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ARTICLE

THE COMMANDER IN CHIEF AT THE LOWEST EBB —
FRAMING THE PROBLEM, DOCTRINE,
AND ORIGINAL UNDERSTANDING

David J. Barron & Martin S. Lederman

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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. In this Article, 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." Contrary to the traditional assumption that Congress has ceded the field to the President when it comes to war, the Commander in Chief often operates in a legal environment instinct with legislatively imposed limitations. In the present context, the Bush Administration has been faced with a number of statutes that clearly conflict with its preferred means of prosecuting military conflicts. The Administration's response, based on an assertion of preclusive executive war powers, has been to claim the constitutional authority to disregard many of these congressional commands.

This Article is the first of a two-part effort to determine how the constitutional argument concerning such preclusive executive war powers is best conceived. Professors Barron and Lederman demonstrate that, notwithstanding recent attempts to yoke the defense of executive defiance in wartime to original understandings, there is surprisingly little historical evidence supporting the notion that the conduct of military campaigns is

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beyond legislative control. Thus stripped of its assumed roots in a supposedly longstanding tradition, and considered in light of the long pattern of executive acceptance of constraining statutes, the Administration's recent assertion of preclusive war powers is revealed as a radical attempt to remake the constitutional law of war powers.

This Article begins by explaining why the debate about the "lowest ebb" is now emerging as the primary constitutional war powers question, and by addressing the methodological missteps that have typically infected this debate. It then explores recent attempts to identify the preclusive prerogatives of the Commander in Chief and explains why the tests often deployed to cabin the scope of the presumed preclusive power are flawed. Finally, it reviews the relevant Supreme Court precedent, along with the constitutional text, the historical context in which the text was written, and the original understandings, and sets the stage for the post-Founding historical review contained in the next Article.

I. INTRODUCTION

Since at least the Vietnam War, discussions of constitutional war powers have consistently depicted a Congress so fearful of taking responsibility for wartime judgments that it hardly acts at all. Although there is an important element of truth in this common understanding, it is also misleading. In particular, whatever utility the scholarly paradigm of congressional abdication might once have had, it is inadequate in the special context of the so-called "war on terrorism."¹ The specific methods and means of warfare that this conflict privileges; the unusual and geographically transient nature of the non-state enemy that it targets; and a host of other factors all conspire to ensure that the President's prosecution of the conflict against al Qaeda will bump up against statutory regulations more often than has been the case in traditional military operations. Moreover, the congressional abdication paradigm is not even adequate to explain important war powers issues that now often arise in more traditional military contexts. It is commonly thought that the de facto expansion since the Korean War of unilateral executive authority to use military force confirms Congress's timidity. But if a war goes badly, or if concerns about its wisdom become significant, the modern Congress has been willing — more than in previous eras — to temper or constrain the President's preferred prosecution of the war, and sometimes even to contract or end the conflict contrary to the President's wishes. For this reason, the Commander in Chief increasingly confronts disabling statutory restrictions even in conducting conventional military operations abroad.

¹ In these Articles, we will occasionally refer to the "war on terrorism." By this we mean only to refer to the particular armed conflict Congress authorized in September 2001 against those responsible for the attacks on September 11, 2001. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

In this Article, therefore, we disclaim the traditional assumption that Congress has ceded the field to the President when it comes to war, and proceed from a contrary premise: that even when hostilities are underway, the Commander in Chief often operates in a legal environment instinct with legislatively imposed limitations. This reframing suggests that executive defiance is no less important a potential threat to the balance of war powers than legislative inaction, and thus that the constitutional war powers issue that now demands scrutiny is very different from the one that has long attracted the lion's share of academic attention. Over the past half-century, the predominant question has been the scope of the President's independent or "inherent" power as Commander in Chief to act in the absence of prior congressional authorization. By contrast, we argue, attention should now shift to the equally fundamental questions of whether and when the President may exercise Article II war powers in contravention of congressional limitations.

The need to examine this issue has become particularly urgent precisely because President George W. Bush and his lawyers have recognized that the congressional abdication paradigm poorly describes the legal world they inhabit. Having identified a number of statutes that clearly do conflict with its preferred means of prosecuting military conflicts, the Bush Administration has proceeded to claim the constitutional authority to disregard many of them. The Administration's legal theory that Congress is severely constrained in its ability to interfere with presidential discretion extends not only to measures already enacted to govern the conduct of the war on terrorism, but also to those that have been proposed concerning the war in Iraq.² Thus, the war powers issue that is now at the forefront of the most important clashes between the political branches — and that is likely to remain

² See 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) [hereinafter Message to the House of Representatives] (vetoing H.R. 1591, in part on the ground that "it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the Presidency by the Constitution, including as Commander in Chief of the Armed Forces"). The bill provided that "the Secretary of Defense shall commence the redeployment of the Armed Forces from Iraq not later than October 1, 2007, with a goal of completing such redeployment within 180 days," and that after the completion of redeployment, troops could be used in Iraq only to: (1) protect American diplomatic facilities and American citizens, including members of the U.S. armed forces; (2) serve in roles consistent with customary diplomatic positions; (3) engage in "targeted special actions limited in duration and scope to killing or capturing members of al-Qaeda and other terrorist organizations with global reach"; and (4) train and equip members of the Iraqi Security Forces. H.R. 1591, 110th Cong. § 1904(c), (e) (2007). Some commentators expressed sympathy with the President's view that such limitations would be unconstitutional. See, e.g., Noah Feldman & Samuel Issacharoff, *Declarative Sentences*, SLATE, Mar. 5, 2007, <http://www.slate.com/id/2161172>.

there for the foreseeable future — is the one Justice Jackson famously described in *Youngstown Sheet & Tube Co. v. Sawyer*³ as arising when the President’s authority as Commander in Chief is at its “lowest ebb,” namely, when the chief executive acts contrary to congressional will.⁴

Perhaps because the question of how to determine what should happen at the “lowest ebb” has long been of only marginal scholarly interest, it has been obscured by a dense fog of half-developed and largely unexamined intuitions. Chief among these is the notion, supposedly deeply embedded in the constitutional plan, that the Commander in Chief Clause prevents Congress from interfering with the President’s operational discretion in wartime by “direct[ing] the conduct of campaigns.”⁵ Or, as it is sometimes more broadly put, the idea is that Congress may not regulate the President’s judgments about how best to defeat the enemy — that the Commander in Chief’s discretion on such matters is not only constitutionally prescribed but is *preclusive* of the exercise of Congress’s Article I powers.⁶

In its most persuasive form, the Bush Administration’s assertion of preclusive executive war powers rests on precisely this contention — that Congress cannot “dictate strategic or tactical decisions on the battlefield.”⁷ It follows from that premise, the Administration argues, that Congress may not enact statutes restricting troop levels in Iraq or defining the mission of the armed forces operating there. Nor may it “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.”⁸ “These decisions,”

³ 343 U.S. 579 (1952).

⁴ *Id.* at 637 (Jackson, J., concurring).

⁵ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment)).

⁶ Following Justice Jackson’s lead, in these Articles we will often refer to indefeasible Article II prerogatives as “preclusive” powers of the Commander in Chief — preclusive because they would supersede any effort by Congress to use its own constitutional authorities to enact statutes that would limit the discretion the President would otherwise be constitutionally entitled to exercise. See *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”). We choose that adjective advisedly, for we certainly share Justice Jackson’s view that the “[l]oose and irresponsible” use of adjectives in these discussions more often obscures than illuminates. See *id.* at 646–47.

⁷ Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 207 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter OLC 2002 Torture Opinion].

⁸ The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL (OLC) 34726560, at *19 (Sept. 25, 2001) [hereinafter OLC 9/25/01 Opinion], reprinted in *THE TORTURE PAPERS*, *supra* note 7, at 3, 24. In some cases, the Administration has used this principle not only to conclude that a statute was unconstitutional, as such, but also as a justification for adopting extremely strained interpretations of

claims the Bush Administration, “under our Constitution, are for the President alone to make.”⁹

There is an understandable temptation to dismiss as aberrant constitutional claims that are so broad and unconditional. Indeed, the Supreme Court’s decisions in high-profile war powers cases that have enforced statutory limitations against the Commander in Chief might be thought to justify one’s doing so. But in fact, the Court’s message in these cases is much more equivocal than is often acknowledged.¹⁰ And just as appeals to judicial precedent cannot resolve the issue, neither can the various distinctions that war powers analysts and scholars have often invoked to cabin such preclusive executive powers, such as those between so-called framework statutes and detailed regulations of the battlefield, or between *ex ante* measures and statutes enacted in the midst of a specific operation.¹¹ In our view, these taxonomies are much less capable of identifying the bounds of preclusive executive war powers than is usually acknowledged. The issue, therefore, is less whether a test for defining such inviolate powers of presidential tactical discretion can be enunciated than whether it is justifiable to accept in the first place the common premise that Congress may not enact legislation that “interferes with the command of the forces and the conduct of campaigns.”¹²

Accordingly, we seek to move the discussion of the “lowest ebb” issue beyond the taxonomic in order to examine the logically prior question whether, as a matter of original constitutional understanding and longstanding constitutional practice, operational or tactical matters are in fact within the exclusive, and preclusive, province of the Commander in Chief.¹³ Surprisingly, that question has never been evalu-

statutory constraints so as to avoid allegedly serious constitutional questions. *See, e.g.*, OLC 2002 Torture Opinion, *supra* note 7, at 203.

⁹ OLC 9/25/01 Opinion, *supra* note 8, at *19, *reprinted in* THE TORTURE PAPERS, *supra* note 7, at 24.

¹⁰ *See infra* pp. 762–66.

¹¹ *See infra* pp. 750–60.

¹² *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment).

¹³ We should emphasize that this question is distinct from the question of whether the President has the constitutional authority to act in defiance of a statute if he concludes that it is unconstitutional or whether, instead, he is obliged to obey the statute unless and until a court declares it invalid. We believe the President does possess some such nonenforcement authority, although there are complex questions concerning the scope of that authority and when and how he should exercise it. *See, e.g.*, Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994); David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61; Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7. Our focus in these Articles is not on what a President can or should do when he determines that a statute is unconstitutional, but instead on the substantive basis for the contention that a statutory restriction would unconstitutionally regulate his authority as Commander in Chief.

ated fully. Discussions of the “lowest ebb” question have been uninformed by a deep and broad historical interrogation of the underlying assumption of inviolable executive “military campaign” authority, notwithstanding the role that history and practice have long played in informing our understandings of constitutional war powers more generally. This Article, then, is the first of a two-part effort to determine how the constitutional argument for preclusive executive war powers, now being pressed so boldly, is best conceived. Is it properly understood to be rooted in fidelity to the founding generation? Does it reflect instead the principles established by a longstanding constitutional tradition that, although concededly at odds with that early understanding, has emerged over time as exigencies presented themselves? Or is it instead dependent on the stark contention that the world has changed, due to either the advent of nuclear weapons or the rise of terrorism, in such a way as to render obsolete and intolerable the constitutional mechanisms for checking the Commander in Chief that earlier generations consistently accepted?

In this Article, we reject the first possibility by reviewing two foundational sources of constitutional guidance: the text of the Constitution and the original understandings associated with it. In starting this way, we do not mean to suggest that evidence of Founding-era understandings and intentions is necessarily determinative; but it plainly has significant contemporary relevance, if only because of its potential to influence both popular and elite understandings of the legitimacy of a particular constitutional claim regarding executive war powers.¹⁴ As we show, notwithstanding recent attempts to yoke the defense of executive defiance in wartime to original understandings, there is surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it. Instead, the text and evidence of original understanding provide substantial support only for the recognition of some version of a very different sort of preclusive power of the Commander in Chief — namely, a prerogative of *superintendence* when it comes to the military chain of command itself. That is, the President must to some considerable extent retain control over the vast reservoirs of military discretion that exist in every armed conflict, even when bounded by important statu-

¹⁴ Prominent defenders of the Bush Administration’s practices clearly seem to be of a similar view, as they have sought to ground their argument in text and original design. *See, e.g.*, JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 118–21 (2006); *see also* Stephen Holmes, *John Yoo’s Tortured Logic*, *NATION*, May 1, 2006, at 31, 38 (book review) (“By claiming that the Framers themselves would have been perfectly happy with unchecked presidential power, [they] encourage[] people to believe in the deep fidelity of a constitutionally unleashed President to an ideal America that was always meant to be.”).

tory limitations; and thus Congress may not assign such ultimate decisionmaking discretion to anyone else (including subordinate military officers).

In our next Article,¹⁵ we carry the story forward and explain that no post-Founding historical consensus has ever developed among the political branches in favor of the Commander in Chief's preclusive power over the conduct of campaigns.¹⁶ There is only a rough consensus as to the superintendence prerogative just mentioned and, perhaps, a limited executive power to act in times of necessity when it would be infeasible to obtain legislative permission because Congress is unavailable (a tradition that purports to respect, rather than disregard, congressional will). In fact, until 1950, the evidence of political branch practice points strongly against the conventional assumption of a broader presidential preclusive power over the conduct of campaigns; regulations of just that authority were enacted in every era and accepted without constitutional challenge by the executive branch. Even after 1950, nothing approaching a constitutional consensus, either among the branches or within the executive branch itself, has emerged to support the view that the President has the power to defy statutes that interfere with his preferred manner of prosecuting a military conflict. Indeed, Congress enacted such restrictions too often, and Presidents challenged their legality too infrequently (and for almost two centuries, not at all), for anything like a tradition of preclusive power to have taken root.

By attending to the distinction between war powers claims that rest on longstanding historical foundations and those that do not, we contend that the constitutional argument favoring preclusive executive power necessarily rests on a strong form of living constitutionalism. So understood, the argument for preclusive executive control over the conduct of war must be defended in terms that face up to the lack of historical foundation and to what are, in fact, historical contraindications. In other words, the argument for a substantive preclusive power must proceed, if at all, by defending a reversal of our constitutional tradition in more frankly normative and functional terms — as

¹⁵ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. (forthcoming Feb. 2008).

¹⁶ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (explaining that the post-ratification practices with the greatest claim to interpretive authority on separation of powers questions are those of one political branch that have been systematic, unbroken, and not subject to question by the other); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970) (“[A]n unbroken practice . . . is not something to be lightly cast aside.”). *But cf. Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution.”); *INS v. Chadha*, 462 U.S. 919, 944 (1983) (stating that the Court’s inquiry is sometimes “sharpened rather than blunted” by the “increasing frequency” of a consensus practice in more recent times).

to which, we believe, traditional concerns about unchecked executive power provide forceful rejoinders. Thus stripped of its assumed roots in a supposedly longstanding tradition, and considered in light of the long pattern of executive acceptance of constraining statutes, the Administration's recent assertion of — and action in reliance upon — a claim of preclusive war powers is revealed as an even more radical attempt to remake the constitutional law of war powers than is often recognized.

Part II of this first Article explains why the debate about the “lowest ebb” is now emerging as the primary constitutional war powers question. Part III addresses the methodological missteps that have typically infected discussions of the question; we argue for an analytical approach focused on distinguishing executive powers regulable by Congress from those “core” or preclusive powers of the Commander in Chief that are not. Part IV explores recent attempts to identify the preclusive prerogatives of the Commander in Chief and explains that the tests often deployed to cabin the scope of the presumed preclusive power are not as useful as they might appear. Part V briefly reviews the relevant Supreme Court pronouncements on the question. Part VI carefully reviews the constitutional text; the historical context in which the text was written; and original understandings. Part VII offers a brief conclusion that sets the stage for the post-Founding historical review contained in our next Article.

II. WHY THE PROBLEM IS NOW ACUTE — AND WHY IT WILL CONTINUE TO BE IMPORTANT

For decades, academic war powers debates have been predicated on a rarely questioned narrative concerning the relative roles of the political branches. On this view, Congress's attempts to insist on neutrality in the years leading up to the Second World War proved disastrous. Thereafter, a cowering or complaisant legislature, “overawed by the cult of executive expertise” on questions of war, and performing a kind of penance for its earlier isolationism,¹⁷ stood mute on the sidelines. On this view, insofar as the legislature has acted, it has uncritically ratified, *nunc pro tunc*, the President's unilateral choices about whether and how to conduct war. It naturally follows from this account that the primary focus of war powers scholarship has been on the second category of Justice Jackson's famous tripartite model of executive action — where there is an “absence of either a congressional grant or denial of authority,” and where the President thus must rely, if

¹⁷ S. REP. NO. 91-129, at 16 (1969).

he can, on only “his own independent powers” under Article II to defend the legality of his conduct.¹⁸

As we shall see, strikingly different assumptions have long informed the Supreme Court’s own treatment of the congressional role in matters pertaining to war.¹⁹ Moreover, as we explain, the abdication paradigm is especially inadequate at the present moment. For one thing, the Bush Administration has repeatedly made striking assertions of preclusive war powers. More fundamentally, the nature of the current conflict against an international terrorist network, and broader currents in constitutional jurisprudence, ensure that the issue of the scope and existence of the President’s preclusive military powers will continue to be at the center of the constitutional law of war powers for the foreseeable future. That will be the case, moreover, not only in the war on terrorism but also in more conventional military conflicts, and not only for the rest of this Administration but also for those to come.

A. The Modern Preoccupation with the President’s Unilateral Authority To Use Military Force

As Professor Peter Shane correctly noted as recently as a decade ago, contemporary academic work on war powers overwhelmingly focuses on what he deemed “the ultimate question of law on this subject: Whom does the Constitution authorize to commit United States troops to military hostilities?”²⁰ Emblematic of this tradition is Professor

¹⁸ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁹ Moreover, some political scientists and historians have recently begun to challenge this framing by emphasizing the influential role that Congress plays, both formally and informally, in shaping the parameters of the use of military force and the conduct of war. See, e.g., WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); ROBERT DAVID JOHNSON, *CONGRESS AND THE COLD WAR* (2006); JULIAN E. ZELIZER, *WASHINGTON WARFARE: THE POLITICS OF NATIONAL SECURITY SINCE WORLD WAR II* (forthcoming 2009).

²⁰ Peter M. Shane, *Learning McNamara’s Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1281 (1997). The best and most influential of the voluminous academic sources on this subject include the following: EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 262–97 (5th ed. 1984); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS* 113–26 (2002); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* (1981); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2d ed. 2004); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (2d ed. 1989); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Alexander M. Bickel, *Congress, the President and the Power To Wage War*, 48 CHI.-KENT L. REV. 131 (1971); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Henry P. Monaghan,

John Hart Ely's book *War and Responsibility*.²¹ With an emphasis on the war in Indochina, that volume concluded that the separation of powers had all but disappeared in war — less because an imperial presidency refused to be checked by an assertive Congress than because a passive legislature abdicated its constitutional role by refusing to take responsibility for the hostilities carried out in its name. Indeed, Professor Ely was so convinced that congressional abdication rather than executive usurpation was the problem in need of analysis that he expressly singled out the third (“lowest ebb”) category of cases Justice Jackson identified in his *Youngstown* concurrence — that is, the “point at which congressional limitation . . . becomes a violation of the Commander in Chief Clause” — as the one issue relating to war powers that he would “not propose to try to settle in this book.”²²

Because Congress unambiguously authorized military operations against those responsible for the September 11, 2001, attacks in the Authorization for Use of Military Force (AUMF) signed one week after the attacks,²³ and one year later enacted a similar authorization for the

Presidential War-Making, 50 B.U. L. REV. 19 (1970); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 564–76 (1999); William Michael Treanor, *Fame, the Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695 (1997); William Van Alstyne, *Congress, the President, and the Power To Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); 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 (1994) (book review); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)); and Note, *Congress, the President, and the Power To Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

This war powers question has also received sustained attention within the Executive branch. See, e.g., Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. Off. Legal Counsel 327 (1995); Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173 (1994); Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, to Charles W. Colson, Special Counsel to the President (May 22, 1970) [hereinafter OLC Cambodian Sanctuaries Opinion], available at http://lawreview.stanford.edu/content/vol58/issue6/bybee_appendix.pdf (regarding “The President and the War Power: South Vietnam and the Cambodian Sanctuaries”); Office of the Legal Adviser, U.S. Dep’t of State, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085 (1966); 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 (1950).

²¹ ELY, *supra* note 20.

²² *Id.* at 143 n.22.

²³ Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF, passed by Congress three days after the attacks and signed by President Bush four days after that, authorizes 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.

Id. § 2(a), 115 Stat. at 224.

subsequent conflict in Iraq,²⁴ scholarly debates over separation of powers in the current conflicts, including especially the war on terrorism, have had a somewhat different cast. Those debates have centered not on the question of initiation, but instead on the scope of the President's Article II powers to determine *how* to prosecute military campaigns that Congress has plainly authorized. But this twist notwithstanding, the recent scholarship still shares the conventional post-*Youngstown* orientation — a predominant focus on Category Two questions of the President's unilateral powers. Given the common view that Congress has been silent on operational issues in the war on terrorism,²⁵ the interbranch dynamic that garners the most attention is between the President and the judiciary — the dominant question being whether the courts ought to rein in the President. On this view, Congress is merely an afterthought, or at best a department considered to be only reluctantly capable of being spurred to action by judicial prodding.²⁶

Scholars have recently shifted some attention to whether Congress has authorized particular contested executive actions in the war on terror.²⁷ There has been scant consideration, however, of whether Con-

²⁴ Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

²⁵ See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2352 (2006) (“[T]he most glaring institutional fact about the war on terror so far is how little Congress has participated in it. The President has resolved most of the novel policy and institutional challenges terrorism poses *with virtually no input or oversight from the legislative branch.*” (emphasis added)).

²⁶ See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 45, 47–48 (2007) (explaining that, for purposes of addressing whether judges should take an active role in restraining the “government” in this context, their working assumption will be that “government means the executive branch,” in part because of their *descriptive* assumption that, as a matter of course, Congress virtually always acquiesces in the President's wartime judgments). Even those who favor greater judicial intervention have tended to do so because they presume that the legislature will not act of its own accord. See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1277 (2002) (challenging the constitutionality of the President's executive order establishing military tribunals for enemy combatants on the ground that the President had “usurped the legislative powers vested by the Constitution exclusively in Congress and threatened the Constitution's rights-protecting asymmetry” by issuing the order without securing advance legislative authority). *But cf.* Neal K. Katyal, *The Supreme Court, 2005 Term—Comment: Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 75 & n.40 (2006) (noting that during the litigation of *Hamdan* in the Supreme Court, Professor Neal Katyal and his co-counsel gradually shifted their arguments in order to put more emphasis on the notion — which the Court ultimately adopted — that the tribunals as the President constituted them violated the Uniform Code of Military Justice and the Geneva Conventions).

²⁷ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005). Earlier treatments of questions involving

gress has also imposed particular restrictions, and thus almost no sustained scholarly analysis of the *Youngstown* Category Three issue in the conflict with al Qaeda (as well as the Iraq war).²⁸ Indeed, as two commentators recently wrote, “For the past eighty years, no scholar has undertaken an in-depth analysis of the proper line of demarcation between the Commander in Chief’s exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority.”²⁹

In contrast to the conventional scholarly approach, the Supreme Court has frequently grounded its war powers decisions — both in cases decided before the war on terrorism and in those resolved during it — in statutory interpretation. In some cases, the Court has held that Congress expressly or impliedly authorized the President’s conduct,³⁰

congressional authorization can be found in, for example, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994); HENRY COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWERS: 1829–1901 (1984); ELY, *supra* note 20; FISHER, *supra* note 20; SOFAER, *supra* note 20; and Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87 (2002).

²⁸ See, e.g., Bradley & Goldsmith, *supra* note 27, at 2056 n.25 (noting that although “potential legal restrictions on Executive Branch action during war against terrorist organizations, such as the War Crimes Act, the federal criminal torture statute, the Uniform Code of Military Justice, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Geneva Conventions,” might all be relevant to the analysis of just what Congress has authorized, “in general the effect of these restrictions is beyond the Article’s scope” (citations omitted)).

²⁹ Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 172 n.395 (2004). Occasional treatments of the general question have included WORMUTH & FIRMAGE, *supra* note 20, at 89–123; Bennet N. Hollander, *The President and Congress — Operational Control of the Armed Forces*, 27 MIL. L. REV. 49 (1965); and Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress’s Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183 (2004). For a recent article reviewing some of the relevant historical materials and questioning the conventional assumption that Congress cannot regulate the conduct of campaigns, see Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028526. The question has also received some attention in connection with particular statutes or proposals, such as: the 1973 War Powers Resolution (WPR), compare, e.g., Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984) (arguing that the WPR is constitutional), with ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 107–33 (1983) (contesting the constitutionality of the WPR), and J. Terry Emerson, *The War Powers Resolution Tested: The President’s Independent Defense Power*, 51 NOTRE DAME L. REV. 187, 203–13 (1975) (same); and proposals in the 1980s to statutorily restrict the President’s authority to use nuclear weapons, see, e.g., FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? (Peter Raven-Hansen ed., 1987). For additional consideration of the question, see the sources cited in Part IV, *infra*.

³⁰ In three important nineteenth-century cases, for example, the Court held that the Militia Act of 1795 and/or the Insurrection Act of 1807 provided the President with broad authorization to determine whether the requisite exigencies were in place to call forth the militia and to make certain uses of the armed forces. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28–32 (1827); see also Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 178–80,

while in several landmark cases, including *Youngstown* itself, the Court has held that the Executive's actions were invalid because they violated express or implied statutory limitations.³¹ Far from assuming that Congress has been a silent witness to executive action in wartime, then, the Court has regularly acted as though the legislature has been deeply involved in establishing the basis for, and the bounds of, war-making. And, as evidenced by recent cases relating to the war on terrorism, the Court continues to assume that statutory enactments both authorize and limit the ways in which President Bush may conduct the campaign against al Qaeda.³²

Nonetheless, many war powers scholars remain partial to the legislative abdication paradigm. For example, the statutory interpretation on which the recent decision in *Hamdan v. Rumsfeld*³³ purported to

182, 186–92 (2004) (explaining that the holding in the *Prize Cases* turned on an interpretation of the Militia and Insurrection Acts). More recent cases in which the Court's judgment relied upon congressional approval of the challenged presidential conduct include *Ex parte Quirin*, 317 U.S. 1 (1942); *Ludecke v. Watkins*, 335 U.S. 160 (1948); and *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

³¹ See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). We discuss both of these cases further in our companion Article. See Barron & Lederer, *supra* note 15, sections II.C.2, III.C.2. *Youngstown* itself is best read as a case involving congressional limitations. Although Justice Black's majority opinion is generally understood to have rested on the notion that the domestic seizure of private property is a "legislative" power that the President may not exercise even where the legislature has been silent, see, e.g., *Clinton v. Jones*, 520 U.S. 681, 700 (1997) (so describing *Youngstown*), at least three of the six Justices in the *Youngstown* majority expressly grounded their votes against the President's seizure of the steel mills on the fact that Congress had effectively precluded such Executive action; and in the absence of such a legislative prohibition, at least two of those Justices might have joined with the dissenting Justices to form a majority of the Court in support of the President's actions. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 659–60 (1952) (Burton, J., concurring) ("The foregoing circumstances distinguish this emergency from one in which Congress takes no action and outlines no governmental policy. In the case before us, Congress authorized a procedure which the President declined to follow. . . . The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency."); *id.* at 662 (Clark, J., concurring in the judgment) ("I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because . . . Congress had prescribed methods to be followed by the President in meeting the emergency at hand."); *id.* at 597, 602 (Frankfurter, J., concurring) (declining to address "what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure," because "nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice" and "expressed its will to withhold this power from the President as though it had said so in so many words"); see also *id.* at 639–40 (Jackson, J., concurring) (stating that the seizure was inconsistent with Congress's established statutory scheme). See generally Bellia, *supra* note 27, at 99–106.

³² See *infra* pp. 765–66 (discussing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)).

³³ 126 S. Ct. 2749 (2006).

rest has been met with a chilly academic reception. The Court invalidated the Bush Administration's system for trying terrorist suspects before military commissions on the ground that it violated earlier-enacted provisions of the Uniform Code of Military Justice (UCMJ).³⁴ In the eyes of many scholars, though, *Hamdan* was "actually a . . . case[] where Congress [was] silent or, at best, terminally ambiguous,"³⁵ and thus the Court must have been relying sub silentio on a rule of constitutional law about the President's lack of authority to exercise certain war powers in the absence of clear congressional authorization.³⁶ And so, while the Court insisted at every turn that the commissions were unlawful because Congress had prescribed statutory limits to govern the operation of the tribunals, the predominant scholarly account contends that what really happened in *Hamdan* was that the Court "vindicated separation of powers by requiring Congress' focused and deliberate involvement where at best inadvertence had gone before."³⁷

*B. The Bush Administration's Theory
of Preclusive Commander in Chief Powers*

As much as the Court's own doctrine suggests that the conventional scholarly template has been overly dismissive of the congressional role in regulating the conduct of war, recent actions of the executive branch demonstrate beyond question how partial an account of war powers the legislative abdication paradigm provides. Far from acting on the assumption that Congress has been silent, or even that it has been hopelessly ambiguous, the Bush Administration has claimed the constitutional power to defy a number of extant statutory restrictions on executive war powers that would otherwise cabin the Commander in Chief's discretion.

The Bush Administration's argument is rooted in an intuition that the Commander in Chief Clause affords the President a core of infeasible authority to control the conduct of a war once it is under-

³⁴ See *infra* notes 219–220 and accompanying text.

³⁵ Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1112 (2006).

³⁶ See, e.g., Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in Hamdan v. Rumsfeld*, 2005–2006 CATO SUP. CT. REV. 51, 52, 54, 58; Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 159–68 (2006); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 4–5, 28, 44.

³⁷ Flaherty, *supra* note 36, at 52; see also Sunstein, *supra* note 36, at 4 (arguing that the Court held the commissions to be invalid because of the absence of "an explicit and focused decision from the national legislature" (emphasis omitted)).

way.³⁸ The infamous 2002 Office of Legal Counsel (OLC) memorandum on torture, for example, defends the President's discretion to use whatever interrogation methods he deems appropriate to "best prevail against the enemy"³⁹ in just this way. In explaining why "Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war,"⁴⁰ OLC offered a simple logical argument predicated on what it assumed to be a well-settled view that tactical battlefield judgments — paradigmatically, the decision whether to start an attack from the left flank or the right — are for the President alone to make. OLC explained:

Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.⁴¹

The precise list of executive actions encompassed by this reasoning is not self-evident, nor has the Administration attempted to specify them comprehensively. But the category plainly goes beyond judgments involving where and when to launch attacks within a combat zone during an otherwise authorized military engagement. It appears to subsume, in the Administration's view, a panoply of judgments regarding how best to engage the enemy, ranging from detention and interrogation to surveillance and trial. Indeed, the theory is that there is no meaningful legal distinction between the case of a classic tactical judgment on the battlefield, such as when and where to send troops into battle, and the sorts of tactical decisions that the war on terrorism brings to the fore.

³⁸ At times, the Administration's claim of preclusive executive power also invokes a somewhat different argument based on the President's supposed constitutional *duty* to respond to "an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security" with "whatever means are necessary, including the use of military force abroad." OLC 9/25/01 Opinion, *supra* note 8, at *10, *reprinted in* THE TORTURE PAPERS, *supra* note 7, at 13; *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, 1406–07 (2006) (invoking this "constitutional obligation" as an explanation for why a statute cannot be construed to limit some electronic surveillance in the war on terrorism). We discuss this alternative theory *infra* at pp. 745–48.

³⁹ OLC 2002 Torture Opinion, *supra* note 7, at 206.

⁴⁰ *Id.* at 203.

⁴¹ *Id.* at 207; *accord id.* at 203 ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").

C. *The President's Theory in Action*

The Bush Administration has applied this robust conception of the Commander in Chief's preclusive power on several fronts. Indeed, virtually all of the major legal flashpoints in the war on terrorism have concerned, to one degree or another, the question of the President's constitutional authority as Commander in Chief to override existing legislative constraints on his conduct of military operations. Viewed together, these assertions of preclusive power do much to undermine the notion that the congressional abdication paradigm is a useful construct for understanding contemporary war powers. For as supine as Congress is thought to be, the President has not believed it to be so completely in his sway that he could ask it to remove existing restrictions on his preferred means of prosecuting the current conflict. And thus, as the following examples demonstrate, the Administration has repeatedly asserted — and often quite publicly — a right to act in defiance of congressional limitations in a range of areas.

1. *Limitations on the Power To Detain Enemy Combatants.* — In two recent cases, the Supreme Court was asked whether and under what circumstances the September 2001 AUMF gave the President the authority to indefinitely detain, in military custody, U.S. citizens alleged to have some relationship to the enemy.⁴² Although this issue might appear to involve a legal question pertaining solely to Categories I and II of Justice Jackson's framework in *Youngstown*, in fact the question was thornier because of a 1971-enacted statute, 18 U.S.C. § 4001(a), which prohibits the detention of U.S. citizens "except pursuant to an Act of Congress."⁴³ Recognizing this reality, the Administration sought to blunt the force of that statutory restriction by arguing that the power to detain suspected enemy "combatants" lies "at the heart of [the President's] constitutional powers as Commander in Chief."⁴⁴ Thus, it contended, a statutory limit on that power must be construed narrowly to avoid "substantial constitutional doubts."⁴⁵

2. *Regulations Governing Treatment of Detainees.* — Soon after the September 11 attacks, the CIA began to explore the use of what the Administration eventually described as "enhanced interrogation tech-

⁴² See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

⁴³ 18 U.S.C. § 4001(a) (2000).

⁴⁴ Brief for the Petitioner at 27, *Padilla*, 542 U.S. 426 (No. 03-1027).

⁴⁵ *Id.* at 49; see also Brief for the Respondents at 22, *Hamdi*, 542 U.S. 507 (No. 03-6696) ("The canon of constitutional avoidance counsels against interpreting Section 4001(a) in a manner that would interfere with the well-established authority of the Commander in Chief to detain enemy combatants in wartime."). The Court did not opine on this constitutional argument directly, because it held that the prerequisite of § 4001(a) was satisfied. See *Hamdi*, 542 U.S. at 517 (plurality opinion). Five Justices, however, indicated that they would reject the constitutional challenge to § 4001(a). See *infra* note 232.

niques.” Several legal restrictions potentially stood in the way of the use of such techniques. The primary problem, from the CIA’s perspective, was a federal criminal statute, 18 U.S.C. § 2340A, categorically prohibiting torture outside the United States.⁴⁶ In 2002, OLC issued an opinion that not only construed the torture statute narrowly,⁴⁷ but also went further: it contended that to the extent the torture prohibition did apply to interrogations of enemy combatants, it unconstitutionally impinged upon the Executive’s tactical judgment as to how best to defeat the enemy.⁴⁸

The next year, the Department of Defense applied that same reasoning to justify the legality of using certain interrogation techniques that appeared to violate the UCMJ, which prohibits military personnel from using assaults, threats, and cruelty or maltreatment against detainees under their control.⁴⁹ A Pentagon working group report, which reportedly adopted OLC’s analysis contained in a memorandum issued in March 2003,⁵⁰ indicated that the techniques it discussed could potentially violate these and other UCMJ prohibitions.⁵¹ It nonetheless reasoned that not only the torture statute, but also “any other potentially applicable statute[,] must be construed as inapplicable to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority.”⁵² The Report therefore recommended the use of presumptively unlawful techniques, apparently on the view that the President’s

⁴⁶ 18 U.S.C. § 2340A (2000 & Supp. IV 2004).

