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## Deciphering the Commander-in-Chief Clause

**ABSTRACT.** The conventional wisdom is that the Commander-in-Chief Clause arms the President with a panoply of martial powers. By some lights, the Clause not only equips the President with exclusive control over military operations, but also conveys the powers to start wars, create military courts, direct and remove officers, and wield emergency wartime powers. Under such readings, the meaning of “commander in chief” is as obvious as it is unequivocal—it confers some measure of absolute and unchallengeable authority upon the President. Yet, seemingly paradoxically, proponents of this stance cannot say where the Commander in Chief’s power begins and ends. In particular, establishing the Clause’s *limits* is an acute and persistent problem.

Using eighteenth-century understandings as a yardstick, this Article topples the orthodox reading of the Clause and demarcates the Clause’s elusive frontiers. In contrast to modern assumptions, the Article reveals that eighteenth-century commanders in chief enjoyed neither sole nor supreme authority over the military. Throughout the seventeenth and eighteenth centuries, there were, at any one time, a multitude of British and American commanders in chief, and both assemblies and other military officials consistently directed these commanders, often in quite intrusive ways. By borrowing a familiar expression, the Constitution incorporated the modest, contemporary conception. Rather than being a *sui generis* military potentate, the President is nothing more than a chief commander, or what Alexander Hamilton called the “first General and Admiral.” The Commander in Chief of the Army and Navy lacks a vast arsenal of military authority but instead possesses only the constrained powers of a general and admiral. Crucially, the Clause does not grant any exclusive authority over peacetime operations or even the conduct of war. Nothing about the term “commander in chief” would have suggested such autonomy because previous chief commanders had lacked such independence. Indeed, early Presidents never objected to congressional bills that sought to regulate military operations pervasively, including wars. Rather, they signed the proposals into law and, thereafter, sought to faithfully execute them.

To be sure, the President is more than a mere general and admiral. Due to the rest of Article II and the Presentment Clause, the President wields considerable authority and influence over the military, far more than a generic commander in chief would. These other sources of power convey authority over the appointment, direction, and removal of military officers and substantial influence on which military bills will become law. In the grand scheme of things, the Commander-in-Chief Clause is far less significant than these other clauses.

How we read the Commander-in-Chief Clause matters. Without a sense of the Clause’s alpha and omega, Presidents will continue to cite it to evade, minimize, and commandeer congressional powers. If this Article’s assertions are correct, however, Presidents will no longer be able to insist that the Founders established a chief commander that can start wars or one that enjoys



exclusive authority over operations. By decrypting the Clause, this Article highlights the extent to which Presidents have amassed power untethered from constitutional moorings and also may help fend off further executive overreach. Although some puzzles remain, this Article takes some initial strides in the long march towards deciphering the Commander-in-Chief Clause.

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## INTRODUCTION

The Commander-in-Chief Clause is chock-full of absolute and exclusive military powers,<sup>1</sup> or so our modern Executive insists. And, like a procrastinator's to-do list, the catalog of such powers grows ever longer. In peace and in war, with something approaching the regularity of a military march, the Executive invokes the Clause to commandeer more power.

Recent administrations have depicted the Commander-in-Chief Clause as a source of significant power that stretches across a variety of domains. During the Clinton Administration, the Office of Legal Counsel (OLC) opined on a proposed appropriations rider that sought to limit the President's ability to place American military forces under United Nations commanders. The OLC proclaimed that "there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces."<sup>2</sup> With the advent of the War on Terror in 2001, the Bush OLC observed that "[t]he power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President,"<sup>3</sup> and claimed "inherent constitutional power[]" to place troops overseas, order preemptive strikes, initiate retaliatory counterattacks,<sup>4</sup> and dictate the conditions of prisoner treatment and detention.<sup>5</sup> Although then-candidate Barack Obama balked at such claims,<sup>6</sup> his Administration asserted, without explanation, that Congress could not constrain the Commander in Chief's ability to transfer prisoners

1. By "absolute," I refer to the assertion that certain military powers are not subject to any constitutional check prior to their exercise. By "exclusive," I mean the claim that Congress has no authority over at least certain exercises of the commander-in-chief authority. For a typology of presidential powers, see Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 327 (2008).
2. Placing of U.S. Armed Forces Under U.N. Operational or Tactical Control, 20 Op. O.L.C. 182, 185 (1996).
3. The President's Const. Auth. to Conduct Mil. Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 190 (2001).
4. *Id.* at 188, 190.
5. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, U.S. Dep't of Just., to Alberto Gonzalez, Counsel to the President (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download> [https://perma.cc/B5QJ-FPMA] [hereinafter Bybee Memorandum].
6. Charlie Savage, *Barack Obama's Q&A*, BOSTON.COM (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA> [https://perma.cc/33H5-8GWX].

from Guantanamo Bay.<sup>7</sup> The Trump and Biden Administrations echoed assertions of congressional impotence to impose transfer restrictions.<sup>8</sup>

Even if they agree on little else, recent Presidents speak with one voice in insisting that they enjoy an array of exclusive military powers. Why do they sing from the same hymnal? Because it suits their purposes, policy and electoral, to claim broad military powers and to rarely, if ever, concede an inch. The Commander-in-Chief Clause, with its brevity, constitutes an ideal instrument to amass more power. If the President cannot grant foreigners tactical control over American units, deploy troops overseas, order the use of coercive interrogation techniques, and release prisoners of war, the President is not a true commander in chief, or so the arguments go.

Despite their repeated and undifferentiated use of the Commander-in-Chief Clause to claim one or another power, modern Executives have been little interested in outlining all the powers encompassed by the Clause and, importantly, all those authorities beyond its scope. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson decried the tendency of executive-branch lawyers to cite the Commander-in-Chief Clause relentlessly even though they could not delimit it. “[J]ust what authority goes with the name [of Commander in Chief] has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.”<sup>9</sup> Jackson had succumbed to this tendency when, as Attorney General for President Franklin Roosevelt, he had cited the Clause to evade statutory constraints on the President’s authority to provide military aid to the United Kingdom prior to American entry into World War II.<sup>10</sup>

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7. Press Release, White House, Statement by the President on H.R. 4310 (Jan. 3, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/03/statement-president-hr-4310> [<https://perma.cc/XV84-VYEV>] (suggesting that the National Defense Authorization Act may be an unconstitutional violation of the separation of powers).
  8. See, e.g., Press Release, White House, Statement by President Donald J. Trump on H.R. 2810 (Dec. 12, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-h-r-2810> [<https://perma.cc/3LT8-W52D>]; Press Release, White House, Statement by the President on H.R. 7776, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (Dec. 23, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/23/statement-by-the-president-on-h-r-7776-the-james-m-inhofe-national-defense-authorization-act-for-fiscal-year-2023> [<https://perma.cc/KJ84-A6QN>].
  9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).
  10. Acquisition of Naval and Air Bases in Exch. for Over-Age Destroyers, 39 Op. Att’y Gen. 484, 489-90 (1940).

Such reticence and caginess have continued since. In 1975, a House committee called upon State Department Legal Advisor Monroe Leigh for testimony about the War Powers Act.<sup>11</sup> Leigh cautiously observed that “it is very difficult to lay down any rule of thumb [about the Clause] because . . . our constitutional system . . . constantly produc[es] . . . questions” that even “the brightest people” could not foresee.<sup>12</sup> Hence, “[i]t is almost impossible to give a rigid and precise definition of what the President’s constitutional powers are as Commander in Chief[.]”<sup>13</sup> The Clinton Administration said that the Clause clearly gave the President exclusive authority over selecting personnel for tactical control, “[w]hatever the scope of this [military] authority in other contexts.”<sup>14</sup> In other words, the Clause’s hypothetical limits might be laid bare some other day.<sup>15</sup>

- 11. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affs. of the H. Comm. on Int'l Rels.*, 94th Cong. 1 (1975) (statement of Rep. Clement J. Zablocki, Chairman, H. Subcomm. on Int'l Sec. & Sci. Affs.).
- 12. *Id.* at 90 (statement of Monroe Leigh, Legal Advisor, Dept. of State).
- 13. *Id.*
- 14. Placing of U.S. Armed Forces Under U.N. Operational or Tactical Control, 20 Op. O.L.C. 182, 185 (1996).
- 15. The literature on the Commander in Chief (CINC) is voluminous. Yet, despite its vastness, it fails to specify where the commander-in-chief power begins and ends. Instead, it focuses on two crucial issues: (1) whether Presidents can start wars, and (2) whether Congress can constrain presidential direction of the military. These two queries do not encompass all the questions that one should ask (and answer) about the Clause. For a flavor of that literature, see generally Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (1970); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364 (1994) (book review); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999); Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183 (2004); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006); David J. Barron &

As far as the Executive is concerned, that day never quite comes. A definition, because it comes with limits, is something of a box. Executive officials, Presidents included, do not wish to box themselves in. From the perspective of advisers, supplying rigid and precise definitions of the Commander in Chief of the Army and Navy (CINCAN) is unwise, for they may live to regret their rigor and strictness. Today's limiting definition may become tomorrow's unwanted constraint, one that must be gingerly danced around or openly scorned. Better to say that the President has authority to deal with the matter at hand without defining what is outside the CINCAN's reach.

