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CONGRESSIONAL AUTHORITY OVER MILITARY OFFICES

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ABSTRACT

While scholars have explored at length the constitutional law of office-holding with respect to civil and administrative offices, recent scholarship has largely neglected parallel questions regarding military office-holding. Even scholars who defend broad congressional authority to structure civil administration typically presume that the President as Commander in Chief holds greater authority over the military. For its part, the executive branch has claimed plenary authority over assignment of military duties and control of military officers.

This pro-presidential consensus is mistaken. Although the President, as Commander in Chief, must have some form of directive authority over U.S. military forces in the field, the constitutional text and structure, read in light of longstanding historical practice, give Congress extensive power to structure offices, chains of command, and disciplinary mechanisms through which the President's authority is exercised. In particular, just as in the administrative context, Congress may vest particular authorities—authority to launch nuclear weapons or a cyber operation, for example, or command over particular units—in particular statutorily created offices. In addition, although the Constitution affords Presidents removal authority as a default disciplinary mechanism, Congress may supplant and limit this authority by replacing it with alternative disciplinary mechanisms, such as criminal penalties for disobeying lawful orders.

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By defining duties, command relationships, and disciplinary mechanisms in this way, Congress may establish structures of executive branch accountability that promote key values, protect military professionalism, and even encourage or discourage particular results, all without infringing upon the President's ultimate authority to direct the nation's armed forces. These conclusions are relevant pending Supreme Court cases regarding military discipline and presidential removal authority. They also bear directly on pending legislative proposals to vest authority over cyber weapons, force withdrawals, or nuclear weapons in officers other than the President. From a broader perspective, they shed new light on separation-of-powers debates over the "unitary" executive branch, conventions of governmental behavior, the civil service's constitutionality, and Reconstruction's historical importance.

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INTRODUCTION

Recent events have highlighted office-holding's importance as a constraint on modern presidents. By vesting authorities in subordinate offices rather than the presidency, Congress may place friction between presidential desires and policy outcomes, even when the officer in question is subject to at-will removal. Doing so may help maintain agency adherence to legal requirements, ensure fidelity to agency statutory missions, and enable political enforcement of norms and conventions regarding appropriate conduct. President Trump's failure to fire Special Counsel Robert Mueller, despite repeatedly expressing a desire to do so, is only the most salient example: Because the power to hire and fire special counsels is vested by statute in the Attorney General, not the President, Trump likely could have gotten his way only by firing the Attorney General (or Acting Attorney General), but doing so would have risked severe political backlash.

Congressional authority over offices—its power to vest duties in subordinate offices and structure the executive branch—thus appears practically important, as indeed scholars of administrative law have long recognized. Yet despite extensive debate over relative presidential and congressional authority with respect to regulatory policy and administrative governance, parallel questions regarding military functions have received insufficient attention. Even scholars who take broad views of congressional authority in the administrative context have typically assumed that the President, as Commander in Chief, must have plenary directive authority over military officers.[1] For its part, the executive branch, in legal opinions, signing

[1] *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 737-38 (2007) ("Unlike army generals, who may simply be commanded, the heads of departments the President appoints and the

statements, and other documents across multiple administrations, has asserted remarkably broad theories of presidential command authority. Based on its asserted view that "[i]t is for the President alone, as Commander-in-Chief, to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces,"[2] the executive branch has even claimed authority to ignore statutory limits on who may command U.S. forces in combat[3] and how many troops must compose particular units.[4]

This pro-presidential consensus is mistaken. It is true that the President, as Commander in Chief, must have some form of directive authority over U.S. military forces in the field. This core presidential authority, however, leaves Congress with extensive power to structure offices, chains of command, and disciplinary mechanisms through which the President's authority is exercised. In particular, much as in the administrative context, Congress may vest particular authorities—authority to launch nuclear weapons or a cyber operation, for example, or command over particular units—in particular offices, even with respect to use of force. Furthermore, although the Constitution affords Presidents removal authority over these officers as a default disciplinary mechanism, Congress may to some degree supplant and limit this authority by replacing it with alternative disciplinary mechanisms, such as criminal penalties for disobeying lawful orders. By defining duties, command relationships, and disciplinary mechanisms in this way, Congress may establish structures of executive branch accountability

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Senate confirms have the responsibility to decide the issues Congress has committed to their care—after appropriate consultation, to be sure—and not simply to obey."); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 769 (2008) ("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 form presidential direction and removal"). Scholars with broader views of presidential authority of course share this view. *See, e.g.*, John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2279-80 (2009) (presuming that "[e]ven if inferior officers refused to carry out presidential orders, the Commander-in-Chief Clause would seem to include the power to promote or demote officers and to make duty assignments"); *cf.* Mark Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437, 482 (2015) (arguing that the President's Commander-in-Chief authority likely includes power to form a combatant command to address climate change).

[2] *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1996).

[3] *Id.* at 183.

[4] Letter from the Assistant Attorney General, Office of Legislative Affairs, to Chairman Mac Thornberry, Committee on the Armed Services, U.S. House of Representatives and Chairman John McCain, Committee on the Armed Services, U.S. Senate (Nov. 8, 2017) [hereinafter "2017 NDAA Views Letter"] (expressing views on the National Defense Authorization Act for Fiscal Year 2018, H.R. 2810).

that promote key values, protect military professionalism, and even encourage or discourage particular results, all without infringing upon the President's ultimate authority to direct the nation's armed forces.

Here, as in prior work, I will defend these conclusions using what I take to be the "mainstream" approach to separation-of-powers interpretation.[5] Under this approach, constitutional analysis is a holistic inquiry centered on considerations of text, structure, original understanding, and subsequent practice and precedent. Absent dispositive judicial decisions, the Constitution's text and structure are ultimately controlling, but the broad contours of historical practice carry great weight in resolving ambiguities.

By these lights, although my conclusions may be at odds with modern intuitions about the President's Commander-in-Chief power, they have the virtue of according substantially not only with the Constitution's plain text, but also with our government's actual practice over the past 150 years—or so I will argue. Contrary to a widespread assumption that the President's military command authority is unusually broad, in fact an unusually thick overlay of statutes regulates military office-holding at every stage. Statutes regulate military offices from appointments[6] and promotions[7] to duties and assignments[8] to removals[9] and other forms of discipline,[10] often to a degree unheard of with respect to civil and administrative officers. Ironically, then, the frequent assumption that military affairs are an area of special presidential authority relative to civil governance may have it backwards in key respects.

Indeed, during at least one key historical period, Reconstruction, Congress went so far as to require that all Army orders go through a particular officer who was also protected from at-will removal. Although some key decisions and scholarship, rather curiously, have treated such Reconstruction-era precedents as dangerous anomalies,[11] we shall see that

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[5] H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 191-93 (2016); *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

[6] *See, e.g.*, 10 U.S.C. § 531, 532.

[7] *See, e.g.*, 10 U.S.C. §§ 611, 624.

[8] *See, e.g.*, 10 U.S.C. §§ 125, 7065, 8062.

[9] *See, e.g.*, 10 U.S.C. § 1161.

[10] *See, e.g.*, 10 U.S.C. §§ 801-946a.

[11] *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 544 (1969) (characterizing Congress's "abandonment of . . . restraint" in employing its exclusion power as "among the casualties of the general upheaval produced in war's wake"); Myers v. United States, 272 U.S. 52, 164 (1926) (characterizing statutes limiting presidential removal authority as growing "out of the serious political difference between the two houses of Congress and President Johnson"); NLRB v. Noel Canning, 573 U.S. 513, 585 (2014) (Scalia, J., dissenting) (questioning value as precedent of Reconstruction-era recess appointments in part because they arose in "a period of dramatic conflict between the Executive and Congress that saw the first-ever impeachment of a sitting President").

other precedents set during that period have remained central to the military's practical operation ever since.[12] Given Reconstruction's centrality to the modern constitutional order, as well as its resonance with our own era of unstable and conflicted politics, Congress's maximal assertions of power in that period warrant a more respectful reconsideration, on this question among others.

The issues addressed here are relevant to at least two pending Supreme Court cases: one addressing presidential authority to fire administrative officers,[13] and another addressing congressional authority over military discipline.[14] They also bear directly on numerous current controversies. In just the past few months, the Navy Secretary resigned rather than accept presidential interference with planned discipline for a wayward Navy SEAL,[15] controversy erupted over an aggressive military strike against a senior Iranian officer in Iraq,[16] and Congress created a new "Space Force" within the Department of the Air Force.[17] In addition, Congress recently passed one statute vesting authority over certain offensive cyber operations jointly in the President and Secretary of Defense, rather than the President alone.[18] It is debating another that would condition any withdrawal of U.S. forces from South Korea on certain determinations by the Secretary,[19] and some have called for statutory limits on presidential discretion over nuclear weapons, among other things.[20] The validity of all these actions and proposals depends on the relative extent of congressional and presidential authority to define military officers' duties and their degree of independence

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[12] *See infra* Part III.

[13] Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680 (9th Cir.), *cert. granted*, 140 S. Ct. 427 (2019).

[14] United States v. Briggs, 78 M.J. 289, 290 (C.A.A.F. 2019), *cert. granted*, No. 19-108, 2019 WL 6042319 (U.S. Nov. 15, 2019).

[15] Ashley Parker & Dan Lamothe, Navy Secretary Forced Out by Pentagon Chief Over Handling of Navy SEAL's War Crimes Case, WASH. POST (Nov. 25, 2019), https://www.washingtonpost.com/national-security/2019/11/24/pentagon-chief-asks-navy-secretarys-resignation-over-private-proposal-navy-seals-case/.

[16] Isabel Coles, *Tensions Rise in the Middle East After U.S. Killing of Iranian Military Leader*, WALL STREET JOURNAL (Jan. 3, 2020), https://www.wsj.com/articles/u-s-strike-in-iraq-threatens-ties-with-vital-middle-east-ally-11578058413?mod=hp_lead_pos1.

[17] United States Space Force Act, Pub. L. No. 116-92, div. A, tit. IX, subtit. D, §§ 951-953 (2019) (codified at 10 U.S.C. §§ 9081-9083).

[18] Pub. L. No. 115-232, tit. A, div. XVI, § 1642, 132 Stat. 2132 (2018), 10 U.S.C. § 394 note.

[19] United States and Republic of Korea Alliance Support Act, H.R. 889, 116th Cong. (introduced Jan. 30, 2019).

[20] *See, e.g.*, Joseph Cirincione, *No President Should Have the Absolute Authority to Launch Nuclear Weapons*, WASH. POST (Dec. 1, 2019); Bruce Blair & Jon Wolfsthal, *Trump Can Launch Nuclear Weapons Whenever He Wants, With or Without Mattis*, WASH. POST (Dec. 23, 2016).

from presidential dictates. Nor are such questions likely to fade away. So long as our politics remain erratic, conflicted, and polarized, it is not hard to image Congress employing its power to structure the military still more aggressively—nor to anticipate Presidents pushing back hard with aggressive theories of Commander in Chief power.

Beyond their immediate importance, furthermore, the conclusions reached here have important implications for broader separation-of-powers debates. First, Congress's broad authority to allocate military duties should put to rest, at least for the military, the strongest versions of so-called "unitary" executive branch theory, under which all power vested in executive offices is thought to be necessarily vested in the presidency as well.[21] Second, the analysis highlights the importance of baseline constitutional understandings about office-holding to sustaining the super-structure of norms, expectations, and "conventions" about government behavior that recent scholarship has underscored as a key feature of responsive and accountable governance.[22] Third, recognizing Congress's authority over military offices should strengthen arguments that parallel legal protections for officers and employees in the civil service are constitutionally valid, notwithstanding a Trump Administration Executive Order suggesting otherwise.[23] Finally, the history addressed here should refocus scholarly attention on Reconstruction's importance not only to the constitutional law of civil liberties, but also to operative understandings of separation of powers.[24]

My analysis proceeds as follows. Part I provides background on debates over office-holding in general and key understandings regarding appointment of military officers. In particular, Part I maps out major schools of thought regarding presidential authority over federal officers, explaining how the arguments developed here fit into these debates. Part II then addresses a first key question: whether Congress may assign particular duties and authorities to military offices other than the presidency. This Part advances the view that, contrary to frequent executive assertions and the undeveloped assumption of many scholars, Congress in fact holds extensive authority to assign authorities and responsibilities to particular offices. Part III turns to removal and argues that Congress also may limit presidential removal of military officers provided it enacts alternative means of command discipline. Part IV briefly addresses the four broader implications described earlier. The article ends with a conclusion reflecting on these constitutional principles'

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[21] *See infra* Part IV.A.

[22] *See infra* Part IV.B.

[23] *Excepting Administrative Law Judges from the Competitive Service*, Exec. Order No. 13843, 83 FED. REG. 32755, 2018 WL 3388912 (July 10, 2018).

[24] *See infra* Part IV.D.

importance in our political moment.

I. KEY BACKGROUND ON MILITARY OFFICES AND APPOINTMENTS

Article II of the Constitution, as Jerry Mashaw has observed, gives remarkably little attention to administration.[25] The Constitution, to be sure, establishes a single President as "chief" of the executive branch and "commander in chief" of the military, and it prescribes the appointment process for all "offices of the United States." It says nothing explicit, however, about the President's authority to remove officers and contains maddening ambiguities about the degree of presidential control over federal administration. These gaps in the text have fostered long-running debates in scholarship, case law, and legislative practice over the precise content of the president's authority over the executive branch.

To lay groundwork for analyzing congressional authority over military duties and command discipline, I begin here with a brief overview of relevant Article II provisions on military office-holding, the questions about duties and removal that these provisions generate, and the connection between these questions and related, more developed scholarly debates over civil and administrative office-holding. I then briefly address and set aside two key threshold issues that are much contested outside the military but relatively clear in this setting: which positions count as "offices" in the first place, and what limits Congress may place on who receives those positions.

A. Article II's Text and Its Ambiguities

What does the Constitution say about military offices? To begin with, of course, Article II makes the President "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual Service of the United States."[26] Article I, however, gives Congress the power to "declare War," "raise and support Armies," "provide and maintain a Navy," and provide for calling the state militias into federal service.[27] It also empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces."[28] It does the same for state militia forces when in federal service, except that the states retain power over "the Appointment of the [militia] Officers, and the Authority of training the

[25] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 30 (2012) ("The American Constitution of 1787 left a hole where administration might have been.").

[26] U.S. CONST. art. II, § 2, cl. 1.

[27] *Id.* art. I, § 8.

[28] *Id.*

Militia according to the discipline prescribed by Congress."[29]

More generally, the Constitution's Appointments Clause provides that all "Officers of the United States" must be appointed by the President with Senate advice and consent, unless Congress provides by law for appointment of an "inferior officer" by the President alone, the head of a department, or a court of law.[30] Congress also holds overall authority to structure the executive branch by virtue of the Necessary and Proper Clause. Though better known for granting Congress authority to enact laws "necessary and proper for carrying into Execution" Congress's other enumerated legislative powers, the Necessary and Proper Clause grants Congress the same authority with respect to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[31] On the other hand, Congress lacks the power to impeach and remove military officers. Although certain officers "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors," this clause specifically applies only to "[t]he President, Vice President, and all *civil* officers of the United States."[32]

Long-running debates address Congress's authority to structure civil and administrative offices under these and other related provisions.[33] Although the Constitution's plain text says nothing at all about removal of executive officers through means other than impeachment, the First Congress debated the issue at length. It apparently concluded, in its celebrated "Decision of 1789," that presidents have constitutional authority to remove executive officers they appoint.[34] Subsequent Supreme Court decisions have rejected requiring Senate or congressional approval for removal of an executive officer,[35] but approved tenure protections for certain civil or administrative positions.[36] Even the question why presidents hold removal authority remains a matter of some debate. Some authorities base this authority on the so-called Vesting Clause, which vests "the executive power" in the President[37]; others locate it in the Take Care Clause, which obligates the

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[29] *Id.*

[30] *Id.* art. II, § 2, cl. 2.

[31] *Id.* art. I, § 8.

[32] *Id.* art II, § 4 (emphasis added).

[33] *See generally* HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 29-32 (2015).

[34] *Id.*; *see also* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006). I discuss this historical debate and its implications in more detail below in Part III.A.1.a.

[35] Myers v. United States, 272 U.S. 52 (1926); Bowsher v. Synar, 478 U.S. 714 (1986).

[36] Humphrey's Executor v. United States, 295 U.S. 602 (1935); Morrison v. Olson, 487 U.S. 654 (1988).

[37] *See, e.g.*, Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006).

President to "take Care that the Laws be faithfully executed"[38]; and still others argue that removal authority may be inferred from appointment authority.[39]

As a rough approximation, judges and scholars who have addressed presidential removal authority with respect to administrative offices fall in three main camps. A first group understands Article II to require a "unitary" executive branch in which the President holds indefeasible power to remove all executive officers.[40] A second camp, whose views accord with current case law, maintains that while presidents hold removal authority as a default, Congress may restrict or regulate that power by statute when doing so is functionally justified.[41] Finally, a third group holds that Congress may impose whatever removal limitations it likes as a matter of plenary discretion over administrative design.[42] As we shall see, parallel questions arise in the military context, but the arguments are less well developed, some textual theories for civil officers are not readily applicable, and the Commander-in-Chief Clause raises distinct questions.[43]

A related and overlapping debate concerns Congress's authority to vest particular authorities in particular executive offices other than the presidency. On this question, the predominant view, reflected in both case law and scholarship from a range of perspectives, holds that Congress may vest civil and administrative authorities and functions in offices other than the president.[44] Proponents of this view maintain that the Appointments Clause and Necessary and Proper Clause grant Congress the power to create offices and vest them with particular duties and authorities—duties and authorities

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[38] *See, e.g.*, MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (forthcoming).

[39] *See, e.g.*, In re Hennen, 38 U.S. (13 Pet.) 230 (1839).

[40] *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008); MCCONNELL, *supra* note __; Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting).

[41] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671-72 (1988).

[42] *See, e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 34-35 (2009) ("Congress may structure the agencies to prevent the President from exercising his own supervisory control over their policy discretion.").

[43] *See infra* Part III.

[44] *See, e.g.*, MCCONNELL, *supra* note __; Strauss, *supra* note __, at 698; Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1210, 1234-36 (2014); Robert B. Percival, *Who's in Charge?: Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2490 (2011); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 143-44 (2009); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 456-59 (2006); HAROLD J. KRENT, PRESIDENTIAL POWERS 23, 56-57 (2005); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L REV. 443, 465 (1987).

that may then be exercised only by those officers, not by the President personally. On the other hand, however, proponents of a strong "unitary" executive branch argue to the contrary that the President, as a Chief Executive endowed with "executive power" and obliged to ensure faithful execution of the laws, necessarily holds authority to control subordinate executive officers' functions or even personally discharge those officers' duties.[45]

As with removal, parallel questions regarding whether and to what extent Congress may assign duties and authorities to military offices have received far less attention. Even leading proponents of congressional authority in the civil and administrative context have presumed that the military is different,[46] and presidents, as noted earlier, have repeatedly claimed a plenary authority to reassign military duties.[47] Yet the textual basis for this distinction is unclear. Although the President is the military's Commander in Chief under Article II, the Appointments and Necessary and Proper Clauses apply by their terms to military offices, and Congress holds specific authority not only to raise armies and maintain navies, but also to enact rules for their governance.