⁴⁷ See OLC 2002 Torture Opinion, *supra* note 7, at 173–99.

⁴⁸ *Id.* at 204–07. This same theory was pressed earlier in 2002 in a draft OLC memorandum raising constitutional concerns about the War Crimes Act, 18 U.S.C. § 2441, which at the relevant time criminalized all violations of Common Article 3 of the Geneva Conventions. The memo explained that the Commander in Chief Clause “gives the President the plenary authority in determining how best to deploy troops in the field,” and thus, to the extent the Act prohibits certain proscribed conduct listed in Common Article 3 (for example, “cruel treatment and torture”), it could “represent a possible infringement on presidential discretion to direct the military.” Draft Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. (Jan. 9, 2002), in THE TORTURE PAPERS, *supra* note 7, at 38, 47 (regarding the “Application of Treaties and Laws to al Qaeda and Taliban Detainees”).

⁴⁹ 10 U.S.C. § 893 (2000) (cruelty and maltreatment); *id.* § 928 (2000) (assault); *id.* § 934 (2000) (general article, which has long been understood to prohibit communicating threats, see MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 110 (2002 ed.)).

⁵⁰ See Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32 (discussing how the April 4, 2003, Working Group Report was written to conform with the Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. (Mar. 14, 2003) (regarding the “Military Interrogation of Alien Unlawful Combatants Held Outside the United States”).

⁵¹ See U.S. DEP’T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003), reprinted in THE TORTURE PAPERS, *supra* note 7, at 286, 325–27.

⁵² *Id.* at 303.

Commander in Chief authority “could render specific conduct, otherwise criminal, *not* unlawful.”⁵³

It is not entirely clear whether the Bush Administration continues to adhere to every aspect of the constitutional analysis in the 2002–2003 OLC memoranda.⁵⁴ The Administration apparently continues to believe that at least some statutory restrictions on coercive interrogation practices can impermissibly infringe the Commander in Chief power. Indeed, the President issued a statement suggesting as much in 2005 in the course of signing into law legislation (the Detainee Treatment Act of 2005⁵⁵) that bans the use by all U.S. officials of “cruel, inhuman, and degrading” treatment or punishment of individuals in their custody or physical control.⁵⁶

⁵³ *Id.* at 330.

⁵⁴ In late 2004, OLC repudiated most of the 2002 opinion’s analysis of the Torture Act, but *declined* to repudiate the Commander in Chief analysis, claiming that it was no longer relevant because the President would never authorize torture. See Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice (Dec. 30, 2004), in *THE TORTURE DEBATE IN AMERICA* 361, 362 (K. Greenburg ed., 2005) (regarding the “Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A”); see also Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html> (Jan. 7, 2005, 9:10 EST).

⁵⁵ Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739, 2739–40 (codified at 42 U.S.C.A. § 2000dd (West 2007)).

⁵⁶ 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, relating to detainees, in a manner consistent with the constitutional authority of the President . . . as Commander in Chief”). Even after the *Hamdan* decision, the Department of Justice pointedly declined an invitation from the Senate Judiciary Committee to acknowledge that Congress could prohibit the abuse of prisoners of war, and the Department held fast to the argument that there are limitations on Congress’s authority “to regulate the President’s conduct” in the field of military affairs. See Answers to Questions for the Record Posed to Attorney General Alberto Gonzales Following the Senate Judiciary Committee Hearing on “Wartime Executive Power and the National Security Agency’s Surveillance Authority” 55, 58 (July 17, 2006) [hereinafter *Gonzales Answers to Questions*], available at <http://balkin.blogspot.com/NSA.DDJ.Responses.February13.pdf>. The Department even went so far as to assert that whether the UCMJ itself (which was at issue in *Hamdan*) might be unconstitutional in “exceptional circumstances” is “a difficult constitutional question.” *Id.* at 23.

It is difficult to discern exactly how the new Attorney General approaches the issue. In response to questions from the Senate Judiciary Committee, Michael Mukasey disclaimed any presidential authority to disregard the torture statute; he stated that “to the extent that the President’s [constitutional] authority comes into conflict with FISA’s limitations,” the President’s authority “would be at its ‘lowest ebb,’” but whether the President could violate the statute would be a “difficult separation of powers question.” Responses of Michael B. Mukasey to Questions for the Record Submitted by Senator Edward M. Kennedy 17 (Oct. 30, 2007), available at http://judiciary.senate.gov/pdf/Mukasey_responses_to_QFRs.pdf (beginning at p. 10 of the PDF). He also stated that he does not “yet” have a view on whether Congress may enact legislation setting a deadline for withdrawal of troops from an armed conflict. See Responses of Michael B. Mukasey to Questions for the Record Submitted by Senator Russell D. Feingold 7 (Oct. 30, 2007), available at http://judiciary.senate.gov/pdf/Mukasey_responses_to_QFRs.pdf (beginning at p. 97 of the PDF). Although this might suggest that Attorney General Mukasey is *least* likely to embrace a

3. *Habeas Corpus Rights of Alien Detainees.* — One of the central tenets of the Bush Administration's strategy against al Qaeda and the Taliban has been that alien detainees held abroad, including at the Guantánamo Bay Naval Station, must be denied any power to petition courts for writs of habeas corpus challenging the fact and conditions of their military detention. Indeed, the Administration's official 2005 National Defense Strategy identified judicial process itself as a threat to the United States: it stated that one of the "key assumptions" upon which U.S. defense strategy is formulated is that "[o]ur strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."⁵⁷ Thus, one of the very first things the Administration lawyers all agreed on was that alien detainees should be housed at Guantánamo, precisely because they believed that the captives would thereby be beyond the reach of judicial process.⁵⁸

This was not simply a matter of trying to prevent the courts from second-guessing the legality of the Administration's conduct. In the Administration's view, the ability to convince detainees that they were in a legal black hole — that all hope of assistance or possible release was lost, and that they were completely at the mercy of their captors — was indispensable to the effectiveness of interrogations: any expectations that ultimate release from captivity "may be obtained through an adversarial civil litigation process . . . would break — probably irreparably — the sense of dependency and trust that the interrogators are attempting to create."⁵⁹

This may explain why, when the issue of habeas corpus rights for Guantánamo detainees came before the Supreme Court in *Rasul v. Bush*,⁶⁰ the Solicitor General argued that judicial review of the detain-

preclusive presidential prerogative in the context of statutory limits on interrogation techniques, it is noteworthy that just five days after he took office, the Bush Administration issued a statement of administration policy (presumably cleared by Attorney General Mukasey's Justice Department) in which it stated that a proposal that would limit the CIA to using only those interrogation techniques found in the Army Field Manual (which are those the military may employ) would not be "consistent with the President's obligation to take all lawful measures to protect the citizens of the United States from future attacks." OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 4156 — MAKING EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR THE DEPARTMENT OF DEFENSE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2008, AND FOR OTHER PURPOSES 3 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr4156sap-h.pdf>.

⁵⁷ U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005), available at <http://www.defenselink.mil/news/Mar2005/d20050318nds2.pdf>.

⁵⁸ YOO, *supra* note 14, at 142–43.

⁵⁹ Joint Appendix at 86, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (declaration of Vice Admiral Lowell E. Jacoby), available at http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

⁶⁰ 542 U.S. 466 (2004).

ees' claims "would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters," and thus would raise "grave constitutional problems."⁶¹ In arguing that the federal habeas statute should not be construed to protect these detainees, the government's brief invoked the notion of "core" constitutional prerogatives directly, suggesting that Congress lacked the power to so impinge on the President's prosecution of the war: "To be sure, the Constitution would limit the ability of Congress to extend federal court jurisdiction into areas that interfered with the core executive responsibilities."⁶²

4. *Regulations of Electronic Surveillance.* — Further evidence of the robust Bush Administration view of the President's preclusive tactical command authority is found in Department of Justice memoranda defending the National Security Agency's (NSA's) recently disclosed "terrorist surveillance program." Under this program, the NSA monitored the international telephone calls and international e-mail messages of hundreds or thousands of persons inside the United States without warrants or judicial orders for more than five years. The Department of Justice argued that the NSA program did not violate the Foreign Intelligence Surveillance Act⁶³ (FISA), because the post-September 11 AUMF authorized such surveillance — an argument that depends on the notion that the AUMF *superseded*, or impliedly repealed, the existing limitations on electronic surveillance found in FISA.⁶⁴ The Department bolstered that contention by arguing that such a construction of the AUMF was necessary to avoid serious constitutional questions that would arise under the Commander in Chief Clause if FISA were construed to bar the President from authorizing such surveillance without court approval, and that if the AUMF could not be so construed, the President had the constitutional power to ignore FISA's prohibitions.⁶⁵

⁶¹ Brief for the Respondents at 42, 44, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343).

⁶² *Id.* at 45. We discuss the *Rasul* case further *infra* at pp. 765–66.

⁶³ 50 U.S.C. §§ 1801–1863 (2000 & Supp. IV 2004). A FISA provision in Title 18 of the U.S. Code provides that surveillance pursuant to FISA and specified criminal statutes is to be the "exclusive means" of engaging in electronic surveillance. 18 U.S.C. § 2511(2)(f) (2000 & Supp. IV 2004).

⁶⁴ See generally Cole & Lederman, *supra* note 38 (collecting and reprinting documents debating whether Congress authorized the NSA surveillance program through the AUMF and FISA). For the Department's argument, see the unsigned, so-called NSA/FISA "White Paper," DOJ WHITE PAPER, *supra* note 38.

⁶⁵ See DOJ WHITE PAPER, *supra* note 38, at 1401–08; see also Sunstein, *supra* note 36, at 38–39 ("On the most extreme version of this view, Congress cannot limit [the President's power to engage in international electronic surveillance] even if it chooses to do so. Foreign surveillance is a presidential prerogative, *akin to dictation of the movement of troops*, and perhaps Congress cannot limit that prerogative — at the very least, after a declaration of war or an authorization for the use of force." (emphasis added)). Many observers — including those who had previously

5. *Further Assertions of the Preclusive Commander in Chief Power.* — In light of the Bush Administration's theory of preclusive Commander in Chief authority, and its consistent invocation of that argument across so many distinct areas, there are probably other examples as well. Because any further OLC documents containing arguments in support of such statutory noncompliance are not public, we do not know the extent of the phenomenon. On dozens of occasions, however, the President has invoked his power as Commander in Chief in issuing signing statements objecting to statutory enactments, suggesting that he will not fully comply with such laws in some circumstances, in particular when they cut too close to his chosen means of conducting a military campaign.⁶⁶ Moreover, the President, as we have noted, has invoked a Commander in Chief objection in vetoing a bill purporting to regulate the use of troops in Iraq.⁶⁷ The Administration has further indicated that any statutory restrictions Congress might approve on the use of force against *Iran* would be unconstitutional.⁶⁸ These recent assertions give practical effect to the expansive and uncompromising constitutional theory of preclusive executive war powers first enunciated in the OLC memorandum drafted two weeks after the attacks of September 11.⁶⁹

been sympathetic to the Administration's statutory argument — concluded that *Hamdan* appeared to have severely or fatally undermined the argument that FISA's constraints on electronic surveillance are unconstitutional in the conflict against al Qaeda. *See, e.g., id.* at 42. Two weeks after the Court's decision, however, the Department of Justice asserted that *Hamdan* "does not affect our analysis of the Terrorist Surveillance Program." Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Justice, to Sen. Charles Schumer (July 10, 2006), *available at* <http://lawculture.blogs.com/lawculture/files/NSA.Hamdan.response.schumer.pdf>. For a counterargument to the DOJ's position, see Letter from Professor Curtis A. Bradley et al. to Sen. Bill Frist et al. at 6–8 (July 14, 2006), *available at* <http://balkin.blogspot.com/NSA.Hamdan.July14.FINAL.pdf> (arguing that the Department of Justice failed to offer any convincing basis for distinguishing the constitutionality of the limits in FISA from the constitutionality of the statutory limits the Court addressed in *Hamdan*).

⁶⁶ *See* Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 *PRESIDENTIAL STUD. Q.* 515, 522 (2005); *see also* NEIL KINKOPF, *INDEX OF PRESIDENTIAL SIGNING STATEMENTS, 2001–2007* (2007), <http://www.acslaw.org/files/Index%20of%20Presidential%20Signing%20Statements.pdf> (compiling all of President Bush's signing statements from 2001 through August 2007, which include dozens of constitutional objections based on the President's role as Commander in Chief); Barron & Lederman, *supra* note 15, section V.G.

⁶⁷ *See* Message to the House of Representatives, *supra* note 2.

⁶⁸ *See* OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: S. 1547 — NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008, at 3 (2007) [hereinafter STATEMENT OF ADMINISTRATION POLICY], *available at* <http://www.whitehouse.gov/omb/legislative/sap/110-1/s1547sap-s.pdf>.

⁶⁹ *See supra* pp. 694–95 (quoting OLC 9/25/01 Opinion, *supra* note 8).

*D. Structural and Historical Reasons
Why the Question Is Now Prominent*

The Bush Administration's bold claims of preclusive war powers are clearly rooted in an overarching view of executive authority that even its proponents concede to be aggressive. But that does not mean the *Youngstown* Category Three issue is relevant solely because this Administration has chosen to make it so. There are also a number of structural factors — some connected directly to the war on terror, others to the jurisprudential and historical context in which it occurs — that suggest the issue of what should happen at the “lowest ebb” and, in particular, whether the President's decisions about how to prosecute a war are beyond legislative control, warrants much more serious and sustained scholarly attention than it has traditionally received.

1. *The Historical Trend of Increasing Executive Branch Assertions of Indefeasible Substantive Powers.* — The Bush Administration's claims, forceful as they are, must be seen in the context of an increased willingness on the part of modern Presidents to assert wartime prerogatives.⁷⁰ Although that trend by no means provides a historical foundation for the actual claim of preclusive authority that the Bush Administration has put forth (a point we elaborate upon at length in our companion Article), it does provide important jurisprudential context for the emergence of such an argument. For as aggressive as the Bush Administration has been, the historical trend lines of executive claims to preclusive war powers make it hazardous to assume that future administrations will not themselves want to assert preclusive authority. The likelihood that future Presidents will find such arguments attractive increases to the extent they are viewed as flowing from a longstanding legal tradition that accepts substantial and indefeasible executive discretion in the conduct of war. After all, aggressive claims to executive power left unchallenged have a history of begetting further and more aggressive claims. That has certainly been the case with respect to the President's historical assertions of unilateral powers to deploy troops and to use military force. There is no reason to think the same pattern would not develop with claims of preclusive authority to disregard legislatively imposed limits.

2. *Armed Conflict Against Terrorist Organizations and Preexisting Framework Statutes.* — Beyond this general executive trend, certain central features of the current military conflict against al Qaeda help to create the conditions for constitutional battles over the legal status of statutory (and treaty-based) limitations that apply to the war on terrorism. Important in this regard is the fact that in most traditional wars, the Executive has perhaps had less reason to feel unduly con-

⁷⁰ See, e.g., ELY, *supra* note 20; KOH, *supra* note 20; SCHLESINGER, *supra* note 20.

strained by extant statutory and treaty-based regulations on his treatment of the enemy, in part because many such restrictions (such as those in multilateral treaties) have, at least nominally, merely put the nation on common ground with its enemies with respect to the methods of battle and the treatment of prisoners.

In the war on terrorism, however, there is less reason to expect executive compliance rooted in such a calculation of the national interest. This armed conflict is being waged not against a nation state that has agreed to abide by basic common rules of organized warfare (such as the Geneva Conventions). Its target is a diffuse and unaccountable terrorist network that is not itself party to any international accords and that does not purport to abide by the laws of war. Accordingly, the Executive's incentive to avoid those restrictions is arguably greater. That is particularly the case because it is generally assumed that the kind of attack the enemy is interested in making is one that targets the civilian U.S. population. The Executive and its defenders are inclined to argue that existing statutory and treaty-based restrictions only tie the United States' hands, forcing compliance with rules the enemy willfully disdains.⁷¹

Similar reasoning may lead Congress to be sympathetic to the Executive's aggressive instincts in this regard. Justified or not, such an impulse may help to explain Congress's relatively reticent response to the Bush Administration's assertions of preclusive executive authority as to statutes implementing international humanitarian norms. But even if Congress might be timid in responding to statutory disregard, or at times receptive to the Administration's proposed statutory amendments, that does not mean no Category Three issues will arise. The executive branch may have reasons of its own, both ideological and practical, for not seeking legislative repeals of preexisting limitations.⁷² Aside from not wanting to devote the time to engage in legislative lobbying, the executive branch may be wary of establishing a precedent implicitly conceding a congressional role in such matters. In addition, the executive branch may be fearful that the enacted legislation will be more limiting than it would wish. Moreover, just because Congress may be skittish about enacting *new* restrictive legislation in

⁷¹ See, e.g., POSNER & VERMEULE, *supra* note 26, at 260–72 (arguing that the United States should ignore, violate, or narrowly construe the laws of war and humanitarian treaty obligations in the conflict against al Qaeda, both because such constraints are not symmetrical (they will impose more onerous restrictions on the United States), and because our enemy will not reciprocate by enforcing those norms).

⁷² See JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007) (arguing this point in connection with the Bush Administration); see also CHARLIE SAVAGE, *TAKEOVER* (2007) (making the point as to several modern administrations).

the midst of war as a general matter⁷³ does not mean it will repeal statutes enacted well before 2001 that stand in the President's way. For one thing, members of Congress may see value in the restrictions such measures impose, including that such laws enhance military effectiveness in the long run. Moreover, repeal requires an actual enactment, and thus a degree of congressional consensus, that inaction does not. Indeed, the current Administration's pessimism about its ability to effectuate legislative repeals of earlier-enacted measures underlies its attraction to assertions of a constitutional power to disregard them.⁷⁴ Ironically, then, legislative inaction, whether or not motivated by a congressional desire to avoid taking responsibility in the midst of a conflict, may actually entrench a baseline of robust statutory regulation already in place, and thereby *increase* the likelihood that Category Three issues might arise.

That there is a baseline of regulation in place concerning the war on terrorism, moreover, cannot be denied. The reason preexisting statutory limits figure so prominently in the current conflict is primarily that a central component of the war against terrorism is, by its nature, the collection of intelligence. Although the conflict is being fought in part by traditional armed forces, on a traditional "battlefield" (such as against al Qaeda and the Taliban in certain regions of Afghanistan), the Executive has identified its principal goal in this conflict not as defeating the enemy in battle, but as preventing the enemy from "fighting" in the first instance. Al Qaeda is a largely hidden enemy — often secreted in civilian populations — and can do great damage very suddenly through the use of terrorism against civilian populations. Moreover, because al Qaeda is not a nation state, it has no population to protect, and no territory or homeland — or armed forces — to defend. Ordinary forms of deterrence, then, are arguably less effective than in a traditional war. Therefore, in the war on terrorism, the chief military way to prevent attacks — to win the war in any effective sense — is to interdict terrorist operations, or so the Executive insists.⁷⁵ And that can be done, the Administration claims,

⁷³ It bears emphasis, however, that the recent Detainee Treatment Act stands as a powerful counterexample to this general trend. See Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739, 2739-40 (codified at 42 U.S.C.A. § 2000dd (West 2007)).

⁷⁴ See Press Briefing by Att'y Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Director for Nat'l Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (statement by the Attorney General that "[w]e have had discussions with Congress in the past — certain members of Congress — as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible").

⁷⁵ For a critique of the Bush Administration's pervasive reliance on a "paradigm of prevention" in the current conflict, see DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007).

only by acquiring intelligence from within al Qaeda.⁷⁶ It follows that much of the primary action or “engagement” with the enemy is more likely to occur in interrogation rooms and detention facilities, and across wires, and in vast computer reservoirs of stored data, than in bunkers and on traditional battlefields.

As it happens, however, in recent decades — but well before the war on terrorism began — both intelligence collection and the treatment and interrogation of detained persons have become subject to a thicket of statutory regulation, through laws enacted to implement human rights treaties and the laws of war and to respond to the public’s outrage at the abuse of national security powers exposed in the aftermath of Watergate. For that reason, and notwithstanding all the talk of congressional acquiescence to executive discretion when it comes to national security matters, executive actions central to the current military conflict are in fact subject to a substantial body of legislative and treaty-based regulation.

In addition, in this conflict the battlefield “lacks a precise geographic location and arguably includes the United States.”⁷⁷ For this reason, too, the freedom that Congress usually has been willing to afford the President in waging war against the enemy is much less likely to result in the President’s being able to operate without concerning himself with statutorily imposed constraints. Matters that arguably concern “battlefield” operations are too likely to overlap with matters that Congress has long considered to be within its natural purview as the branch of government chiefly responsible for regulating the nation’s domestic affairs — such as protecting domestic communications from surveillance, and ensuring that residents of the United States are not detained arbitrarily.

3. *The Criminalization of Wartime Conduct.* — The potential for interbranch constitutional conflict over war powers is arguably made all the greater by a feature of some of the statutory restrictions on warmaking that Congress has enacted in recent decades: they often take the form of criminal prohibitions. In previous armed conflicts, Presidents have occasionally avoided seemingly applicable statutory limits by means of creative — in some cases, perhaps even tendentious — statutory construction.⁷⁸ Such an executive branch legal strategy

⁷⁶ See YOO, *supra* note 14, at 20–21.

⁷⁷ Bradley & Goldsmith, *supra* note 27, at 2049. See generally Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 720–25 (2004) (arguing that in the context of the war on terror, the breakdown of spatial boundaries between zones of conflict and zones of peace has “potentially breathtaking domestic consequences”).

⁷⁸ See Barron & Lederman, *supra* note 15, section IV.E.1 (discussing Attorney General Jackson’s 1940 opinion on the trade with the British of destroyers for military bases); *id.* section V.D.2 (discussing Reagan Administration attempts to construe a requirement that Congress be

forestalls the Category Three constitutional question by interpreting away the legislative constraint, leaving it to Congress to respond by attempting to impose (or reimpose) the constraint — but this time with unmistakable clarity. But while the Bush Administration has used this approach at times, as in its creative interpretations of the Torture Act and the relationship between FISA and the AUMF,⁷⁹ it has consistently supplemented such statutory construction with a strong constitutional objection (or it has insisted on narrow readings of statutes in order to avoid allegedly serious Article II questions).

As suggested above, this approach might reflect the idiosyncratic predilections of this particular Administration. But a structural factor that reportedly exerts special pressure on the President's legal advisors also motivates this approach. In particular, many of the statutes that now regulate detention, interrogation, and surveillance are not merely prohibitions against specified conduct but actual criminal laws, subjecting violators to severe penalties. Officers in the Central Intelligence Agency, the Department of Defense, and elsewhere are understandably reluctant to engage in action that arguably falls within or comes close to such a criminal prohibition, without substantial assurances that they would have airtight defenses to any future prosecution. They might well conclude that creative statutory interpretation is not enough — that they need the imprimatur of a constitutional presidential “override” to establish a complete defense.

notified of covert actions); *id.* section V.F.1 (discussing a Clinton Administration opinion that an appropriations statute authorized a continuation of hostilities in Kosovo that would otherwise have been limited by the War Powers Resolution). It is a very interesting and important question whether and when such statutory creativity is consistent with the President's constitutional obligation to faithfully execute the law. See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/07/chalk-on-spikes-what-is-proper-role-of.html> (July 4, 2006, 11:28 EST); see also Kinkopf, *supra* note 27; Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006). Such questions, however, are not germane to our present topic, except to the extent such statutory interpretation purports to be driven by the need to avoid allegedly serious constitutional questions relating to the President's Commander in Chief prerogatives.

⁷⁹ See *supra* pp. 707, 710.

Or so the argument runs, anyway.⁸⁰ We are somewhat skeptical that the modern enactment of domestic criminal sanctions has so significantly changed the incentive structure of the intelligence agencies and armed forces. Criminal prohibitions on wartime conduct were not unknown in earlier wars.⁸¹ In addition, a definitive opinion of the Department of Justice that no statute prohibits the conduct in question

⁸⁰ See, e.g., YOO, *supra* note 14, at 183, 186 (explaining that the 2002 OLC Torture Opinion addressed the Commander in Chief issue in order to offer “a legal framework for the White House and the CIA,” telling intelligence agents “[w]hat might happen if someone stepped over the line” and further explaining that “[i]n the war on terrorism, we will need officials at all levels, from career civil servants to cabinet members, to innovate and take risks”); cf. Memorandum from Att’y Gen. John Ashcroft to President George W. Bush (Feb. 1, 2002), in THE TORTURE PAPERS, *supra* note 7, at 126 (advising the President to find that the Geneva Conventions did not apply to Afghanistan because, inter alia, “grave breaches” of that treaty are criminalized as “war crimes,” and therefore “a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees”). See generally GOLDSMITH, *supra* note 72.

⁸¹ The conduct of war has long been subject to a significant array of legal rules, many of them enforceable through criminal sanctions. Throughout the long history of our nation’s military conflicts, U.S. courts-martial and other military tribunals have tried, and imposed sentences upon, members and officers of the U.S. armed forces, including commanding officers, for municipal crimes, violations of the military code, statutory violations, and violations of the laws of war. Such tribunals have also often sanctioned foreign military officers for crimes in the service of military objectives (including on a theory of command responsibility), for conduct that would also be unlawful if undertaken by our own forces. These crimes have often involved mistreatment of the enemy, and/or unlawful intelligence activities (including spying behind enemy lines). See, e.g., *infra* note 181 (discussing the federal conviction of General Andrew Jackson of contempt for certain unlawful actions taken in imposing martial law in New Orleans at the end of the War of 1812); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 33–37 (2005) (discussing the use of military commissions to try U.S. soldiers for violations of common law offenses during occupation of Mexico in the Mexican War, and the use of the Council of War to try violations of the laws of war); Lewis L. Laska & James M. Smith, “*Hell and the Devil*”: *Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 MIL. L. REV. 77, 77–78, 97–98, 127–28 (1975) (discussing a military commission’s conviction of the Confederate commander of the prisoner of war camp in Andersonville, Georgia, for conspiring to injure the health and destroy the lives of prisoners of war and to murder thirteen prisoners there); Guénaél Mettraux, *U.S. Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contributions to National Case Law on War Crimes*, 1 J. INT’L CRIM. JUST. 135, 136, 139–43 (2003) (discussing the court-martial conviction of the commander of army and marine troops on the island of Samar during the U.S.–Philippine War for conduct to the prejudice of good order and discipline, based on his role in instigating the abuse of prisoners, and the court-martial of several army and marine officers during that same conflict for war crimes, including for having subjected prisoners to the “water cure”); *In re Yamashita*, 327 U.S. 1, 16 (1946) (upholding the military commission conviction of the commanding general of the Imperial Japanese Army in the Philippines, on a theory of command responsibility, for breaching his “affirmative duty to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population”). In addition, it has long been a crime under the Anti-Deficiency Act for an officer or employee of the United States government to “make or authorize an expenditure or obligation” — including for military purposes — that “exceed[s] an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. §§ 1341(a)(1)(A), 1350 (2000).

makes remote the prospect of future criminal enforcement.⁸² What is more, the military has long been devoted to rule-of-law norms; and the same has been true of the intelligence community since the Church Committee hearings in the mid-1970s, not only because of the prospect of criminal sanctions, but also because the CIA and other agencies wish never again to be accused of rampant lawlessness, a charge that haunts the CIA to this day.⁸³ Finally, we simply have not seen the evidence to support the notion that the Executive more regularly disregarded statutes, or construed them unreasonably, in the many years prior to the spate of recent criminal enactments. All of this suggests that the more recent executive branch anxieties have less to do with criminal sanctions, and more to do with the simple fact that the laws have comprehensively and specifically cabined many forms of conduct that the Executive would otherwise be inclined to exploit in recent armed conflicts. Under either explanation, however, the recent emergence of the claim of preclusive executive power may be less a confirmation of Congress's weakness than evidence of the firmness with which the Congress has in recent decades attempted to constrain presidential conduct.

4. *Judicial Enforcement of Implied Statutory Restrictions.* — The way the Supreme Court approaches war powers generally, when combined with the increased mass of potentially relevant legislative restrictions on the conduct of this military conflict, further increases the likelihood that the “lowest ebb” issue will be joined in the future. Principles of deference to executive authority tend to dominate academic discussion of statutory interpretation and war powers. As we have indicated, however, *Hamdan*, *Youngstown*, and other modern war powers cases demonstrate that the Court cannot be counted on to give the President the benefit of the doubt. And in many war powers cases, the Court has been perfectly willing to construe ambiguous statutory language against certain background rules that it presumes Congress intended to honor,⁸⁴ including a presumption that the Executive must

⁸² It is extremely unlikely that the Department would ever prosecute someone who had reasonably relied on OLC advice that his conduct was legal. Such prosecution might even raise serious due process concerns if and when the reliance on OLC legal advice was reasonable. See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 571–72 (1965); *Raley v. Ohio*, 360 U.S. 423, 437–39 (1959); *Sanger v. Reno*, 966 F. Supp. 151, 164–65 (E.D.N.Y. 1997).

⁸³ See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 89–90, 93 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>; GOLDSMITH, *supra* note 72, at 90–91.

⁸⁴ For example, the Court will often look to “the birth, development and growth of our governmental institutions up to the time Congress passed the [law]” in order to understand the backdrop against which Congress acted. *Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946); cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2754–56 (2006) (construing the AUMF to require a presumption of conformity between military commissions and traditional courts-martial). In some cases this

comply with the laws of war.⁸⁵

This general and longstanding judicial willingness to find implied limitations in ambiguous texts concerning the use of military force and national security powers is sometimes controversial. But whether justified or not, such an interpretive approach is of particular import now, given the sheer mass of preexisting statutes potentially applicable to the conflict with al Qaeda and the likelihood that this body of law will grow. Executive branch lawyers may be hard-pressed to advise their client agencies that creative construction can overcome the apparent statutory restrictions, at least if there is a reasonable prospect of judicial review (as there often will be in the war on terrorism due to its peculiar domestic connections). Instead, the prospect of judicial review will impel these lawyers to advise that the courts could well construe the potentially restrictive language to impose hard constraints on the Executive's preferred course of conduct — and that only the assertion of a superseding constitutional power of the President could, possibly, overcome such limits. Thus, the relatively weak deference the Court has long shown the President in many war powers cases, when combined with the relatively high likelihood in the war on terrorism of the applicability of restrictive but ambiguous statutory language and a justiciable case to hear, make constitutional assertions of preclusive executive powers a more likely occurrence than war powers scholarship typically assumes.

5. *Congressional Responses to Increasingly Aggressive Assertions of Unilateral Presidential Authority To Use Military Force.* — Even outside the context of the war on terrorism, contemporary developments suggest that the *Youngstown* Category Three question will loom larger than the congressional abdication paradigm would indicate. In the early years of the Constitution, it was generally assumed that congres-

historical backdrop will suggest implied *authorizations*. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004) (plurality opinion); *Dames & Moore v. Regan*, 453 U.S. 654, 679–86 (1981). See generally Bradley & Goldsmith, *supra* note 27, at 2086–88. Other times, the Court will assume that Congress has not authorized (or has implicitly proscribed) practices that represent a sharp break with past experience. In *Duncan* itself, for example, the Court assumed that Congress had not intended to authorize a deviation from historical practices respecting trials of persons in controlled territory during wartime. See 327 U.S. at 324; see also, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 601–02 (1952) (Frankfurter, J., concurring) (construing congressional intent based upon the presumption that Congress was familiar with the history of governmental seizure as a protective measure).

⁸⁵ In both *Hamdan* and *Hamdi*, the Court assumed that Congress intended to direct the Executive to comply with the laws of war. See *Hamdan*, 126 S. Ct. at 2778 n.31 (construing the UCMJ to require compliance with the law of war); *id.* at 2780 (concluding that Congress has incorporated the law of war by reference in the UCMJ); *id.* at 2794; *id.* at 2799 (Kennedy, J., concurring in part); *Hamdi*, 542 U.S. at 520–21 (plurality opinion); see also, e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (stating that “we must assume[] Congress ordinarily seeks to follow” the “principles of customary international law”); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

sional authorization was required before the President could initiate military hostilities, use military force, or introduce troops into battle. Thus, in order to restrict the scope, conduct, or objectives of a conflict, Congress would simply write such limitations into its initial authorization.⁸⁶ In the wake of the Korean and Southeast Asian wars, however, modern Presidents have frequently used military force on their own initiative, without congressional preapproval — as examples such as the conflicts in Somalia, Haiti, and Bosnia attest. In still other cases, modern Congresses have provided very broadly worded initial authorizations that the President has construed capaciously (such as the Nixon Administration's construction of the Tonkin Gulf Resolution to approve hostilities in Laos and Cambodia in the late 1960s).⁸⁷ This means that, in order to cabin the President's conduct of war, Congress must now often act, if at all, after the fact.⁸⁸

But notwithstanding the conventional assumption that the legislature has stood idly by during this transformation in the constitutional system of war powers, Congress has actually shown itself to be quite willing to intervene. It has passed restrictions on ongoing military operations in a surprisingly large number of post-Korea conflicts, from Southeast Asia to the Balkans.⁸⁹ And although these sorts of statutory restrictions are not historically anomalous,⁹⁰ they are much more numerous today. The frequency of foreign deployments in the modern era, and the dramatic shift in the relative authority of the political branches at the outset of many military conflicts, from a dominant congressional to a dominant executive model, have contributed to this upsurge in the number of such restrictive enactments. Thus, the story of congressional abdication as to the modern Executive's unilateral use of military force overlooks the frequency of congressional intervention once a conflict has begun.

III. THE METHODOLOGICAL FRAMEWORK: THE CORE/PERIPHERY METAPHOR AND WHY THE EASY ANSWERS ARE TOO EASY

Because constitutional disputes concerning what Justice Jackson called the "lowest ebb" are central to the modern law of war powers, it is important to identify a conceptual framework for evaluating them.

⁸⁶ See, e.g., Barron & Lederman, *supra* note 15, section II.C (discussing statutes in Quasi-War with France).

⁸⁷ See ELY, *supra* note 20, at 15–26, 31–32, 75.

⁸⁸ This is a principal theme, and concern, in most of the leading post-Vietnam studies of war powers, such as ELY, *supra* note 20; KOH, *supra* note 20; and SCHLESINGER, *supra* note 20.

⁸⁹ See Barron & Lederman, *supra* note 15, Part V.

⁹⁰ There are, for example, important precursors in the Civil War, which we shall discuss in our next Article. See *id.* sections III.C–E.

In large part because academics have relegated this question to the background of war powers scholarship for many decades, there has been very little effort in the legal literature to provide any systematic account of what such a framework would look like. From the work that has been done, however, as well as from numerous other more fleeting accounts of *Youngstown* Category Three (in the legal literature, in casebooks, and in common conversation among constitutional lawyers, academics, and students), one can identify and extract a familiar set of distinct, and even contradictory, analytical constructs for assessing which political branch should have the constitutional upper hand.