In light of recent experience, we must revise James Madison's trenchant remark that "[w]ar is in fact the true nurse of executive aggrandizement."<sup>16</sup> It now is palpable that in war, in peace, and in the grey area in between, the Commander-in-Chief (CINC) Clause is a steady wellspring of aggrandizement. No one quite knows what it means and what powers it conveys. Yet, par-

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Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) [hereinafter Barron & Lederman, *Framing the Problem*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *A Constitutional History*]; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391 (2008); David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477 (2008); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009); Robert J. Delahunt & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599 (2011); Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Philip Levitz, Freya Pitts & Sirine Shebaya, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123 (2013).

I have discussed the Clause previously. See Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319 (2006); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORNELL L. REV. 45 (2007); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008) [hereinafter Prakash, *Separation and Overlap*]; Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361 (2013) [hereinafter Prakash, *Imbecilic Executive*]; SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015) [hereinafter PRAKASH, *IMPERIAL FROM THE BEGINNING*]; SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* (2020) [hereinafter PRAKASH, *LIVING PRESIDENCY*]. This Article reflects new research about CINCs, the Clause, and early practices. As is fitting in the wake of a scholarly reconsideration, my views have evolved.

<sup>16</sup>. James Madison, "Helvidius" Number 4, GAZETTE U.S. (Phila.), Sept. 14, 1793, reprinted in 15 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 106, 108 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985).

adoxically, it is that deep uncertainty that makes it a powerful trump card in debates about presidential power over wars, foreign affairs, and national security.

This Article describes where the Clause begins and ends by unearthing what it meant to be a commander in chief in the eighteenth century. It provides an exhaustive account of commanders in chief, the Commander-in-Chief Clause, and how that Clause fits into the Constitution. Many of the conclusions about the Clause's original meaning may seem startling, bordering on implausible. At the Founding, the CINC Clause—"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"<sup>17</sup>—had a rather modest ambit. We are blind or resistant to a narrow reading because we approach the Clause against the backdrop of more than a century of expansive readings of it. We are conditioned to suppose that it grants the President an array of exclusive and extraordinary military powers. To see the Clause in a different light, we must compartmentalize or shunt aside much of what we imagine it to mean.

We can perhaps move beyond stale assumptions and be open to new possibilities if we stop visualizing a military autarch and instead imagine someone akin to an editor in chief. The commander in chief is the principal commander in the same way that an editor in chief is the principal editor. If you prefer a martial phrase, think of "commander in chief" as nothing more than a "chief commander." The latter phrase seems generic and perhaps does not suggest any exceptionality or autonomy. Though the component words are essentially the same, the order is different, and that minor change may shake us out of our easy and familiar suppositions.

This Article advances several claims. First, at the time of the Constitution's creation, commanders in chief were plentiful and unexceptional. Every leader of a military unit was its CINC. A commander in chief of a company served under the commander in chief of a brigade who was subordinate to an army's commander in chief. Great Britain had hundreds of CINCs, each directing a specific unit and almost all of them subordinate to another CINC. America inherited this tradition. During the Revolutionary War, George Washington was the CINC of the Continental Army. Yet, that Army had many other CINCs. By providing that the President is the CINCAN, the Constitution makes clear that the President is a chief commander. To quote Alexander Hamilton, as CIN-

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<sup>17.</sup> U.S. CONST. art. II, § 2, cl. 1.

CAN, the President is akin to a “first General and Admiral.”<sup>18</sup> But just as the creation of a first general would hardly preclude a second or third general, the establishment of a CINCAN in the Constitution did nothing to prevent the creation, or recognition, of other CINCs. Indeed, early Congresses and Presidents understood that the military had multiple commanders in chief. Without hyperbole, one can say that the number of CINCs in the eighteenth century rivaled the number of administrators in a modern university.

Second, every CINC was subordinate to other institutions. In England and, later, in Great Britain, the Crown and Parliament could command the numerous commanders in chief. Moreover, because officers operated within a hierarchy, almost every English and British CINC could direct other CINCs. America adopted this framework. Prior to the Constitution, the Continental Congress directed the many army CINCs, including George Washington. Because the Constitution incorporated a CINC and contained nothing suggesting a transformation, the Constitution borrowed the prevailing concept. As before, an obligation to follow the commands of others was wholly consistent with the status of serving as a commander in chief. Further, like every other CINC that preceded it, the Constitution’s CINCAN lacks a sphere of protected operational autonomy.

Third, CINCANS may do what generals and admirals may do. They may set up camps, regulate the conduct of marches, and direct patrolling vessels. Likewise, the CINCAN may set passwords, grant safe passages, and create other interstitial rules of conduct and operations. Because the President is but a general and admiral, there are matters beyond the CINCAN’s reach. The CINCAN cannot formally declare war, nor commence warfare. Further, the CINCAN cannot raise and support armies and navies or create a criminal code for the military. Finally, the CINCAN may not suspend the privilege of the writ of habeas corpus, order the military trial of civilians, seize private property, or declare martial law.

Fourth, Congress enjoys sweeping authority over the military and its CINCs. Congress creates, funds, and equips the military.<sup>19</sup> Congress’s power to

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<sup>18</sup>. THE FEDERALIST No. 69 (Alexander Hamilton), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 387, 389 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION].

<sup>19</sup>. U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power “[t]o raise and support Armies”); *id.* art. I, § 8, cl. 13 (granting Congress the power “[t]o provide and maintain a Navy”).

declare war<sup>20</sup> includes the power to command warfare. Hence, Congress can order the military, including the CINCAN, to wage war. Wielding its power to govern and regulate the military,<sup>21</sup> Congress can direct voyages, regulate encampments, and choose military targets. Further, Congress can create criminal codes covering personal and military conduct.<sup>22</sup> Congress's power to regulate the military and its conduct of wars makes the CINCAN an intermediary in a hierarchy that has Congress at the apex, the CINCAN in the middle, and officers and the enlisted at the bottom of the pyramid.

Finally, despite Congress's far-reaching legislative authority, the CINCAN will have, as a practical matter, great latitude. As President, the CINCAN enjoys substantial nonmilitary powers that grant the CINCAN greater power and influence over the military. The President can appoint all military officers<sup>23</sup> and can, by virtue of the Article II Vesting Clause, direct and remove them.<sup>24</sup> The powers to appoint and remove make it more likely that officers will heed the CINCAN's direction. Furthermore, a President's considerable sway also reflects Congress's institutional limits. A bicameral process coupled with a deliberate, qualified veto<sup>25</sup> yields few legislative blitzkriegs. This ability to stall and, in many cases, block reforms yields a temporary freedom of action in battle and elsewhere. Furthermore, legislators cannot predict the future and often will be reluctant to impose constraints in a field where discretion seems necessary. In sum, Congress will often be reluctant to micromanage the military and its operations, and when it attempts to do so, its interventions will often be dilatory and fruitless.

This Article proceeds in five parts. Part I parses the Clause. It argues that the Clause's text does not support many assumptions about its meaning. Many contemporary readings reflect what we have imbibed about the Clause rather than sustained attempts to grapple with it.

Part II underscores the modest original understanding of "commander in chief." In contrast to the modern view of CINCs as lofty and potent, Part II ad-

<sup>20</sup>. *Id.* art. I, § 8, cl. 11 (granting Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

<sup>21</sup>. *Id.* art. I, § 8, cl. 14 (granting Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces").

<sup>22</sup>. Congress has used its Govern and Regulate Power to enact the Uniform Code of Military Justice (UCMJ), a comprehensive code regulating military personnel. *Id.*; 10 U.S.C. §§ 801-946a (2018).

<sup>23</sup>. *Id.* art. II, § 2, cl. 2 (granting the power to appoint officers).

<sup>24</sup>. *Id.* art. II, § 1, cl. 1 (granting "[t]he executive Power").

<sup>25</sup>. *Id.* art. I, § 7, cl. 2 (requiring Congress to present bills and authorizing the President to return them with objections).

vances two points: CINCs were numerous, and none enjoyed any operational autonomy. In Britain, her colonies, and America, there were many commanders in chief at any one time and each was subordinate, whether to other CINCs, the Crown, and/or legislatures. With the advent of the Constitution, Americans maintained this practice of multiplicity and subordinacy.<sup>26</sup> The CINCAN served as the first general and admiral.<sup>27</sup> Just as generals and admirals lacked unicity or a protected sphere of autonomy, so too did the CINCAN. In the Constitution's early years, the legislative and executive branches recognized that there were multiple CINCs. Furthermore, Congress regulated the military, telling the CINCAN where and how to conduct military operations, and, by implication, which were forbidden.

Because every CINCAN is also President, every CINCAN also enjoys numerous *presidential* powers that enhance the CINCAN's military sway. Part III sketches the power of a CINCAN and the authority and influence that the CINCAN enjoys by virtue of being President. The Vesting Clause, the Presentment Clause, and a host of other provisions make the CINCAN far more powerful and influential than most previous CINCs.

Part IV describes various war and military powers that the President lacks. The Commander-in-Chief Clause grants no emergency powers in wartime or otherwise. Nor does it authorize Presidents to wage war. It conveys no exclusive authority over designating subcommanders, holding prisoners of war, or establishing military tribunals.

Part V considers some puzzles. It discusses the functions of the CINC Clause, whether "Commander in Chief" is an office or a status, and whether the Clause establishes civilian control of the military. It enters more speculative territory and considers whether Congress can require the CINCAN to consult others; oblige the CINCAN to secure the consent of others prior to taking certain military actions; create military officers who are independent of the CINCAN; and use its power to regulate the military to override other constitutional powers of the presidency, like the veto and appointment powers.