Resolving these questions—the degree of congressional authority to limit removal power and assign duties with respect to military functions—will be the focus of this Article. Again simplifying greatly, most administrative-law

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[45] *See, e.g.*, SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 184-92 (2015) (arguing the President holds plenary directive authority over executive officers and may revise their determinations); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008) ("All subordinate nonlegislative and nonjudicial officials exercise executive power, and they do so only by implicit or explicit delegation from the president. They are thus subject to the president's powers of direction and control."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598-99 (1994) (indicating that the President may "completely withdraw [an officer's] authority should he feel that an officer is no longer exercising authority consistent with his views" and then personally "make all those decisions previously vested by statute in the now constitutionally disempowered officer"); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243-44 (1994) (arguing that the President "necessarily has the power to nullify discretionary actions of subordinates"); Adam White, *The D.C. Circuit's "Trump Card" for Executive Orders*, NOTICE & COMMENT BLOG (Mar. 13, 2017), http://yalejreg.com/nc/the-d-c-circuits-trump-card-for-executive-orders/ (suggesting that executive agencies may be obligated to follow presidential directives).

[46] *See, e.g.*, Strauss, *supra* note __, at 737-38; Barron & Lederman, *supra* note __, at 769; *cf.* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 324 (2016) (challenging the "hard version" of unitary executive branch theory under which President's hold "plenary authorit[y], which Congress may not limit, . . . to direct how [administrative officials] shall exercise any and all discretionary authority that those officials possess under law," but conceding that "the President enjoys such control over subordinate personnel who assist the President in performing specific constitutionally enumerated tasks, such as negotiating treaties or commanding the military").

[47] *See supra* note __.

scholars embrace either the unitarian view on both questions (advocating an indefeasible removal power as well as a presidential power to revise or control subordinates' actions)[48] or else the non-unitarian view on both (advancing the second or third view described above on removal while also defending congressional authority to define officers' duties).[49] At least one scholar maintains the intermediate view that the President holds indefeasible removal authority but Congress may vest statutory duties in particular offices.[50]

With respect to the military, I will defend yet another position: Congress may assign duties to offices, and it may also displace presidential removal authority, but only if it provides a robust alternative disciplinary mechanism. I will return later to this position's implications for administrative law debates. To lay groundwork for these arguments, however, two other key Article II ambiguities warrant brief attention. Whereas the removal and duty questions have received at least an uneasy resolution in the civil and administrative context but remain under-explored with respect to the military, these next two issues have the opposite character: relative clarity with respect to the military despite considerable debate outside it.

B. Which Positions Are Offices?

The first such question is who counts as an "officer of the United States" under the Appointments Clause in the first place. Outside the military, this question has recently gained new salience. Under governing case law, the Supreme Court has considered a position an office if it entails both a degree of permanence—"tenure and duration," as opposed to ad hoc or temporary responsibility—and some exercise of "significant authority under the laws of the United States."[51] As a matter of current practice, only the most senior officials within administrative agencies—agency heads, assistant heads,

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[48] *See, e.g.*, Calabresi & Prakash, *supra* note __, at 598-99.

[49] *See, e.g.*, SHANE, *supra* note __, at 34-35; Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 107–08 (2006) ("In our system, . . . while the President may sometimes exercise independent organizational power it is largely Congress that decides what departments to create, how to organize those departments into various authorities and agencies and whether to create agencies outside of any department.").

[50] MCCONNELL, *supra* note __.

[51] Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879), for the first requirement and *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), for the second). The executive branch has generally applied this same framework, *see, e.g.*, *The Constitutional Separation of Powers Between the President and Congress*, 20 O.L.C. 124 (1996), but an Office of Legal Counsel opinion during the George W. Bush administration adopted a similar framework focused instead on whether the position is "continuing" and entails an exercise of "sovereign power." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 O.L.C. 73 (2007).

deputy assistant heads, and the like—have been understood to meet these twin criteria. Prompted, however, by recent scholarship suggesting that the framers viewed a wider range of positions as offices,[52] litigants and commentators have begun raising challenges to existing statutory arrangements.[53] In 2018, in *Lucia v. SEC*, the Supreme Court entered this fray, but offered little clarification.[54] Rather than adopting any new general framework for identifying "significant authority," the Court held narrowly on the facts of the case that the administrative law judges in question were officers under the Appointments Clause because a closely analogous precedent had so held.[55]

In contrast to this general ferment with respect to administrative offices, statutes, executive practice, and judicial opinions all point to a clear—and unusually broad—understanding of who counts as an officer in the military setting. As the Justice Department's Office of Legal Counsel put it in a recent opinion, all "[c]ommissioned military officers are 'Officers of the United States' for purposes of the Appointments Clause of the Constitution, and each promotion of a military officer from one grade level to the next is considered a separate appointment to a new office."[56] Accordingly, within the military, the operative understanding of "officer" converges with ordinary usage, thereby ensuring that all commissioned officers, from generals and admirals down to lieutenants and ensigns, must either be appointed by the President with Senate consent or else, if Congress so provides, by the President alone or the Secretary of Defense. Further, although promotion within grade is viewed as a mere change in duties and not a change in office, a promotion from one grade to the next requires a new appointment in accordance with the Appointments Clause.

This understanding with respect to military offices may be relevant to current debates regarding other offices—a point I return to below.[57] The key point here is that a very broad set of officials, stretching from the upper ranks of the Defense Department down to nearly the most junior officers, qualify

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[52] *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018); *see also* James C. Phillips, Benjamin Lee, & Jacob Crump, *Corpus Linguistics and "Officers of the United States"*, 42 HARV. J. L. & PUB. POL'Y 872 (2019) (similar); Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501 (2018) (addressing understanding of early Attorneys General).

[53] *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018).

[54] *Id.*

[55] *Id.* at 2052 (relying on *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[56] *Promotions of the Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008*, 32 O.L.C. 70 (2008) (internal citations omitted); *see also, e.g.*, Weiss v. United States, 510 U.S. 163, 170 (1994); Dysart v. United States, 369 F.3d 1303, 1306 (Fed. Cir. 2004); 10 U.S.C. § 531.

[57] *See infra* Part IV.C.

as Appointments Clause officers; they all therefore hold positions that implicate constitutional debates over the relative extent of congressional and presidential authority.

C. How Are They Appointed?

Another unusual, but seemingly settled, feature of military office-holding relates to appointment qualifications. Despite the broad definition of Appointments Clause "officers" with respect to the military, in practice military appointments are highly regulated. Even at the highest level, statutes establishing military offices are rife with qualification requirements that limit the pool of eligible appointees. At the very top, the Secretary of Defense may not have served on active duty in the military within the past seven years.[58] Similar or more onerous requirements apply to Assistant Secretaries and other senior civilian offices.[59] Requirements for regular military officers are often even more restrictive. By their terms, governing statutes limit candidates for promotion to those included on lists of qualified officers prepared by boards of other military officers based on their assessment of junior officers' performance.[60] Although presidents may remove candidates from the lists, in principle this statutory framework limits their choice of nominees to individuals recommended by other military officers.

The executive branch has never fully accepted these statutes. In a series of legal opinions, executive-branch lawyers have asserted that "Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it cannot control the President's discretion to the extent of compelling him to commission a designated individual."[61]

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[58] 10 U.S.C. § 113(a).

[59] *See, e.g.*, 10 U.S.C. § 136 (requiring at least seven years in civilian life for the Under Secretary of Defense for Personnel and Readiness); *id.* § 137 (same for Under Secretary of Defense for Intelligence); *id.* § 135 (same plus "significant budget, financial management, or audit experience in complex organizations" for the Defense Department Comptroller).

[60] *See, e.g.*, 10 U.S.C. §§ 611, 616-618, 624; *see also* 10 U.S.C. § 9082(a) (requiring appointment of the Chief of Space Operations from the general officers of the Air Force). Statutes of this sort stretch back to the nineteenth century. *See, e.g.*, Act of Apr. 21, 1864, 12 Stat. 53 (directing that "no line officer of the navy, upon the active list, below the grade of commodore, nor any other naval officer, shall be promoted to a higher grade, until his mental, moral, and professional fitness to perform all his duties at sea shall be established to the satisfaction of a board of examining officers to be appointed by the President of the United States").

[61] *Issuance of Commission in Name of Deceased Army Officer*, 29 Op. Att'y Gen. 254, 256 (1911); *see also, e.g.*, *Promotions of the Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008*, 32 O.L.C. 70 (2008) ("the President must retain sufficient discretion in selecting nominees for Executive Branch offices").

Presidents, moreover, appear to have occasionally acted on this understanding by appointing unlisted individuals.[62] With these limited exceptions, however, the executive branch appears to have acquiesced to a remarkable degree to a quite restrictive process for making certain military appointments. Subject to some residual presidential discretion that remains ill-defined, Congress has effectively confined and professionalized the selection of individuals who may hold certain key positions within the military.[63]

Executive acquiescence in this appointments process may, once again, hold implications beyond the military; I will explore this theme briefly in Part IV. With respect to the military itself, the most pressing questions regarding presidential control of military functions relate to assignment of duties and removal of officers: with respect to the broad set of military positions universally treated as "offices" and appointed through the process just described, what authority does Congress have either to vest particular authorities and responsibilities in particular offices other than the presidency, or to limit at-will presidential removal of individuals holding those offices? I turn now to more sustained analysis of these two issues.

II. ASSIGNMENT OF DUTIES

The first key question regarding congressional authority over military offices is whether Congress may not only impose qualifications on officers, but also define in detail the particular authorities and responsibilities that those officers may perform. As we have seen, the executive branch has repeatedly asserted that any such congressional power is nugatory. "As commander-in-chief of the army it is your right to decide according to your own judgment what officer shall perform any particular duty," Attorney

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[62] *See, e.g.*, *Promotion of Marine Officer*, 41 Op. Att'y Gen. 291, 293 (1956) (upholding President's authority to temporarily appoint an individual outside the statutory framework for promotions because "the President may not be bound in his selection of an officer or group of officers merely because in the opinion of others they are better qualified for promotion"). Former President and future Chief Justice William Howard Taft argued in a lecture on presidential powers that although such promotion statutes are constitutionally valid, "[n]o court and no other authority . . . can compel the President to make a nomination, and the only method of preventing his appointing someone other than the one specified by law is for the Senate to refuse to confirm him, or for Congress to withhold an appropriation of his salary, or for the Comptroller of the Treasury to decline to draw a warrant for his salary on the ground of his ineligibility under the law." WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 128 (2002).

[63] An Attorney General opinion from 1911 describes, and properly rejects, the still broader theory that Congress's power to establish rules for the military entails power to make military appointments on its own. *Issuance of Commission in Name of Deceased Army Officer*, 29 Op. Att'y Gen. 254, 255-56 (1911).

General Jeremiah S. Black wrote to President Buchanan in 1860,[64] and presidents ever since have nodded in agreement. Commentators seem largely to have agreed as well. Even a leading proponent of congressional power over non-military offices argues the military is categorically different: Although "the heads of departments the President and appoints and the Senate confirms have the responsibility to decide the issues Congress has committed to their care—after appropriate consultation, to be sure—and not simply to obey," "army generals" may simply "be commanded."[65] A leading account of congressional authority over use of military force likewise suggests that vesting particular command responsibilities in officers other than the president could be unconstitutional.[66]

In fact this view, at least in its strongest form, is mistaken. It is at odds not only with the constitutional text and structure, but also with both contemporary and historical practice. This conclusion, moreover, may matter. Outside the military, scholars have recognized that "[f]iring [an officer to get the President's way] typically has much higher political cost to the President than (successfully) directing an official's exercise of discretion."[67] In consequence, legal understandings of where powers are legally vested "likely influences the relative bargaining positions of the [officer] and the President."[68] Precisely the same benefits could flow from vesting military functions in particular offices. Indeed, in keeping with that assumption, Congress in recent years has either considered or adopted measures vesting key authorities, most notably over certain cyber operations, in the Secretary of Defense, or the Secretary in combination with the President, rather than the President alone.[69] Some have proposed measures to limit exclusive presidential responsibility for nuclear weapons launches,[70] or over certain strategic force withdrawals,[71] as well as more mundane

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[64] *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 468 (1860).

[65] Strauss, *supra* note __, at 737-38.

[66] Barron & Lederman, *supra* note __, at 769 (indicating that the President's Commander-in-Chief title "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," but acknowledging that "the full extent of this preclusive prerogative of superintendence remains uncertain").

[67] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 295 (2006).

[68] *Id.*

[69] Pub. L. No. 115-232, tit. A, div. XVI, § 1642, 132 Stat. 2132 (2018), 10 U.S.C. § 394 note.

[70] Bruce Blair & JonWolfsthal, *Trump Can Launch Nuclear Weapons Whenever He Wants, With or Without Mattis*, WASH. POST (Dec. 23, 2016).

[71] United States and Republic of Korea Alliance Support Act, H.R. 889, 116th Cong. (introduced Jan. 30, 2019).

measures governing assignment of forces to particular ships, units, or commands.[72] Whatever the wisdom of such measures—a point I return to below[73]—these proposals raise the constitutional question directly.

Here, I will defend Congress's authority to enact such measures first as a matter of constitutional text, structure, and contemporary practice and then as a matter of historical tradition. I will close this part by reflecting on some key implications of this view.

A. Text, Structure, and Current Practice

1. Congressional Authority Over Non-Military Duties

Let me begin with the basic case for congressional authority to allocate and define non-military officers' powers. Under the prevailing (though not exclusive) view, the President is ultimately an "overseer" and not a "decider," to use Peter Strauss's memorable terms, with respect to powers vested in civil and administrative offices.[74] In other words, while the President may oversee how other officers discharge their responsibilities, and perhaps remove them from office if their performance is unsatisfactory, authorities vested by statute in a particular officer ultimately belong to that officer, not the President.[75] On this view, Congress holds authority not only to create offices as the Appointments Clause contemplates, but also, by virtue of that power and the Necessary and Proper Clause, to vest those offices with particular functions and duties that then belong to the individual officer, not the President.

Article II's text reinforces this conclusion in two places. First, by empowering the President to seek "the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," the Opinions Clause implies that "duties" may belong to other "officers," even if those officers are subject to presidential supervision.[76] Second, by requiring the President to "take care that the Laws be faithfully executed," the Take Care Clause implies that officials other than the president may sometimes be doing the executing.[77]

Practice and precedent generally support this understanding, despite one early Attorney General opinion to the contrary.[78] It also serves important practical purposes. To the extent they hold authority to remove officers and

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[72] *See* 2017 NDAA Views Letter, *supra* note __ (discussing provisions to that effect).

[73] *See infra* Part II.C.

[74] Strauss, *supra* note __, at 737-38. *See supra* Part I.A. for discussion of competing views on removal.

[75] *Id.*

[76] U.S. CONST. art. II, § 2, cl. 1; *see also* Strauss, *supra* note __, at 702-03.

[77] U.S. CONST. art. II, § 3, cl. 3; *see also* Strauss, *supra* note __, at 703.

[78] *See* Strauss, *supra* note __, at 705-715 (collecting precedents and examples).

replace them with someone more pliable, Presidents may ultimately be able to get their way. But needing to remove an officer to do so raises the political stakes, enabling what I have called the "fire alarm function" of office holding.[79] If the officer believes the action the President seeks would be unlawful or profoundly unwise—as, for example, when President Jackson sought to require removal of treasury funds from the Bank of the United States, or when President Nixon demanded termination of a special prosecutor—the officer may resign or force his or her own termination, thereby elevating the issue's political salience and bringing maximum scrutiny and pressure to bear on the President.[80] The simple expedient of vesting authorities in a particular office other than the presidency may thus enable political enforcement of legal requirements and conventional understandings that surround particular government functions. Insofar as the position requires Senate confirmation, furthermore, the appointment process may ensure that only people with particular skills or a particular outlook and proven sense of responsibility discharge the authorities of particular offices, such as the Attorney General, Secretary of the Treasury, or Environmental Protection Agency Administrator.

2. The Theory Extended to Military Duties

Could this same constraint on presidents extend to military functions? In a word, yes. Contrary to scholarship and executive branch assertions suggesting otherwise, there is no compelling textual, structural, or historical reason to distinguish military offices from other positions when it comes to statutory assignment of duties and functions. Indeed, if anything, the case for such congressional authority with respect to the military is stronger. Congress, if it chose, could vest control over nuclear weapons, or offensive cyber capabilities, or a particular component of the Army, Navy, or Air Force, in a particular officer who would then be subject to removal, and perhaps other forms of discipline,[81] but who would not otherwise be obligated to act as the President directs.

Why? To begin with, the language governing office-holding in the Appointments Clause and Necessary and Proper Clause makes no distinction between military and non-military offices. Both types of positions must be "established by Law" under the Appointments Clause,[82] and in both cases Congress holds authority to enact "all Laws which shall be necessary and

[79] Zachary Price, *The Fire Alarm Function of Office-Holding*, TAKE CARE BLOG (June 19, 2017), https://takecareblog.com/blog/the-fire-alarm-function-of-office-holding.

[80] *See, e.g.*, Stack, *supra* note __, at 294-96; MCCONNELL, *supra* note __.

[81] *See infra* Part III.

[82] U.S. CONST. art. II, § 2, cl. 2.

proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[83] To the extent these provisions give Congress authority to define civil officers' functions and the organizational hierarchy within which they operate, Congress holds precisely the same authority with respect to the military.

In fact, even if one doubted Congress's power to allocate statutory authorities with respect to civil and administrative officers, Congress's specific constitutional powers with respect to the military provide a still stronger warrant for inferring such congressional power in that context. Congress, again, holds specific constitutional authority to "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces."[84] Assigning duties and responsibilities within the military chain of command may be a potent means of governing and regulating the military; indeed, as we shall see, it is one that Congress has routinely employed as a means of shaping and controlling the nation's armed forces.

As a matter of plain text, a provision assigning some responsibility or command to a particular office can readily be described as a "Rule[]" regarding the military's "Government," if not also its "Regulation," even if this constitutional language might more immediately call to mind legislation prescribing a military code of conduct and procedures for military justice. For that matter, such a provision might also be characterized as a valid condition Congress has imposed on the army or navy it has raised or provided. In cases implicating these provisions, furthermore, the Supreme Court has repeatedly emphasized the breadth of Congress's authority. "It is clear," the Court has ruled, "that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment . . . ."[85] In a recent case, moreover, the Court addressed a statutory bar on military officers exercising certain civil governmental functions.[86] Far from indicating any constitutional difficulty, the Court characterized this provision as validly

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[83] U.S. CONST. art. I, § 8.

[84] U.S. CONST. art. 1, § 8, cl. 12-14.

[85] Chappell v. Wallace, 462 U.S. 296, 301 (1983); *see also, e.g.*, Loving v. United States, 517 U.S. 748, 768 (1996) ("we give Congress the highest deference in ordering military affairs"); Burns v. Wilson, 346 U.S. 137, 140 (1953) (holding that "[t]he Framers expressly entrusted . . . to Congress" the task of balancing the rights of servicemembers against the "overriding demands of discipline and duty"); Dynes v. Hoover, 61 U.S. 65, 79 (1857) (deriving Congress's "power to provide for the trial and punishment of military and naval offenses" from its constitutional authorities over the military).

