And two weeks after that, during discussions of a possible exchange for bases, Churchill again wrote that "we also need the motor torpedo boats." Telegram from Joseph Kennedy, U.S. Ambassador to the United Kingdom, to Cordell Hull, Sec'y of State (Aug. 15, 1940), *supra* note 419, at 67. Jackson's legal opinion about the restriction of the 1917 statute, however, prevented the sale of those boats. According to Arthur Schlesinger, this was "evidence that his statutory construction had at least a measure of discrimination." SCHLESINGER, *supra* note 110, at 108; see also Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 63 (1941) (Jackson opinion concluding that the President had authority as Commander in Chief to authorize Army Air Corps to instruct British flying students, but noting specifically that he was "aware of no statute which seeks to negative this authority in the President"). In his British Flying Students Opinion, in the midst of a string of citations, Jackson cited one authority to the effect that there are certain powers of the Commander in Chief, such as regulating the movements and stationing of the army and navy, "with which Congress cannot interfere." *Id.* at 61 (quoting HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 115 (3d ed. 1910)). The Department of Justice has recently cited this as authority for a preclusive Commander in Chief authority. See DOJ WHITE PAPER, *supra* note 162, at 1383. But Jackson's own analysis did not suggest any such substantive prerogative; indeed, Jackson stressed that the presidential authority

vigorously lobby Congress for the passage of the Lend-Lease Act, which finally authorized him to transfer defense articles to belligerent nations without significant restrictions.⁴³⁶

2. *The Deployment to Iceland Before the War.* — Two weeks after the destroyers deal, Congress enacted the nation's first peacetime conscription bill. The isolationist Congress, however, designed it as a draft for defensive purposes only. It therefore included a condition limiting conscription to twelve months, and another that would prevent the deployment of draftees to the European theater. The law provided that persons inducted into the land forces under that act

at issue in the British Flying Students Opinion was supported, rather than limited, by statute. Training of British Flying Students in the United States, *supra*, at 63.

⁴³⁶ An Act to Promote the Defense of the United States, Pub. L. No. 77-11, 55 Stat. 31 (1941). During congressional consideration of the lend-lease legislation, there was considerable concern about how the war materiel could be conveyed to Britain: it was generally understood that it might be necessary to use navy ships to escort convoys of merchant ships or British ships in order to make good on the sales, and yet if such naval ships entered belligerent waters, there would be a great risk of engagement with the German fleet, which would likely precipitate war. Isolationists in Congress therefore threatened to attach an amendment to the Lend-Lease Act that would have prohibited escorts of convoys. Within the Administration, Secretary of War Henry Stimson expressed the view that such a restriction would be unconstitutional. Henry Lewis Stimson, Diary Entry (Jan. 27, 1941), in 32 HENRY LEWIS STIMSON DIARIES 131 (available in the Yale University Library). Yet in its public statements about the matter, the Roosevelt Administration did not clearly interpose a constitutional objection. Testifying before the House, Stimson himself expressed only policy objections, as did Secretary of the Navy Frank Knox. *Lend-Lease Bill: Hearings on H.R. 1776 Before the H. Comm. on Foreign Affairs*, 77th Cong. 113-15 (1941) (statement of Sec'y Stimson); *id.* at 163 (statement of Sec'y Knox). A few days later, appearing before the Senate Foreign Relations Committee, Stimson expressed the view that the President's authority as Commander in Chief would give him the independent power to unilaterally deploy the fleet, but he did not directly say that a statutory restriction on escorting convoys would be unconstitutional, only that it would be "very unfortunate" for Congress to seek "to fetter a power which has existed untrammelled for over 150 years." *A Bill Further to Promote the Defense of the United States and for Other Purposes: Hearings on S. 275 Before the Committee on Foreign Relations*, 77th Cong. 90-91, 114-15 (1941). In stating that such a provision would be "very unfortunate," Stimson did obliquely add: "even if it was a provision which had no power or efficacy at all." *Id.* at 115. It is not clear whether Stimson here was implying that the President could ignore such a provision. In any event, the Administration forestalled any statutory restriction by agreeing to a proviso that nothing in the bill *authorized* the use of the navy to transfer lend-lease goods — a proviso that appeared in the final Act and that in effect left the President's constitutional power to escort convoys where Congress had found it. See An Act to Promote the Defense of the United States § 2(d), 55 Stat. at 32; see also DALLEK, *supra* note 404, at 259; WARREN F. KIMBALL, THE MOST UNSORDID ACT: LEND-LEASE, 1939-1941, at 180-81, 198-99 (1969); LANGER & GLEASON, *supra* note 406, at 273.

In the spring of 1941, after Lend-Lease was enacted, the prospect of naval convoy escorts became more pronounced, which prompted isolationists to introduce a joint resolution that would have directly prohibited convoying prior to a declaration of war. See 87 CONG. REC. 2707-09 (1941) (discussing S.J. Res. 62, 77th Cong. (1941)). The Roosevelt Administration opposed the measure, but apparently did not suggest any constitutional infirmity. See, e.g., Letter from Cordell Hull, Sec'y of State, to Sen. Walter F. George (Apr. 29, 1941) (on file with the Harvard Law School Library) (arguing against the proposed resolution only because "its passage would be misunderstood abroad"). The bill did not get out of committee in the Senate. See COLE, *supra* note 406, at 424-26.

could not be deployed involuntarily “beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States.”⁴³⁷ A few weeks earlier, Congress had enacted a virtually identical geographical restriction with respect to army reservists called to active duty.⁴³⁸

In the spring of 1941, Roosevelt was determined to send sufficient U.S. troops to Iceland to relieve British troops garrisoned there and thereby to protect American security interests.⁴³⁹ The statutory restrictions on sending reservists and selectees outside the Western Hemisphere, however, proved a serious obstacle to Roosevelt’s objectives. There was no problem with respect to sending the Marines, because they were composed of active-duty volunteers and thus were not covered by the statutory prohibitions against sending reservists and draftees. But the army, which contained a substantial percentage of reservists and draftees, was a different story.⁴⁴⁰ The problem of rounding up a sufficient army force therefore became the topic of considerable discussion and consternation within the Administration during the spring and summer of 1941.⁴⁴¹ Both Britain and Iceland desperately wanted the United States to replace Britain’s entire 20,000-man force, but the statutory restrictions, as *Time* magazine complained in an editorial urging their repeal, ensured that the “occupation of Iceland was a move the Army could not have joined on anything but pip-

⁴³⁷ Act of Sept. 16, 1940, Pub. L. No. 76-783, § 3(e), 54 Stat. 885, 886. There was a short debate in the Senate about the constitutionality of this restriction. Senator Henry Ashurst complained that the law would be unconstitutional because the President “may send the Navy or the Army anywhere he chooses.” 86 CONG. REC. 10,896 (1940); *accord id.* at 10,896–97 (statement of Sen. Wiley). Senator J. Bennett Clark strongly disagreed, arguing that “Congress has the right to impose any limitation it may see fit to insert upon the character of service or the tenure of service, or anything else, as to the Army which they are furnishing the President.” *Id.* at 10,899; *accord id.* (statement of Sen. Adams). A majority of Congress obviously did not share Senator Ashurst’s concerns. The Senate debate thereafter was devoted to the policy arguments for and against the bill, *id.* at 10,900–12, and the vote in favor was 66–4, *id.* at 10,914. The President did not suggest any constitutional doubts.

⁴³⁸ Act of Aug. 27, 1940, ch. 689, § 1, 54 Stat. 858, 859.

⁴³⁹ See Message from President Roosevelt to the Congress of the United States (July 7, 1941), in H.R. DOC. NO. 77-307, at 1, 1 (1941) (“The United States cannot permit the occupation by Germany of strategic outposts in the Atlantic to be used as air or naval bases for eventual attack against the Western Hemisphere. . . Assurance that such outposts in our defense frontier remain in friendly hands is the very foundation of our national security and of the national security of every one of the independent nations of the New World.”). The British desperately wanted to re-deploy their division in Iceland to defend Britain and the Middle East. Moreover, German submarines were being increasingly sighted in Icelandic waters, and Germany was building up troop concentrations in Norway. See LANGER & GLEASON, *supra* note 406, at 523.

⁴⁴⁰ See MARK SKINNER WATSON, CHIEF OF STAFF: PREWAR PLANS AND PREPARATIONS 488–90 (1950).

⁴⁴¹ See MAURICE MATLOFF & EDWIN M. SNELL, STRATEGIC PLANNING FOR COALITION WARFARE, 1941–1942, at 48–50 (1953).

squeak scale.”⁴⁴² According to Army Chief of Staff General George Marshall, the statutory limits “require[d] the use of Marines on a mission which was not a Marine Corps mission” and effectively prevented the use of the army “on a mission which was peculiarly an Army mission.”⁴⁴³ Moreover, even with respect to the army troops that could lawfully be sent to Iceland, the statutory limits proved very disruptive: to supplement the Marine contingent with army volunteers, it was necessary to obtain transfers from many places throughout the army, which, according to Marshall, would “require the disruption of approximately three regiments for every one sent.”⁴⁴⁴ In the end, Roosevelt deployed only about half the number of troops that Britain wanted and that he originally contemplated, a contingent comprised of a mix of Marines and statutorily eligible army forces.⁴⁴⁵

It has sometimes been alleged that Roosevelt sent draftees to Iceland in violation of the statutory restriction,⁴⁴⁶ but we have found no evidence supporting this conclusion.⁴⁴⁷ Despite the fact that the statu-

⁴⁴² *The Chief Reports*, TIME, July 14, 1941, at 34.

⁴⁴³ *Strengthening the National Defense: Hearing Before the S. Comm. on Military Affairs*, 77th Cong. 11 (1941) [hereinafter *1941 Hearing*] (statement of Gen. Marshall). Administration plans to ask Congress to remove the legal restrictions on employment of selectees were expected to “provoke bitter Congressional controversy.” *Id.* at 476, 479 (quoting Memorandum from War Plans Div. to Gen. Chaney, Air Force (July 5, 1941)).

⁴⁴⁴ WATSON, *supra* note 440, at 490. And even as to reservists, Marshall explained that to find volunteers by serving notice of expedition would in effect have been to publicly advertise a mission that required secrecy. *1941 Hearing, supra* note 443, at 11.

⁴⁴⁵ See STETSON CONN, ROSE C. ENGELMAN & BYRON FAIRCHILD, *GUARDING THE UNITED STATES AND ITS OUTPOSTS* 484, 486 (2000), available at <http://www.army.mil/cmhp-g/books/wwii/Guard-US/ch18.htm>; DALLEK, *supra* note 404, at 276; LANGER & GLEASON, *supra* note 406, at 576; MATLOFF & SNELL, *supra* note 441, at 50.

⁴⁴⁶ See, e.g., SCHLESINGER, *supra* note 110, at 308; Charles J. Cooper, Response, *Comment on The Constitution and Presidential Leadership*, 47 MD. L. REV. 84, 96–97, 97 n.44 (1987); J. Terry Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 74, 105 (1971); Don Wallace, Jr., *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 735 n.83 (1972).

⁴⁴⁷ In 1970, Assistant Attorney General Rehnquist suggested that Roosevelt had complied with the statute only in the sense that he secured “the opinion of what was apparently a minority-view geographer that Iceland was actually in the Western Hemisphere,” thereby in effect construing away the statutory restriction. Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, to Charles W. Colson, Special Counsel to the President 20 (May 22, 1970) [hereinafter OLC *Cambodian Sanctuaries Opinion*], available at http://www.lawreview.stanford.edu/content/vol58/issue6/bybee_appendix.pdf (regarding “The President and the War Power: South Vietnam and the Cambodian Sanctuaries”). But as we have explained, the Roosevelt Administration in fact complied with the statutorily imposed hemispheric restrictions for draftees and reservists, even when those limitations posed an obstacle to its Iceland defense. Rehnquist may have acquired his misunderstanding because there was, indeed, debate at the time as to Iceland’s geographic status, precipitated in the main by contentions that if Iceland were outside the Western Hemisphere, then any deployment of forces to that country would have breached the nonstatutory Monroe Doctrine tradition that U.S. forces would be deployed only to protect the Western Hemisphere, and not to take sides in European conflicts. In announcing the deployment of Marines to Iceland on July 7, 1941, Roosevelt did tell reporters that whether Iceland was in the Western Hemisphere was an academic question — “as pointless as the complaint of the old lady

tory limits prevented him from taking action in a manner he deemed most efficacious for the national defense, Roosevelt honored the law while his Administration worked to have it repealed,⁴⁴⁸ something it was not able to accomplish until after the bombing of Pearl Harbor.⁴⁴⁹

3. *Ex Parte Quirin*. — As far as we can tell, the question of a substantive preclusive power of the Commander in Chief was publicly suggested for the first time in the Roosevelt Administration during the actual conduct of World War II itself, in the litigation resulting in the landmark decision in *Ex parte Quirin*.⁴⁵⁰ President Roosevelt had decided to use a special military war crimes commission to try eight Nazi saboteurs who had secretly entered the United States on missions to destroy war industries and facilities. During their trial before the military tribunal, the defendants petitioned for a writ of habeas corpus in federal court. The Supreme Court heard argument in the expedited case on July 29 and 30, 1942, apparently after being informed privately that the President planned to proceed with the executions regardless of what the Court did.⁴⁵¹

The questions presented in *Ex parte Quirin* included whether Congress had authorized the saboteurs' military commission, whether the charges against them were consistent with the laws of war, and a statutory question — namely, whether the procedures used in the military tribunal were consistent with the congressionally enacted Articles of War.⁴⁵² At oral argument, Attorney General Francis Biddle argued

on a Norwegian cruise who was upset because she was unable to see the Arctic Circle when she entered it" — and that his government would "act outside of the strictly defined Western Hemisphere if and when necessary in the interest of defense." Turner Catledge, *Hemisphere No Bar*, N.Y. TIMES, July 9, 1941, at 1. It was in this context that Roosevelt joked to reporters that the definition of the Western Hemisphere "depended on what geographer one talked to last." *Id.* As a statutory matter, however, the Administration did not argue that draftees or reservists could be involuntarily deployed to Iceland in the summer of 1941 on the theory that the island was in the West. Indeed, even as he began the deployment, Roosevelt acknowledged that General Marshall was continuing to seek repeal of the geographical limit for selectees and reservists, and Roosevelt himself "proposed to leave the question with Capitol Hill for the moment." *Id.* at 1, 11.

⁴⁴⁸ See Charles Hurd, *Urgent Need Cited: General Marshall Says Law "Hamstrings" Defense with Peril Grave*, N.Y. TIMES, July 4, 1941, at 1 (reporting Marshall's "urgent" recommendation to Congress to repeal the geographical limitation, a change that was "vital to the security of the nation," because the law had "'hamstrung' the development of the Army as an effective defensive force").

⁴⁴⁹ See Act of Dec. 13, 1941, Pub. L. No. 77-338, § 1, 55 Stat. 799, 799-800.

⁴⁵⁰ 317 U.S. 1 (1942).

⁴⁵¹ See David J. Danelski, *The Saboteurs' Case*, 1996 J. SUP. CT. HIST. 61, 69 (describing how, at pre-argument conference, Justice Roberts informed the Court of Attorney General Francis Biddle's view that Roosevelt might have the saboteurs executed regardless of the Court's ruling).

⁴⁵² The particular statutory problem, according to the defendants, was that Articles 46 and 50 1/2 of the Articles of War provided that before an officer who had authorized a military commission (here the President) could ratify the commission's judgment, he was required to submit it to the Judge Advocate General's (JAG) Office for review, see Act of June 4, 1920, ch. 227, 41 Stat. 759, 796, 797-99; Roosevelt's order, however, did not include any provision for submitting the

that the commission's procedures were authorized by, and consistent with, the statute,⁴⁵³ just as he had done in his brief.⁴⁵⁴ But in the second day of his argument he added the suggestion — not set forth in his brief — that even if a statute specifically prescribed how such defendants were to be tried (such as by foreclosing the use of military tribunals), perhaps the President could insist upon his own rules “in the exercise of his great authority as the Commander-in-Chief during the war and in the protection of the people of the United States.”⁴⁵⁵ Chief Justice Stone, plainly surprised by this suggestion, quickly cut Biddle off, wondering whether the Court should entertain such an argument. Biddle replied that the Court “[did] not have to come to that.”⁴⁵⁶ A bit later, after Biddle seemed to suggest the tribunal's procedures *could* be “modified by Congress,” he quickly corrected himself (after being prompted by Justice Frankfurter):

Perhaps I narrowed that too much. I have always claimed that the President has special powers as Commander-in-Chief. It seems to me, clearly, that the President is acting in concert with the statute laid down by Congress. But . . . I argue that the Commander-in-Chief, in time of war and to repel an invasion, is not bound by a statute.⁴⁵⁷

As far as we have been able to determine, this interjection is the only occasion on which the Roosevelt Administration adverted to any claims of a substantive Commander in Chief prerogative.⁴⁵⁸

judgment to the JAG — it prescribed review directly, and exclusively, to the President himself. *Quirin*, 317 U.S. at 10–11 (argument for petitioners).

⁴⁵³ Transcript of Oral Argument, July 30, 1942, at 26–36, *Quirin*, 317 U.S. 1 (Nos. 1–7), in 39 LANDMARK BRIEFS, *supra* note 198, at 601.

⁴⁵⁴ See, e.g., Brief for the Respondent at 54–60, *Quirin*, 317 U.S. 1 (Nos. 1–7), in 39 LANDMARK BRIEFS, *supra* note 198, at 397.

⁴⁵⁵ Transcript of Oral Argument, July 30, 1942, *supra* note 453, at 6. At that point in the oral argument, Biddle even questioned whether the Habeas Corpus Act at issue in *Milligan*, which had prohibited the military trial there, see *supra* pp. 1005–08, might have been unconstitutional. In the previous day's argument, Biddle had likewise suggested that the government could “have argued with some force” in *Milligan* that it was unconstitutional for a statute to prevent the President from trying *Milligan* in a military court, but that “[c]uriously enough, that question was never, so far as I know, raised in the *Milligan* case.” Transcript of Oral Argument, July 29, 1942, at 80, *Quirin*, 317 U.S. 1 (Nos. 1–7), in 39 LANDMARK BRIEFS, *supra* note 198, at 496.

⁴⁵⁶ Transcript of Oral Argument, July 30, 1942, *supra* note 453, at 7.

⁴⁵⁷ *Id.* at 35. Justice Roberts at that point interjected, expressing surprise that Biddle would argue that if the President acted in conflict with the Acts of Congress “it was still all right.” Once again, Biddle backed down, stressing that it was unnecessary for him to press that point. *Id.*

⁴⁵⁸ A few weeks after the oral argument in *Quirin*, the President made a notorious speech in which he warned Congress that if it did not repeal a farm-parity provision in the Emergency Price Control Act within three weeks, he would decline to continue enforcing it in order to “avert a disaster which would interfere with the winning of the war.” SCHLESINGER, *supra* note 110, at 115 (quoting Franklin Roosevelt, Address to the United States Congress (Sept. 7, 1942)) (internal quotation mark omitted). Of course, this “extraordinary assertion,” *id.* at 116, had nothing to do with the army or navy, and therefore it must have been premised on a general notion of wartime emergency and prerogative rather than on the Commander in Chief Clause. See EDWARD S.

In a short per curiam opinion on July 31, 1942, the Court denied the petition on the merits,⁴⁵⁹ a disposition that led quickly to the trial and execution of six of the saboteurs.⁴⁶⁰ In its full opinion justifying the judgment, issued on October 29, 1942, the Court held that Congress had authorized the use of the military commission⁴⁶¹ and that the petitioners were properly charged with violations of the laws of war.⁴⁶² In the final substantive paragraph of its opinion, the Court also rejected the claim that the commission's procedures were inconsistent with the Articles of War.⁴⁶³ But that paragraph begins with an eye-opening sentence that seems to acknowledge the possibility Biddle had raised: "We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents."⁴⁶⁴

The Court's cryptic suggestion that there was some question of Congress's power to regulate military tribunal procedures appears to have been the product of tumult within the Court after the oral argument. The Court's junior Justice, none other than Robert Jackson himself (who had been serving as Roosevelt's Attorney General one year earlier), had been at work on a proposed concurrence. Several of the early drafts of that separate opinion, including what appears to have been the first draft to be circulated to his colleagues, argued that the Articles of War should not be construed to limit the President's treatment of such belligerents because otherwise "we would have a serious question of the validity of any such effort to restrict the Commander in Chief in the discharge of his constitutional functions."⁴⁶⁵ Justice Jackson's draft conceded Congress's power to enact procedural protections in military commission trials of "persons whose civil rights may well have been the proper concern of Congress," such as U.S. citizens, inhabitants of occupied foreign territory in which martial law applies, and "nonbelligerents who may be in our military power."⁴⁶⁶ His opinion questioned, however, whether Congress's power extended to the protection of "those who come here as belligerents to destroy

CORWIN, TOTAL WAR AND THE CONSTITUTION 62-65 (1947) ("He was suggesting, if not threatening, a virtually complete suspension of the Constitution.").

⁴⁵⁹ *Quirin*, 317 U.S. at 18 (reproducing the per curiam opinion in an unnumbered footnote).

⁴⁶⁰ See FISHER, *supra* note 128, at 77-79.

⁴⁶¹ *Quirin*, 317 U.S. at 26-29.

⁴⁶² *Id.* at 29-38.

⁴⁶³ *Id.* at 47-48.

⁴⁶⁴ *Id.* at 47.

⁴⁶⁵ Robert Jackson, Draft Opinion in *Ex Parte Quirin 2* (undated) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 77), available at http://gulcfac.typepad.com/georgetown_university_law/files/quirin.Jackson.firstdraft.pdf. Evidence from surrounding drafts indicates that this draft was distributed sometime between October 15 and October 19. A notation in the subsequent (October 19) draft suggests that this one was likely distributed on Friday, October 16, 1942.

⁴⁶⁶ *Id.* at 3.

our institutions.”⁴⁶⁷ Justice Jackson added that “[t]he magnitude and urgency of the menace presented by this hostile military operation and the measures to meet it were for the Commander in Chief to decide.”⁴⁶⁸

In the midst of several revisions of his separate opinion the following week, however, Justice Jackson abandoned the assertion that the Articles of War would be constitutionally problematic if applied to limit the President’s discretion on the trial of enemy belligerents.⁴⁶⁹ Instead, his later drafts, including what appears to have been the final draft distributed on Friday, October 23, pressed the view that Congress could not have intended the Articles to apply to such a case because “[t]he seizure and trial of these prisoners is not in pursuit of the functions of internal government of the country,” and their treatment “[was] an exclusively military responsibility.”⁴⁷⁰ Justice Jackson conceded, moreover, that his views (including presumably his initial constitutional doubts) were “not accepted by a single one of my respected seniors in service on this Court.”⁴⁷¹ And he ultimately decided to join

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ The draft distributed on Wednesday, October 21 stated that if Congress “had unwittingly conferred rights upon enemies of the United States by which they could fetter the Commander in Chief in a manner so related to his duties in defense of the country, a constitutional question of the first magnitude would be presented thereby.” Robert Jackson, Draft Opinion in *Ex Parte Quirin* 4 (Oct. 21, 1942) (on file with the Library of Congress, Manuscript Division). Justice Jackson omitted that passage by the time he distributed another draft the next day. See Robert Jackson, Draft Opinion in *Ex Parte Quirin* (Oct. 22, 1942) (on file with the Library of Congress, Manuscript Division).