Some comments about methodology are obligatory. This Article offers an originalist reading of the Commander-in-Chief Clause. Some may deny the relevance of the effort because they believe that what the Commander-in-Chief Clause has become is far more significant than what it once meant in the misty

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26. See *THE FEDERALIST* NO. 74 (Alexander Hamilton), reprinted in 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 479 (John P. Kaminski & Gaspare J. Saladinno eds., 1986) (underscoring the Constitution's continuity with historical practice by noting that the CINC Clause replicates the tradition of chief executives serving as CINCs).

27. *THE FEDERALIST* NO. 69, *supra* note 18, at 389 (Alexander Hamilton).

past. As Oliver Wendell Holmes put it, the life of the law is experience, not logic.<sup>28</sup> And some would add that the life of the law is certainly not to be found in forgotten practices dredged up by a graying professor in an august journal. But, in the academy and in the courts, the now-dominant groups regard originalist readings as relevant, even essential. For the burgeoning originalist crowd, original meanings are often decisive. For many other scholars and jurists, the original meaning of the CINC Clause is an element in a mélange of Bobbitian factors to be considered and weighed.<sup>29</sup> Hence, for numerous scholars and jurists, what the Clause meant in the past is germane to what we should take it to mean today.

How we make sense of the CINC Clause matters. Presidents have deployed the Clause to usurp congressional power to declare wars, to thwart laws that regulate and govern the armed forces, and to ignore statutory conditions on the use of military funds. If this Article's claims are correct, Presidents and their advisers will have to fight on different terrain. They can continue to rely upon practices and policy arguments for their insistence on broad presidential power and for their claim that Congress cannot intrude upon certain military matters. But they will no longer be able to insist that the Founders constitutionalized a CINCAN that can start wars or a chief commander that enjoys exclusive authority over military operations. Deciphering the Clause helps to disarm and neutralize the Executive's aggressive and grasping claims.

## I. A PRELIMINARY PARSING

What a “Commander in Chief” is may seem patently obvious. A CINC, one might assume, must by definition be a unique, formidable, and imposing creature, one bristling with the full panoply of martial powers. The Commander-in-Chief Clause would then seem to grant quite straightforwardly the President sole and supreme military authority.

But if we are open to other readings, we can begin to see that the Clause’s meaning is far from crystal clear. At the outset, “commander in chief” is a military expression. Military culture is rife with expressions and acronyms that are obscure to outsiders. “Bird,” “hard deck,” and “SNAFU” are examples. Though found in the Constitution, “Commander in Chief” might be a similarly opaque

<sup>28</sup>. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Belknap Press of Harvard Univ. Press 2009) (1881).

<sup>29</sup>. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-8 (1982) (discussing types of constitutional arguments).

martial expression. Outsiders may imagine that they grasp its meaning and significance, but they may be under a severe misapprehension.

Many forget that the Commander-in-Chief Clause's "cryptic words have given rise to some of the most persistent controversies in our constitutional history."<sup>30</sup> Quite true. From James Polk starting a war with Mexico,<sup>31</sup> to Abraham Lincoln suspending habeas corpus,<sup>32</sup> to Barack Obama warring against Moammar Qaddafi and the Libyan government,<sup>33</sup> Presidents and their aides have cited the Commander-in-Chief Clause to justify various military adventures and decisions. In each case there were critics.<sup>34</sup> In some cases, the detractors went on to become President, in which role they often experienced a change of heart about what it means to be the CINCAN.<sup>35</sup>

The Clause requires decryption. One way to begin the decoding is to disaggregate the Clause's terms and speculate about their meaning. Again, the entire clause is: "The President shall be Commander in Chief of the Army and

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30. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).
31. MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 56-60 (2013).
32. See Letter from Abraham Lincoln to Matthew Birchard and Others (June 29, 1863), in 6 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 300, 303 (Roy P. Basler ed., 1953) ("[W]hen Rebellion or Invasion comes, the decision [to suspend the writ] is to be made . . . and I think . . . the commander-in-chief . . . is the man who holds the power . . .").
33. Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 20, 28 (2011) (claiming that the President's power as Commander in Chief granted him "independent authority" to take military action against Libya).
34. Abraham Lincoln, among others, criticized James Polk for starting a war. See Speech in United States House of Representatives: The War with Mexico (Jan. 12, 1848), in 1 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 32, at 431-32. Years later, Chief Justice Roger Taney held that Lincoln lacked the authority to unilaterally suspend the privilege of the writ. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). In 2011, Republicans criticized President Obama for waging war against Libya. See Ewen MacAskill, *Libyan Bombing 'Unconstitutional,' Republicans Warn Obama*, GUARDIAN (Mar. 22, 2011, 4:03 PM EDT), <https://www.theguardian.com/world/2011/mar/22/libyan-conflict-unconstitutional-obama-warned> [<https://perma.cc/5MSH-F8GF>].
35. On the campaign trail, Senator Obama criticized President George W. Bush's expansive view of presidential war powers. President Obama embraced some of the claims he formerly rejected. See Bruce Ackerman, *Obama's Betrayal of the Constitution*, N.Y. TIMES (Sept. 11, 2014), <https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html> [<https://perma.cc/PKQ9-H5P3>] (arguing that in using force against Libya without congressional authorization, Obama "betray[ed] the electoral majorities who twice voted him into office on his promise to end Bush-era abuses of executive authority").

Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>36</sup>

In parsing the Clause’s text, “shall be” seems to create a rule. The President, who wields so many powers, is also a commander in chief. Is this status an absolute rule or a default rule? The answer turns on whether another institution has power to modify this status. The Clause does not directly address whether the Constitution elsewhere conveys authority to encumber, constrain, or divest the powers of a CINC. Nor does the Clause clearly signal that the powers of the CINCAN are exclusive or that the powers do not overlap with those of another institution. In fact, the Clause does not even tell us what a commander in chief is.

“Commander in Chief” may sound imposing and mighty to our civilian ears. But, as noted earlier, perhaps the phrase signifies something more humdrum than high. Think of “commander in chief” in the context of “editor in chief,” “accountant in chief,” or “engineer in chief,” none of which imply vast powers.

According to the Oxford English Dictionary (OED), a “commander” is “[t]he officer in command of a military force.”<sup>37</sup> The OED further declares that “in chief” means “[i]n the . . . highest place or position.”<sup>38</sup> According to the OED, one early example of “in chief” is “friend in chief,”<sup>39</sup> which probably means no more than topmost friend. Or consider the seventeenth-century sermon that declared that Satan was “the leader in chief” of opponents of Zion’s

<sup>36</sup>. U.S. CONST. art. II, § 2, cl. 1.

<sup>37</sup>. *Commander*, def. 2.a, OXFORD ENG. DICTIONARY (2d ed. 1989), <https://doi.org/10.1093/OED/1101783905> [https://perma.cc/4UUZ-TG6Q]. I cite this dictionary because “commander,” “in chief,” and “commander in chief” come from Britain. Further, as discussed later, this dictionary usefully reveals that the definitions of the latter are more varied than knowledgeable American lawyers might suppose. I am not stacking the deck because the rest of the paper rests on eighteenth-century usage and does not rely upon the Oxford English Dictionary.

In any event, Merriam-Webster’s less fulsome entry for “commander in chief” also advances my points. A “commander in chief” is “one who holds the supreme command of an armed force.” See *Commander in Chief*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/commander%20in%20chief> [https://perma.cc/4P2V-TK5Y]. Nothing about that definition implies that there can be only one CINC or that a CINC enjoys operational autonomy.

<sup>38</sup>. *Chief*, n. def. II.12.b, OXFORD ENG. DICTIONARY (2d ed. 1989), <https://doi.org/10.1093/OED/5416483418> [https://perma.cc/26NR-9JBD].

<sup>39</sup>. *Id.* (quoting HESIOD, THE GEORGICKS OF HESIOD 16 (George Chapman trans., London, Humphrey Lownes 1618)).

restoration.<sup>40</sup> By way of comparison, consider *Chief Justice*.<sup>41</sup> The word “chief,” by itself, does not necessarily imply the power to direct or control. The Chief Justice seems to be the first amongst the “[j]udges of the Supreme Court.”<sup>42</sup> But the Chief cannot command these Justices in the way a general may direct captains. Had the title been “Justice in Chief,” I doubt whether we would embrace a broader sense of the Chief Justice’s powers.

Per the OED, a “commander in chief” means: “a. The chief or supreme commander of all the military land forces of a State; also b. of a detached portion permanently quartered in a colony, or c. on expeditionary service in a hostile foreign country.”<sup>43</sup> These definitions are more varied than one might suppose. While for many the first is what may come to mind, the other two definitions are narrower and perhaps have implications for interpreting the Clause. And even the first definition might hint at a difference between a *chief* commander and a *supreme* commander. *Chief* might suggest merely first in status and not control, much less supremacy.

The next subclause, “of the Army and Navy of the United States, and of the Militia of the several States,”<sup>44</sup> might seem like an afterthought. But perhaps it makes clear that the President is not the commander in chief of whatever army or navy a state may choose to establish in time of war.<sup>45</sup> Relatedly, one might speculate that this subclause distinguishes the CINCAN from *other federal* commanders in chief who direct smaller units within the army and navy. Put another way, if there were but one CINC, there would be no need to specify the President’s relationship to *particular* forces. To say that the President is the CINCAN is to invite speculation that there are (or could be) other CINCs that are not CINCAN.

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40. ROBERT BAYLIE, SATAN THE LEADER IN CHIEF TO ALL WHO RESIST THE REPARATION OF SION (London, Samuel Gellibrand 1643).