[86] Ortiz v. United States, 138 S. Ct. 2165, 2181-82 (2018) (addressing 10 U.S.C. § 973(b)).

"designed to ensure civilian preeminence in government."[87]

On the other hand, the Commander in Chief Clause's language might suggest a stronger directive power with respect to the military than the Take Care Clause provides for the civil service. The Take Care Clause, after all, obligates the President only to "take Care" that the laws are executed faithfully, whereas being Commander in Chief implies some power to issue affirmative commands. From a broader perspective, however, both provisions suggest that primary government power will at least sometimes be exercised by others: much as the obligation to ensure faithful execution implies that someone else may do the executing, serving as commander in chief implies having some military force to command. The framers at the Philadelphia Convention in fact debated whether the President even could exercise direct command over troops in the field.[88] Although President Washington did so during the Whiskey Rebellion,[89] the norm across American history has been to command troops only indirectly, through orders to subordinate commanders in the field.[90]

In both civil and military contexts, the President's directive authority does properly imply some means of getting his or her way, and it is true (as discussed below) that military orders may often be enforced by criminal penalties or other draconian measures that Congress has not seen fit to authorize for civil and administrative offices.[91] Nevertheless, the language of command itself provides no reason to think that such strict hierarchical control is constitutionally necessary if Congress chooses instead to provide some other enforcement mechanism, such as authority to remove the disobedient officer. In fact, as we shall see, whether presidents could remove military officers at all for disobedience has been a matter of lively historical debate—and one largely resolved against plenary presidential authority.[92]

The Federalist Papers, at any rate, emphasized only that the President would be the military's overall commander. Stressing that the President would be "in substance much inferior to" the British King with respect to

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[87] *Id.* at 2172. For general discussion of this statutory "civil office ban," see Stephen I. Vladeck, *Military Officers and the Civil Office Ban*, 93 IND. L.J. 243 (2018).

[88] *See, e.g.*, Barron & Lederman, *supra* note __, at 787 ("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").

[89] PRAKASH, *supra* note __, at 159-60.

[90] *See, e.g.*, 2 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION, AND CONSTRUCTION 919 (1910) (arguing that if the President "should undertake to command the military and naval forces of the government in time of war, he would be exercising a power which would necessarily prevent him from executing important duties required of him by the Constitution").

[91] *See infra* Part III.

[92] *Id.*

military powers, the Federalist No. 69 observed that the American President's Commander-in-Chief power "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."[93]

Another possible basis for inferring preclusive presidential authority over duties is the Vesting Clause. A favorite empty vessel for proponents of broad presidential authority, this clause grants "[t]he executive Power" to the President. But even if this clause carries substantive import, as opposed to serving as a mere placeholder for more specific grants of power in Article II, there is no reason to think it confers preclusive authority to personally exercise military powers vested specifically in other offices. For one thing, some recent scholarship suggests the framers would have understood the term "executive power" to refer exclusively to an authority to execute the law, a meaning with no relevance to military command.[94] Whether or not this view is convincing, it does at least suggest that unitarian arguments for personal presidential authority over civil or administrative authorities need not carry over to the military; only civil administration involves "executive power" in the plain sense of executing federal law.

Besides, even if the term "executive power" carries broader meaning, as indeed some early authority regarding foreign affairs suggests,[95] the Commander in Chief Clause more specifically indicates the relationship between the President and the military, and the power conferred by that clause is, again, merely a power to issue commands, not a power to personally discharge other officers' duties or reallocate at will what officers will perform them. Congress, furthermore, even apart from its general authority over the executive branch under the Appointments and Necessary and Proper Clauses, holds specific authority to "make Rules for the Government and Regulation of the land and naval Forces"—an authority that suggests, once again, still broader authority to structure the military than Congress holds with respect to the civil service.

3. Contemporary Statutes

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[93] *The Federalist No. 69*, *in* THE FEDERALIST PAPERS 349 (Ian Shapiro ed., 2009); *see also* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMPLE L. REV. 599, 614-16 (2011) (emphasizing the breadth of Congress's regulatory authority over the military as reflected in early practice and the original understanding).

[94] *See* Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative* (forthcoming).

[95] *See* Pacificus No. 1 (June 29, 1792) (Hamilton); Thomas Jefferson, *Opinion of Thomas Jefferson* (Apr. 24, 1790), *in* 5 THE PAPERS OF GEORGE WASHINGTON 343 (Dorothy Twohig et al. eds., 1996); *see also* Myers v. United States, 272 U.S. 52 (1926).

Further support for congressional authority over allocation of military duties may be found in current statutes. Executive branch bluster notwithstanding, the actual governing statutory architecture is replete with provisions assigning particular functions to particular offices. To give just a few examples, the Chairman of the Joint Chiefs of Staff is "principal military adviser" to the President and certain cabinet secretaries[96]; the Army's Judge Advocate General is "the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army" and "shall direct the members of the Judge Advocate General's Corps in the performance of their duties"[97]; the commander of the unified special operations command is responsible for various functions involving special operations forces[98]; the commanders of other unified combatant commands hold authority over certain forces and missions assigned to them by the President[99]; the Undersecretary of Defense for Intelligence holds responsibility, subject to the Secretary of Defense's direction, for certain intelligence functions and operations;[100] and the brand new Chief of Space Operations prepares certain plans and supervises certain forces, subject to the Air Force Secretary's direction.[101]

These statutes carry no implication that the president holds plenary constitutional authority to reallocate military responsibilities at will. On the contrary, they presume that when the Senate confirms individuals for particular offices, those individuals (or validly appointed substitutes) will perform those responsibilities and not others. It is true, of course, that Congress has often provided a degree of flexibility. In general, for example, the Secretary of Defense holds broad authority to reallocate duties and responsibilities within the department (as do commanders and service secretaries within their commands and services).[102] In many places, too, governing statutes specify that functions should be performed subject to direction from the President, the Defense Secretary, or some other senior officer.[103] But the very enactment of such provisions for flexibility may

[96] 10 U.S.C. § 151(b)(1).

[97] 10 U.S.C. § 7037(c)(1)-(2).

[98] 10 U.S.C. § 167.

[99] 10 U.S.C. § 164.

[100] 10 U.S.C. § 137.

[101] 10 U.S.C. § 9082(c).

[102] 10 U.S.C. § 113(d) ("Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.").

[103] *See, e.g.*, 10 U.S.C. § 125(b) ("if the President determines it to be necessary because of hostilities or an imminent threat of hostilities, any function, power, or duty vested by law in the Department of Defense, or an officer, official, or agency thereof, including one assigned to the Army, Navy, Air Force, or Marine Corps by section 7062(b), 8062, 8063, or 9062(c) of this title, may be transferred, reassigned, or consolidated."); *id.* 162(b) (specifying

imply congressional authority to withhold such discretion if it wishes. As Kevin Stack has argued with respect to administrative statutes generally, "the longstanding and active congressional practice of granting authority to officials expressly subject to the control of the President" supports, by negative inference, that duties vested without such qualifications may belong to the particular officer alone.[104] The same inference applies equally here.[105]

In at least a few places, furthermore, Congress has specifically precluded command discipline, thus effectively insulating officers performing specified functions from oversight. Officers serving on courts-martial, for example, are specifically protected from command influence or retaliation,[106] and the Judge Advocates General are protected from any interference with their authority to provide independent legal advice.[107] Likewise, judges on the Court of Appeals for the Armed Forces, a non-Article III court that reviews court-martial rulings, are removable only for cause during their fifteen-year terms.[108] Congress, moreover, recently tightened considerably the convening officer's authority to alter or override a court-martial's conviction and sentence.[109] These changes effectively vest exclusive authority over certain military-justice functions in the particular officers serving as jurors or judges on a given court-martial.

All these examples, to be sure, reflect a particular concern, rooted in due process, to afford a neutral decision-maker in military tribunals. But Congress has also guaranteed independence with respect to at least one function with more concrete effects on military performance: service on the promotion boards that effectively determine who occupies the military's higher ranks.[110] In addition, as noted, one provision addressed in a recent Supreme Court decision specifically precludes many military officers from "hold[ing], or exercis[ing] the functions of, [certain] civil office[s] in the Government of the United States."[111] At the level of senior civilian leadership, furthermore, Rebecca Ingber has recently highlighted that Congress quite frequently rejigs procedures, command relationships, and

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chain of command for combatant commands "[u]nless otherwise directed by the President").

[104] Stack, *supra* note __, at 268, 284.

[105] Some of Stack's examples from the early Republican in fact involve the military. *See id.* at 278 (discussing 1789 statute vesting authority in the Secretary of the Navy but requiring the Secretary to execute the President's orders).

[106] 10 U.S.C. § 616.

[107] 10 U.S.C. § 7037.

[108] 10 U.S.C. § 942.

[109] Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000; National Defense Authorization Act for 2014, Pub. L. No. 133-66, § 1702(b), 127 Stat. 672, 954 (2013); *see generally* 2 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE & PROCEDURE § 17-9 (10th ed., 2018).

[110] 10 U.S.C. § 616(f).

[111] 10 U.S.C. § 973(b); *Ortiz*, 138 S. Ct. at 2172.

even allocation of duties within the country's national security apparatus as a backdoor means of shaping substantive policy outcomes.[112] One recent provision goes so far as to vest authority over certain cyber operations jointly in the President and Secretary of Defense, rather than the President alone;[113] other proposals under consideration would go still further.[114] Such provisions would be meaningless if presidents could simply assume and redelegate duties within the military command structure as they saw fit.

B. Historical Debates

History adds still more support for congressional authority to vest military duties in particular offices. Without attempting any comprehensive account, briefly considering several salient episodes across time highlights both the extent of debate over these questions and the ultimate weakness of the executive branch's current stated view. To the extent historical practice properly illuminates constitutional meaning, as the Supreme Court has repeatedly assumed it does,[115] this history reinforces textual, functional, and originalist arguments for congressional authority to assign military duties to particular offices.

1. Early Statutes and Practice

To begin with, some of the earliest military-organization statutes specified that senior officials held particular authorities but exercised them subject to presidential direction. A 1789 statute, for example, established the office of Secretary of the Navy and specified that the Secretary's "duty . . . shall be to execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States."[116] The same statute, moreover, specifically transferred these authorities from the previously created office of Secretary of War to the newly created position of Secretary of the Navy, making clear that the Secretary of War could no longer exercise them.[117] This statute's sharp

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[112] Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. __ (forthcoming 2019).

[113] Pub. L. No. 115-232, tit. A, div. XVI, § 1642, 132 Stat. 2132 (2018), 10 U.S.C. § 394 note.

[114] *See supra* __.

[115] *See, e.g.*, Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1 (2015); NLRB v. Noel Canning, 573 U.S. 513 (2014).

[116] Act of Apr. 30, 1789, ch. 35, § 1, 1 Stat. 553, 553.

[117] *Id.* § 5, 1 Stat. at 554 (repealing "so much of" a prior statute creating the department

division between Army and Navy commands would persist, with only limited interruptions, until 1947.[118] Other early statutes referred, albeit obliquely, to top military officers in the army and navy serving as "commander in chief" with respect to particular operations.[119]

Provisions for presidential superintendence in these and other statutes might be read to endorse a broad view of presidential Commander-in-Chief power. As with modern statutes, however, the very specification of presidential command in these provisions more naturally implies congressional authority to withhold such directive power if Congress so desired.[120] Indeed, Congress's specification of such directive authority in the 1789 statute seems especially telling, given that Congress extensively debated presidential removal authority earlier in the same Congress—and ultimately used indirect language to indicate that the President held such authority by virtue of Article II rather than congressional grace.[121] Furthermore, the repeated clarifications and revisions in these early statutes—transferring powers from the Secretary of War to the Navy Secretary,[122] for example, and specifying ranks and authorities within both the army and navy[123]—provide strong early support for Congress's authority to define the authorities and relationships of offices within the military under the Appointments and Necessary and Proper Clauses, just as it does for non-military administration.[124]

For its part, the executive branch early on seems also to have accepted Congress's authority to structure the military by defining officers' duties. An 1815 report to Congress from Secretary of War James Monroe appeared to consider it beyond doubt that "a provision for actual command is an object of legislative regulation," whereas "the selection of the person to whom [the command] is committed" is a matter of "executive discretion."[125] In 1822, an Attorney General opinion concluded that the President could determine

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of war "as vests any of the powers contemplated in the provisions of this act, in the Secretary for the department of War").

[118] *See infra* Part II.B.4.

[119] *See, e.g.*, Act of Mar. 3, 1797, ch. 16, § 4, 1 Stat. 507, 508 (providing double rations to the brigadier general "while commander in chief"); Act of Mar. 2, 1799, ch. 24, §§ 6, 11, 1 Stat. 709, 715-17 (discussing share of prize money owed to "any commander in chief" in the event of a naval capture).

[120] *See* Stack, *supra* note __, at 268, 284.

[121] *See infra* Part III.A.1.a.

[122] Act of Apr. 30, 1789.

[123] *See, e.g.*, Act of Apr. 30, 1790, ch. 10, 1 Stat. 119 (repealed 1795).

[124] *See generally* PRAKASH, *supra* note __, at 162, 166 (explaining that "Americans [in the early Republic] were quite familiar with the idea that there could be multiple commanders in chief in a single branch of the military," each of which "enjoyed circumscribed military authority").

[125] AMERICAN STATE PAPERS: MILITARY AFFAIRS at 604, 605.

"what should constitute a brigade, or what should be a command according to brevet rank," but only "[i]n the silence of the law."[126] A few years later, Attorney General John MacPherson Berrien concluded still more emphatically that although the President, as Commander in Chief, could "designate posts or stations among which the army should be distributed," nevertheless "if Congress thought proper to assume the power, and expressly to specify a certain number of military stations for the peace establishment, inhibiting their increase or diminution, . . . the authority of the President would be superseded."[127]

An episode two decades later suggests these constraints remained real and powerful throughout the antebellum period. Though disgruntled with his top general Winfield Scott during the Mexican-American War, President James K. Polk apparently considered himself powerless to displace Scott without authority from Congress to appoint a different general in a superior grade.[128] Scott, Polk complained in his diary in 1847, "acted with so little discretion since he assumed command" that certain confidential plans were revealed; "[h]is vanity [was] such that he could not keep the most important secrets of the Government which were given to him"; and he was "wasting himself in most extravagant preparations, and . . . making such a parade before the public in all he does that there is danger that the objects of the campaign may be entirely defeated."[129] Nevertheless, Polk felt his hands were tied: "I have asked Congress for authority to select a commander in whom I have confidence, and some weeks ago they refused it."[130] Overall, Polk complained to posterity, "[m]y situation is most embarrassing. I am held responsible for the War, and yet I am required to entrust the chief command of the army to a Gen'l in whom I have no confidence."[131]

2. Captain Meigs and the Washington Aqueduct

Perhaps because this early practice appears unsupportive, the urtext for plenary presidential authority over military duties is instead an 1860 Attorney

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[126] *Brevet Pay of General Macomb*, 1 Op. Att'y Gen. 547, 548 (1822).

[127] *Brevets' Pay and Rations*, 2 Op. Att'y Gen. 223, 232 (1829).

[128] *See* CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 126 (1920, reprinted 2003) (discussing this episode as evidence that "no officer can be appointed by the President until Congress has created the grade and made provision for it").

[129] 2 DIARY OF JAMES K. POLK 393-94 (entry for Feb. 27, 1847).

[130] *Id.* at 394.

[131] *Id.* A recent history of the war observes that "Polk's choice of Scott to command the campaign was driven mostly by the desire to prevent Whig and potential presidential candidate [General Zachary] Taylor from gathering even more laurels." PETER GUARDINO, THE DEAD MARCH: A HISTORY OF THE MEXICAN-AMERICAN WAR 293 (2017).

General opinion regarding Captain M.C. Meigs and his work on the Washington, D.C. aqueduct.[132] A self-confident and ambitious officer who went on to serve as Union army quartermaster during the Civil War, Meigs had been overseeing the aqueduct project since 1853.[133] He came into conflict, however, with President Buchanan's Secretary of War over the latter's political favoritism in awarding contracts.[134] To forestall termination of the aqueduct project, Meigs personally (and insubordinately) lobbied congressional allies for funding. Congress obliged by including provisions in an appropriations statute that not only provided $500,000 for the aqueduct, but also required that it be completed according Meigs's plans and under his supervision.[135] Indeed, although an initial version of this legislation would have accomplished its goal obliquely by requiring that "the Chief Engineer of the Washington Aqueduct . . . shall be as heretofore an officer of the corps of Engineers not below the rank of Captain and having experience in the design and construction of Bridges & aqueducts,"[136] the final version brazenly referred to Meigs by name, requiring that the appropriated funds were "to be expended according to the plans and estimates of Captain Meigs, and under his supervision."[137]

In a statement to Congress, President Buchanan objected to this provision. Buchanan explained that he would consider it precatory because he "deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and order its officers to any duty he might deem most expedient for the public interest."[138] His Attorney General issued an opinion to similar effect. "As commander-in-chief of the army," Attorney General J.S. Black opined, "it is your right to decide according to your own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have power of appointment."[139] In accordance with its view of the proviso, the administration initially appointed a different officer to serve as chief engineer, retaining Meigs only as the aqueduct's disbursing officer and charging him with "keeping such general supervision of the works as to assure himself that they are being constructed according [his] plans and

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[132] *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 468 (1860).

[133] HARRY C. WAYS, THE WASHINGTON AQUEDUCT: 1852-1992, at 10 (1996).

[134] *Id.* at 35-37; RUSSELL F. WEIGLEY, QUARTERMASTER GENERAL OF THE UNION ARMY: A BIOGRAPHY OF M.C. MEIGS 101 (1959).

[135] WAYS, *supra* not __, at 37; WEIGLEY, *supra* note __, at 103.

[136] WEIGLEY, *supra* note __, at 103.

[137] WAYS, *supra* not __, at 37.

[138] [Buchanan Statement (June 26, 1860), 7 Comp. of MPP 3128, 3129 (James A. Richardson ed., 1897)]

[139] *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 468 (1860).

estimates."[140] After Meigs disobeyed orders to approve certain payments, however, the Secretary of War ordered Meigs to leave Washington and assume command of a fort in Florida.[141] Meigs nevertheless had the last laugh. Within four and a half months, following replacement of the Secretary of War and Attorney General, Meigs was ordered back to Washington to resume control of the project.[142]

This rather odd episode from an undistinguished administration has taken on an improbable precedential importance in later executive-branch imaginings. The Trump Administration, for example, recently cited the Meigs signing statement and Attorney General opinion in its letter asserting that Congress lacks authority to prevent reduction in personnel levels for certain ships.[143] The Clinton Administration similarly relied heavily on the Meigs precedent to conclude that Congress could not forbid placing U.S. forces under U.N. command.[144]

On examination, however, even on its own terms, the Meigs precedent is ambiguous and at best provides only weak support for any notion of plenary presidential authority over assignment of military duties. For one thing, notwithstanding broad language about presidential authority over duties in the statement and opinion, the proviso's constitutional deficiency could be understood much more narrowly. By vesting particular responsibilities in a particular individual, rather than a particular office, Congress infringed upon the President's appointment and removal powers, effectively requiring him, contrary to the principles discussed earlier, to place a particular individual in a particular office.[145] Furthermore, neither President Buchanan's signing statement nor the Attorney General opinion ultimately resolved the constitutional question. Both read the statute (admittedly counter-textually) as merely stating Congress's "preference." For both these reasons, the executive's resistance to the provision need not signify that Presidents can reallocate military responsibilities as they see fit, without regard to the office-holding structure Congress has enacted.