⁴⁷⁰ Robert Jackson, Draft Opinion in *Ex Parte Quirin* 6 (Oct. 23, 1942) [hereinafter October 23 Draft Opinion], reprinted in Jack Goldsmith, *Justice Jackson’s Unpublished Opinion in Ex Parte Quirin*, 9 GREEN BAG 2d 223, 232 (2006). Justice Jackson’s purported distinction between statutes intended to apply to the “internal government of the country,” including its citizens (which he thought was within Congress’s area of concern), and the treatment of enemy detainees (which was a function that he did not think Congress would address) was at least a bit imprecise, and question-begging, in the *Quirin* case itself, because at least one of the saboteurs appeared to be a U.S. citizen, *Quirin*, 317 U.S. at 20, and the saboteurs’ crimes occurred in the United States, *id.* at 21.

The October 23 draft offers a hint of why Justice Jackson might have eliminated his earlier pointed language about constitutional concerns: immediately after making the point quoted in the text above, Justice Jackson wrote that Roosevelt’s “exclusively military responsibility . . . is to be discharged, of course, in the light of any obligation undertaken by our country under treaties or conventions or under customs and usages so generally accepted as to constitute the ‘laws of warfare.’” October 23 Draft Opinion, *supra*, at 6. In other words, it had occurred to Justice Jackson that the President *was* bound by certain norms imposed by treaty and by the laws of war. It would presumably then be anomalous for him to declare that Congress could not impose similar restrictions by *statute*, which may explain why he confined his comments to the suggestion that Congress would not dream of doing any such thing.

⁴⁷¹ October 23 Draft Opinion, *supra* note 470, at 8. In Justice Black’s chambers, for example, there was skepticism of Justice Jackson’s “serious” constitutional questions. LOUIS FISHER, MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT 30 (Cong. Research Serv., CRS Report for Congress Order Code RL 31340, Mar. 26, 2002) (quoting Memorandum from John P. Frank, Law Clerk, to Justice Hugo Lafayette Black (undated) (on file with the Library of Congress, Manu-

the Chief Justice's opinion rather than to write separately. It is not without interest, however, that the author of the *Youngstown* "lowest ebb" opinion himself was at least temporarily attracted to the distinction between the internal government of the country, which is clearly within Congress's responsibility, and the engagement of the enemy, which Justice Jackson tentatively viewed as an exclusively military responsibility. In fact, Justice Jackson adverted to a similar distinction in his concurrence in *Youngstown* itself.⁴⁷²

E. Conclusion

The ninety-plus years of constitutional practice just reviewed has brought the story of the "lowest ebb" full circle. It begins, as we have explained, with the now famous Chase dictum in the *Milligan* concurrence. That opinion, while arguing for the power of Congress to restrict the President's use of military commissions, contends nonetheless that the powers of the Commander in Chief as to the "command of the forces and the conduct of campaigns" cannot be limited by statute. In the intervening years, scholars seized upon this suggestion and inflated it. They were driven in part by Professor Pomeroy's rejection of the possibility of there being overlapping war powers, but also by the notion, best articulated by Professor Berdahl, that "political science" demands that the President alone control the conduct of war. As much as theorists pushed this notion, however, the political branches seemed wary of it in practice. Presidential administrations repeatedly complied (sometimes while expressly averring their duty to comply) with not only treaty-based restrictions on their conduct of war in actual conflicts, but also a number of statutes (albeit directed outside the context of actual ongoing hostilities) that regulated their ability to use and deploy forces as they thought best. Such compliance occurred even in cases, as in the run-up to World War II, when these restrictions seemed to the President to have serious implications for national security. Moreover, while the occasional dissenting voice on the constitutional question was heard in Congress, there is no indication that an anxiety of authority overtook Congress when it came to the exercise of the legislature's war powers.

At the end of the period, however, President Franklin Roosevelt's Attorney General, in an almost offhand manner, suggested a position that goes far beyond the Chase dictum itself. He hinted to the Supreme Court that what even Chief Justice Chase had seemed to con-

script Division, Papers of Hugo Lafayette Black, Box 269)) (internal quotation mark omitted), available at <http://www.fas.org/irp/crs/RL31340.pdf>. Justice Black's law clerk, John Frank, thought that Justice Jackson's position was "completely and outrageously wrong." *Id.* (internal quotation marks omitted).

⁴⁷² See Barron & Lederman, *supra* note 2, at 764-65.

cede in *Milligan* to be within the authority of Congress — the power to set the terms by which persons could be tried on U.S. soil outside of civilian courts — might not be. To be sure, the *Quirin* Court did not endorse that view, but neither did the Court firmly reject it. Although Biddle's remarks went well beyond what the government had argued in its brief, his comments nonetheless stand as an indication that the constitutional theory of preclusive executive war powers was at long last making inroads in the political branches, more than a century and a half after the convention in Philadelphia. As we will see, like kudzu, executive branch claims of the sort would accumulate over the next half century, although not in any straightforward or systematic way. So, too, however, would new statutes that stood as a challenge to these very claims.

V. THE MODERN ERA

The beginnings of the nuclear age and the emergence of the United States as a dominant world power had a galvanizing effect on questions of constitutional war powers. In June 1950, President Truman publicly committed to sending U.S. air, naval, and ground forces to assist South Korean forces against attack from the North. Truman did not seek Congress's approval before or after taking these steps, heeding Secretary of State Dean Acheson's advice to endeavor to establish a constitutional precedent for a broad unilateral prerogative.⁴⁷³ In so acting, Truman took a dramatic step forward in a history of unilateral presidential use of military power, a development that had been building for over one hundred years, since at least the Mexican War, in various contexts short of full-scale hostilities against another nation's armed forces.⁴⁷⁴ The ensuing controversy twenty years later over what were arguably unilateral presidential expansions of the Vietnam War to Cambodia and Laos only served to highlight the audacious nature of what Truman had done, thus ensuring that contentious disputation over the scope of the Commander in Chief's "inherent" power to

⁴⁷³ For accounts of Truman's actions and the minimal role of Congress, see, for example, DEAN ACHESON, *PRESENT AT THE CREATION* 414–15 (1969); FISHER, *supra* note 128, at 97–100; SCHLESINGER, *supra* note 110, at 130–35; and Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 *GEO. L.J.* 597, 622–35 (1993).

⁴⁷⁴ Many of these earlier incidents of unilateral executive use of force abroad are recounted in, for example, OLC *Cambodian Sanctuaries Opinion*, *supra* note 447, at 9–19; FISHER, *supra* note 128; and SCHLESINGER, *supra* note 110. Truman's State Department issued a memorandum listing what purported to be eighty-five historical precedents. U.S. Dep't of State, Authority of the President to Repel the Attack in Korea (July 3, 1950), in 23 *DEP'T ST. BULL.* 173, 177–78 (1950). For sources providing background information on the alleged precedents for Truman's unilateral action in Korea, see JOHN HART ELY, *WAR AND RESPONSIBILITY* 147 nn. 54–55 (1993).

deploy U.S. forces abroad would dominate war powers debates for most of the half-century after Korea.⁴⁷⁵

By the conclusion of the Clinton Administration, however, it appeared that something of a practical settlement between the political branches regarding this long-contested constitutional question had been reached. By that time, Presidents were in rough agreement that, whatever the Founding-era understandings might have been, extensive historical practice had established that the Commander in Chief was, to some not fully specified extent, “authorized to commit American forces in such a way as to seriously risk hostilities . . . without prior congressional approval.”⁴⁷⁶ Some Presidents made even bolder claims;⁴⁷⁷ but executive branch precedent and opinions from after 1951 generally indicated that any conflict of a scale directly comparable to Korea or Vietnam must be carried out with legislative approval.⁴⁷⁸ Congress, for its part, seemed largely resigned to this executive branch approach to the initiation question, and has therefore recently focused its attention more on policing the duration and conduct of campaigns, rather than on challenging their legality at the outset. Meanwhile, the courts have not had much to say about the question of unilateral executive use of military force.

⁴⁷⁵ See Barron & Lederman, *supra* note 2, at 699–704.

⁴⁷⁶ OLC Cambodian Sanctuaries Opinion, *supra* note 447, at 17; see also Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. Off. Legal Counsel 327, 336 (1995); Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173, 173 (1994) [hereinafter OLC Haiti Opinion]; Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 186–88 (1980).

⁴⁷⁷ See Authority to Use United States Military Forces in Somalia, 16 Op. Off. Legal Counsel 6, 6 (1992); see also The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560, at *1, *11 (Sept. 25, 2001) [hereinafter OLC 9/25/01 Opinion], reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 3, 3, 15 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (relying in part on the precedent of President Truman’s actions at the beginning of the Korean War to conclude that there are virtually no limits on the President’s authority to initiate hostilities and that, in particular, the President has “plenary” “constitutional power . . . to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States”; to strike against foreign States suspected of harboring or supporting such organizations; and to “deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11”).

⁴⁷⁸ See, e.g., Proposed Deployment of United States Armed Forces into Bosnia, *supra* note 476, at 331 n.5 (hinting, without concluding, that hostilities in Korea and Panama should not have proceeded without congressional approval); OLC Haiti Opinion, *supra* note 476, at 173 (opining that congressional approval is necessary for “war” in the constitutional sense); OLC Cambodian Sanctuaries Opinion, *supra* note 447, at 17 (explaining that “if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include Executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale” (emphasis added)); cf. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, *supra* note 476, at 188 (stating that, as a practical matter, a military response such as that in Korea “cannot be sustained over time without the acquiescence, indeed the approval, of Congress,” because the legislature holds the purse strings).

But even as the political branches appeared to be reaching a *détente* on the principles governing the *Youngstown* Category Two question of deployment and initiation, controversy was building over the equally fundamental Category Three question that is our focus. Here, too, the Truman Administration was the instigator. As we have seen, up until 1950 there had been a fairly consistent practice, with Presidents routinely defending their superintendence authority and occasionally asserting a power to act in contravention of statutes in times of emergency when Congress was unavailable. Otherwise, there was little in the way of executive assertion of preclusive war powers; this was true even as to legislative restrictions that had been passed in each era that intruded — sometimes very deeply — into decisions relating to the peacetime organization and deployment of the military and, in some instances, to the actual conduct of war (or, in Franklin Roosevelt’s case, to preparation for imminent war). But just as Truman was claiming unsurpassed powers of unilateral military engagement and deployment, he simultaneously asserted, in a way no President had previously done, that the President’s war authorities were not only extensive, but preclusive.

This broader notion of preclusive presidential control was hardly unknown by the end of World War II. It had become prominent in the legal literature,⁴⁷⁹ and the notion that there is *some* operational “core” of Commander in Chief authorities that are indefeasible, especially with respect to the “conduct of campaigns,” has sounded a common theme in war powers scholarship right to the present day.⁴⁸⁰ But it was at the beginning of the Cold War, and in the five decades that followed, that the executive branch first asserted such a claim in any forthright and sustained way. A clear change had occurred. Still, the developing presidential practice in this era did not produce a consensus, even within the executive branch, as to either the nature or the scope of the Commander in Chief’s preclusive powers. Instead, presidential assertions of such inviolable authority waxed and waned, and were often too cursory to reflect any coherent underlying theory or justification.

⁴⁷⁹ See *supra* pp. 1025–26.

⁴⁸⁰ See Barron & Lederman, *supra* note 2, at 751 n.191 (citing examples). We will not further canvass that legal literature here, except to note that the era’s leading constitutional law treatise is a notable exception. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-6, at 665 (3d ed. 2000) (stating that, in his role as Commander in Chief, including while “conducting hostilities,” the President “must respect any constitutionally legitimate restraints on the use of force that Congress has enacted”); *id.* at 662 (stating that claims that the War Powers Resolution is unconstitutional are “misguided”); *id.* § 4-3, at 638 (stating that the President’s “exclusive responsibility for announcing and implementing military policy” is “influenced (often decisively) by congressional action”).

Underscoring the protean quality of constitutional practice, Congress hardly acted as if it were resigned to the new claims that Presidents were pressing. Individual legislators did continue to articulate arguments for preclusive executive authority during congressional debates.⁴⁸¹ Congress as an institution, however, turned out to be as willing as ever (if not more so) to enact legislation restricting executive war powers, including highly intrusive measures concerning combat operations in specific conflicts.

A. *The Truman Administration*

In the years immediately following World War II, Congress increasingly saw fit to enact “framework” measures to govern the military, the intelligence agencies, and the conduct of war.⁴⁸² None of these measures occasioned constitutional claims by the President of preclusive executive authority.

Nor did the Truman Administration rely on such preclusive claims in the most dramatic war powers confrontation of the modern era — the *Youngstown* litigation. To the contrary, the government’s argument in that case was that Congress had been silent on the steel seizure, and therefore the President had begged Congress to pass legisla-

⁴⁸¹ See, e.g., Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 977–80 (1999) (discussing statements by Senators George Mitchell and Bob Dole, as well as Representative Newt Gingrich, arguing for preclusive executive war-making authority); Louis Fisher, *Presidential Independence and the Power of the Purse*, 3 U.C. DAVIS J. INT’L L. & POL’Y 107, 123–40 (1997) (recounting such statements by, for example, Senators John McCain, Dole, and Mitchell about the conflicts in Bosnia, Haiti, and Kosovo); see also Arlen Specter, Op-Ed., *Surveillance We Can Live With*, WASH. POST, July 24, 2006, at A19 (asserting that if President Bush had an Article II power to engage in electronic surveillance, then Congress could not limit such surveillance by statute); *Meet the Press* (NBC television broadcast Jan. 7, 2007) (transcript available at <http://www.msnbc.msn.com/id/16456248/page/3/>) (assertion of Senator Joseph Biden that under the Constitution, Congress has no power to require President Bush to withdraw troops from Iraq). Except as it is relevant to the discussion of the political branches’ actions, we will not discuss in detail such common statements by modern legislators.

⁴⁸² The Senate provided advice and consent to the 1949 Geneva Conventions in July 1955. 101 CONG. REC. 9973 (1955). In 1950, Congress amended and recodified the Articles of War as the Uniform Code of Military Justice (UCMJ). Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107. In addition to provisions of the UCMJ concerning military tribunals discussed in *Hamdan*, the UCMJ also prohibits U.S. armed forces from engaging in cruelty, oppression or maltreatment of prisoners, assaults, and threats. See Barron & Lederman, *supra* note 2, at 707 & n.49. In 1951, Congress provided that members of the armed forces could not be assigned to duty outside the United States or its territories without having had the equivalent of at least four months of basic training. Universal Military Training and Service Act, Pub. L. No. 82-51, § 1(d), 65 Stat. 75, 78 (1951). This deployment limitation, as amended to require twelve weeks of training, still appears in federal law. See 10 U.S.C. § 671(a)–(b) (2000 & Supp. IV 2004); 50 U.S.C. app. § 454(a) (2000 & Supp. IV 2004). In the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, and the Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208, Congress also subjected military and other foreign intelligence operations to statutory regulation for the first time, mainly by imposing organizational restrictions.

tion resolving the crisis.⁴⁸³ In its brief to the Court, the Department of Justice stressed repeatedly that the President would abide by whatever statutory solution Congress prescribed.⁴⁸⁴ The Attorney General's claim was simply that the President had taken "temporary action, of a type not prohibited by either the Constitution or the statutes, to avert the imminent threat, while recognizing fully the power of Congress by appropriate legislation to undo what he has done or to prescribe further or different steps."⁴⁸⁵ A majority of the Justices, of course, concluded that Congress in an earlier enacted statute *had* prohibited the seizures.⁴⁸⁶ When it came to two other matters touching on the powers of the Commander in Chief, however, the Truman Administration adopted a far less accommodating stance — one that had no real precedent in prior practice.

1. *Preclusive Powers Concerning Deployment of Forces.* — When Truman made his unilateral moves in Korea in 1950, there was little opposition in Congress, because the legislature largely favored what he had done.⁴⁸⁷ The major debate in Congress came the following winter, when the war in Korea was beginning to go badly, and Truman announced that he was, without congressional authorization, sending four army divisions to reinforce the forces serving under NATO in Europe, where the Soviet threat was gathering. Truman contended

⁴⁸³ "The Congress can, if it wishes, reject the course of action I have followed in this matter. . . . The Congress may have a different judgment." Harry S. Truman, Letter to the President of the Senate Concerning Government Operation of the Nation's Steel Mills, PUB. PAPERS 283, 284 (Apr. 21, 1952).

⁴⁸⁴ See Brief for Petitioner [Secretary of Commerce] at 93, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 745), in 48 LANDMARK BRIEFS, *supra* note 198, at 595 (stressing that in two public messages, President Truman had "expressed a readiness to abide by any program or directive which Congress may enact with regard to the emergency situation presented by the threatened shut-down of the steel mills"); see also *id.* at 150, 164.

⁴⁸⁵ *Id.* at 174. Solicitor General Philip Perlman sounded a similar theme at oral argument: "[T]he President has made it absolutely clear . . . [that] if Congress rejected what he did, he would abide by the action of Congress. . . . There is no question about the power of Congress." Transcript of Oral Argument, *Youngstown*, 343 U.S. 579 (No. 745), in 48 LANDMARK BRIEFS, *supra* note 198, at 877, 922. Notably, however, earlier in his argument Perlman was a bit more equivocal about Congress's power to limit the Commander in Chief: "Whether he has the Constitutional authority to ignore [the course Congress prescribed] is not an issue here, because he took the position that . . . he would abide by what Congress finally did — and Congress has done nothing." *Id.* at 906. A few minutes later, Chief Justice Vinson asked Perlman point blank: "Do I understand that you concede any power exists in the Congress to effect any course that would affect the Presidential action?" *Id.* at 907. And Perlman surprisingly answered: "No, sir, I do not concede the power. But I say that that is not in issue here because the President . . . said to Congress that he would abide by what Congress did." *Id.* This statement was less conciliatory of Congress's powers than the government's brief had indicated.

⁴⁸⁶ See Barron & Lederman, *supra* note 2, at 703 n.31 (explaining the Justices' reasoning).

⁴⁸⁷ One of the exceptions was Senator Robert Taft of Ohio, President Taft's son, who favored the deployment but who openly chastised Truman for refusing to seek legislative assent. 96 CONG. REC. 9320–23 (1950).

that as Commander in Chief he could “send troops anywhere in the world” without consulting Congress.⁴⁸⁸ This bold assumption of deployment authority set off an extended debate in the Senate, lasting more than three months.

During the 1951 Senate debate, Secretary of State Acheson provided Senate committees with a State Department memorandum, the principal thrust of which was to justify Truman’s bold assertion of unilateral deployment powers.⁴⁸⁹ In the midst of that memorandum, however, was an even more aggressive claim — that such authority was not only inherent but *preclusive* of congressional control:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that *this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.*⁴⁹⁰

In a follow-up memorandum submitted to the Senate in February 1951, the Administration more elaborately argued that “since the direction of the armed forces is the basic characteristic of the office of the Commander in Chief, the Congress cannot constitutionally impose limitations upon it.”⁴⁹¹

⁴⁸⁸ Harry S. Truman, The President’s News Conference, PUB. PAPERS 17, 19 (Jan. 11, 1951).

⁴⁸⁹ Memorandum (Jan. 6, 1951), in *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings on S. Con. Res. 8 Before the S. Comm. on Foreign Relations and the S. Comm. on Armed Services*, 82d Cong. 88 (1951) [hereinafter *Assignment of Ground Forces Hearings*].

⁴⁹⁰ *Id.* at 92 (emphasis added). The only relevant support for this proposition cited by the State Department was a couple of quotations from Senator Borah, *see supra* p. 1036, and the fact that, in 1912 and 1922, proposals to restrict appropriations for particular troop deployments were defeated in the Senate and the House, respectively. Memorandum, *supra* note 489, at 92–93.

⁴⁹¹ POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES 16 (Comm. Print 1951) [hereinafter POWERS OF THE PRESIDENT] (publishing a memorandum prepared by the executive branch for the Senate Committees on Foreign Relations and Armed Services, 82d Congress). The authority cited for this argument was once again very slim. The memorandum asserted that the courts had “rejected” the contention that Congress’s power to make rules for the government and regulation of the armed forces enables Congress to limit the Commander in Chief’s exercise of his power. But the only case cited was a Claims Court case from the nineteenth century, *id.* at 15 (citing *Swaim v. United States*, 28 Ct. Cl. 173 (1893), *aff’d*, 165 U.S. 553 (1897)), which had held merely that a statute governing convening of courts-martial should be construed not to give subordinate officers authority unchecked by the President — that is, an unremarkable example of the superintendence prerogative, *see Swaim*, 28 Ct. Cl. at 221 (“a power of command devolved by statute on an officer of the Army or Navy is necessarily shared by the President”); *accord Swaim*, 165 U.S. at 556–58. Most of the rest of the argument was dependent on a single quotation from President Taft’s 1916 *Yale Law Journal* article, *see Taft, supra* note 395, at 606; on another quotation from Senator Borah; and, of all things, on the 1940 Selective Service statute limiting the deployment of army inductees outside the Western Hemisphere, *see supra* pp. 1048–51. The State Department memorandum noted that at least one Senator had been of the view that that statute was unconstitutional, and that another Senator predicted Roosevelt would ignore it. POWERS OF THE PRESIDENT, *supra*, at 17; *see also id.* at 16 (referring to this as “plenty of support in the Senate” for the constitutional objection). But the memorandum

With Congress focused on Truman's claim of *initiative and deployment* authorities, the Administration's preclusive-power argument did not receive much attention.⁴⁹² But it was the first of a number of related executive branch assertions — many but not all of which took aim at restrictions on the deployment power — over the next fifty-plus years.

2. *Military Impoundments.* — In addition to asserting an inviolable deployment power, the Truman Administration also asserted preclusive war power to challenge appropriations statutes that mandated particular military expenditures. For virtually all of the nation's history, Presidents had regarded most specific statutory appropriation prescriptions as permissive, rather than mandatory, and, going back at least to Jefferson, Presidents therefore on occasion "impounded" certain sums that Congress had appropriated for particular projects, including defense spending, in order to save money or because of changed circumstances.⁴⁹³ In doing so, Presidents generally made no claim of any constitutional prerogative to ignore Congress's will. Impoundment was instead viewed as a function of a presumed legislative intent to confer discretion on the President *not* to spend all that was appropriated. By the middle of the twentieth century, however, Congress began to push back, and to make known its intent that the

failed to mention that the Senate overwhelmingly approved the 1940 bill, and that Roosevelt signed it. The State Department memorandum did not go so far as to contend that Roosevelt actually disregarded the statute; instead it stated that whether the troops he sent to Iceland included any inductees barred by the statute was "not clear." *Id.* at 15. *But see supra* p. 1050 (explaining that FDR complied with the statute).