This Part explains why we believe the most useful way to frame the question is to draw important distinctions among the authorities that the Commander in Chief Clause conveys to the President — to identify the preclusive core, if any, of the President’s war powers and to distinguish it from the remaining, more “peripheral” Commander in Chief powers that are subject to statutory and treaty-based regulation. This way of framing the problem does not dictate which branch should win a given dispute. Indeed, the Bush Administration’s contention that congressional war powers must give way to the President’s tactical command authority — because the latter is a core, indefeasible power — is itself one way of applying a core/periphery distinction. We ultimately challenge that categorization of the tactical command power, but here we focus on a preliminary inquiry. We explain not only why the law of war powers should attempt to distinguish preclusive from regulable powers, but also why alternative approaches that purport to obviate the need to do so — and thus suggest there is no need to confront the extent to which the President enjoys inviolate tactical discretion — are inadequate.⁹¹

Before proceeding to examine these alternative legal approaches, however, it is necessary to contend with a more fundamental objection. There are those who would argue it is folly even to seek a “correct” analytical framework for the “lowest ebb” puzzle, because constitutional interpretation, as such, hardly matters in this context. Such an

⁹¹ We could hardly claim to be the first to suggest that segregating core, or indefeasible, Commander in Chief authorities from those that are “peripheral” or defeasible, is the key to unpacking the Category Three problem. Indeed, just such a distinction has been a common assumption for many in this field since after the Civil War, when Chief Justice Chase suggested that Congress has extensive warmaking authority but may not enact legislation that “interferes with the command of the forces and the conduct of campaigns.” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment); see also *infra* note 191 (identifying contemporary war powers scholars who have assumed the need to separate core from peripheral Commander in Chief powers). There have even been occasional attempts to unpack that notion in a somewhat more systematic manner, although as far as we know no one has ventured the sort of comprehensive treatment that we offer in this and our companion Article. See, e.g., BANKS & RAVENHANSSEN, *supra* note 27, at 150–57; Powell, *supra* note 20, at 564–76.

objection might simply reflect a disdain for, or skepticism of, legal exegesis, born of a certain cold-eyed realism that might be thought especially warranted in the area of war powers. After all, judicial involvement is relatively rare in this context, and thus the assumption appears to be that the political branches will likely set the constitutional balance themselves, using equal measures of negotiation, accommodation, and straightforward political maneuvering, rather than reference to constitutional analysis. As Professor Mark Tushnet has recently put the point with respect to the allocation of war powers: “[W]hatever the political process produces is what the Constitution requires (or permits, if you prefer).”⁹² Others would argue that the Framers’ actual design was to leave the question unanswered — that the founding document merely established a framework in which the political branches could themselves negotiate a solution to the problem as the exigencies of a particular era demand.⁹³

But this sort of objection reflects an incomplete, and quite unrealistic, understanding of both how our system of war powers actually operates and how it relates to constitutional argumentation. To begin with, the more prescriptive variations of the objection — that the Constitution should itself be construed as establishing an exclusively procedural means of resolving such conflicts by inviting “struggle” be-

⁹² Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons From Hamdan*, 91 MINN. L. REV. 1451, 1468 (2007). Some even suggest there are compelling normative or functional reasons to believe that, as a general matter, such a dynamic interplay of the political departments will best establish the constitutional “law” on questions of divided and shared powers, with each branch assiduously attempting to preserve its own prerogatives using the tools at its disposal. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 275–95 (1980). Something akin to this theory is often invoked in the context of interbranch disputes over claims of executive privilege and control of executive branch information. See, e.g., *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977); see also Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 516–20 (1987) (advocating a similar approach to executive privilege disputes).

⁹³ See John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317, 1317–18 (1997) (arguing that the founding document should not be analyzed in terms of formal or fixed legal rules, but that the Constitution itself contemplates “a spontaneous order generated by the dynamic interplay of institutions”); cf. CORWIN, *supra* note 20, at 201 (arguing that the Constitution’s incomplete description of Article I and Article II authorities with respect to foreign affairs “is an invitation to struggle for the privilege of directing American foreign policy”). Professor John McGinnis offers little evidence for such an originalist argument. He cites only the fact that Madison thought “parchment barriers” were unlikely to sufficiently constrain rulers, McGinnis, *supra*, at 1326 (quoting THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted), and a comment of Elbridge Gerry at the Constitutional Convention that the branches might seek alliances with one another, much as nation-states do, *id.* at 1326 n.33, neither of which is much support for his claim that the Framers were indifferent to how war powers would be allocated and thus designed the Constitution so that such questions would be resolved by whatever “spontaneous order[ing]” the political branches might generate from era to era.

tween the political departments for relative supremacy in matters of war — often appear to assume the judiciary will rarely be asked to broker such disputes. In the rare instances where a case is teed up for judicial resolution, moreover, this approach suggests that the courts will or should throw the matter back to the political departments for their continued struggle. It is true, of course, that courts are reluctant to police wartime disputes between the branches.⁹⁴ Nevertheless, the Supreme Court's jurisprudence, stretching from early in our history through *Youngstown* to numerous contemporary war powers cases, is rife with instances of the Court's resolving questions of the Executive's war powers, just as it has adjudicated other separation of powers disputes between the political departments.⁹⁵ If there is a party with constitutionally sufficient standing to demand judicial protection from a presidential refusal to obey a statute during war, it is not clear why there should be a general rule that courts must leave the question to the political branches.⁹⁶ One need only consider the cases that could arise in the contemporary setting to see that leaving the question of the President's constitutional authority to defy a statutory restriction on his war powers to the give-and-take of the political branches would be quite radical in its implications.

Of course, conventional jurisdictional barriers may prevent judicial review with respect to many war powers disputes, or permit such review only well after the President has acted in defiance of a statute. Therefore, it is true as a practical matter that the majority of such disputes are ultimately settled (or left unresolved) by the give-and-take between the political branches, and by the nonjudicial precedent that such negotiated resolution establishes.⁹⁷ But even so, it is especially odd to conclude that in this context the answer to the constitutional question should be determined by the vagaries of politics. By definition, these are not cases in which the President is merely the "first mover," acting when Congress has not — a context in which Congress

⁹⁴ See, e.g., *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (rejecting a suit to enjoin the Iraq War on constitutional and statutory grounds).

⁹⁵ Cf. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 559 n.7 (1977) (Rehnquist, J., dissenting) ("It could have been plausibly maintained that the Framers thought that the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion. But that is not the way the law has developed in this Court.")

⁹⁶ See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 37–41 (D.C. Cir. 2000) (Tatel, J., concurring) (citing cases); *Massachusetts v. Laird*, 451 F.2d 26, 29–34 (1st Cir. 1971). In some cases, of course, the courts' rulings on the merits might be that the executive conduct *was* authorized by Congress. See *id.* at 34; *supra* note 30 (citing cases such as the *Prize Cases*).

⁹⁷ For an especially thoughtful and thorough contemporary account of such interbranch practice, see JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* (2007).

can hardly complain that its will has been ignored or that it was denied any role in the ultimate decision. These are, instead, cases in which the President chooses to *disregard* a statute already in place. That is to say, the legislature has already acted in accord with the fundamental form of political maneuvering our Constitution contemplates — the bicameralism and presentment mechanism that Article I prescribes. If executive defiance of such a political outcome is to be checked, then, it would appear to require Congress to do much more than simply accept responsibility for the obligation to exercise its ordinary legislative powers. Instead, the legislature apparently would be obliged to continue to reenact the same statute (and now by supermajorities in each House) until the President capitulates, or perhaps to augment its exercise of lawmaking authority with other, more dramatic shows of legislative force (perhaps even through the institution of impeachment proceedings), until the Commander in Chief relents. For that reason, the insistence that allocation of war powers should be “left to politics” would hardly be a neutral solution to the problem: it would inevitably tilt the constitutional structure decidedly in favor of executive supremacy — and its defenders have not explained why that necessary consequence is a proper one.

Most importantly, perhaps, the “politics is law” model seriously underestimates the role of traditional constitutional analysis — especially historical exegesis — in war powers disputation *outside* the context of litigation. It would be a serious mistake to assume that those who do not wear robes or wield gavels — from executive branch decision-makers, including the lawyers charged with advising the President regarding the scope of his legal authority; to members of Congress (and their staffs) who must determine the scope of their own powers regarding the conduct of military operations; to the broader public whose own views will necessarily influence the kinds of arguments that members of the political branches will make — are unaffected by the kind of constitutional argumentation we too often associate only with courtrooms.

The everyday executive-legislative “dynamic” process is itself crucially shaped by felt understandings and shared notions of the constitutional role that each branch is expected to play with respect to war powers. Therefore the “accommodation” worked out between the political branches is dependent on the ability of each branch to assert that it enjoys certain prerogatives that establish baselines for negotiation.⁹⁸ This is true not only because in “a culture as legalistic as ours,

⁹⁸ See generally John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293.

where the audience to be persuaded [is] the public and more particularly, political and media elites, it is hardly surprising that arguments will be put in terms that appeal to concepts familiar from the area of our law more governed by rule centralism," but, more importantly, because "[p]ublicizing principles in legal terms may also serve as precommitments to strengthen positions in the bargaining game."⁹⁹ As Justice Jackson correctly noted, "The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy."¹⁰⁰

The interdepartmental struggle for war powers supremacy itself, in other words, is precisely about the rules of engagement. Neither the Executive nor Congress enters the process by conceding that the Constitution reveals no right answers. Indeed, to do so would be to give away the game. Each department (correctly) understands that its ultimate success may depend in large part on its ability to plausibly assert — and persuade the public of — its "core," preclusive powers. That exercise in public persuasion is necessarily one involving, even if it is not wholly dependent upon, traditional modes of constitutional interpretation — and of historical fidelity, in particular.¹⁰¹

Thus, a fuller understanding of the "lowest ebb" issue, and what our constitutional tradition shows regarding it, should prompt reflection as to the basis for uncompromising assertions of preclusive war powers, both now and in the future.¹⁰² A more complete examination of the issue should similarly spur examination of the reflexive assumption of many in Congress, and in the public more generally, that our constitutional tradition necessarily casts suspicion on the legitimacy of statutory restrictions on the President's powers to prosecute a war.

⁹⁹ McGinnis, *supra* note 93, at 1327. This is a bit different from Judge Leventhal's view in the context of executive privilege disputes, which assumes the departments will not be entirely self-serving and strategic, but rather that "each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977).

¹⁰⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring).

¹⁰¹ Even when executive defiance occurs in secret, moreover, understandings of the constitutional limits of executive war powers still matter. If the Department of Justice were to decline to proffer formal "rule of law" arguments in terms of established notions of Article II prerogatives, it would hardly be able to convince actors within the bureaucracy (for example, the CIA) that they may act without fear of legal exposure. (Imagine, for instance, the reaction if the Department of Justice were to advise the CIA that whether the President has the constitutional authority to disregard a statute will depend on the "spontaneous order generated by the dynamic interplay of institutions," McGinnis, *supra* note 93, at 1317.) The more scrutiny given to the notion that the President's war powers are inviolate, the less likely it is that creative applications of such a claim, even if made in secret, would suffice to guarantee the degree of legal security that may be needed to tamp down resistance or skepticism at the agency level or in the field.

¹⁰² See generally Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005).

A. *The Core/Periphery Approach to Category Three Questions*

Our manner of framing the inquiry draws from what Professor Neil Kinkopf aptly calls the “reciprocity model”¹⁰³ of interbranch relations, a concept most famously suggested in Justice Jackson’s *Youngstown* concurrence itself.¹⁰⁴ Under this approach, the war powers of each political branch are presumed to be extensive and, for that reason, blended and overlapping with those of the competing branch. The model thus contemplates interbranch conflict in matters relating to war because it rejects the idea that there are clear lines of demarcation establishing the proper domain of each branch. Justice Jackson himself, however, did not provide a neat doctrinal test for resolving the conflicts over authority that he clearly anticipated. Instead, he employed a subtraction metaphor: in the case of a conflict between departmental war powers, he wrote, the President “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁰⁵ This image, which suggests a kind of mathematical equation for determining constitutional powers, seems to us unhelpful. We prefer a different metaphor, one that draws from the Supreme Court’s treatment of similar questions in other separation of powers contexts but that also accords with Justice Jackson’s own indications of how the inquiry should be performed — namely, that of cores and peripheries.

The notion is that certain Article II clauses, such as the Commander in Chief Clause, might afford the President at least two types of constitutional powers: those that he may exercise on his own but that are regulable by statute, and those that form the “core,” or, in the Court’s recent phrase in a different separation of powers context, the “central prerogatives,”¹⁰⁶ of the Executive’s powers. The latter are authorities that establish not only a power to act in the absence of legislative authorization, but also an infeasible scope of discretion — what we (following Justice Jackson) are characterizing as “preclusive” powers.¹⁰⁷

There are those who would strongly resist this notion at the threshold — after all, the words of the power-granting clauses of the Consti-

¹⁰³ Kinkopf, *supra* note 27, at 1170.

¹⁰⁴ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but *interdependence*, autonomy but *reciprocity*.” (emphases added)); *see also* Powell, *supra* note 20, at 540–44, 550–51.

¹⁰⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *see also id.* at 640 (suggesting that in some cases there may be a “remainder of executive power after subtraction of such powers as Congress may have over the subject”).

¹⁰⁶ *Loving v. United States*, 517 U.S. 748, 757 (1996).

¹⁰⁷ *See supra* note 6.

tution, including the Commander in Chief Clause, do not disclose on their face any such distinction between preclusive and non-preclusive authorities.¹⁰⁸ Yet, in fact, such a core/periphery distinction is commonly accepted as a prominent feature of many textually enumerated powers, even though the constitutional clauses that establish those powers do not expressly prescribe such an approach.

For example, the Court has held that the “judicial Power” of Article III¹⁰⁹ confers substantial authority on the federal courts to set the procedural and evidentiary rules for the functioning of the federal judiciary.¹¹⁰ As a general matter, however, Congress possesses its own powers under the Necessary and Proper Clause (and perhaps under Article III itself¹¹¹) to establish judicial procedures, including procedures that can preempt judicially created ones.¹¹² That does not mean, however,

¹⁰⁸ Professor Saikrishna Prakash, for example, has recently questioned the notion of trying to segregate “core” from peripheral executive powers. Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 236–37 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)). Such a theory, Professor Prakash argues, “requires some basis for sorting presidential powers into an indispensable core and a regulable periphery,” and he can find “no basis in the Constitution’s text or structure” for such sorting, other than in a few discrete cases where the Constitution identifies specific congressional powers. *Id.* at 236, 237. “As a result,” he concludes, “any other classification of presidential powers into regulable and nonregulable categories will ultimately reflect nothing more than the taxonomist’s estimation of the relative importance and value of the various powers and of the benefits and drawbacks of congressional regulation.” *Id.* at 237. Interestingly, however, Professor Prakash at times appears to embrace what looks like a core/periphery distinction in evaluating executive war powers. Although the principal thrust of his essay is that Congress cannot rely simply on the Necessary and Proper Clause as a ground for limiting the exercise of executive constitutional authorities, Professor Prakash appears to assume that if Congress acts according to one of its other, enumerated Article I authorities, then its power to regulate the executive is virtually plenary. *See id.* at 241, 256. As an example, he points to Congress’s powers to regulate the armed forces and organize the militia as a basis for concluding that the President’s independent Commander in Chief authorities, adopted in the absence of statutory constraint, can be “trump[ed]” by statutes enacted pursuant to Congress’s specific war and spending powers, such as the Rules for Government and Regulation Clause. *Id.* at 235 & n.119. This would mean that, under Professor Prakash’s view, virtually all the statutes currently in question would be constitutional. Yet Professor Prakash also adds a suggestion of *preclusive* Commander in Chief powers: “There is also the separate question of where the Congress’s regulatory authority ends, for it is unlikely that the President’s Commander in Chief authority is entirely defeasible.” *Id.* at 235 n.119. This suggests that even Professor Prakash recognizes the need to distinguish core from peripheral powers, at least when it comes to war powers. *See also* Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1321–22 (2006) (appearing to embrace a core/periphery analysis for determining when Congress can regulate the actions of the Commander in Chief, because, inter alia, it “is consistent with the notion that there are some things that Congress cannot do, such as set battlefield tactics”).

¹⁰⁹ *See* U.S. CONST. art. III, § 1.

¹¹⁰ *See, e.g.,* *United States v. Hasting*, 461 U.S. 499, 505 (1983) (“[F]ederal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.”).

¹¹¹ *See* U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and *under such Regulations as the Congress shall make.*” (emphasis added)).

¹¹² *See, e.g.,* *Degen v. United States*, 517 U.S. 820, 823 (1996) (“In many instances the inherent powers of the courts may be controlled or overridden by statute or rule.”); *Carlisle v. United*

that Congress's Article I powers inevitably trump the judicial power. There is a limit — a “core” — of the federal judicial power that no statute can regulate, as the Court recognized in the 1995 case *Plaut v. Spendthrift Farm, Inc.*,¹¹³ in which it held that Congress cannot enact retroactive legislation requiring Article III courts to set aside their final judgments.¹¹⁴

Similarly, in the context of the President, the extent of indefeasible Article II powers may vary, depending on the particular authority in question. The Court has long understood, for instance, that the President's power to decide whom to pardon for federal offenses is virtually plenary, and may not be regulated by statute.¹¹⁵ By contrast, the his-

States, 517 U.S. 416, 425–26 (1996) (“[Federal courts possess] ‘inherent supervisory power’ . . . [to] formulate procedural rules not specifically required by the Constitution or the Congress.” Whatever the scope of this ‘inherent power,’ however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.” (citation omitted) (quoting *Hasting*, 461 U.S. at 505)); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22, 42–43 (1825); see also *United States v. Sioux Nation of Indians*, 448 U.S. 371, 390–407 (1980) (holding that Congress can require federal courts to reach certain claims on the merits, without regard to notions of res judicata or collateral estoppel).

¹¹³ 514 U.S. 211 (1995).

¹¹⁴ See *id.* at 219; see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58, 60 (1991) (Scalia, J., dissenting) (arguing that although “Congress may prescribe the means by which the courts may protect the integrity of their proceedings,” “[s]ome elements of that inherent authority are so essential to [t]he judicial Power[] that they are indefeasible, among which is a court’s ability to enter orders protecting the integrity of its proceedings” (second alteration in original) (citation omitted) (quoting U.S. CONST. art. III, § 1)); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47 (1871) (holding that a statute requiring a court to treat certain pardons as conclusive evidence of disloyalty “inadvertently passed the limit which separates the legislative from the judicial power” by prescribing an “arbitrary rule of decision,” requiring the court to give evidence an effect “precisely contrary” to the effect the court itself would give it). There has been considerable recent debate about the possibility of other preclusive Article III powers that are indefeasible by statute, such as whether Congress could require that oral arguments be televised; limit the Court’s resort to stare decisis; prohibit unpublished or non-precedential opinions; or require that courts decide cases on certain deadlines. See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 591–96 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711 (2004). The Court has yet to directly address these questions.

¹¹⁵ See *Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). This is not to say that Congress can do absolutely nothing to affect the President’s pardoning practices. For example, Congress arguably can impose regulations, such as disclosure requirements and bribery restrictions, with respect to those who lobby the President for pardons. See Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1250–59 (2003). But see *id.* at 1254 (explaining that in 2000, the Department of Justice proffered constitutional objections to a bill that would have imposed certain procedural requirements on Department of Justice

torical understanding of the core, preclusive discretion at the heart of the President's appointment power has been quite different. The consensus view has long been that Congress can cabin the President's otherwise unbounded appointment power by imposing statutory qualifications for officers. But there are limits: the qualifications Congress sets must be attainable "by a sufficient number to afford ample room for [presidential] choice"¹¹⁶ so as to give the President "scope for [his] judgment and will";¹¹⁷ otherwise, they infringe on the core of the President's appointing power.¹¹⁸

In like fashion, and standing firmly with Justice Jackson's *Youngstown* concurrence, our approach assumes that the Commander in Chief Clause confers a broad range of powers that the President can exercise without advance legislative authorization; that Congress has the authority to limit some of those powers by statute; but that other of those powers are beyond legislative reach. The difficulty, of course, is in determining which, if any, of the powers that the Commander in Chief possesses are in the final category and thus are preclusive.

B. Arguments that the President Lacks Substantive War Powers

Some observers would challenge this framework's premises. They would contend that the Commander in Chief Clause does not grant the President any substantive authority in the first instance — that it is purely a hierarchical designation. If so, the President can never win in Category Three disputes concerning how he may engage the enemy, for all of the powers that would be relevant to that mission would, by definition, be established by legislation. A more tempered variation of this argument is limited to the war on terrorism, which we will consider separately below.

officials who assist in the President's pardoning process); *see also* Whether the President May Have Access to Grand Jury Material "in the Course of" Exercising His Discretion To Grant Pardons, 2000 WL (OLC) 34474450, at *1 (Dec. 22, 2000) (concluding that the prohibition in Federal Rule of Criminal Procedure 6(e) "cannot constitutionally be applied to prevent the President from obtaining grand jury information already in the possession of the Executive Branch when the President determines that, for purposes of making a clemency decision, his need for that information outweighs the confidentiality interests embodied in Rule 6(e)").

¹¹⁶ Civil-Service Commission, 13 Op. Att'y Gen. 516, 525 (1871).

¹¹⁷ *Id.* at 520; *see also* Myers v. United States, 272 U.S. 52, 128 (1926) (the qualifications Congress sets must "not so limit selection and so trench upon executive choice as to be in effect legislative designation"); *id.* at 264–74 (Brandeis, J., dissenting) (canvassing scores of historical examples of statutory qualifications for officers).

¹¹⁸ As these two examples demonstrate, identification of a preclusive "core" of an Article II power can in some cases entail identifying a function (such as designating who will be pardoned) that must remain entirely unlimited, whereas in other cases (such as identifying who should be appointed to federal office), the core is defined by identifying the *degree* of discretion the Constitution preserves.

1. *The Commander in Chief Clause Does Not Confer Substantive Powers.* — The strongest form of the argument asserts that the Commander in Chief Clause's sole function is to place the President at the top of the chain of military command.¹¹⁹ Such a contention makes the Category Three question easy in all cases unrelated to the possible infringement of the President's prerogative of superintendence, for surely the President may not acquire substantive authority by virtue of Congress imposing a statutory restriction.

The problem with this argument is that it cannot be reconciled with a long line of Supreme Court precedent recognizing a range of distinct substantive powers that the Commander in Chief may exercise in the absence of legislative authorization. These powers include, in particular, the power "to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."¹²⁰ There continue to be contested questions on the limits of the President's independent authorities (most notably with respect to the power to initiate hostilities).¹²¹ In virtually all of the

¹¹⁹ See, e.g., David Gray Adler, *George Bush as Commander in Chief: Toward the Nether World of Constitutionalism*, 36 PRESIDENTIAL STUD. Q. 525, 526 (2006). A variant on this argument, based on a strict separationist war powers model, insists that if a power "is given explicitly to the Congress," "[i]t cannot be given implicitly to the President, except on pain of contradiction." Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321 (2005). On this view, no Category Three issue can ever arise for the simple reason that, if Congress has the express authority to enact a statute, then the President must be without power over the matter at hand.

¹²⁰ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850); see also OLC Cambodian Sanctuaries Opinion, *supra* note 20, at 4–16 (describing the Commander in Chief's substantive powers as including the power to respond to enemy attack, the power to protect the lives of troops, the authority to deploy troops throughout the world, and the authority to conduct armed conflict once it is instituted by making and implementing the strategic and tactical discretionary decisions associated with such a conflict). In addition, these powers may include the authority to constitute courts-martial, see *Swain v. United States*, 165 U.S. 553, 557–58 (1897), and to make regulations for rewards for the capture of deserters, see *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885). The President can also establish a custom house in a conquered enemy's territory "as a measure of hostility, and as . . . a mode of exacting contributions from the enemy to support our army, and . . . cripp[ing] the [enemy's] resources . . . , and mak[ing] it feel the evils and burdens of the war." *Fleming*, 50 U.S. at 616. And he almost certainly has some independent authority to attempt to obtain intelligence about the enemy, by way of spying, surveillance, and the like. See *Totten v. United States*, 92 U.S. 105, 106 (1876); see also *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61–63 (1941) (concluding that the President may order troops to assist in the training of British students).

¹²¹ See *supra* note 20 (collecting authorities devoted to this question). Another traditional area of dispute is the extent to which the Commander in Chief may seize property in war. Although the Court in an early case held that the President could not, on his own authority, order the confiscation of enemy property found in the United States, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814), it later appeared to backtrack from this view, see *The Prize Cases*, 67 U.S. (2 Black) 635, 670–71 (1863), and, famously, President Lincoln relied upon his Commander in

cases that have thus far arisen in the context of the current armed conflicts, however, the President at least arguably has such independent powers.¹²²

2. *The War on Terrorism Does Not Trigger Any Substantive War Powers.* — A perhaps more appealing (and certainly more modest) approach seeks to elide the problem by resting the argument on the narrower ground that some of the President's substantive war powers are not triggered by the conflict against al Qaeda, in particular, because it is not a traditional warlike conflict. The problem with this argument is that, although Congress has not formally declared war, the 2001 AUMF plainly authorizes an executive branch military response to the September 11 attacks that goes beyond the use of ordinary law enforcement techniques. The Supreme Court has suggested, rightly in our view, that the 2001 AUMF activated the President's traditional war powers in the conflict against al Qaeda, at least insofar as the exercise of such powers is consistent with limitations that Congress has imposed or recognized.¹²³

One can imagine a related challenge to the premises of our inquiry, such as the following: whatever the proper status of the conflict against al Qaeda might be for some constitutional and statutory (and international law) purposes, a nontraditional conflict such as this one, characterized more by intelligence gathering than by battlefield maneuvering, and of an indefinite duration (because of the nature of the non-state enemy), does not activate the same type, or quantum, of Commander in Chief powers as those that may be exercised during a

Chief power to liberate Confederate slaves in the Emancipation Proclamation, even though they belonged to U.S. citizens.

¹²² Of course, even in the present conflicts there remain areas of contention. There is some dispute, for example, about whether the President has independent authority to institute military tribunals to try violations of the laws of war. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006). It also has been argued that the war powers conferred by the Commander in Chief Clause are themselves delimited as a matter of constitutional design by the international laws of armed conflict. See, e.g., David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363 (2003); David Golove, *The Commander-in-Chief and the Laws of War* (2007) (unpublished manuscript, on file with the Harvard Law School Library). But see Bradley & Goldsmith, *supra* note 27, at 2097 n.220. If this is correct, it would mean that the most notorious of the *Youngstown* Category Three disputes in the Bush Administration — that involving torture — would be quite beside the point, because the injunction against torture is one of the handful of most well-established and accepted norms of international law. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (“[T]he torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind” (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)) (internal quotation mark omitted)). If the Commander in Chief Clause does not in the first instance give the President any power to violate the laws of war, then the existence of a statutory constraint against torture does not impinge on any inherent constitutional powers.

¹²³ *Hamdan*, 126 S. Ct. at 2775 (“[W]e assume that the AUMF activated the President's war powers” (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion))).

traditional conflict between nation-states. To recognize the full measure of traditional executive authority in this type of conflict, the argument might run, would pose too substantial a threat to the basic structure of separation of powers and to individual liberty, especially in light of the likely domestic effects of such an executive prerogative during a war that might last for lifetimes.¹²⁴

Such an argument would seem vulnerable to the response that the Constitution's recognition of inherent Commander in Chief authorities — and, arguably, of a preclusive power of presidential command in military campaigns — should not be cast aside because of necessarily speculative concerns about the harms to the constitutional structure that would arise from the President's decision to act in conformity with present-day military requirements. At other times in history, after all, most notably during the Civil War (and even the Second World War), the battlefield has extended to the home front, conflicts have been of indefinite duration, and our enemies have included non-state and non-uniformed actors, including some who were difficult to distinguish from civilians.¹²⁵ The problem, in other words, is not a new one, even if it might be especially prominent with respect to al Qaeda.

But even putting aside the substantive problems with the terrorism-is-different argument, this approach is still insufficient. The issue that arises at the “lowest ebb” has simply become too central to the law of constitutional war powers to be kept at the margins of analysis by claims about the uniqueness of a particular conflict. After all, such an argument has no relevance to the question whether the Commander in Chief possesses preclusive powers over the kinds of legislative regulations that have been imposed on the President's execution of the more conventional military operations in Southeast Asia, Lebanon, Somalia, Haiti, and Bosnia, and that may be imposed on operations in Iraq or in Iran.¹²⁶ And yet those constitutional questions are neither minor, nor rare, nor unlikely to recur.

C. Arguments that Congress Lacks Substantive Article I Powers

Just as the claim that the President lacks substantive war powers would resolve the Category Three question in a categorical fashion, so, too, would the mirror-image argument that Congress lacks the affirma-

¹²⁴ Professor David Luban suggests this sort of argument. David Luban, *The Defense of Torture*, N.Y. REV. BOOKS, Mar. 15, 2007, at 37, 38 (reviewing YOO, *supra* note 14) (“[T]he full panoply of traditional presidential war powers . . . were designed for conflicts in which the enemy is in uniform and belongs to an identifiable foreign government, and whose duration and conclusion are defined by victories, surrenders, and peace treaties.”).

¹²⁵ See, e.g., *Ex parte Quirin*, 317 U.S. 1, 21 (1942); FRANCIS LIEBER, *GUERRILLA PARTIES: CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR* (1862).

¹²⁶ See Barron & Lederman, *supra* note 15, sections V.B.1, V.D.1, V.F.1, V.F.2.b, V.I.B.

tive Article I authority to enact statutes limiting the executive's conduct of war. This sort of claim is also often premised on the formalist notion that presidential and congressional war powers are strictly segregated and cannot overlap: if the President has a certain power to act independently, it must be that Congress's Article I authorities do not encompass such subject matters.¹²⁷ But whereas some conclude that such strict segregation favors Congress because the Commander in Chief's substantive powers verge on the nonexistent, others contend the approach actually redounds to the benefit of the President.¹²⁸

The problem with this contention is that it also conflicts with a long line of Supreme Court precedent. These cases construe Congress's several enumerated war and other Article I powers to be more than capacious enough to support not only the statutes President Bush has already claimed the right to override, but also others that might be expected to raise *Youngstown* Category Three issues. For example, the Court has construed broadly Congress's power to "make Rules for the Government and Regulation of the land and naval Forces,"¹²⁹ concluding that it gives Congress "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."¹³⁰ Congress has a similarly broad power to make rules with respect to "Captures" of enemy property and prisoners,¹³¹ and to "govern[]" those armed forces — the militia called forth to be "employed in the Service of the United States" — that were originally contemplated as the primary line of national defense.¹³² In addition, Con-

¹²⁷ See, e.g., Prakash, *Regulating the Commander in Chief: Some Theories*, *supra* note 108, at 1322 (surmising that if the President has certain exclusive authorities that derive from his role as Commander in Chief, such as the "power to set battlefield tactics," then those decisions by definition "do not constitute or involve regulation of armed forces or of captures" under those particular congressional powers, and then assuming that "[i]f these powers do not concern the regulation of armed forces or captures, then the Congress clearly cannot have any claim over them"); see also Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 825–29 (2006).

¹²⁸ See *infra* note 143 (giving examples, including the Bush Administration's claim that FISA lacks an affirmative source of congressional authority).

¹²⁹ U.S. CONST. art. I, § 8, cl. 14.

¹³⁰ *Chappell v. Wallace*, 462 U.S. 296, 301 (1983); see also *Loving v. United States*, 517 U.S. 748, 767 (1996) (stating that this power is "no less plenary" than other Article I powers). The Court's decision in *Hamdan*, with respect to the UCMJ, implies that the clause applies not only to the government and regulation of the *internal* affairs of the army and navy, but also to rules imposed by statute for how the army and navy are to treat the enemy. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74 (2006) (citing both Rules Clauses).

¹³¹ U.S. CONST. art. I, § 8, cl. 11; see *infra* note 143.

¹³² U.S. CONST. art. I, § 8, cl. 16; see Barron & Lederman, *supra* note 15, section II.B.3; see also THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 93, at 178 (arguing that "a well-regulated militia [is] the most natural defense of a free country," and thus that placing the militia under federal control will render unnecessary a standing army, which is "dangerous to liberty").

gress has no fewer than three relevant spending powers,¹³³ and collectively these are authorities the Court has recently dubbed “broad and sweeping.”¹³⁴ Pursuant to them, Congress has the power to determine not only how money shall be spent on military functions, but also how appropriated funds shall *not* be spent.¹³⁵

To like effect, Congress’s power to “declare War”¹³⁶ has been interpreted to encompass the lesser included power to limit the scope and nature of hostilities in which U.S. armed forces may engage.¹³⁷ In addition, Congress’s power to “define and punish . . . Offences against the Law of Nations”¹³⁸ gives the legislature substantial authority to decide what conduct violates international law, and to make that conduct unlawful under domestic law.¹³⁹ The Offenses Clause is sufficient

¹³³ U.S. CONST. art. I, § 8, cl. 1 (granting authority to “provide for the common Defence”); *id.* art. I, § 8, cl. 12 (providing power to “raise and support Armies” with appropriations to last no longer than two years); *id.* art. I, § 8, cl. 13 (authorizing Congress to appropriate funds to “provide and maintain a Navy”).

¹³⁴ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306 (2006) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)) (internal quotation mark omitted).

¹³⁵ *See* *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring) (“Congress alone . . . may determine in what manner and by what means [revenues] shall be spent for military and naval procurement.”); *Appropriations — Marine Corps — Service on Battle Ships, Etc.*, 27 Op. Att’y Gen. 259, 260–61 (1909); BANKS & RAVEN-HANSEN, *supra* note 27; Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS*, *supra* note 29, at 113; Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1045–46 (2003).

¹³⁶ U.S. CONST. art. I, § 8, cl. 11.

¹³⁷ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) (“Congress is empowered to declare a general war, or congress may wage a limited war; *limited in place, in objects, and in time*. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; *but if a partial war is waged, its extent and operation depend on our municipal laws.*” (emphases added)); *id.* at 40 (opinion of Washington, J.) (“[B]eing limited as to places, persons, and things[,] . . . this is more properly termed *imperfect war*; because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.”); *id.* at 45 (opinion of Paterson, J.) (emphasizing that Congress may authorize warfare “as to certain objects, and to a certain extent”); *see also* *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (“[C]ongress may authorize general hostilities . . . or partial hostilities”); 8 ANNALS OF CONG. 1980 (1798) (remarks of Rep. Gallatin) (explaining that the Declare War Clause gave Congress the authority to enact the Alien Enemies Act (as opposed to the Alien Act, which Gallatin thought beyond Congress’s power as it had nothing to do with war): “[T]he power to remove alien enemies . . . resulted from the power to make all laws necessary to carry into effect one of the specific powers given by the Constitution. Among these powers is that of declaring war, which includes that of making prisoners of war, and of making regulations with respect to alien enemies, who are liable to be treated as prisoners of war. By virtue of that power, and in order to carry it into effect, Congress could dispose of the persons and property of alien enemies as it thinks fit, provided it be according to the laws of nations and to treaties.”).