In actual fact, notwithstanding Meigs's temporary reassignment, the administration at least partially complied with the statute's text. Before

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[140] *Id.* at 464.

[141] WAYS, *supra* not __, at 39; WEIGLEY, *supra* note__, at 105, 107-09.

[142] WAYS, *supra* note __, at 40-41.

[143] 2017 NDAA Views Letter, *supra* note __ (expressing views on the National Defense Authorization Act for Fiscal Year 2018, H.R. 2810).

[144] *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1996); *see also* Nevitt, *supra* note __, at 459-60 (citing the Meigs signing statement to indicate that Congress has "largely been unsuccessful" in using "its appropriations power to thwart the President's command and organization authority").

[145] *See supra* Part I.C.

leaving Washington, Meigs deposited all remaining aqueduct funds in the U.S. Treasury and advised the Treasury Secretary that any disbursements without his approval would violate the governing appropriation.[146] The Army nevertheless paid out substantial sums (some $150,000 out of the $500,000 appropriation) during Meigs's absence, but upon his return Meigs made good on his view of the law by declining to approve payment of $5,600 in remaining open claims for work done in his absence.[147]

The foundational precedent for plenary presidential authority over military duties thus offers no compelling reason to doubt that Congress may assign particular military duties and authorities to particular offices. Indeed, to the extent the Buchanan Administration in fact complied with Congress's enactment, the Meigs episode might even suggest that Congress could go beyond assigning duties to offices and assign them directly to particular individuals.[148]

3. Civil War and Reconstruction

During the Civil War, President Lincoln claimed authority to allocate particular command responsibilities to individual officers within the military hierarchy.[149] Indeed, along with promotions and firings, assigning and reassigning particular commands was one of Lincoln's main means of controlling the progress of military campaigns.[150] Lincoln, however, appears to have exercised this authority within prescribed statutory structures, not in defiance of them. While applicable statutes often granted the President authority to organize military units,[151] they dictated the military's overall structure, prescribing, for example, the precise numbers of officers in particular ranks and the general composition of particular units.[152] At least

[146] WEIGLEY, *supra* note __, at 108-09.

[147] WAYS, *supra* note __, at 41; CALABRESI & YOO, *supra* note __, at 158-59; Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 949-52 (1994).

[148] Congress in fact appears to have successfully assigned military duties to particular individuals on at least two other occasions. *See* WAYS, *supra* note __, at 37-38.

[149] THOMAS J. GOSS, THE WAR WITHIN THE UNION HIGH COMMAND: POLITICS AND GENERALSHIP DURING THE CIVIL WAR 109 (2003) ("To the president, the power to assign commanders, which he alone possessed, was the power to steer Union strategy and impose his views on senior military officers.").

[150] GOSS, *supra* note __, at 109, 111.

[151] *See, e.g.*, Act of July 22, 1861, § 2, 11 Stat. 268, 269 (authorizing president to form volunteers into army regiments); Act of July 17, 1862, § 9, 11 Stat. 597, 598 (granting president discretion to organize army corps).

[152] *See, e.g.*, Act of July 22, 1861, §§ 2-4 (specifying organization and number of officers for regiments and authorizing certain general officer appointments); Act of July 25, 1861, 11 Stat. 275 (specifying number of officers in each grade for the Marine Corps); Act of July 29,

some of these statutes, moreover, conferred particular duties on particular offices.[153] On at least one occasion, Lincoln declined a general's request for command authority over certain bureaus because of statutory constraints.[154] Congress, furthermore, specifically granted authority to detail three naval officers to the War Department for inspecting transport vessels,[155] specify command precedence without regard to seniority between certain officers,[156] and transfer certain gunboats from the War Department to the Navy,[157] thus implying in each case that the President lacked such powers without statutory authorization. Likewise, late in the war, Lincoln specifically obtained statutory authority to appoint a Lieutenant General who could "be authorized, under the direction, and during the pleasure of the President, to command the armies of the United States."[158] This law again implied that the President otherwise lacked such power to grant one general supreme command over all others in the field.[159]

1861, 11 Stat. 279 (specifying number and composition of regular army regiments); Act of Aug. 3, 1861, 11 Stat. 287 (prescribing composition of adjutant-general's office and army corps of engineers); Act of July 5, 1862, 11 Stat. 510 (dividing the Navy Department into nine bureaus to be led by "chiefs" with four-year terms); Act of July 16, 1862, 11 Stat. 583 (specifying naval officer grades, the number of positions in each grade, and the class of ship subject to command by each grade of officer); Act of July 17, 1862, § 10, 11 Stat. 597, 599 (prescribing organization of certain army corps); Act of Mar. 2, 1863, 11 Stat. 699 (authorizing additional general officer appointments); Act of Mar. 2, 1863, 11 Stat. 743 (reorganizing the army corps of engineers and ordinance department); Act of Mar. 3, 1863, 11 Stat. 758 (authorizing conferral of brevet ranks); Act of July 4, 1864, 12 Stat. 395 (reorganizing army quartermaster-general's office); *see also* Act of July 25, 1866, 13 Stat. 222 (specifying organization and number of officers in each grade for peacetime navy); Act of July 28, 1866, 13 Stat. 332 (same for peacetime army).

[153] *See, e.g.*, Act of July 16, 1862, 11 Stat. 583 (specifying the grade of naval officer required to command each class of ship); Act of Mar. 5, 1863, §§ 5-7, 11 Stat. 731, 732 (requiring of appointment of provost-marshals and obligating them to arrest deserters).

[154] *See* GOSS, *supra* note __, at 174 ("When Grant sought control over the various bureaus that supplied the army, Lincoln told him that he could not legally change the military organization . . . .").

[155] Act of Feb. 12, 1862, 11 Stat. 338.

[156] Act of Apr. 4, 1862, 11 Stat. 617.

[157] Act of July 16, 1862, 11 Stat. 587.

[158] Act of Feb. 29, 1864, 12 Stat. 11. Nine days later, President Lincoln appointed Ulysses Grant to this position and "delegated an unprecedented level of authority to his new commanding general." GOSS, *supra* note __, at 165; *see also* RON CHERNOW, GRANT 337-44 (2017) (discussing appointment).

[159] GOSS, *supra* note __, at 173 (discussing "the congressional effort to revive the rank of lieutenant general in order to promote Grant over all the generals in the army"); *but cf.* CHERNOW, *supra* note __, at 335-36 (indicating that Grant expected to "outrank and supersede" other officers by virtue of the promotion but also noting then-Congressman James Garfield's view in congressional debates that "Lincoln already had full authority to name a new general in chief"). The Lieutenant General rank had previously been held only by George Washington and (by brevet) Winfield Scott. CHERNOW, *supra* note __, at 330.

After Lincoln's death, amid Congress's intense conflict with President Andrew Johnson over Reconstruction policy, a more focused debate over presidential command authority arose. In a transparent attempt to constrain Johnson, Congress in 1867 enacted an appropriations rider that required all Army orders from the President or Secretary of War to go through the Army's top general, who was then former Union commander and future President Ulysses Grant.[160] At the same time, the rider precluded the Army chief's termination or suspension without Senate approval and precluded his reassignment outside Washington, D.C.[161] In the same year, Congress also adopted the Tenure-of-Office Act, which barred removal of key executive officers, including the Secretary of War, without Senate approval.[162] The House of Representatives eventually impeached President Johnson for suspending Secretary of War Edwin Stanton without Senate consent, but the Senate failed to convict, in part because key Republican Senators doubted whether requiring Senate approval for removal of executive officers was constitutional.[163] Soon after President Ulysses Grant's election in 1868, Congress repealed the Army Chief rider.[164]

Today, Reconstruction is considered foundational to the modern American constitution. It was America's "second founding," a "rebirth of freedom" in which three key amendments and a host of statutes sought to purge the founding sin of slavery and establish a racially egalitarian republic. Despite the general (and deserved) reverence for the period, however, some modern scholars and court decisions have remained curiously dismissive of separation-of-powers precedents from so-called "Radical Reconstruction."[165] In particular, although modern historical scholarship has repudiated the early twentieth-century "Dunning School" interpretation of Reconstruction as a period of frightening military governance, some scholars continue to view Congress's efforts to constrain President Johnson as aberrant and illegitimate.[166] Yet even if Reconstruction is not the best model for constitutional governance in ordinary times, precedents from this period need not all be understood as aberrational. On the contrary, they might reflect a

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[160] Army Appropriations Act § 2, 14 Stat. 485, 486-87 (1867).

[161] *Id.*

[162] Act of Mar. 2, 1867, 14 Stat. 430.

[163] BRUFF, *supra* note __ at 69, 174-75.

[164] Act of July 15, 1870.

[165] *See supra* note __.

[166] *See, e.g.*, BRUFF, *supra* note __, at 175 ("The judgment of history has been that Johnson was right, that the [Tenure of Office Act] was an unconstitutional infringement on the President's control over the executive branch."); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 744-45 (1920; reprinted 1979) (referring to the "political history" surrounding enactment of an 1866 statute limiting presidential removal of military officers as a factor counting against the law's constitutionality).

latent toolkit of congressional powers that Congress can deploy if hostility to a given president arouses it to do so. Indeed, the Johnson impeachment's failure might indicate a capacity for self-correction that should weigh against wholesale suspicion of Reconstruction-era separation-of-powers precedents other than removal limitations.[167]

From that point of view, the Grant rider's requirement that all army orders go through the Army's Chief General warrants more serious consideration as a valid precedent. Holding aside for the moment the restrictions Grant's removal, this provision would simply have exercised Congress's power to design the military command structure by requiring that certain orders from the Commander in Chief flow through a particular office. Unlike the Meigs rider, the provision did not, by its plain terms, require any particular individual to perform this function; nor for that matter did it vest direct control over the military in an officer other than the President. On the contrary, the provision simply vested a particular authority and responsibility—issuing orders to the army—in a particular office. Even absent removal limitations, to be sure, this vesting of duties strengthened the Army Chief's bargaining position in policy disputes with the President, and Grant in fact employed his statutory authority to undermine certain directions from the President.[168] In the event of an impasse, moreover, resignation or removal, or perhaps a court martial for insubordination, might have been the President's only means of getting his way. But building such friction into the command structure could constitute a valid exercise of Congress's powers to govern the military and pass laws necessary and proper to discharging other officers' powers; it is not an unconstitutional imposition on the President's Commander-in-Chief authority.[169]

4. Early Twentieth-Century Military Reorganization and the National Security Act of 1947

In the first half of the twentieth century, the United States's rise to global preeminence in two World Wars and the early Cold War prompted a renewed set of congressional debates over military organization. During World War

[167] *Cf*. BRUFF, *supra* note __ at 175 (noting that "the Johnson acquittal provided some precedential support for the constitutional unity of the executive branch under presidential command").

[168] *See* CHERNOW, *supra* note __, at 589, 596 (describing orders from Grant to subordinate military officers that contradicted President Johnson's objectives).

[169] President Johnson, to be sure, objected strenuously to the provision and advised military officers by proclamation of their duty to obey orders from the President and others within the chain of command, see G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 72 (1898), but Grant employed the powers of his office on the assumption the statute was valid.

I, the so-called Overman Act gave the President just the sort of command flexibility that modern presidents, invoking the *Meigs* opinion, have claimed as a matter of constitutional right. Under this statute, the President held authority "to make such redistribution of the functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act."[170] Those purposes specifically included "successful prosecution of the war" and "the more effective and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces."[171] This statute, however, expired six months "after the termination of the war by proclamation of the treaty of peace," at which point "all executive or administrative agencies, departments, commissions, bureaus, offices, or officers" were to revert to "the same functions, duties, and powers as heretofore or hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding."[172]

In 1919, the War Department proposed legislation that, among other things, would have preserved such presidential flexibility with respect to military duties and functions.[173] Opponents argued that this consolidation of power was antithetical to republican government; a blistering report by one Senator decried "the spirit displayed by its framers throughout the whole bill—a consuming desire for despotic, unrestricted power—militarism run mad."[174] The bill died. Congress instead largely prescribed the Army's structure itself in the National Defense Act of 1920.[175]

During World War II, institutional problems resurfaced. In particular, Army-Navy rivalries and coordination problems repeatedly marred combat performance; the British Air Marshal observed that "[t]he violence of interservice rivalry in the United States had to be seen to be believed and was

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[170] Act of May 20, 1918, Pub. L. No. 65-152, § 1, 40 Stat. 556, 556.

[171] *Id.*

[172] *Id.* §§ 1, 6, 40 Stat. at 556, 557.

[173] [1919-08-04 Cong. Rec. at 3600 (recording War Department's transmission of bill that would require the President to "merge" existing War Department offices and then grant the President "authority to make such distribution or redistribution of the duties, powers, functions, records, property, and personnel of such previously existing departments, bureaus, and offices as he may deem necessary for the efficiency of the military service," as well as "authority to prescribe the duties, powers, and functions of officers of the services, units, and organizations" authorized for the Army).] *See also* WAR DEPARTMENT, ANNUAL REPORTS 1919, vol. 1, part 1, at 478, 480 (proposing this legislation).

[174] SEN. GEORGE E. CHAMBERLAIN, ARMY REORGANIZATION BILL: ANALYTICAL & EXPLANATORY STATEMENT 8 (Sept. 5, 1919).

[175] National Defense Act of 1920, Pub. L. No. 66-242, 41 Stat. 759 (June 4, 1920).

an appreciable handicap to their war effort."[176] In what might admittedly be construed as a precedent for broad Commander-in-Chief authority over military duties, President Roosevelt improvised a coordinating body of "joint chiefs" including top officers from the Army and Navy to oversee operations and in some ways undermining the service secretaries' command authority; he also gave the Army and Navy precedence in different theaters and in some instances placed units from one service under the command of officers from the other.[177] These measures, however, failed to alleviate inter-branch friction, thus demonstrating how powerfully statutory and institutional structures could limit presidential authority over the armed forces.[178]

These continuing problems led President Truman to again propose statutory consolidation of military functions.[179] Recognizing that post-War rivalry with the Soviet Union would necessitate more or less permanent mobilization and an effective global military deterrent, Congress took action this time in the National Security Act of 1947.[180] But even this reorganization again fell far short of the degree of flexibility sought by the President and some military leaders.[181] Among other changes, the 1947 statute merged the War and Navy Departments into a single new agency, the National Military Establishment (later renamed the Department of Defense), to be headed by a new Secretary of Defense.[182] It also created the Air Force as a distinct service and established separate Secretaries of the Army, Navy, and Air Force with authority over their respective services, subject to the general direction of the Secretary of Defense.[183] Though significant, these changes deliberately stopped short of complete consolidation, and the Act imposed multiple impediments to direct presidential control over the services.

To address renewed fears about militarism and dictatorship and appease concerns about preserving distinct service identities, Congress included statutory definitions of each service's functions in the Act.[184] It also sharply

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[176] JAMES R. LOCHER III, VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON 20-21 (2002).

[177] DALE R. HERSPRING, THE PENTAGON & THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH 23-26, 31 (2005); James R. Locher III, *Has It Worked?: The Goldwater-Nichols Reorganization Act*, 54 NAVAL WAR COLLEGE REV. 95, 96 (2001).

[178] HERSPRING, *supra* note __, at 40-42.

[179] *Id.* at 97-98.

[180] Pub. L. No. 80-253, 61 Stat. 495 (1947).

[181] *Id.* at 98-99.

[182] National Security Act of 1947, Pub. L. No. 80-253, §§ 201-202, 61 Stat. 495, 499-500 (July 26, 1947).

[183] *Id.* §§ 205-208, 61 Stat. at 501-04.

[184] *See id.* at §§ 205(e), 206(b), 207(f), 61 Stat. at 501-03. For concerns about militarism in the legislative history, see, e.g., [1947-07-19 debate, Cong. Rec. 1947 (statement of Rep. Hoffman) ("to permit immediate or gradual growth of military control of war management

limited the new Secretary of Defense's authority, giving the office power to set general policies but not to issue direct commands,[185] though subsequent amendments in 1949, 1953, and 1958 expanded the Secretary's authority.[186] Some critics, including the Marine Corps Commandant, worried that unification of the services would cause a withering and eventual abolition of the Marine Corps and naval aviation, despite those components' distinguished contributions to the recent Allied victory.[187] Congress addressed those concerns by adding specific statutory protections for marines and aviators within the Navy.[188] Finally, building on the jerry-rigged joint command structure developed during the war, the Act created the National Security Council and Joint Chiefs of Staff.[189] In another nod to militarism fears, however, the statute specifically limited these bodies to advisory rather than command functions.[190]

Amid all these changes, Congress recognized and preserved the President's constitutional authority as Commander in Chief. Some legislative history even appeared to take a broad view of such presidential power. A Senate committee report observed, for example, that "[t]he creation of such an official [as the Secretary of Defense] in no way reduces the responsibility and authority of the President who, by the Constitution, remains both the Commander in Chief, and also the source of all executive power in the Government."[191] Similarly, during floor debates, Senators and

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is to follow the path of militarism—to disaster")]; [1947-07-07 debate, Cong. Rec. 8297 (statement of Sen. Gurney) (responding to "some who express a fear that the creation of this office [the Secretary of Defense] will lead toward dictatorship")]; [1947-07-07 debate, Cong. Rec. 8316-17 (statement of Sen. Robertson) (expressing concerns that the bill will foster militarism)]; *National Security Act of 1947*, H.R. Rept. No. 80-961, at 7 (June 16, 1947) (additional views of Clare E. Hoffman, Chairman) ("A careful reading of the bill, of the hearings, and a realization of the implications justify the conclusion that the possibilities of a dictatorship by the military are in this legislation."). More practical worries about loss of Navy prestige and congressional influence over procurement and basing decisions appear also to have motivated Congress's weakening of the proposed motivation. *See* Locher, *supra* note __, at 98.

[185] National Security Act § 202, 61 Stat. at 500 (granting limited duties to the Secretary and providing specifically that the Army, Navy, and Air Force Departments "shall be administered as individual executive departments by their respective Secretaries").

[186] Locher, *supra* note __, at 99.

[187] *See, e.g.*, *Statement of Gen. A.A. Vandergrift, Commandant, United States Marine Corps, Washington, D.C.* (Apr. 22, 1947), Hr'gs Before the Committee on Armed Services of the U.S. Senate, 18th Cong., First Sess., on S. 758, pt. 2, at 411-13.

[188] National Security Act § 206(b), (c), 61 Stat. at 501-02.