⁴⁹² One of the only exceptions, interestingly enough, was then-Representative John Fitzgerald Kennedy. He testified at a Senate hearing in February 1951 in favor of a statutory policy of at least six European army divisions for every one U.S. division. One of the Senators present reminded Kennedy of the Commander in Chief Clause, and asked him: "Do you want the control of the Army turned over to Congress?" Kennedy, while conceding that he was not a lawyer, opined that he would want Congress to set the policy of troop ratios that he proposed. *Assignment of Ground Forces Hearings, supra* note 489, at 443; *see also id.* at 435 (insisting that Congress had a responsibility to participate in the decision and that "perhaps" Congress could impose his proposed ratio "through our appropriation power or in other ways that might be worked out"). Not surprisingly, Senator Taft also expended a bit of energy on the Senate floor lambasting the Administration's preclusive power argument, explaining that the predicate for that argument — that the President's Commander in Chief power supersedes all of Congress's Article I war powers — was "entirely unrealistic." 97 CONG. REC. 2996–97 (1951). Even Taft, however, stated that legislation would be permissible so long as it did "not impair the efficiency of the President as Commander in Chief." *Id.* at 2996. Later in 1951, the House did briefly debate a proposal (eventually defeated) to impose a spending limitation on deployment. That debate was almost entirely based on policy, not constitutional, arguments, *see id.* at 9735–46, but two Representatives did briefly invoke constitutional concerns, *see id.* at 9739 (statement of Rep. Javits); *id.* at 9742 (statement of Rep. Price).

⁴⁹³ *See* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 148–51 (1975).

President was obligated to spend certain appropriated funds in the manner specified by statute.⁴⁹⁴

Early in his Administration, Truman responded to one such legislative attempt in a dramatically new way. In 1949, the President requested funding for forty-eight Air Force groups. The House, however, insisted on the creation of fifty-eight groups.⁴⁹⁵ Truman signed the bill, but, invoking his powers as Commander in Chief, he directed the Secretary of Defense to impound the extra \$735 million, arguing that the ten extra groups would only make the Air Force less flexible.⁴⁹⁶ Following Truman's lead, the executive branch continued to raise constitutional doubts, of varying degrees, about mandatory defense spending provisions until at least the mid-1970s, although it is not clear that the Commander in Chief Clause was ever again impressed as a necessary justification for an actual refusal to comply with an expenditure mandate.⁴⁹⁷

⁴⁹⁴ See, e.g., *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 245-46 (1971) [hereinafter *Impoundment Hearings*] (statement of Sen. Ervin). Eventually, in response to perceived abuse of the impoundment practice by President Nixon, Congress enacted the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 621-691 (2000)), which established a framework for mandatory and discretionary spending that Presidents were obliged to follow.

⁴⁹⁵ FISHER, *supra* note 493, at 162-63. Some Senators questioned whether the extra spending would be discretionary. See *id.* at 163, 307 n.41. Truman's signing statement, however, did not suggest any such statutory ambiguity, and his Secretary of Defense later testified that the impoundment was justified on the basis of the President's constitutional designation as Commander in Chief. See *Department of Defense Appropriations for 1951: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 81st Cong. 52-56, 61 (1950) (statement of Louis Johnson, Sec'y of Def.).

⁴⁹⁶ See Statement by the President (Oct. 29, 1949), in *Impoundment Hearings*, *supra* note 494, at 524, 524-25. The specific reference to the Commander in Chief authority appeared not in the signing statement, but in Truman's directive to the Secretary. See Letter from President Harry S. Truman to Louis A. Johnson, Sec'y of Def. (Nov. 8, 1949), in *Impoundment Hearings*, *supra* note 494, at 525, 525 (claiming that the impoundment was based on "the authority vested in me as President of the United States and Commander in Chief of the Armed Forces").

⁴⁹⁷ In 1962, for example, President Kennedy successfully lobbied the chair of the House Armed Services Committee to remove a provision of a bill that would have required building a reconnaissance-strike manned weapon system. See FISHER, *supra* note 493, at 163-67; John H. Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 GEO. L.J. 1159, 1164-66 (1969). Kennedy's request was based both on a "spirit of comity" and on his "insist[ence] upon the full powers and discretions essential to the faithful execution of my responsibilities as President and Commander in Chief." Letter from President John F. Kennedy to Rep. Carl Vinson, Chairman, Armed Servs. Comm. (Mar. 20, 1962), in *Impoundment Hearings*, *supra* note 494, at 526, 526; see also 108 CONG. REC. 4715 (1962) (statement of Rep. Ford) (arguing that a statutory mandate would impermissibly "usurp" the Commander in Chief's prerogatives); Gerald W. Davis, *Congressional Power to Require Defense Expenditures*, 33 FORDHAM L. REV. 39, 41-44 (1964) (recounting the congressional debate). Three years later, President Johnson invoked both policy objections and his role as Commander in Chief in vetoing a military authorization bill that would have prohibited the President from closing any domestic military installations until 120 days after issuing reports of the proposed action

B. Nixon, Ford, and the War in Indochina

The constitutional debate that Truman's bold claims might have provoked was not fully joined until two decades later.⁴⁹⁸ In the late

to the congressional Armed Services committees. See Lyndon B. Johnson, Veto of the Military Authorization Bill, 2 PUB. PAPERS 907, 907 (Aug. 21, 1965). *But cf.* Lyndon B. Johnson, Statement by the President Upon Signing the Military Construction Authorization Bill, 2 PUB. PAPERS 1008, 1008 (Sept. 12, 1966) (signing a bill containing a similar but somewhat less onerous reporting provision, but cautioning that "my responsibilities as President and Commander in Chief will require me to seek prompt revision of the restriction if future circumstances prove it to be inimical to the national interest"). In signing a military construction authorization bill in 1967, Johnson similarly expressed doubts about certain provisions that in his view "raise[d] questions concerning the constitutional separation of powers," including one that prevented alteration of the geographic boundaries and headquarters of the Naval Districts; another that prohibited the closing of a particular Hawaiian fort; and a third that prohibited the closing of the Naval Academy dairy farm. Lyndon B. Johnson, Statement by the President Upon Signing the Military Construction Authorization Act, 1968, 2 PUB. PAPERS 935, 935 (Oct. 21, 1967). As to the latter, Johnson complained (perhaps tongue-in-cheek) that "Congress, which has given the Navy Department authority over the world's most powerful fleet, has withdrawn the Department's authority over 380 cows"! *Id.* For critiques of the legal basis for such constitutionally based impoundment claims, see *Impoundment Hearings*, *supra* note 494, at 243–53; Davis, *supra*, at 46–54; Stassen, *supra*, at 1184–91. *But see* Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1 (2001) (proffering a defense of the Commander in Chief impoundment prerogative).

⁴⁹⁸ The issue was broached in the Kennedy and Johnson Administrations primarily in the context of "impoundment." See *supra* note 497. President Eisenhower appeared to approve of this approach, as well. See *Precedents for Reserving Funds Appropriated by the Congress*, but not Requested by the President, in *Impoundment Hearings*, *supra* note 494, at 526. Yet Eisenhower did not invariably assert such authority. In response to a bill authorizing appropriations for the Atomic Energy Commission, for example, he explained that because "military requirements govern our need for more plutonium production capacity," he would consider it "unsound to proceed" with developing an additional plutonium production reactor for which the bill authorized \$145 million until he had received a study from the Department of Defense advising of its "necessity." Dwight D. Eisenhower, Statement by the President Upon Signing Bill Authorizing Appropriations for the Atomic Energy Commission, PUB. PAPERS 582, 582 (Aug. 4, 1958). But Eisenhower did not suggest that the legislation required him to do otherwise or that he possessed a constitutional power to ignore this or any of the other problematic provisions in the bill. Indeed, he concluded the signing statement with a plea to the Congress "to guard more vigilantly against the ever present tendency to burden the government with programs, such as those I have here described." *Id.* at 583. Eisenhower adopted a similar posture in other signing statements on defense-related restrictions that concerned him. See, e.g., Dwight D. Eisenhower, Statement by the President Upon Signing Bill Concerning the Promotion of Naval Officers, PUB. PAPERS 572, 573 (Aug. 11, 1959) (signing bill imposing deadline for honorary promotions of Naval Officers but urging Congress to "promptly accord them . . . additional time"); Dwight D. Eisenhower, Statement by the President Upon Signing the Department of Defense Appropriation Act, PUB. PAPERS 635 (Aug. 22, 1958) (signing a bill imposing minimum strength requirements on reserve forces but calling on Congress to repeal them promptly).

Indeed, Eisenhower appears to have taken a relatively accommodating stance even as to his inherent (*Youngstown* Category Two) powers, as reflected in his special message to Congress urging enactment of a resolution authorizing the use of limited force with respect to the Formosa conflict. See Dwight D. Eisenhower, Special Message to the Congress Regarding United States Policy for the Defense of Formosa, PUB. PAPERS 207, 209 (Jan. 24, 1955) ("The authority [to use force] that may be accorded by the Congress would be used only in situations which are recognizable as parts of, or definite preliminaries to, an attack against the main positions of Formosa and the

1960s and early 1970s, as congressional opposition to the war in Indochina reached its apex, Congress enacted a number of significant regulations of ongoing combat operations, thereby pushing its war powers as far as any Congress had since the Civil War. In response, both political branches gave serious consideration to the preclusive-power question. Congress basically held fast to what it believed to be its authority; the executive branch shifted back and forth between positions of defiance and acceptance of statutory limitations.

1. *Congress's Restrictions on the Use of Force in Indochina.* — Congress began to impose restrictions on the ongoing conflict in Vietnam when it included a provision in the 1970 Defense Appropriations Act forbidding the use of funds “to finance the introduction of American ground combat troops into Laos or Thailand.”⁴⁹⁹ “Unfortunately,” Senator Thomas Eagleton would later write, “the Congress had picked the wrong countries,” because on April 29, 1970, President Nixon sent troops into Cambodia.⁵⁰⁰ So, the next year, the Senate engaged in a wide-ranging, seven-week debate on Congress’s powers to regulate and limit the President’s conduct of war in Cambodia — what Senator Bob Dole called “one of the greatest, most productive debates in the history of this body.”⁵⁰¹ Congress did not pass any such restrictions in

Pescadores. Authority for some of the actions which might be required would be inherent in the authority of the Commander-in-Chief.” (emphasis added)). Consistent with historic practice, however, Eisenhower does appear to have asserted a preclusive power of superintendence with respect to a provision of a defense bill. See Dwight D. Eisenhower, Statement by the President Upon Signing the Department of Defense Reorganization Act, PUB. PAPERS 597, 597 (Aug. 6, 1958) (“In order to maintain the proper relationship of the positions of the President, the Congress, and the Secretary of Defense, I am instructing the Secretary of Defense that any report to the Armed Services Committees of the Congress as to changes of functions established by law, as prescribed in this act, shall be forwarded first to the President.”).

⁴⁹⁹ Department of Defense Appropriation Act, 1970, Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969). To similar effect, see also Department of Defense Appropriation Act, 1971, Pub. L. No. 91-668, § 843, 84 Stat. 2020, 2038; and Department of Defense Appropriation Act, 1972, Pub. L. No. 92-204, § 742, 85 Stat. 716, 735 (1971).

⁵⁰⁰ THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER 112 (1974).

⁵⁰¹ 116 CONG. REC. 22,245 (1970). “It has been a rare occasion,” he noted, when so many Members of this body have given such prolonged and eloquent attention to a matter with the constitutional significance of the balance of the war powers between the legislative and executive branches of Government. This debate will stand as a valuable guide for the Congress, the President and constitutional scholars for years to come.

Id. The primary impetus for the debate was the so-called Cooper-Church Amendment, a bipartisan measure to bar funding for most military action in Cambodia, drafted in response to the U.S. invasion of that nation. See *Foreign Military Sales Act Amendment: 1970, 1971: Hearings on S. 2640, S. 3429 and H.R. 15628 Before the S. Comm. on Foreign Relations*, 91st Cong. 75 (1970). The extensive constitutional debate in the spring of 1970 focused as much on the President’s independent power to use military force without prior congressional approval as on Congress’s power to impose statutory limitations. See generally THE SENATE’S WAR POWERS: DEBATE ON CAMBODIA FROM THE CONGRESSIONAL RECORD (Eugene P. Dvorin ed., 1971) (providing extensive excerpts from the Senate debate). Still, some Senators did object that the measure

1970, but at the outset of the following year the legislature enacted the Cooper-Church Amendment, which comprehensively provided that “none of the funds authorized or appropriated pursuant to this *or any other Act* may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.”⁵⁰² By that time, all ground troops had left Cambodia, and the final legislation noted that the restrictions it imposed were “[i]n line with the expressed

would unconstitutionally interfere with the Commander in Chief’s tactical discretion during combat operations. *See, e.g., id.* at 21 (quoting statement of Sen. Griffin) (“In Congress we cannot, and should not, attempt to make battlefield decisions, or to draw precise lines or to make decisions regarding the time or scope of a battle, nor should we try to direct the Commander in Chief specifically with regard to how battles should be conducted, or exactly where they should be conducted.”). Others defended the measure’s constitutionality even though they appeared to concede it would have such an effect. *See id.* at 39 (quoting statement of Sen. Church) (“[I]f ever the safety of American troops is involved, then the President can make his case and the Congress will quickly move to do whatever is necessary There is no problem along these lines. That is a decision which should be shared between the President and the Congress, as the Constitution intended.”); *id.* at 190–91 (Senator Javits defending Congress’s authority to impose restrictions on the use of force even if it might result in endangering some American soldiers); *see also* EAGLETON, *supra* note 500, at 117 (complaining that both opponents and proponents of the limitations “either argued for, or assumed, some odd constitutional notions,” including “wild claims that the Constitution could be turned on its head and that no legislative restraints on the executive branch could be properly imposed”).

A key focus of the debate was a proposal offered by Senator Robert Byrd that, in its final form, would have amended the bill to authorize the use of funds “to protect the lives of United States forces in South Vietnam or to facilitate the withdrawal of United States forces from Vietnam.” *See* THE SENATE’S WAR POWERS, *supra*, at 188. In a letter to Senator Hugh Scott, President Nixon explained that by “reaffirm[ing] the Constitutional duty of the Commander in Chief to take actions necessary to protect the lives of United States forces . . . [the Byrd Amendment] goes a long way toward eliminating my more serious objections to the Cooper-Church amendment.” Letter from President Richard M. Nixon to Sen. Hugh Scott (June 4, 1970), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=2536>. The Byrd Amendment ultimately failed, however. *See* THE SENATE’S WAR POWERS, *supra*, at 182–83. Nonetheless, some supporters of the legislation denied that their intent was to restrict the President’s constitutional war powers. *E.g., id.* at 32 (statement of Sen. Church); *see also* EAGLETON, *supra* note 500, at 113 (arguing that supporters of the bill were trying only to say “where U.S. military forces could and could not be engaged,” and were not “trying to decide tactical questions”). Reflecting this ambiguity, the version of the Cooper-Church Amendment the Senate approved on June 30, 1970, expressly stated that nothing in the measure was intended to “impugn” the constitutional war powers of either the Congress or the President. *See* 116 CONG. REC. 19,425–38 (1970) (discussing and voting on Mansfield amendment specifying that Cooper-Church would not impugn powers of the President); *id.* at 21,651–56, 21,672–75 (discussing and voting on Javits amendment specifying that Cooper-Church would not impugn powers of the Congress); *id.* at 22,245 (statement of Sen. Dole) (describing the final version of Cooper-Church that the Senate was about to approve); *id.* at 22,251 (final, 58–37 Senate vote). Notably, such limiting language would not appear in the Cooper-Church bill enacted the following year, nor in any of the other restrictive statutes that Congress passed in succeeding years.

⁵⁰² Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (emphasis added). President Nixon signed this bill. *See* Richard Nixon, Statement About the Special Foreign Assistance Act of 1971, PUB. PAPERS 26 (Jan. 5, 1971).

intention of the President of the United States.”⁵⁰³ Nonetheless, the measure limited the President’s tactical discretion going forward by strictly prohibiting the use of further ground troops in Cambodia, and it contained none of the exceptions that the Administration strenuously fought for when the measure had first been debated the year before.⁵⁰⁴

As significant as the Cooper-Church Amendment was, Congress did not stop there. Two years later, revelations of President Nixon’s bombing operation in Cambodia — an action that complied with the letter of the 1971 restriction — prompted efforts to impose even greater restrictions. Both houses of Congress approved an amendment to prohibit the use of all appropriated funds to support directly or indirectly *any* U.S. combat activities in Cambodia or Laos.⁵⁰⁵ President Nixon vetoed the bill on policy grounds. He claimed that this “Cambodia rider” would undermine the possibility of a negotiated settlement in Cambodia,⁵⁰⁶ but his veto message raised no constitutional objection. After the House fell thirty-five votes short of overriding the veto,⁵⁰⁷ and the Paris Peace Treaty had been completed, Nixon eventually signed a bill that cut off *all* funds for combat activities in, over, or off the shores of North Vietnam, South Vietnam, Laos, and Cambodia, as of August 15, 1973 — arguably giving the President six additional weeks to continue operations, but no more.⁵⁰⁸ During the following fifteen months, Congress enacted several additional laws prohibiting expenditures, absent express statutory authorization, for military action in North Vietnam, South Vietnam, Laos, Cambodia, and Thailand.⁵⁰⁹

⁵⁰³ Special Foreign Assistance Act, § 7(a), 84 Stat. at 1943.

⁵⁰⁴ See *supra* note 501.

⁵⁰⁵ See 119 CONG. REC. 21,173 (1973) (House vote); *id.* at 21,544 (Senate vote).

⁵⁰⁶ See Richard Nixon, Veto of the Supplemental Appropriations Bill Containing a Restriction on United States Air Operations in Cambodia, PUB. PAPERS 621 (June 27, 1973) (internal quotation marks omitted).

⁵⁰⁷ See 119 CONG. REC. 21,778 (1973).

⁵⁰⁸ See Second Supplemental Appropriations Act, 1973, Pub. L. No. 93-50, §§ 304, 307, 87 Stat. 99, 129. For a thorough account of the legislative events surrounding the two bills, see EAGLETON, *supra* note 500, at 168–83. See also Holtzman v. Schlesinger, 361 F. Supp. 553, 555–60 (E.D.N.Y.), *rev’d*, 484 F.2d 1307 (2d Cir. 1973).

⁵⁰⁹ *E.g.*, Department of Defense Appropriation Act, 1975, Pub. L. No. 93-437, § 839, 88 Stat. 1212, 1231 (1974); Foreign Assistance and Related Programs Appropriation Act, 1974, Pub. L. No. 93-240, §§ 111–112, 87 Stat. 1049, 1053; Foreign Assistance Act of 1973, Pub. L. No. 93-189, §§ 30–31, 87 Stat. 714, 732; Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155, §§ 805–806, 87 Stat. 605, 615 (1973); Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 13, 87 Stat. 451, 454; Joint Resolution of July 1, 1973, Pub. L. No. 93-52, §§ 108, 110, 87 Stat. 130, 134. The texts of these and other warmaking restrictions, both proposed and enacted, from 1971 through 1999, are compiled in the appendix to AMY BELASCO, LYNN J. CUNNINGHAM, HANNAH FISCHER & LARRY A. NIKSCH, CONGRESSIONAL RESTRICTIONS ON U.S. MILITARY OPERATIONS IN VIETNAM, CAMBODIA, LAOS, SOMALIA AND KOSOVO (Cong. Research Serv., CRS Report for Congress Order Code RL 33803, Jan. 16, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33803.pdf>.

2. *President Nixon's Legal Response.* — Although President Nixon objected to Congress's newly assertive posture, and even raised constitutional concerns about some of its actions, he did not make a preclusive war powers claim in vetoing or signing any of these highly restrictive measures. Nonetheless, his Administration did briefly address the constitutionality of restrictions on ongoing military operations, in a May 1970 memorandum authored by the then-Assistant Attorney General for the Office of Legal Counsel (OLC), William Rehnquist.⁵¹⁰ In his memo, Rehnquist defended the President's authority to use U.S. armed forces to attack sanctuaries employed by the Viet Cong in Cambodia in the absence of legislation barring him from doing so. He also included a short section entitled, "Extent to Which Congress May Restrict by Legislation the Substantive Power Granted the President by Virtue of His Being Designated as Commander-in-Chief."⁵¹¹

Rehnquist's discussion in that section was notably equivocal. It included none of the unqualified argumentation manifest in the earlier Truman Administration memoranda. Citing the then-recent Laos/Thailand proviso (which, Rehnquist noted, "was accepted by the Executive"); the 1940 statute prohibiting the deployment of inductees outside the Western Hemisphere (about which the Truman Administration had earlier expressed constitutional doubts, but with which Roosevelt had complied); and the Supreme Court's decision in *Little v. Barreme*; Rehnquist concluded that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation."⁵¹² Rehnquist further noted, however — with the canonical cite to the dictum in Chief Justice Chase's concurrence in *Milligan* — that separation of powers problems "would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander-in-Chief of the armed forces."⁵¹³

In a hearing several weeks later, Rehnquist similarly testified that "the power to repel sudden attacks, the power to determine how hostilities lawfully in progress shall be conducted, and the power to protect the lives and safety of U.S. forces in the field," were authorities that "[i]ndisputably belong[] to the President alone."⁵¹⁴ Rehnquist went so far at the hearing as to deny that Congress could constitution-

⁵¹⁰ OLC Cambodian Sanctuaries Opinion, *supra* note 447.

⁵¹¹ *Id.* at 20–22.

⁵¹² *Id.* at 20–21.

⁵¹³ *Id.* at 21.

⁵¹⁴ *Congress, the President, and the War Powers: Hearing Before the Subcomm. on National Security, Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 91st Cong. 216 (1970).

ally enact a statute prohibiting the President from initiating “war” without a congressional declaration.⁵¹⁵ Rehnquist further elaborated on his somewhat cryptic reservation of preclusive authority at a Senate Judiciary Committee hearing in 1971. The context was an examination of the President’s constitutional claims of a right to “impound” appropriated funds.⁵¹⁶ Interestingly, Rehnquist had written a memorandum in 1969, which he submitted to the Senate committee, in which he disclaimed any *general* constitutional impoundment authority (thereby dissenting from the longstanding executive branch view) but did defend constitutional impoundment in the context of the President’s role as Commander in Chief.⁵¹⁷ “Of course,” Rehnquist wrote,

if a Congressional directive to spend were to interfere with the President’s authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs, a situation would be presented very different from the one before us.⁵¹⁸

At the 1971 Senate hearing, several Senators praised Rehnquist for his acknowledgement that Congress as a general matter had the authority to command specific expenditures. The Senators and their special counsel pressed him, however, on his continued insistence that the Commander in Chief Clause might establish an impoundment authority in the context of national defense spending.⁵¹⁹

This prompted a fascinating discussion in which Rehnquist and his defenders (principally Senator Samuel Ervin and Professor Ralph Winter, acting as counsel to the committee) attempted to navigate the uncertain “continuum” of possible statutory restrictions on the Commander in Chief — hypothesizing which were permissible, and which were not — in what Rehnquist called “the most difficult area of all of the Constitution.”⁵²⁰ Contrary to Truman’s view, Rehnquist conceded that Congress would have the prerogative to prohibit the President from sending troops into the Eastern Hemisphere.⁵²¹ But Rehnquist

⁵¹⁵ *Id.* at 232.