41. U.S. CONST. art. I, § 3, cl. 6 (specifying that “[w]hen the President of the United States is tried [before the Senate], the Chief Justice shall preside”).

42. *Id.* art. II, § 2, cl. 2. For a discussion of the authority of the Chief Justice, see Theodore Ruger, *The Chief Justice’s Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551 (2006).

43. *Commander*, n., defs. 10.a-c, *supra* note 37. The fifth definition of “Commander in Chief” also offers a narrow sense of the phrase. *Id.*, def. 10.e (“In the Navy: ‘The senior officer in any port or station appointed to hold command over all other vessels within the limits assigned to him.’”).

44. U.S. CONST. art. II, § 2, cl. 1.

45. Per the Constitution, states may have armies and a navy in time of war. See *id.* art. I, § 10, cl. 3 (barring the keeping of troops and ships of war in peacetime).

The CINC's command over the state militias exists only "when [the latter are] called into the actual Service of the United States."<sup>46</sup> This perhaps marks the CINCAN's control over the militias as more tenuous and episodic. Yet there is an uncertainty and instability with respect to the army and navy as well, for the rest of the Constitution makes clear that Congress need not establish, or continue, either institution. Congress may determine whether to "raise and support Armies" and "provide and maintain a Navy."<sup>47</sup> Nothing in Article I requires the creation of either, and I would not read the CINC Clause as compelling Congress to erect a military for the CINCAN to direct.

From the text of the Constitution, perhaps all we can say is that the President is to be a leader of any federal army and navy and a leader of the state militias when they are summoned into federal service. This seemingly straightforward language, however, conceals several latent ambiguities and uncertainties. As modern readers, we overlook these uncertainties, and instead construct an apparent plain meaning undergirded by certain assumptions. We are prone to suppose that there is only one CINC. We are disposed to imagine that the CINCAN must be a powerful, autonomous creature. We tend to assume that no one can direct a CINC. We are inclined to conclude that a CINC wields absolute control over some, or all, aspects of her military.

In fact, none of these supposedly plain meanings are obvious. They are largely a byproduct of reading the Constitution through a modern lens. The Clause, by itself, provides no easy answers to key questions such as (1) whether the President is the only CINC; (2) whether the President's command extends to the entire army and navy; and (3) whether the Constitution guarantees that the CINCAN enjoys a measure of autonomy over military operations.

When understood in its historical context, the language of the Constitution definitively answers these questions. The Constitution does not bar the creation or recognition of other CINCs. Surprisingly, the Clause does not guarantee the President the power to direct the entire army and navy. Instead, the grant of "executive power" serves that function. The Constitution does not ensure that the CINCAN will enjoy operational autonomy over wars or otherwise. To the contrary, Congress can pervasively regulate the military and its operations, in peace and in wars. The evidence, strong or weak, for these somewhat counterintuitive propositions is found below.

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<sup>46</sup>. *Id.* art. II, § 2, cl. 1.

<sup>47</sup>. *Id.* art. I, § 8, cl. 12-13.

## II. COMMANDERS IN CHIEF—NEITHER UNCOMMON NOR AUTONOMOUS

In 2002, Secretary Donald Rumsfeld altered Department of Defense (DOD) practices.<sup>48</sup> DOD had long recognized regional commanders as “commanders in chief.”<sup>49</sup> There was CINCPAC for the Pacific, CINCEUR for Europe, CINCSOUTH for southern Europe, and a few others, each with authority over particular regions.<sup>50</sup> Secretary Rumsfeld eradicated those titles.<sup>51</sup> “There is only one CinC under the Constitution and law, and that is POTUS,” he instructed the legal counsel to the Joint Chiefs of Staff.<sup>52</sup> Accordingly, the Secretary barred the use of “Commander in Chief” for anyone other than the President.<sup>53</sup> Regional CINCs were now simply “Commanders.”<sup>54</sup> Nonetheless, these Commanders could deplete existing (but now outmoded) stationery.<sup>55</sup> Rumsfeld thus honored the Defense Department’s tradition of frugality.

This Part interrogates the Secretary’s claims. It considers whether, in the eighteenth century, CINCs were unique. It also addresses the vital question of whether CINCs enjoyed autonomy over military operations. It considers commanders in chief prior to the Constitution, then takes up the creation of a CINCAN in 1787, and concludes by recounting early practices under the Constitution.

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- 48. Memorandum from Donald Rumsfeld, U.S. Sec’y of Def., U.S. Dep’t of Def., to the Sec’ys of the Mil. Dep’ts, U.S. Dep’t of Def. (Oct. 24, 2002) [hereinafter Rumsfeld Memorandum] (on file with author).
  - 49. See *Department of Defense Dictionary of Military and Associated Terms* app. A at A-23 to -24, 134 (2004), <https://www.dtic.mil/doctrine/jel/doddict> [<https://perma.cc/JL6U-56TN>] (defining acronyms for eleven different commanders in chief). For a discussion of the creation of these commands, see generally RONALD H. COLE, WALTER S. POOLE, JAMES F. SCHABEL, ROBERT J. WATSON & WILLARD J. WEBB, *THE HISTORY OF THE UNIFIED COMMAND, 1946-1999* (2003).
  - 50. Rumsfeld Memorandum, *supra* note 48.
  - 51. *Id.*
  - 52. DANA PRIEST, *THE MISSION: WAGING WAR AND KEEPING PEACE WITH AMERICA’S MILITARY* 29 (2003).
  - 53. Memorandum from Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, U.S. Dep’t of Def., to Donald Rumsfeld, U.S. Sec’y of Def., U.S. Dep’t of Def. (May 30, 2002) (on file with author).
  - 54. Memorandum from William J. Haynes II, Gen. Couns., U.S. Dep’t of Def., to David S.C. Chu, Under Sec’y of Def. for Pers. & Readiness, U.S. Dep’t of Def. (Oct. 16, 2002) (on file with author).
  - 55. Rumsfeld Memorandum, *supra* note 48.

### A. *Commanders in Chief Before the Constitution*

Practices from the seventeenth and eighteenth centuries do not reflect Secretary Rumsfeld’s understandings. First, there were hundreds of commanders in chief. There were many offices styled, among other things, “commander in chief.” Some might have commissions that marked them “vice admiral and commander in chief”<sup>56</sup> or “general and commander in chief.”<sup>57</sup> Those lower in the hierarchy might be styled nothing but “colonel” or “captain.” But colonels and captains were commanders in chief as well, without regard to what a commission said. The phrase could refer to a status—topmost officer of a unit—without being part of any formal title. Second, commanders in chief lacked autonomy and others, both military and civilian, could command them. In Britain, Parliament, the Crown, the Cabinet, and military officers could command CINCs. In America, one CINC might direct another, with both under the thumb of an assembly. Indeed, Congress’s military regulation was pervasive. It extended to the proper means of loading and firing, targets to attack, and the theaters of warfare. Third, the CINC of an entire army sometimes was not vested with command authority over all units within it. In other words, rather than serving as a *supreme* commander, with authority to direct all the units within his army, a CINC might sometimes be but its chief commander, meaning the principal or highest officer.

#### 1. English and British Practice

The understandings and practices of the mother country matter because Americans received and adopted them. Colonials often do this—they borrow the familiar from the old country, rather than creating out of whole cloth new offices and institutions. They copy because the offices and institutions are recognizable and because it is easier to rely upon off-the-shelf concepts and practices. By this logic, if British CINCs had certain features or powers, we have good reason to imagine that when Americans created CINCs, they replicated those features and powers. If, however, British CINCs lacked certain traits or

<sup>56</sup>. Letter from William Penn to William Goodsonn (June 25, 1655) in 3 A COLLECTION OF THE STATE PAPERS OF JOHN THURLOE 582, 582 (Thomas Birch ed., London, Fletcher Gyles 1742) [hereinafter STATE PAPERS OF JOHN THURLOE] (identifying vice admiral William Goodsonn’s commission as “commander in chief of a squadron”).

<sup>57</sup>. Commission and Instruction of Sir William Johnson (Apr. 16, 1755), in ROBERT ROGERS, JOURNALS OF MAJOR ROBERT ROGERS app. at 205 (Franklin B. Hough ed., Albany, Joel Munsell’s Sons 1883) (identifying William Johnson’s commission as “Major General and Commander-in-Chief”).

authorities, we have reasons to doubt the claim that American CINCs enjoyed those traits and authorities.

Precisely when the phrase “commander in chief” first arose is uncertain. Some scholars contend that, in 1639, King Charles I made Thomas Howard, Earl of Arundel, the first commander in chief of the army.<sup>58</sup> In fact, the scholarly claim turns on an ambiguity between status and title. The Earl’s commission did not actually name him a “commander in chief.”<sup>59</sup> He was instead made “General of [the] Army” and given broad powers over it. Yet, he could be regarded as a commander in chief by later observers,<sup>60</sup> and perhaps by his contemporaries, because he commanded all English armies. Descriptively, he was the chief commander of the English Army—its commander in chief—whether or not an official document stated as much.

The earliest meaningful use of the phrase that I have unearthed is from 1634, where “Lady Button” petitioned the Crown for an annuity and for the return of forfeited goods.<sup>61</sup> She described her deceased husband, Sir Thomas Button, as the former “commander-in-chief and admiral of forces on the coast of Ireland.”<sup>62</sup> Whether he had been commissioned as such or merely had the status of chief commander is unknown. He certainly had not served as the topmost commander in the English Navy. Given Lady Button’s description, the Admiral likely had been a “commander in chief” because he had led a mission off Ireland. One suspects that Lady Button was not the first to use the phrase in official correspondence. But, of course, there is always a first for everything.