¹³⁸ U.S. CONST. art. I, § 8, cl. 10.

¹³⁹ *See, e.g.*, *United States v. Arjona*, 120 U.S. 479, 487–88 (1887). *See generally* J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007); Beth Stephens, *Federalism and Foreign Affairs: Congress’s*

to support some of the most controversial statutes in the recent debate, such as the Torture Act and the War Crimes Act.

In addition to all of these targeted war powers, Congress has the power to “make all Laws which shall be necessary and proper for carrying into Execution” not only its own powers, but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁴⁰ On the now-common understanding of the Necessary and Proper Clause, Congress may “exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government” as a whole, including the powers that the Constitution vests in the President (or in the federal judiciary) — at least so long as the means chosen are “plainly adapted” to a permissible end.¹⁴¹ Thus, Congress may use its Necessary and Proper authority not only to create federal agencies and instrumentalities (such as the National Security Agency), but also to define the scope of those agencies’ authorizations and the conditions under which they shall operate.¹⁴²

In light of these precedents and historical understandings, the argument that Congress lacks the enumerated authority necessary to precipitate a Category Three dispute is at least as problematic as the symmetrical claim concerning the President’s supposed lack of inherent war powers.¹⁴³ Whatever else one might say about the original

Power to “Define and Punish . . . Offenses Against the Law of Nations,” 42 WM. & MARY L. REV. 447 (2000).

¹⁴⁰ U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

¹⁴¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420–21 (1819); see *Sabri v. United States*, 541 U.S. 600, 605 (2004); *Jinks v. Richland County*, 538 U.S. 456, 461–62 (2003); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1871) (upholding, as necessary and proper to carrying into effect the federal government’s war powers, a statute that tolled limitations periods for state-law civil and criminal cases for the time during which actions could not be prosecuted because of the Civil War); see also *Gonzales v. Raich*, 125 S. Ct. 2195, 2218–19 (2005) (Scalia, J., concurring in the judgment); cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs.”).

¹⁴² Some scholars recently have argued that the Necessary and Proper Clause authorizes Congress only to enact laws that bolster or assist, but *not* restrict, the other two branches in the conduct of their constitutional authorities. See, e.g., David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75; Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 333–34 (1993); Prakash, *Regulating Presidential Powers*, *supra* note 108. Such an argument would, if adopted, have a fairly dramatic impact on longstanding laws, such as those that cabin the courts’ discretion to establish procedures and evidentiary rules. See *supra* p. 727. In any event, it is hard to imagine any statute impinging on the Commander in Chief’s authority that would not be supported by one or more of Congress’s additional Article I powers.

¹⁴³ This is certainly true as to recent claims that there is no Article I authority for particular statutes that have restrained President Bush. Professor John Yoo, for example, argues that the Captures Clause gives Congress the power only to regulate the capture of property, not enemy

understanding of the war powers of either branch, our constitutional tradition, as expounded by the Supreme Court, has developed much more in accord with Justice Jackson's reciprocity model than with one that would reject the possibility of substantially (or even modestly) overlapping war authorities. Accordingly, an attempt to resolve the issue through an assertion that congressional authority is insufficient seems, in general, an argument for dramatically altering the established constitutional law of war powers.¹⁴⁴

prisoners — intimating that Congress lacks any power to regulate how the Commander in Chief treats such detained persons. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201–02 (2004). This reading of the Captures Clause, however, is not consistent with Chief Justice Marshall's contrary assumption in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814), and the Court in *Hamdan* appeared to side with Chief Justice Marshall. See *Hamdan v. Rumsfeld*, 126 S. Ct 2749, 2773 (2006) (listing the Captures Clause among the Article I authorities presumably germane to the statutes at issue in the case, dealing with enemy prisoners). Theorists contemporaneous with the Founding also considered "captures" to include takings of persons. See RICHARD LEE, TREATISE OF CAPTURES IN WAR 45–63 (2d ed. 1803) (tracing the evolution of the law concerning definition and treatment of captured enemies); EMMERICH DE VATEL, THE LAW OF NATIONS 394 (Joseph Chitty ed., London, S. Sweet 1834) (1758) (explaining that *persons* or things "captured" by the enemy are usually freed as soon as they fall into the hands of soldiers belonging to their own nation). In any event, Congress has several additional sources of authority for such regulation, including the Law of Nations Clause and the Declare War Clause, discussed in the text above.

The Department of Justice has gone so far as to suggest that perhaps Congress lacked any affirmative Article I power to enact FISA. Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Justice, to Sen. Charles Schumer, *supra* note 65, at 2. But Congress plainly had the power to enact FISA under its Commerce Clause authority. See U.S. CONST. art. I, § 8, cl. 3; 50 U.S.C. § 1801(l) (2000) (defining "[w]ire communication" to mean "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications" (emphasis added) (internal quotation marks omitted)). In this respect, FISA is akin to many other federal statutes involving wire and electronic communications systems. See *Weiss v. United States*, 308 U.S. 321, 327 (1939) (holding that the Commerce Clause authorizes Congress to regulate governmental interception of phone calls, even when the calls are wholly intrastate). FISA may also be a proper exercise of the Necessary and Proper Clause, which empowered Congress to create the NSA in the first instance; and, at least as applied to the NSA, which is a component of the Department of Defense, it is also a legitimate exercise of Congress's power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

¹⁴⁴ In a recent article, Professor Stephen Vladeck suggests that perhaps a *Youngstown* Category Three dispute can be resolved by asking whether the particular statute in question was enacted "pursuant to a direct textual grant of authority," or whether, instead, "Congress's authority is less well established or less clearly textually committed to the legislature," in which case "those may well be the cases where the executive prevails even in Jackson's 'lowest ebb' category." Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 963 (2007) (emphasis added). Perhaps Professor Vladeck is insinuating that if the President's and judiciary's authorities can be split into "core" and "peripheral" powers, so, too, should we distinguish between core and peripheral Article I powers. Although the notion is intriguing, we are not aware of any warrant for it in governing law, and, other than a reference to statutes dealing with "foreign affairs," *id.*, Professor Vladeck does not offer any indication of the sorts of Article I authorities that would *not* be "direct" or that would be less than "clearly textually committed to the legislature." Moreover, virtually *all* of the

*D. Arguments that Powers Are Shared
but Congress (Almost) Always Prevails at the Lowest Ebb*

Another set of responses to the “lowest ebb” problem accepts that both political branches have overlapping affirmative war powers, but contends that Congress’s detailed and specific Article I powers should always (or almost always) take precedence over the vague substantive emanations of the Commander in Chief Clause. Relatedly, some contend that Congress should typically prevail in such disputes because statutory restrictions on the Commander in Chief, like restrictions on other executive powers, should be analyzed under the so-called “general separation-of-powers principle,” a highly deferential, Court-crafted standard that focuses on the extent to which a statute prevents the President from performing constitutionally assigned functions.¹⁴⁵ But here, too, the approach is problematic.

1. *Congress Wins Whenever It Exercises One of Its Article I Powers.* — The argument for the virtually irrebutable presumption of supremacy of congressional war powers draws force from statements such as the one the Court recently articulated in *Hamdan* that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”¹⁴⁶ It is tempting to conclude that whether Congress’s exercise of its powers is “proper” in a particular case is simply a matter of whether the statute has some basis in the enumerated Article I powers. On that view, given the breadth of the precedents reviewed above, virtually every statute at issue in *Youngstown* Category Three would be constitutional.

This conclusion follows, however, only if the word “proper” in *Hamdan* applies to any exercise of legislative authority that would fall within Congress’s powers regardless of the powers held by the Commander in Chief. But it is just as possible that the constitutional test of propriety should hinge on whether the exercise of an Article I power infringes a preclusive Article II power of the President. Surely the President possesses some such preclusive authorities — most obviously his designation as civilian superintendent of the military — that Congress may not infringe. Indeed, the opinion in *Hamdan* suggests another, when Justice Stevens quotes directly from Chief Justice Chase’s concurring dictum in *Ex parte Milligan*¹⁴⁷ that Congress may not “di-

President’s war powers are themselves implied rather than express, so it is not clear why they would trump implied legislative powers.

¹⁴⁵ See The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 133–35 (1996) (describing the general separation of powers principle).

¹⁴⁶ *Hamdan*, 126 S. Ct. at 2774 n.23.

¹⁴⁷ 71 U.S. (4 Wall.) 2 (1866).

rect the conduct of campaigns.”¹⁴⁸ If an otherwise “proper” exercise of a congressional power ceases to be “proper” at the point at which a preclusive Commander in Chief power kicks in, as the *Hamdan* Court indicated might be the case in some instances, then an exclusive focus on the breadth of Article I powers simply refuses to engage with the really difficult question: even if Congress does possess enumerated authority, does its exercise of that legislative power become improper because it impinges on the preclusive constitutional prerogatives of another branch?

2. *Congress (Almost) Always Wins Under the Separation of Powers Principle.* — We must also consider a related argument for congressional supremacy. This claim is based on the doctrinal test that generally governs separation of powers issues arising from clashes between the President and the Congress in the domestic setting.¹⁴⁹ Under this test, the “real question” the Court asks is whether the statute “impede[s] the President’s ability to perform” his constitutionally assigned functions.¹⁵⁰ And even if such a potential for disruption of executive authority is present, the Court employs a balancing test to “determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”¹⁵¹ Thus, under the general separation of powers principle, even a “serious impact . . . on the ability of the Executive Branch to accomplish its assigned mission” might not be enough to render a statute invalid.¹⁵²

This approach appears to have a pro-congressional tilt; yet it actually does little more than relocate the dilemma it is impressed to avoid. Even under this deferential test, it is well understood that certain statutes can infringe the President’s constitutionally assigned authority to exercise discretion; a statutory restriction on the pardoning of a given category of persons is an obvious example. Nothing in the application of the separation of powers test, then, explains why certain core executive powers (including merely discretionary authorities, rather than obligatory duties) cannot be infringed, even though it is generally understood that such inviolable cores might exist. For this reason, the general separation of powers principle does not actually resolve the question that arises in a *Youngstown* Category Three case. In all

¹⁴⁸ *Hamdan*, 126 S. Ct. at 2773 (quoting *Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in the judgment)).

¹⁴⁹ See, e.g., Kinkopf, *supra* note 27, at 1183.

¹⁵⁰ *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

¹⁵¹ *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977); see also *Mistretta v. United States*, 488 U.S. 361, 383 & n.13 (1989). See generally Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 348–57 (1998) (describing the Court’s historical application of the test).

¹⁵² *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

events, the question remains whether the President possesses an illimitable reserve of wartime authority. Insofar as the separation of powers principle is thought to provide affirmative support for congressional control, it seems objectionable because it, too, fails to require the analyst to explain why the particular wartime power the President is asserting is not one that Congress can countermand. It simply asserts that it is not.

3. *The Power of the Purse Ensures that Congress Is Always Supreme.* — One variant of the congressional supremacy argument is much more clause-specific. It contends that, whether or not Congress may directly restrict a particular executive power, the question is academic because the legislature can use its powers of the purse to prohibit the expenditure of federal funds for a disfavored military function. The Appropriations Clause,¹⁵³ it is said, establishes an absolute barrier to the President's expenditure of funds in violation of a statutory limitation on such expenditures.¹⁵⁴

But this argument rests on an undefended assumption. Even though Congress has very broad Article I powers to place conditions on the expenditure of funds,¹⁵⁵ and even though the Framers viewed the "power of the purse" as a very important "bulwark" against "Executive usurpations,"¹⁵⁶ Congress's own obligation to respect the constitutional powers of other branches precludes it from using spending conditions to effect limitations that other provisions of the Constitution would prohibit Congress from imposing directly. Accordingly, as even some pro-legislative scholars have acknowledged, there is no obvious reason to think Congress can use its spending powers to violate limits that might derive from the Commander in Chief Clause, any more than it may use its powers of the purse to violate the First Amendment, the Bill of Attainder Clause,¹⁵⁷ or the Due Process Clause, to require a court to decide a case in a certain way, or to prohibit the President from issuing a particular pardon.¹⁵⁸ Certainly no one believes the

¹⁵³ U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

¹⁵⁴ See, e.g., YOO, *supra* note 14, at 125 (arguing that although FISA would be unconstitutional to the extent it foreclosed the NSA's recent "terrorist surveillance program," "Congress could easily eliminate the surveillance program itself simply by cutting off all funds for it"); see also MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 108–13, 252 (2007).

¹⁵⁵ See *supra* pp. 733–34.

¹⁵⁶ 3 ANNALS OF CONG. 938 (1793) (statement of James Madison); see also THE FEDERALIST NO. 58 (James Madison), *supra* note 93, at 357 (describing the power of the purse as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people").

¹⁵⁷ See *United States v. Lovett*, 328 U.S. 303, 317–18 (1946).

¹⁵⁸ See *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. Off. Legal Counsel 182, 187–88, 188 nn.7–8 (1996) (collecting authorities); see also *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring); Powell, *supra*

appropriations power can be used, in effect, to permit Congress to supplant the President with the Secretary of Defense as the chief military commander. Thus, the Appropriations Clause does not explain which expenditure conditions on presidential wartime powers are constitutionally permissible and which are not.¹⁵⁹

It is sometimes said that, regardless of the constitutionality of particular spending restrictions, Congress holds the trump card as a matter of de facto power because it can simply decline to provide the needed funds. To be sure, if there literally were no funds in the treasury, because Congress had not appropriated them, then the federal government could not pay the bills required to run a war. But the treasury will never literally be empty even if Congress has enacted restrictions on expenditures for certain purposes. All that will stand between the President and the available funds is a legal provision set forth in an appropriations bill. Thus, if the President concludes that the spending restriction is unconstitutional, the money the President needs to continue the military operation will literally be available. The question remains, therefore, whether the President is constitutionally justified in disregarding the restriction.

note 20, at 551–53; Symposium, *The Presidency and Congress: Constitutionally Separated and Shared Powers*, 68 WASH U. L.Q. 485, 640–51 (1990) (remarks of Professors Geoffrey Miller and Kate Stith). These authorities concededly do not answer the question of what the Executive's remedy is if it concludes that a statutory condition on expenditures is invalid. Is the Executive entitled simply to make the expenditures out of appropriations otherwise suitable for the task, that is, to treat the invalid statutory *condition* "as if the paper on which it is written were blank"? Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469–70 (1866). Or does the Appropriations Clause prevent such "self-help"? The Executive has historically taken the former view, and there is some support for it in the Court's doctrine. See *Lovett*, 328 U.S. at 317–18; cf. *Califano v. Westcott*, 443 U.S. 76, 93 (1979) (ordering payment of funds beyond what was appropriated in order to remedy equal protection violation).

¹⁵⁹ Conversely, one might argue that, in light of Founding-era expectations, Congress can *only* regulate the President's wartime authorities by defunding the military altogether. Largely because they feared that the President might employ a permanent standing army without adequate legislative control, the Framers provided in Article I that no appropriation of funds to raise and support armies "shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12. In our early history, when there was no standing army, Congress could effectively control the use of the army by authorizing the army to be called into service in the first instance only for statutorily specified purposes, and by carefully structuring discrete and modest appropriations so that they were for all practical purposes limited to such uses. Thus, turning off the financial spigot altogether was a pragmatic means of control if Congress doubted the wisdom of the President's plans for the army. In the modern age, however, where there is an enormous, effectively permanent military establishment, that is no longer a practical option; and certainly the Court's war powers decisions do not indicate that Congress can only regulate the President in wartime by use of such a crude and infeasible tool. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (enforcing non-appropriations-based limits on military commissions).

E. Arguments that the Commander in Chief (Almost) Always Prevails at the Lowest Ebb

Against those who acknowledge the possibility of overlapping enumerated powers but contend that Congress invariably wins Category Three cases, others argue just the opposite. They read the Commander in Chief Clause to confer substantive powers that are necessarily superior to the war powers possessed by Congress, or they appeal to executive powers external to the Commander in Chief Clause that are also thought to take precedence.

1. *Conflating Inherent and Preclusive Executive War Powers.* — It is common for defenders of presidential prerogatives to conflate inherent (or what we have been calling defeasible or peripheral) executive war powers with preclusive ones, and to assume that any powers granted by Article II must also be immune from statutory limitation. In the debate over the NSA's "terrorist surveillance program," for example, the Department of Justice has repeatedly cited a recent dictum of the Foreign Intelligence Surveillance Court of Review.¹⁶⁰ That court opined that the President has "inherent authority to conduct warrantless searches to obtain foreign intelligence information."¹⁶¹ The court then added that, "assuming that is so, FISA could not encroach on the President's constitutional power."¹⁶² In other words, the FISA court appeared to assume that if the President has an inherent, or independent, substantive surveillance authority, that authority settles the question of whether his exercise of that authority may be regulated by statute.

More often, defenders of the Bush Administration resort to a slightly less aggressive variant of this argument, one they derive from Justice Kennedy's concurrence in *Public Citizen v. United States Department of Justice*.¹⁶³ On this view, if the President has an independent enumerated Article II power (as opposed to a general "executive" power), no statute may impinge upon it in any respect.¹⁶⁴ And because

¹⁶⁰ See, e.g., DOJ WHITE PAPER, *supra* note 38, at 1400 n.13.

¹⁶¹ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

¹⁶² *Id.*

¹⁶³ 491 U.S. 440, 482–89 (1989) (Kennedy, J., concurring in the judgment).

¹⁶⁴ Thus, Justice Kennedy argued that because the President's power to appoint principal officers is an express Article II authority, "any intrusion by the Legislative Branch" is intolerable. *Id.* at 485. He would have *automatically* invalidated a statute requiring a modest level of transparency with respect to which private groups lobby the President regarding nominations, without regard to its actual impact on the President's powers. *Id.* at 488–89. As we have seen, however, it is simply a mistake to assume that the assignment of an executive power by "explicit text" means that the power is in "the exclusive control of the President." *Id.* at 485. The appointment power itself, for instance, can be substantially tempered by the proper exercise of Congress's own Article I power to set qualifications for officers. See *supra* pp. 728–29. For additional critiques of the enumerated/nonenumerated distinction found in Justice Kennedy's *Public Citizen* concurrence,

the President derives most of his independent war powers from the express Commander in Chief Clause, it follows on this view that Congress may not limit those powers.¹⁶⁵

That the President might enjoy a particular power does not mean, however, that statutes cannot temper his exercise of that power. In Justice Jackson's words, the question whether a power is "within [the President's] domain" is distinct from the question whether the exercise of that power is "beyond control by Congress."¹⁶⁶ The Court has often recognized this point in the context of Commander in Chief powers: it is well-established that at least some of the substantive authorities the clause confers on the President are provisional — that is, they are permissible only until superseded by legislation.¹⁶⁷ This distinction is

see, for example, *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 907–08 (D.C. Cir. 1993); Harold J. Krent, Essay, *The Lamentable Notion of Indefeasible Presidential Powers*, 91 CORNELL L. REV. 1383, 1387 n.24 (2006); and Prakash, *Regulating Presidential Powers*, *supra* note 108, at 236.

¹⁶⁵ See, e.g., Eric Posner & Adrian Vermeule, Op-Ed., *A "Torture" Memo And Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22 (arguing with respect to the Torture Act that "[e]veryone, including even the most strident of the academic critics, agrees that Congress may not, by statute, abrogate the president's commander-in-chief power, any more than it could prohibit the president from issuing pardons," and that "[t]he only dispute is whether the choice of interrogation methods should be deemed within the president's power"); see also Brief for the Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae Supporting Defendants-Appellants at 9, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (No. 06-2095) ("Congress simply cannot pass a law [such as FISA] that curtails powers the President has directly from the Constitution itself."); Paulsen, *supra* note 127, at 828 ("Where that power is triggered, it is exclusive of whatever powers Congress might have concerning these activities as a matter of general, non-wartime law. Congress's powers to make rules governing land and naval forces, whatever their scope as a general proposition, do not extend into the President's province to wage and conduct war. *The Commander in Chief power, where it applies, marks the boundaries of Congress's general regulatory powers under Article I.*" (emphasis added)); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 246–47 (2002).

¹⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring); see also *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[T]he great ordinances of the Constitution do not establish and divide fields of black and white." (quoting *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring) (quoting *Springer v. Phil. Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))) (internal quotation marks omitted)); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441 (1977) (noting that such a strict-separationist theory is "inconsistent with the origins of [the] doctrine" and with the "contemporary realities of our political system"); *id.* at 443 (rejecting the "archaic view of the separation of powers as requiring three airtight departments of government" (quoting *Nixon v. Adm'r of Gen. Servs.*, 408 F. Supp. 321, 342 (D.D.C. 1976)) (internal quotation marks omitted)).

¹⁶⁷ For example, although the Commander in Chief has the "inherent" authority to make rules for the naval establishment, those rules must be supplementary to, and not in conflict with, acts of Congress enacted pursuant to Congress's power to make rules for the government and regulation of the armed forces. See *United States v. Symonds*, 120 U.S. 46, 49–50 (1887). Similarly, the Commander in Chief has the constitutional power to promulgate rules for governing occupied territory, but Congress can supersede those rules via legislation. See *Santiago v. Noguerras*, 214 U.S. 260, 265–66 (1909); *Texas v. White*, 74 U.S. (7 Wall.) 700, 730 (1869). Likewise, the Commander in Chief can make rules relating to courts-martial, see *Loving v. United States*, 517 U.S.

also of serious practical import. There is no reason in principle to think that the argument for recognizing a robust executive power to act when no other branch has spoken is the same as the one that would be needed to justify exercise of that same power when the legislature has specifically ruled it out. In the latter case, it cannot be said that the nation's politically accountable institutions have agreed that governmental action is demanded. The general principle of democratic accountability that a President might rely upon to explain why a court should not restrain him in the face of congressional silence cannot suffice, therefore, to justify his decision to act in violation of laws enacted by the people's elected representatives.

2. *The Foreign Affairs Power.* — Another argument asserts an extremely broad vision of a particular core of executive power, one that applies in the context of war powers but that extends to other matters as well. On this view, the President, as the so-called “sole organ” of the nation in external relations,¹⁶⁸ has plenary authority to deal with foreign nations and persons, such that statutes may not regulate those “foreign” relations.¹⁶⁹ Actions focused on the domestic arena, such as, perhaps, the seizing of steel mills at issue in *Youngstown*, might legitimately be subject to legislative constraints, according to this argument. But all actions directed at the outside world would be immune from them. On this view, therefore, statutes cannot regulate the President's treatment of enemies in wartime because that represents the ultimate example of engagement with the external world.

The contention, however, seems clearly overdrawn. Given that the Constitution expressly assigns extensive powers to Congress to deal with foreign relations, foreign commerce, and war — not to mention

748, 772–73 (1996); *Swain v. United States*, 165 U.S. 553, 557–58 (1897); but only until Congress enacts superseding rules, *Loving*, 517 U.S. at 767.

¹⁶⁸ The “sole organ” notion has its genesis in a speech by John Marshall on the floor of the House of Representatives, see 10 ANNALS OF CONG. 613 (1800), and the phrase eventually made its way into the opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936). As we explain in our companion Article, there is nothing in Marshall's speech, or in the notion of the President as “sole organ” of U.S. foreign relations, that suggests any power to disregard statutory directives; to the contrary, Marshall was pellucid on the point that the President as “sole organ” was bound by statutes and treaties. See Barron & Lederman, *supra* note 15, section II.C.2. Nor does *Curtiss-Wright* support the notion of an indefeasible preclusion power. See *Youngstown*, 343 U.S. at 636 n.2 (Jackson, J., concurring) (“It was intimated [in *Curtiss-Wright*] that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.”). See generally Louis Fisher, *Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRESIDENTIAL STUD. Q. 139 (2007).

¹⁶⁹ It is often argued, for example, that the negotiation of treaties is a function beyond congressional control, save for the Senate's role in ratifying agreements. See, e.g., *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993) (holding that a statute directing the Secretary of State to initiate negotiations with foreign countries to develop treaties to protect sea turtles violated separation of powers by infringing upon President's exclusive power to negotiate with foreign governments); Powell, *supra* note 20, at 558–59.

Congress's implied power to establish the basic immigration-law framework regulating who can enter the country and under what conditions — the notion that Congress has no role to play with respect to the way in which our nation interacts with foreigners cannot be reconciled with the constitutional text and structure,¹⁷⁰ to say nothing of the recent Supreme Court decisions in *Hamdan* and *Rasul*.

In any event, acceptance of “plenary” (that is, preclusive) executive power over foreign affairs would not obviate the Category Three questions that the war on terrorism is likely to bring to the fore. As we have already emphasized, the distinction between “domestic” and “foreign” affairs dissolves rather rapidly in the context of this conflict. Not surprisingly, therefore, many of the most contentious recent disputes, such as the NSA/FISA matter and judicial review of detentions at Guantánamo, involve interactions between alleged foreign enemies and U.S. residents, governmental actions taken with respect to U.S. citizens (such as surveillance of their communications with persons abroad), or actions taken against non-U.S. citizens on what is arguably U.S. territory or in U.S.-controlled facilities.¹⁷¹ Moreover, even those statutes primarily directed at U.S. conduct toward the outside world — such as the ban on torture, treaty-based restrictions on warfare, and proposals to limit the number of troops in Iraq — are not enacted or ratified merely for the protection of those outside our borders, but more importantly because Congress has concluded that compliance will ultimately redound to the benefit of U.S. persons and the broader “domestic” national interest.¹⁷²

¹⁷⁰ See, e.g., *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (“Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). On this point, at least, there is no current dispute on the Court. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (“Congress, to be sure, has a substantial and essential role in both foreign affairs and national security.”).

¹⁷¹ What is more, almost all the statutes that the Bush Administration has circumvented or threatened to ignore are direct regulations (for example, through the imposition of criminal penalties) of U.S. persons, such as the troops and officers of the army and navy, and the employees of the NSA.

¹⁷² See, e.g., 151 CONG. REC. S12,381–82 (daily ed. Nov. 4, 2005) (remarks of Sen. McCain) (explaining that the “McCain Amendment” prohibition on the use of cruel, inhuman, and degrading treatment of prisoners was not designed for the prisoners’ benefit, but instead to protect U.S. armed forces and, more broadly, to advance U.S. interests). In its NSA/FISA White Paper, the Department of Justice suggests that the President’s prerogative to ignore statutes in the context of foreign relations derives not only from the Commander in Chief Clause, but also from the so-called Vesting Clause of Article II, U.S. CONST. art. II, § 1. See DOJ WHITE PAPER, *supra* note 38, at 1402–03. There is a current academic debate concerning whether and to what extent the Vesting Clause confers on the President any “inherent” and unenumerated foreign affairs powers. Compare Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004), with Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001). But even the most prominent pro-

3. *The President's Constitutional Duty To Defend the Nation.* — The Bush Administration and its defenders have also argued for the general trumping power of the President's wartime authorities on the basis of a broader constitutional authority to respond to necessity, or emergency. This claim has special resonance in the war on terror because of the particular threat of catastrophic harm to civilians within the United States. On this view, several statutes and treaties limiting the President's discretion about how best to fight al Qaeda are unconstitutional not because they limit the President's discretion as Commander in Chief, but instead because they prevent the President from complying with a constitutional *duty*, namely, "the President's most solemn constitutional obligation — the defense of the Nation,"¹⁷³ which is said to have its roots in the Oath Clause.¹⁷⁴ This notion has obvious echoes in Lincoln's famous statement that the President may disregard "a single law" if the alternative is that "the government itself go to pieces,"¹⁷⁵ and in similar remarks of Thomas Jefferson.¹⁷⁶ In the current debates, one commonly hears a related argument, invoking

ponents of the "executive power" thesis do not argue that the Vesting Clause gives the President any exclusive, non-derogable authorities in cases where the matter is subject to one or more of Congress's enumerated powers. *See id.* at 253–54, 346–50. Indeed, the White Paper itself concedes that the President's so-called "plenary" authority under the Vesting Clause to pursue U.S. interests "outside the borders of the country" is "subject . . . to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers." DOJ WHITE PAPER, *supra* note 38, at 1402–03 (quoting The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act, 10 Op. Off. Legal Counsel 159, 160–61 (1986)). The Vesting Clause, therefore, should be of little or no relevance to the Category Three question.

¹⁷³ *See* DOJ WHITE PAPER, *supra* note 38, at 1408.

¹⁷⁴ U.S. CONST. art. II, § 1, cl. 8 (imposing on the President a requirement that, to the best of his ability, he "preserve, protect and defend the Constitution"). *See generally* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

¹⁷⁵ *See* Message from Abraham Lincoln to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 246, 252–53 (1989); *see also* Letter from Abraham Lincoln to the Senate and House of Representatives (May 26, 1862), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra*, at 325, 325 ("[T]he capital was put into the condition of a siege. . . . Congress had indefinitely adjourned. There was no time to convene them. It became necessary for me to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the government fall at once into ruin, or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it with all its blessings for the present age and for posterity.").

¹⁷⁶ *See* Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 418, 418 (Albert Ellery Bergh ed., 1907) ("A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.").

similar notions, that “[w]ar is too difficult to plan for with fixed, antecedent legislative rules.”¹⁷⁷

Whether there is such a constitutional duty has long been the subject of debate. Historically, the understanding seems to have been not that there is a constitutional power (or duty) to disregard the law, but that extreme threats to the nation might sometimes dictate that the President act extraconstitutionally and thereafter publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public.¹⁷⁸ However, even if one accepts the notion of a President’s constitutional duty in “emergency” situations, it would hardly suffice to cover the broad range of cases that already have been raised, and are likely to be raised, by executive-legislative clashes in recent wars, especially in the conflict against al Qaeda. The plain terms of the Oath Clause indicate that the duty at most requires the President to take such measures “indispensable to the preservation of the constitution, through the preservation of the nation.”¹⁷⁹ The awesome responsibility of national preservation is quite different from the much broader notion of necessity that would be needed to justify the Bush Administration’s claim of a duty to disregard a range of statutory limi-

¹⁷⁷ See YOO, *supra* note 14, at 118; Symposium, *The President’s Powers as Commander-in-Chief Versus Congress’s War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 31, 33–34 (1988) (remarks of Professor Geoffrey P. Miller). This idea derives from Locke’s suggestion that it would be “almost impracticable” to place the so-called “federative power” — “contain[ing] the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth” — outside of executive hands, because it is difficult to direct such federative functions “by antecedent, standing, positive Laws,” JOHN LOCKE, TWO TREATISES OF GOVERNMENT 383–84 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). See, e.g., JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 37 (2005) (relying on Locke’s notion of “federative powers”). The Framers did not, of course, follow Locke’s recommendations in this respect — they had a much more cautious view about executive prerogatives, and therefore gave Congress substantial express and implied powers to exercise what Locke called “federative” authority. See James Madison, “*Helvidius*” Number 1 (1793), reprinted in 15 THE PAPERS OF JAMES MADISON 66, 68 (Thomas A. Mason et al. eds., 1985) (“Had [Locke] not lived under a monarchy, in which these [executive and federative] powers were united; or had he written by the lamp which truth now presents to lawgivers, the last observation [that the powers should not be separated] would probably never have dropt from his pen.”). What is more, Locke himself insisted that the executive and the federative powers were to be “both Ministerial and subordinate to the Legislative, which as has been shew’d in a Constituted Commonwealth, is the Supream.” LOCKE, *supra*, at 387 (emphasis omitted).

¹⁷⁸ See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 28 (1993); see also, e.g., Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392–96 (1989); Lucius Wilmerding, Jr., *The President and the Law*, 67 POLI. SCI. Q. 321, 324 (1952) (arguing that this was the consensus view of “every single one of our early statesmen,” including Jefferson). An important modern iteration of this argument can be found in Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

¹⁷⁹ See Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 175, at 585, 585.

tations on the conduct of a war on terrorism.¹⁸⁰ Needless to say, such claims fare no better when directed against the kind of battlefield restrictions that Congress enacted in connection with ongoing military operations in Kosovo, Somalia, and Southeast Asia, and that it may yet enact with regard to Iraq.

Moreover, as much as this emergency theory has received attention from commentators, no President, as far as we know, has ever actually acted on Lincoln's suggestion that a single law must be violated in order that all others — that the nation — be preserved.¹⁸¹ There have, however, been a handful of other cases throughout our history, which we discuss in our companion article, in which Presidents have invoked a different sort of emergency theory as justification for acting in conflict with existing statutes. In these cases, the Executive has claimed that the exigencies of the moment — short of national preservation — required a deviation from extant law because Congress was simply unavailable in the short term to consider the emergency needs. More often than not, the President has made clear that he was acting as he be-

¹⁸⁰ See OLC 9/25/01 Opinion, *supra* note 8, at *10, reprinted in THE TORTURE PAPERS, *supra* note 7, at 13 (“If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, the courts have affirmed that it is his constitutional responsibility to respond to that threat with whatever means are necessary, including the use of military force abroad.” (emphasis added)). It follows, in OLC's view, that the President is obliged (or, at least, authorized) not only to take necessary steps to repel an immediate attack, but to “take whatever actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters.” *Id.* at *19, reprinted in THE TORTURE PAPERS, *supra* note 7, at 23.