⁵¹⁶ *See supra* pp. 1062–63.

⁵¹⁷ Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel (Dec. 1, 1969), in *Impoundment Hearings*, *supra* note 494, at 279 (regarding “Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools”).

⁵¹⁸ *Id.* at 283–84 (citation omitted) (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–22 (1936)).

⁵¹⁹ *See, e.g., Impoundment Hearings*, *supra* note 494, at 243–44 (statement of Professor Bickel, Counsel to the Committee).

⁵²⁰ *See id.* at 243–53; *see also id.* at 144–45 (colloquy between Professor Bickel and Office of Management and Budget Deputy Director Weinberger on the same question).

⁵²¹ *Id.* at 251–52. Senator Edward Gurney asked what would happen if Congress had imposed such a restriction but then the President had learned of missiles in the Eastern Hemisphere that were to be fired at the U.S. Capitol within two weeks. Rehnquist’s response was revealing: he replied not that there would be a Commander in Chief override in such a case, but that the Presi-

contrasted those very intrusive restrictions with what he thought was an easy case of an unconstitutional statute — a law requiring that appropriated funds be used to equip all soldiers in Regiment A with blue uniforms, when the President does not want them to wear blue.⁵²² Rehnquist also hypothesized a law providing that in no circumstance should another assault be made on “Hamburger Hill” in Vietnam, which he thought — in accord with the position President Taft had set forth after leaving office — would be a “rather clear invasion of the President’s power as Commander in Chief.”⁵²³ When pressed to explain the standards that might support such distinctions, he agreed that there was no obvious bright line: “I think it was designed by the framers to be amorphous and we just have to wrestle with it the best we can.”⁵²⁴

3. *The War Powers Resolution.* — There things stood until 1973, when Congress enacted a landmark framework statute dealing with military engagements in *any* setting: the War Powers Resolution⁵²⁵ (WPR). This measure, perhaps more than any other, has spurred scholarly debate over the “lowest ebb” question. The measure, among other things, effectively requires the President to withdraw armed forces from hostilities within ninety days if Congress has not in the interim approved such engagement.⁵²⁶

dent would be “perfectly right in concluding that Congress had not intended [the prohibition] to apply to this situation.” *Id.* at 252. That is to say, he was prepared to read an implicit emergency exception into such a statutory limitation.

⁵²² *Id.* at 246. Even Senator Ervin disagreed with Rehnquist on that one. *Id.*

⁵²³ *Id.* at 250.

⁵²⁴ *Id.* at 250–51.

⁵²⁵ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (2000)).

⁵²⁶ Sections 3 and 4(a) of the WPR establish consultation and reporting requirements that the President must satisfy before introducing armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. *Id.* §§ 3, 4(a), 87 Stat. at 555–56. Section 5(b) then requires that within sixty days after the President issues (or is required to issue) a report under section 4(a), he must *terminate* the relevant use of armed forces unless one of three things has happened in the meantime: Congress has declared war or enacted a specific authorization for such use of the armed forces; Congress has extended by law the sixty-day period; or Congress is physically unable to meet as a result of an armed attack upon the United States. *Id.* § 5(b), 87 Stat. at 556. The sixty-day period can be extended for an additional thirty days if the President certifies to Congress that “unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.” *Id.* § 5(b), 87 Stat. at 556. Another provision of the WPR, section 5(c), rather than setting a *durational* restriction, requires the President to remove armed forces from hostilities outside the territory of the United States if Congress prescribes such withdrawal *by concurrent resolution*. *Id.* § 5(c), 87 Stat. at 556–57. Ever since the Supreme Court’s decision in *INS v. Chadha*, 462 U.S. 919, 952 (1983) (which held that Congress can only “alter[] the legal rights, duties and relations of persons” through statutes enacted pursuant to the Constitution’s strict requirements of bicameralism and presentment), most observers have assumed that section 5(c) is unconstitutional, because it gives Congress *as a body* the power to cease hostilities by a process other than the enactment of a statute. *See id.* at 970–71 (White, J., dissenting); 1 TRIBE, *supra* note 480, § 2-6, at 150 n.44. For arguments that section

President Nixon vetoed the measure, setting forth a constitutional position seemingly broader than Rehnquist's, and echoing Truman's. Nixon argued that the durational limit was an unconstitutional "attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."⁵²⁷ Nixon's logic seemed to be that if the President may independently (that is without congressional authorization) introduce forces into battle in a particular situation, Congress could not "by a mere legislative act" place any limits on the duration of such hostilities.⁵²⁸

Congress overwhelmingly disagreed with this constitutional view: it overrode the veto.⁵²⁹

4. *President Ford and the Rescues in Southeast Asia.* — The limitations on combat operations in Indochina that Congress enacted during Nixon's tenure proved to be particularly important after President

5(c) is not unconstitutional, see, for example, Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* 109, 117–18 (Peter Raven-Hansen ed., 1987); and Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 *YALE L.J.* 1330, 1348–50 (1984). See also Charles L. Black, Jr., *The Presidency and Congress*, 32 *WASH. & LEE L. REV.* 841, 852–53 (1975).

⁵²⁷ Richard Nixon, Veto of the War Powers Resolution, *PUB. PAPERS* 893, 893 (Oct. 24, 1973).

⁵²⁸ *Id.*

⁵²⁹ See 119 *CONG. REC.* 36,198 (1973) (75–18 Senate vote); *id.* at 36,221 (284–135 House vote). For arguments that section 5(b) of the WPR is constitutional, see, for example, H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 122–25 (2002); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 *VA. L. REV.* 101 (1984); and Rushkoff, *supra* note 526. It is often asserted that every President since Nixon has agreed that section 5(b) of the WPR is unconstitutional. See, e.g., Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 *YALE L.J. POCKET PART* 84, 84 (2006); David B. Sentelle, *National Security Law: More Questions Than Answers*, 31 *FLA. ST. U. L. REV.* 1, 12 (2003). But as we will see, the historical picture is much more complicated and equivocal. The executive branch has not often confronted the constitutional issue directly, because it has rarely deemed the durational limit to be applicable. For instance, the executive branch has taken a very narrow view of when the section 4(a) reporting requirement, see *supra* note 526, is triggered — and where such a report is not required, the sixty-day clock never begins to run. See *ELY*, *supra* note 474, at 49, 171 n.10. Since President Nixon's veto, the only administration to flatly announce the view that section 5(b) is unconstitutional is the current Bush Administration. As we will explain, the Carter Administration took exactly the opposite view, and the Reagan Administration only hinted that it was constitutionally suspect. In the Ford Administration, the State Department Legal Adviser testified that, in his own view, the sixty-day limit was constitutionally improper. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the H. Comm. on International Relations*, 94th Cong. 95 (1975) [hereinafter *Test of Compliance Hearings*] (statement of Monroe Leigh, Legal Adviser, Dep't of State). And after he left office, President Ford insisted that he had never "concede[d]" that it was constitutionally binding on the President. Gerald R. Ford, *The War Powers Resolution: Striking a Balance Between the Executive and Legislative Branches*, John Sherman Cooper Lecture at the University of Kentucky, Louisville (Apr. 11, 1977), in *War Powers Resolution: Hearings Before the S. Comm. on Foreign Relations on a Review of the Operation and Effectiveness of the War Powers Resolution*, 95th Cong. 325, 327 (1977). But the Ford Administration never formally expressed the view that it was unconstitutional.

Ford took office and the long and unpopular war came to a chaotic close. In fact, so far as we are aware, these restrictions occasioned the first instance, outside the context of the impoundment of appropriated funds, in which a President invoked his authority as Commander in Chief to actually disregard a statutory mandate while Congress was sitting and (at least nominally) available to consider a statutory amendment.

In April 1975, numerous U.S. nationals and others were trapped in Phnom Penh and Saigon. Statutory limitations barring the use of funds for the involvement of U.S. armed forces in “combat activities” and “hostilities” in Southeast Asia arguably prohibited the use of armed forces to rescue U.S. nationals and foreigners.⁵³⁰ President Ford convened a rare joint session of Congress on April 10, at which he pleaded with Congress “to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation, if this should be necessary,” and to revise the law “to cover those Vietnamese to whom we have a very special obligation and whose lives may be endangered should the worst come to pass.”⁵³¹

As Congress searched for “language that would give Ford the authority he needed for the evacuations without possibly inviting military involvement in Southeast Asia,”⁵³² Ford took action unilaterally. The day after his address to Congress, he ordered U.S. troops into the Khmer Republic to evacuate eighty-two U.S. citizens. According to Ford’s message to Congress the next day, U.S. forces were fired at but did not fire back — so *perhaps* the statutory limit was not implicated in that instance.⁵³³ But the statutory limitation did appear to bar what happened soon thereafter. On April 29, Congress still not having passed new legislation, U.S. troops entered South Vietnam airspace in order to rescue Americans in Saigon. A force of 70 evacuation helicop-

⁵³⁰ At the time of the evacuation, two statutes prohibited the use of any appropriated funds for “hostilities” in Southeast Asia. See Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155, § 806, 87 Stat. 605, 615 (1973); Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 13, 87 Stat. 451, 454. Another defense appropriation bill prohibited the use of funds “herein appropriated” for “combat activities” in or over or off the shores of North Vietnam, South Vietnam, Laos, or Cambodia. Department of Defense Appropriation Act, 1975, Pub. L. No. 93-437, § 839, 88 Stat. 1212, 1231 (1974).

⁵³¹ Gerald R. Ford, Address Before a Joint Session of the Congress Reporting on United States Foreign Policy, 1 PUB. PAPERS 464 (Apr. 10, 1975), available at <http://www.ford.utexas.edu/library/speeches/750179.htm>.

⁵³² FISHER, *supra* note 128, at 155. Both Houses passed bills that would have confirmed or granted an authority to rescue, but were unable to resolve their differences in conference. W. TAYLOR REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS 251-52 (1981).

⁵³³ Gerald R. Ford, Letter to the Speaker of the House and the President of the Senate Reporting on the Evacuation of the United States Mission in Phnom Penh, Cambodia, 1 PUB. PAPERS 476 (Apr. 12, 1975).

ters and 865 Marines evacuated approximately 1400 U.S. citizens and 5500 third-country nationals and South Vietnamese.⁵³⁴ This operation did result in a brief battle, and some U.S. forces were killed⁵³⁵ — all in the apparent teeth of a statutory restriction, and while Congress was still deciding whether and how to authorize what the President was already doing. Two weeks later, the new Cambodian regime seized a U.S. merchant ship, the *Mayaguez*, and President Ford responded by sending troops into Thailand, where they engaged in hostilities against the Cambodians. More than a dozen Americans were killed, and U.S. troops employed significant weapons (including a seven-and-a-half-ton bomb), going so far as to bomb an airfield and storage depot *after* the *Mayaguez* crew had been rescued (apparently as a deterrent to such attacks on U.S. interests).⁵³⁶

The Ford Administration insisted that the preexisting statutory restrictions on the involvement of U.S. armed forces in “combat activities” and “hostilities” in Southeast Asia did not cover its efforts to rescue U.S. nationals. It based its argument primarily on legislative intent purportedly reflected in a pair of colloquies that had taken place in Congress when those laws were being considered.⁵³⁷ But the Ford Administration conceded that the evacuation of *non-Americans* did violate the funding limitations.⁵³⁸ Accordingly, when President Ford went ahead with the rescue of non-Americans, he appears to have been relying on his authority as Commander in Chief, which he expressly invoked in both the Saigon and *Mayaguez* cases, as justification for ignoring statutory limits.⁵³⁹ According to the State Department Legal Adviser: “[M]y understanding is that the President thought that he had adequate constitutional power *despite the funds limitation provisions* to take out Americans and to take out those foreign nationals whose rescue was . . . so interwoven with that of U.S. citizens that the two

⁵³⁴ Letter from President Gerald R. Ford to the Speaker of the House (Apr. 30, 1975), in *Test of Compliance Hearings*, *supra* note 529, at 7.

⁵³⁵ *Id.*

⁵³⁶ See FISHER, *supra* note 493, at 156–58; REVELEY, *supra* note 532, at 253, 365 n.54.

⁵³⁷ See *Test of Compliance Hearings*, *supra* note 529, at 27, 31, 88–89 (statement of Monroe Leigh, Legal Adviser, Dep’t of State). For arguments about whether this statutory claim was reasonable, see MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 289 n.45 (1990); and Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 875–82, 916–23 (1994). See also Letter from Prof. Raoul Berger to Sen. Thomas F. Eagleton (Dec. 29, 1975), in 3 MICHAEL J. GLENNON & THOMAS M. FRANCK, *UNITED STATES FOREIGN RELATIONS LAW* 365 (1981) (arguing that the *Mayaguez* mission was illegal because the firing and bombing in that case constituted “combat” that certain statutes proscribed).

⁵³⁸ *Test of Compliance Hearings*, *supra* note 529, at 11–12, 13–14, 17 (statement of Monroe Leigh, Legal Adviser, Dep’t of State).

⁵³⁹ See Letter from President Gerald R. Ford to the Speaker of the House, *supra* note 534, at 7; Letter from President Gerald R. Ford to the Speaker of the House (May 15, 1975), in *Test of Compliance Hearings*, *supra* note 529, at 76, 77.

were impossible to segregate.”⁵⁴⁰ These incidents prompted Senator Eagleton to worry that a significant precedent had been set for the exercise of a preclusive executive war power.⁵⁴¹

5. *The Ford Administration, Angola, and FISA.* — Bold as President Ford’s actions were in response to the fast-moving and exigent circumstances at the end of the Vietnam War, they did not appear to reflect an overarching theory that the President’s otherwise available executive wartime authorities were preclusive. That much is clear from a couple of other settings in which the preclusive-power question arose during his administration. For example, when Congress enacted the 1976 Tunney Amendment, which prohibited the expenditure of procurement funds in Angola for any purposes other than intelligence gathering (including covert activity by the CIA),⁵⁴² Ford wrote that he was “deeply disappointed,” and that “this provision is an extremely undesirable precedent that could limit severely our ability to play a positive and effective role in international affairs.”⁵⁴³ But he did not raise any constitutional objection.⁵⁴⁴

⁵⁴⁰ *Test of Compliance Hearings*, *supra* note 529, at 26 (statement of Monroe Leigh, Legal Adviser, Dep’t of State) (emphasis added). Professors William Banks and Peter Raven-Hansen have argued that perhaps the evacuation of non-Americans “incident to” the evacuation of Americans was not prohibited by the funding limitations. Raven-Hansen & Banks, *supra* note 537, at 919. The Ford Administration did not make this argument — the President acknowledged that he needed further statutory authority with respect to non-Americans — and, in any event, it would be difficult in the case of the Saigon evacuation to make the case that the rescue of 5500 non-Americans was merely “incidental” to the rescue of 1400 U.S. citizens.

⁵⁴¹ Thomas F. Eagleton, Op-Ed., *Congress’s “Inaction” on War*, N.Y. TIMES, May 6, 1975, at 39 (“Congress fumbled the ball. . . . This unfortunate decision [not to act either before or after the Saigon evacuation] raises grave questions about the willingness of Congress to fulfill its constitutional responsibilities. The President obviously had no authority to use the United States forces to rescue foreign nationals in Vietnam. Yet our forces evacuated thousands of Vietnamese. Asked to explain, President Ford tried to justify his action on ‘moral’ rather than legal grounds. Yet Congress let the precedent stand. Future Presidents might now conclude that the Commander in Chief had an inherent right to do what Mr. Ford did.”).

⁵⁴² Department of Defense Appropriation Act, 1976, Pub. L. No. 94-212, 90 Stat. 153, 165–66; *see also* Foreign Assistance and Related Programs Appropriations Act, 1976, Pub. L. No. 94-330, § 109, 90 Stat. 771, 776 (prohibiting use of funds made available by the Act to finance any military assistance to Angola); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757–58 (prohibiting all assistance “of any kind for the purpose, or which would have the effect, of promoting or augmenting . . . the capacity of any [person, group or nation] to conduct military or paramilitary operations in Angola”).

⁵⁴³ Gerald R. Ford, Statement on Signing the Department of Defense Appropriation Act, 1976, 1 PUB. PAPERS 241, 242 (Feb. 10, 1976), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=6277>.

⁵⁴⁴ In addition to the incidents discussed in the text, in July 1976, President Ford vetoed a bill in part on grounds similar to the earlier “impoundment” objections. The bill contained a provision that would have prohibited certain base closures or the reduction of civilian personnel at certain military installations unless there was an initial report to Congress, a second report after nine months, and a final delay period of ninety additional days. Notwithstanding that there was a provision for a presidential waiver of the reporting requirements for reasons of military emergency or national security, Ford objected to the report-and-wait requirement, partly on policy

The Ford Administration also took a much more accommodating view of congressional authority to restrict the powers of the Commander in Chief in another controversial area, involving proposals to regulate foreign intelligence collection efforts. Since at least 1940, Presidents had approved electronic surveillance by the military and other intelligence agencies, including within the United States, without any statutory authorization.⁵⁴⁵ More specifically, the Executive had engaged in warrantless electronic surveillance of communications in wartime (for example, telegraph communications) since at least the Civil War. And during the Second World War, for instance, President Franklin Roosevelt authorized surveillance of virtually all communications coming into and going out of the United States.⁵⁴⁶ The Church Committee hearings in the Senate in the 1970s, however, revealed many decades of extensive intelligence agency abuses of civil liberties in the exercise of unchecked electronic surveillance. These revelations prompted proposals for legislation to regulate domestic electronic surveillance for foreign intelligence purposes.⁵⁴⁷

Although there were clearly divisions within the Ford Administration as to the constitutionality of such legislation,⁵⁴⁸ Ford's Attorney General, Edward Levi, ultimately testified⁵⁴⁹ on behalf of the legislation that was to become the Foreign Intelligence Surveillance Act of

grounds, but also because it raised "serious questions by its attempt to limit my powers over military bases. The President must be able, if the need arises, to change or reduce the mission at any military installation if and when that becomes necessary." Gerald R. Ford, Veto of the Military Construction Bill, 2 PUB. PAPERS 1953, 1953 (July 2, 1976). Three months later, Ford signed a bill that replaced the one-year delay with a sixty-day waiting period — a "substantial compromise on behalf of the Congress" that Ford wrote "refreshes my faith in the system of checks and balances established by our Constitution." Gerald R. Ford, Statement on Signing the Military Construction Authorization Bill, 3 PUB. PAPERS 2375, 2375 (Sept. 30, 1976); see also *supra* note 529 (discussing Ford Administration posture toward the War Powers Resolution).

⁵⁴⁵ See, e.g., United States v. U.S. Dist. Court, 444 F.2d 651, 669–71 (6th Cir. 1971) (reproducing memoranda from Presidents Franklin D. Roosevelt, Harry S. Truman, and Lyndon B. Johnson). The Supreme Court had recognized much earlier that the Commander in Chief has some inherent authority to gather foreign intelligence. See, e.g., Totten v. United States, 92 U.S. 105, 106 (1876) (recognizing the President's authority to hire spies in time of war).

⁵⁴⁶ See DOJ WHITE PAPER, *supra* note 162, at 1389. In 1972, the Supreme Court held that the Fourth Amendment requires a warrant for electronic surveillance directed at *domestic* security threats, but reserved judgment on whether a similar rule applies when the government is seeking information from foreign powers and their agents. United States v. U.S. Dist. Court, 407 U.S. 297, 308, 321–22 & n.20 (1972).

⁵⁴⁷ See generally William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 30–76 (2000).

⁵⁴⁸ See Memorandum for President Gerald Ford from Philip Buchen, Counsel to the President 1 (Mar. 15, 1976), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv8a.pdf> (regarding "Legislation on Electronic Surveillance for Foreign Intelligence Purposes").

⁵⁴⁹ See *Foreign Intelligence Surveillance Act of 1976: Hearings on S. 743, S. 1888, and S. 3197 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 94th Cong. 16 (1976) [hereinafter *Criminal Laws Subcomm. Hearing*].

1978⁵⁵⁰ (FISA). Levi repeatedly explained that the proposed bill then being considered covered an area — domestic surveillance for foreign intelligence purposes — where the President had inherent authority to act, but that such executive action could also “be directed by the Congress,” and future Presidents would be bound to follow the procedures in the bill.⁵⁵¹ Levi explained:

As you know, a difference of opinion may exist as to whether it is within the constitutional power of Congress to prescribe, by statute, the standards and procedures by which the President is to engage in foreign intelligence surveillances essential to the national security. I believe that the standards and procedures mandated by the bill are constitutional. The Supreme Court’s decision in the Steel Seizure case seems to me to indicate that when a statute prescribes a method of domestic action adequate to the President’s duty to protect the national security, the President is legally obliged to follow it.⁵⁵²

Levi did say that there were other aspects of presidential power “which cannot be limited, no matter what the Congress says.”⁵⁵³ While he did not explain what this indefeasible core of executive authority might be, he hinted that it might involve purely overseas surveillance of foreign nations and their collaborators.⁵⁵⁴ Even as to that, however, Levi did not argue that all foreign exercises of war powers were beyond congressional power to regulate. As to such entirely overseas surveillance, Levi hedged: “This is not to say that the development of legislative safeguards in the international communications area is impossible,” and “that is a problem which obviously has to be

⁵⁵⁰ Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1862 (West 2003 & Supp. 2007)).

⁵⁵¹ *Criminal Laws Subcomm. Hearing*, *supra* note 549, at 16. Asked by Senator James Abourezk whether the President’s power in such cases could be “defined by Congress,” Levi responded:

Oh, yes; I think in effect this bill does it. Now, Senator Abourezk, if you would wish me to be a proper Attorney General, always supporting the ultimate in Executive power, I may retreat from my statement, but I have tried to give you what I regard as really the most thoughtful and accurate statement of what I think it should be. . . . I think there is an area where Congress can establish procedures to govern the exercise of [presidential] power and I think this bill does that.

Id. at 20.

⁵⁵² *Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 94th Cong. 92 (1976) [hereinafter *Courts Subcomm. Hearings*]; *accord id.* at 98.

⁵⁵³ *Criminal Laws Subcomm. Hearing*, *supra* note 549, at 17; *see also id.* at 19 (“[I]n terms of the ultimate in [the President’s] constitutional power, it cannot be limited by the Congress.”); *id.* at 20 (stating that there is “undoubtedly an area where [Congress] cannot” establish procedures to govern the exercise of executive power).

⁵⁵⁴ *Id.* at 23–24.

faced.”⁵⁵⁵ Despite the Administration’s support, however, no legislation reached the President’s desk before Ford’s term expired.