The earliest commission that I have found is from 1641.<sup>63</sup> The Irish Rebellion had begun in October, led by Catholics upset by religious discrimination.

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58. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 107 (2d ed. 1989).
59. Wormuth and Firmage cite a work by Charles Clode. Clode’s caption preceding the Commission for the Earl of Arundel identifies the document as the “Appointment of Commander-in-Chief.” *Appointment of Commander-in-Chief and Generals Under Him* (Mar. 7, 1638), in 1 CHARLES M. CLODE, THE MILITARY FORCES OF THE CROWN: THEIR ADMINISTRATION AND GOVERNMENT 425, 425 (London, John Murray 1869). But the commission never uses the phrase. See *id.* at 425-29; Lord Marshal’s Commission (Mar. 7, 1638), in 2 HISTORICAL COLLECTIONS 835-38 (London, John Rushworth 1721).
60. CLODE, *supra* note 59, at 425.
61. Petition of Lady Button to the King (May 8, 1634), in CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES I, 1634-1635, at 12, 12-13 (John Bruce ed., Kraus Reprint Ltd. 1967) (1864).
62. *Id.* at 12.
63. The Lord Justices Commission to the Lord Gormanstown (Nov. 1641), in 4 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE 409, 409 (John Rushworth ed., London, D. Browne 1721) [hereinafter HISTORICAL COLLECTIONS].

In Dublin, the Lords Justices and Council of Ireland made Lord Gormanstown, Nicholas Preston, the “[c]ommander in chief” of the forces within the County of Meath, Ireland.<sup>64</sup> He was to enjoy the “Command in Chief of all the [Meath] Forces”<sup>65</sup> and was authorized, as “Commander of them in chief, to Arm, Array . . . Conduct, Lead, and Govern” those forces.<sup>66</sup> The commission was necessary to subdue “Conspirators, Traitors, and their Adherents.”<sup>67</sup> This commission conveyed a regional command.

Thereafter, there are innumerable references to “commander in chief” in official papers, both parliamentary and regal. One reason for the proliferation relates to the protracted rebellion and civil war across the British Isles. But the predominant explanation lies elsewhere. As the Gormanstown commission signals, there were local commanders in chief, each vested with the control of a limited military force, within a city, county, or region. The Crown certainly knew that there were many commanders in chief. For instance, King Charles I issued a proclamation to, among other people, his “Commanders in Chief.”<sup>68</sup> Much later, the army’s Articles of War prohibited soldiers from switching units without the sanction of the “Commander in Chief of the regiment, troop, or company.”<sup>69</sup> Each of those units had its own CINC.

During the English Commonwealth, the short-reigning Second Lord Protector, Richard Cromwell,<sup>70</sup> said something about commanders in chief and classification that is worth bearing mind. As high-school students are aware, the scientific classification has seven groupings: (1) kingdom, (2) phylum, (3) class, (4) order, (5) family, (6) genus, and (7) species. Cromwell, while making a point about substance versus form, said that “comaunder in chife is the genus; the others are the species.”<sup>71</sup> The “others” were “major-generall, a lieutenant-generall, a field marshall”—these were some of the species of the genus

<sup>64.</sup> *Id.* at 410.

<sup>65.</sup> *Id.* at 409.

<sup>66.</sup> *Id.*

<sup>67.</sup> *Id.*

<sup>68.</sup> See, e.g., Safe Conduct (Jan. 21, 1644), in 5 HISTORICAL COLLECTIONS, *supra* note 63, at 792 (ordering officers, including commanders in chief, to allow safe passage).

<sup>69.</sup> Rules and Articles for the Better Government of Their Majesties Land-Forces in the Low Countries and Ports Beyond the Seas art. 24, in CLIFFORD WALTON, HISTORY OF THE BRITISH STANDING ARMY: A.D. 1660 TO 1700, at 809, 812 (London, Harrison & Sons 1894).

<sup>70.</sup> Richard was the son of Oliver Cromwell.

<sup>71.</sup> The Speech of the Protector Richard to the Officers of the Army (1658), in 7 PAPERS OF JOHN THURLOE, *supra* note 56, at 449.

commander in chief.<sup>72</sup> He might have added captain and colonel to the list. In any event, because there were many species under the genus and many specimens within each species, there were hundreds of commanders in chief.

This practice of creating, and recognizing, many CINCs extended beyond the Crown. During this era, Parliament sometimes issued commissions to commanders in chief of the entire British Army.<sup>73</sup> But it also issued commissions to multiple local commanders in chief and various naval commanders.<sup>74</sup> About a century later, in 1749, Parliament promulgated Articles of War for the navy that referenced “Commander[s] in Chief of . . . [f]leet[s] or [s]quadron[s].”<sup>75</sup> Parliament (and the Crown) thereby recognized that individual flotillas had commanders in chief.

The custom also went beyond the government. Private groups could raise armies and make commanders in chief as well. For instance, Irish Catholics made Colonel Thomas Preston the “commander-in-chief of the Catholic Army raised in Leinster.”<sup>76</sup> They charged him with warring on behalf of King Charles I against the latter’s “unfaithful officers and ministers” in Ireland.<sup>77</sup>

In one instance, the status of commander in chief devolved upon multiple leaders. In 1659, Parliament replaced General Charles Fleetwood, commander in chief of the forces in England and Scotland, with a plural leadership.<sup>78</sup> The resulting septemvirate, which included Fleetwood, was said to exercise “the

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72. *Id.*

73. See, e.g., An Ordinance for Raising and Maintaining of Forces for the Defence of the Kingdome, Under the Command of Sir Thomas Fairfax, Knight (Feb. 17, 1644), in 1 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 614 (C.H. Firth & R.S. Rait eds., 1911).

74. See, e.g., 9 JOURNALS OF THE HOUSE OF LORDS 476 (Oct. 8, 1647) (making Colonel Rainsborough the Vice Admiral and Commander in Chief of a fleet); An Ordinance for the Appointing of Col. Massey Commander in Chief of the Forces of the Western Association (May 24, 1645), in 1 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, *supra* note 73, at 685.

75. An Act for Amending, Explaining and Reducing into One Act of Parliament 1749, 22 Geo. 3 c. 33, § VI-VII.

76. Commission of the Supreme Council of the Confederate Catholics of Ireland to Colonel Thomas Preston (Dec. 14, 1642), in CALENDAR OF THE STATE PAPERS RELATING TO IRELAND, OF THE REIGN OF CHARLES I, 1633-1647, at 374, 374 (Robert Pentland Maffy ed., 1901).

77. *Id.*

78. See An Act Appointing Commissioners for the Government of the Army (Oct. 12, 1659), in 2 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, *supra* note 73, at 1352 [hereinafter Act of 1659].

power of the Commander in Chief of all the forces of England and Scotland.”<sup>79</sup> The septemviroate did not last long; they rarely do.

By the late seventeenth century, few could have thought that the phrase “commander in chief,” by itself, signified a special status or that there was but one such person. A 1685 English-Latin phrase book for students said the following: “He was in chief command, or commander in chief”<sup>80</sup> and “[t]hey are in chief command, i.e. Commanders in Chief.”<sup>81</sup> The latter sentence confirmed that there could be multiple commanders in chief. Both sentences signaled that the phrase was a synonym for “chief command.”

Indeed, in the early part of the eighteenth century, James, Duke of Ormonde, was made Commander in Chief in England, Commander in Chief in Great Britain, and Commander in Chief in the Netherlands.<sup>82</sup> While James served as CINC, the Crown made several subordinate commanders in chief, one each for England, Scotland, and Great Britain.<sup>83</sup> The latter was made while James was on the Continent to direct troops during the War of the Spanish Succession.

Consistent with both the phrase book and actual practice, military dictionaries in the early years of the eighteenth century employed the term “commander in chief” liberally<sup>84</sup>: a generalissimo was a “Commander in Chief,”<sup>85</sup> an

<sup>79.</sup> 2 EDMUND LUDLOW, MEMOIRS OF EDMUND LUDLOW, Esq. 722 (Vevey, n.p. 1698). Ludlow had been commander in chief in Ireland and hence could speak with authority on the powers vested in the seven-person commission. Act of 1659, *supra* note 78, at 1352.

<sup>80.</sup> WILLIAM ROBERTSON, PHRASEOLOGIA GENERALIS: A FULL, LARGE, AND GENERAL PHRASE BOOK 329 (Cambridge, John Hayes 1685).

<sup>81.</sup> *Id.* at 350.

<sup>82.</sup> MICHAEL ROPER, THE RECORDS OF THE WAR OFFICE AND RELATED DEPARTMENTS: 1660-1794, at 6 (1998).