¹⁸¹ In 1815, at the tail end of the War of 1812, then-General Andrew Jackson declared martial law in New Orleans, which he continued to impose even after winning the battle of New Orleans, because he feared widespread desertion from the army and possible reengagement with the British. Jackson eventually arrested a Louisiana legislator who had written a letter to a newspaper attacking him, along with the federal judge who issued a habeas writ on behalf of the legislator, the local U.S. Attorney who had sought the legislator's relief from a state judge, and, finally, the state court judge himself. See Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 239–43 (1981). After word arrived that the war had ended, the federal judge initiated a contempt proceeding against Jackson, and Jackson interposed the defense of necessity — a “departure from the constitution,” he argued, justifiable in order to preserve the nation “from conquest and ruin.” PHILO A. GOODWIN, BIOGRAPHY OF ANDREW JACKSON 181 (1835). The judge rejected the defense and sentenced Jackson to a \$1000 fine, which Jackson paid, “cheerfully submit[ting] to the laws of his country,” and finding “indemnity in the approbation of his own conscience.” *Id.* at 191, 193. President Madison's Secretary of War thereafter wrote to Jackson on Madison's behalf expressing the President's “confidence and esteem,” but stressing that “[t]he military power” was “carefully limited” by the Constitution and laws of the United States; that there was no general authority to impose martial law “beyond the positive sanction of the Acts of Congress”; and that although a commander “may be justified by the law of necessity, while he has the merit of saving his country, . . . he cannot resort to the established law of the land, for the means of vindication.” Letter from Alexander J. Dallas, Sec'y of War, to Andrew Jackson (July 1, 1815), in 2 CORRESPONDENCE OF ANDREW JACKSON 211, 212–13 (John Spencer Bassett ed., 1927). Three decades later, just before Jackson died, Congress voted to indemnify Jackson for the contempt fine. See Sofaer, *supra*, at 250–52.

lieved the legislature would have had it been available. In other words, the President has claimed to be acting as a surrogate of the Congress, rather than contrary to its will. To the extent there is a constitutional emergency authority of this kind, it would confer a time-limited immunity that lasts only long enough to enable the Executive to make a case to Congress for the revision or repeal of preexisting legislation.¹⁸²

F. *The Liberty-Enhancement Test*

A distinct proposal for resolving the Category Three question might derive from the notion that one of the principal functions of our system of separated and blended powers is to protect individual liberty.¹⁸³ It is tempting to suggest that the answer to a war powers dis-

¹⁸² See Barron & Lederman, *supra* note 15, section II.D (discussing President Jefferson); *id.* sections III.B.1–2 (discussing President Lincoln). As Justice Souter recently put the point, the Constitution might admit of an extraordinary executive power to act in violation of law “in a moment of genuine emergency, when the Government must act with *no time for deliberation*, . . . [and there is] an *imminent* threat to the safety of the Nation and its people,” but if there is such “an emergency power of necessity [it] must at least be limited by the emergency.” Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (emphases added). Even this more modest argument of the need for interstitial disregard of statutes will rarely have purchase today, not only because modern communications and transportation guarantee that the legislature can almost always convene forthwith, but also because Congress will often have provided in advance for such extraordinary temporary action. There are countless statutes throughout the U.S. Code authorizing the President to take extraordinary action in wartime or in other emergency situations. That was true even before the Second World War. See, e.g., Request of the Senate for an Opinion as to the Powers of the President “in Emergency or State of War,” 39 Op. Att’y Gen. 343, 348–64 (1939) (listing scores of statutes that expressly provided special presidential authorizations for use in times of emergency or war, many of which involved use of the armed forces). And the scope and breadth of statutorily conferred emergency powers have expanded exponentially in recent decades. See Lobel, *supra* note 178, at 1407–21; see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 570, 653 (1952) (Jackson, J., concurring) (stating that he was “quite unimpressed” with the argument that the President should enjoy emergency powers to act without statutory authority — much less to disregard statutes — “[i]n view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers”). In FISA, for example, Congress provided that “[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.” 50 U.S.C. § 1811 (2000). Congress explained that the fifteen-day window would be sufficient time for Congress to consider and enact further authorization necessary in wartime. H.R. REP. NO. 95-1720, at 34 (1978) (Conf. Rep.).

¹⁸³ See, e.g., THE FEDERALIST NO. 47 (James Madison), *supra* note 93, at 298 (“No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”); see also Bowsher v. Synar, 478 U.S. 714, 722 (1986) (“Even a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that would protect liberty.”).

pute should turn on which branch's substantive decision would most enhance individual liberty in the particular case.¹⁸⁴ Attractive though this impulse may be, it is difficult to see how it might map onto most war powers disputes. In a literal sense, all warfare can be seen as impinging on the liberty of its targets and, often, of its participants as well. Therefore, virtually any statute limiting the President's war powers would in this sense be liberty-enhancing, at least in the short run.¹⁸⁵ Yet many interbranch conflicts over warmaking — such as a debate on a cap on the number of troops the President may commit to Iraq — seem to have little to do with “liberty enhancement” in the conventional constitutional sense, particularly because those with the most “liberty” to gain might well be foreign persons, whom the Constitution is not usually thought to protect against the ravages of war. The competing arguments over the merits of imposing the restriction are much more likely to be concerned with the relative short-term and long-term costs and benefits to our national security — which is itself another important value that the Constitution was designed to advance.¹⁸⁶

One might contend that statutes protecting the liberty of persons who are the intended beneficiaries of the Constitution should be particularly immune from executive claims of preclusive war powers.¹⁸⁷ Yet, if the principle were limited in this way, it would likely fail to resolve many important cases, because statutory and treaty-based restrictions on the power of the Commander in Chief will often principally protect the liberty of non-U.S. persons overseas, including

¹⁸⁴ See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515–16 (1991) (arguing that the Madisonian goal of protecting individual rights against encroachment by a tyrannical majority should be “an animating principle for the jurisprudence of separated powers”); *id.* at 1533–38 (examining historical evidence in support of the liberty-protective function of separated powers); *cf.* Krent, *supra* note 164, at 1398–404 (arguing that statutes restricting executive power should be presumed unconstitutional if they impinge on one of the President's “critical checking function[s]” (such as the pardon or veto power), but be presumed constitutional to the extent they themselves serve as a “check” on what would otherwise be a concentration of power in the President).

¹⁸⁵ The possible exceptions would be statutes requiring the President to use harsher methods, such as a law requiring retaliation against enemy captives or confiscation of enemy property. In our companion Article, we discuss such retaliation and confiscation statutes that Congress has occasionally enacted, including, importantly, the Second Confiscation Act during the Civil War. See Barron & Lederman, *supra* note 15, section III.D.

¹⁸⁶ “The ultimate purpose of th[e] separation of powers is to protect the liberty *and* security of the governed.” *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (emphasis added).

¹⁸⁷ This appears to be the principle identified and defended in Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004). See also Sunstein, *supra* note 36, at 18, 28–29, 33 (arguing that the modern Court, especially in *Hamdan*, is best understood as refusing to defer to the President in war powers disputes when individual liberty is at stake).

civilians and combatants threatened by the violence of war on or near a battlefield, as well as enemy prisoners. Whether and to what extent the Constitution is designed to protect the interests of such persons when they are outside the United States (or in a U.S.-controlled location such as Guantánamo Bay) is a famously open and contested question.¹⁸⁸ Therefore, a liberty-enhancement test tethered to constitutional liberty would likely be inconclusive as to many of the most important statutes limiting the President's conduct of war, since neither the President nor Congress will be acting so as to protect any liberty interest that is unambiguously *constitutional* in origin.

G. Conclusion

In the mine run of cases, as in virtually all of those that have precipitated debate in recent years, there will be no serious question concerning the affirmative constitutional authorities of either of the political branches. There will also be no special reason relating to the Executive's prerogatives with respect to foreign affairs or his obligations in cases of emergency to conclude that a statutory or treaty-based restriction should be deemed without force and effect. Conversely, appeals to Congress's spending powers or the general separation of powers principle will rarely suffice to explain why the legislative branch's position should clearly prevail when it conflicts with that of the Executive. Resolution in such cases will instead require a judgment as to whether the statute in question infringes any of the "central prerogatives"¹⁸⁹ — preclusive authorities — the President enjoys by virtue of his constitutional designation as Commander in Chief. In this regard, there is no avoiding an inquiry into what those core prerogatives are.

IV. DRAWING LINES AND DEFINING THE SPHERE OF PRECLUSIVE, TACTICAL DISCRETION

One prominent contention regarding the nature of the President's central war powers prerogatives is that the Commander in Chief Clause, at its core, establishes that "the president has tactical com-

¹⁸⁸ Compare *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 274–75 (1990) (indicating that aliens are not entitled to Fourth and Fifth Amendment rights outside the sovereign territory of the United States), and *Johnson v. Eisentrager*, 339 U.S. 763, 781–85 (1950) (suggesting broadly that the Constitution does not protect suspected enemy aliens outside the United States), with *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (implying that aliens detained by the United States abroad — at least at Guantánamo Bay — have some constitutional protections), and *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (denying that the Due Process Clause is categorically inapplicable to aliens overseas). See generally Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 149–52; Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1 (2004); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005).

¹⁸⁹ *Loving v. United States*, 517 U.S. 748, 757 (1996).

mand once Congress decides troops should be used.”¹⁹⁰ Although the “lowest ebb” question has rarely been considered in depth, most war powers scholars have embraced some variant of this description of the clause’s preclusive core.¹⁹¹ Their instinct in this regard accords with the not-obviously-objectionable intuition that one could conjure up any number of hypothetical war-related statutes that would interfere with the President’s tactical decisions and that no one would wish to defend as a matter of policy. But of course, and as most war powers analysts have themselves readily acknowledged, such a core constitutional power over tactical matters could be extremely broad if it is not given some relatively precise definition. In attempting to define the bounds of the core power they concede exists, therefore, analysts have offered up various legal distinctions designed to rule out the seemingly absurd hypothetical laws (“Take this hill”; “Don’t land on that beach”),

¹⁹⁰ POWELL, *supra* note 20, at 115 n.123.

¹⁹¹ See, e.g., BANKS & RAVEN-HANSEN, *supra* note 27, at 150, 154–57 (noting that “there is a broad scholarly consensus that Congress may not interfere with the President’s day-to-day command of an authorized war,” and that because the Commander in Chief has complete discretion over “tactical control of day-to-day combat operations in the theatre of war and defense of the troops deployed in them,” statutes forbidding introduction of ground troops into Laos, Thailand, and Cambodia were unconstitutional); ELY, *supra* note 20, at 25 (arguing that had Congress, in a force authorization, instructed the President how to fight the enemy, “it would have at least flirted with unconstitutionality, as it was the point of the Commander in Chief Clause to keep Congress out of day-to-day combat decisions once it had authorized the war in question”); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 84 (1990) (“[The President’s] sole powers do extend to operational battlefield decisions concerning the means to be employed to achieve ends chosen by Congress.”); RAMSEY, *supra* note 154, at 254–55 (suggesting that even though “there seems little basis for presidential claims of exclusivity,” nevertheless it is “likely” that “Congress cannot take tactical command of military operations,” and thus its regulations “must be generalized standards of conduct, not tactical directions addressed to specific command situations”); Carter, *supra* note 29, at 119 n.81 (“[T]here is little question but that [the Framers] intended to insulate day-to-day conduct of authorized military operations from legislative direction.”); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1855 (1998) (describing a “robust core of exclusivity”: “[o]nly the President can direct troop movements, form military strategies, order a battlefield attack, and so on”); Skibell, *supra* note 29, at 201 (assuming that the Framers intended the Commander in Chief Clause to give the President authority independent of Congress “in battlefield decisions”); Symposium, *supra* note 177, at 37 (rebuttal remarks of Professor William Van Alstyne) (“The combined [Declare War and Commander in Chief] clauses prohibit Congress from meddling in the particulars or minutia of tactics in the combat zone.”); Bobbitt, *supra* note 20, at 1389–92 (asserting that although Congress may forbid the use of forces “in pursuit of a particular policy at any time,” it may not “act as a commander, directing where troops will go,” or “direct the forces it has created,” and the President may act within his constitutional power to send troops into hostile action, without specific authorization, “even if . . . statutes purported to interfere with his command of these forces”). Exceptions include a handful of scholars who appear to contend that even though Congress in the ordinary course will not and should not impose substantial restrictions on the Commander in Chief, the legislature retains the powers to do so where necessary. See, e.g., CORWIN, *supra* note 20, at 293–96; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 103–15 (2d ed. 1996); Monaghan, *supra* note 178, at 31. Professor Raoul Berger was perhaps the most unapologetic and unequivocal of these writers. See Berger, *supra* note 20, at 75–81.

while still permitting Congress to exercise important authority pursuant to its enumerated war powers. The lines most commonly proposed are those that distinguish between battlefield and nonbattlefield regulations; between affirmative commands and negative prohibitions; and between ex ante framework measures designed for all wars and post hoc restrictions aimed at particular conflicts.

There would be no need to examine whether tactical discretion is, in principle, vested solely in the President if these distinctions could, in and of themselves, resolve the constitutional controversies that actual assertions of preclusive executive war powers are likely to occasion. But as we explain in this Part, these distinctions are simply too slippery to perform that task. Presidents are likely to confront a number of statutory constraints in the years to come that, while hardly absurd, still may be characterized as falling on the impermissible side of the lines that these distinctions draw. The conventional distinctions, therefore, are likely to invite and even support just the sorts of controversial claims of infeasible executive power that the Bush Administration now presses. But just as these distinctions fail to demonstrate that controversial claims of preclusive executive war powers necessarily should be rejected, neither do they provide a convincing basis for determining that they must be accepted. The sole function of these proposed distinctions is to assess whether a given regulation interferes with tactical decisionmaking in a particularly egregious manner. But the fact that a statute may be characterized as doing so does not prove that the measure therefore violates the Commander in Chief Clause. That ultimate legal judgment can be reached only if one concludes that such interference is constitutionally foreclosed. Yet it is that very question that those pressing such distinctions refuse to confront. Instead, they simply assume the question must be answered in the affirmative and then purport to offer a means of determining when such tactical discretion has been infringed.

In demonstrating the malleability of these distinctions, our aim is not to prove it is impossible to construct a “test” that would identify some bounds of impermissible legislative infringement of the Commander in Chief’s core tactical discretion.¹⁹² Such a distinction might not be easily administrable or satisfying, but that would not materially distinguish it from other amorphous and multifactor “tests” the Court uses in various areas of constitutional law. Rather, we highlight the

¹⁹² See, e.g., Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT’L L. 291, 318–25 (2006) (reading recent executive branch objections to have focused on three fairly ill-defined criteria that might collectively be applied to particular statutory restrictions: “intrusiveness as to the monopoly of command itself; generality of measures, so as not to wrest authority over the disposition of particular forces; and a threshold of funding impact, so that Congress does not use its appropriations power as leverage to control operational affairs”).

ambiguity of the conventional lines only to show that they are, as a practical matter, poor mechanisms for cabining executive authority to disregard statutory constraints on the conduct of military operations, particularly given how most cases arising at the “lowest ebb” will be resolved in the absence of judicial review. In doing so, we seek to prompt reflection on whether the effort to develop a taxonomy of preclusive tactical authority — an effort that has, to this point, dominated the modern scholarly discussion of core executive wartime powers — is fundamentally misguided. Instead, we argue, attention should focus on the basis, if any, for the underlying premise that tactical matters, however defined, are beyond Congress’s power to regulate.

A. *The Battlefield-Nonbattlefield Distinction*

One classic means of attempting to distinguish permissible statutes from impermissible ones relates to whether they purport to regulate troops in the “field of battle.” This impulse is captured by the common idea that, although peacetime regulations of the military may raise no constitutional concerns, it would clearly be impermissible for a statute to instruct the President to direct his troops to take a certain hill.¹⁹³ The problem with relying on this distinction to resolve the legitimacy of a presidential claim of preclusive power is that, in many cases, it merely restates the legal controversy.

In the war on terrorism, for example, the distinction between the “field” and actions “outside the field” is potentially thin, given the President’s contention that the line between the home front and the battlefield has faded to insignificance. One might well wonder why a restriction on where, when, and how the enemy may be detained and interrogated by U.S. forces in this conflict is not, for all intents and purposes, a restriction on how the troops already in the “field” may act. Of course, one might conclude that the distinction therefore shows that all statutes regulating executive decisions regarding intelligence techniques in the war on terrorism are interferences with illimitable tactical judgments. But if so, the underlying constitutional concession that tactical decisions are within the exclusive discretion of the President turns out to have a scope that extends well beyond the fanciful hypotheticals — whether involving instructions to take hills or land on beaches — from which people often begin their constitutional analyses. Accordingly, that foundational legal concession needs to be defended rather than simply presumed to be correct.

¹⁹³ See, e.g., OLC Cambodian Sanctuaries Opinion, *supra* note 20, at 21 (explaining 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”).

A related indeterminacy arises in connection with regulations of more traditional military conflicts. Is the battlefield-nonbattlefield line meant to prohibit only the regulation of troops already in the field, or also to prohibit statutes denying the President the use of funds to introduce new troops into the field, setting geographical restrictions on the scope of a conflict, or prohibiting the use of armed forces in a particular area after a date certain? The bare terms of the proposed distinction hardly resolve such questions, and thus the distinction arguably renders constitutionally suspect any legislative effort to wind down a conflict, short of an edict to withdraw in toto. Similarly, in light of the large number of forces that are deployed abroad at any given time, many statutory regulations on the use of troops adopted before hostilities have actually commenced could be deemed inappropriate attempts to regulate troops in a theater of operations.¹⁹⁴ Finally, many of the laws of war, and statutes implementing them, including the Uniform Code of Military Justice, plainly purport to regulate the conduct of troops on the battlefield proper.¹⁹⁵ In all of these ways, then, the bat-

¹⁹⁴ Cf. Feldman & Issacharoff, *supra* note 2 (arguing that Congress may “specify the geographical scope of a war” or its nature (for example, air-war/ground-war or nuclear/conventional), but may not decide “which troops should be placed where,” order withdrawal of a particular number of troops, or limit the number of troops).

¹⁹⁵ In this respect, the distinction between battlefield and nonbattlefield regulations seems not even to capture the constitutional line that the analysts who invoke such a distinction intend to draw. For example, Professors Derek Jinks and David Sloss argue that the President’s ostensible preclusive authority over “battlefield” operations does not entitle him to ignore statutes implementing the Geneva Conventions that restrict his options when it comes to the detention and interrogation of captured enemies. They explain that battlefield decisions require activity, secrecy, and dispatch, whereas the treatment of detainees in *long-term* captivity off the field of battle can be governed by rules arrived at through deliberative processes. See Jinks & Sloss, *supra* note 29, at 170–76. But the dichotomy between immediate, fact-intensive wartime decisions and rules and standards better suited to the long term does not map precisely, or even roughly, onto a distinction between the battlefield and the interrogation room. On the one hand, as one of the drafters of the 2002 OLC Torture Opinion has written, the post-battlefield “handling and disposition of individuals captured during military operations requires command-type decisions and the swift exercise of judgment that can only be made by ‘a single hand.’ . . . Quick, decisive determinations must often be made in the face of the shifting contingencies of military fortunes. This is the essence of executive action.” John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1200 (2004) (footnotes omitted). On the other hand, many “battlefield” decisions are made long in advance, after careful deliberation, and many statutory and treaty-based *restrictions* on battle result from extensive study and debate. It would be odd, to say the least, for writers such as Professors Jinks and Sloss to question the constitutionality of such limitations. Recognizing this problem, Professors Jinks and Sloss propose that Congress *can* implement such battlefield limitations through its power under the Law of Nations Clause, even though the very same statute would on their view be unconstitutional if it were not enacted in order to implement a treaty but were instead an exercise of, for example, Congress’s power under the Rules for Government and Regulation Clause. Jinks & Sloss, *supra* note 29, at 176–77. This distinction strikes us as untenable because nothing in the text or structure of the Constitution suggests that Congress’s power to regulate the Commander in Chief’s battlefield decisionmaking is broader under the Law of Nations Clause than under its numerous other war-related Article I authorities.

tlefield-nonbattlefield distinction potentially casts constitutional doubt on a much broader range of measures in the traditional military context than is commonly acknowledged — a fact that further underscores the need to examine the underlying constitutional premise that battlefield decisions are for the President alone.

B. The Positive-Negative Distinction

Another approach would distinguish between statutes that prescribe a particular affirmative obligation to use force and those that impose a negative limitation preventing its use.¹⁹⁶ This distinction reflects the oft-stated view that a “Take Hamburger Hill” or “Land at Utah Beach” statute would be constitutionally dubious, even if a restriction on aggressive military action would not be. Presumably, if the distinction clearly prohibited no more than these particular hypothetical statutes, it would hardly invite the kind of claims of preclusive power that are likely to generate legal controversy. There are, after all, few statutes that mandate such detailed military actions. In fact, however, a positive-negative distinction is no more coherent or stable here than it is in other areas of the law. Statutes frequently do not lend themselves to unambiguous characterizations one way or the other; laws that from one perspective appear as limitations can often be fairly recast as directory. Thus, a number of constraining measures that have recently been proposed or enacted could be deemed impermissibly affirmative.

For example, the recent legislative initiative (which President Bush vetoed) that would have required the withdrawal of some troops from Iraq and altered the mission of others¹⁹⁷ could be viewed both as an “affirmative” command directing how troops should be used going forward and as a restriction on the continuation of the Iraq War at current levels and according to the President’s current objectives.¹⁹⁸ The same difficulty arises even with respect to measures directly germane to the war on terrorism. Consider a proposed restriction contained in a recent defense authorization bill. It would require Combatant Status Review hearings, using statutorily prescribed procedures,

¹⁹⁶ See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 188 (2005) (“One possible guidepost might be that laws *proscribing* certain uses of the military may be easier to justify than laws *prescribing* highly specific uses of armed forces in certain tactical situations . . .”).

¹⁹⁷ See H.R. 1591, 110th Cong. § 1904 (2007) (described *supra* note 2).

¹⁹⁸ Even more plainly, a provision of the National Defense Authorization Act for 2006 requires the Secretary of Defense to ensure that all personnel responsible for training Iraqi Security Forces “provide training to such units regarding international obligations and laws applicable to the humane treatment of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.” National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1406, 119 Stat. 3136, 3479.

for detainees in the war on terrorism who have been held for more than two years.¹⁹⁹ The measure could be viewed as a restriction on executive discretion to detain enemy combatants in the war on terrorism, but it is also legitimate to view it as a command to use certain procedures in handling detainees — after all, the measure applies not only to future detainees, but also to many currently being held. In fact, the Bush Administration issued a Statement of Administration Policy that characterized this provision as “impos[ing] on the U.S. military an unprecedented and onerous burden” and stated that it, along with related provisions in the bill concerning detainees, “would interfere with the President’s constitutional authority as Commander in Chief and Chief Executive during a time of armed conflict.”²⁰⁰

In this regard, the affirmative-negative line is no more helpful than the battlefield-nonbattlefield demarcation. Rather than confining the scope of the “core” Commander in Chief powers to foreclose statutory measures that few would wish to defend, it would establish a distinction that threatens to call into question statutes that many observers would think should be immune from executive assertions of preclusive authority. Thus, the constitutional controversy cannot be resolved by appealing to this distinction or debating whether such provisions may be classified as interfering with tactical choices in some Platonic sense. The deeper and more fundamental legal question is whether such a measure, even if properly understood to be an affirmative command that in some respects does trench on tactical judgments, is for that reason unconstitutional.

C. *The Ex Ante–Ex Post and General-Specific Distinctions*

One might try to eradicate the ambiguity inherent in these distinctions by drawing a line separating statutes enacted during a military conflict and those, such as FISA and the Torture Act, enacted prior to the initiation of hostilities. The latter class of enactments, on this view, does not raise constitutional concerns because these enactments establish a framework for war, and thus the President can account for such restrictions when he plans a campaign at the outset. By contrast, ex post enactments interfere with, and possibly upend, a battle plan he has already designed.²⁰¹ It might be thought that agreement on this

¹⁹⁹ See S. REP. NO. 110-77, at 390 (2007).

²⁰⁰ STATEMENT OF ADMINISTRATION POLICY, *supra* note 68, at 1.

²⁰¹ An analysis of this sort, for example, leads Professors William Banks and Peter Raven-Hansen to conclude that Congress went too far in restricting President Nixon’s escalation of the war in Indochina by forbidding him from attacking Viet Cong sanctuaries in Cambodia. They argue that Congress could have initially limited the war in Indochina so that it did not extend to Cambodia; could have “deescalated” that war with a view to ending it; and could have prohibited the start of a “new war,” that is, a conflict “so different in location, magnitude, or risk that it cannot fairly be encompassed with the initial authorization for war,” which would apparently include

distinction would resolve most of the major controversies likely to arise at the “lowest ebb.” After all, there now exists a vast and growing body of what might fairly be characterized as prospective framework legislation.

But this distinction, too, is not as clear or helpful as one might think. The Detainee Treatment Act, which is one of the signature interventions of Congress in the war on terrorism, nicely reveals the categorization problem.²⁰² The statute is clearly crafted to apply in future conflicts, but it was enacted right in the midst of the conflict with al Qaeda and in response to reports of practices the President was authorizing in that conflict. In enacting a prospective statute as a consequence of what it learns during a conflict that is ongoing, has Congress adopted a permissible *ex ante* measure or an impermissible *ex post* one?

This question points to the indeterminacy of the related distinction, sometimes suggested, between measures that target military actions generally (which are said to be permissible framework measures) and those that are aimed at regulating a specific conflict (which are thought to be more constitutionally suspect).²⁰³ A 1940 statute prohibiting the use of new conscripts outside the Western Hemisphere, for example, was framed as a general rule for stationing troops — it was not by its terms limited to the Second World War.²⁰⁴ Yet it was clearly also intended to restrict a particular deployment that President Roosevelt would be inclined to order in the near future. Similarly, the prohibition against the use of ground troops in Cambodia²⁰⁵ operated as a general, prospective restriction on the use of military force until its re-

occupation of Cambodia as well as attacks on Beijing. BANKS & RAVEN-HANSEN, *supra* note 27, at 156–57. Nevertheless, they conclude that a 1971 statute prohibiting the use of appropriations to introduce ground troops into Cambodia was unconstitutional because there was an “arguable tactical necessity” for such border incursions, *id.* at 156, and the Commander in Chief has complete discretion over “tactical control of day-to-day combat operations in the theater[s] of war and defense of the troops deployed in them,” *id.* at 155.

²⁰² See 42 U.S.C.A. § 2000dd (West 2007) (described *supra* at p. 708). President Bush in his signing statement did assert the power to disregard that statute — to “construe” it “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.” 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 (Dec. 30, 2005).

²⁰³ See, e.g., RAMSEY, *supra* note 154, at 254; Robert H. Bork, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT’L L. 79, 80 (1971) (“The Constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach the tactical and managerial are for the President, while the major questions of war and peace are . . . confined to the Congress.”).

²⁰⁴ See Barron & Lederman, *supra* note 15, section V.B.2.

²⁰⁵ See *supra* note 201; see also Barron & Lederman, *supra* note 15, section V.B.1.

peal,²⁰⁶ but the restriction was also clearly aimed at limiting the conduct of the Vietnam War in particular.

The war on terrorism starkly reveals the potential ambiguity in this area, since the nature of the conflict, as all sides recognize, is so indistinct. This is not a war with clear geographic bounds or any clear moment at which it will end. Thus, although it might appear that most of the statutes involved in the war on terrorism fall comfortably on the general, *ex ante* framework side of the proposed line, the fact that some of them were enacted after 2001 complicates that judgment. Indeed, the Detainee Treatment Act reveals this very problem.²⁰⁷

In sum, without some sharp criteria for determining when a measure is too specific to be constitutional, the general-specific distinction, like the *ex ante-ex post* distinction, seems as likely to support controversial assertions of preclusive authority as to undermine them. Was the statute prohibiting ground troops from entering Cambodia sufficiently rule-like or impermissibly focused? What about a law prevent-

²⁰⁶ Indeed, as we discuss in our next Article, a 1973 limitation on the use of armed forces in Indochina did have unanticipated effects years after its enactment, when it would have prevented President Ford from using armed forces to rescue non-U.S. persons from Saigon under siege — a restriction that Ford disregarded. See Barron & Lederman, *supra* note 15, section V.B.4.

²⁰⁷ To be sure, in some constitutional contexts, a generality requirement can function as an important means of constraining legislative overreaching. A constitutional requirement that a tax be general rather than specific, for example, may well have a constraining effect in terms of on-the-ground political reality: the less narrowly targeted the tax, the more constituents may be aroused in opposition. Generality requirements can in this way make taxation harder to impose as a means of singling out a politically weak target. But it is difficult to see how a generality requirement would limit the legislature's practical ability to restrict a President's authority to use certain war tactics in any appreciable way. As we have just discussed, a restriction on placing troops in certain places — such as one prohibiting them from going into Cambodia or Fallujah — can easily be written without making reference to any particular conflict. The same is true with respect to restrictions on practices implicated by the war on terrorism, such as coercive interrogation techniques. Yet in these cases, it is hard to see how Congress would incur any political costs, or be at all deterred, by complying with a formal requirement of generality in drafting. Indeed, if anything, it may actually be *more palatable*, and thus easier, for Congress to adopt many wartime restrictions in the form of general prohibitions, as doing so makes it seem less as if Congress is unduly singling out a particular executive strategy for rebuke. That Congress may easily draft around a generality requirement, however, does not mean that acceptance of a general-specific distinction would effectively foreclose executive assertions of the power to disregard statutory restrictions. If a constitutional bar on conflict-specific restrictions were to be generally accepted, executive branch lawyers would no doubt argue — and with some justification — that the form of a restriction, standing alone, could not reasonably be viewed as controlling the constitutional question of whether the law was sufficiently general. The real issue, they would contend, must be tied to whether the measure *effectively* targets the President's actions in a particular conflict. Indeed, otherwise the test would be devoid of the very substantive constraining power that was thought to justify its application in the first instance, precisely because of the ease with which it could be circumvented through clever drafting. For that reason, we think it likely that acceptance of the legitimacy of this sort of constraint on congressional power, toothless though it might seem to be in theory, would in practice inevitably provide a foothold from which the President could quite plausibly argue that a broad range of statutes that appear to be "general" are in fact conflict-specific, and thus constitutionally dubious, in every sense that matters.

ing troops in Iraq from taking sides in sectarian strife? Or a statute capping force levels in Iraq or banning military strikes on terrorist training camps in Pakistan? Does FISA's requirement that each discrete act of electronic surveillance be separately justified before a neutral tribunal establish a general restriction, or does it mandate detailed individualized review of a whole category of military judgments? How about a statute purporting to shut down the detention facility at Guantánamo Bay? Would that be a general framework rule governing detentions, or a conflict-specific intervention?

Some have suggested that the test should turn on whether the regulation in question fundamentally changes the military mission (in which case it would be permissible) or merely tinkers with how a mission is to be carried out.²⁰⁸ But even to state that test is to acknowledge how deep the ambiguity runs as to whether a given regulation of the use of force is appropriately general or impermissibly specific.²⁰⁹

D. Conclusion

In the aftermath of the Korean War, the fight over war powers understandably zeroed in on concerns about the President's unilateral use of military force. Conflicts between the branches over how a military conflict should be carried out seemed marginal at best. In today's world, however, marked as it is by a substantial body of legislative regulation prescribing acceptable means and modes of warfare, clashes between the branches over the terms of battle are no longer legitimately characterized as hypothetical brain-teasers that may be pushed to the edges of constitutional inquiry. The existence of such prescriptive regulation does not demonstrate that legislative "micromanagement" is more defensible now than it was a generation ago. It does suggest, however, that those who reason outward from indefensibly fanciful hypothetical "micromanagement" statutes to conclude without much reflection that an unspecified category of tactics must be reserved exclusively to the President as a matter of constitutional law now have more reason than they once did to pause before embracing that legal judgment.

Upon reflection, we think a large part of the reason the oft-cited extreme examples of legislative micromanagement seem so difficult to

²⁰⁸ See, e.g., Feldman & Issacharoff, *supra* note 2.

²⁰⁹ It is worth noting that an inquiry into the nature of the mission is especially complicated when Congress has not authorized the military action in the first place. If Congress legislates to shape the conduct or nature of the conflict only after the President has initiated hostilities, in what sense can the legislature be said to have changed the initial mission — the mission never having been defined by Congress to begin with? Yet if Congress *could* impose such limits on presidentially initiated conflicts, it would seem strange to conclude that Congress would somehow *lose* the power to intervene in the midst of military operations in those cases where it played a role in authorizing the hostilities at the outset.

defend may have nothing to do with intuitions about constitutional principles. The discomfort may instead reflect the simple fact that such hypothetical statutes are fairly preposterous. Why would Congress want to insist that troops take one hill rather than another? Why would it prefer a landing at Omaha rather than Utah Beach — let alone a public statute mandating and announcing such a tactic in advance? Precisely because there will rarely if ever be a pressing need for such legislative second-guessing at this level of detail, it is virtually inconceivable that a majority of both Houses, let alone a supermajority of each, would begin to enact laws telling the President which hills to take, or which flanks to secure, against his own preferences. Nor is it even clear, given the President's capacity to delay the signing of a bill, that a Congress bent on making real-time tactical decisions of this kind could actually do so.

For these hypotheticals to be helpful to the constitutional question at hand, therefore, one must conjure a world much more like the one we presently inhabit — a world in which each House would actually have reason to enact rules that the President would plausibly oppose as an interference with his tactical decisionmaking. From this more realistic vantage point, cases such as those presented by the standard hypotheticals would be remotely conceivable only if the President were to announce in advance his intention to use a particular tactic (say, to take Hamburger Hill, or to firebomb an urban setting), and there were an overwhelming public and legislative consensus that such a tactical judgment would be catastrophic for the prosecution of the war, or harmful to the nation's long-term well-being. But in that case, the hypothesized statute might not seem so preposterous after all. Indeed, what might then be counterintuitive would be the idea that the President could, in the teeth of such a consensus view, go ahead with his plan anyway, and that no one — not even two supermajorities prepared to take the momentous step of second-guessing the Commander in Chief's judgment in wartime — could stop him.

In other words, once the difficulty of classifying various imaginable legislative measures becomes apparent, the need to examine the legal predicate for the lines of distinction becomes clear. The problem with many executive assertions of preclusive war power is not that they clearly misapply various distinctions that have been deployed to define the bounds of allegedly preclusive tactical command authority. It is, rather, that their plausible applications of those distinctions rest on a legal predicate that is assumed rather than independently justified.

And so we now turn to an examination of the legal basis for the underlying constitutional premise on which these distinctions rest —

that Congress may not “interfere[] with the command of the forces and the conduct of campaigns.”²¹⁰

V. THE MODEST AND INCOMPLETE LESSONS FROM SUPREME COURT DOCTRINE

One obvious place to look in assessing the basis for the claimed preclusive constitutional power is in the opinions of the Supreme Court. Both defenders and opponents of the Bush Administration’s theory of executive war powers have done just that. The Department of Justice has recently asserted, for example, that there are “numerous” cases acknowledging limits on Congress’s power to control the President’s conduct of military campaigns.²¹¹ But the Administration has failed to identify a single Supreme Court precedent, with the exception of Chief Justice Chase’s concurring dictum in *Milligan*, to support such a claim.²¹² In various recent memoranda, the Department of Justice overwhelmingly cites authorities, such as the *Prize Cases*, that are simply inapposite.²¹³

²¹⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment).

²¹¹ Gonzales Answers to Questions, *supra* note 56, at 57 (emphasis omitted).

²¹² The Department recently has begun to cite another dictum penned by Judge Silberman while sitting on the FISA Court of Review, stating that if the President enjoys an *inherent* Commander in Chief authority, it may not be limited by statute. *See, e.g., id.* (citing *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002)). But the FISA Court of Review did not provide any justification of that dictum, and as we have explained, *see supra* pp. 741–43, that court appears to have fundamentally erred in failing to distinguish between inherent and preclusive Article II powers.

²¹³ *See, e.g.,* OLC 2002 Torture Opinion, *supra* note 7, at 206 (citing *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863)). Because the blockade at issue in the *Prize Cases*, far from being proscribed by law, was *authorized* by two preexisting acts of Congress, *see* 67 U.S. (2 Black) at 668, and because Congress subsequently ratified the blockade by legislation for good measure, *see id.* at 670, that case hardly supports the argument that Congress has no role in governing or controlling the President’s conduct of campaigns. Indeed, in the *Prize Cases* litigation, the United States argued to the Court 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 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., 1978) (emphases added).