[189] *Id.* §§ 101, 211, 61 Stat. at 496-97, 505.

[190] *Id.* Although less relevant here, another noteworthy innovation in the statute was its creation of the Central Intelligence Agency. *Id.* § 102, 61 Stat. at 497.

[191] *National Security Act of 1947*, 80th Cong., 1st Sess., S. Rep. No. 239, at 11 (June 5, 1947) (reporting bill from Senate Committee on Armed Services).

Representatives recognized the President's ultimate constitutional power; some, for example, justified the new position of Defense Secretary as a measure aimed at easing the President's workload, rather than displacing his command authority.[192]

As a practical matter, however, the statute, like earlier enactments, presumed broad congressional authority to structure the offices and command relationships through which presidential power would be exercised. Indeed, neither the Act itself nor the extensive debate surrounding it would have made much sense if the President held constitutional authority to simply reorganize military forces and command structures as he saw fit. Stating the constitutional theory implied by the bill itself, one Congressman observed in floor debate, "I would remind you that the responsibility for the organization and maintenance of our Army and Navy is not one which the Constitution places upon the Commander in Chief. It is one which is imposed upon the Congress . . . ."[193]

Even the executive branch appeared to acknowledge this view. Early in the legislative debates, it submitted a joint statement from the War and Navy Secretaries calling for legislation with particular features, including provisions to ensure that "[t]he armed forces shall be organized" into separate services and that "[e]ach [service] shall be under a Secretary and, under the over-all direction of the Secretary of National Defense, shall be administered as an individual unit."[194] Likewise, the same Senate committee report that referred to the President as the "source of all executive power" observed that "[t]he safeguard against militarism in this country is not to be found in the costly confusion and inefficiency of uncoordinated executive agencies with confused lines of authority"—thus seemingly acknowledging that Congress could create, if it wished, just such confused and inefficient agency relationships within the military.[195] More directly, a House committee report observed that "[t]he specific powers given the Secretary of Defense have been carefully delineated in the bill so that there can be no doubt as to the

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[192] *See, e.g.*, [1947-07-07 Cong. Rec. at 8297 (statement by Sen. Gurney) ("It is universally recognized that all are forces are subject to the direction of the President as constitutional Commander in Chief. . . . But all of us know full well that the overburdened Chief Executive of our Government . . . cannot possibly discharge [the] responsibility [of directing all military subordinates] with a modern military organization.")]; *National Security Act of 1947*, H.R. Rept. No. 80-961, at 4 (July 16, 1947) ("The complexity and magnitude of the President's task in peace and war are such that your committee believes it is a generally accepted fact that he needs a full-time civilian official to assist him in the performance of his onerous duties as Commander in Chief of the armed forces. The Secretary of Defense fills this need.").

[193] [1947-07-19 Cong. Rec. at 9419 (statement by Rep. Cole)]

[194] Letter to the President from Robert P. Patterson, Secretary of War, and James Forrestal, Secretary of the Navy (Jan. 16, 1947), *reprinted in* S. Rep. No. 80-239, at 5.

[195] S. Rep. No. 80-239, at 16.

kind and scope of the powers he will exercise."[196] This report thus asserted unambiguously that Congress may define, and limit, the military authorities of officers other than the President.

On the whole, then, both the Act itself and its legislative history support broad congressional power to allocate military duties and authorities by statute.

5. The Goldwater-Nichols Act of 1986

A last major military reorganization took place in 1986, when Congress sought to update and improve the 1947 structure in the Goldwater-Nichols Department of Defense Reorganization Act.[197] This Act took military unification much further by authorizing the President, "through the Secretary of Defense," to establish so-called "combatant commands" with authority over forces in particular regions of the globe.[198] Under the structure established by the Act, military commanders drawn from the different services would exercise command authority over particular units, also drawn from different services and assigned to the command by the service secretaries as directed by the Secretary of Defense; these combatant commanders would then bear responsibility for achieving military objectives within the region under their charge.[199] At the same time, the Act relegated the service secretaries—officers who once held exclusive command authority over entire branches of the military—to an essentially supportive role, with power over training, equipping, and disciplining their respective services but no power of actual military command.[200] Finally, the Act made additional adjustments to the National Security Council, consolidating authority in the Chairman of the Joint Chiefs while allowing Joint Chiefs to express dissenting views.[201]

As with the National Security Act of 1947, neither this statute nor the multi-year "battle of the Potomac" fought to enact it would have made any sense if Congress lacked power to define duties and authorities within the

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[196] H.R. Rept. No. 80-961, at 4.

[197] Pub. L. No. 99-433, 100 Stat. 992 (Oct. 1, 1986).

[198] *Id.* § 211, 100 Stat. at 1012-13 (codifying new provisions at 10 U.S.C. §§ 161, 162).

[199] *Id.*, 100 Stat. 1012-16 (codifying new provisions at 10 U.S.C. §§ 162, 164, 165).

[200] *See generally* Mark P. Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905 (2019); Andrew J. Bacevich, *Elusive Bargain: The Pattern of U.S. Civil-Military Relations Since World War II*, *in* THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II 207, 245 (ANDREW J. BACEVICH, ED., 2007).

[201] Pub. L. No. 99-433, § 201, 100 Stat. 1004-10 (codifying new provisions at 10 U.S.C. §§ 151-155).

military apparatus.[202] The legislation's entire purpose was to break down prior command relationships and replace them with new ones better suited (presumably) to achieving the nation's military and foreign policy objectives.[203] Again, even the executive branch appeared to acknowledge congressional authority to make such changes. In a statement of executive views early in the legislative process, President Reagan cautioned that any new statute "must not infringe on the constitutionally protected responsibilities of the President as Commander in Chief."[204] He explained: "Any legislation in which the issues of Legislative and Executive responsibilities are confused would be constitutionally suspect and would not meet with my approval."[205] But the very same statement went on to discuss the President's goals without suggesting any constitutional difficulty with statutory assignment of duties and command relationships.

President Reagan wrote, for example: "Where the roles and responsibilities of each component of our defense establishment are necessarily placed in law, they must be clear and unambiguous, but not so constrained or detailed as to impair operational flexibility or the common sense of those in positions of responsibility. . . . [Laws] should establish sound, fundamental relationships among and between civilian and military authorities . . . ."[206] Elsewhere, he advocated strengthening the Secretary of Defense's authority[207] and "set[ting] apart and establish[ing] in law" the Joint Chiefs Chairman's "unique position and responsibilities."[208] Reagan's eventual signing statement on the final legislation indicated no constitutional objections.[209]

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[202] JAMES R. LOCHER III, VICTORY ON THE POTOMAC: THE GOLDWATER-NICHOLS ACT UNIFIES THE PENTAGON (2004).

[203] Locher, *supra* note __.

[204] *Message from the President of the United States Transmitting His Views on the Future Structure and Organization of Our Defense Establishment and the Legislative Steps that Should be Taken to Implement Defense Reforms*, H.R. Doc. 99-209, at 1-2 (Apr. 28, 1986).

[205] *Id.* at 2. Elsewhere Reagan observed cryptically: "Restrictions in the law that prohibit the establishment of certain command arrangements should be repealed. My authority as Commander in Chief is sufficient to deal with any necessary command arrangements or adjustments in the assignment of forces that unforeseen circumstances could require." *Id.* at 5. These sentences seem ambiguous as to whether Reagan was advocating repeal of command restraints because he considered them unconstitutional or simply because they were unduly constraining.

[206] *Id.* at 3.

[207] *Id.* at 4.

[208] *Id.* at 5.

[209] President Ronald Reagan, *Statement on Signing the Goldwater-Nichols Department of Defense Reorganization Act of 1986* (Oct. 1, 1986), https://www.presidency.ucsb.edu/documents/statement-signing-the-goldwater-nichols-department-defense-reorganization-act-1986.

Much like President Reagan's statement, some assertions in key legislative documents could imply that Congress believed a degree of command flexibility was constitutionally required. A key provision in the Act prescribed that "[u]nless otherwise directed by the President, the chain of command to a unified or specified combatant command runs—(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command."[210] Commenting on this provision, a conference committee report on the final legislation explained that "the conferees determined that the extremely important chain of command to the warfighting commands should be clearly prescribed."[211] Accordingly, the report explained, the report "specif[ied] the normal chain of command," but it did so "[w]ithout infringing upon the President's authority as Commander in Chief to direct otherwise."[212]

Though seeming to assert robust authority to prescribe chains of command, this cryptic qualification by the conferees might imply that preserving presidential authority to alter command structures was constitutionally necessary; alternatively, it might suggest only that Congress saw fit to preserve such flexibility as a matter of prudence. Whatever the correct view, however, more specific assertions in the very same report contradict any inference of preclusive general presidential control over military duties. For example, the very next paragraph addressed separate provisions precluding the Chairman of the Joint Chiefs from exercising command authority.[213] According to the report, "the conferees intend[ed] that (1) the JCS Chairman would not be part of the chain of command, and (2) the chain of command would not run through the JCS Chairman."[214] Likewise, an earlier Senate committee report indicated that its bill would preserve the President's authority as commander in chief despite specifically precluding any exercise of command authority by the Chairman of the Joint Chiefs.[215]

On balance, then, both the Act and its history once again support broad congressional authority to structure the offices and command relationships through which the executive branch exercises military power.

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[210] Pub. L. No. 99-433, § 211, 100 Stat. at 1013 (enacting provision to be codified at 10 U.S.C. § 162(b)).

[211] *Conference Report*, H.R. Rep. No. 99-824, at 118 (Sept. 12, 1986).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] Senate Committee on Armed Services, *Department of Defense Reorganization Act of 1986*, S. Rept. 99-280, at 38 (Apr. 14, 1986).

C. Implications

Congress's broad authority to allocate military duties, reflected not only in the Constitution's text and structure but also in legislative and executive practice across the Republic's history, carries general implications for separation of powers that I will address later.[216] This authority also, however, has immediate concrete significance.

To begin with, the understanding developed here places recent statutes assigning military functions to officers other than the President on rock-solid constitutional footing. One important recent example is the statute mentioned earlier that grants the President and Secretary of Defense joint authority over whether to undertake certain cyber operations.[217] If the President's executive power or commander-in-chief authority entailed preclusive authority over such governmental decisions, then such statutory limitations on the President's personal authority would be unconstitutional. But they do not, for all the reasons I have indicated.

By the same token, Congress might impose measures that go even further, giving the Secretary or other senior officers authority over nuclear weapons, for example, or over troop withdrawals from the Korean peninsula, as recent proposed legislation would do.[218] Lower down the hierarchy, it could also impose more rigid restraints on particular commands so as to give the Senate greater say in who actually holds specified operational authorities in the event of a conflict.

To the extent past executive-branch opinions and statements suggest otherwise, such assertions are mistaken. Perhaps the most thorough and thoughtful opinion in this vein is OLC's Clinton-era opinion concluding that Congress could not by statute preclude assignment of U.S. forces to a non-U.S. commander as part of a United Nations operation.[219] Although OLC reasoned that such authority is inherent in the President's power to command U.S. forces, the President's commander-in-chief power properly carries no such implication. For one thing, even if the President generally held broad authority over military assignments, it would not follow that the President's command authority entails a preclusive power to place U.S. forces under officers who are not themselves subject to presidential command.[220]

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[216] *See infra* Part IV.

[217] Pub. L. No. 115-232, tit. A, div. XVI, § 1642, 132 Stat. 2132 (2018), 10 U.S.C. § 394 note.

[218] United States and Republic of Korea Alliance Support Act, H.R. 889, 116th Cong. (introduced Jan. 30, 2019).

[219] *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996).

[220] According to John Yoo, presidents had never before claimed that such authority was part of the Commander in Chief power. JOHN YOO, THE POWERS OF WAR AND PEACE: THE

Furthermore, and more to the point here, because Congress holds authority to define military officers' duties and command relationships, presidents lack authority to disregard such restraints; they must instead exercise command authority through the particular mechanisms Congress has provided. Accordingly, if Congress precludes assignment of U.S. forces to foreign commanders, thus effectively defining command of U.S. forces as an exclusive responsibility of American officers, then presidents lack constitutional power to override Congress's choice.

This constitutional analysis, of course, does not mean that limiting presidential command authority in these ways is necessarily prudent or wise. The best course may often be to retain clear presidential accountability for matters of war and peace and operational success or failure. Indeed, the broad and flexible authority over military responsibilities that Congress has generally provided to the President seems to reflect just that type of judgment. It might also be the case that binding presidential authority too tightly, particularly with respect to such weighty matters of national security, could risk undermining constitutionalism as a whole by tempting presidents to defy limits on their power during an emergency.[221] Under the constitutional analysis advanced here, however, such judgments are ultimately Congress's to make; the Constitution has not already made them for us.

Congressional authority to vest duties in offices also does not necessarily mean that Congress can simultaneously impair presidential supervision and removal of the officer exercising those duties. Grasping the full contours of this question, however, requires grappling with yet another question that has been a matter of historic debate but is largely neglected in contemporary scholarship: the scope of presidential removal authority over military officers.

III. PRESIDENTIAL REMOVAL AUTHORITY

A next key question regarding congressional authority over military offices concerns presidential removal power. Do presidents necessarily hold constitutional authority to remove all military officers at will, or can Congress instead grant such officers tenure protection or require their removal through specified procedures, such as court-martial prosecution? Earlier in the country's history, this question was a matter of extensive debate, yet for all the ink spilled over removal in general, modern scholars have given the question and its broader implications comparatively little attention.[222]

CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 173, 175 (2005).

[221] *See* Adrian Vermeule, *The Publius Paradox*, 82 MODERN L. REV. 1 (2019).

[222] Two past treatments have briefly defended these removal limitations. *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1399-

In fact, the best view of the constitutional text and structure, interpreted in light of subsequent practice, supports a result with respect to military officers that administrative lawyers may find surprising. In the civil and administrative context, the removal debate has resulted (for the moment at least) in case law that generally supports presidential authority to remove officers but grants Congress limited authority to give certain positions tenure protection. With respect to the military, by contrast, longstanding practice supports allowing limits on presidential removal authority over all but the most senior military officials, at least during peacetime, so long as Congress has provided by law for robust alternative means of command discipline. In this Part, I first defend this understanding of Article II and then address its implications for congressional authority.

A. Congress's Power to Limit Presidential Removal

1. The Constitutional Text and Structure

a. Removal as Default Commander-in-Chief Authority

As noted earlier, the extent of presidential removal authority is one of the oldest and most fraught debates in constitutional law. Although the Constitution says nothing specific about presidential removal, the First Congress apparently determined, following extensive debate, in its "Decision of 1789" that at least principal executive officers are properly subject to at-will termination by the President.[223] At any rate, the debate resulted in a set of statutes that made no provision for removal but referred obliquely to presidential removal of the department head. Attorneys General and other commentators at the time understood this outcome to imply a constitutional removal power for the President.[224]

One department addressed in these statutes, albeit not the initial focus of debates, was the Department of War.[225] This early practice thus supports viewing at least the Defense Secretary and other senior civilian officials with responsibility for military functions as removable at will by the President.

1400 (2012) (arguing the limitations are valid exercises of Congress's power over military discipline and accord with other cases upholding removal limitations), and Barron & Lederman, *supra* note __, at 1105 ("Each of the branches has long accepted . . . that Congress can provide for courts-martial to have a decisive role, even countermanding the President's judgments, in some personnel questions, including dismissal from the service."). *See also* Rudesill, *supra* note __, at 406-07 n.51 (noting "reasonable disagreement" over the question).

[223] Prakash, *Decision of 1789*, *supra* note __.

[224] *Id.*; *see also infra* Part III.A.2.a.

[225] *See* Prakash, *Decision of 1789*, *supra* note __.

Even apart from this history, moreover, the constitutional text and structure offer particularly strong reasons to presume presidential removal power, at least as a default rule, with respect to all officers with military authority. The President, after all, is Commander in Chief. Whatever else this status entails, it must carry some constitutional power to ensure adherence to presidential commands. Presuming presidential authority to impose disciplinary measures other than removal or suspension, however, would violate more specific constitutional prohibitions on ex post facto laws and punishment without due process.[226] Removal and suspension, by contrast, hold a deep pedigree as basic aspects of command authority, even apart from the broader history of removal debates going back to the Decision of 1789.[227]

The Constitution's exclusion of military offices from impeachment reinforces this inference. Lest the Constitution create a dangerous vacuum of military unaccountability, military officers must be accountable, directly or indirectly, to the President if they are not accountable to Congress through impeachment. Joseph Story's influential treatise thus explained military officers' exclusion from impeachment by reference to the alternative system of military discipline: "The very nature and efficiency of military duties and discipline require this summary and exclusive jurisdiction; and the promptitude of its operations are not only better suited to the notions of military men; but they deem their honour and their reputation more safe in the hands of their brother officers, than in any merely civil tribunal."[228]

It is true that, even without the Commander in Chief Clause, one might derive presidential removal authority from textual provisions invoked in other settings, such as the Vesting and Take Care Clauses, but those provisions seem less readily applicable to the military. By obligating the President to ensure faithful execution of the laws, the Take Care Clause arguably implies authority to remove officers who execute laws unfaithfully. As Saikrishna Prakash has observed, however, it is not obvious that most military functions constitute execution of the laws.[229] To be sure, the military has at times served law enforcement functions, but since 1878 the Posse Comitatus Act and other statutes have severely limited such use of the military;[230] a conventional military campaign amounts to law-execution only in the attenuated sense that it involves carrying out some express or implied congressional objectives. Alternatively, removal authority might be part of

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[226] *See* PRAKASH, *supra* note __, at 158 (arguing the President lacks unilateral authority to impose such penalties).

[227] *Id.*

[228] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 258-59 (1833; reprinted 1991).

[229] Prakash, *Removal*, *supra* note __, at 1837.

[230] 18 U.S.C. § 1385. For a brief primer on current statutory restraints, see Nevitt, *supra* note __, at 471-73.

the "Executive Power" conferred on Presidents by the Vesting Clause. Prakash in fact endorses this view, arguing that "the Constitution's grant of executive power encompasses a removal power" with respect to executive officers.[231] But applying that view here requires presuming not only that the Vesting Clause has substantive content (rather than simply conferring the powers granted elsewhere in Article II), but also that it too properly extends beyond law execution into other aspects of traditional executive authority. Recent scholarship, however, has called that view into question, at least as a matter of original meaning.[232] In any event, whatever other provisions might be applicable, the Commander in Chief Clause provides a specific textual anchor for presuming presidential removal authority with respect to military officers.