<sup>83.</sup> *Id.*

<sup>84.</sup> See, e.g., *Captain, Colonel, General, A Military Dictionary: Explaining all Difficult Terms in Martial Discipline, Fortification, and Gunnery* (London, J. Nutt 1702) [hereinafter Military Dictionary (1702)] (applying the designation of “Commander in Chief” or “commands . . . in chief” to captains, colonels, and generals); *Admiral, Captain, Colonel, Commodore, General, Generalissimo, Generalissimus*, John Kersey, *Dictionarium Anglo-Britannicum: or, A General English Dictionary* (London, J. Wilde 1715) [hereinafter Dictionarium Anglo-Britannicum] (applying the designation “commander in chief” or “chief Commander” to admirals, captains, colonels, commodores, and generals); *Captain, Colonel, General, A Military and Sea Dictionary: Explaining All Difficult Terms in Martial Discipline, Fortification, and Gunnery, and all Terms of Navigation pt. 1, A Military Dictionary* (4th ed., London, J. Morphew 1711) [hereinafter Military and Sea Dictionary pt. 1] (applying the designation “Commander in Chief” or “commands . . . in Chief” to captains, colonels, and generals); *Admiral, Captain, Vice-Admiral, A Military and Sea Dictionary: Explaining All Difficult Terms in Martial Discipline, Fortification, and Gunnery, and all Terms of Naviga-*

admiral was a “Commander in Chief,”<sup>86</sup> a general was “he that commands [an army] in Chief,”<sup>87</sup> a captain was “Commander in Chief of a Company,”<sup>88</sup> and a colonel was “Commander in Chief of a Regiment.”<sup>89</sup> These definitions stayed rather uniform throughout the century, at least where dictionaries were concerned.<sup>90</sup> In part, this continuity reflected the fact that later dictionaries seemed to copy previous ones. That is one way to curb definitional drift. In any event, the repetition reinforced the earlier definitions.

These meanings confirm that the phrase referred to an officer enjoying principal command of a unit, even if his commission said nothing about being a CINC. These definitions also signal that someone was a commander in chief even if they did not lead an entire army. Every captain was a commander in chief of a company, even though the company was part of a regiment that had its own commander in chief—a colonel. Further, there might be a general commanding all the regiments. He would be the commander in chief of those regiments.

Commanders in chief seemed to be everywhere that the English sent armies, including in India and elsewhere. For instance, in 1775, the East India Company made Robert Fletcher the “Commander in Chief” of the “coast of Choromandel.”<sup>91</sup> Fletcher was to honor the “rules, orders, and instructions”

tion pt.2, *A Sea-Dictionary* [hereinafter Military and Sea Dictionary pt. 2] (applying the designation “Commander in Chief” to admirals, captains, and vice admirals).

- <sup>85.</sup> *Generalissimo, Generalissimus*, DICTIONARIUM ANGLO-BRITANNICUM, *supra* note 84.
- <sup>86.</sup> *Admiral*, MILITARY AND SEA DICTIONARY PT. 2, *supra* note 84; see also *Admiral*, DICTIONARIUM ANGLO-BRITANNICUM, *supra* note 84, (defining an admiral as “the chief Commander of any distinct Squadron”).
- <sup>87.</sup> *General*, MILITARY AND SEA DICTIONARY PT. 1, *supra* note 84; see also *General*, MILITARY DICTIONARY (1702), *supra* note 84, (defining a general as “he that commands in chief”); *General*, DICTIONARIUM ANGLO-BRITANNICUM, *supra* note 84 (defining a general as “the chief Commander of an Army”).
- <sup>88.</sup> *Captain*, MILITARY DICTIONARY (1702), *supra* note 84; *Captain*, DICTIONARIUM ANGLO-BRITANNICUM, *supra* note 84; *Captain*, MILITARY AND SEA DICTIONARY PT. 1, *supra* 84.
- <sup>89.</sup> *Colonel*, MILITARY DICTIONARY (1702), *supra* note 84; *Colonel*, DICTIONARIUM ANGLO-BRITANNICUM, *supra* note 84; *Colonel*, MILITARY AND SEA DICTIONARY PT. 1.
- <sup>90.</sup> *Captain, Captain General, Colonel, General of an Army*, A MILITARY DICTIONARY, EXPLAINING AND DESCRIBING THE TECHNICAL TERMS, PHRASES, WORKS, AND MACHINES USED IN THE SCIENCE OF WAR (London, G. Robinson, Fielding and Walker 1778) [hereinafter MILITARY DICTIONARY (1778)].
- <sup>91.</sup> Commission from the Governor and Council of Fort St. George to Sir Robert Fletcher, as Commander in Chief (Oct. 16, 1775), in LORD PIGOT’S NARRATIVE OF THE LATE REVOLUTION IN THE GOVERNMENT OF MADRASS 136, 136 (n.p., 1776) [hereinafter Fletcher Commission]. “Choromandel” is a corruption of Cholamandalam or “land of the Chola,”

from the East India Company and from the “Commander in Chief of all [the Company’s] forces in the East Indies.”<sup>92</sup> Similarly, in 1779, there were on the Company’s payrolls a swathe of commanders in chief, and the simultaneous presence of a commander in chief of a garrison and a commander in chief of field forces raised no eyebrows.<sup>93</sup>

Because they were British offshoots, American colonies followed similar practices. The royal governors, as regional administrators of the Empire, directed militias and were, therefore, commanders in chief. Governors were to “arm, muster, and command all persons residing within his province; to transfer them from place to place; to resist all enemies, pirates, or rebels; if necessary, to transport troops to other provinces in order to defend such places against invasion; to pursue enemies out of the province.”<sup>94</sup> Occasionally, one person served as two separate CINCs. The Crown made Danvers Osborn the governor of New York and its commander in chief.<sup>95</sup> But his commission also made him Connecticut’s commander in chief.<sup>96</sup>

The Crown eventually appointed CINCs for the British forces in North America, creating a continent-wide commander in chief to direct local CINCs. For instance, in 1755, the Crown made Governor William Shirley of Massachusetts the Commander in Chief of all British forces in North America.<sup>97</sup> That year, Shirley held a Council of War with some subordinates, namely the “Commander[s] in Chief” from New York, Connecticut, Pennsylvania, and Maryland.<sup>98</sup> Shirley also appointed other CINCs.<sup>99</sup> The practice of an overall

and refers to the southeastern coast of India. *Coromandel Coast*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Coromandel-Coast> [<https://perma.cc/P668-WJ8S>].

- 92. Fletcher Commission, *supra* note 91, at 136.
- 93. See Letter from John Carmichael to Warren Hastings, in *FIFTH REPORT FROM THE SELECT COMMITTEE, APPOINTED TO TAKE INTO CONSIDERATION THE STATE OF THE ADMINISTRATION OF JUSTICE IN THE PROVINCES OF BENGAL, BAHAR, AND ORISSA*, app. no. 8 at sig. Qqr-v [pp. 153-54] (n.p. 1782).
- 94. EVARTS B. GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 98-99 (2d ed. 1906).
- 95. Commission to Sir Danvers Osborn (1754), in *A COLLECTION OF SEVERAL COMMISSIONS, AND OTHER PUBLIC INSTRUMENTS* 240, 249 (London, W. & J. Richardson 1772).
- 96. *Id.* at 249-50.
- 97. Letter from Sir Thomas Robinson to William Shirley (Aug. 28, 1755), in *2 CORRESPONDENCE OF WILLIAM SHIRLEY: GOVERNOR OF MASSACHUSETTS AND MILITARY COMMANDER IN AMERICA, 1731-1760*, at 241, 241-42 (Charles Henry Lincoln ed., 1912) [hereinafter *CORRESPONDENCE OF WILLIAM SHIRLEY*].
- 98. Proceedings of Council of War (Dec. 12, 1755), in *1 CORRESPONDENCE OF GOVERNOR HORATIO SHARPE* 315, 315 (William Hand Browne ed., Balt., Md. Hist. Soc'y 1888).

commander in chief for North American British Forces predated Shirley and continued until the Revolutionary War.

In a corner of America, during the French and Indian War, a certain colonial became first acquainted with commanders in chief. Robert Dinwiddie, the Lieutenant Governor and Commander in Chief of the Colony of Virginia, made George Washington the “Colonel . . . & Commander in Chief” of the Virginia militia sent out on a mission.<sup>100</sup> The green and eager colonel learned early on that there were many CINCs and that each lacked operational autonomy, for he received detailed instructions from Dinwiddie. These were lessons that Washington never forgot.

Some final comments on English and British understandings are necessary, especially as they relate to practices regarding the topmost army CINC after the English Civil War. The “supreme command” of the army rested with the Crown.<sup>101</sup> Yet this command was not preclusive, for the monarch’s control was subject to legislative direction. If Parliament passed a law, with the Crown’s assent, it could constrain what the Crown might do with the military. For instance, under certain circumstances, Parliament forbade the Crown from waging war to protect the Crown’s possessions in Germany.<sup>102</sup> Parliament also barred sending the militia overseas.<sup>103</sup> Though I believe such regulation by Parliament was pervasive, I have not attempted to survey British statutes. In any event, it is clear that the Crown’s control of the military was subject to meaningful legislative direction and constraints.

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99. See Letter from William Shirley to John Winslow (c. spring 1756), in 2 CORRESPONDENCE OF WILLIAM SHIRLEY, *supra* note 97, at 423-24; Letter from William Shirley to John Winslow (Aug. 10, 1756), in 2 CORRESPONDENCE OF WILLIAM SHIRLEY, *supra* note 97, at 510-11.

100. Commission (Aug. 14, 1755), in 2 THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES 3-4 (W.W. Abbot ed., 1983) [hereinafter PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES] (Governor Dinwiddie commissioning Washington “Colonel of the Virga Regimt & Commander in Chief of all the Forces now rais’d & to be rais’d for the Defence of this H: Majesty’s Colony”).