Similarly, DOJ’s NSA/FISA White Paper quotes *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850), in which the Court stated that “[a] commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual.” DOJ WHITE PAPER, *supra* note 38, at 1404 (second alteration in original) (quoting *Fleming*, 50 U.S. (9 How.) at 615) (internal quotation mark omitted). That case, however, dealt with the question of whether a foreign port under the control of the U.S. military could be considered part of the United States for revenue purposes, rather than with any substantive prerogative to ignore statutory commands. If anything, the decision appears to confirm the opposite position by stating that foreign conquests “do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the

By contrast, in arguing against the Bush Administration's theory, there is an understandable temptation to invoke three more well-known Supreme Court authorities — Justice Jackson's "lowest ebb" formulation from *Youngstown*, the Court's recent decision in *Hamdan*, and the 1804 case of *Little v. Barreme*²¹⁴ — in support of the idea that the Court has already settled the question in favor of Congress's Article I war powers. After all, in *Little*, no less an authority than Chief Justice Marshall, for a unanimous Court, held that a statute had prohibited the President from using the navy during an armed conflict in a manner that might otherwise have been within his constitutionally authorized discretion.²¹⁵ In *Youngstown*, not only did Justice Jackson famously cast a skeptical eye on presidential conduct undertaken contrary to Congress's "expressed or implied will,"²¹⁶ but the votes of at least three of the six Justices in the majority rested on the conclusion that the President's seizure of the steel mills in that case was contrary to legislative will.²¹⁷ Indeed, not a single Justice in the case denied Congress's power to regulate such seizures.²¹⁸ Finally, in *Hamdan*, although it was widely expected that the Court would decide the vexing and long-contested question of whether the President has the unilateral constitutional power to establish military tribunals to try enemy combatants for war crimes, the Court actually assumed that the President had the constitutional and statutory authority to convene war crimes commissions²¹⁹ and held instead that the commissions established by

limits before assigned to them by the legislative power." *Fleming*, 50 U.S. (9 How.) at 615 (emphasis added).

DOJ has also relied heavily on the Court's decision in *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73 (1875). See, e.g., DOJ WHITE PAPER, *supra* note 38, at 1404 (quoting *Hamilton*, 88 U.S. (21 Wall.) at 87). But although the Court in *Hamilton* did state that the President alone is "constitutionally invested with the entire charge of hostile operations," 88 U.S. (21 Wall.) at 87, that unremarkable claim — it is indisputable that no one else but the President has the charge of U.S. military campaigns — does not begin to support the strong claim about the unconstitutionality of statutory limits on the Commander in Chief's powers. Indeed, the Court declined even to decide "[w]hether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy [the power at issue in *Hamilton*] may or may not be exercised by the President alone," *id.* (emphasis added), finding instead that the President's actions were *statutorily authorized*, *id.* at 88–97.

²¹⁴ 6 U.S. (2 Cranch) 170 (1804).

²¹⁵ *Id.* at 177–78.

²¹⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²¹⁷ See *supra* note 31.

²¹⁸ Even the three dissenting Justices agreed that there was "no question" that the President's actions were "subject to congressional direction." *Youngstown*, 343 U.S. at 710 (Vinson, C.J., dissenting).

²¹⁹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 (2006) ("Whether . . . the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity' is a question this Court has not answered definitively, and need not answer today." (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866) (Chase, C.J., concurring in the judgment)); *id.* ("[W]e held in [*Ex parte Quirin*, 317 U.S. 1, 28 (1942)], that Congress had, through

President Bush transgressed statutory *limitations* that Congress had enacted more than fifty years earlier.²²⁰ Moreover, the Court pointedly implied that the statutory limits enforced in that case were constitutional, citing Justice Jackson's famous instruction in *Youngstown* that the President's war powers are at their "lowest ebb" when exercised in the teeth of a statutory prohibition. The President may not, the *Hamdan* Court held, "disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."²²¹

To be sure, these decisions, together with opinions in two other cases less commonly cited for congressional supremacy — one from the War of 1812 (*Brown v. United States*²²²), and the other decided in the wake of the Civil War (*Ex parte Milligan*) — do provide substantial reason to question the undifferentiated notion that tactical matters, or the "command of campaigns," are flatly beyond congressional control. These authorities do not, however, definitively resolve the "lowest ebb" question, either individually or in combination.²²³ In fact, in none of these cases did the government argue that the Commander in Chief should be entitled to disregard a statute because it unduly impinged on

Article of War 15 [enacted in 1916], sanctioned the use of military commissions in such circumstances. . . . We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions.".)

²²⁰ The Court held that the 1950-enacted version of the Uniform Code of Military Justice required such tribunals to comply with the laws of war, including the Geneva Conventions. *Id.* at 2774, 2786. The Court further held that the Administration's commissions violated Common Article 3 of the Geneva Conventions, which requires, among other things, that detainees in an armed conflict such as the U.S. conflict with al Qaeda be tried for violations of the laws of war only by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2795–97 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138) (internal quotation mark omitted). The Court concluded that the Administration's commissions were not "regularly constituted" because their procedures deviated from the statutorily authorized courts-martial system in ways that had not been justified by any practical need. *Id.* at 2796–97; see also *id.* at 2790–93 (holding similarly based on a provision of the UCMJ, 10 U.S.C. § 836(b) (2000), which requires that the rules that apply to a military court conform to those of other military courts "insofar as practicable"); *id.* at 2802–08 (Kennedy, J., concurring in part) (also finding that *Hamdan's* military tribunal did not meet Common Article 3's "regularly constituted" standard). The emerging scholarly consensus treats the Court's exercise in statutory interpretation as an elaborate and implausible ruse. See *supra* pp. 703–04. Although we think that much of the Court's statutory analysis is more defensible than many have assumed, that is not especially important for present purposes. What matters here, instead, is that the Court indicated, without any recorded dissent on this point, that Congress *could* prescribe the nature of the military tribunals that try enemies for violations of the laws of war. As we explain in our next Article, that was a question the Court had specifically left open in 1942, in the case of *Ex parte Quirin*. See Barron & Lederman, *supra* note 15, section IV.E.3 (discussing *Quirin*, 317 U.S. at 47).

²²¹ *Hamdan*, 126 S. Ct. at 2774 n.23 (citing *Youngstown*, 343 U.S. at 637).

²²² 12 U.S. (8 Cranch) 110 (1814).

²²³ We discuss *Brown* and *Milligan*, along with *Little*, in our next Article.

his constitutional powers,²²⁴ and thus the Court had no occasion in these cases to adjudicate any such preclusive claims.

Moreover, the Court's own message on the "lowest ebb" question in both *Hamdan* and *Youngstown* was more equivocal than is often acknowledged. In addition to the fact that in both cases the constitutional question was not technically presented,²²⁵ key language from the crucial opinions in each case suggests the difficulty of the question. Justice Jackson chose his "lowest ebb" imagery with some care in his influential *Youngstown* concurrence; he did not say that the President's war powers always run dry when they conflict with a statutory restriction. Indeed, although Justice Jackson stated that Congress's war powers could "impinge upon even [the President's] command functions," this was so only "to some unknown extent."²²⁶ Justice Jackson suggested a distinction between control over "domestic" or "internal affairs," which would be plainly subject to statutory control,²²⁷ and "command [of] the instruments of national force . . . when turned against the outside world for the security of our society," as to which

²²⁴ As we explain in our next Article, at oral argument in *Youngstown*, the Solicitor General did suggest in passing that perhaps President Truman was not constitutionally obliged to adhere to Congress's direction. But he stressed that the issue was not raised in that case because Truman had repeatedly insisted that he would abide by any congressional resolution of the question. See Barron & Lederman, *supra* note 15, section V.A; see also *infra* note 225.

²²⁵ In *Youngstown*, the constitutional issue was not directly joined because President Truman insisted that *if* Congress had prohibited the seizures, it would be a practical matter to be controlling. See 343 U.S. at 676–77 (Vinson, C.J., dissenting) (quoting President's messages to Congress); see also Brief for Petitioner [Secretary of Commerce] at 93, 150, 164, *Youngstown*, 343 U.S. 579 (No. 745), in 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 595 (Philip B. Kurland & Gerhard Casper eds., 1975) (repeatedly emphasizing that President Truman would abide by any directive Congress might enact and would "accept and execute any Congressional revision of his judgment as to the necessary and appropriate means of dealing with the emergency in the steel industry"); *id.* at 174 (stating that the President "recogniz[es] fully the power of Congress by appropriate legislation to undo what he has done or to prescribe further or different steps"). In *Hamdan*, after noting that the President could not disregard "proper[ly]" enacted statutes, the Court noted: "The Government does not argue otherwise." 126 S. Ct. at 2774 n.23. In the lower court proceedings, the Bush Administration had specifically argued that the district court's construction of the UCMJ — "to reflect congressional intent to limit the President's authority" — would "create[] a serious constitutional question." Brief for Appellants at 56, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393), available at <http://www.law.georgetown.edu/faculty/nkk/documents/Hamdan-opening-brief2.pdf> (last visited Dec. 8, 2007). Thus, the Government's argument continued, the statutes should not be understood "to effect such an infringement on core executive powers" absent "[a] clear statement of Congressional intent." *Id.* at 57. In the Supreme Court, however, the Solicitor General retreated somewhat: he argued, a bit more obliquely, that the exercise of the President's powers "as Commander in Chief of the Army in time of war and of grave public danger are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress." Brief for Respondents at 23, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 460875 (quoting *Quirin*, 317 U.S. at 25) (internal quotation mark omitted). He did not stress the Article II override argument directly, however.

²²⁶ *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

²²⁷ *Id.* at 636 n.2, 644.

the Justice said he would “indulge the widest latitude of interpretation to sustain [the President’s] exclusive function.”²²⁸ As for *Hamdan*, just before the passage explaining that the President may not disregard “proper” statutory limitations in prosecuting a war, Justice Stevens pointedly quoted from the famous war powers concurrence of Chief Justice Chase in *Ex parte Milligan* to the effect that “Congress cannot direct the conduct of campaigns.”²²⁹

The Court has recently decided three other cases in the war on terrorism — *Hamdi v. Rumsfeld*,²³⁰ *Rumsfeld v. Padilla*,²³¹ and *Rasul* — in which the Bush Administration specifically invoked the Commander in Chief Clause in arguing that federal statutes cannot be construed to impinge on the President’s discretion to detain “enemy combatants.” Although not a single Justice on the Court suggested any favorable disposition to such an argument, and in *Hamdi* and *Padilla* some specifically or impliedly rejected it,²³² the Court’s holdings in *Hamdi* and *Padilla* did not depend on resolving the question.²³³ The Court’s holding in *Rasul* that Congress had, in fact, conferred jurisdiction on the federal courts to entertain the detainees’ habeas actions²³⁴ did implicitly reject the Government’s constitutional avoidance argument.²³⁵ But the Court did not say why it had turned aside the consti-

²²⁸ *Id.* at 645.

²²⁹ *Hamdan*, 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment)).

²³⁰ 542 U.S. 507 (2004).

²³¹ 542 U.S. 426 (2004).

²³² The government argued in *Hamdi* and *Padilla* that 18 U.S.C. § 4001(a) (2000), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” could not be construed to prohibit the sort of military detention to which the petitioners were subject without raising substantial constitutional doubts under the Commander in Chief Clause. See *supra* p. 706. Justice Souter’s concurrence in *Hamdi*, joined by Justice Ginsburg, addressed the constitutional argument directly, quickly turning it aside with a reference to Justice Jackson’s “lowest ebb” categorization. See 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Scalia (joined by Justice Stevens) also implicitly rejected the argument: he opined that Congress had, in fact, permissibly prohibited Hamdi’s detention through § 4001(a). See *id.* at 574 (Scalia, J., dissenting). In addition, Justices Souter, Ginsburg, and Breyer joined Justice Stevens’s dissent in *Padilla*, which would have held that Padilla’s detention was unlawful because § 4001(a) had proscribed “the protracted, incommunicado detention of American citizens arrested in the United States.” 542 U.S. at 464 n.8 (Stevens, J., dissenting).

²³³ The governing plurality opinion of the Court in *Hamdi* held that 18 U.S.C. § 4001(a) had been superseded by the later-enacted AUMF, see 542 U.S. at 517 (plurality opinion), and the Court decided *Padilla* on venue grounds, see 542 U.S. at 430.

²³⁴ *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004).

²³⁵ Indeed, even Justice Scalia, who dissented on the statutory interpretation question, agreed that Congress *could* authorize habeas for such detainees. See *id.* at 506 (Scalia, J., dissenting).

tutional concern, and was silent as well on the question of whether its holding reflected a more general principle of legislative supremacy.²³⁶

The inscrutability of the relevant Supreme Court precedents is compounded by the fact that there are some signs (such as the ambiguities in Justice Jackson's concurrence discussed above) pointing in the opposite direction. Most notably, as the *Hamdan* Court's citation to Chief Justice Chase's *Milligan* dictum demonstrates, the modern Court does not appear to have rejected the assumption that Congress may not by legislation "direct the conduct of campaigns"²³⁷ — even though the Court's holding in *Hamdan* is fairly viewed as indicating that the statutory restrictions on military commissions in that particular case were constitutional.²³⁸ Thus, the Court has yet to resolve definitively the precise contours of Congress's powers to control the President's war powers, and it surely has not ruled out the modern consensus of war powers scholars that the President does retain some, not fully specified, preclusive control and that therefore Congress may not enact statutes that "interfere[] with the command of the forces and the conduct of campaigns."²³⁹

As a result, examination of the constitutional basis for this core executive prerogative must proceed as an exercise less in doctrinal analysis than in historical reconstruction, relying as much if not more on constitutional interpretations rendered outside the context of litigation as on those based in case law. To that end, we begin the next Part by closely examining both the relevant constitutional text and the evi-

²³⁶ In addition to how the issue is addressed in the cases discussed in the text and in our next Article, Justice Marshall appeared to address the question in his concurrence in the *Pentagon Papers* case. See *New York Times Co. v. United States*, 403 U.S. 713, 740–48 (1971) (Marshall, J., concurring). He assumed for the purposes of argument that (as the Solicitor General had argued) the Commander in Chief Clause provided some basis for the President to invoke the Court's equity jurisdiction to prevent publication of material damaging to national security, *id.* at 742, but reasoned that such authority could not be invoked where Congress had considered the question and "specifically decline[d]" to make the conduct in question unlawful, *id.* at 745–47. The *Pentagon Papers* case, however, did not involve any constitutional power of the Commander in Chief to command the armed forces in war; moreover, the government did not argue that the President could secure the injunction if Congress had precluded such a remedy. In other words, it was another case in which the "lowest ebb" question was not directly joined.

²³⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74 (2006) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment)).

²³⁸ Justice Stevens did not attempt to reconcile the implicit holding that the statutory limits on commissions were constitutional with his embrace of the notion that Congress cannot control the "conduct of campaigns." The trial of enemy combatants for violations of the laws of war is, "by 'universal agreement and practice,' . . . [an] 'important incident[] of war,'" *Hamdi*, 542 U.S. at 518 (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)) — one that is designed to "operat[e] as a preventive measure" against further violations of the laws of war, *In re Yamashita*, 327 U.S. 1, 11 (1946).

²³⁹ *Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in the judgment).

dence of the founding generation's understandings and intentions regarding it.

VI. TEXT, STRUCTURE, AND ORIGINAL UNDERSTANDINGS

The constitutional clause at the heart of the debate sets forth a single, unelaborated declaration: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."²⁴⁰ "[C]ryptic words," Justice Jackson called them,²⁴¹ but this much is uncontroverted: the designation of the President as "Commander in Chief" is "more than an empty title."²⁴² What is deeply contested, therefore, concerns not whether, but the extent to which, this clause empowers the President to exercise authority that would supplement the honorific. In beginning our inquiry into that debate, we start with two foundational sources of constitutional guidance: the text of the Constitution that bears most directly on the question and the available evidence of the original understandings of those words.

A. Text and Structure

1. *The Designation of Presidential Superintendence of the Military.* — By designating that a new constitutionally created officer — the President — was to be the Commander in Chief, the Framers accomplished two important things. First, they effected a fairly radical change by taking away the legislature's virtually unbridled power to appoint, and to remove, the military commander, which the Congress had possessed under the Articles of Confederation. This change, in and of itself, ensured that the new Commander in Chief would not be under the yoke of the legislature in the same manner that General Washington had been early in the Revolutionary War.²⁴³ Under the new system, the people would choose the Commander in Chief, and only the people could remove him, except in the rare case of impeachment.²⁴⁴ The designation of the chief elected official — and not some military officer — as the Commander in Chief also accomplished a second important objective: it was "a striking proof of the generality of the sentiment prevailing in this country at the time of the formation of

²⁴⁰ U.S. CONST. art. II, § 2, cl. 1.

²⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

²⁴² *Id.*

²⁴³ See *infra* pp. 773–80.

²⁴⁴ Of course, at the Founding, it was contemplated that the national legislature would sometimes play a role (as it did in 1800) in choosing from among presidential candidates receiving less than a majority of the votes of Electors. See U.S. CONST. art. II, § 1. But still, it was extremely unlikely a President could be chosen who did not have substantial popular support and, more to the point, Congress would not be free simply to appoint, and replace, the Commander in Chief.

our government, to the effect that the military ought to be held in strict subordination to the civil power,"²⁴⁵ thus addressing directly the complaint in the Declaration of Independence that the King had "affected to render the Military independent of and superior to the Civil Power."²⁴⁶

There seems to be no question, then, that the textual designation of the President as the Commander in Chief was intended to ensure that that officer, and no other, would be ultimately responsible for performing that role, whatever it was to entail. As Justice Jackson put it, the Commander in Chief Clause "undoubtedly puts the Nation's armed forces under Presidential command."²⁴⁷ That is to say, it establishes a particular hierarchical relationship within the armed forces and the militia (when called into federal service), at least for purposes of traditional military matters — and this relationship appears to be something no statute can change.

This conclusion draws support from the language of other constitutional provisions that also use words that appear to establish fixed hierarchical relations between governmental actors. The textual designation of some actors as superior to others has long been understood to establish lines of authority that the legislature is bound to respect. The document contemplates both "inferior" and "principal" officers, for example,²⁴⁸ and, at least as a general matter, the former are those "whose work [must be] directed and supervised at some level" by the latter.²⁴⁹ The Constitution also establishes a judicial hierarchy, with both a "supreme" Court and "inferior" courts.²⁵⁰ The lower tribunals are meaningfully subordinate to the directions of the Supreme Court,²⁵¹ and

²⁴⁵ Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 79 (1861) (emphasis omitted).

²⁴⁶ THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); see also Greer v. Spock, 424 U.S. 828, 845–46 (1976) (Powell, J., concurring). Attorney General Bates explained that the reason for designating the President as Commander in Chief was:

Surely not because [he] is supposed to be, or commonly is, in fact, a military man, a man skilled in the art of war and qualified to marshal a host in the field of battle. No, it is for quite a different reason; it is that whatever skilful soldier may lead our armies to victory against a foreign foe, or may quell a domestic insurrection; however high he may raise his professional renown, and whatever martial glory he may win, still he is subject to the orders of the civil magistrate, and he and his army are always "subordinate to the civil power."

10 Op. Att'y Gen. at 79 (emphasis omitted).

²⁴⁷ *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring).

²⁴⁸ U.S. CONST. art. II, § 2, cls. 1–2.

²⁴⁹ *Edmond v. United States*, 520 U.S. 651, 663 (1997); but cf. *id.* at 667–68 (Souter, J., concurring in part and concurring in the judgment) (arguing that some officers subordinate to others, and whose decisions may be reviewed by others, might still themselves be "principal" officers).

²⁵⁰ U.S. CONST. art. III, § 1; *id.* art. I, § 8, cl. 9; see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (describing the Article III system as a "hierarchy").

²⁵¹ See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the

thus Congress may not provide for them to review the judgments of the Supreme Court.²⁵²

It thus requires no special interpretive creativity to conclude that the designation of the President as the “Commander in Chief” grants more than a nominal title. It suggests that, at least with respect to certain functions, Congress may not (by statute or otherwise) delegate the ultimate command of the army and navy (or of the militia when in the service of the national government) to anyone other than the President. Therefore, at least as far as the army, navy, and federalized militia are concerned, no statute may prescribe that certain “command” decisions are to be the province of anyone who is not subordinate to the Chief Executive.²⁵³

The full extent of this preclusive prerogative of superintendence remains uncertain, and the history of such questions in the political branches is decidedly uneven.²⁵⁴ Nevertheless, we think the text, as reinforced by historical practice, makes a strong case for at least some variant of a “unitary executive” within the armed forces, particularly as to traditional functions in armed conflicts.²⁵⁵ So, for example, the text of the Commander in Chief Clause is fairly read to instruct that no statute could place a general or other officer in charge of the authorized armed conflict against al Qaeda, or the war in Iraq, and insulate that officer from presidential direction or removal. Indeed, such an argument would be especially powerful with respect to an assign-

Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)) (internal quotation marks omitted). The Court has also long asserted the power to prescribe rules of evidence and procedure that are binding in lower federal courts. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000). Although the courts have taken the view that the terms “supreme” and “inferior” establish a judicial hierarchy, there has been some recent debate over whether they instead simply describe differing geographic and subject matter jurisdictions. Compare David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457 (1991) (arguing against the hierarchical model), with Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (providing both originalist and functionalist arguments in favor of a hierarchical model).

²⁵² See *United States v. O’Grady*, 89 U.S. 641, 647–48 (1875) (“[I]nasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal . . .”).

²⁵³ See *Loving v. United States*, 517 U.S. 748, 772 (1996) (explaining that the President’s duties as Commander in Chief, whether in war or peacetime, “require him to take responsible and continuing action to superintend the military”).

²⁵⁴ See Barron & Lederman, *supra* note 15, section VI.A (discussing this question at greater length); *id.* section II.F.3.a (describing the historical example of a statute removing the President’s authority with respect to a domestic architectural project of the Army Corps of Engineers).

²⁵⁵ Moreover, as we show in our companion Article, there is a much longer and more distinct history of the executive branch asserting such a superintendence prerogative than there is of that branch claiming a preclusive authority to disregard *substantive* statutory limitations on the Commander in Chief’s authority.

ment of command authority to someone within the military itself, for such an assignment would be in considerable tension with the object of the Framers to ensure civilian command of the armed forces.²⁵⁶

2. *The Scope and Nature of the Commander in Chief's Substantive Powers.* — Even if the text appears to place the President at the apex of the military command structure (at least for purposes of some functions), does it do anything more? In particular, does it show that the President enjoys a substantive preclusive power over the conduct of military operations, even in the face of a legislative restriction that would limit what would otherwise be the Executive's constitutionally authorized discretion?

To answer such questions, one must first inquire whether the Commander in Chief Clause provides textual support for the President's possession of *any* substantive war powers, preclusive or otherwise. The text does not by terms enumerate such powers with any specificity — certainly not with the degree of precision with which it lists the war powers of Congress in Article I. But that said, the words of Article II themselves cannot fairly be said to preclude the recognition of such presidential powers. Decisions concerning the conduct of military operations, in particular, fit quite comfortably within what a contemporary reader might imagine to be the responsibilities of one who has been named as the "Commander in Chief" of the armed forces. And indeed, more than 200 years of usage and court precedents reflect the view that the Commander in Chief Clause does confer broad substantive war powers on the President.²⁵⁷

That is not to say the scope of these inherent or independent war powers is determinate or uncontested. There remains a great deal of debate about the particulars of the President's independent war powers, and some of the specific questions (such as, especially, the power to initiate large-scale military engagements without prior legislative approval) are very important. For present purposes, however, there is no need to identify the exact list of the President's independent war powers — something that the constitutional text, in any event, can hardly be thought to do. Our interest instead is in determining whether the text has anything to say regarding the analytically distinct question of the extent to which these substantive executive war powers are subject to statutory regulation.

On this question, the text is largely unhelpful. To be sure, one might conclude that the use of the root "command," when combined with the word "chief," suggests that the President's substantive powers are necessarily preclusive of statutory limitation. It might be thought

²⁵⁶ See Barron & Lederman, *supra* note 15, section III.G.3.

²⁵⁷ See *supra* pp. 730–31.

that a statutory directive or limitation is itself in some sense a “command” to the armed forces. But this reading of the text of Article II would beg a host of difficult questions. As an initial matter, such an interpretation offers no convincing account of what it means to “command.” If the Commander in Chief is bound to act in conformity with statutory requirements concerning his use of troops in the field, it is not clear whether such statutes would infringe his power to command, or instead simply define that power.²⁵⁸ A preclusive reading of the Commander in Chief Clause also fails to grapple with the fact that the text of Article I is rife with express references to the congressional role with respect to the army, navy, and militia, including specific war powers.²⁵⁹ If the words of the Commander in Chief Clause were construed to give the President an illimitable power to establish the modes and means of waging war, they would render trivial these extensive Article I powers or, at most, read them merely to give the legislature the power to adopt advisory regulations that the President would be free to disregard at his discretion.²⁶⁰

The potential for conflict between the overlapping textual authorities of the political departments is in this respect potentially instructive as to how best to construe the war powers provisions of Articles I and II — namely, in a manner consistent with the approach the Supreme Court has adopted in its modern doctrine. The Court has largely em-

²⁵⁸ Is a conductor of an orchestra any less a conductor because he must follow the score? Is a chief executive officer not in fact the “chief” merely because she must abide by a corporation’s bylaws?

²⁵⁹ See *supra* pp. 732–36 (discussing these Article I powers). As James Wilson — a principal architect of the Constitution and defender of executive power — explained in a lecture shortly after ratification:

The power of declaring war, and the other powers naturally connected with it, are vested in congress. To provide and maintain a navy — to make rules for its government — to grant letters of marque and reprisal — to make rules concerning captures — to raise and support armies — to establish rules for their regulation — to provide for organizing, arming, and disciplining the militia, and for calling them forth in the service of the Union — all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in congress.

1 THE WORKS OF JAMES WILSON 433 (Robert Green McCloskey ed., 1967) (1804) (emphasis added). Similarly, Jefferson famously wrote to Madison in 1789 that “[w]e have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., 1958).

²⁶⁰ Moreover, the Commander in Chief Clause itself does not distinguish between war and peace. The President is the head of the army and navy regardless, and yet not many would argue that Congress cannot regulate the way in which, for instance, affairs at the Pentagon are arranged in peacetime. From this, Judge Posner questions how it can be that the President’s designation as Commander in Chief (as opposed to some other constitutional authority) forecloses statutory regulation of the armed services. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 67–68 (2006); see also Prakash, *Regulating the Commander in Chief: Some Theories*, *supra* note 108, at 1319, 1322 n.13.

braced Justice Jackson's framework in *Youngstown*, in which the Commander in Chief Clause of Article II confers independent war powers that are subject to statutory limitations in an unspecified range of circumstances. This approach does not treat the text as resolving which branch possesses the ultimate power in a case of a conflict over the control of warfare. It assumes that such conflicts between the Article I and Article II war powers may well arise and that their resolution must be based on appeals to something other than the text of the Constitution itself. In other words, the text is probably best construed to make clear that both branches come to the table with plausible claims to authority, but it is impossible to tell from the words of the document alone which one, if either, has a conclusive argument for primacy.

B. Evidence of Original Understandings

The interpretive openness of the relevant constitutional text invites inquiry into original understanding. The Framers of Articles I and II no doubt had some idea of the nature of the office they were creating when they drafted and ratified the Commander in Chief Clause, and thus it makes sense to inquire whether they had a view about the extent to which the Constitution would properly be construed to authorize or restrict the legislature's regulation of the President's exercise of war powers. The question, in particular, is whether the creation of a constitutional office of "Commander in Chief" would reasonably have been understood as establishing some notion of a military leader impervious to legislative control over some subset of military decision-making.²⁶¹

1. Evidence of the Understanding of the Office of "Commander in Chief" During the Revolutionary War. — The term "Commander in Chief" apparently derives from the reign of King Charles I in the seventeenth century, when it denoted a purely military post under the command of political superiors.²⁶² During the English Civil Wars, for example, Parliament appointed Sir Thomas Fairfax to be commander in chief of its forces, "subject to such orders and directions as he shall receive from both Houses or from the Committee of Both King-

²⁶¹ It is not our intention here to take sides in current debates about whether the relevant inquiry is best viewed as one of determining subjective "original intent" or, instead, determining the "original meanings" that constitutional terms might have conveyed to relevant actors at the time of the Founding (including delegates at the ratifying conventions). Our review looks both to subjective intent and, more comprehensively, to general contemporary understandings of the terms used in, and the office created by, the Constitution. The evidence points in the same direction.

²⁶² See 1 CHARLES M. CLODE, *THE MILITARY FORCES OF THE CROWN; THEIR ADMINISTRATION AND GOVERNMENT* 425–29 (London, John Murray 1869) (reproducing the 1638 appointment order of Thomas Earl of Arundel and Surrey as Commander in Chief).

doms.”²⁶³ This commander in chief appears to have had very little, if any, discretion to act in contravention of Parliament. Thus, for example, when George Monck was appointed “Commander-in-Cheife” of all forces in England and Scotland in 1659, he was expressly given extraordinarily broad powers and virtually unlimited superintendence over the forces (which were “required to bee obedient unto [Monck] as their Comander-in-Cheife, and . . . obey such orders as they shall receive from [Monck]”). He also was instructed, however, “to observe and obey such orders and directions as yow shall from time to tyme receive from the Parliament.”²⁶⁴

More broadly, and consistent with this tradition of parliamentary control of the conduct of war, beginning in 1624 Parliament began to impose substantive restrictions on the grants of revenue that it provided the King for military operations.²⁶⁵ Such parliamentary limitations were standard practice in 1678, when Charles II sought the power to maintain or disband his army in Flanders at his discretion. Parliament responded with an appropriations act that specified that the funds could be used to disband the Flanders forces by a specified date, and for no other purpose.²⁶⁶

Nearly a century later, during the Revolutionary War, George Washington became keenly aware of just how minimal the authority conferred by the seemingly significant title of “Commander in Chief” could be. Washington was appointed to an office unmistakably established so as to confirm the fact that he was a mere creature, and agent, of the Continental Congress. On June 17, 1775, the Continental Congress designated Washington both “General and Commander in chief, of the army of the United Colonies.”²⁶⁷ All evidence indicates that, at least at that time, there was nothing inherent in the title that precluded its bearer from being subject to detailed congressional control, and not

²⁶³ Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 630 (1972) (quoting CALENDAR OF STATE PAPERS, DOMESTIC, 1644–1645, at 24, 478 (1890)) (internal quotation marks omitted).

²⁶⁴ Commission to General Monck as Commander-in-Chief (Jan. 26, 1659), in 4 THE CLARKE PAPERS 137–39 (photo. reprint 1965) (C.H. Firth ed., 1901).

²⁶⁵ See generally BANKS & RAVEN-HANSEN, *supra* note 27, at 11–17.

²⁶⁶ See 91 CONG. REC. 16,121 (1970) (reprinting a Legal Memorandum on the Amendment To End the War written by several students at Harvard Law School); see also RAMSEY, *supra* note 154, at 417 n.57 (citing 11 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 155 (1812) (recording a 1739 Commons debate over the details of a proposed military expedition)). For an argument that this assumption of ultimate parliamentary control continued to be a part of the consensus British understanding long after our own Constitution was written, see John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754, 788–89 (2007).

²⁶⁷ 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 96 (Worthington Chauncey Ford et al. eds., 1904–1937) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS], available at <http://memory.loc.gov/ammem/amlaw/lwjclink.html>.

solely because of the practical fact that he was dependent upon appropriations (as would be the case with any official not given the purse strings). Indeed, wholly apart from questions of funding, Washington's original commission from the Continental Congress specifically required him to conform his conduct "in every respect by the rules and discipline of war," and directed him "punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress."²⁶⁸

Of course, at that time our constitutional system of separated powers had not yet taken root; the Continental Congress was, in the words of one delegate, a "deliberating Executive assembly."²⁶⁹ But that body did not hesitate to assert authority over the commander that it had named as the "chief." It used committees to direct the war effort, such as a war committee and special committees assigned to oversee the administration of domestic and foreign affairs, including war.²⁷⁰ Although the Continental Congress increasingly shifted its involvement from the delegates themselves to a model of centralized, expert management,²⁷¹ the Congress or its agents remained closely involved in the operations of prosecuting the war, and there was no Chief Executive who might wield a veto. The Continental Congress occasionally would even resolve that its committees repair directly to the front to consult with General Washington or give him directives. The instructions to the Commander in Chief and his subordinates dealt with matters from the deployment of troops to the interception of ships, and much else.²⁷² They were often extremely detailed, including with respect to tactical judgments and particular decisions as to how to treat the enemy.²⁷³ A quick glance at any volume of Washington's collected

²⁶⁸ *Id.*

²⁶⁹ Letter from Thomas Burke to the North Carolina Assembly (Aug. 1779), in 4 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 366, 367 (Edmund C. Burnett ed., 1928).

²⁷⁰ Jay Caesar Guggenheimer, *The Development of the Executive Departments, 1775-1789*, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD, 1775-1789, at 116, 118-20 (photo. reprint 2006) (J. Franklin Jameson ed., 1889).

²⁷¹ In 1776, at Washington's request, the Continental Congress created a Board of War and Ordnance, consisting of five members of Congress. *Id.* at 121-22. This system soon tied the Congress in knots, however, as it was "manifest to close observers that it was a sheer impossibility for a committee of members of Congress to attend to their duties as delegates, and at the same time take upon themselves the management of the details of a great war." *Id.* at 124. The next year, therefore, the Congress created a Board of War consisting of first three, then five non-congressmen, and when this, too, proved unmanageable, the Congress finally appointed a Secretary of War in 1781. *Id.* at 125-26.

²⁷² See SOFAER, *supra* note 20, at 20-21, 388 n.76; WORMUTH & FIRMAGE, *supra* note 20, at 108-09.

²⁷³ See B. Logan Beirne, Note, *Battle Royale: George v. George v. George: Commander-in-Chief Power*, 26 YALE L. & POL'Y REV. (forthcoming Winter 2007) (manuscript at 55 & n.289, 162, on file with the Harvard Law School Library) (discussing Continental Congress's constraints on the

writings from the war period reveals the extraordinary degree of dependency. Washington was constantly writing to the Continental Congress seeking permission for all manner of wartime decisions, and eagerly awaiting the Congress's approval before implementing his proposals.²⁷⁴

Such approval did not always arrive. Washington implored the Congress, for instance, to raise a better and more extensive army in 1776, "but all his letters seemed to disappear into a bottomless pit of shady, short-lived committees and windy politicians."²⁷⁵ Most famously, upon retreating from New York in the late summer of 1776 in the wake of the British success in the Battle of Long Island, Washington concluded it would be tactically advantageous to burn the city to the ground before fully departing. Before doing so, however, he first sent for permission from the Congress. The Continental Congress "absolutely forbid" the burning; Washington later wrote that "this in my judgment may be set down among one of the capital errors of Congress."²⁷⁶ Washington also wished to abandon Fort Washington, at the northern tip of Manhattan,²⁷⁷ but the Congress resolved that he "obstruct effectually the navigation of the North river, between Fort Washington and Mount Constitution," at least "if it be practicable."²⁷⁸ When the Continental Congress thereafter once again delivered its wishes to Washington in "forcible terms," he relented and tried to hold the post, resulting in devastating losses — a decision that he later described as being "repugnant to my own judgment."²⁷⁹ Another exam-

manner of treating enemy prisoners and confiscating enemy property); *see also, e.g.*, 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 605–06 (recording a resolution on confiscation of British subjects' property).