C. *The Carter Administration and FISA*

In the wake of the Watergate revelations, Nixon’s impeachment, and the public outrage over President Ford’s pardon of the disgraced former president, President Carter took office in a context notably hostile towards claims of unchecked executive authority. Not surprisingly, the Carter Administration’s approach to preclusive war powers did not seek to capitalize on the ground that had been laid by the Truman, Nixon, and Ford Administrations. Instead, Carter appeared to push in the opposite direction. In particular, the Carter Administration expressly and publicly concluded that the time limit of section 5(b) of the War Powers Resolution was constitutional.⁵⁵⁶ More importantly, Carter and his Administration promoted, negotiated, and signed FISA, which, with minor exceptions, permits the government to engage in electronic surveillance within the United States only upon demonstrating to a special FISA Court that there is probable cause to believe that the target of such surveillance is a foreign power or the agent of a foreign power.⁵⁵⁷ Moreover, in the event of a declared war, the statute specifically authorizes warrantless domestic electronic surveillance, but only for the first fifteen days of the conflict.⁵⁵⁸

In the years before FISA, the modest regulations of federal wire-tapping then in place specifically preserved the President’s *constitutional* authority to engage in foreign intelligence collection free from

⁵⁵⁵ *Courts Subcomm. Hearings*, *supra* note 552, at 91, 99. For an especially helpful analysis of what types of surveillance might have been left unregulated by the draft and final versions of FISA, see David S. Kris, *Modernizing the Foreign Intelligence Surveillance Act 14–23* (Nov. 15, 2007) (unpublished working paper, available at http://www.brookings.edu/~media/Files/rc/papers/2007/11115_nationalsecurity_kris/11115_nationalsecurity_kris.pdf). See also *id.* at 14–16 (discussing Levi’s testimony).

⁵⁵⁶ Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, *supra* note 476, at 196; see also “Ask President Carter”: Remarks During a Telephone Call-in Program on the CBS Radio Network, 1 PUB. PAPERS 291, 324 (Mar. 5, 1977) (noting that the WPR is an “appropriate reduction” in the President’s power). *But cf.* Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, *supra* note 476, at 195 (suggesting that certain applications of the WPR *consultation* requirement may “raise constitutional questions”).

⁵⁵⁷ See FISA, Pub. L. No. 95-511, § 105(a)(3), 92 Stat. 1783, 1790 (codified at 50 U.S.C.A. § 1805(a)(3) (West 2003 & Supp. 2007)); see also Cole & Lederman, *supra* note 162, at 1356 & nn.6–8.

⁵⁵⁸ FISA § 111, 92 Stat. at 1796 (codified at 50 U.S.C. § 1811 (2000)). The congressional conferees explained that “this [fifteen-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency. . . . The conferees expect that such amendment would be reported with recommendations within 7 days and that each House would vote on the amendment within 7 days thereafter.” H.R. REP. NO. 95-1720, at 24 (1978) (Conf. Rep.).

such constraints.⁵⁵⁹ Near the end of the FISA legislative process in 1978, several Representatives argued that this statutory carve-out should be retained because Congress could not constitutionally limit such inherent powers of the Commander in Chief. They proposed that the new FISA, too, be amended to clarify that the President would retain all his constitutional prerogatives — particularly during war.⁵⁶⁰ The House approved the amendment by voice vote.⁵⁶¹ In the conference committee, however, the Senate insisted on exactly the opposite result, and the Senate conferees prevailed.⁵⁶² Thus, as enacted, FISA specifically *repealed* the previous statutory provision preserving the President's constitutional authority,⁵⁶³ and replaced it with language dictating that FISA and specific provisions of the U.S. criminal code were to be the “exclusive means by which electronic surveillance . . . may be conducted.”⁵⁶⁴

In making this dramatic change, Congress did not deny that the President had constitutional power to conduct electronic surveillance for national security purposes. It concluded, however, that

even if the President has the inherent authority *in the absence of legislation* to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted.⁵⁶⁵

The Carter Administration's Office of Legal Counsel specifically opined that the bill did not “trammel upon [foreign affairs] powers exclusively reserved to the Executive.”⁵⁶⁶ And Attorney General Griffin Bell testified that “we have had two Presidents in a row who are will-

⁵⁵⁹ See 18 U.S.C. § 2511(3) (1976) (“Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States . . .” (citation omitted)), *repealed* by FISA § 201(c), 92 Stat. at 1797.

⁵⁶⁰ See 124 CONG. REC. 28,396–400 (1978) (statements of Reps. McClory and Butler); *id.* at 28,400 (statement of Rep. Ashbrook) (“I believe that he has certain inherent powers. We cannot change them.”); *id.* at 28,399 (statement of Rep. Hyde) (“[The amendment] recognizes that we know the Constitution has given the President some power that we cannot deprive him of.”).

⁵⁶¹ *Id.* at 28,401.

⁵⁶² See *id.* at 36,409–16 (statements of Reps. Boland, Butler, McClory, Robinson, and Wilson).

⁵⁶³ FISA § 201(c), 92 Stat. at 1797.

⁵⁶⁴ *Id.* § 201(b), 92 Stat. at 1797 (codified as amended at 18 U.S.C. § 2511(2)(f) (2000 & Supp. IV 2004)).

⁵⁶⁵ H.R. REP. NO. 95-1283, pt. 1, at 24 (1978) (emphasis added).

⁵⁶⁶ Memorandum from John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, to Hon. Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978), in *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 26, 31 (1978) [hereinafter *Legis. Subcomm. Hearings*].

ing to cede power, and I think that is good.”⁵⁶⁷ When he signed FISA on October 25, 1978, President Carter explained that it “clarifies the Executive’s authority to gather foreign intelligence by electronic surveillance in the United States,” and he did not indicate any constitutional objection.⁵⁶⁸

D. *The Reagan Administration*

If Presidents Ford and Carter pulled back from Truman’s unqualified claims of preclusive war powers, the Reagan Administration swung the pendulum in the other direction. President Reagan did accept, without constitutional objection, some highly intrusive statutory restrictions on matters that had long been thought to be within the scope of the Commander in Chief’s authority.⁵⁶⁹ And he negotiated and signed the Convention Against Torture, which requires the United States to categorically prohibit torture, with “[n]o exceptional circum-

⁵⁶⁷ *Legis. Subcomm. Hearings, supra* note 566, at 38; see also *Foreign Intelligence Surveillance Act of 1978: Hearings on S. 1566 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. 48 (1978) [hereinafter *Intelligence Subcomm. Hearings*] (statement of Stanfield Turner, Director of Central Intelligence) (President Carter and he agreed that the President’s constitutional authority should be subjected to the bill’s procedures). At one point in his FISA testimony, Attorney General Bell noted that the 1978 version of the bill, unlike existing law, did not itself recognize any “inherent power of the President to conduct electronic surveillance,” and added that this absence of any such statement “does not take away the power of the President under the Constitution.” *Legis. Subcomm. Hearings, supra* note 566, at 15. It is clear from the context, however, that Bell was simply clarifying that there were constitutional surveillance powers (such as surveillance of wholly overseas communications) that the new statute did not affect, see *Kris, supra* note 555, at 18–19; he was *not* suggesting that the President had the constitutional authority to disregard the procedures of the new legislation. See *Intelligence Subcomm. Hearings, supra*, at 25 (statement of Griffin Bell, Att’y Gen.) (“While it may seem strange for me to be indicating that we want to give up power that we now have, we do.”); *id.* at 40 (“[W]e’re willing to give up this power.”). Some years later, a Department of Justice official at the heart of the negotiations wrote that the Ford and Carter Administrations had supported FISA’s regulation of the President’s powers, notwithstanding “strong dissents opposing its enactment on grounds of separation of powers,” because of “the practical imperative of continuing to collect foreign intelligence in the face of growing resistance from the communications common carriers whose cooperation was essential.” Memorandum from Mary C. Lawton, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, to Dan Levin, Office of the Deputy Att’y Gen. 4 (Nov. 1, 1990), available at http://gulcfac.typepad.com/georgetown_university_law/files/Lawton.1990.FISA.Memo.clean.pdf.

⁵⁶⁸ Jimmy Carter, Foreign Intelligence Surveillance Act of 1978: Statement on Signing S. 1566 into Law, 2 PUB. PAPERS 1853 (Oct. 25, 1978).

⁵⁶⁹ See, e.g., Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986); Ronald Reagan, Statement on Signing the Goldwater-Nichols Department of Defense Reorganization Act of 1986, 2 PUB. PAPERS 1312 (Oct. 1, 1986). See also Ronald Reagan, Statement on Signing the National Defense Authorization Act for Fiscal Year 1987, 2 PUB. PAPERS 1557 (Nov. 14, 1986) (explaining that he was “extremely disappointed” that Congress “saw the need to legislate the reorganization of the Special Operations Forces, particularly in mandating the creation of a unified command, which has heretofore been the exclusive prerogative of the President as Commander in Chief” — but not contending the measures were unconstitutional).

stances whatsoever,” including “a state of war,” to be invoked as a justification, and which further requires the United States to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”⁵⁷⁰ But in other respects, the Reagan Administration also claimed preclusive war powers that, if taken seriously, appeared to be broader than even those that Truman had asserted.⁵⁷¹

1. *Restrictions on the Use of Force in Lebanon and the War Powers Resolution.* — In 1983, Congress authorized the President to continue participation by U.S. armed forces in Lebanon. That authorization specified that it would expire in eighteen months (and even sooner, under certain circumstances), absent further authorization.⁵⁷² In his signing statement, President Reagan came close to endorsing the view

⁵⁷⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2, 16(1), *adopted* Dec. 10, 1984, 108 Stat. 382, 85 U.N.T.S. 1465.

⁵⁷¹ One other, less public aspect of the Reagan White House perspective on these questions is also noteworthy in light of more contemporary developments. When he was a young attorney working in the Office of the Counsel to the President in the Reagan White House, John Roberts, now Chief Justice of the United States, wrote a short memo suggesting there might be constitutional problems if Congress were to try to require a cessation of a military conflict. The memo in question dealt with a proposed bill granting a veterans’ preference to persons who served in Lebanon between August 20, 1982, and the date the Lebanese operation would end, with the latter date to be defined either by presidential proclamation or by concurrent resolution of Congress. In his memo to the White House Counsel, Roberts noted that the concurrent resolution provision would violate the presentment requirement articulated in *INS v. Chadha*. However, he further wrote that even if the bill were changed so that hostilities could be ended upon a joint resolution of Congress enacted over presidential veto — that is, by statute — it would present a “difficulty” because “it recognizes a role for Congress in terminating the Lebanon operation,” and “I do not think we would want to concede any definitive role for Congress in terminating the Lebanon operation.” Memorandum from John G. Roberts to Fred F. Fielding (Feb. 29, 1984), in *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1242, 1242 (2005) [hereinafter *Roberts Confirmation Hearing*].

At Roberts’s Senate confirmation hearing to be Chief Justice, Senator Patrick Leahy pressed him on the constitutional question (“We have the power to declare war. Do we have the power to terminate war?”); but Roberts was reluctant to concede that Congress could control the question of conflict-cessation by statute:

Senator, that’s a question that I don’t think can be answered in the abstract. You need to know the particular circumstances and exactly what the facts are and what the legislation would be like, because the argument on the other side — and as a judge, I would obviously be in a position of considering both arguments, the argument for the Legislature and the argument for the Executive. The argument on the Executive side will rely on authority as Commander in Chief, and whatever authorities derive from that. So it’s not something that can be answered in the abstract.

Roberts Confirmation Hearing, supra, at 151–52.

⁵⁷² Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §§ 3, 6, 97 Stat. 805, 806–07 (1983). Section 3 of the bill also stated that the participation of the armed forces in Lebanon “shall be limited to performance of the functions, and shall be subject to the limitations” specified in an agreement between the United States and Lebanon establishing the Multinational Force in that country, or any “protective measures as may be necessary to ensure the safety” of the Multinational Force. *Id.* § 3, 97 Stat. at 806.

that Nixon had first taken, but that Carter had reversed — namely, that the durational limit of the War Powers Resolution was unconstitutional. Such an “inflexible deadline[,]” he wrote, “creates unwise limitations on Presidential authority,” and he expressly disclaimed any acknowledgement that section 5(b) of the War Powers Resolution was constitutional.⁵⁷³ Moreover, Reagan stated that “I do not and cannot cede any of the authority vested in me . . . as Commander in Chief of the United States Armed Forces,” and that he would not construe the eighteen-month limit of the bill itself “to revise the President’s constitutional authority to deploy United States Armed Forces.”⁵⁷⁴ Despite laying down this marker, there was no actual statutory disregard, because hostilities in Lebanon did not extend beyond ninety days.

2. *Regulation of Covert Actions and the Iran-Contra Affair.* — The issue concerning preclusive executive war powers was more famously implicated in Reagan’s second term, in connection with the Iran-Contra Affair. The scandal concerned, among other things, the possible violation of several laws that Congress had passed — known as the Boland Amendments — to restrict military and other assistance to the Contras in Nicaragua. One of the final such acts prohibited the use of all funds, by the Department of Defense, the CIA, and any other U.S. agencies involved in intelligence activities, for the purpose, or which would have the effect, of supporting any military or paramilitary operations in Nicaragua during fiscal year 1985.⁵⁷⁵ Similarly, in 1986 Congress enacted a law that provided for renewed military aid and humanitarian assistance to Nicaragua, but that flatly prohibited all members of the U.S. armed forces, and other employees of any agency or department of the United States, from entering Nicaragua to provide military advice, training, or logistical support to paramilitary groups operating inside that country.⁵⁷⁶ Later that year, Congress enacted another statute of even greater specificity, providing that:

United States Government personnel may not provide any training or other service, or otherwise participate directly or indirectly in the provi-

⁵⁷³ Ronald Reagan, Statement on Signing the Multinational Force in Lebanon Resolution, 2 PUB. PAPERS 1444, 1444 (Oct. 12, 1983).

⁵⁷⁴ *Id.* at 1444-45.

⁵⁷⁵ Department of Defense Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984). The Act further provided that the prohibition could be avoided after February 28, 1985, upon the satisfaction of certain conditions. *Id.* § 8066(b), 98 Stat. at 1935-36. Earlier versions of the limitation were contained in: Joint Resolution of Oct. 3, 1984, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01; Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983); Department of Defense Appropriation Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865 (1982). See generally United States: Legislation Relating to Nicaragua, 26 I.L.M. 433 (1987) (outlining all legislative restrictions on Nicaragua funding from 1980 to 1987, with reprints of relevant texts).

⁵⁷⁶ Joint Resolution of Oct. 18, 1986, Pub. L. No. 99-500, § 203(e), 100 Stat. 1783, 1783-297 (1986).

sion of any assistance, to the Nicaraguan democratic resistance pursuant to this title within those land areas of Honduras and Costa Rica which are within 20 miles of the border with Nicaragua.⁵⁷⁷

Although the failure of actors within his Administration to comply with these laws gave rise to the most serious crisis of his presidency, Reagan did not publicly object to the constitutionality of any of the bills when he signed them into law.⁵⁷⁸ Nonetheless, the Administration did take a position on a related matter that clearly called these provisions into constitutional question. In a 1974 statute,⁵⁷⁹ Congress enacted the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961, which prohibited the CIA from engaging in activities other than intelligence gathering (including covert action) unless and until the President makes a finding that the operation is "important to the national security of the United States and reports, in a timely fashion, a description and scope" of such activities to specified congressional committees.⁵⁸⁰ A few years later, the Intelligence Authorization Act for Fiscal Year 1981⁵⁸¹ continued a version of the Hughes-Ryan Amendment's executive reporting requirement, and also provided that the Director of Central Intelligence must give *prior*, instead of "timely," notice of "any significant anticipated intelligence activity," except in

⁵⁷⁷ Joint Resolution of Oct. 30, 1986, Pub. L. No. 99-591, § 216(a), 100 Stat. 3341, 3341-307 (1986).

⁵⁷⁸ As the subsequent Iran-Contra scandal demonstrated, it was not clear to what extent every actor in the Reagan Administration agreed that the restrictions concerning actions in Latin America were constitutional. In addition, a group of Representatives in Congress, led by Richard Cheney, issued a "Minority Report" to accompany the Iran-Contra Committee's report. That Minority Report did criticize the Boland restrictions, arguing that any statutes limiting the President in the broad area of "conducting the foreign policy of the United States" should be "reviewed with a considerable degree of skepticism," and should be deemed invalid "[i]f they interfere with core presidential foreign policy functions." Minority Report, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 431, 469 (1987).

At the end of the Reagan Administration, Congress enacted a bill prohibiting *any* agency or entity of the United States from obligating or expending funds during fiscal year 1989 to provide funds, materiel, or other assistance to the Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua, except as specifically provided by law. Intelligence Authorization Act, Fiscal Year 1989, Pub. L. No. 100-453, § 104, 102 Stat. 1904, 1905 (1988). In signing the bill, Reagan noted that previous versions of this restriction had been limited to entities involved in intelligence activities, and wrote:

I have signed the Act with the understanding that the extension of the restriction to all entities of the United States Government is not intended to, and does not, apply in a manner and to an extent that would conflict with my constitutional authority and duty to conduct the foreign relations of the United States.

Ronald Reagan, Statement on Signing the Intelligence Authorization Act, Fiscal Year 1989, 2 PUB. PAPERS 1249, 1250 (Sept. 29, 1988).

⁵⁷⁹ Pub. L. No. 93-559, 88 Stat. 1795 (1974).

⁵⁸⁰ *Id.* § 32, 88 Stat. at 1804.

⁵⁸¹ Pub. L. No. 96-450, 94 Stat. 1975 (1980).

extraordinary circumstances, where the President must still give timely notice and a statement of the reasons for not giving prior notice.⁵⁸²

In 1986, in connection with the Iran-Contra Affair, controversy arose over whether the Reagan Administration had complied with the “timely notice” requirement after the President indefinitely postponed notification of Congress of covert actions he took with respect to Iran. OLC wrote an opinion concluding that the statutory “timely notice” mandate should be construed to effectively give the President unbounded discretion in deciding when to inform Congress.⁵⁸³ It rested this strained reading of the law⁵⁸⁴ on the notion that such a requirement would otherwise be constitutionally dubious. OLC reasoned that Congress may not require the President to “relinquish any of his constitutional discretion in foreign affairs” (including through the mechanism of an appropriations condition).⁵⁸⁵ More strikingly still, OLC asserted that Congress is almost powerless to act with respect to the world outside U.S. borders — that “the Constitution gave to Congress *only* those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens,” and that the President has virtually plenary authority “[a]s to other matters in which the nation acts as a sovereign entity in relation to outsiders.”⁵⁸⁶

When pressed on the point by the Senate Intelligence Committee in 1987, the Assistant Attorney General for OLC conceded that Congress did have some Article I powers to affect foreign affairs, but continued to defend the notion that the President has certain “zones” of authority that “cannot be regulated,” including with respect to authority over most covert activities.⁵⁸⁷ In a memorandum responding to questions from Senator Arlen Specter, Assistant Attorney General Charles Cooper further argued that although the Rules for Government and Regulation Clause does give Congress the power to “prescrib[e] a code of conduct governing military life,” and to insist upon another code of

⁵⁸² *Id.* § 501, 94 Stat. at 1981–82.

⁵⁸³ The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act, 10 Op. Off. Legal Counsel 159 (1986).

⁵⁸⁴ Professor Jefferson Powell has argued that the OLC opinion is an exercise in statutory construction only in the Pickwickian sense that it assigns meanings to the words Congress enacted. If, as is generally assumed, the purpose of statutory construction has something to do with identifying and applying what presumably was the will of the legislating body — however difficult that may be in practice and even in theory — the opinion is a simple and indeed unembarrassed failure as a reading of section 501.

POWELL, *supra* note 529, at 13.

⁵⁸⁵ The President’s Compliance With The “Timely Notification” Requirement of Section 501(b) of the National Security Act, *supra* note 583, at 169–70.

⁵⁸⁶ *Id.* at 161.

⁵⁸⁷ *Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the S. Select Comm. on Intelligence*, 100th Cong. 84–85 (1987) (statement of Charles Cooper, Assistant Att’y Gen., Office of Legal Counsel).

conduct “for the individuals engaged in . . . covert actions,” that Article I authority does *not* permit Congress to pass laws “control[ling] actual military operations,” or “intrud[ing] in any way upon the Commander-in-Chief’s decisionmaking authority.”⁵⁸⁸ Thus, he wrote, “[t]o the extent a covert action is analogous to a military action, . . . the President as Commander-in-Chief retains complete control over the operation,” including “the authority to decide when and to whom to disclose the operation.”⁵⁸⁹

E. Bush 41: Aggressive Expansion of Preclusive Claims

Assertive as the Reagan Administration was, a qualitative change in the Executive’s posture toward statutory regulation of issues concerning the military’s organization and functions appears to have occurred in 1989, under the Administration of George H.W. Bush.⁵⁹⁰ Part of this was a consequence of a broader, general invocation of executive prerogatives: OLC went so far as to write that “[w]hile Congress has a free hand in determining what laws the President is to enforce, we do not believe that Congress is constitutionally entitled to dictate *how* the executive branch is to execute the law.”⁵⁹¹

But there was a particular aggressiveness with respect to the Commander in Chief Clause, reflected in a series of presidential signing statements on omnibus appropriations and authorizations bills. In

⁵⁸⁸ *Id.* at 181.

⁵⁸⁹ *Id.* at 181–82. Senator Specter asked Cooper how this view could be squared with *Little v. Barreme*. Cooper responded that the statute in that case was an exercise of Congress’s foreign commerce power, and that “[a]t most *Barreme* establishes congressional authority to prohibit the President from taking certain actions abroad when Congress is acting pursuant to one of its enumerated powers.” *Id.* at 182–83. Cooper failed to explain why that concession did not undermine his argument that Congress could not use its powers under the Rules for Government and Regulation Clause to regulate the President’s Commander in Chief functions. In 1991, Congress reenacted the “timely fashion” reporting requirement. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. 102-88, sec. 602(a)(2), § 503(c)(3), 105 Stat. 429, 443 (1991) (codified at 50 U.S.C. § 413b(c)(3) (2000 & Supp. IV 2004)). In connection with that action, the Intelligence Committees wrote that they “wish to emphasize and make absolutely clear” that they did not agree or acquiesce in the OLC construction of the statute, and that “[n]either [intelligence] committee has ever accepted” the Executive’s constitutional argument. H.R. REP. NO. 102-166, at 28 (1991) (Conf. Rep.), reprinted in 1991 U.S.C.C.A.N. 243, 250. The conferees urged President George H.W. Bush to reject President Reagan’s view, and to agree that the law required notice within a few days of covert actions. Bush agreed that he would ordinarily comply with such a deadline, but added that “[a]ny withholding beyond this period will be based upon my assertion of authorities granted this office by the Constitution.” *Id.* at 27 (quoting a letter from President Bush to the Chairman of the House Committee on Intelligence).

⁵⁹⁰ The dramatic shift coincides with Richard Cheney taking office as Secretary of Defense.

⁵⁹¹ Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 248, 253–54 (1989); see also *id.* at 256 n.7 (suggesting that it is unconstitutional for Congress to pass a law “restrict[ing] the President’s ability to dispatch troops abroad in a crisis” (quoting John G. Tower, *Congress Versus the President: The Formulation and Implementation of American Foreign Policy*, 60 FOREIGN AFF. 229, 234 (1981–1982))).

them, the first President Bush indicated his intent not to fully enforce certain provisions to the extent they impinged on his understanding of his authority as Commander in Chief. Interestingly, most of these measures did not even deal with the regulation of military campaigns, as such, or treatment of the enemy — generally the provisions at issue were the sort of run-of-the-mine regulations of the organization and structure of the armed forces that appear all throughout Title 10 of the United States Code. The systematic nature of the objections to these measures, combined with the apparent breadth with which they were described, suggested that Truman's gambit on behalf of preclusive war powers had at last found a champion. It should be emphasized, however, that President Bush set forth many of these contentions in cursory fashion. Thus, the signing statements may have been designed as much to lay down markers for exceptional applications of the measures in question as to announce an actual intention to disregard them as a matter of routine administration.