This conclusion nevertheless is not the end of the story, because here, as in other areas, the most difficult question is not whether the Article II supports inferring presidential removal authority as a constitutional default, but whether the Constitution ever allows Congress to limit that authority. Despite all the reasons for generally inferring presidential removal authority, modern case law, at least, could support relaxing this requirement with respect to certain narrow functions, even within the military, such as those relating to military justice. Simplifying somewhat, after suggesting in one case that at-will presidential removal is essential for executive officers,[233] the Supreme Court held during the New Deal that Congress may grant tenure protection to "quasi-legislative" and "quasi-adjudicative" offices such as multi-member regulatory commissions, but not to "purely executive" offices.[234] Half a century later, the Court qualified even that conclusion by holding that Congress could require for-cause removal for even a purely executive position such as a prosecutor if the office's responsibilities were relatively narrow and some particular functional need justified independence.[235]

Under this framework, military offices would presumably be purely executive (and thus subject to at-will removal) as a general matter, but tenure protection could be justified in particular narrow settings involving a functional need for independence. In keeping with this logic, several adjudicatory military offices hold tenure protections of the sort associated with independent agencies and adjudicatory officers in the administrative context. Judges on the Court of Appeals for the Armed Forces, for example, are appointed to fifteen-year terms and removable only "by the President, upon notice and hearing, for (1) neglect of duty; (2) misconduct; or (3) mental

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[231] *Id.* at 1815.
[232] Mortenson, *supra* note __.
[233] Myers v. United States, 272 U.S. 52 (1926).
[234] Humphrey's Executor v. United States, 295 U.S. 602 (1935).
[235] Morrison v. Olson, 487 U.S. 654 (1988).

or physical disability."[236] Military judges are similarly protected against adverse treatment based on their rulings even though they are military officers within the chain of command.[237]

But it turns out that such narrow, functionally justified limitations are only the tip of the iceberg with respect to the military. Congress has enacted much more general removal restraints, albeit ones that involve a model of independence quite alien to the usual debates in administrative law.

b. The Complicating Factor of Military Discipline

Since 1866, governing statutes have limited disciplinary removal of nearly all military officers in peacetime without a court martial. The current version of the governing statute provides: "No commissioned officer may be dismissed from any armed force except (1) by sentence of a general court-martial; (2) in commutation of a sentence of a general court-martial; or (3) in time of war, by order of the President."[238] At the same time, the Uniform Code of Military Justice makes disobedience of lawful orders, as well as other forms of insubordination, punishable by court-martial through sanctions including, when appropriate, removal from office.[239] Today, "dismissal" is a term of art for a punitive separation, akin to the "dishonorable discharge" of enlisted personnel,[240] and dismissal by a general court-martial sentence generally results in a loss of veterans' benefits.[241] Other statutes, however, more generally regulate involuntary separation. Apart from certain officers

[236] 10 U.S.C. § 942(c).

[237] 10 U.S.C. § 826(c)(2).

[238] 10 U.S.C. § 1161(a); *see also* 10 U.S.C. § 123(a) ("In time of war, or of national emergency declared by Congress or the President after November 30, 1980, the President may suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioned officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard Reserve."); Kahn v. Anderson, 255 U.S. 1, 10 (1921) (indicating that the term "time of peace" in this statute requires "not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed"). Section 1161(b) also provides for an officer's termination following an extended unauthorized absence or certain criminal convictions by a court martial or civilian court.

[239] *See* 10 U.S.C. § 890 (willful disobedience); *id.* § 889 (disrespect toward superior officer). For a much earlier statute to similar effect, see Act of Mar. 2, 1799, ch. 24, § 1, art. 24 (prescribing "death, or such other punishment as a court martial shall direct" for "[a]ny officer, seaman, mariner or other person [in the navy] who shall disobey the orders of his superior").

[240] 2 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE & PROCEDURE § 16-17(C) (10th ed., 2018).

[241] *See, e.g.*, 38 U.S.C. § 5303(a); *United States v. Reed*, 54 M.J. 37, 45 (C.A.A.F. 2000); *see generally* Major John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012).

in an initial probationary status,[242] officers in the regular military can generally be discharged against their will only if they are not promoted within certain periods,[243] or if a board of inquiry composed of other officers determines, in accordance with applicable regulations, that their performance was substandard, that they committed "moral or professional dereliction," or that their continued service is "not clearly consistent with the interests of national security."[244]

Furthermore, when Congress first imposed limits on "dismissal" in 1866, the term carried no pejorative implication. Treatises and Attorney General opinions referred to presidential removals of military officers as dismissals.[245] As a 1915 treatise explained, "[d]ismissal by executive order is quite distinct from dismissal by sentence. The latter is a punishment; the former is removal from office."[246] Another treatise from 1920 elaborated that "a reproach upon [the officer's] reputation" was "by no means an essential incident of an executive dismissal," even if the terms "discharge" or "mustering out," rather than dismissal, were typically employed for blameless separations from service.[247] At any rate, during the Civil War, President Lincoln summarily dismissed officers "in a great number of cases, sometimes for the purpose of summarily ridding the service of unworthy officers, sometimes in the form of a discharge or muster-out of officers whose services were simply no longer required."[248] Nineteenth-century statutes limiting presidential dismissal were thus understood at the time as congressional attempts to displace any presidential authority to summarily

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[242] 10 U.S.C. § 630.

[243] 10 U.S.C. §§ 631, 632.

[244] *See* 10 U.S.C. §§ 1181-1182, 1184, 1185-1187 (establishing review process to determine whether the service secretary may remove an officer from active duty); *see also* SECNAV Instruction 1920.6D, "Administrative Separation of Officers," https://www.secnav.navy.mil/doni/Directives/01000%20Military%20Personnel%20Support/01-900%20Military%20Separation%20Services/1920.6D.pdf (regulation governing administrative separation of Navy and Marine Corps officers). Apart from these procedures, the President or Secretary of Defense may also "drop from the rolls" an officer who has been absent without authority for three months. 10 U.S.C. § 1161(b); *see also* 10 U.S.C. § 804(d) (providing no right to trial for such discharges).

[245] *See, e.g.*, *Claim of Surgeon Du Barry*, 4 Op. Att'y Gen. at 608-09 (addressing "the power of the President to dismiss military or navel officers from the service without the sentence of a courtmartial" and equating this authority with removal of civil officers).

[246] MAJOR-GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 524 (1915).

[247] WINTHROP, *supra* note __, at 737; *see also* DAVIS, *supra* note __, at 526 (indicating that the dismissal of an officer dismissed by executive order "may have involved no disgrace"). Winthrop did acknowledge that a non-punitive dismissal without any adjudicatory process could neither impose any disability against future employment nor strip an officer of vested rights such as entitlement to pay. WINTHROP, *supra* note __, at 739-40.

[248] DAVIS, *supra* note __, at 525 n.3; *see also* WINTHROP, *supra* note __, at 737.

remove military officers.[249]

The statutory structure adopted at the close of the Civil War and refined over time thus raises a somewhat different question from more familiar debates over at-will removal. Whereas administrative-law debates typically center on whether Congress can limit presidential control altogether, current and historic military statutes present the question whether Congress can displace outright presidential removal power if it provides instead some alternative mechanism of control. Lacking impeachment authority, Congress, in effect, has reinforced military officers' accountability to the President through the chain of command by criminalizing certain forms of disobedience. At the same time, however, it has implemented this control through courts martial, thus affording a degree of due process that would be lacking if a president simply terminated the officer directly. To the extent this statutory structure is valid, it affords military officers with the rough equivalent of the civil-service protections that prevent arbitrary dismissal for non-officer personnel outside the military.

But are such removal limitations constitutional? On the one hand, Congress not only holds authority to raise armies and provide navies, but also to establish "Rules for [their] Government and Regulation."[250] As a textual matter, prescribing mechanisms of military discipline is a straightforward exercise of Congress's power to establish rules regulating the military. Given the Constitution's express assignment of this power to Congress, any such statutory provision exercising it might therefore override any competing presidential authority to exercise command discipline outside of statutorily prescribed limits. By the same token, statutory limits on discharging military officers might also constitute necessary and proper means of "raising" an army or "providing" a navy; after all, an unremoved officer necessarily remains available for service.

The Supreme Court's broad holding, noted earlier, that "the Legislative Branch [has] plenary control over rights, duties, and responsibilities in the

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[249] BERDAHL, *supra* note __, at 128 (indicating that in "the acts of March 3, 1865 and July 13, 1866," both discussed *infra*, "Congress divested the President of his absolute power of removal at all times"); *see also* DAVIS, *supra* note __, at 524-25, 534; WINTHROP, *supra* note __ at 740; *infra* note __.

[250] For an argument that this constitutional provision authorizing Congress to "make rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. II, § 8, cl. 14, grants broad authority not only over internal military discipline, but also over the military's external projection of force, see Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CINN. L. REV. 391 (2018). *See also* John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813 (2018) (arguing that Congress may bind the President by statute to follow law-of-war restrictions on use of force).

framework of the Military Establishment"[251] could reinforce these textual inferences. As we have seen, furthermore, even absent specific statutes governing military discipline, early authorities like Joseph Story presumed that military discipline would generally occur through the judgments of "military men" rather than the President alone (or impeachment).[252] As a practical matter, such disciplinary mechanisms may help sustain military professionalism and protect officers' careers, thus limiting presidents' ability to make military service a matter of personal allegiance. That objective accords strongly with the framers' oft-stated fear that standing armies could undermine republican governance.[253]

On the other hand, the President does, once again, also hold the constitutional status of Commander in Chief. Allowing removal only through courts martial could greatly burden this command prerogative if it meant that presidents could be stuck with officers in whom they had lost confidence. As one Senator put it in a debate discussed further below, "I can not conceive how discipline could be maintained in the Army if the President of the United States could not weed out the unworthy, the unfaithful, and the dishonest."[254] Avoiding exercises of government power without presidential accountability has been a key reason for inferring removal authority in other settings with respect to core executive offices.[255] The same functional concern might likewise support recognizing a constitutional removal power over military officials.

The tension between these two positions has in fact been a matter of long-running, if largely forgotten, debate. The controversy, moreover, is not only important in its own right, but also offers an important example of apparent constitutional resolution followed by renewed controversy and resolution.

2. Historical Liquidation, De-Liquidation, and Re-Liquidation

a. The Antebellum Understanding

Although Presidents in the early Republic appear to have claimed authority to remove all military officers at will, this practice's validity was contested throughout the nineteenth century.

In an influential 1846 treatise on military law, Captain William C. De

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[251] Chappell v. Wallace, 462 U.S. 296, 301 (1983).

[252] 2 STORY, *supra* note __, at 158-59.

[253] *See, e.g.*, *The Federalist No. 26*, *No. 41*, *in* THE FEDERALIST PAPERS 132-33, 208-09 (Ian Shapiro ed., 2009) (addressing concern).

[254] [1907-01-14 debate (Clay) at 1082]

[255] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.").

Hart argued that presidents lacked "the legal right . . . to dismiss from the service, without trial, a commissioned officer of the army or navy."[256] According to De Hart, the Decision of 1789 provided no authority for such removal power. Officers in civil departments, according to De Hart, "were appointed by the president as aids in the administration of the government, and for the proper and becoming exercise of all its powers he is justly held responsible."[257] Hence, in the 1789 debates, "it was, in reference to civil officers, conceded, that for the faithful execution of the law, the power of removal was incidental to that duty, and might often be requisite to fulfill it."[258] By contrast, because military officers are subject to military discipline for disobedience, they are "the mere actors in a subordinate sphere."[259] "[H]armony of opinions between them and the executive is not requisite for any administrative act or measure of government; and though the president is responsible to the nation for the general direction of military forces, yet he is not so for their individual conduct."[260] Nor, according to De Hart, was a power of immediate presidential removal practically necessary, "because the legally established tribunal [a court martial] can always be convoked for the doing of justice . . . in all cases of military delinquencies."[261]

Echoing De Hart's view, terminated military officers apparently objected repeatedly to being fired without a court martial. In several antebellum opinions, exasperated Attorneys General rejected this view, but the argument, zombie-like, kept coming back. In the first such opinion, in 1842, Attorney General Hugh Legare considered "whether the President of the United States may strike an officer from the rolls, without a trial by a court martial, notwithstanding a decision in that officer's favor by a court of inquiry ordered for the investigation of his conduct."[262] "Whatever I might have thought of the power of removal from office, if the subject were *res integra*," Legare opined, "it is now too late to dispute the settled construction of 1789."[263] That construction, according to Legare, treated removal as deriving "from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust."[264]

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[256] WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTIONAL AND PRACTICE OF COURTS MARTIAL 228 (1846).

[257] *Id.* at 230-31.

[258] *Id.* at 231.

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Military Power of the President to Dismiss From Service*, 4 Op. Att'y Gen. 1, 1 (1842).

[263] *Id.*

[264] *Id.* at 1-2.

The Attorney General went on to draw the opposite inference from De Hart. "[I]f necessity is a sufficient ground" for inferring removal authority with respect to civil officers, Legare reasoned, then "[i]t is obvious that . . . the argument applies *a multo fortiori* to the military and naval departments."[265] Furthermore, although it may be a "very peculiar hardship" to subject "brave and honorable men" holding military commissions to the "capricious despotism" of discretionary presidential removal, prior English practice, as well as apparently the practice of other "nations jealous of their rights, and earnest in upholding and enforcing their laws against all prerogative," nonetheless recognized "the necessity of such a power in the commander in chief of their army and navy."[266]

Just a few years later, in 1847, Attorney General Nathan Clifford revisited the issue at greater length. He, too, relied principally on the Decision of 1789, declaring that "the question was distinctly settled by the Congress of 1789 in favor of the power of the President, so far as it relates to the civil officers of the government."[267] This understanding, according to Clifford, "was acquiesced in at the time, and has since received the sanction of every department of the government."[268] Like Legare, moreover, Clifford viewed the Decision of 1789 as a gloss on the nature of executive power, though he also suggested that removal authority should normally be incident to appointment power.[269] At any rate, he devoted the bulk of his analysis to rejecting any distinction between civil and military officers with respect to removal. Given the Appointments Clause's uniform applicability to civil and military offices, Clifford found it "difficult to appreciate the reasoning which seeks to affix a permanent tenure to military office, while it is admitted that all civil officers appointed under the same clause, with the exceptions specially provided for in the constitution, hold their places subject to the executive discretion. . . . If the power results as a necessary incident in the one case, no good reason is perceived why it does not result in like manner in all other cases where a special tenure is not prescribed."[270]

Finally, in 1853, Attorney General Caleb Cushing reiterated the same conclusions all over again. "Reasons of a special nature may be deemed to exist," he observed, "why the rule [of presidential removal authority] should not be applied to military, in the same way it is to civil, officers; but the legal applicability to both classes of officers is, it is conceived, the settled

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[265] *Id.* at 2.
[266] *Id.*
[267] *The Claim of Surgeon Du Barry for Back Pay*, 4 Op. Att'y Gen. 603, 609 (1847).
[268] *Id.*
[269] *Id.* at 609-10, 611.
[270] *Id.* at 610.

construction of the Constitution."[271] Although military officers may "be deprived of their commissions by the decision of a court martial," Cushing saw this possibility as equivalent to the impeachment option for civil officers.[272] "The difference between the two cases is the form and mode of trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President."[273] In short, Cushing concluded, "I know of nothing essential in the grounds of legal conclusion, which have been so thoroughly explored at different times in respect of civil officers, which does not apply to officers of the Army."[274]

Curiously, none of these opinions relied on the Commander in Chief Clause. On the contrary, all these opinions relied principally on the Decision of 1789 and the presumed equivalence of civil and military officers under the pertinent constitutional provisions. In any event, all concluded, over the repeated objections of disgruntled officers, that the president held removal authority over military officers under the Constitution notwithstanding Congress's provision by statute for such officers' removal by court martial.

By the time of the Civil War, then, presidential removal authority over military officers appeared to be settled; as noted, President Lincoln repeatedly discharged officers on his own authority, sometimes even after a court-martial acquitted them.[275] In fact, in 1862, Congress codified this understanding. It enacted a statute providing:

> That the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service either in the army, navy, marine corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service.[276]

Attorneys General in the years afterwards viewed this statute as confirming

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[271] *Military Storekeepers*, 6 Op. Att'y Gen. 4, 6 (1853).

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *See supra* __. Military appointments and promotions during the Civil War were often self-consciously partisan. *See, e.g.*, Timothy J. Orr, *"All Manner of Schemes and Rascalities": The Politics of Promotion in the Union Army*, *in* ANDREW L. SLAP & MICHAEL THOMAS SMITH, EDS., THIS DISTRACTED AND ANARCHICAL PEOPLE: NEW ANSWERS FOR OLD QUESTIONS ABOUT THE CIVIL WAR-ERA NORTH (2013); Andrew J. Polsky, *"Mr. Lincoln's Army" Revisited: Partisanship, Institutional Position, and Union Army Command, 1861-1865*, 16 STUD. AM. POL. DEV. 176 (2002).

[276] Act of July 17, 1862, § 17, 12 Stat. 594, 596.

the earlier executive branch view. "This provision did not," one wrote in 1868, "clothe the President in any new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him."[277] "So far as [the 1862 Act] gives authority to the President," another wrote in an 1878 opinion addressing an 1861 dismissal, "it is simply declarative of the long-established law."[278]

In the terms employed by some scholars today, legislative and executive practice thus appeared to have "liquidated" the Constitution's meaning with respect to military removal authority, resolving any textual ambiguity on the question in favor of presidential power.[279] Even then, to be sure, it was arguably unclear whether such power existed only in the absence of statutory restraints or even in the face of them. Whatever its scope, however, no sooner had this understanding crystallized than the earthquake of Reconstruction destabilized it.

b. The Reconstruction Watershed

As the Civil War drew to a close, Congress abruptly shifted its view of military removals. First, in March 1865, it enacted a statute allowing any officer dismissed by presidential order to request a court martial on the charges forming the basis for his dismissal.[280] Then, in July 1866, amid intense political conflicts with President Andrew Johnson over Reconstruction policy, Congress went further. As a rider to an appropriations statute, Congress enacted a provision that not only repealed the 1862 statute on removals, but also imposed the following constraint on presidential authority: "And no officer in the military or naval service shall in time of peace, be dismissed except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."[281] Thus, after effectively codifying the executive branch view of presidential authority in 1862, Congress adopted statutes at the start of Reconstruction that effectively codified De Hart's alternative theory. Limitations on peacetime removal of military officers have remained in effect, with minor alterations, ever since.[282]

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[277] *Case of Colonel Berger*, 12 Op. Att'y Gen. 421, 426 (1868).

[278] *Dismissal of Officer in the Marine Corps*, 15 Op. Att'y Gen. 421, 422 (1878).

[279] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019).

[280] Act of Mar. 3, 1865, § 12, 13 Stat. 487, 489 (requiring the President to convene a court martial if a dismissed officer "shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed").

[281] Act of July 17, 1866, § 5, 14 Stat. 90, 92.