²⁷⁴ *See, e.g.*, Letter from George Washington to John Hancock, President, Continental Congress (Sept. 2, 1776), *in* 6 THE PAPERS OF GEORGE WASHINGTON 199, 200 (Dorothy Twohig ed., 1994) (asking permission to burn New York City if forced to abandon it); Letter from John Hancock to George Washington (Sept. 3, 1776), *in* 6 THE PAPERS OF GEORGE WASHINGTON, *supra*, at 207 (conveying Congress's denial of permission).

²⁷⁵ EDWARD G. LENGEL, GENERAL GEORGE WASHINGTON: A MILITARY LIFE 175–76 (2005).

²⁷⁶ Letter from George Washington to Lund Washington (Oct. 6, 1776), *in* 6 THE PAPERS OF GEORGE WASHINGTON, *supra* note 274, at 493, 494. After Washington abandoned the city, a fire was set, destroying hundreds of houses on September 21, 1776. LENGEL, *supra* note 275, at 157. Although some of the British and loyalists suspected Washington had something to do with it, and although Washington himself certainly did not *regret* the conflagration (he later wrote that "Providence — or some good honest Fellow, has done more for us than we were disposed to do for ourselves, as near One fourth of the City is supposed to be consumed," Letter from George Washington to Lund Washington, *supra*, at 495), no evidence was ever uncovered that Washington played any role, and Lengel concludes that his involvement is "questionable," not least because "[h]e would have hesitated to disobey Congress's orders." LENGEL, *supra* note 275, at 158.

²⁷⁷ *See* DAVID HACKETT FISCHER, WASHINGTON'S CROSSING 111 (2004).

²⁷⁸ 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 866.

²⁷⁹ Letter from George Washington to Joseph Reed, *in* 16 THE WRITINGS OF GEORGE WASHINGTON 150, 151–52 (John C. Fitzpatrick ed., 1931–1944).

ple involved the Continental Congress's instruction to Washington, in its initial broad delegation of authority, that he was to "advise with your council of war."²⁸⁰ Washington apparently construed this directive to require that he obtain the assent of his council for major operations. In September 1775, and on several later occasions, Washington urged his council to approve an attack on the British army in Boston. However, the council voted against Washington's better judgment, in part because of the expected collateral damage to the city, and Washington acted in accord with the majority's view.²⁸¹

Washington's action in connection with a dispute over the proper treatment of enemy prisoners reflected his felt sense of obligation to adhere to the directives of the Continental Congress.²⁸² Early in the War, in response to British mistreatment of American General Charles Lee, the Congress resolved that if the British did not exchange Lee for six Hessian field officers, "the same treatment which General Lee shall receive, may be exactly inflicted upon [the British prisoners]," including Lieutenant Colonel Archibald Campbell.²⁸³ One commentator has recently asserted that in this "significant instance," Washington "effectively circumvented Congress" by advising Campbell's captors, the Massachusetts Council, not to retaliate against him in the manner the Congress had prescribed.²⁸⁴ But the truth of the matter is exactly the opposite. The Massachusetts Council had been treating Campbell very harshly,²⁸⁵ and Campbell apparently wrote to Washington, urging him to take steps to countermand the congressional directive. On March 1, 1777, Washington responded to Campbell, explaining that he could not violate the Congress's order: "I am not invested with the Powers you suppose; and it is as incompatible with my authority as my inclination to contravene any determinations Congress may make."²⁸⁶ Washington noted further, however, that the Council appeared to be treating Campbell *worse* than the British were treating Lee, something that the Congress had not commanded: "[A]s it does not appear to me, that your present Treatment is required by any resolution of theirs, but is the result of misconception, I have written my opinion of the matter to [the Council], which I imagine will procure a mitigation of what you

²⁸⁰ 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 101.

²⁸¹ See LENGEL, *supra* note 275, at 118-21; Beirne, *supra* note 273 (manuscript at 115-16). For additional examples of congressional direction of the war with deleterious results, see Emerson, *supra* note 29, at 205-06.

²⁸² See Beirne, *supra* note 273 (manuscript at 150-51).

²⁸³ 7 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 16.

²⁸⁴ See Beirne, *supra* note 273 (manuscript at 151).

²⁸⁵ See Letter from Archibald Campbell to William Howe, in SCOTS MAGAZINE, May 1777, at 249.

²⁸⁶ Letter from George Washington to Archibald Campbell (Mar. 1, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 279, at 214.

now suffer.”²⁸⁷ Indeed, the previous day Washington had written to the Council, not to instruct a deviation from the Congress’s decree, but rather to impress upon the captors that the Congress’s resolution only required treating Campbell with “exactly the same Treatment” that the British were imposing on Lee, and urging them to comport with that decree of equal treatment.²⁸⁸

²⁸⁷ *Id.*

²⁸⁸ Letter from George Washington to the Massachusetts Council (Feb. 28, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 279, at 207, 207–08 (emphasis omitted). Moreover, Washington wrote to the Continental Congress urging them to rescind the orders of retaliation, which Washington thought “would not have the desired effect, . . . and will, if adhered to, produce consequences of an extensive and melancholy nature.” Letter from George Washington to the President of Congress (Mar. 1, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 279, at 211, 211. As an example of the spiral of increasingly severe mistreatment that Washington feared, he explained that the retaliation imposed on Campbell was in fact “not justified by any [mistreatment] that Genl. Lee has yet received.” *Id.* at 212. On March 14, 1777, the Congress declined to alter its retaliation order, but clarified in its resolution that “it was never their intention that [Campbell] should suffer any other hardship than such confinement as is necessary to his security for the purpose of [the prior retaliation resolution].” 7 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 179. In transmitting this resolution to Washington, the President of the Congress explained that the assembly’s objective was, indeed, equal treatment — that “as severities against [Lee] were increased, . . . the same Treatment should be exercised on six Field Officers.” Letter from John Hancock, President, Continental Congress, to George Washington (Mar. 17, 1777), in 1 CORRESPONDENCE OF THE AMERICAN REVOLUTION 356, 357 (Jared Sparks ed., 1853).

Professor David Glazier has recently suggested that George Washington’s summary treatment in 1780 of a British Major, John André, who had conspired with Benedict Arnold, contravened an earlier resolution of the Continental Congress concerning the use of courts-martial to try suspected spies. Glazier, *supra* note 81, at 21–23. Instead of using a court-martial, General Washington convened a Board of General Officers, comprising fourteen prestigious officers, to hear André’s case. The Board found that he was a spy, and André was hanged on October 2, 1780. See Charles F. Barber, *Trial of Unlawful Enemy Belligerents*, 29 CORNELL L.Q. 53, 67 (1943). The congressional resolution in question provided that “all persons, not members of, nor owing allegiance to, any of the United States of America, . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court martial, or such other punishment as such court martial shall direct.” 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 693. As far as we have been able to determine, however, no one at the time suggested that Washington had acted in violation of the resolution. That might be because the resolution was understood to permit, rather than to prescribe, a court-martial, or perhaps because the Board’s proceedings were thought to be even more protective than a court-martial. (On the latter possibility, compare Barber, *supra*, at 68 (hypothesizing that Washington “sought to create an extraordinary court of great prestige” in order to forestall any criticism that André was being treated unfairly), with Glazier, *supra* note 81, at 22 (suggesting that Washington was seeking to avoid the formality of a regular trial).) Moreover, it is not clear that André even came within the terms of the resolution, because he was apprehended on a road outside Tarrytown, New York, see ROBERT MCCONNELL HATCH, MAJOR JOHN ANDRÉ: A GALLANT IN SPY’S CLOTHING 241–44 (1986), rather than “found lurking . . . in or about the fortifications or encampments of the armies of the United States.” Whatever the reason, there does not appear to have been any contemporaneous understanding that Washington had done anything to circumvent the Continental Congress’s will.

Over time, aspects of the relationship between the Continental Congress and General Washington did change as a practical, if not a legal, matter. The exigencies of war quickly revealed that detailed control of the Commander in Chief was not the most efficient way to prosecute a war. In response, the Congress increasingly delegated substantial discretion to Washington so as to relieve him of the constant need to seek out advance authorization. Indeed, the Congress foresaw the possible need for such executive flexibility just three days after Washington's initial commission, when its orders to Washington provided:

And whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection and (advising with your council of war) to order and dispose of the said Army under your command as may be most advantageous for the obtaining the end for which these forces have been raised, making it your special care in discharge of the great trust committed unto you, that the liberties of America receive no detriment.²⁸⁹

In December 1776, General Nathanael Greene wrote to the President of the Congress urging a broader delegation of authority to the Commander in Chief so that Washington could match the readiness of Britain's General Howe: "Time will not admit nor Circumstance allow of a Reference to Congress."²⁹⁰ Six days later, the Continental Congress passed a resolution granting Washington extraordinary discretionary powers. But it did so without disavowing the legal authority it had previously exercised, indicating instead that the delegation was the consequence of the Congress's "having perfect reliance on the wisdom, vigour, and uprightness of General Washington," in particular.²⁹¹ On January 1, 1777, Washington wrote to thank the Congress for having "done me the honor to intrust me with powers, in my Military Capacity, of the highest nature and almost unlimited in extent" — a delegation that Washington deemed a "mark of their Confidence."²⁹² And later that year, the Congress wrote to Washington to confirm that he was not in fact bound to comply with his Council of War's majority views: "[I]t never was the intention of Congress, that he should be

²⁸⁹ 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 101.

²⁹⁰ Letter from Nathanael Greene to John Hancock, President, Continental Congress (Dec. 21, 1776), in 1 THE PAPERS OF GENERAL NATHANAEL GREENE 370, 372–74 (Richard K. Showman ed., 1976).

²⁹¹ 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 1045.

²⁹² Letter from George Washington to Robert Morris et al. (Jan. 1, 1777), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 279, at 463, 464.

bound by the majority of voices in a council of war, contrary to his own judgment.”²⁹³

One could conclude that the Continental Congress’s gradual but substantial augmentation of General Washington’s commission shows that a minimalist understanding of the powers of the “Commander in Chief” had given way to a much broader one by the latter part of the War of Independence. On this view, by the time of the Constitutional Convention in 1787, the title “Commander in Chief” had become identified in the popular mind with the de facto authority possessed by the military hero of the Revolution at the tail end of the conflict. This view has some force if one adopts the common assumption that in drafting the Constitution the Framers were attempting to instantiate and guarantee the more efficient arrangements in place toward the end of the war, and were specifically aiming to prevent the sorts of inefficiencies that characterized the earlier regime, when the Continental Congress had micromanaged General Washington.²⁹⁴

But even if one were to accept the common notion that the Framers were partial to, and intent on preserving, the role of the Commander in Chief at the end of the Revolutionary War, it would not follow that they intended, by designating the President as Commander in Chief, to immunize the Executive from congressional regulation of military affairs. For one thing, one might well conclude from this same history that the Revolutionary War provided the Framers with strong evidence that delegations from an assembly of elected representatives would ordinarily accommodate the need for discretion on the part of the chief commander as events warranted — at least in cases where that commander was thought to have the “wisdom, vigour, and uprightness” of Washington, which was the predicate for the Continental Congress’s broad grant of discretion in late 1776.

Even more fundamentally, the history indicates that Washington’s effectiveness was hampered less by congressional decisions to countermand judgments made on his own initiative than by a structure of authority that precluded him from taking virtually any action — no

²⁹³ 7 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 196–97. We do not mean to suggest that Washington was afforded complete discretion by the end of 1777. It was not until the summer of 1780, for instance, that the Continental Congress rescinded earlier resolutions that had restricted the Commander in Chief’s operations to within the United States. *See* 17 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 267, at 687–88. We are indebted to Logan Beirne for drawing this resolution to our attention.

²⁹⁴ *See, e.g.*, Beirne, *supra* note 273 (manuscript at 111–13, 121–22); Emerson, *supra* note 29, at 205–06; John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT’L L. 38, 68 n.107 (1971) (suggesting that members of the Constitutional Convention “probably thought they could prevent” the recurrence of Washington’s early difficulties with the Continental Congress “by making the President Commander-in-Chief of the Army and Navy” (quoting 2 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES* 912 (1910)) (internal quotation mark omitted)).

matter how discrete or time-sensitive — without first obtaining permission from the authors of his commission. So although there may be some basis for concluding that a consensus had emerged by war's end favoring a recognition of robust but defeasible “inherent” war powers of the Commander in Chief — since such powers would have sufficed to address the inefficiencies that plagued the early stages of the war — there is nothing to suggest a similar convergence around the notion that the top military official in the new nation should be permitted to exercise substantive powers entirely free from legislative control. To the contrary, the early English and American experience with the office of the Commander in Chief showed that the person holding such an office could and would be subject to such control — including in the tactical direction of troops during wartime — by an assembly of elected representatives. And, indeed, Washington himself apparently accepted that understanding.²⁹⁵

In any event, if the Continental Congress's increasing delegation of discretion to Washington had reflected a general consensus that the chief military commander had to be guaranteed a degree of unreviewable decisional power, one would expect such a notion to be reflected in the Articles of Confederation, drafted just as the Continental Congress had begun to delegate significant discretion to Washington, and ratified in 1781, toward the end of the war. But the Articles reflected an understanding that the person named “Commander in Chief” would *not* be immune from control of a multimember body of elected representatives. They expressly afforded the new Congress most of the war authorities that would appear in Article I of the later Constitution, and specified that the Congress would have the “sole and exclusive right and power” to exercise such authorities.²⁹⁶ Furthermore, the Articles provided that the Congress would be responsible for appointing and commissioning all naval officers and most officers of the land forces, for making rules for the government and regulation of the said land and naval forces, and for “directing their operations.”²⁹⁷ In other words, the Congress of the Confederation would, to the extent it wished, retain control of the officer named as “Commander in Chief,” even with respect to the “direction of operations” of the armed forces.

2. *The Commander in Chief in Early State Constitutions.* — This understanding from the early federal practice is wholly consistent with the understanding of the office of “Commander in Chief” elsewhere in

²⁹⁵ See, e.g., Letter from George Washington to Joseph Reed (Mar. 3, 1776), in 4 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 279, at 365, 367 (“I am not fond of stretching my powers; and if the Congress will say, ‘Thus far and no farther you shall go,’ I will promise not to offend whilst I continue in their service.”).

²⁹⁶ ARTICLES OF CONFEDERATION art. IX, para. 1 (U.S. 1781).

²⁹⁷ *Id.* art. IX, para. 4.

the new Republic — in particular, in the states that ratified the Constitution. After the Declaration of Independence, the vast majority of the new nation's military force was found not in the federal troops subject to Washington's command, but instead in the state militia and other military forces, which were subject to the control of state authorities.²⁹⁸ Ten of the new state constitutions designated the state's highest executive officer — usually but not always denominated the "Governor" — as the "commander in chief" of the state militia, while two others placed the top state executive official in control of the military but did not affix that specific title.²⁹⁹ The consistent decision in each of these state constitutions to make the chief commander the highest-ranking civilian executive officer is itself powerful evidence of a popular commitment to civilian control over the military — which had by then become a fundamental postulate in the new nation. But these state constitutions are also instructive on the question of the scope of such a chief commander's preclusive substantive powers.

To be sure, there was no consensus as to what substantive authorities would inhere in the office of a "Commander in Chief." The only common notion, it appears, was that the title itself did not define the actual powers of the office. Some of these new constitutions, for example, made a point of elaborating that such an officer had few independent powers apart from what the legislature prescribed, whereas others expressly provided that the Commander in Chief was to have extensive affirmative powers.³⁰⁰ But more pertinent for present pur-

²⁹⁸ The inefficiencies of this decentralized system of national defense prompted the Framers to design a new system in 1787 that guaranteed the central government much greater control of foreign relations and military affairs — in particular, by giving Congress the power to call forth the state militia for federal service under the command of the President. See RICHARD H. KOHN, *EAGLE AND SWORD* 73–81 (1975); Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 61, 64 (Richard H. Kohn ed., 1991).

²⁹⁹ For constitutions designating the chief executive "commander in chief," see DEL. CONST. of 1776, art. IX; GA. CONST. of 1777, art. XXXIII; MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. VII; N.H. CONST. of 1784, pt. 2; N.J. CONST. of 1776, art. VIII; N.Y. CONST. of 1777, art. XVIII; N.C. CONST. of 1776 (Constitution, or Form of Government), art. XVIII; PA. CONST. of 1776, § 20; S.C. CONST. of 1776, art. III; VT. CONST. of 1777, ch. 2, § 18. The Maryland Constitution gave the top state executive official control of the military but did not use the phrase "commander in chief." See MD. CONST. of 1776 (Constitution, or Form of Government), art. XXXIII. The Virginia Constitution provided that "[t]he Governor may embody the militia, with the advice of the Privy Council; and when embodied, shall alone have the direction of the militia, under the laws of the country." VA. CONST. of 1776. Each of these documents is reprinted in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* (William S. Hein & Co. 2002) (Francis Newton Thorpe ed., 1909).

³⁰⁰ South Carolina's 1776 Constitution, for example, provided expressly "[t]hat the president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council." S.C. CONST. of 1776, art. XXVI; see also S.C. CONST. of 1778, art. XXXIII (similar); VA. CONST. of 1776 (providing that

poses, there was also no indication, let alone consensus, that the executive official named the “Commander in Chief” (or the one vested with ultimate control over the militia without such a title) could, by virtue of that office, act in derogation of statutory restrictions as to military matters. Indeed, not a single one of the new state constitutions expressly conferred such preclusive authority, nor did any of them suggest that the legislative branch would be prevented from interfering with the Commander in Chief’s conduct of military operations. Moreover, five of them — including the Massachusetts Constitution, which likely was the primary model for the federal Commander in Chief Clause in 1787 — stated expressly that the governor would have to exercise his military powers in conformity with state law.

For example, the Virginia Constitution of June 1776 (which did not specifically use the phrase “Commander in Chief”) gave the governor the power to “embody the militia, with the advice of the privy Council.” It further provided that once the militia were embodied, the governor “shall alone have the direction of the militia,” but added that he was to exercise that authority “under the laws of the country.”³⁰¹ It thus appears that, at least to the drafters of the Virginia Constitution, a statute regulating the governor’s use of the militia was not regarded as inconsistent with his constitutionally vested authority to “alone have the direction of the militia.”

In the same vein, but even more directly, Article IX of the Delaware Constitution of 1776 provided that “[t]he president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander in chief of them, and the other military forces of this state, under the laws of the same.” The Maryland Constitution of the same year was a bit more equivocal. Article XXXIII provided that the governor “alone shall have the direction” of the militia — with no reference to state law limits; whereas, by contrast, that same clause provided that he “shall have the direction . . . under the laws of this State” of the “regular land and sea forces.” This distinction might suggest statutory limits would be permissible as to the governor’s command of the “regular” forces but not as to the militia, although we are not aware of any support for such a reading. In any event, the wording of the clause, like that in the Virginia Constitution, indicates that there was no inherent inconsistency between a prescription that the governor shall “direct” armed forces and a provision that he be bound in such direction by state laws.

the Governor “shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England”). By contrast, the Massachusetts Constitution conveyed substantial powers to the Commander in Chief. *See infra* p. 783.

³⁰¹ *See also infra* note 313 (discussing the function of the phrase “laws of the land” in early state constitutions).

Most important were the constitutions of Massachusetts (1780) and New Hampshire (1784). These were the state constitutions ratified closest in time to the federal Constitution. As with our federal Constitution, a significant innovation of these state constitutions was to designate the popularly elected governor as the “commander in chief” (thus limiting the legislature’s control).³⁰² Both also expressly conveyed extensive substantive war authorities on those chief commanders, making them the most powerful and independent commanders in chief in the nation before 1787. Under Article VII of the Massachusetts Constitution, the commander in chief possessed

full power . . . to train, instruct, exercise and govern the militia and navy; and, for the special defence and safety of the Commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them, to encounter, repel, resist, expel and pursue, by force of Arms, as well by sea as by land, within or without the limits of this commonwealth, and also to kill, slay and destroy, if necessary, and conquer, by all fitting ways, enterprizes, and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this Commonwealth; and to use and exercise, over the army and navy, and over the militia in actual service, the law martial, in time of war or invasion, and also in time of rebellion, declared by the Legislature to exist, as occasion shall necessarily require; and to take and surprize by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition and other goods, as shall, in a hostile manner, invade, or attempt the invading, conquering, or annoying this Commonwealth; and that the Governor be intrusted with all these and other powers, incident to the offices of Captain-General and Commander in Chief and Admiral . . .³⁰³

After listing this broad set of substantive powers, however, the Massachusetts Constitution provided that each of the discrete powers listed, as well as any unenumerated ones the commander in chief might possess, would have “to be exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise.”³⁰⁴ The relevant provision of Part II of the later-enacted New Hampshire Constitution was virtually identical in this respect.³⁰⁵

This limitation on the executive’s war powers does not appear to have been controversial in Massachusetts, despite the fact that Massachusetts had opted for a popularly elected governor, and notwithstanding significant support for the idea of the governor having unprecedented military powers. An earlier 1778 draft of the state constitution,

³⁰² MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. III; N.H. CONST. of 1784, pt. 2.

³⁰³ MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. VII.

³⁰⁴ *Id.*

³⁰⁵ See N.H. CONST. of 1784, pt. 2 (omitting “and not otherwise,” but otherwise identical).

which contained a much less robust description of the powers of the commander in chief, had failed to win popular approval. That was in part because of what was perceived to be its inadequate grant of military authority to the governor. The most substantial critique along these lines was set forth in the *Essex Result*, a pamphlet written principally by Theophilus Parsons on behalf of the people of the town of Essex.³⁰⁶ The *Essex Result* is said to have had a substantial impact on the federal Framers' thinking about the separation of powers and individual rights. Its emphasis on the need for a commander in chief who can act with "vigour, secrecy, and dispatch,"³⁰⁷ has obvious echoes in Hamilton's similar arguments in *The Federalist*.³⁰⁸ Professor John Yoo relies heavily on the *Essex Result* in his defense of robust presidential war powers, including preclusive ones pertaining to the conduct of war.³⁰⁹

The *Essex Result* did argue for broader powers of executive initiative in relation to the deployment of troops and the use of military force. But it also consistently conceded — even highlighted — the legitimacy of legislative regulation of the executive's military judgments. In particular, the *Essex Result* urged that in the case of a threat from outside the state, the Governor should be empowered to

march the militia without the state . . . for ten days and no longer, unless the legislative body in the mean time prolong it. In these ten days he may convene the legislative body, and take their opinion. If his authority is not continued, *the legislative body may controul him, and order the militia back.*³¹⁰

The *Essex Result*, then, suggests that the concluding limitation on executive war powers set forth in Article VII of the later constitution ratified by the people of Massachusetts was not a throwaway line. Rather, it reflected a comfort with legislative control by even ardent advocates of broad executive war powers. Thus, even if we assume, as Professor Yoo has argued, that the Massachusetts Constitution is an important template for understanding the President's war powers under the federal Constitution,³¹¹ that text expressly confirmed that the strong executive's war powers were to be exercised in conformity with state law. That is, even where specific consent of the legislative body would not be required prior to a military initiative, "[s]till the Gover-

³⁰⁶ See *Essex Result* (1778), reprinted in THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS 359 (1859).

³⁰⁷ *Id.* at 380.

³⁰⁸ See *infra* p. 798.

³⁰⁹ Yoo, *supra* note 20, at 231–33.

³¹⁰ *Essex Result*, *supra* note 306, at 396 (emphasis added).

³¹¹ See YOO, *supra* note 177, at 68–71.

nor should be under a controul³¹² — namely, that conferred by “the rules and regulations of the constitution and the laws of the land.”³¹³

3. *Evidence from the Constitutional Convention.* — Suffice it to say, then, that as the constitutional convention commenced in the summer of 1787, there was no clear and common understanding of the title “Commander in Chief” that necessarily included a power to disre-

³¹² *Essex Result*, *supra* note 306, at 396. Professor Yoo asserts that “[e]ven if the legislature disapproved” of the Commander’s marching of the militia across state lines, “the governor could still press on if ‘the general good requires it, and then he will be applauded.’” YOO, *supra* note 177, at 70 (quoting *Essex Result*, *supra* note 306, at 396). But this interpretation misreads the *Essex Result*. The *Result* explains that under its preferred system, the legislative body may “controul” the Commander in Chief and “order the militia back” after the Governor has marched it outside the state. *Essex Result*, *supra* note 306, at 396. If his conduct “is disapproved” in this manner, the Commander’s “reputation . . . is ruined.” *Id.* The very next sentence, which Professor Yoo quotes in part, states that “[h]e will never venture on the measure, unless the general good requires it, and then he will be applauded.” *Id.* In other words, what the *Result* was explaining was *not* that the Commander in Chief could ignore the legislature’s order, but instead that the possibility of legislative repudiation would act as a deterrent at the outset, discouraging the Commander in Chief from “venturing” on such a bold unilateral course unless he were certain that the general good required it, in which case he would be met with legislative “applau[se]” rather than rebuke and overruling.

³¹³ MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. VII. The phrase “laws of the land” also appears in the Bill of Rights of several state constitutions, in which context it plainly was derived from Chapter 39 of the Magna Carta. *See, e.g., id.* pt. 1, art. XII (“[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”). It is a famously contested question whether that phrase was designed, in some or all of those state constitutions, to impose substantive limitations on the legislature itself, akin to the substantive protections the Due Process Clause of the federal Constitution is now understood to provide. But whatever the proper answer to that question might be, Founding-era sources repeatedly and consistently used the phrase “law of the land” to include those valid legislative enactments that do not transgress any such substantive, liberty-protective limitations. This is reflected in Article VI of the federal Constitution itself, which provides that laws and treaties of the United States are to be the “supreme Law of the Land.” U.S. CONST. art. VI. And this conclusion should be especially sound where, as in Article VII of the Massachusetts Constitution and Part II of the New Hampshire Constitution, the phrase is expressly designed as a limit on the Governor, acting as Commander in Chief, and is phrased as a plural (“laws of the land”). *See, e.g.,* A Letter from the Governor of the Commonwealth of Massachusetts, to the Justices of the Supreme Judicial Court, with the Answer of the Justices, 8 Mass. (7 Tyng) 548, 548–49 (1812) (“By the constitution of this state, the authority of commanding the militia of the commonwealth is vested exclusively in the governor, who has all the powers incident to the office of commander in chief, and is to exercise them . . . agreeably to the rules and regulations of the constitution and the laws of the land. . . . It is the duty of [the commanders in chief of the militia of the several states] to execute this important trust agreeably to the laws of their several states respectively, without reference to the laws or officers of the *United States*, in all cases, except those specially provided for in the federal constitution.”); *cf.* *Mayo v. Wilson*, 1 N.H. 53, 58–59 (1817) (construing “law of the land” provision in the New Hampshire Bill of Rights to refer, inter alia, to “statutes made in pursuance of the constitution”); 1 WILLIAM BLACKSTONE, COMMENTARIES *141 (“It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament.”).

gard validly enacted laws regulating the conduct of war. Indeed, the evidence indicates a relatively well-developed understanding that a “Commander in Chief” could be subject to legislative control even as to tactical matters of war, and we are not aware of any evidence of a contrary view having taken hold. Against this backdrop, the fact that the Commander in Chief Clause — and the distribution of war powers between the Executive and legislature more generally — received almost no attention in the debates at the Convention is itself at least somewhat instructive: there was no recorded discussion urging or suggesting any significant change from the past practice. It is also notable that Hamilton felt comfortable assuring those who were considering the Constitution for ratification that “little need be said to explain or enforce” the Commander in Chief Clause³¹⁴ — strongly implying that there was no intended departure from the common understanding at the time of what such a designation entailed.

Although the available notes of the Philadelphia Convention are famously incomplete and do not purport to represent anything close to a verbatim transcript, the evidence that does survive suggests that the question of the Commander in Chief’s powers, and the relationship of presidential and congressional war powers more broadly, consumed but a tiny fraction of the delegates’ attention. As the later *Federalist* essays would demonstrate, when it came to questions of the military and foreign relations, the delegates were far more consumed by discussions of the relative powers of the federal and state governments than by the allocation of such powers within the federal system.

That said, the Constitution did introduce the separation of powers into the national government in a way the Articles of Confederation had not. Clearly, then, an object of the proceedings was to enhance the powers of the President generally. Thus, while the Convention did not spend much time discussing the office of the Commander in Chief in particular, neither did it shy away from making changes designed to create a more robust Chief Executive than had formerly been established, including changes that diminished the legislature’s power over the Commander in Chief. Rather than indicating that the Convention must have intended to vest preclusive tactical powers in the Commander in Chief, however, the widely shared goal of enhancing executive power actually led to drafting decisions that point in the opposite direction.

(a) *Debates and Actions Pertaining Directly to the Commander in Chief Clause and the Direction of the Conduct of War.* — The term “Commander in Chief” first appeared at the Convention in the plan

³¹⁴ THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 93, at 447.

proposed by Charles Pinckney of South Carolina on May 29, 1787.³¹⁵ It did not appear in the other three early proposed models — the Virginia and New Jersey plans, and Hamilton’s proposal.³¹⁶ On July 26, the Convention delegated the drafting of the Constitution to the Committee on Detail. With respect to the contemplated new Executive, the Convention adopted a resolution for the Committee instructing merely that the office “be instituted to consist of a Single Person to be chosen by the national Legislature . . . with power to carry into execution the national Laws [and] to appoint to Offices in cases not otherwise provided for.”³¹⁷ The Committee returned on August 6 with a proposal that included a designation of the lone Executive as “commander in chief of the Army and Navy of the United States, and of the Militia of the Several States.”³¹⁸ And, with the addition of one minor alteration — namely, that the President would be Commander in Chief of the militia not at all times but only when they were “called into the actual service of the United States”³¹⁹ — the Committee’s formulation became the clause that appeared in the Constitution itself.

From the sparse notes available, it appears there were only a couple of brief debates or votes concerning the clause, neither of which bears directly on the question here. First, on August 27, Roger Sherman moved to add the phrase “when called into the actual service of the [United States],” in reference to the President’s command of the militia. That motion passed six to two.³²⁰ Also, as Luther Martin later explained to the Maryland legislature, there were some delegates who wished to restrict the President from commanding the army and navy in person, as the New Jersey Plan had prescribed, but that proposal failed.³²¹

Some commentators have discerned an indefeasible presidential authority to conduct military operations not from an affirmative statement to that effect but from an *omission* in the final draft of the Con-

³¹⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 23 (Max Farrand ed., 1911); *id.* at 599.

³¹⁶ The Virginia Plan did not expressly discuss the military or war powers at all, although the delegates mentioned such matters in their early June debates about what was implicit in the broad generalities of the Virginia Plan and whether the executive power should be wielded by one person or by a group of three. *See, e.g., id.* at 64–66, 70, 88–89, 97. The New Jersey Plan offered on June 15 provided not only that its plural executive would “direct all military operations,” but also that the persons comprising the Executive could not “take command of any troops, so as to personally conduct any enterprise as General, or in other capacity.” *Id.* at 244. Hamilton’s plan, offered three days later, provided that the “supreme Executive authority” would have “the direction of war when authorized or begun.” *Id.* at 292.

³¹⁷ *Id.* at 116.

³¹⁸ *Id.* at 185.

³¹⁹ U.S. CONST. art. II, § 2, cl. 1.

³²⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 426–27.

³²¹ *See id.* at 172, 217–18.

stitution. As noted above, Article IX of the Articles of Confederation contained a clause that was the progenitor of the Constitution's Rules for Government and Regulation Clause. Article IX provided that the Congress would have the power of "making rules for the government and regulation of the . . . land and naval forces, *and directing their operations*."³²² This clause was adopted virtually verbatim in Article I, section 8 of the Constitution, except that the Framers omitted the final phrase — "and directing their operations." It has been suggested — most prominently by the Office of Legal Counsel in the Reagan Administration — that this elision indicates that the "direction" of the armed forces was to be left to the discretion of the Commander in Chief, and cannot be limited by statute.³²³

This conclusion, however, comes much too fast. The most that can be said about which branch ultimately should be in control of the "direction" of the armed forces, in light of the available evidence, is that the Framers did not assign that function at all in the text of the Constitution. During the Philadelphia Convention, at least two of the proposed plans for the Constitution specified that the Executive would "direct" military operations. William Paterson's proposed New Jersey Plan, presented on June 15, 1787, would have given its multiple-member Executive the authority to "direct all military operations."³²⁴ Three days later, Alexander Hamilton proffered an informal proposal that would have included a "supreme Executive authority" that would "have the direction of war when authorized or begun."³²⁵ But neither of these proposals emerged from the Committee on Detail, which instead opted simply to specify that the President would be Commander in Chief, without mentioning any powers of direction. Thus, the Framers were familiar with models that expressly assigned the power of direction to either the Congress (the Articles of Confederation) or the Executive (the New Jersey and Hamilton plans) — and they opted for neither choice. Therefore, we cannot be certain whether there was any consensus about which branch would "direct" the military, or military operations,³²⁶ although we can be sure that the war powers that

³²² ARTICLES OF CONFEDERATION art. IX, para. 4 (U.S. 1781).

³²³ See *Oversight Legislation: Hearings Before the Select Comm. on Intelligence*, 100th Cong. 179–81 (1987) (written response of Charles Cooper, Assistant Att'y Gen., Office of Legal Counsel); see also 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, 72–76 (1999).

³²⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 242, 244.

³²⁵ *Id.* at 292.

³²⁶ It is noteworthy that James Madison himself assured those in the Virginia ratifying convention that the *Congress* retained "the direction and regulation of land and naval forces." 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DOCUMENTARY HISTORY].

Article I assigns to Congress are written in ways that, by their terms, seem to include within them substantive authorities that could easily be understood to result in statutory “direction” of military operations.

More fundamentally, there is good reason to think that “direction” at the time of the Convention had a more technical reading than modern defenders of preclusive executive powers over the conduct of war now ascribe to it. Whereas the Congress’s “direction” of the military under the Articles of Confederation consisted of direct orders from the legislature and its agents to the military command, the Constitution’s establishment of a distinct executive branch, and the requirements of bicameralism and presentment necessary for legislative enactments to take effect, makes it difficult to conclude that the omission of the congressional power to “direct” would have been understood (or intended) to strip Congress of the power to act in a similarly substantive manner *by statute*. Hamilton’s (unadopted) proposal to give the “direction of war” to the Executive might have meant nothing more than that the President would command, and superintend, the war effort. It did not necessarily suggest that statutes prescribing or proscribing particular conduct in war would be invalid.

In fact, as we have seen, the Virginia Constitution was written as if there were no conflict between giving the Chief Executive the power of direction over the militia and subjecting his exercise of that directory authority to regulation by statute.³²⁷ And although Hamilton himself, in *The Federalist No. 69*, understood that the federal Constitution would vest the President with “nothing more than the supreme command and direction of the military and naval forces,” he expressly indicated that such a power was to be no greater than that under the Massachusetts Constitution, which, as we have seen, prescribed that such control be exercised in accord with “the laws of the land.”³²⁸ Accordingly, the absence of the verb “direct” in the Constitution is not in and of itself a very helpful clue to resolving the question at hand.³²⁹

³²⁷ See *supra* p. 782.