1. *Objections to Regulations Concerning National Security Information.* — The Bush Administration's first publicly announced Commander in Chief Clause objection did not deal with the military at all. It instead concerned a provision of an appropriations act that proscribed the implementation of certain "nondisclosure" agreements the Executive had required of government employees who had access to classified information.⁵⁹² Relying on *Department of the Navy v. Egan*,⁵⁹³ President Bush wrote that the Commander in Chief Clause gave the President the duty "to ensure the secrecy of information whose disclosure would threaten our national security."⁵⁹⁴ The provision in question thus raised "profound constitutional concerns" in the President's view, because it regulated the manner in which he could prevent the disclosure of classified information "concerning our most sensitive diplomatic, military, and intelligence activities."⁵⁹⁵

⁵⁹² Act of Nov. 3, 1989, Pub. L. No. 101-136, § 618, 103 Stat. 783, 820.

⁵⁹³ 484 U.S. 518, 527 (1988) (identifying the Commander in Chief Clause as one of the sources of the President's authority to exercise authority over classified national security information).

⁵⁹⁴ George Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, 2 PUB. PAPERS 1448, 1449 (Nov. 3, 1989).

⁵⁹⁵ *Id.* Because the control of classified information within the executive branch is not limited to the armed services, the Commander in Chief Clause is probably the wrong hook for identifying any presidential power to make rules for classifying information. More importantly, whatever the source of that executive power might be, the Supreme Court in *Egan* did not suggest that it was immune from statutory regulation — to the contrary, the Court merely held that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." 484 U.S. at 530 (emphasis added). In fairness to President Bush, however, the Reagan Administration had made the same *Egan*-based argument the previous year in a case in federal court, and a district court had agreed — as far as we know the only time in the nation's history that a court has declared a statute to usurp a (purported) Commander in Chief function. *Nat'l Fed'n of Fed. Employees v. United*

President Bush also objected to various statutes requiring the executive branch to disclose to Congress information about military intelligence and operations. In signing an annual defense appropriations act, for instance, the President wrote that he would interpret certain reporting or consultation provisions — such as a provision requiring a report on the measures that would be required to verify conventional force reductions in Europe, and another calling for a report on intelligence estimates on future Soviet tank production and operational capacities — “so as not to impose unconstitutional constraints upon my authority to protect sensitive national security information.”⁵⁹⁶ Again with respect to a supplemental appropriations act for the first Gulf War in 1991, President Bush suggested that he might not comply with reporting requirements — one that required notifying Congress of the proposed storage of certain equipment, supplies, or material in a prepositioned status for use by the U.S. armed forces; another that required a report on “all enemy equipment falling under the control . . . of allied forces within the Desert Storm theater of operations”;⁵⁹⁷ and a third that required a report on “any arrangement for a United States military presence that has been made or is expected to be made to the government of any country in the Middle East.”⁵⁹⁸

2. *Objections to Statutes Regulating the Manner of Deploying the Armed Forces.* — In a series of signing statements concerning regula-

States, 688 F. Supp. 671, 684–85 (D.D.C. 1988). The Supreme Court vacated the district court judgment without reaching the merits. *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989). Even in the Clinton Administration, the executive branch view was that the Commander in Chief Clause is among the authorities that allegedly prevent Congress from making rules for the proper treatment of classified information. See *Whistleblower Protections for Classified Disclosures*, 22 *Op. Off. Legal Counsel* 92, 94 n.6 (1998). *Egan*, however, appears to leave open a strong counterargument that Congress could replace the President's chosen rules for classifying information with a statutory scheme.

This is not to say that there might not be a constitutional issue raised by the nondisclosure statute at issue in the Bush 1989 signing statement. But if there is such a problem, it has to do with the fact that the statute gives subordinate executive officials a unilateral power to make decisions regarding disclosure of classified information, not subject to the President's review. This is essentially the focus of the 1998 OLC memorandum, which disclaimed the “need to resolve the precise parameters of the President's authority to control access to classified diplomatic and national security information,” and instead emphasized that “the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President.” *Whistleblower Protections for Classified Disclosures*, *supra*, at 100. Even if there is some force to this argument, it does not necessarily depend upon the President's designation as Commander in Chief of the army, navy, and militia.

⁵⁹⁶ George Bush, Statement on Signing the National Defense Authorization Act for Fiscal Years 1990 and 1991, 2 *PUB. PAPERS* 1599, 1599 (Nov. 29, 1989).

⁵⁹⁷ George Bush, Statement on Signing the Operation Desert Shield/Desert Storm Supplemental Appropriations Act, 1991, 1 *PUB. PAPERS* 357, 357 (Apr. 10, 1991) (omission in original) (quoting H.R. 1282, 102d Cong. (1991)) (internal quotation marks omitted).

⁵⁹⁸ *Id.* (quoting H.R. 1282) (internal quotation marks omitted).

tions of deployments, the first President Bush evidenced a remarkably strong notion of a substantive Commander in Chief preclusive power — one that would allow him to ignore statutory regulation of the positioning of even *peacetime* armed forces if the statutes did not conform to his view of what was best for the defense of the nation. For example, President Bush issued constitutional objections to a provision that would have restricted the availability of certain members of the armed forces to fill positions in a new light infantry battalion; a provision that would have restricted the establishment or transfer of certain naval functions and billets until sixty days after a report to congressional committees; and a provision that would have prohibited certain Air Force weather reconnaissance squadrons from being operated at a reduced level.⁵⁹⁹

More significantly, in a statement several days later the President singled out several provisions that “could be read as limiting the deployment of military personnel,” such as one that would have limited the active-duty forces deployed in Europe, and another that would have restricted the President’s authority to relocate defense personnel from an air base in Spain.⁶⁰⁰ Even though the former provision specifically authorized a waiver upon a presidential determination that an exception was critical to the national security, Bush wrote that “I do not believe my discretion to deploy military personnel may be subject to such a statutory standard.”⁶⁰¹ Therefore, “[w]hile I will respect the intent of such provisions as far as possible, I sign this bill with the understanding that they do not constrain my authority to deploy military personnel as necessary to fulfill my constitutional responsibilities as President and Commander in Chief.”⁶⁰²

This trend continued with respect to an even greater range of provisions in the signing statement for the National Defense Authorization Act for Fiscal Year 1991.⁶⁰³ The President identified constitutional concerns in a provision that regulated the executive system of classification by requiring notice to the Congress regarding initiation of, or changes in, special access programs.⁶⁰⁴ Bush also complained about provisions that limited the number of military personnel stationed in Japan and in Europe — even though such statutes provided for waivers when the President determined that national security required

⁵⁹⁹ George Bush, Statement on Signing the Department of Defense Appropriations Act, 1990, 2 PUB. PAPERS 1572 (Nov. 21, 1989).

⁶⁰⁰ Bush, *supra* note 596, at 1600.

⁶⁰¹ *Id.*

⁶⁰² *Id.*

⁶⁰³ George Bush, Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 2 PUB. PAPERS 1556, 1556–57 (Nov. 5, 1990).

⁶⁰⁴ *Id.* at 1557.

them.⁶⁰⁵ He also noted that he would construe yet other provisions “consistent with my authority as Commander in Chief to deploy the Armed Forces as I see fit” — namely, a provision that required assignment of all Army Reserve operational forces to U.S. Forces Command, and provisions that established standards for the allocation of aircraft to Naval Reserve, Air Force Reserve, and Air National Guard units, and required assignment of the tactical airlift mission to the Air Force Reserve and Air National Guard.⁶⁰⁶ Finally, in October 1992, President Bush announced a power to depart from two other statutory provisions related to troop deployments that would affect “my authority to deploy military personnel as necessary to fulfill my constitutional responsibilities”: one that limited the use of funds to support only 100,000 troops in Europe as of October 1, 1995, and another that required a forty percent cut in U.S. forces overseas after September 30, 1996, absent a war or national emergency.⁶⁰⁷

As these statutes demonstrate, however, Congress did not at all share President Bush’s view of preclusive Commander in Chief war powers. Indeed, even in authorizing the first Gulf War, Congress provided that before the President could use the armed forces to achieve implementation of specified U.N. Security Council resolutions, he was required to provide to congressional leaders his determination that the United States had successfully tried “all appropriate diplomatic and other peaceful means to obtain compliance by Iraq” with those Security Council resolutions.⁶⁰⁸

F. *The Clinton Administration*

The Clinton Administration did not swing the pendulum back to where the Carter Administration had left it, but neither did it embrace the broader view of the preclusive war powers that the Bush Administration had pushed. Indeed, in some respects, the Clinton Administration was very generous in its respect for Congress’s powers, though it, too, occasionally invoked a notion of preclusive powers broader than Presidents prior to Truman had seen fit to claim. Moreover, throughout this period, marked as it was by an often hostile legislature

⁶⁰⁵ Bush wrote that “I shall construe these provisions consistent with my authority to deploy military personnel as necessary to fulfill my constitutional responsibilities.” *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ See George Bush, Statement on Signing the National Defense Authorization Act for Fiscal Year 1993, 2 PUB. PAPERS 1941, 1942 (Oct. 23, 1992).

⁶⁰⁸ See Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a)–(b), 105 Stat. 3, 3 (1991). Although President Bush, in his signing statement, disclaimed the need to have obtained Congress’s authorization, he did not raise any constitutional objection to the diplomacy and reporting prerequisites in the authorization resolution. See George Bush, Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 PUB. PAPERS 40, 40 (Jan. 14, 1991).

and a number of controversial military engagements abroad, Congress enacted a number of measures restricting the use of military force abroad, even when operations were already underway.

1. *Acceptance of Congressional Restrictions.* — President Clinton promoted and signed the 1994 federal torture statute,⁶⁰⁹ as well as the War Crimes Act.⁶¹⁰ The latter statute, enacted in 1996 and amended in 1997,⁶¹¹ established criminal penalties for conduct in violation of certain humanitarian treaty obligations: grave breaches of any of the Geneva Conventions; violations of Articles 23, 25, 27, or 28 of the Annex to the Fourth Hague Convention;⁶¹² and, until recently, all violations of Common Article 3 of the Geneva Conventions.⁶¹³

Nor did President Clinton object to several enactments limiting the use of military force abroad.⁶¹⁴ For example, when Congress provided in November 1993 that funds could be obligated with respect to hostilities in Somalia beyond March 1994 only “to protect American diplomatic facilities and American citizens, and [for] noncombat personnel to advise the United Nations commander in Somalia,”⁶¹⁵ Clinton did not raise a constitutional objection to this limitation, notwithstanding that the provision imposed a restriction on the use of combat forces in an area where hostilities had already broken out.⁶¹⁶ In 1997, Clin-

⁶⁰⁹ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, tit. V, § 506(a), 108 Stat. 382, 463-64 (1994) (codified as amended at 18 U.S.C. §§ 2340-2340B (2000 & Supp. IV 2004)).

⁶¹⁰ War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C.A. § 2441 (West 2000 & Supp. 2007)).

⁶¹¹ Foreign Operations, Export Financing and Related Programs Appropriation Act, 1998, Pub. L. No. 105-118, tit. V, § 583, 111 Stat. 2386, 2436 (1997) (amending 18 U.S.C. § 2441).

⁶¹² See *supra* note 344 (describing these Articles).

⁶¹³ The recent Military Commissions Act of 2006 decriminalized certain violations of Common Article 3, perhaps including some or all of the “enhanced interrogation techniques” that President Bush had authorized the CIA to use. See Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633-35 (amending 18 U.S.C. § 2441); see also Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/09/clarification-of-what-war-crimes.html> (Sept. 26, 2006, 4:37 EST); Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/09/three-of-most-significant-problems.html> (Sept. 22, 2006, 3:41 EST).

⁶¹⁴ In addition to the statutes discussed in the text, see also Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317. The Chemical Weapons Convention was actually signed by President Bush in the last few days of his term in 1993.

⁶¹⁵ Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1418, 1476 (1993).

⁶¹⁶ See William J. Clinton, Statement on Signing the Department of Defense Appropriations Act, 1994, 2 PUB. PAPERS 1958 (Nov. 11, 1993). Clinton did raise a constitutional concern respecting another provision in that same statutory section requiring that U.S. combat forces in Somalia “shall be under the command and control of United States commanders,” H.R. 3116, 103d Cong. § 8151(b)(2) (1993). See Clinton, *supra*, at 1958 (stating that he would construe that requirement “as not restricting my constitutional responsibility and authority as Commander In Chief, including my ability to place U.S. combat forces under the temporary tactical control of a

ton did not raise a constitutional objection when Congress passed a law prohibiting the use of Department of Defense appropriations for the deployment of any U.S. ground combat forces in the Republic of Bosnia and Herzegovina after June 30, 1998, unless the President transmitted to Congress a certification that such deployment was “required in order to meet the national security interests of the United States” (and that such ground forces would not serve as civil police).⁶¹⁷ The Clinton Administration also carefully avoided adoption of a position on the constitutionality of the sixty-day limit in the War Powers Resolution.⁶¹⁸ Most notably, although Clinton deployed troops in hostilities in Kosovo for longer than the WPR time limit in 1999, his OLC justified such action not on the ground that the WPR was unconstitutional, but instead on a controversial statutory interpretation.⁶¹⁹

foreign commander where to do otherwise would jeopardize the safety of U.S. combat forces”). We discuss that particular constitutional issue *infra* at pp. 1091–92.

Several years later, Clinton’s Office of Legal Counsel discussed the 1993 functions limitation as an example of a congressional option for limiting hostilities, without mentioning any constitutional concerns. See Authorization for Continuing Hostilities in Kosovo, 2000 WL (OLC) 33716980, at *7 (Dec. 19, 2000) [hereinafter OLC Kosovo Opinion]. In that same opinion, Clinton’s OLC noted, without any hint of constitutional problem, that Congress could likewise bring an end to U.S. involvement in Kosovo if it were able to enact a statute to that effect. See *id.* at *24; see also Brief for Appellee, *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (No. 99-5214), 1999 WL 34834288, at *30 (arguing, in a case brought to challenge the Kosovo campaign, that “Congress could, of course, have enacted such a measure” commanding cessation of all military actions in Kosovo); Brief for the Respondent in Opposition, *Campbell v. Clinton*, 531 U.S. 815 (2000) (No. 99-1843), 2000 WL 34013589, at *9 (“[P]etitioners remain free to utilize the legislative process to vindicate their policy objectives.”).

⁶¹⁷ See National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, tit. XII, § 1203, 111 Stat. 1629, 1929 (1997); see also William J. Clinton, Statement on Signing the National Defense Authorization Act for Fiscal Year 1998, 2 PUB. PAPERS 1611 (Nov. 18, 1997). Congress also passed laws restricting the use of forces in Rwanda and Haiti. See *infra* notes 631–633 and accompanying text.

⁶¹⁸ See OLC Kosovo Opinion, *supra* note 616, at *1 n.1 (“In light of our conclusion that Congress lawfully authorized continued hostilities beyond the 60-day statutory limit, we have no occasion to consider any constitutional arguments that might be made.”); see also OLC Haiti Opinion, *supra* note 476, at 176 n.2.

⁶¹⁹ See OLC Kosovo Opinion, *supra* note 616; see also *Campbell*, 203 F.3d at 20. The House of Representatives’ reactions to Clinton’s decision to initiate a bombing campaign in Kosovo were hardly consistent. On the one hand, the House overwhelmingly rejected a resolution declaring a state of war; rejected (by a tie vote) a concurrent resolution that would have expressly authorized the President “to conduct military air operations against Serbia”; and voted to block funding for ground troops without additional specific authorization from Congress. OLC Kosovo Opinion, *supra* note 616, at *24. On the other hand, the House also defeated a resolution that would have directed the President to remove the armed forces from the region. *Id.* OLC concluded that “[t]he message of all these votes is ambiguous,” and that “[t]he only clear message that Congress sent regarding the continuation of military operations in Serbia” was an emergency supplemental appropriation for military operations. *Id.* OLC concluded that the appropriations measure constituted authorization for continuing hostilities beyond the time limits in the War Powers Resolution, even though the appropriations bill did not conform to section 8(a)(1) of the WPR, which specifically provides that such appropriations measures shall not satisfy the requirement of congressional authorization in section 5(b). 50 U.S.C. § 1547(a)(1) (2000). OLC reasoned that the

2. *Invocations of Preclusive Powers.* — That said, the Clinton Administration frequently invoked Commander in Chief prerogatives, chiefly in areas concerning the internal structure of the military chain of command. In doing so, however, the Administration often reasoned in ways that hinted at broader notions of preclusive authority, such as those that former President Taft had pushed nearly a century before concerning the impermissibility of statutory regulation of troop movements, and that Assistant Attorney General Rehnquist had appeared to endorse while serving as Nixon's head of OLC.⁶²⁰

(a) *The U.N. Command Legislation.* — The Clinton Administration's most direct assertion of preclusive power was set forth in an opinion that OLC issued in 1996, dealing with a bill that would have restricted the President's use of appropriated funds to place U.S. armed forces under the operational or tactical control of the United Nations.⁶²¹ OLC acknowledged Congress's broad power to establish

1973 Congress that enacted the WPR lacked the constitutional power to limit the manner in which *subsequent* Congresses could evidence authorization of military activities, and that therefore WPR section 8(a)(1) should be construed merely to establish a background principle of statutory construction in the shadow of which later Congresses are assumed to act — a principle that was overcome by the evidence of legislative intent in the Kosovo appropriations measure. OLC Kosovo Opinion, *supra* note 616, at *8–12; see also POWELL, *supra* note 529, at 124–25; Philip 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, 1399–1400 (1994) (book review).

It has also been alleged that President Clinton caused the United States to breach a treaty obligation, in Article 2 of the U.N. Charter, see *supra* note 343, when he unilaterally ordered air attacks in Kosovo in 1999. See, e.g., John C. Yoo, *Kosovo, War Powers and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1725–26 (2000). The Clinton Administration never conceded that it had violated the U.N. Charter, but neither did it articulate any theory under which the bombing might have been consistent with Article 2. The Secretary of State called the intervention a “unique situation *sui generis*,” Madeleine Albright, U.S. Sec'y of State, Press Conference with Russian Foreign Minister Igor Ivanov (July 26, 1999) (transcript available at <http://secretary.state.gov/www/statements/1999/990726b.html>); and the Acting Legal Advisor explained somewhat obliquely that the United States and NATO allies “decided that [the] justification for military action would be based on the unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory.” Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000). For present purposes, the important point is that, so far as we know, the Clinton Administration never asserted or suggested any power under the Commander in Chief Clause that would justify deviating from the treaty — Clinton did not assert any constitutional executive prerogative to ignore binding treaty obligations. Moreover, as noted above, OLC construed an appropriations law enacted several weeks after the bombings began as congressional authorization for the campaign. Such a later-enacted statute supersedes the relevant treaty for purposes of domestic law enforcement, although presumably it would not affect the President's obligation to have complied with the treaty before enactment of the appropriations law.

⁶²⁰ See *supra* pp. 1039–40, 1067–70.

⁶²¹ Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. Off. Legal Counsel 182 (1996) [hereinafter OLC U.N. Control Opinion]. A variation on the same question arose earlier in the Clinton Administration: a defense appropriations act enacted in 1993 provided that U.S. combat forces in Somalia “shall be under the command and control of United States commanders under the ultimate direction of the President of the United

rules creating and regulating “the framework of the Military Establishment.”⁶²² The opinion then countered that “such framework rules may not unduly constrain or inhibit the President’s authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field, including the choice of particular persons to perform specific command functions in those missions.”⁶²³ In doing so, the opinion did not cite, let alone discuss, *Youngstown*. Nor did it account for the fact that the proposed legislation would *not* have prohibited the President from assigning troops to U.N. command — he would have been entitled to do so upon a certification that it would serve the interests of national security, as long as he also filed a timely report to Congress explaining his decision.⁶²⁴

The opinion was not clear as to what “core” power it was protecting. Some of the language suggested that the constitutional problem arose from the attempt to interfere with the President’s capacity to choose his commanders rather than with its infringement of tactical judgments per se.⁶²⁵ In that respect, the OLC analysis might be read as an aggressive, and perhaps unwarranted, application of the well-established principle that the Commander in Chief’s superintendence of the military may not be compromised.⁶²⁶ But the opinion also cited favorably Taft’s *Yale Law Journal* article statement concerning the inviolability of executive decisions regarding troop movements,⁶²⁷ and a Clinton signing statement characterized the offending provision as constitutionally problematic because it restricted “the President’s au-

States.” Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1418, 1476-77 (1993). In signing the bill, President Clinton guaranteed that U.S. forces in Somalia would remain under *operational* command and control of U.S. commanders at all times, but he reserved the authority of the Commander in Chief to place such forces under “the temporary tactical control of a foreign commander where to do otherwise would jeopardize the safety of U.S. combat forces.” Clinton, *supra* note 616, at 1958. The Commander in Chief prerogative asserted in the 1996 OLC U.N. Control Opinion is significantly broader — it is not limited to cases of tactical control or cases in which the safety of forces is in jeopardy.

⁶²² OLC U.N. Control Opinion, *supra* note 621, at 185 (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)) (internal quotation marks omitted).

⁶²³ *Id.*

⁶²⁴ OLC viewed this certification and reporting requirement as a “condition[] precedent” to exercise of a “core constitutional power” and concluded that Congress may not “burden or infringe” such a core power by attaching any conditions precedent. *Id.* at 187.

⁶²⁵ Thus, OLC concluded, “there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces.” *Id.* at 184.

⁶²⁶ For a critique of the OLC Opinion, see Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress’s Power to Restrict the President’s Authority To Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50 (1999).

⁶²⁷ OLC U.N. Control Opinion, *supra* note 621, at 184.

thority to make and implement decisions relating to the operational or tactical control of elements of the U.S. armed forces.”⁶²⁸

(b) *Legislation Regulating Foreign Deployments.* — President Clinton also invoked the Commander in Chief Clause in several signing statements concerning measures regulating foreign deployments. The statements had a remarkably similar formulation, one that seemed designed to explain how the statutory language would be construed rather than to assert that a constitutional problem would be raised if such a construction were not adopted. Thus, although such statements certainly did not disclaim the existence of preclusive powers, they appeared to be serving notice that the measures would be interpreted to accord flexibility in emergencies.⁶²⁹ Some of those signing statements objected to reporting requirements.⁶³⁰ Others objected to more substantive requirements and limitations.

⁶²⁸ William J. Clinton, Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226, 226 (Feb. 10, 1996). The OLC U.N. Control Opinion, *supra* note 621, also resulted in at least two subsequent signing statements in which President Clinton suggested he would not comply with similar limitations on assignment of troops to foreign command because they “unconstitutionally constrain . . . my authority as Commander in Chief.” William J. Clinton, Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 2 PUB. PAPERS 1843, 1847 (Oct. 26, 1998) (regarding Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, div. A, tit. VI, § 610, 112 Stat. 2681, 2681-112); *accord* William J. Clinton, Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, 2 PUB. PAPERS 1666, 1667 (Nov. 26, 1997) (regarding Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, tit. VI, § 610, 111 Stat. 2440, 2517).