[282] *See* 10 U.S.C. § 1161; *supra* note __. A leading treatise on military law from 1920 characterized the 1866 Act as "the first instance, since the organization of the government under the Constitution, in which Congress has expressly prohibited the exercise by the

Given the context and the statutory exclusion of wartime dismissals, these restraints on presidential authority might have been understood when they were first enacted as effectively governing a form of domestic civil administration. The Army, after all, was the federal government's main instrument for enforcing Reconstruction policy in the defeated confederate states,[283] and concerns that President Johnson might disrupt Reconstruction by demobilizing the Army or purging it of disloyal officers might well explain this provision's enactment in 1866. Around the same time, Congress, as noted earlier, also enacted tenure protections for senior government officials, including the Secretary of War and Chief General of the Army, through whom it also required that all Army orders be sent.[284]

Yet general restrictions on military dismissals endured while those on the Secretary of War and Chief Army General did not. As noted, the House of Representatives ultimately impeached President Johnson for violating the Tenure of Office Act by removing the Secretary of War, but the Senate failed to convict in part because of constitutional doubts about the statute's validity.[285] Following Ulysses Grant's election in 1868, Congress repealed the Army Chief rider and relaxed the Tenure of Office Act (eventually repealing it altogether in 1886),[286] but the more general removal restrictions in the 1865 and 1866 statutes remained in effect. They thus continued to govern military removals well after the Army's withdrawal from the South and from law enforcement functions more generally. Indeed, they remain in place to this day, albeit as part of a more reticulated statutory structure.[287] Even if such limitations apply only during peacetime, constraints on presidential removal authority could significantly constrain presidents' power to staff the military officer corps on which they will depend if war in fact erupts.

c. Curious Judicial and Executive Decisions

But are these statutes valid? Rather surprisingly, neither courts nor the executive branch have squarely resolved the question. Instead, courts have issued a curious and confused set of decisions that limit the statutes' scope in

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President of the power of removal from office." WINTHROP, *supra* note __, at 740. The 1866 law rendered the earlier 1865 provision effective only for wartime dismissals. DAVIS, *supra* note __, at 528 n.1.

[283] On the federal government's limited enforcement capacity during Reconstruction, see BROOKS D. SIMPSON, THE RECONSTRUCTION PRESIDENTS 182 (1998).

[284] *See supra* __.

[285] SIMPSON, *supra* note __, at 125-27.

[286] Act of July 15, 1870 (repealing Army rider); Myers v. United States, 272 U.S. 52, 168 (1926) (discussing revision of Tenure of Office Act followed by full repeal in 1887).

[287] *See supra* note __.

some respects, but appear out of step with later decisions. For its part, the executive branch has at times taken advantage of options reflected in these decisions, but on the whole appears to have acquiesced in the statutes' restraints.

To begin with, in the only decision to date directly addressing the 1866 statute's constitutionality, the Supreme Court upheld it, yet it did so based on curious reasoning that likely does not survive later cases. Affirming the Court of Claims and adopting its reasoning, the Supreme Court held in *United States v. Perkins* that a Naval Academy graduate was an officer and that the Secretary of the Navy thus lacked authority to unilaterally discharge him.[288] The Court reasoned that "when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest."[289] The Court went on: "The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto," including dismissal.[290]

Although *Perkins* thus supports the statute's validity, several problems with its reasoning prevent complete confidence in that result. For one thing, the Court's reasoning would not necessarily apply to other officers covered by the 1866 Act's removal limitations who are appointed by the President with Senate confirmation.[291] Insofar as those officers, too, are inferior officers whose appointment Congress could vest in the President alone or the Secretary of Defense, the removal limitation might still be valid under the reasoning in *Perkins*. But on the other hand one might argue that activating the authority to limit removal should require making an affirmative choice to vest appointment authority in the Secretary or President alone.[292]

In any event, as a further difficulty, the reasoning in *Perkins* seems hard to reconcile with later cases. In 1997, in *Edmond v. United States*, the Court

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[288] 116 U.S. 483, 483 (1886).

[289] *Id.* at 485 (quoting *Perkins v. United States*, 20 Ct. Cl. 438 (1885)).

[290] *Id.*; *see also* WILLOUGHBY, *supra* note __, at 1185 (embracing this view of congressional authority over inferior offices based on *Perkins*).

[291] *See, e.g.*, 10 U.S.C. § 624(c) (allowing appointment by the President alone for promotions to lieutenant or lieutenant (junior grade) in the navy or First Lieutenant or Captain in the other branches but otherwise requiring Senate confirmation for promotions); *id.* § 531 (similar for original appointments).

[292] *Cf.* Myers v. United States, 272 U.S. 52, 161–62 (1926) ("Whether the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone would make his power of removal in such case any more subject to Congressional legislation than before is a question this court did not decide in the *Perkins* Case. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.").

held that "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior."[293] Accordingly, the Court went on, "we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[294] As one lower court recently observed, this reasoning directly contradicts *Perkins*, which seemed instead to allow statutory interruption of superior officials' authority to supervise and discipline inferior officers.[295] Even *Morrison*, though differing from *Edmond* in some respects, upheld removal limitations on an independent prosecutor only because they were functionally justified and the prosecutor's mandate was purportedly limited.[296] It did not apply *Perkins*'s logic that Congress's discretion over appointment of inferior officers implies plenary discretion over criteria for their removal. The modern cases thus appear to have abandoned *Perkins*'s formalistic focus on Congress's power to vest appointment authority for inferior officers in favor of a more practical concern with maintaining adequate accountability between subordinate officers and their superiors. Although this focus, as we shall see, might provide grounds for upholding the law, it undermines the precise logic used to reach that result in *Perkins*.

In fact, a separate line of decisions appears to recognize constitutional difficulties with limiting presidential removal authority, yet these decisions, too, are difficult to square with later case law. Beginning in *McElrath v. United States* in 1880, the Supreme Court interpreted the 1865 and 1866 statutes to allow replacement of an officer without a court-martial through confirmation of another individual to take the officer's place.[297] As the Court explained in another decision that year, *Blake v. United States*, the 1866 statute reflected "the serious differences existing, or which were apprehended, between the legislative and executive branches of the government, in the States lately in rebellion, of the reconstruction acts of Congress."[298] Because "[m]ost, if not all, of the senior officers of the army enjoyed, as we may know from the public history of the period, the confidence of the political organization then controlling the legislative branch

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[293] 520 U.S. 651, 662 (1997).

[294] *Id.* at 663.

[295] United States v. Concord Mgmt. & Consulting LLC, 317 F. Supp. 3d 598, 614 (D.D.C. 2018) ("It is unlikely that the broad and dated language of *Perkins* survived *Edmond*, which demands that inferior officers be subordinate to superiors and does not contemplate allowing unremovable officers if 'for the public interest.'"), appeal dismissed, No. 18-3061, 2018 WL 5115521 (D.C. Cir. Sept. 17, 2018).

[296] Morrison v. Olson, 487 U.S. 654, 671-72 (1988).

[297] 102 U.S. 426, 437 (1880).

[298] 103 U.S. 227, 235 (1880).

of the government [i.e., the Republican Party]," Congress expected that those officers "would carry out the policy of Congress, as indicated in the reconstruction acts, and suppress all attempts to treat them as unconstitutional and void, or to overthrown them by force."[299] The Court thus presumed that the statute's purpose was to prevent willful presidential depletion of the force, not replacement of some officers with others confirmed by the Senate. "There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace [officers] by the appointment of others in their place."[300]

Although in these and later decisions the Court expressly avoided resolving any constitutional questions,[301] its reading of the statute might be understood as a saving construction aimed at preserving presidential authority over the officer corps. If so, however, the Court solved one constitutional difficulty only by creating a worse one, at least from the point of view of later cases. Indeed, the Tenure of Office Act originally had precisely the form the Court in *McElrath* and *Blake* attributed to the 1866 Act: it allowed removal of officers only upon confirmation of a Senate-approved successor.[302] In its landmark 1926 decision in *Myers v. United States*, the Supreme Court invalidated a provision directly conditioning removal of an inferior executive officer on Senate approval, yet its reasoning extends equally to provisions conditioning removal on Senate approval of a successor.[303] In both cases, the Senate is free to block presidential displacement of an executive officer in whom the President has lost confidence. The *Myers* majority even appeared to view the removal condition as an improvement over the Tenure of Office Act's original structure.[304] Under modern case law, then, construing the 1866 Act as the *McElrath* and *Blake* decisions did hardly resolves constitutional questions

[299] *Id.* at 235-36.

[300] *Id.* at 237.

[301] *See* Wallace v. United States, 257 U.S. 541, 545 (1922) (noting statutory construction and observing that "[t]he validity of these acts has never been directly passed on by this court in any case"); Mullan v. United States, 140 U.S. 240, 245-46 (1891) (applying statutory construction from *Blake* and *McElrath*); *Blake*, 103 U.S. at 236 (expressing "no opinion" as to whether "the power of the President and Senate . . . could be constitutionally subjected to restrictions by statute"); *McElrath*, 102 U.S. at 437 (likewise avoiding constitutional questions).

[302] Act of March 2, 1867, § 1, 14 Stat. 430, 430 (providing that all civil officers "shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified," but providing that "the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney General" would hold their offices throughout the appointing president's term unless removed "by and with the advice and consent of the Senate").

[303] Myers v. United States, 272 U.S. 52 (1926).

[304] *Id.* at 168.

about the law's validity.

Nevertheless, in more recent cases, lower courts, at least, have appeared to apply the restriction without recognizing any constitutional difficulty. For example, in keeping with its prior decision in *Perkins* (though without citing it), the Court of Claims held in 1968 that an Air Force officer "could be involuntarily separated only under the very limited circumstances recognized by Congress."[305]

For its part, the executive branch likewise applied the statute without recognizing any difficulty in at least one legal opinion. In 1910, Attorney General George Wickersham declined to apply Attorney General Cushing's 1853 opinion on presidential removal authority because it was written "long before the enactment [in the 1866 statute], which forbids the dismissal except upon sentence of a court-martial. This is a limitation upon the power of removal from office of one who had been legally appointed."[306] To the same effect, Attorney General Henry Stanberry opined in 1866 that Congress's initial statute allowing court-martial override of presidential removals was valid.[307] "It does not seem to me obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer," the Attorney General wrote. "On the contrary, . . . [i]t is simply a regulation which is to follow a dismissal, providing, in certain contingencies, for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen."[308] Though the more stringent 1866 prohibition on any dismissal without a court-martial might be distinguishable from this statute, Attorney General Stanberry's reasoning, which appears never to have been reconsidered, at least generally supports congressional authority to condition military removals on court-martial procedures.

As a matter of practice, furthermore, presidents in the decades since appear to have complied routinely with these limitations on their removal power. Although a leading treatise on military law in 1920 asserted that the 1866 statute was unconstitutional given the contrary view "firmly established" in antebellum practice,[309] at least one leading practice manual today does not even indicate any possible constitutional problem.[310]

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[305] Hankins v. United States, 183 Ct. Cl. 32, 40 (1968) (citing 10 U.S.C. § 1161); *see also* Boruski v. United States, 155 F. Supp. 320, 324 (Ct. Cl. 1957) ("the only way an officer of the armed services can be dismissed therefrom is by those methods specifically spelled out by the statutes").

[306] *Boatswain in Navy—Revocation of Warrant*, 28 Op. Att'y Gen. 325, 328 (1910).

[307] *Restoration of Dismissed Military and Naval Officers*, 12 Op. Att'y Gen. 4 (1866).

[308] *Id.* at 5. For some background regarding this opinion, see David J. Barron & Martin S. Lederman, *The Commander in Chief Clause at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1017 (2008).

[309] WINTHROP, *supra* note __, at 744-45.

[310] *See* 6 CORPUS JURIS SECUNDUM ARMED SERVICES § 110 (Mar. 2019) ("compliance

d. An Illuminating Later Debate in Congress

As for Congress, it extensively debated the scope of presidential removal authority with respect to the military at least one other time after Reconstruction, and its apparent conclusions are illuminating, if again not entirely decisive.

In November 1906, President Theodore Roosevelt impulsively dismissed 167 African-American soldiers in three infantry companies based on reports that some men in the companies had engaged in a "riotous disturbance," leading to one death, while stationed in Brownsville, Texas.[311] The evidence supporting these allegations was weak or non-existent, and historians have judged them to be false; in fact, the soldiers were likely framed by racist town residents who wanted the companies relocated.[312] Nevertheless, and despite considerable political controversy at the time, Roosevelt obtusely resisted calls to reinstate the men pending a more thorough investigation.[313]

This sorry episode is relevant here because congressional opposition to Roosevelt's action prompted extensive debate in the Senate over the President's authority to dismiss military personnel without a court martial. Leading the opposition efforts, one Ohio Senator, Civil War veteran Joseph Benson Foraker, introduced a resolution to call for a Senate investigation of the President's action.[314] In support of the resolution, Foraker argued at length on the Senate floor that the President lacked legal authority to fire the soldiers without a court martial. As a constitutional matter, Foraker asserted:

> [N]o one can question that the Congress has power to prescribe by law what rules and regulations shall govern the Army as to its organization, as to the size of the Army, its maximum, its minimum, as to the number of infantry regiments, the number of cavalry regiments, the number of artillery regiments, and the number of batteries, and the number of men in each of these units of organization, and how, Mr. President, particularly, men shall be enlisted and men shall be discharged from the Army, the terms and conditions upon which they shall be enlisted, the rights that

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with applicable statutory and regulatory requirements is necessary before an officer validly can be discharged, dismissed, separated, or released from service").

[311] EDMUND MORRIS, THEODORE REX 453-55, 467 (2001).

[312] *Id.* at 511; JOHN D. WEAVER, THE SENATOR AND THE SHARECROPPER'S SON: EXONERATION OF THE BROWNSVILLE SOLDIERS 129 (1997).

[313] MORRIS, *supra* note __, at 474, 554.

[314] EVERETT WALTERS, JOSEPH BENSON FORAKER: AN UNCOMPROMISING REPUBLICAN 235-36 (1948).

> shall accrue to them on account of their service—long service, faithful service—whether or not they shall be recognized by the Government and be rewarded by the Government. All that rests with Congress as part of that power. As a part of that power it is competent for the Congress of the United States to provide that no man shall be summarily discharged from the Army after he has regularly enlisted except upon certain terms and conditions . . . .[315]

Foraker then argued that then-governing statutes in fact imposed such limitations on presidential discharge of enlisted men, much as the 1866 Act did for officers.[316]

Foraker ultimately succeeded in getting his investigation, but only after he agreed to modify the resolution so as not to question the President's legal authority. In the resolution's final form, the Senate resolved to authorize a committee to "ascertain all the facts" regarding the incident, but did so "without questioning the legality or justice of any act of the President."[317] Foraker thus obtained his investigation at the cost of abandoning his legal theory. (Sadly, the investigation ultimately came to naught. Over the dissent of four Senators, including Foraker himself, the investigative committee upheld the President's action.[318] Foraker then proposed a bill to create a military board of inquiry to investigate the terminations. But though Congress ultimately enacted a substitute convening a board to consider the soldiers' eligibility for reenlistment, the board in the end concluded that only fourteen of the men could reenlist.[319])

Nevertheless, the practical import of this vote is more ambiguous than the Senate resolution's language might suggest. Though Foraker's most articulate opponents disagreed with his analysis of presidential authority, they pointedly did so on statutory rather than constitutional grounds. In particular, Senator John Coit Spooner of Wisconsin argued, despite professing sympathy for the discharged soldiers,[320] that the President held statutory authority to terminate their enlistments.[321] Accordingly, Spooner argued, "[i]t is not necessary to discuss whether the President, as Commander in Chief possesses

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[315] [1906-12-20 debate, 41 Cong. Rec. at 568 (statement by Sen. Foraker)]

[316] *Id.*

[317] [1907-01-21 debate, 41 Cong. Rec. at 1434]; [1907-01-22 debate, 41 Cong. Rec. at 1512]

[318] MORRIS, *supra* note __, at 511.

[319] WALTERS, *supra* note __, at 245-46.

[320] [1907-01-14 debates, 41 Cong. Rec. at 1084 (statement of Sen. Spooner)]

[321] [1907-01-15 debate, 41 Cong. Rec. at 1134]

inherent power to terminate the contract of enlistment."[322] On the merits, Spooner asserted that the Senate lacked power to override a discharge decision within the President's power and that, in consequence, it also lacked competence to conduct the requested investigation.[323] At the same time, however, even Spooner acknowledged Congress's extensive power to regulate and structure the military. At one point early in the debate, he went so far as to observe: "The grounds upon which men may be discharged [from the army] is within the constitutional capacity of the Congress. Whether any man can be discharged for offense without a trial is entirely within the constitutional competency of Congress. Whether the President shall be given the right to dismiss an officer at will without trial is for Congress to say."[324]

Furthermore, despite adding language on presidential authority to Foraker's resolution, the Senate rejected several substitute resolutions that would have asserted more directly that the President in fact held authority to order the discharges.[325] Thus, although President Roosevelt claimed initially to the Senate that he discharged the soldiers in "the exercise of my constitutional power and in pursuance of what, after full consideration, I found to be my constitutional duty as Commander in Chief of the United States Army,"[326] the Senate pointedly declined to endorse this view and its claimed power to investigate the discharges arguably casts doubt upon it.

Overall, then, to quote Edward Corwin, this incident illustrates not only "the President's residual power over the forces," but also that power's "limits."[327] At most, it leaves ambiguous whether the President holds preclusive authority to remove military personnel in the face of statutory restrictions requiring a court martial.

B. Implications

What to make of this history? At this point, despite considerable ambiguity and mixed signals, the overall pattern of conduct by all three branches suggests general acquiescence to Congress's authority to limit, at least during peacetime, presidential removal without a court martial or other procedural protections governing promotions and administrative discharges. The theory suggested in *Perkins* in the late nineteenth-century to explain this

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[322] *Id.* (statement of Sen. Spooner).

[323] [1907-01-14 debate, 41 Cong. Rec. at 1086]

[324] [1906-12-06 debate, 41 Cong. Rec. at 105 (statement by Sen. Spooner) (addressing earlier resolution requesting documents relating to the discharges from the executive branch)]

[325] [1907-01-22 debate, 41 Cong. Rec. at 1503, 1508, 1511-12]

[326] [TR message to Senate, 1906-12-19 debate, 41 Cong. Rec. at 549]

[327] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 295 (5th revised ed., 1984).

practical result, however, appears internally unsatisfactory and inconsistent with subsequent case law, while the limiting construction reflected in *McElrath* and its progeny only exacerbates the statute's arguable constitutional problems.

An alternative theory, reflected in antebellum years in De Hart's treatise and in subsequent congressional debates, offers a better explanation for the statute's validity: Although Congress may not displace the President's command authority over the military as Commander in Chief, it can displace the specific enforcement mechanism of removal, so long as it provides a robust alternative disciplinary mechanism for effectuating the President's directives. In terms employed by then-Professor (now-Judge) Neomi Rao with respect to Senate-confirmed officers, removal may be "sufficient" to ensure adequate presidential control of military officers, but it is not also "necessary"; Congress may displace it with alternative disciplinary mechanisms.[328] By authorizing courts martial to punish disobedience and insubordination, Congress has preserved strong incentives to comply with lawful commands—indeed, incentives arguably stronger than any that exist in civil administration. At the same time, however, Congress has protected officers' positions from arbitrary removal by precluding such punishment without military due process, even if the President has lost confidence in a particular officer for reasons other than such disobedience.[329]

Though quite alien to debates in the civil and administrative context, this understanding accords with the constitutional text and structure at least as well as arguments for inferring preclusive presidential removal authority. It also, at least potentially, establishes a valuable equilibrium well-suited to the military context. While strongly enforcing a general norm of command discipline, it ensures that officers who disobey directives they perceive to be unlawful or unwise will lose their position only if the military justice system fails to back up their judgment. Amid the exigencies of war or another declared emergency, Congress has preserved a different equilibrium that more strongly favors command authority, making dismissal by court-martial optional rather than mandatory.[330] At a minimum, however, Congress's

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[328] Rao, *supra* note __, at 1208. Paralleling the analysis here in some respects, Rao defends for-cause removal limitations for certain inferior civil officers, so long as insubordination is understood to provide cause for termination. Rao, *supra* note __, at 1244-47. She does not address the military specifically, however, and appears to extend this theory only to situations in which "the appointment of [the] officer is vested in the head of a department," *id.* at 1246. That limitation would exclude many military officers whom current law protects from removal without a court martial.