³²⁸ See *supra* p. 783 (discussing the Massachusetts Constitution); *infra* pp. 796–97 (discussing *The Federalist No. 69*).

³²⁹ In the first post-ratification Congress, Representative Thomas Tucker of South Carolina proposed a long slate of constitutional amendments, one of which would have struck the words “be commander in chief” from Article II and replaced them with the phrase “have power to direct (agreeable to law) the operations.” 1 ANNALS OF CONG. 790–92 (1789) (Joseph Gales ed., 1834). The House immediately rejected Tucker’s motion to refer his amendments to a committee of the whole. *Id.* at 792. One historian has assumed that Tucker’s proposed Commander in Chief Clause amendment “would have immeasurably weakened the position of the Commander in Chief by expressly making his direction of military operations subordinate to the legislative dictates of Congress.” JAMES HART, *THE AMERICAN PRESIDENCY IN ACTION 1789*, at 149 (1948). But that assumption simply begs the question whether such direction was already subordinate to *statutory* dictates. We have found no explanation for Tucker’s proposal, nor any indication that other members of Congress thought it uncertain whether the President’s direction of the opera-

One other well-known Convention exchange, concerning an arguably related issue, bears brief mention, although it involved a clause in Article I rather than the Commander in Chief Clause. The Committee of Detail's draft would have assigned Congress the power to "make" war. On August 17, Madison moved to replace the verb "make" with "declare," and the motion carried seven votes to two, apparently after having first been defeated five to four.³³⁰ This cryptic episode has occasioned frequent and bitter debates concerning the meaning and significance of the verb-switching vote and whether it has any bearing on the classic question of the President's authority to initiate hostilities without congressional authorization.³³¹

A footnote in Madison's notes indicates that at some point in the debate, Oliver Ellsworth of Connecticut changed his vote from "no" to "yes," prompted by a remark by Rufus King to the effect that "'make' war might be understood to 'conduct' it which was an Executive function."³³² It is not clear how King's and Ellsworth's understanding of the operations of war would have been different if Congress had been given the power to "make" or "conduct" it. Even less clear is what the understanding of the other delegates might have been on the question. Certainly, there is no direct indication that King or Ellsworth wished to disable Congress from enacting legislation that might regulate the conduct of war. There is no evidence, for example, that either delegate raised concerns about other provisions of the Constitution that gave Congress powers fairly understood to encompass the authority to enact such limits, including the power to enact rules and regulations for the army, navy, and militia.³³³ In any event, the exchange between King and Ellsworth probably has even less historical importance than the August 17 debate as a whole. As Professor Bobbitt notes, even if one or more delegates favored the change from "make" to "declare" so as to keep Congress from being entangled in tactical war decisions, that un-

tions of the armed forces had to be "agreeable to law." Indeed, there is no evidence that any other member of the House even considered this particular Tucker proposal, which was conjoined with many others that were collectively and summarily rejected without debate.

³³⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 313, 318-19.

³³¹ The better, more careful treatments of what Professor Philip Bobbitt called "the fragmentary stage directions we have of th[is] debate at the Convention," Bobbitt, *supra* note 20, at 1375, include Bobbitt himself, *id.* at 1372-78; REVELEY, *supra* note 20, at 81-85; and Lofgren, *supra* note 20, at 675-77.

³³² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 319 n.*. See also JACK N. RAKOVE, ORIGINAL MEANINGS 263 (1996) (suggesting that this exchange demonstrates that Congress cannot "direct[] operations" of war).

³³³ Perhaps they were thinking of Congress and its agents directly overseeing war outside the lawmaking process, which was the system they had known.

derstanding “was not conveyed to the ratifiers who had only the text and the Federalist gloss to go on.”³³⁴

(b) *The Implications of Broader Structural Debates Concerning Executive Powers.* — As our discussion of the uncertain meaning of the concept of legislative “direction” indicates, the Convention debates over the contemplated role for the legislature in defining the scope and conduct of war cannot be fully examined without widening the lens to examine how the Framers, as a general matter, reconfigured the role of the Congress and the President in much more fundamental ways.

First, as we have already mentioned, the delegates very late in the Convention followed the lead of the Massachusetts Constitution in providing that the Commander in Chief shall be someone chosen by state Electors — not a designee of the legislature — and someone whose salary is not dependent on the legislature³³⁵ and who thus is not constantly fearful of unbridled congressional removal.³³⁶ This provision in and of itself profoundly altered the degree to which the legislature could control the Commander in Chief.³³⁷

Second, and potentially even more importantly, the requirement of presentment ensured that legislative regulation could be imposed only with the President’s consent or, in very rare cases, by overwhelming majorities of both chambers. As Hamilton explained, the veto serves as “a shield to the executive,” because without it, he “would be absolutely unable to defend himself against the depredations of [Congress]. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote.”³³⁸ This fact and related structural changes produced another dramatic shift in relative power between the departments. If an Executive perceived that a bill seriously implicated his constitutional prerogatives, he would now have the power of the veto to prevent the unwarranted intrusion. Moreover,

³³⁴ Bobbitt, *supra* note 20, at 1375.

³³⁵ See THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 93, at 441 (“The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.”).

³³⁶ The Virginia and New Jersey Plans, proffered early in the Convention, each would have had the executive chosen by the legislature. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 21, 244. The New Jersey plan also would have permitted the Congress to remove its plural executive. *Id.* at 244.

³³⁷ Cf. *Edmond v. United States*, 520 U.S. 651, 664 (1997) (“The power to remove officers . . . is a powerful tool for control.”); *Bowsher v. Synar*, 478 U.S. 714, 727–29 (1986) (discussing how legislative removal power gives Congress effective control over the officer).

³³⁸ THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 93, at 442–43; see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 587 (recording James Madison’s statement that the object of the “revisionary power” was, inter alia, “to defend the Executive Rights”).

Congress could override such a veto only in the extremely rare case that a supermajority of both Houses rejected the President's judgment.³³⁹ As Charles Black has explained, the "substantive law" of presidential war powers might in this sense be thought to have been "secreted in the interstices of [a] procedure" that dramatically alters the relative powers of the political departments.³⁴⁰

These two innovations substantially changed the relationship of the Commander in Chief to the Congress. Legislative "micromanagement" necessarily became much harder to effect than it had been under the preconstitutional order.³⁴¹ And given this procedural and structural change, debates over Congress's power to "direct" or "make" war might easily be understood as proceeding wholly independent of issues relating to Congress's power to exercise control through the newly reticulated scheme of bicameralism and presentment that governed the enactment of actual statutes. Thus, even if avoiding the inefficiencies of the earlier system had been one of the Framers' objectives (a proposition for which there is actually little direct evidence³⁴²), it is not at all clear that their cure for the problem included an immunization of the President from statutory regulation.

4. *Evidence from the States' Ratification Process.* — The limited discussion of the Commander in Chief Clause in the Convention proceedings makes all the more relevant James Madison's general interpretive instruction that, other than the text, the most significant guide to the Constitution's meaning is to be found "not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution."³⁴³ Here too, in the ratification conventions and other public debates, one finds evidence of a deep Founding-generation commitment to civilian control of the military through the

³³⁹ See Barron & Lederman, *supra* note 15, section V.B.3. See generally KEVIN R. KOSAR, CONG. RESEARCH SERV., REGULAR VETOES AND POCKET VETOES: AN OVERVIEW 3 tbl.1 (2007), available at <http://www.senate.gov/reference/resources/pdf/RS22188.pdf> (showing that Congress has enacted laws over presidential vetoes only 106 times in history).

³⁴⁰ Charles L. Black, Jr., *Reflections on Teaching and Working in Constitutional Law*, 66 OR. L. REV. 1, 12 (1987) (internal quotation marks omitted).

³⁴¹ For example, at the very end of his second term, President Washington vetoed a military establishment bill because one provision in it would have dismissed a company of light cavalry serving on the western front that in Washington's view was "destined to a necessary and important service." George Washington, Veto Message (Feb. 28, 1797), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908, at 211, 212 (James D. Richardson ed., 1908).

³⁴² *But cf.* Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 THE PAPERS OF ALEXANDER HAMILTON 400, 404 (Harold C. Syrett ed., 1961) ("Congress have kept the power too much into their own hands and have meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision, or with system.")

³⁴³ 5 ANNALS OF CONG. 776 (1796).

mechanism of establishing the President as the chief military officer;³⁴⁴ a much less clear record when it comes to the scope of the substantive war powers that he was understood to possess;³⁴⁵ and no significant indication of a sudden consensus that the President should be beyond the control of the legislature, at least when that branch comported with the requirement of presentment.³⁴⁶ In fact, one even finds support for the opposite assumption having prevailed.

³⁴⁴ See, e.g., John DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, AM. HERALD (Boston), Dec. 3, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 326, at 351, 357 (“[Armies] never ought to exist at all, but in subordination to civil authority.”).

³⁴⁵ See, e.g., REVELEY, *supra* note 20, at 101–06; SOFAER, *supra* note 20, at 51–52, 56–59; Lofgren, *supra* note 20, at 683–88.

³⁴⁶ Most of the ratification proposals for amendment to the Constitution on the subject of war powers involved two other issues. The first concerned the creation of a standing army and the shift of some control of the militia (which was contemplated as the principal fighting force in the absence of a standing army) from the states to the national government. See, e.g., New Hampshire Constitutional Convention, Ratification Message (June 21, 1788), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 325, 326 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (Proposal X); Rhode Island Constitutional Convention, Ratification Message (June 16, 1790), in 1 ELLIOT’S DEBATES, *supra*, at 334, 336 (Proposal XVII); New York Constitutional Convention, *The Recommendatory Amendments of the Convention of This State to the New Constitution*, POUGHKEEPSIE COUNTRY J., Aug. 12, 1788, reprinted in 18 DOCUMENTARY HISTORY, *supra* note 326, at 301, 302; *Address of the Minority of the Maryland Convention*, ANNAPOLIS MD. GAZETTE, May 1, 1788, reprinted in 17 DOCUMENTARY HISTORY, *supra* note 326, at 242, 244 (Proposal 13); 10 DOCUMENTARY HISTORY, *supra* note 326, at 1550, 1554 (Virginia Proposals 9 and 11). See generally David Luban, *On the Commander-in-Chief Power*, 81 S. CAL. L. REV. (forthcoming Mar. 2008) (manuscript at 38–44), available at <http://www.law.georgetown.edu/faculty/documents/LubanCommanderinChief.doc> (discussing contemporary British and American concerns about standing armies).

The second question was whether the Constitution should prohibit the President from taking *personal* command of the armed forces, such as by leading them on horseback. Luther Martin raised the concern in Maryland, see Luther Martin, *Genuine Information IX*, BALTIMORE MD. GAZETTE, Jan. 29, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 326, at 494, 495, but the Maryland Convention rejected a motion to propose an amendment to prohibit personal command without prior congressional authorization, see *Address of the Minority of the Maryland Convention*, *supra*, at 245 (rejected proposal 5). Similar initiatives were made in New York. See New York Constitutional Convention, *supra*, at 304. Similarly, in the Virginia ratifying convention on June 18, 1788, George Mason was “animadverting on the magnitude of the powers of the President.” 10 DOCUMENTARY HISTORY, *supra* note 326, at 1378. Having conceded the “propriety” of placing the President at the top of the military chain of command, “he thought it would be dangerous to let him command *in person*, without any restraint, as he might make a bad use of it.” *Id.* (emphasis added). Mason reasoned that an able and magnetic (“amiable”) commander who was ambitious — not “disinterested” as Washington had been — could gain autocratic power if he led the command personally, because of “the strong attachment of both officers and soldiers towards him.” *Id.* George Nicholas tried to allay Mason’s fears by emphasizing that the Commander in Chief would be analogous to the Virginia governor, and that Congress would have the power to raise the army and navy. *Id.* at 1379. Besides which, Nicholas noted, the President would only serve four years before being subject to an electoral check. *Id.* Mason, trying to paint the Constitution in an unfavorable light, was not deterred. He responded that “no security arises” from Congress’s discretion whether to raise armies, because it was inevitable the legislature would do so, “and then the President is to command *without any controul*.” *Id.* (emphasis added). (The

With respect to substantive warmaking, rather than mere superintendence, Judge Sofaer has summarized his comprehensive examination of the ratification debates over war powers as confirming “that Congress was to have the final say in foreign and military affairs.”³⁴⁷ But Judge Sofaer drew this conclusion by focusing primarily on the relative authority of the President and the Congress to initiate hostilities, rather than on their comparative powers to determine how an authorized military campaign should be conducted once initiated.³⁴⁸ For that reason, Judge Sofaer devoted relatively less attention to the evidence from the ratification process that bears directly on the President’s power to conduct military operations — once begun — in contravention of statutory limitations.³⁴⁹ Judge Sofaer asserted that Founding-era commentators saw Congress as having “exclusive control of the means of war.”³⁵⁰ But while that statement is largely accurate, it is not quite right: there was some relatively modest debate on the question, and that debate tends to confirm what seems to have been the dominant view going into the Convention — namely, that a “Commander in Chief’s” powers were subject to the control of the laws enacted by the legislature.

(a) *State Ratifying Conventions.* — As with the evidence from the Convention itself, questions of the substantive powers of the Commander in Chief were hardly the focus of debate in the state conventions. There were occasional statements addressing the issue, including some that reflected a concern about the President having an uncontrollable command power. But such statements were not left unchallenged by those who defended the document.

One exchange in the state conventions — between Roger Miller and Richard Spaight in North Carolina on July 28, 1788 — is of particular note. Miller was fearful that the President’s “influence would be too great in the country, and particularly over the military, by being

quotations here are those of the reporter to the convention, presumably summarizing Mason’s remarks — there is no existing record of what, exactly, Mason said.) We do not think it is fair to understand Mason as intending here to say anything about Congress’s general power to control the Commander in Chief by statute. The question for discussion was simply whether, as Mason suggested, the Constitution should require congressional *assent* before the President could take personal command — otherwise, there would be no “control” prescribed by the Constitution itself with respect to that particular problem. For what it is worth, earlier in the Virginia Convention Wilson Nicholas stated that “[t]he President is to command. But the regulation of the army and navy is given to Congress. Our Representatives will be a powerful check here.” 10 DOCUMENTARY HISTORY, *supra* note 326, at 1281.

³⁴⁷ SOFAER, *supra* note 20, at 56.

³⁴⁸ *See id.* at 56–59.

³⁴⁹ *But see id.* at 58 (contrasting evidence of intent to allow independent executive action with Congress’s power of the purse and ability to “at least pronounce its own view . . . of any other potentially explosive issue”).

³⁵⁰ *Id.* at 56.

the commander-in-chief," and that the President "could too easily abuse such extensive powers."³⁵¹ Thus, he "considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army."³⁵² But Spaight, who had been a delegate to the Constitutional Convention, answered Miller that Congress "could certainly prevent any abuse of that authority in the President" because Congress would have the power of raising and supporting armies.³⁵³

It is not surprising that Congress's power of the purse was the basis for Spaight's response.³⁵⁴ The expectation was that there would be no standing army, and thus every two years, at a minimum, Congress would have to specifically approve new appropriations, merely in order to give the President an army to command. Accordingly, a bare majority of a single House could put a stop to a disfavored military endeavor, a point these defenders of the proposed Constitution naturally emphasized — whereas the prospect of statutory limits might have hardly comforted those such as Miller, because such enactments would be much harder to come by, requiring either presidential assent or supermajorities of both Houses.³⁵⁵

³⁵¹ 4 ELLIOT'S DEBATES, *supra* note 346, at 114.

³⁵² *Id.*

³⁵³ *Id.* James Iredell argued that the Commander in Chief's powers would be similar to those of the governors of the different states and that although his command of the military forces was going to be singular, not shared, "at the same time it will be found to be sufficiently guarded." *Id.* at 107. We are not aware of any other record of this aspect of the debate, assuming it proceeded any further.

³⁵⁴ See also *supra* note 346 (discussing Nicholas's response to Mason).

³⁵⁵ In the Virginia Convention debates, Patrick Henry, an opponent of the Constitution, raised several concerns about a lack of checks, including that:

If your American chief, be a man of ambition, and abilities, how easy is it for him to render himself absolute! The army is in his hands, and, if he be a man of address, it will be attached to him; and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design I would rather . . . have a King, Lords, and Commons, than a Government so replete with such insupportable evils. If we make a King, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them: But the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke. I cannot with patience, think of this idea. If ever he violates the laws, one of two things will happen: He shall come at the head of his army to carry every thing before him; or, he will give bail, or do what Mr. Chief Justice will order him. If he be guilty, will not the recollection of his crimes teach him to make one bold push for the American throne? Will not the immense difference between being master of every thing, and being ignominiously tried and punished, powerfully excite him to make this bold push? But, Sir, where is the existing force to punish him? Can he not at the head of his army beat down every opposition? Away with your President, we shall have a King: The army will salute him Monarch; your militia will leave you and assist in making him King, and fight against you: And what have you to oppose this force? What will then become of you and your rights? Will not absolute despotism ensue?

9 DOCUMENTARY HISTORY, *supra* note 326, at 964.

The concerns Miller expressed were arguably mirrored by the pseudonymous “Tamony,” an ardent Antifederalist and the sole person on whom Professor Yoo relies for his contention that some Antifederalists during ratification debates “believed that the Constitution gave the president even more freedom from legislative control than that enjoyed by the Crown.”³⁵⁶ In an editorial published in early 1788 in an effort to defeat ratification, Tamony argued that the President would “possess more supreme power . . . than Great Britain allows her hereditary monarchs,” and that, in particular, “his command of a standing army [would be] unrestrained by law or limitation.”³⁵⁷

But the concerns Tamony and Miller raised about unreviewable authority hardly offer a definitive view of the contemporaneous understanding of the Commander in Chief Clause’s meaning. Indeed, those concerns were firmly rejected by the noted champion of executive authority, Alexander Hamilton, and for reasons that also seem to suggest such fears were exaggerated (and not only because of Congress’s power to refuse to raise and support the armies).

(b) *Hamilton and The Federalist*. — Writing as “Publius” in *The Federalist No. 69*, Hamilton specifically singled out Tamony for criticism when he explained that the Commander in Chief would have far less unchecked power than the British monarch.³⁵⁸ Hamilton conceded that the Commander in Chief’s authority “would be nominally the same with that of the king of Great Britain” — but, Hamilton immediately clarified, such authority would be

in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies — all which, by the Constitution under consideration, would appertain to the legislature.³⁵⁹

Although this warning might be read to suggest a belief that Congress could not prescribe any “terms” to govern the President “in the field,” we think the more natural reading is that Henry was warning that *as a practical matter* the President might easily become despotic with the army in his hands — that he might well “violate[] the laws,” knowing that with the army at his command, he might get away with it. Indeed, a few days later, Henry remarked about the proposed Constitution: “The Congress can both declare war, *and carry it on*; and levy your money, as long as you have a shilling to pay.” 9 DOCUMENTARY HISTORY, *supra* note 326, at 1069 (emphasis added).

³⁵⁶ YOO, *supra* note 177, at 113.

³⁵⁷ Tamony, *To the Freeholders of America*, VA. INDEP. CHRON., Jan. 9, 1788, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 326, at 287.

³⁵⁸ See THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 93, at 418.

³⁵⁹ *Id.* at 417–18. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 568–69 (2004) (Scalia, J., dissenting). Professor Corwin reads *The Federalist No. 69* to recognize what we have called the “superintendence” prerogative, but not a substantive prerogative:

Rendered freely, this appears to mean that in any war . . . the President will be top general and top admiral of the forces provided by Congress, so that no one can be put over

Hamilton went on to explain that, at most, the Commander in Chief would have those powers enjoyed by the governors of Massachusetts and New Hampshire (although even there, Hamilton thought, “it may well be a question” whether the constitutions of those states “confer[red] larger powers”).³⁶⁰ And, as we have seen, although the substantive powers of the Massachusetts and New Hampshire commanders in chief were very broad, the constitutions of those states contemplated legislative control. They expressly stated that the commander in chief’s powers were “to be exercised agreeably to the rules and regulations of the Constitution, and the laws of the land”³⁶¹ Thus, Hamilton appeared to be reassuring his audience that although the powers of the Commander in Chief might be broad, they were not unchecked: “The propriety of this provision is so evident in itself and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it.”³⁶²

Defenders of a preclusive executive prerogative over the conduct of military operations often augment their claims with passages from Hamilton’s *Federalist* essays in which he discusses the need for energy in the Executive, including one (No. 74) that does so with specific reference to the prosecution of war: “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”³⁶³ Without specifically referring to war, Hamilton explained in *The Federalist No. 71* that one of the necessary components for such executive energy is a degree of independence from the legislature, and a type of independence that prevents all power from uniting in the latter’s hands. If the Executive were, in Hamilton’s words, “constituted as to be at the absolute devotion of the legislative,” the separation would be “merely nominal, and incapable of producing the ends for which it was established.”³⁶⁴

But it is wrong to assume that Hamilton here was warning against statutory restrictions on the President. Hamilton himself indicated in *The Federalist No. 71* that his reference to the harm in placing the Ex-

him or be authorized to give him orders in the direction of the said forces; but otherwise he will have no powers that any high military or naval commander not also President might not have.

CORWIN, *supra* note 20, at 263.

³⁶⁰ THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 93, at 418.

³⁶¹ MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. VII (adding “or not otherwise”); N.H. CONST. of 1784, pt. 2.

³⁶² THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 93, at 447.

³⁶³ *Id.* at 446, *quoted in* YOO, *supra* note 14, at 120 (citing this passage from Hamilton as support for President Bush’s disregard of FISA).

³⁶⁴ THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 93, at 433. *See also* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 93, at 423 (“Energy in the Executive is a leading character in the definition of good government.”).

ecutive at “the absolute devotion of the legislative branch” was not a reference to the Executive being bound by the statutes that such a legislature enacts: “It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government”³⁶⁵ This passage sheds light on Hamilton’s surrounding ruminations about the need for the exercise of power by a “single hand,” particularly on matters related to war. Hamilton was inveighing against the notion of a multiple executive; he was not in any way suggesting that the Executive with “energy” would not or should not be bound by statutes, even if such laws happened to have been enacted (in large part) by a deliberative, multimember legislature. Most of the relevant discussion is in *The Federalist No. 70*, in which Hamilton wrote of the Executive’s energy in order to respond to those who were arguing for “plurality in the Executive” — a plural presidency, or a presidency subject to an advisory council. In the context of that debate (which had been the primary debate about the chief military leader at the Philadelphia Convention), Hamilton explained:

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and co-operation of others, in the capacity of counselors to him . . . [such as] the votaries of an executive council³⁶⁶

The reasons for the lack of energy in a multi-headed Executive were obvious: ego, ambition, and difference of opinion make consensus and decision more difficult to achieve.³⁶⁷ By contrast, Hamilton explained, a multimember body, such as the legislature, is “best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.”³⁶⁸ Although Hamilton explained that the natural internal dissent within a legislature only creates disadvantages if transferred to the executive department, he nowhere suggested that the Executive should not be

³⁶⁵ THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 93, at 433.

³⁶⁶ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 93, at 424–25.

³⁶⁷ Here, Hamilton was expressing the views that had led the Convention delegates to reject a three-member executive. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 315, at 97 (paraphrasing Elbridge Gerry as stating that such an executive would “be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads”).

³⁶⁸ THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 93, at 424.

subject to the laws that do emerge from the sometimes slow and deliberate process of legislation. To the contrary:

In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable.³⁶⁹

In other words, because of the dissensus and relative sloth of the legislature, it is highly unlikely that such a body could, as a practical matter, and working through legislation, establish day-to-day supervision of the Executive in wartime. Moreover, certainly *The Federalist No. 70* would condemn a system, such as that of the Confederation period, in which the Congress acted as a singular supervisory body directing and overseeing an Executive without a veto power — a type of “executive council” in fact, if not in name. But Hamilton suggested that when the deliberative body enacts a law — which under our system of presentment almost always requires executive acquiescence — the Commander in Chief would be bound to implement it. Of course, to the extent such a law affords the Executive discretion — and in matters of war, that is certainly the overwhelming norm — the “energy” of the single President was seen as a distinct virtue for purposes of decisionmaking and implementation.³⁷⁰ Hamilton’s “energy” and “single hand” argument, however, provides a weak basis, considered in its proper context, for any substantive Commander in Chief prerogative to disregard statutory directives.³⁷¹

³⁶⁹ *Id.* at 426–27.

³⁷⁰ Indeed, Hamilton saw such energy as essential not only to the protection of the community against foreign attacks, but also “to the steady administration of the laws,” *id.* at 423, a context in which violation of the laws cannot, of course, be constitutionally indicated.

³⁷¹ Professor Jefferson Powell has argued that *The Federalist* expressed “a certain skepticism about the value, and therefore the legitimacy, of arguments that policymaking [in the field of foreign affairs] should be governed by legal rules conceived in advance of the exigencies of national needs.” POWELL, *supra* note 20, at 34. According to Professor Powell, in *The Federalist No. 41*, Madison was contending that “[o]ne product of trying to regulate by law issues involving foreign affairs — or, in a starkly realist phrase, to ‘chain the discretion of [our] own Government’ — is likely to be contempt for the law and for constraints on government generally.” *Id.* at 32 (alteration in original) (quoting THE FEDERALIST NO. 41 (James Madison), *supra* note 93, at 253). It is not clear whether Professor Powell means by this to refer to possible statutory limits on the President. But in *The Federalist No. 41*, Madison was not writing about whether the Executive could or should be bound by “legal rules conceived in advance of . . . exigencies.” He was explaining why *Congress itself* should be given the constitutional power to raise armies even in peacetime. See THE FEDERALIST NO. 41 (James Madison), *supra* note 93, at 257. In other words, the “discretion” of our government was, at least in this respect, to be exercised by the legislature.

C. Conclusion

The textual and historical evidence we have reviewed demonstrates that the Commander in Chief Clause was understood to establish the hierarchical superiority of the President in the military chain of command, thereby both ensuring civilian control over the armed forces and establishing a "superintendence prerogative" with respect to at least some military operations. Although the exact extent of this prerogative is uncertain, and raises several interesting questions that we discuss in our next Article, the evidence is sufficiently powerful that it does not seem plausible to construe the clause in a way that would, even in the face of what might seem like modern imperatives, permit Congress to act as if the Constitution did no more than give an additional but ultimately legally inconsequential title to the Chief Executive. In that regard, there is an inviolate, preclusive core to the clause.

At the same time, the early history casts substantial doubt on the claim that the clause's preclusive core also includes a power to make and act upon judgments as to how best to carry out military operations once they are underway. That is so even though that early history does provide support for the recognition of inherent or independent substantive war powers of the chief commander. The Framers dramatically cabined Congress's power of control by withdrawing from the legislature the powers to appoint and freely remove the Commander in Chief and, most importantly, by giving the President a provisional veto over legislative directives. But a fair review of the evidence does not permit a persuasive argument that the text and original intent compel recognition of a more general, illimitable power of command. There is simply too much evidence suggesting a Founding-era understanding under which the legislature possessed the power to subject the Executive to control over all matters pertaining to war-making, save those that would deprive him of superintendence. Indeed, some of this evidence directly reflects an understanding that the legislature could control the Commander in Chief even as to such clearly tactical matters as the movement of troops.

VII. CONCLUSION

There is no small irony in the fact that the Founding era provides so little support for the judgment that the Commander in Chief possesses a general power to use his substantive wartime authorities to conduct military operations in contravention of statutes. After all, some of the leading defenders of this position, including in the Bush Administration itself, have been prominent advocates of an originalist

interpretive methodology.³⁷² Sometimes the originalist defense has taken the form of a direct and simple claim, easily digested by the public, that the decision in 1789 to name the President the Commander in Chief is best viewed as a considered determination to protect the actual prosecution of a military conflict from legislative interference. In what sense can the President be the chief commander, the argument is often put, if his tactical judgments are subject to revision and override by what are now 535 other decisionmakers? Surely this is what Hamilton must have had in mind, the argument continues, when he emphasized the virtues of secrecy, energy, and dispatch in wartime decisionmaking.

Of late, however, the originalist defense has taken a more nuanced form, but one that is still intended to show that the strong recent claims of preclusive executive war power have a firm lineage. In this version, the Framers are said to have been wise enough to have created a flexible system of war powers, one that eschews fixed rules or hard constraints on how wartime decisions get made. They reputedly designed a framework for action that is highly pragmatic and easily adaptable to new world circumstances.³⁷³ This explication of the pragmatic roots of our constitutional system of war powers then can slip imperceptibly into a defense of executive prerogative, chiefly to initiate the use of force without prior congressional approval, but also, it seems, to disregard statutory restrictions on military judgments as events might require. After all, the argument proceeds, who would need flexibility more than a commander — a chief commander! — doing battle against the nation's enemies? Thus, the fact that the Constitution does not expressly say whether or not the President can be checked by statute in conducting military operations is itself taken to be evidence of the Framers' intent. It is said to create a system open to each branch asserting whatever tools it can, without privileging one particular method — such as the enactment of laws in compliance with the cumbersome process of bicameralism and presentment — as being final and definitive. And so, in recognizing the virtues of leaving

³⁷² See, e.g., Remarks of President Bush at the Federalist Society's 25th Annual Gala (Nov. 15, 2007), <http://www.whitehouse.gov/news/releases/2007/11/20071115-14.html> (rejecting adherence to a "living Constitution" and, with respect to separation of powers in particular, stating: "When the Founders drafted the Constitution, they had a clear understanding of tyranny. They also had a clear idea about how to prevent it from ever taking root in America. Their solution was to separate the government's powers into three co-equal branches: the executive, the legislature, and the judiciary. Each of these branches plays a vital role in our free society. Each serves as a check on the others. And to preserve our liberty, each must meet its responsibilities — and resist the temptation to encroach on the powers the Constitution accords to others.").

³⁷³ See, e.g., YOO, *supra* note 177, at 295 ("A more comprehensive approach to [originalist] sources reveals that the original understanding does not dictate a specific process for foreign affairs decisions, but instead that the Framers anticipated a more fluid, flexible process in which decisions would be reached through the political interactions of the two branches.").

things undecided, the founding generation supposedly evidenced its comfort with the authority of the President to act in disregard of statutes in the midst of waging war. As Professor Yoo contends, in the Founding era, as evidenced by the structure of war powers set forth in the Massachusetts Constitution of 1781, “the president [was] seen as the representative and protector of the people, and his sole command over the military without formal legislative control [was] crucial to the separation of powers and the public safety.”³⁷⁴

Notwithstanding this appeal to what is supposed to reflect the essential common sense of the Framers, there is, as we have shown, little in the way of originalist evidence to support it. The title “commander in chief” did not necessarily imply that its holder possessed any power to operate free from statutory control; to the contrary, there are important indications that the Framers assumed — up to and including the moment of ratification — that a person so named would be subject to such control. The broad statements about secrecy, energy, and dispatch in *The Federalist* and elsewhere were not addressed to the question of whether Congress could constrain the President through the passage of duly enacted statutes. The inefficiencies of the Continental Congress, which the Founders arguably sought to avoid when drafting the Constitution, stemmed more from its early failure to grant the Commander in Chief certain powers of independent initiative than from its refusal to grant the nation’s top military official immunity from congressional interference. Nor does the Massachusetts Constitution, or any other state constitution from this period, support the notion that the Commander in Chief must be free from legislative control. Both the Massachusetts Constitution’s plain text and the commentary that surrounded its adoption indicate that legislative control was not only contemplated but endorsed. Indeed, against the current originalist claim stands significant evidence that points toward a contrary assumption that Washington himself espoused during the Revolutionary War: the chief military commander would at all times be subject to control by a body of elected representatives.

On reflection, it should hardly be a great surprise that the evidence does not provide much support for preclusive presidential power. Far from reflecting impracticality, the system of war powers the Framers appear to have favored comports quite well with their well-established embrace of checks and balances, a belief that was itself rooted in their practical experience with the dangers of unconstrained executive authority, particularly in war. Remembering this history — and being reawakened to it through the detailed review of the relevant materials that we have set forth — is important if the constitutional argument

³⁷⁴ *Id.* at 71.

for preclusive power now asserted so confidently is to be seriously evaluated. For too long, the claim that the Framers did not intend the President to be statutorily constrained as to a category of decisions denominated “the conduct of campaigns” has had a firm grip on modern war powers scholarship and, by extension, the contemporary constitutional culture. Our detailed review is a reminder that the high school civics notion of checks and balances should not be dispensed with so quickly in this context. When it comes to constitutional mythmaking about war powers in the Founding era, it seems it is the contemporary defenders of preclusive power, rather than those who raise concerns about monarchy, who may be spinning tales.

Of course, charges of methodological inconsistency in this context are a two-edged sword. That originalist evidence fails to support, and in key respects undermines, a position associated with originalists hardly resolves the constitutional war powers question for those who, like ourselves — and, truth be told, like most, though not all, of those who are troubled by the Bush Administration’s claims — find originalist argumentation a problematic approach to interpreting the founding charter. For those willing to accept the possibility that the constitutional balance between the branches — like that between the states and the national government — is subject to evolution and change, it will hardly do to conclude that there is no preclusive power when it comes to tactical matters simply because those who drafted and ratified the relevant constitutional provisions appear not to have recognized its existence. Those who are not devoted to an originalist methodology must be willing to examine the “gloss which life has written upon” those provisions³⁷⁵ through actual practice over the course of the more than two centuries in which the nation has been involved in more than its share of military conflicts.

Indeed, one prominent recent originalist account of war powers concedes the potential force of evolving constitutional practice in determining the proper allocation of war powers.³⁷⁶ But those espousing this new account often assume that the historical practice also supports a robust exercise of presidential war powers, including *preclusive* powers. That is precisely why so much energy has been devoted of late to showing that the actual practice of war powers, as it has unfolded over time, is entirely consistent with the Founders’ own preference for a system that is flexible enough to permit aggressive assertions of presidential prerogative. Such checks as there are on executive power in this arena are thought to consist of oversight, impeachment, or perhaps

³⁷⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

³⁷⁶ See YOO, *supra* note 177, at 295–96.

refusals to provide the funds necessary to carry out any military operations at all.

In our next Article, we take on this assertion about what the post-Founding practice shows, as we move forward from the moment of constitutional creation. We consider those clashes that have occurred at the “lowest ebb,” from the period immediately following ratification up through the current Bush Administration. We focus in particular on the last time in the nation’s history when such questions were as salient as they are today: during the Civil War. In doing so, we argue that constitutional practice, no less than originalist understanding, also fails to provide a grounding for the claim to preclusive presidential power. Its defense, therefore, must rest on what we contend is a strong form of living constitutionalism: namely, that the unique dangers the nation now faces render statutory constraints of a kind that have been imposed in each generation, and that Presidents have repeatedly complied with, intolerable. We ultimately conclude that the basis for such an argument is undermined by the normative implications of the constitutional tradition we describe. But that is getting ahead of the story. And so, before turning directly to that contention, it is first necessary to explore the content of the tradition itself.