⁶²⁹ We should also note that in most of these statements, as well as in some of the OLC Opinions, Clinton’s Commander in Chief objections were joined with objections that certain enactments intruded too deeply or directly on what the President viewed as a plenary power *over foreign affairs*, especially negotiations and arrangements with other nations. This broader asserted constitutional prerogative, not limited to the military or to Commander in Chief functions, was a prominent constitutional theme in the Clinton Administration. *See, e.g.*, Bill To Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off. Legal Counsel 123, 124-26 (1995); *see also* POWELL, *supra* note 529.

⁶³⁰ *See, e.g.*, William J. Clinton, Statement on Signing the Department of Defense Appropriations Act, 2000, 2 PUB. PAPERS 1981, 1981 (Nov. 4, 1999) (“I am concerned about section 8074, which contains certain reporting requirements that could materially interfere with or impede this country’s ability to provide necessary support to another nation or international organization in connection with peacekeeping or humanitarian assistance activities otherwise authorized by law. I will interpret this provision consistent with my constitutional authority to conduct the foreign relations of the United States and my responsibilities as Commander in Chief.”); William J. Clinton, Statement on Signing the Department of Defense Appropriations Act, 1999, 2 PUB. PAPERS 1819, 1820 (Oct. 17, 1998) (stating that the President would interpret and implement a provision requiring him to report to Congress prior to additional deployment of armed forces to Yugoslavia, Albania, or Macedonia “consistent with my constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive, and not in a manner that would encumber my constitutional authority”); William J. Clinton, Statement on Signing the Department of Defense Appropriations Act, 1998, 2 PUB. PAPERS 1322, 1322 (Oct. 8, 1997) (stating similar objection to that in the Statement on Signing the Department of Defense Appropriations Act, 2000); William J. Clinton, Statement on Approval of the Department of Defense Ap-

For example, Clinton expressed concern with the alleged “inflexibility” of a 1994 appropriations measure that denied the availability of funds provided in that act for military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action necessary to protect the lives of United States citizens.⁶³¹ Similarly, in 1999, Congress passed a provision stating that “[n]o funds available to the Department of Defense during fiscal year 2000 may be expended after May 31, 2000, for the continuous deployment of United States Armed Forces in Haiti pursuant to the Department of Defense operation designated as Operation Uphold Democracy.”⁶³² Although Clinton had already decided to terminate the Haiti deployment, he issued a signing statement that the limitation “concern[ed]” him, and that “I will interpret this provision consistent with my constitutional responsibilities as President and Commander in Chief.”⁶³³

In at least one instance, Clinton went further and appeared to claim a power to defy a restriction on his preferred use of troops abroad. The issue arose in connection with a provision of a budget bill that conditioned funding for diplomatic efforts in Vietnam on that country’s actions in assisting to identify the remains of Americans, and to account for POWs and MIAs in Vietnam.⁶³⁴ A footnote in an OLC Opinion focusing on other constitutional problems with the measure

propriations Act, 1996, 2 PUB. PAPERS 1813, 1813 (Nov. 30, 1995) (similar); William J. Clinton, Statement on Signing Legislation Regarding United States Policy Toward Haiti, 2 PUB. PAPERS 1897, 1897 (Oct. 25, 1994) (construing provision requiring a detailed description of “the general rules of engagement under which operations of the United States Armed Forces are conducted in and around Haiti” as excluding “information of a sensitive operational nature”); William J. Clinton, Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 1 PUB. PAPERS 807, 809 (Apr. 30, 1994) (stating that the President would construe reporting and notification requirements, including a requirement for fifteen-day advance notification (with no waiver provision) before the United States provides certain in-kind assistance to support U.N. peacekeeping operations, as consistent with the President’s “constitutional prerogatives and responsibilities as Commander in Chief”).

⁶³¹ William J. Clinton, Statement on Signing the Department of Defense Appropriations Act, 1995, 2 PUB. PAPERS 1676, 1676 (Sept. 30, 1994) (stating that he would interpret the legislation — Pub. L. No. 103-335, tit. IX, 108 Stat. 2599, 2659–60 (1994) — “consistent with . . . my responsibility as Commander in Chief”).

⁶³² National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1232(a), 113 Stat. 512, 788 (1999).

⁶³³ William J. Clinton, Statement on Signing the National Defense Authorization Act for Fiscal Year 2000, 2 PUB. PAPERS 1685, 1687–88 (Oct. 5, 1999). In addition, in 1998, Clinton wrote of his concern with several unspecified provisions of an authorization act that “could be interpreted to intrude unconstitutionally on the President’s authority to . . . direct the military as Commander in Chief” and of his intent to “interpret these provisions in light of my constitutional responsibilities.” William J. Clinton, Statement on Signing the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, 2 PUB. PAPERS 1817, 1819 (Oct. 17, 1998).

⁶³⁴ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 609, 110 Stat. 1321, 1321-63 to 1321-64.

explained that “[t]here is [an] apparent constitutional flaw in section 609: it purports to prescribe to the President the manner in which he must proceed to recover the remains Such detailed prescriptions may well encroach on the President’s constitutional authority as Commander in Chief. We do not press that objection here.”⁶³⁵

G. The George W. Bush Administration

The Administration of George W. Bush has embraced the aggressive preclusive claims of its predecessors, and even pushed them to their logical extremes, while evincing none of the tempering impulses one detects in the statements of the Nixon, Ford, Carter, and Clinton Administrations. Most importantly, the Administration has gone beyond merely asserting the preclusive power in signing statements, veto messages, or memoranda to Congress. It appears to have relied upon such claims to engage in outright defiance of statutory restrictions in exercising coercive governmental authority. With the exception of the actions of President Ford in the extraordinary chaos of the last days of the Vietnam War, we are not aware of a similarly consequential act of executive disregard, premised on executive war powers, undertaken in

⁶³⁵ Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. Off. Legal Counsel 189, 190 n.3 (1996). The Clinton-era OLC also issued opinions asserting a preclusive Executive prerogative with respect to the disposition of national security information in the government’s control. In 1997, OLC concluded that in “extraordinary circumstances,” such as where grand jury testimony reveals a plot to bomb a major government building, the President can authorize federal attorneys to share grand jury materials with intelligence officials, even though Rule 6(e) of the Federal Rules of Criminal Procedure would prohibit such information-sharing. Disclosure of Grand Jury Material to the Intelligence Community, 21 Op. Off. Legal Counsel 159, 172–75 (1997). In 2000, OLC applied this same reasoning to information that law enforcement officials obtain through electronic surveillance, concluding that law enforcement officials could share such information with the intelligence community in “extraordinary circumstances,” if it is “vital to national security,” even though Title III of the Omnibus Crime Control and Safe Streets Act would prohibit such information-sharing. Sharing Title III Electronic Surveillance Material with the Intelligence Community, 2000 WL (OLC) 33716983, at *9. In the course of its discussions in these opinions, OLC sometimes sounded a notion of an executive national-security prerogative that was rather sweeping. But the opinions did not depend on such assertions. Instead, they appear to have been premised primarily on the notion that the President must enjoy a certain sort of superintendence prerogative within the executive branch as a whole when it comes to national security information — that Congress cannot prevent lower-level officials and attorneys from sharing such information with the President. Moreover, in these opinions OLC did not rely exclusively on the Commander in Chief Clause — after all, the statutes in question did not have anything to do with the armed forces — but, more broadly, on an assertion of a broad and undifferentiated authority concerning national security or foreign relations. In both cases, OLC invoked the Commander in Chief Clause because the Supreme Court had indicated in *Egan* that that clause is a source of the President’s authority to control access to information bearing on national security. See, e.g., Sharing Title III Electronic Surveillance Material with the Intelligence Community, *supra*, at *9 n.16 (citing *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). But as we explain in note 595, *supra*, *Egan* hardly supports such a claim to preclusive authority.

the presence of a sitting Congress.⁶³⁶ The Bush Administration has exercised this claimed power, moreover, for prolonged periods of time and on multiple fronts.

The Administration first manifested its approach in the immediate aftermath of the attacks of September 11, 2001. Within a week of the attacks, Congress had overwhelmingly voted for, and the President had signed, legislation authorizing the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁶³⁷

Just one week later, OLC issued a lengthy memorandum espousing a broad view of what the President's unilateral constitutional (or *Youngstown* Category Two) authority would be in the *absence* of the legislative authorization that the President had just obtained.⁶³⁸ The opinion went on, however, to address the Category Three question, contending that where the President is acting in response to a national "emergency" such as an attack from abroad, "we do not think [the President's Commander in Chief power] can be restricted by Congress through, *e.g.*, a requirement that the President either obtain congressional authorization for the action within a specific time frame, or else discontinue the action."⁶³⁹ And, in its final two sentences, the OLC memo asserted that neither the War Powers Resolution nor the force authorization law (nor presumably any other statute) "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."⁶⁴⁰

As we explained in greater detail in our previous Article, the Bush Administration proceeded to apply this robust constitutional position actively. It claimed that the President could disregard an array of important statutes and treaties — from the Torture Act to the Habeas Act of 1867; from the Foreign Intelligence Surveillance Act even to the War Crimes Act; and more — if they happened to interfere with the manner in which he concluded the conflict against al Qaeda should be

⁶³⁶ See *supra* pp. 1071–73 (discussing President Ford's actions and analyzing the underlying rationales). As discussed *supra* at pp. 1062–63, President Truman also contravened a law by impounding funds Congress had allocated to Air Force groups.

⁶³⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

⁶³⁸ OLC 9/25/01 Opinion, *supra* note 477.

⁶³⁹ *Id.* at *18, *reprinted in* THE TORTURE PAPERS, *supra* note 477, at 22; *accord id.* at *18 n.30, *reprinted in* THE TORTURE PAPERS, *supra* note 477, at 22 n.30.

⁶⁴⁰ *Id.* at *19, *reprinted in* THE TORTURE PAPERS, *supra* note 477, at 24.

prosecuted.⁶⁴¹ More recently, President Bush vetoed a bill because, among other things, it would have required initiation of a partial withdrawal of troops from Iraq and regulated the use of remaining troops thereafter — requirements as to which he expressed constitutional doubts.⁶⁴² Furthermore, in scores of signing statements, President Bush has invoked his power as Commander in Chief in objecting to statutory enactments, stating or suggesting that he will not fully comply with them (or will construe them contrary to their natural readings).⁶⁴³ Some of these provisions have involved the manner in which the military shall conduct the campaign against al Qaeda or directives limiting troop deployment and combat operations.⁶⁴⁴ Others have arguably been premised on the well-established superintendence prerogative. Like other Presidents since World War II, however, President George W. Bush has extended his assertion of preclusive powers beyond contexts involving the actual conduct of hostilities to others relating to the organization and use of the armed forces and intelligence agencies.⁶⁴⁵

⁶⁴¹ We canvass the most prominent of these claims in Barron & Lederman, *supra* note 2, at 706–11.

⁶⁴² Message to the House of Representatives Returning Without Approval the “U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007,” 43 WEEKLY COMP. PRES. DOC. 560 (May 1, 2007); see also Barron & Lederman, *supra* note 2, at 693 n.2.

⁶⁴³ See NEIL KINKOPF & PETER SHANE, INDEX OF PRESIDENTIAL SIGNING STATEMENTS: 2001–2007 (2007), <http://www.acslaw.org/files/Signing%20Statement%20Chart%20-%20Neil%20Kinkopf%20and%20Peter%20Shane.pdf> (canvassing Bush’s constitutional objections and identifying which of them have been based, at least in part, on the Commander in Chief Clause).

⁶⁴⁴ See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005) (stating that the executive branch shall construe Title X in Division A of the Act — the Detainee Treatment Act, prohibiting the use of cruel, inhuman, or degrading treatment — “in a manner consistent with the constitutional authority of the President . . . as Commander in Chief”); George W. Bush, Statement on Signing the Intelligence Authorization Act for Fiscal Year 2004, 2 PUB. PAPERS 1791, 1720 (Dec. 13, 2003) (stating that the executive branch shall construe provisions limiting the number of military forces deployed to Colombia for counterdrug and counterterrorism assistance, and limiting the use of funds for military engagement in certain combat operations in connection with such assistance in Colombia, “as advisory in nature, so that the provisions are consistent with the President’s constitutional authority as Commander in Chief”).

⁶⁴⁵ See, e.g., Statement on Signing the John Warner National Defense Authorization Act for Fiscal Year 2007, 42 WEEKLY COMP. PRES. DOC. 1836, 1837 (Oct. 17, 2006) (objecting to a provision prohibiting the retirement of a warship); Statement on Signing the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, 39 WEEKLY COMP. PRES. DOC. 1795 (Dec. 12, 2003) (objecting to statute requiring sanctions against Syria except where the President certifies that such sanctions would not be in the national security interest of the United States); Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 39 WEEKLY COMP. PRES. DOC. 1549 (Nov. 6, 2003) (stating that an entire title of an emergency appropriations act “shall be construed in a manner consistent with the President’s constitutional authorities to conduct the Nation’s foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces,” and

Most recently, the Bush Administration has promulgated a statement of administration policy threatening a veto of a defense authorization bill based on the Commander in Chief Clause if the legislation included a provision requiring an adjudication, with particular procedural protections, of the “unlawful enemy combatant” status of all detainees held for more than two years.⁶⁴⁶ In that same statement, the Administration warned that if the bill contained any proposed amendments restricting actions to “deal effectively” with threats posed by *Iran*, the President would likely veto it, invoking an unqualified theory that “provisions of law that purport to direct or prohibit . . . covert action[] or use of the armed forces are inconsistent with the Constitution’s commitment exclusively to the presidency of the executive power[and] the function of Commander-in-Chief.”⁶⁴⁷

H. Conclusion

There has been an undeniable expansion — one is even tempted to say explosion — of preclusive executive war powers claims between the start of the Korean War and the second Bush Administration. During this period, it appears that every President, save for Carter, invoked this authority in one form or another. These assertions extended beyond the confines of the superintendence and necessity claims that had a well-established pedigree in the period before 1950. Still, one must be careful in assessing this change in executive practice. Administrations varied greatly in the kinds of preclusive assertions they made. The fact that the invocations were so often brief and opaque — at least until some of the more developed and unqualified assertions of the current Bush Administration — adds to the difficulty of discerning the theory that animated them. In many cases, it is not easy to know whether these assertions were intended to lay down markers against unforeseen and exceptional circumstances that might arise, or instead to announce actual defiance of statutory restrictions.

that, in particular, the Inspector General for the Coalition Provisional Authority in Iraq “shall refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counterintelligence matters, [or] ongoing criminal investigations by other administrative units of the Department of Defense related to national security”); Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, 38 WEEKLY COMP. PRES. DOC. 46, 47–48 (Jan. 10, 2002) (objecting to regulations on the provision of defense articles and services for peacekeeping); *id.* at 48 (objecting to a provision imposing caps on the number of employees who can be assigned to legislative affairs or legislative liaison functions within the Department of Defense).

⁶⁴⁶ See OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: S. 1547 — NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008, at 1 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/s1547sap-s.pdf> (objecting to section 1023(a) of S. 1547, 110th Cong. (2007)).

⁶⁴⁷ *Id.* at 3.

This uncertainty underscores the fact that, as much as Presidents plainly became enamored of these claims, the executive branch did not settle upon a set of common principles. Nor was there even agreement across presidencies as to whether such a preclusive power should extend much, if at all, beyond those understandings that were already accepted before 1950. Certainly there was no sustained practice of actually disregarding statutes similar to that we have seen since September 11, 2001. Indeed, some of the statutes that the current Bush Administration claims a constitutional authority to disregard are measures that modern administrations helped to craft and that modern Presidents signed without objection.

Moreover, throughout this period, there was a surge in the flow of statutes directly restricting the President's war powers, even as to the conduct of ongoing campaigns. This countertrend belies the general assumption that Congress has been quiescent in matters of warfare in the face of presidential assertiveness. It also undermines any idea that there was a concord between the branches that military decisions and the command of campaigns are the exclusive preserve of the President.

To be sure, one in search of historical practice to ground the dramatic assertions of preclusive power advanced by the Bush Administration since 2001 could do no better than to look within this fifty-year period. But this era did not establish anything like a consistent political branch practice akin to that concerning the unilateral executive power to deploy troops and to use force abroad. Instead, what resulted was an inchoate jumble of often ill-defined, and occasionally contradictory, executive branch claims sharing space with numerous intrusive statutory and treaty-based limitations, a number of which Presidents accepted as constitutional.

VI. BRINGING OUR CONSTITUTIONAL TRADITION TO BEAR ON DISPUTES AT THE LOWEST EBB

We have emphasized throughout these Articles that the "lowest ebb" issue is more important to the constitutional development of war powers than the prevailing congressional abdication paradigm would suggest. What, then, should happen when the President, in the exercise of his constitutional war powers, confronts a statutory restriction that is at odds with his preferred course of conduct? As we have explained, the text of the Constitution provides no conclusive answer. Nor does a broader examination of the affirmative constitutional powers, whether express or implied, of either of the political branches. In our view, the legislative and executive branches each possess quite substantial independent substantive war powers; these authorities, as Justice Jackson concluded in *Youngstown*, overlap and intersect in important respects. The key constitutional question, therefore, is which, if any, of the President's constitutional war powers are so central to his

performance of his role as the Commander in Chief as to preclude Congress from regulating them.

In broad terms, our historical review has shown that the view embraced by most contemporary war powers scholars — namely, that our constitutional tradition has long established that the Commander in Chief enjoys *substantive* powers that are preclusive of congressional control, especially with respect to the command of forces and the conduct of campaigns — is unwarranted. The fact that this longstanding scholarly assumption about historical consensus is mistaken, however, does not in itself explain what should happen at the “lowest ebb.” Accordingly, we offer our own view of how this tradition bears on the ultimate constitutional conclusions that must be made by those responsible for resolving such issues — whether courts, members of Congress, or actors within the executive branch.

In doing so, we do not mean to suggest that history is dispositive. Just because Presidents have not acted on a theory of preclusive authority — and have only in recent decades even articulated it — does not preclude its contemporary recognition. Past practice does not, in our view, freeze constitutional meaning. Even (and perhaps especially) as to the separation of powers, our constitutional tradition has always been much more tolerant of dynamism. Thus, just as we do not believe a Founding-era consensus can put an end to the need for the exercise of contemporary constitutional judgment in this area, neither do we think longstanding historical practice can entirely pretermit such an inquiry.

We do mean to argue, however, that it is folly to think a sound constitutional judgment can be made as to the proper allocation of war powers without facing up to what the historical practice between the branches has actually shown. A change in constitutional practice cannot be made by turning away from history and examining the relative virtues of the President and the Congress in the abstract. Such an approach would be as impossible as it is indeterminate, because it would ask us to “both exorcis[e] from ourselves the influences of our own traditions and ignor[e] the lessons our society has learned over time.”⁶⁴⁸ Judgments about the proper constitutional roles of the political branches in war are necessarily embedded in historical narratives that, however unconsciously, inform present understandings.

Precisely for that reason, a full account of the actual historical practice is valuable because it challenges the long-accepted narrative about the way Presidents are said to have always acted when it comes to war, and about the way Congress supposedly has long acceded to the imperative of permitting the exercise of such inviolate presidential

⁶⁴⁸ Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 180 (1993).

authority. In particular, the history we have set forth suggests that commonly heard fears and concerns about unchecked executive power should not be discounted. Since we have not had a practice of recognizing such inviolate authority in the Commander in Chief, it cannot be said that such fears and concerns are necessarily overblown. In fact, the Executive's longstanding unwillingness to act in a way that might put those fears to the test itself suggests that they are more substantial than present-day defenders of preclusive Commander in Chief powers would acknowledge.

At the same time, the history we have reviewed casts doubt on the functionalist contention that a President cannot possibly conduct a war so long as he understands himself to be subject to legislatively imposed restrictions. As we have seen, Presidents have long operated on just that assumption, and they have adjusted their actions accordingly — and in ways that cannot be said to have clearly imperiled the nation. Thus the history undermines assertions about the inherent or inevitable unmanageability or dangers of recognizing legislative control over the conduct of war. In other words, this history offers us valuable information about how things have worked in the past, and thereby helps to inform us about what consequences might follow from a constitutional judgment in the here and now.

Moreover, this historical account performs at least one function beyond supplying information relevant to the empirical questions that may arise in constitutional war powers disputes. Such a history also provides important confirmation of what is widely taken to be a fundamental aspect of our national ethos — of how we collectively understand ourselves as a nation. It has long been a central tenet of the American idea — of the basic national story we tell ourselves as early as grade school — that our government is defined by separated and blended powers, with checks and balances that promote public reasoning and debate, preserve democratic self-governance, and protect against concentrations of power in a single figure. The history we have reviewed suggests that this felt understanding is not a myth belied by the way our government has actually operated in times of crisis. Rather, the history shows that this self-conception has deep roots in centuries of political branch practice concerning matters of the gravest national consequence. If a theory of presidential preclusive power were now to take root — such that Presidents began to act, as a matter of course, as if they were entitled to make wartime decisions free of the customary checks, and in ways that prior Presidents simply did not contemplate — then the longstanding narrative about the American system of government might adjust to better fit the new practice. Over time, a story highlighting the imperatives of executive action, and the need for unfettered presidential leadership, might begin to displace the narrative we presently celebrate. The avulsive change in the constitutional law of war powers that some now call for, then,

portends consequences that reach far beyond the way that discrete interbranch battles over the constitutional law of war powers should be resolved. This new, preclusive constitutional practice, if accepted, could influence how we and future generations would conceive of the constitutional system as a whole, such that the ideal of checks and balances might no longer seem so central to what defines the American framework of government. At issue, therefore, is whether present circumstances demonstrate the need for a change that risks such a fundamental revision of our national identity.

A. *The Superintendence Prerogative*

Although the constitutional text does not offer much guidance as to the substantive war powers of the branches, it is difficult to construe the words of the Commander in Chief Clause *not* to establish some indefeasible core of presidential superintendence of the army and the navy (and the militia when they are called into federal service).⁶⁴⁹ As Justice Jackson put it, the Commander in Chief Clause “undoubtedly puts the Nation’s armed forces under Presidential command.”⁶⁵⁰ In addition, as we have seen, there is a longer and much more distinct history of the executive branch asserting such a superintendence prerogative than of it claiming a preclusive authority to disregard *substantive* limitations on the Commander in Chief’s authority. Congress, moreover, has not attempted to enact many statutes that would intrude on such superintendence in a controversial manner. Thus, although it is difficult to ascertain the precise content, or breadth, of this core superintendence prerogative, we think it would be hard to deny that there is some such superintendence core.⁶⁵¹

Consistent with both the constitutional text and the past practice we have examined, Congress cannot, even by statute, appoint a federal

⁶⁴⁹ See Barron & Lederman, *supra* note 2, at 767–70.

⁶⁵⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring); see also *Loving v. United States*, 517 U.S. 748, 772 (1996) (“The President’s duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including the courts-martial.”).