101. ROPER, *supra* note 82, at 2.

102. Act of Settlement 1701, 12 & 13 Will. 3 c. 2. By the Act of Settlement of 1701, Parliament provided that the throne would pass to the Protestant House of Hanover, the ruling dynasty of the German statelet of Hanover. Parliament was keen, however, to avoid expending English resources or lives to defend the Hanoverians’s ancestral lands in Germany. See generally NICK HARDING, HANOVER AND THE BRITISH EMPIRE, 1700-1837, at 38-77 (2007) (discussing the Hanoverian succession).

103. See, e.g., Militia Act 1786, 26 Geo. 3 c. 107, § 96 (Eng.).

The Crown rarely took the field, especially in the eighteenth century. The last British monarch to serve in that capacity was King George II.<sup>104</sup> Rather than serving in the field, the monarch typically delegated authority to the CINC of the English (and, after 1707, British) Army. This CINC, sometimes styled the “Captain General,” held “tactical” command, with “strategic control” left with the Privy Council and, later, the Cabinet.<sup>105</sup>

Lord Albemarle, appointed as the army CINC in 1660, had broad authority, including powers to make disciplinary rules and to raise armies.<sup>106</sup> But later CINCs were more circumscribed. Although there was no detailed set of duties, there were five main responsibilities: counseling on army matters; safeguarding the nation; upholding army discipline; instructing and drilling the infantry and cavalry; and advising on promotions and appointments.<sup>107</sup> This list was consistent with the notion that strategic control rested elsewhere, for to advise others implied that they made decisions.

Furthermore, from the late seventeenth century onwards, there were officers and committees within the army that were independent of the Commander in Chief.<sup>108</sup> For instance, authority over the artillery and engineers rested with the Master General of the Ordnance, not the CINC.<sup>109</sup> Because of the independence of such officers and their units, the chain of command in this era was “more complex”<sup>110</sup> and often unwieldy. This decentralized structure and “the lack of any single authority responsible for the overall administration of the army went unchallenged in the eighteenth century.”<sup>111</sup> In other words, CINCs of the British Army lacked control over the entire army and seem not to have thought that anything was amiss. They seem not to have supposed that a lofty status—Commander in Chief of the British Army—entitled them to control the entire army. Rather they seemed to understand that they were but its principal or topmost commander.

As one might have imagined, the Commander in Chief of the British Army held a powerful military office. But beyond this elementary point, there are some surprising discoveries. The CINC of the British Army was subordinate to Parliament, the Crown, and the Cabinet. Further, the British Army CINC

<sup>104.</sup> ROPER, *supra* note 82, at 2.

<sup>105.</sup> *Id.*

<sup>106.</sup> *Id.* at 5, 8.

<sup>107.</sup> *Id.* at 9.

<sup>108.</sup> *Id.* at 2-3, 10-11.

<sup>109.</sup> *Id.*

<sup>110.</sup> *Id.* at 3.

<sup>111.</sup> *Id.* at 4.

lacked the ability to direct all army units and bureaucracies. In other words, the British Army CINC had many superiors and lacked command authority over vital units. It goes too far to assert, as one parliamentarian did, that “the post was one only of dignity and not of power.”<sup>112</sup> But the claim’s general thrust is useful insofar as it blunts the modern tendency to assume that a commander in chief’s authority necessarily extended across all soldiers within the army and that a CINC must have enjoyed some measure of exclusive power. Finally, even the Crown’s military authority was subject to law, with Parliament regulating the army, navy, and militia. Whether the Crown took the field or not, it lacked exclusive authority over the military and wars.

## 2. American Frameworks

From 1775 onwards, the American experience is similar. There were multiple commanders in chief—state and continental—and every one of them was subject to direction by others. Further, the most renowned CINC prior to the Constitution—George Washington—initially lacked the power to command every unit of the Continental Army.

Most state constitutions of this era made their chief executive the commander in chief.<sup>113</sup> Often the title was used. In some states, the chief executive, whether styled president or governor, was made “captain general and commander in chief” of their state’s militia and military forces.<sup>114</sup> In South Carolina, the title of the executive seems to have been “governor and commander-in-chief,” for each time the state’s constitution grants powers to the executive, it vests them with the “governor and commander-in-chief.”<sup>115</sup> Other times, constitutions conveyed power to direct the armed forces without using the familiar phrase.<sup>116</sup>

Two states were quite specific; the Massachusetts and New Hampshire Constitutions seemed to borrow from the commissions of royal governors.<sup>117</sup>

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<sup>112</sup>. 2 CLODE, *supra* note 59, at 338.

<sup>113</sup>. MARGARET BURNHAM MACMILLAN, THE WAR GOVERNORS IN THE AMERICAN REVOLUTION 57, 62 (1943).

<sup>114</sup>. See, e.g., DEL. CONST. of 1776, art. IX; GA. CONST. of 1777, art. XXXIII; N.J. CONST. of 1776, art. VIII; MASS. CONST. pt. 2, ch. 2, § I, art. VII (repealed 1918); N.Y. CONST. of 1777, art. XVIII.

<sup>115</sup>. S.C. CONST. of 1778, art. III. The 1776 version referenced a “president and commander-in-chief.” S.C. CONST. of 1776, art. III.

<sup>116</sup>. MD. CONST. of 1776, art. XXXIII; VA. CONST. of 1776, cl. 12.

<sup>117</sup>. See MASS. CONST. pt. 2, ch. 2, § I, art. VII (repealed 1918); N.H. CONST. of 1784, pt. 2, art. LI (amended 1792, 1968).

In Massachusetts, the governor could “train, instruct, exercise, and govern the militia and navy.”<sup>118</sup> Furthermore, “for the special defence and safety of the commonwealth,” he could “assemble[,] . . . lead and conduct” the people “to encounter, repel, resist, expel, and pursue, by force of arms, as by sea as by land, within or within the limits of this commonwealth.” He could “kill, slay, and destroy, if necessary, and conquer . . . all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of this commonwealth.” Finally, he could “take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall, in a hostile manner, invade, or attempt the invading, conquering, or annoying this commonwealth.” The governor was vested “with all these and other powers incident to the offices of captain-general and commander-in-chief, and admiral.”<sup>119</sup>

Though broad, these powers were still limited. First, the grants seemed to have a defensive cast because the Massachusetts Constitution spoke of the powers being for the “defence and safety of the commonwealth.”<sup>120</sup> Second, the authority to “kill, slay, and destroy” related to those who attempted to invade or destroy the state.<sup>121</sup> The governor could not use this authority to attack any nation to further *other* purposes. Third, the Massachusetts CINC could not lead the militia outside the state without the legislature’s approval.<sup>122</sup> Again, this limitation suggested that the CINC lacked authority to start wars.

At the national level, the Articles of Confederation, sent to the states in 1777 and ratified in 1781, granted Congress the power to govern and regulate the army and navy and authority to direct military operations.<sup>123</sup> Further, Con-

<sup>118</sup>. MASS. CONST. pt. 2, ch. 2, § I, art. VII (repealed 1918).

<sup>119</sup>. *Id.*

<sup>120</sup>. *Id.*

<sup>121</sup>. To be sure, there was language covering “detriment, or annoyance” as well. *Id.* But it would be a mistake to read that language to authorize the governor to kill anyone who annoyed Massachusetts or sought to disadvantage it. Given the canon of *noscitur a sociis*, “detriment[] or annoyance” should be read in light of the first two words—“destruction” and “invasion.” Hence detriment and annoyance should mean actions that approach or are adjacent to destruction and invasion. Further, the power to kill and destroy attaches to those who act “in a hostile manner.” *Id.* Again, hostile should be understood in its martial sense and not encompass those who merely have adverse interests.

<sup>122</sup>. *Id.*

<sup>123</sup>. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

gress had power to appoint all military and civilian officers.<sup>124</sup> To choose a commander in chief of the army or navy, nine states had to concur.<sup>125</sup>

Before the Articles took a final shape, Congress had appointed Esek Hopkins as commander in chief of the navy and George Washington as commander in chief of the army. Appointed in December of 1775, Hopkins was made “commander in chief of the fleet.”<sup>126</sup> Washington’s commission, from June 1775, made him the “General and Commander in chief of the army of the United Colonies.”<sup>127</sup> He was “vested with full power and authority to act as [he] shall think for the good and Welfare of the service.”<sup>128</sup> All officers and soldiers “under [his] command” were to obey his “orders.”<sup>129</sup>

Although Washington and Hopkins were the most prominent “commanders in chief,” there were other CINCs. Congress had divided the army into geographical departments, including the Northern, Southern, and Eastern. Each of these departments had a general, or as Congress often called them, a “commander in chief.”<sup>130</sup> These officers had chief command of a theater and, following the Anglo-American tradition, they were commanders in chief.

Each of these commanders in chief, Hopkins and Washington included, was subject to congressional direction. Congress instructed its naval commander in chief repeatedly, including on one occasion directing him to destroy the enemy in the Chesapeake Bay, the Carolinas, and then Rhode Island.<sup>131</sup> This was a tall order for a “fleet” of eight ships.<sup>132</sup> Congress booted Hopkins in

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<sup>124.</sup> *Id.*

<sup>125.</sup> *Id.* art. IX, para. 6.

<sup>126.</sup> 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 443 (Worthington Chauncey Ford ed., 1905) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

<sup>127.</sup> Commission from the Continental Congress (June 19, 1775), in 1 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 6, 7 (W.W. Abbott ed., 1985) [hereinafter PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES].