[329] Current statutes do permit review and eventual removal of officers due to deficient performance. 10 U.S.C. §§ 1181, 1182, 1184; *see also supra* __.

[330] One early treatise, arguing that the President held constitutional removal power but should generally allow dismissal by court martial, identified the benefits of this balance: "A

choice to restrict at-will removal in peacetime should stand on solid constitutional ground; any argument to the contrary is unsound.

Could Congress go further and require courts martial for removal even during wartime or a declared emergency? Although in principle the deterrent effect of criminal sanctions should still suffice to ensure obedience, preventing displacement of a recalcitrant or incompetent officer in battlefield circumstances could more concretely interfere with the President's ultimate constitutional authority to direct military operations. Yet this problem could itself be solved by providing (or presuming) some mechanism for temporary suspension or relief from specific duties without permanent removal. Peacetime limitations on removal already mean that presidents may enter an emergency with an officer corps they would not have chosen; to quote one Defense Secretary's glib aphorism, "you go to war with the Army you have—not the Army you might wish to have."[331] Extending removal limitations beyond peacetime into war, if Congress so chose, might then be more a change of degree than of kind in terms of limiting presidential authority.

IV. OFFICE-HOLDING BEYOND THE MILITARY

Congress, then, holds authority not only to allocate military duties to particular offices, but also to displace the President's default removal authority over career military officers by providing sufficiently robust alternative mechanisms of command discipline. Though these conclusions are important in their own right for reasons identified earlier, the analysis supporting them holds at least four broader implications for separation-of-powers law and scholarship.

A. Interring the Unitary Executive Branch

First and foremost, Congress's broad authority over military offices should conclusively undermine the strongest versions of "unitary" executive-branch theory. Under this theory, all executive power necessarily vests in the President, even when placed by statute in a particular subordinate officer, and presidents accordingly may direct how statutory duties are performed or even

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mode of proceeding is interwoven with the military organization of great benefit to the sound constitution of the army. Although the president is unquestionably authorized to deprive any military officer of his commission at pleasure, yet the established practice is, to allow the individual, whose conduct has given dissatisfaction, an opportunity of explaining and vindicating it, by means of a regular tribunal, before he is dismissed, suspended, or even reproved The same usage prevails in the navy." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 165 (2d ed. 1829; reprinted 2003).

[331] DONALD RUMSFELD, RUMSFELD'S RULES (2013).

reallocate them within the executive branch however they see fit.[332] As one early Federalist treatise-writer put it, "the president is not confined in his executive functions to the use of a particular department"; governmental actions "are equally [the President's] acts, whether they emanate from [one department], or any other department."[333] According to a more recent statement of this view, the President, as the unitary receptacle of executive power, necessarily holds authority to "completely withdraw" any executive power vested in a subordinate officer.[334] "Once [the President's] authority is withdrawn," on this account, "the President must make all those decisions previously vested by statute in the now constitutionally disempowered officer, at least until the officer leaves office (and a new officer is appointed) or Congress, by statute, allows some other executive officer to act as the President's agent over those matters."[335]

Although scholars have comprehensively attacked this view with respect to civil administration,[336] even some strong critics of the unitary executive branch have presumed its validity with respect to the military.[337] Yet this presumed distinction between civil and military office-holding is either altogether mistaken or entirely backwards. Congress may or may not hold authority to create so-called "independent" agencies and officials by limiting at-will removal and other means of presidential discipline. Likewise, background normative and constitutional principles may or may not support presuming presidential directive authority with respect to civil offices.[338] But any analysis of these questions should confront that Congress has in fact exercised broad power to structure military positions in closely analogous ways.

As we have seen, arguments that executive branch is too "unitary" to allow congressional assignment of duties to non-presidential offices are descriptive failures even with respect to the military, let alone executive and administrative agencies. Similarly, historic removal protections for military officers should complicate any assumption that presidents necessarily hold

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[332] *See supra* note __.

[333] RAWLE, *supra* note__ at 165-66.

[334] Calabresi & Prakash, *supra* note __, at 598-99.

[335] *Id.* at 599. The D.C. Circuit's recent crytpic decision in *Sherley v. Sibelius*, 689 F.3d 776 (D.C. Cir. 2012), could be read to embrace this view. *See* White, *supra* note __. For a contrary reading, see Nick Bagley, *Sherley You're Joking*, TAKE CARE BLOG (Mar. 27, 2017), https://takecareblog.com/blog/sherley-you-re-joking.

[336] For a sampling of scholarship to this effect, see *supra* note __.

[337] *See supra* note __.

[338] *Compare*, Stack, *supra* note __ (arguing against presumed directive authority), and Percival, *supra* note __ (same), *with* control of administration Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing in favor), *and* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 728-30 (2016) (summarizing debate and defending Kagan's view).

plenary removal authority over all executive officers—a position now being advanced before the Supreme Court in litigation over the tenure-protected head of the Consumer Financial Protection Board.

To my mind, these conclusions with respect to the military only strengthen arguments that Congress holds power to assign duties and structure disciplinary mechanisms in civil administration. Having taken the unitary theory's strongest fortress, non-unitarians might now more easily conquer the territory beyond. Alternatively, those committed to the unitary executive-branch view in civil administration might distinguish military examples on various grounds, including Congress's specific textual powers, longstanding practice, and the special functional need for civilian oversight. Even an argument along those lines, however, would require a considerable shift in current terms of debate: it would suggest that, contrary to much modern commentary and executive-branch bluster, presidential authority is at its nadir, not its apex, in directing the military.

B. Convention and Constraint

A second, related implication bears on current debates over maintaining responsive and accountable government more generally amid turbulent and polarized politics. Recent scholarship has highlighted the importance of "convention," as opposed to hard constitutional law, in our federal government's practical operation. Conventions, in this sense, "are extrajudicial unwritten norms that are enforced by the threat of political sanctions, such as defeat in re-election, retaliation by other political institutions and actors, or the internalized sanctions of conscience."[339] As recent work has emphasized, norms and understandings of this sort may do important work buffering maximal inter-branch conflict within our separation of powers system, thus enabling smoother and more responsive governance.[340] By the same token, conventions may help preserve important values and policy commitments—apolitical law enforcement, for example, or stable monetary policy—even when elected officials have a short-term political interest in violating them. Insofar as tribal politics encourage political actors to play for the win in each case even at the expense of good governance, these effects may be particularly important in our era of acute polarization.[341]

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[339] Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1182 (2013).

[340] *See, e.g.*, STEVEN LIVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (emphasizing importance of "forbearance" to the stability of American democracy).

[341] For a sampling of political science literature on current polarization, see ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF

To the extent all that is true, the constitutional principles developed here hold extraordinary importance. Vesting duties in offices by statute creates a scaffolding on which the political system may build norms and understandings—"conventions" in this theoretical sense—about how those duties will be discharged. The Secretary of Defense or a combatant commander may face different political and reputational pressures (from Congress, professional networks, the media, or elsewhere) than does the President. The same is quite manifestly true of the Attorney General, Treasury Secretary, and any number of other officials. Insofar as these offices require Senate confirmation, moreover, Senators may constrain presidential desires regarding the character and policy aims of officials who hold such positions in the first place.

All these constraints, however, ultimately depend for their operation on some legal separation between the President's wishes and the actual discharge of governmental authorities. If all powers of government could be exercised by the President personally, then only the President's individual electoral accountability would matter. From this point of view, Congress's underlying power to vest authorities in offices may be vitally important to sustaining stable, responsive, and public-spirited government in our era. Indeed, this power may well be even more important to those goals than the more contested authority to limit at-will removal, though the latter has received far more scholarly attention.[342]

It is true that in many cases accurately identifying the boundary between constitutional law and political convention may be difficult, in part because American constitutional law relies heavily on history and practice to resolve textual ambiguities. Here, however, for all the reasons discussed above, the deep structure of constitutional practice, along with primary considerations of constitutional text, history, and structure, support viewing Congress's authority to allocate military and other duties as a matter of constitutional law rather than mere political convention. The understanding's centrality to enabling other mechanisms of political accountability only adds a further practical reason to support it.

It is also true that norms and conventions themselves are not always an unalloyed good. While some norms of government behavior protect the public interest, others may impair it or otherwise deserve repudiation. Indeed, one recent appraisal has condemned that the current structure of military office-holding under the Goldwater-Nichols Act as deeply

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DONALD TRUMP (2018), MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE (2017), and NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2d ed. 2016).

[342] Adrian Vermeule has argued that agencies' real independence is itself a matter of convention rather than statutory law. Vermeule, *supra* note __.

pathological.[343] Current statutory arrangements, according to this critique, give combatant commanders too much effective authority over foreign policy, while also giving the service secretaries too little incentive to match procurement policies to the fighting forces' real needs.[344] To the extent this view is sound, however, it only highlights, once again, the powerful effects of agency design on policy outcomes, even in areas of presumed presidential prerogative like the military. Amid current political vicissitudes, furthermore, the policy inertia generated by these structures might well carry important benefits, even if it also has costs.

In sum, allocating military and other duties, whether in major statutes like Goldwater-Nichols or through piecemeal measures, is one of Congress's most potent means of constraining unilateral presidential action. If employed wisely, this power may enable Congress to generate and reinforce expectations about government policy and official decision-making that foster the long-term public interest, even at the expense of short-term presidential objectives. To the extent our current erratic politics raise fears about rash military action, precipitous changes in policy, or imprudent use of particular weapons systems, Congress might consider responding by more precisely allocating statutory authority over such matters.

C. Securing the Civil Service

A third implication relates to the federal civil service. Recent scholarship by Jennifer Mascott, among others, has called attention to an arguable mismatch between current appointments practice and the range of positions apparently treated as "officers of the United States" under the Appointments Clause as a matter of original usage and early practice.[345] In its recent *Lucia* decision, the Supreme Court confronted this question but effectively sidestepped it,[346] leaving the door open to further waves of litigation challenging administrative actions by civil-service officials.[347] Indeed, following the *Lucia* decision, President Trump issued an executive order casting doubt on both appointment limitations and tenure protections for certain civil officers.[348]

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[343] Nevitt, *supra* note __. For other critical appraisals of the statute, see, *e.g.*, Christopher M. Bourne, *Unintended Consequences of the Goldwater-Nichols Act*, 18 JOINT FORCE QUARTERLY 99 (Spring 1998); Locher, *supra* note __.

[344] Nevitt, *supra* note __.

[345] Mascott, *supra* note __; *see also* Phillips et al., *supra* note __.

[346] 138 S. Ct. 2044 (2018).

[347] *See* Jennifer L. Mascott, *"Officers" in the Supreme Court:* Lucia v. SEC, 2017-2018 CATO SUP. CT. REV. 305, 336 (2018) (discussing pending litigation and noting a "potential torrent" of further cases).

[348] *Excepting Administrative Law Judges from the Competitive Service*, Exec. Order No.

The military history discussed here suggests that such expansive inferences from *Lucia* and the Appointments Clause are wildly over-drawn. As discussed earlier, the set of military positions subject to the Appointments Clause is much broader than in the civil service. Whereas today only the most senior civilian positions are filled in accordance with the Appointments Clause, current governing authority uniformly treats all commissioned military officers as "officers of the United States" under the Appointments Clause.[349] As OLC observed in a Clinton-era opinion, this mismatch is difficult to explain: "[i]t is at least arguable . . . that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees [rather than officers]."[350] To the extent that is true and recent historical scholarship is correct, military practice may have preserved a broader early understanding of "officers" even as practice diverged elsewhere.[351]

From that point of view, military practice might add strength to arguments that existing practice in other areas defies the Constitution, although on the other hand one might interpret current practice instead as reflecting an implicit view that any authority to command military forces in combat, even down to the level of platoons and similar units, is categorically "significant" for Appointments Clause purposes.[352] In any event, military practice should

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13843, 83 FED. REG. 32755, 2018 WL 3388912 (July 10, 2018); *see also* Mascott, *supra* note __, at 548-58 (discussing whether civil service appointment procedures comply with the Appointments Clause).

[349] *See supra* Part I.B.

[350] *The Constitutional Separation of Powers Between the President and Congress*, 20 O.L.C. 124, 144 n.54 (1996).

[351] *See* Mascott, *supra* note __, at 528-30 (discussing early statutes regarding the military).

[352] *See Constitutional Separation of Powers*, 20 O.L.C. at 144 n.54 ("Even the lowest ranking military or naval officer is a potential commander of United States forces in combat—and, indeed, is in theory commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors."). OLC also offered two other, less compelling theories to explain the divergence. First, the Office observed that "[c]ertain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today." *Id.* This theory may have some utility in explaining why certain clerical and administrative positions are no longer treated as offices. In an era of electronic communications and records, for example, routine book-keeping and paperwork functions may lack sufficient responsibility and discretion today to warrant treatment as offices, even if under different technological conditions they carried greater significance. But the theory seems not to explain military practice terribly well. If anything, junior military officers today are probably more closely controlled and supervised, given changes in transportation and communications technology, than were their predecessors.

Second, the Office suggested that military appointments reflect a sub-constitutional practice rather than a controlling understanding of what the Constitution itself requires. *Id.* On this view, although Congress has consistently chosen to require appointment of military

put to rest arguments that an expanded definition of "officers of the United States" in civil and administrative contexts necessarily undermines civil service protections that currently govern the hiring, firing, and disciplining of administrative staff.

In fact, as we have seen, robust statutory constraints on appointment, promotion, and removal have long applied to military officers. There is accordingly little reason to think the Appointments Clause precludes applying comparable restraints on non-military office-holding. With respect to hiring (appointments), historic executive-branch opinions have in fact suggested that precisely the same degree of limitation is permissible for civil and military offices.[353] One treatise writer early in the twentieth century even defended civil-service appointment constraints based on historic military analogues.[354] Accordingly, to the extent the statutory structure for military offices has successfully professionalized the appointment process while also preserving an appropriate degree of ultimate presidential discretion, the broader structure of military statutes could provide a model for doing the same even if courts ultimately embrace an expanded reach for the Appointments Clause within the civil service.

As a matter of fact, some civil-service statutes already require cause to terminate some officers and employees, but treat insubordination as cause for termination or other discipline through an administrative process.[355] If such structures are permissible for the military, as I have argued, then they should be even more defensible for the civil service. After all, no constitutional provision as specific as the Commander-in-Chief Clause prescribes presidential command authority over civil and administrative functions.

Again, appointment and removal protections might or might not be appropriate or valid for all positions within civil administration. For the upper reaches of the civil service, as in the military, accountability concerns, if not hard constitutional doctrine, might support preserving greater discretion with respect to appointments and removals. Likewise, just as in the military

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officers in a manner consistent with the Appointments Clause, it could just as well allow appointment of at least some commissioned military officers by other means; the appointment process is a matter of sub-constitutional discretion rather than constitutional command. This view could readily reconcile military and non-military practice, but it encounters the difficulty that neither the executive branch nor the courts have understood the military appointment process to be optional. As noted, both have instead defined the category of "Officers of the United States" to include all commissioned military officers, and Congress's own unbroken practice supports that understanding.

[353] *See, e.g.*, *Civil-Service Commission*, 13 Op. Att'y Gen. 516 (1871).

[354] 2 WESTEL WOODBURY WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 1180 (1910; 1999 reprint).

[355] For discussion of these statutes and relevant case law, see Barnett, *supra* note __, at 1374-75, 1379-80.

setting, removal restrictions even for officers lower in the bureaucracy might be valid only if sufficiently robust alternative disciplinary mechanisms are available. I will not attempt to resolve all such questions here. Nor do I express any view on whether professionalization is more or less appropriate with respect to the military or the civil service. At present, concerns about corrupting administrative expertise through partisan appointments may appear paramount to some, yet at other times in the past concerns about degrading military competence through patronage appointments were at least as salient.[356]

The key point here is simply that military examples warrant greater attention by both sides in current debates over the civil service's constitutionality. While those challenging the status quo should grapple with the apparent acceptance of parallel constraints for the military, by the same token those opposing a broadened understanding of the Appointments Clause should grapple with the Clause's broad application to military offices.

D. Reconstruction's Centrality

A last broad implication of my analysis relates to Reconstruction and the widespread neglect, if not deprecation, of its lessons for separation of powers. As my analysis throughout has highlighted, Reconstruction proved to be a watershed for key features of military office-holding and the constitutional understandings surrounding it. Furthermore, despite departing in some ways from earlier understandings, these changes have proven to be enduring and time-tested features of constitutional governance ever since. Nor are these changes alone in having such continuing importance: among other things, key limitations on military involvement in law enforcement, on spending without congressional appropriations, and on military officers performing civil duties date from this period.

Insofar as our current polarized era is taking on a troubling resemblance to the bitter politics of the Reconstruction period, congressional actions and executive responses from that era may hold important lessons about how our separation-of-powers system can or should operate in our era. Any further consideration of this question would go well beyond the scope of this article. Yet even if Reconstruction was a watershed only for the questions addressed here, that fact alone would give it a central legacy deserving more attention not only for civil liberties, but also for separation of powers, the structural Constitution, and congressional control of the military.

[356] *See* GOSS, *supra* note __ (discussing "political generals" during Civil War).

CONCLUSION

Though widely presumed to be an area of exceptional presidential authority, military office-holding is in fact an area thick with statutory constraints. Our Constitution's text and structure, read in light of the longstanding practice reflected in these statutes, supports broad congressional authority to allocate military duties and authorities to particular offices other than the President. Although the President as Commander in Chief holds constitutional authority to direct how such functions are discharged, Congress, if it chooses, may preclude their actual performance by the President himself or another officer. Congress likewise holds authority to replace the President's default removal authority with other sufficiently robust mechanisms of disciplinary control, such as criminal punishment through courts martial for disobedience. Beyond their immediate significance for current proposals to vest authority over cyber operations, force withdrawals, or nuclear weapons in sub-presidential offices, these conclusions, and the history informing them, shed new light on separation-of-powers debates about the unitary executive branch, conventions of governmental behavior, the civil service's constitutionality, and Reconstruction's historical importance.

Just as presidents on some accounts are properly "overseers" rather than a "deciders" with respect to civil administration, so too may Congress assign them a more supervisory than dictatorial role with respect to the military. Under the analysis developed here, Congress holds broad authority to structure the United States's military apparatus by statute, allocating duties and authorities as it deems best and crafting appropriate mechanisms of disciplinary control. The prudence or wisdom of any such structure is accordingly a question the Constitution leaves to political debate. For better or worse, the framers did not take it out of our hands.