⁶⁵¹ The Commander in Chief Clause is not the only constitutional provision that might bear on such laws respecting superintendence. A statute generally may not, for example, give an agent or component of Congress itself the power to intervene in any executive decisionmaking. See *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986); see also *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (explaining that the vice of the statute in *Myers v. United States*, 272 U.S. 52 (1926), was that Congress had given the Senate a veto over the removal of certain officers); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 131–32 (1996) (describing this “anti-aggrandizement” principle). In addition, the Appointments Clause would prevent Congress from imposing undue limitations on the President’s power to appoint principal officers in the military. See *Civil-Service Commission*, *supra* note 164, at 520–21, 525 (explaining that qualifications Congress sets by statute must be attainable “by a sufficient number to afford ample room for [presidential] choice”).

officer to be the commander in chief of the armed forces, as the Continental Congress did with General Washington during the War of Independence. The Constitution has already designated the President to serve in that role. Moreover, Congress could not *effectively* take away the President's "command" function by prescribing the substantive rules for the military in such exquisite and comprehensive detail that there would be no room left for any "command" function at all. Of course, no legislature is likely to find such a prospect desirable or feasible. Even if Congress were to construct a statutory regime that regulated military functions to a far greater degree of specificity than it has ever done in the past, it would still be the case that the overwhelming majority of decisions within the military — both the innumerable tactical and strategic decisions necessary to a military campaign, and the even more numerous, everyday decisions made within the military establishment in peacetime, and in contexts outside of active warfare — would be left to command discretion. Therefore, the President's function of command will be considerable even if a particular Congress is quite assertive.

If we move beyond such extreme and even fanciful cases, the question is *which* functions of the armed forces (and the militia) — discretionary functions, in particular — Congress may statutorily remove from the President's ultimate control and assign to other actors outside the President's supervision.⁶⁵² Elsewhere in the executive branch — that is to say, outside the context of the armed forces and military matters — Congress has extensive power, within limits, to assign certain functions to executive officers or employees who are, to one degree or another, "independent" of the President.⁶⁵³ The "independence" that is permissible in areas such as the administration of federal monetary policy, the prosecution of certain criminal laws, and the functions of

⁶⁵² Presumably Congress could assign purely ministerial, executory functions — commands to follow specific statutory mandates that leave no room for discretion or judgment — to officers or employees other than the President, without diminishing any meaningful presidential "command" function, so long as sufficient supervisory capacity remained.

⁶⁵³ Of course, the proper contours of such "independence" have been famously contested and, at least until the past two decades, somewhat indeterminate. Compare *Myers*, 272 U.S. 52, with *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). And there are those who would argue that the "unitary" executive must have effective control over *all* Article II functions, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994), in which case the superintendence guaranteed by the Commander in Chief Clause would not appear to do any additional work with respect to superintendence. The general modern consensus, however, affirmed by the Court, is that Congress may establish significant independence of certain executive branch actors, at least as to most functions, and subject to the qualification that the President must be afforded some means of assuring that the laws are faithfully executed. See *Morrison*, 487 U.S. at 685–93; The Constitutional Separation of Powers, *supra* note 651, at 106–18; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

the National Labor Relations Board or Federal Trade Commission,⁶⁵⁴ might be constitutionally dubious with respect to similarly consequential positions of authority in the military establishment. The Executive's repeated assertion of his prerogative of superintendence, even in areas in which the Executive did not assert (in fact, even disclaimed) a preclusive substantive power, accords with this view, and statements of the Court also support it.⁶⁵⁵ In light of the Founders' quite evident fears about permitting control of the military establishment to be shifted to someone other than the Commander in Chief (particularly military officers not subject to civilian control), this historical consensus seems to us sufficient to indicate that the occasional congressional acts that have been inconsistent with it should be regarded as transgressions of the constitutional plan. Thus, no statute could appoint someone else, such as the Army Chief of Staff or a NATO commander, to be the "Commander in Chief" of the armed conflict of a particular campaign, such as the conflict against al Qaeda or the war in Iraq, and insulate that officer from presidential direction or removal.⁶⁵⁶ Furthermore, the Andrew Johnson Administration was likely right to invoke this basic limitation even with regard to major military functions ancillary to war, such as when Congress effectively shifted command

⁶⁵⁴ See Federal Reserve Act, 12 U.S.C. §§ 241–242 (2000) (providing that members of the Federal Reserve Board have fourteen-year terms and are removable only "for cause" by the President); Federal Trade Commission Act, 15 U.S.C. § 41 (2000) (providing that Federal Trade Commissioners have fixed terms and may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office"); National Labor Relations Act, 29 U.S.C. § 153(a) (2000) (providing that members of the National Labor Relations Board shall have fixed terms and may be removed by the President only for "neglect of duty or malfeasance in office"); *Morrison*, 487 U.S. at 685–93; see also 44 U.S.C.A. § 3502(5) (West 2007) (identifying seventeen "independent regulatory agenc[ies]" (internal quotation marks omitted)).

⁶⁵⁵ See, e.g., *United States v. Sweeney*, 157 U.S. 281, 284 (1895) ("[T]he object of the provision is evidently to vest in the President the supreme command over all the military forces[] — such supreme and undivided command as would be necessary to the prosecution of a successful war."); *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1875) ("[T]he President alone . . . is constitutionally invested with the entire charge of hostile operations . . .").

⁶⁵⁶ The reverse question was posed by the statute, to which the Clinton Administration objected, which would have forbidden the President from placing United States armed forces under the command of U.N. personnel. See *supra* pp. 1091–92. In that instance, Congress did not try to vest control of the military in someone other than the President. It instead sought to prevent the President from provisionally delegating command of the forces to a particular set of actors (subject at all times, of course, to reassertion of presidential control). As we have suggested, that restriction might itself be thought to infringe the President's superintendence prerogative by impermissibly circumscribing his choice of commanders. Congress plainly may, however, place limits on who may serve in the military and presumably may even require commanders to be citizens of the United States. It is difficult to see why the more narrow version of this limitation contained in the U.N. command statute creates a distinct constitutional problem, unless one thought that, in context, it failed to provide the "ample room" for presidential choice of officers that the Appointments Clause, perhaps in this special context implicating the powers of the Commander in Chief, requires. See *supra* note 651.

of the army's role in reconstruction of the South from the President to General Grant.⁶⁵⁷

What other parameters for the preclusive superintendence prerogative does the Commander in Chief Clause require? The broadest argument would be that the President must be able to direct *all* discretionary decisions to be made within the armed forces and the (federalized) militia, no matter their subject matter. This was, in effect, the view the Buchanan Administration expressed in the case of Captain Meigs and the Potomac River aqueduct.⁶⁵⁸ Such an argument does not strike us as compelling in a case (such as the Meigs affair) where Congress could effect independence of direction simply by shifting the non-military function to an agency outside the Pentagon. But where distinctly *military judgments* are at issue, we think the argument has more force.⁶⁵⁹

However, even if Congress cannot transfer military discretion from the President to one of his subordinates, the contours of a principle of presidential superintendence over discretionary military decisions have historically been limited in important respects. Each of the branches has long accepted, for example, that Congress can provide for courts-martial to have a decisive role, even countermanding the President's judgments, in some *personnel* questions, including dismissal from the service.⁶⁶⁰ This example is representative of what appears to be a more general consensus understanding among the branches — unchallenged until the George W. Bush Administration — that if Congress establishes a substantive standard for wartime executive detention, Congress can also decide that the President's adherence to such standards may be assessed by an adjudicatory tribunal. As cases from *Brown*, *Milligan*, and *Youngstown* to *Rasul* and *Hamdan* appear to demonstrate, Congress can empower the federal courts to adjudicate cases challenging the Executive's exercise of war powers (for example, on petitions for habeas corpus, including those filed by alleged enemy detainees), and to issue orders compelling the President to comply with statutory and treaty-based (and constitutional) mandates.

Such an understanding has obvious echoes in the longstanding doctrine, exemplified in *Humphrey's Executor v. United States*,⁶⁶¹ that executive constitutional prerogatives are less seriously implicated where *adjudicatory* (rather than purely "executive") functions are exercised

⁶⁵⁷ See *supra* pp. 1022–24.

⁶⁵⁸ See *supra* pp. 984–86.

⁶⁵⁹ Cf. *Swaim v. United States*, 165 U.S. 553, 556–58 (1897) (declining to construe a statute to make the President's power to appoint courts-martial dependent on the decisions of subordinate commanders); *supra* note 434.

⁶⁶⁰ See *supra* pp. 1017, 1031–32 (discussing statutes).

⁶⁶¹ 295 U.S. 602, 628–29 (1935).

free from presidential control, even within the executive branch. In other, non-military contexts the Court has more recently pulled back from the task of strictly distinguishing between “quasi-judicial” and “purely executive” functions and officers.⁶⁶² Nevertheless, there are strong indications that in the context of the Commander in Chief’s preclusive prerogative of military superintendence, an “adjudicatory” exception persists, although its contours are far from clear.⁶⁶³

*B. The Substantive Preclusive
Prerogatives of the Commander in Chief*

When we shift our focus away from the superintendence question to executive challenges to the congressional power to regulate the *substantive* decisions of the Commander in Chief, the evidence of original understanding is far less supportive of preclusive executive power. It accords instead with the conclusion that the Founders contemplated congressional control of military operations, and betrays little evidence of a consensus assumption that tactical matters were reserved for the President alone. The executive branch itself, moreover, did not unequivocally assert such a broad substantive preclusive power until 1950, and even thereafter, it did so only inconsistently. Congress, for its part, throughout our history has adopted intrusive measures regulating executive war powers, including some in the midst of battle. Consistent with the practices of the political departments, the Supreme Court has never held that any statutory limitations on substantive executive war powers have unconstitutionally infringed the core prerogatives of the Commander in Chief. And this is so even in the recent

⁶⁶² See *Morrison v. Olson*, 487 U.S. 654, 687–91 (1988).

⁶⁶³ FISA, for example, requires a sort of adjudicatory review. The President cannot engage in domestic electronic surveillance without first demonstrating to a federal court that certain statutory prerequisites have been satisfied. The more an “adjudication” that is statutorily required strays from ordinary notions of a case or controversy, however, the more problematic would be the congressional decision to vest the ultimate decisionmaking power in an actor not subject to the President’s superintendence. The FISA proceedings are *ex parte*, but the FISA court is generally thought to be exercising the Article III “judicial power” in making its warrant-like determinations, the notion being that the court is adjudicating a proceeding in which the target of the surveillance is the party adverse to the government, just as Article III courts resolve warrant applications proceedings in the context of conventional criminal prosecutions without occasioning constitutional concerns about the judicial power. See Memorandum from John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, to Hon. Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence, *supra* note 566 (concluding that FISA proceedings were sufficiently analogous to ordinary warrant proceedings in the traditional criminal law context to avoid any serious problems in this regard); see also *In re Sealed Case*, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002) (noting that “there is [not] much left to an argument . . . that the statutory responsibilities of the FISA court are inconsistent with Article III case and controversy responsibilities of federal judges”); *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982) (noting that FISA courts are properly constituted under Article III).

cases (such as, especially, *Rasul*) in which the Executive has advanced such a claim of uncheckable power.

Although we think courts would be acting consistent with, rather than in contravention of, our constitutional tradition if they were to continue to reject claims of preclusive substantive authority under the Commander in Chief Clause, we doubt that courts will choose to resolve *categorically* whether the President possesses preclusive substantive war powers. More likely, they will follow their ordinary practice of upholding such statutory restrictions as they encounter, while leaving unresolved the question of whether some other statutory restrictions not presented to them might go too far. This more modest judicial approach is both understandable and prudent. The cases that arise at the “lowest ebb” and are likely to reach the courts, given jurisdictional constraints and prudential doctrines, are overwhelmingly likely to implicate the individual rights of U.S. persons and persons under U.S. control. By contrast, courts are much less likely to resolve constitutional clashes concerning more classic battlefield restrictions in foreign engagements, such as those contained in legislation concerning the war in Iraq. Therefore, in the course of affirming the constitutionality of the restrictions they are called upon to enforce, courts are unlikely to have any compelling reason to issue opinions addressing the extent of the executive preclusive war powers *vel non*.

But while courts would be unlikely to announce a categorical rule that the President lacks a trumping power in all cases involving the conduct of campaigns, we think they would be unwise to suggest, let alone to hold, that some such preclusive power is established by the Constitution. In this respect, Justice Jackson’s agonized, and thus opaque, evaluation of the “lowest ebb” question in his *Youngstown* concurrence strikes us as a more appropriate judicial approach than was the *Hamdan* Court’s recent invocation, in dicta, of Chief Justice Chase’s statement asserting a general preclusive power as to the conduct of campaigns. Given the inherent indefiniteness of the proposition that the President has preclusive power over the conduct of campaigns, an apparent judicial endorsement of that proposition is bound to invite executive branch assertions that are both more expansive than the courts intended to countenance and unlikely ever to be subject to judicial scrutiny.

The fact that many interbranch disputes over war powers will not be resolved in court does not mean they will be uninfluenced by constitutional understandings. As we have explained, executive branch lawyers, no less than congressional actors, cannot avoid proffering constitutional arguments and reaching constitutional conclusions regarding the binding nature of statutory limitations on a President’s exercise of war powers. In light of the original understanding of such limitations, and the constitutional practices that have accorded with it, we think the argument that tactical matters are “for the President

alone,”⁶⁶⁴ as the Bush Administration has boldly argued, should not guide executive branch action in this area.

To conclude that our constitutional tradition does not leave the conduct of campaigns to the President alone is not to endorse a rigid view of our constitutional system that would deprive the Chief Executive of all flexibility in responding to emergencies. No doubt, as Lincoln suggested, Presidents would have some basis for disregarding restrictions where actually necessary to preserve the nation. Certainly, one would be unlikely to find any clearly articulated congressional opposition to such a reasonable notion. But thankfully there has never been any occasion for a President to test this proposition. There is, moreover, not-insignificant historical precedent for, and even some legislative acknowledgement of, the notion that the Executive may rely upon his war powers to act in contravention of a statutory limitation during an emergency so long as Congress is not in session and the President can reasonably be said to be acting as the legislature’s surrogate.

In addition, history indicates that policy-based executive branch objections to statutory restrictions, tendered in legislative negotiations or veto messages, are entirely appropriate. So, too, are presidential efforts to clarify that a proposed measure includes implicit exceptions for unforeseen exigencies, such as a sudden attack or the emergence of a direct threat to armed forces in the course of ongoing hostilities, thereby setting the stage for the longstanding tradition of “practical” executive branch constructions of war-related measures. By relying on these strategies, and combining them with the Executive’s many other institutional advantages, Presidents have managed to create a great deal of leeway for themselves.

Nevertheless, Chief Executives have in many cases encountered statutes imposing constraints that could not be interpreted away. They have faced them, moreover, in circumstances in which the historically recognized necessity or temporary emergency claims could not plausibly have been asserted. For reasons explained in our previous Article, Executives should expect to confront similar statutory constraints in the future. For the Executive now to contend that such restrictions would actually be unconstitutional would mark a substantial departure from two centuries of practice. For most of our history, the practice instead has been for Executives to abide by limitations (sometimes while expressly affirming their constitutionality) and to find alternative

⁶⁶⁴ OLC 9/25/01 Opinion, *supra* note 477, at *19, *reprinted in* THE TORTURE PAPERS, *supra* note 477, at 24.

means of accomplishing their desired ends.⁶⁶⁵ It is only since 2001 that a practice of actual defiance and disregard has emerged.

Sometimes the claim underlying this new practice is defended as if it accorded with longstanding executive branch practices or even original design. Such claims are also defended, however, on the alternative ground that the circumstances have changed, such that the war on terrorism or the unique complexities of foreign relations in a nuclear era makes it untenable for the President to be hamstrung by “dead hand” restrictions of an earlier age, even where such restrictions might previously have been tolerable, or to be subject to new limitations, especially when enacted after military operations have commenced. In light of the evidence of historical practice and original understanding we have set forth, such claims must be evaluated with a full appreciation of just how novel they are. They cannot fairly be described as contemporary manifestations of a constitutional power that Executives have always asserted. Nor can they be said to have been provoked by the sudden emergence in the modern period of highly intrusive legislative restrictions on executive war powers. Chief Executives have long been confronted with intrusive congressional restrictions on their war powers, and they have responded to them for most of our history without claiming a need to disregard such limits. This longstanding executive accommodation of congressional intervention must be given its due weight in evaluating the normative argument that modern circumstances require a President to be unfettered in the conduct of military campaigns. That is not because past practice requires blind obedience. It is, instead, because a consistent constitutional tradition offers insight into contemporary understandings of the constitutional plan.

At the least, this history shows that for more than a century, there was a working, dynamic practice within the political departments in which neither the Executive nor the legislature acted as if the Constitution prohibited congressional regulation. This historical settlement

⁶⁶⁵ For example, the Executive made no objection to the restriction enforced in *Little v. Barreme*; Lincoln accepted the limitations on his detention powers contained in the Habeas Act of 1863 and the obligations to seize enemy property enacted in the Second Confiscation Act; and Roosevelt abided by the restrictions on his powers to deploy the full complement of troops to Iceland and to provide mosquito boats to Britain in the run-up to World War II. Even in modern times, with the principal exception of President Ford at the end of the Vietnam War, the nation’s chief commanders, for all their broad talk of preclusive war powers, generally have abided by, and on occasion even conceded the legality of, the vast majority of the restrictions on their authority to conduct military campaigns. Of course, there may be minor exceptions, such as Truman’s “impoundment” of appropriated funds; and it is impossible to ascertain how many of the signing statement objections in the past two decades have resulted in *sub rosa* statutory disregard. In addition, some Presidents, such as Nixon and Reagan, have publicly asserted or implied that the War Powers Resolution time limit is unconstitutional, but it appears that no President has actually violated it on the basis of a claimed constitutional prerogative to disregard the statute.

plainly has its virtues, which are not difficult to identify, and which should not be casually discounted. An Executive who believes that existing law unduly constrains his military discretion, but who nonetheless disclaims a preclusive prerogative, would have no choice but to act differently from one who is convinced the Constitution confers unfettered war powers on the Commander in Chief. Rather than assuming he is entitled to disregard existing legal obstacles, such a President will feel obliged to grapple with existing constraints, take seriously their purposes, and perhaps revisit his initial assessment that they are problematic. He will, in other words, take heed of Justice Kennedy's reminder in *Hamdan* of the value of constraints formulated through "a deliberative and reflective process engaging both of the political branches" and removed from "the pressures of the moment."⁶⁶⁶ As Justice Kennedy explained, "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis."⁶⁶⁷

Insofar as such a Commander in Chief nevertheless concludes that the existing constraints are harmful, and that significant changes are needed, an acknowledgment of statutory supremacy will still be important. A President respectful of such constraints will be compelled to provide public justifications for the legal changes he favors, which will effectively subject his proposals to the crucible of public debate. Such a requirement not only helps to ensure that the President's preferred means of exercising wartime authority enjoy substantial popular support, but also necessarily exposes the President's favored course of conduct to scrutiny and critique by an array of others with valuable knowledge and experience. In this way, respect for the lawful authority of statutory constraints on executive war powers permits the ordinary legislative process (over which the President obviously has extraordinary influence, especially in wartime⁶⁶⁸) to temper and correct possible errors or misjudgments that the President might make if left to his own devices.

It is just as likely that executive rejection of preclusive authority would have salutary effects in cases where Congress imposes new con-

⁶⁶⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part).

⁶⁶⁷ *Id.*

⁶⁶⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring) ("By his prestige as head of state and his influence upon public opinion [the President] exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness. Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.").

straints in the midst of an armed conflict. After all, as to such new measures, a President without preclusive power cannot even complain that he has been put in the untenable position of having to cajole an inert or irresponsible legislature to correct a prior mistake by enacting a repeal. Rather, given his veto authority and his other substantial forms of influence on the legislative process, the President's only complaint in such cases would be that it is unfair to require him to offer a persuasive enough argument to convince an often-gridlocked legislative assembly to remain quiescent. Such a complaint should surely be met with skepticism, given that there would have to be some unusually compelling basis for both Houses to countermand the Commander in Chief in the midst of military hostilities.⁶⁶⁹

Given the attractions of what had been the norm for most of our history, it is difficult for us to see why prior constitutional practice should be jettisoned on the basis of necessarily speculative claims about the unique dangers of the modern age. If it were the case that Presidents had always claimed, and acted upon, a conviction that Congress has no legal authority to regulate the conduct of war — and, especially, if Congress had impliedly acquiesced in such a view — the case for recognizing such unchecked executive authority would be stronger. The burden to justify a sharp change in constitutional practice would then fall back on defenders of congressional authority, who would be required to explain how it could be that a deliberative assembly should be empowered by statute to interfere with the operational decisions of the chief commander. But that is not what the history shows. It reveals instead that the conduct of war has long been carried out within a legal culture that has accepted a legislative power to control the Chief Executive as to military matters, even during wartime.

VII. CONCLUSION

Powers once claimed by the Executive are not easily relinquished. One sees from our narrative how, in a very real sense, the constitutional law of presidential power is often made through accretion. A current administration eagerly seizes upon the loose claims of its predecessors, and applies them in ways perhaps never intended or at least not foreseen or contemplated at the time they were first uttered. The unreflective notion that the “conduct of campaigns” is for the President alone to determine has slowly insinuated itself into the consciousness of the political departments (and, at times, into public debate), and has gradually been invoked in order to question all manner of regulations, from requirements to purchase airplanes, to limitations

⁶⁶⁹ See Barron & Lederman, *supra* note 2, at 759–60.

on deployments in advance of the outbreak of hostilities, to criminal prohibitions against the use of torture and cruel treatment. In this regard, the claims of the current Administration represent as clear an example of living constitutionalism in practice as one is likely to encounter. There *is* a radical disjuncture between the approach to constitutional war powers the current President has asserted and the one that prevailed at the moment of ratification and for much of our history that followed.

But that dramatic deviation did not come from nowhere. Rarely does our constitutional framework admit of such sudden creations. Instead, the new claims have drawn upon those elements in prior presidential practice most favorable to them. That does not mean our constitutional tradition is foreordained to develop so as to embrace unchecked executive authority over the conduct of military campaigns. At the same time, it would be wrong to assume, as some have suggested, that the emergence of such claims will be necessarily self-defeating, inevitably inspiring a popular and legislative reaction that will leave the presidency especially weakened. In light of the unique public fears that terrorism engenders, the more substantial concern is an opposite one. It is entirely possible that the emergence of these claims of preclusive power will subtly but increasingly influence future Executives to eschew the harder work of accepting legislative constraints as legitimate and actively working to make them tolerable by building public support for modifications. The temptation to argue that the President has an obligation to protect the prerogatives of the office asserted by his or her predecessors will be great. Congress's capacity to effectively check such defiance will be comparatively weak. After all, the President can veto any effort to legislatively respond to defiant actions, and impeachment is neither an easy nor an attractive remedy.

The prior practice we describe, therefore, could over time become a faint memory, recalled only for the proposition that it is anachronistic, unsuited for what are thought to be the unique perils of the contemporary world. Were this to happen it would represent an unfortunate development in the constitutional law of war powers. Thus, it is incumbent upon legislators to challenge efforts to bring about such a change. Moreover, executive branch actors, particularly those attorneys helping to assure that the President takes care the law is faithfully executed, should not abandon two hundred years of historical practice too hastily. At the very least, they should resist the urge to continue to press the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war.