<sup>128.</sup> *Id.*

<sup>129.</sup> *Id.*

<sup>130.</sup> See, e.g., 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 599 (1906) (“commander in chief in each department” was authorized to exchange prisoners); 7 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 218 (1907) (“commanders in chief of the several departments” should pay their troops); 7 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 248 (1907) (paymasters should consult with “the commanders in chief of their respective districts”).

<sup>131.</sup> 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 335 (1906).

<sup>132.</sup> See Charles Oscar Paullin, *The Administration of the Continental Navy During the American Revolution*, 31 PROC. U.S. NAVAL INST. 625, 625 (1905).

1778.<sup>133</sup> He was Congress's subordinate and served at its pleasure.

Washington also received numerous congressional instructions. He was "to regulate [his] conduct in every respect by the rules and discipline of war (as herewith given [him]) and punctually to observe and foll[ow] such orders and directions from time to time as [he] shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed."<sup>134</sup> In other words, Washington had to follow Congress's Articles of War and its future orders. Like Hopkins, Washington served at its pleasure. The same was true for the army's regional commanders in chief—Congress could direct and fire them.

Initially, Congress showed little hesitation in instructing Washington. The very month it appointed him, he was told to make a "return"—a count—of the men in arms and directed never to disband any of them.<sup>135</sup> There were other instructions as well, "for your better direction."<sup>136</sup> Sometimes Congress summoned Washington to consult with members of Congress.<sup>137</sup> Other times he was directed to order an enquiry against an officer.<sup>138</sup> One of the most famous orders arose in 1776. When it became clear that the army might have to abandon New York City to the British, Washington asked whether he ought to destroy the city. Congress responded that he should take "especial care . . . that no damage be done to the . . . city by his troops."<sup>139</sup> The city burned anyway. Whether civilians or renegade troops played a role is unknown.

At the war's outset, congressional inquiries and instructions came fast and furiously. As the war progressed, Congress gave more leeway to Washington. This reflected a reluctance to micromanage, not a legal conclusion that Congress could not direct operations or its commander in chief. It had, after all, notified Washington that he would be subject to their direction. That provision in his commission was supererogatory, for even in its absence there was an established practice of directing CINCs. Furthermore, all Continental officers operated under congressional direction and superintendence. Hence Congress could

<sup>133.</sup> 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 13 (1906). He likely was fired because of a host of reasons, including failing to follow orders, insufficient aggression, and intemperate language towards Congress. See Paullin, *supra* note 132, at 645-47.

<sup>134.</sup> Commission from the Continental Congress, *supra* note 127, at 7.

<sup>135.</sup> Instructions from the Continental Congress (June 22, 1775), in 1 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 127, at 21 (W.W. Abbott ed., 1985).

<sup>136.</sup> *Id.*

<sup>137.</sup> 12 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 1250 (1908).

<sup>138.</sup> See 13 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 106 (1909).

<sup>139.</sup> 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 733 (1906).

have directed the army CINC even if Washington's commission had said nothing in that regard.

While the subordinacy of every commander in chief to Congress was real, the supremacy of Washington vis-à-vis certain other officers was, at least initially, nonexistent. As a matter of his 1775 commission, the Commander in Chief could direct those "under [his] command."<sup>140</sup> This seems to have excluded armies in other departments or regions. And it excluded certain other officers or units, even when present in his camp.

For an example of Washington's weakness vis-à-vis regional departments, consider his 1776 request that Congress direct the regional commanders in chief to report to him the troops under their command.<sup>141</sup> Congress obliged.<sup>142</sup> The congressional order was necessary because some regional CINCs had not obeyed Washington's request to send those figures. In part, regional CINCs could ignore Washington because American commanders in chief—Washington included—lacked the power, *ex officio*, to appoint and sack officers. When granted, such powers came by separate congressional resolve.<sup>143</sup> Sometimes these regional CINCs had *greater* power than Washington. For instance, Congress gave General Horatio Gates the power to appoint officers while his army fought in the North, a power that Washington lacked over the main army.<sup>144</sup>

The separate commands were a geographical constraint on Washington's authority. There also were cross-cutting limits to the Commander in Chief's control, even within his camp. Periodically, Congress created subject-matter departments. For instance, in 1777, Congress created "inspectors general" and

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<sup>140</sup>. Commission from the Continental Congress, *supra* note 127, at 7.

<sup>141</sup>. See Letter from George Washington to John Hancock (May 5, 1776), in 4 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 127, at 214 (Philander D. Chase ed., 1991).

<sup>142</sup>. See 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 342 (1906).

<sup>143</sup>. Occasionally, Congress conveyed upon Washington temporary authority to appoint and remove officers, grants that confirmed that the Commander in Chief, *ex officio*, lacked authority to remove. See Prakash, *Separation and Overlap*, *supra* note 15, at 362-63. Other times, Congress granted authority without time constraints, but only as to certain officers. See Resolution (June 7, 1777), in 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 426-27 (1907) (granting authority to remove paymasters to the Commander in Chief and departmental commanders).

<sup>144</sup>. See Letter from John Hancock to George Washington (Aug. 2-6, 1776), in 5 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 127, at 547-48 (Philander D. Chase ed., 1993) (noting that the only commander at the time who had power to appoint was Gates and that vesting the power to appoint was a dangerous precedent).

appointed Major General Thomas Conway.<sup>145</sup> By virtue of law, Conway was seen as independent of Washington and answerable only to Congress.<sup>146</sup> Indeed he would be autonomous even when in the same camp as Washington. It was an “*imperium in imperio*.<sup>147</sup> Though this was objectionable to Washington, there was little that he could do. He apparently did not say that Congress had abridged his 1775 commission. He certainly did not complain that with Conway’s appointment, he was no longer the Commander in Chief of the Continental Army.<sup>148</sup>

In 1779, Washington told Congress that in “order to preserve harmony and correspondence in the System of the Army—there must be a controuling power to which the several Departments are to refer . . .”<sup>149</sup> He perhaps was hinting that regional CINCs ought to be subordinate to him. In response, Congress belatedly “directed” the Commander in Chief “to superintend and direct the military operations in all the departments in these states . . .”<sup>150</sup> This resolution was perhaps necessary because Washington had heretofore lacked authority to “superintend and direct” all military operations. Indeed, some argue that this resolve marked the first time that the CINC had genuine command of all operations.<sup>151</sup> If so, it would seem that the “Commander in Chief of the army of the United Colonies and of all the forces raised or to be raised by them,” as Washington was made in 1775, was not quite as powerful as one might have imagined.<sup>152</sup>

<sup>145.</sup> 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 1023-26 (1907).

<sup>146.</sup> DAVID A. CLARY & JOSEPH W.A. WHITEHORNE, THE INSPECTORS GENERAL OF THE UNITED STATES ARMY, 1777-1903, at 25-28 (1987).

<sup>147.</sup> LOUIS CLINTON HATCH, THE ADMINISTRATION OF THE AMERICAN REVOLUTIONARY ARMY 27 (1904).

<sup>148.</sup> Baron von Steuben sought similar independent authority when Congress reformed the Inspector General. See CLARY & WHITEHORNE, *supra* note 146, at 47. Washington pushed back, and a compromise was reached. *Id.*; see also *id.* at 56 (discussing Washington’s disagreements with Benjamin Lincoln about reporting by inspectors).

<sup>149.</sup> Letter from George Washington to James Duane (Jan. 11-12, 1779), in 18 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 127, at 612 (Edward G. Lengel ed., 2008).

<sup>150.</sup> 13 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 110 (1909).

<sup>151.</sup> See, e.g., Editors, *Washington, Congress, and War Strategy, 1779*, J. AM. REVOLUTION (May 30, 2018), <https://allthingsliberty.com/2018/05/washington-congress-and-war-strategy-1779> [https://perma.cc/NVF9-7ZFC].

<sup>152.</sup> Commission from the Continental Congress, *supra* note 127, at 7.

Much later, in 1796, Thomas Paine belittled Washington on such grounds. Paine, who nursed a grudge that the President had not secured his release from a Paris jail several years prior, downplayed Washington’s contributions during the Revolutionary War. Although

In many ways there was a continuity between the Continental Army CINC and the British Army CINC. Both could be commanded and directed by others. Both lacked authority over the entire army, with important units and officers made independent. Perhaps this explains why Washington never complained that Congress had promised him one job—CINC of the army—but had, in fact, created numerous independent military components. Washington, who had long been a martial figure—recall that he was the CINC of a mission during the French and Indian war and was subordinate to another CINC<sup>153</sup>—surely knew that, while the status carried real authority, it did not quite mean what some take it to mean today—a military officer endowed with unreviewable and undiminishable authority over the entire military and all wartime operations.

### *B. Constitutionalizing a Commander in Chief*

General Washington resigned in 1783.<sup>154</sup> This was a historic decision, revealing the virtue of the man who could have seized power and crowned himself King, and prompting astonished contemporaries to hail him as “the greatest man in the world.”<sup>155</sup> However, the public ceremony carried a profound political message as well. At the end of his short speech, Washington said that he was “bidding an Affectionate farewell to this August body under whose orders [he had] so long acted.”<sup>156</sup> Even in that moment of personal glory, he underscored his faithfulness to the principle that American CINCs obeyed orders from Congress.

The Founders took up constitutional reform in this context. The Commander-in-Chief Clause triggered little meaningful discussion within the Philadelphia Convention or subsequently. While there are several discussions, they

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Washington “had the nominal rank of Commander in chief . . . he was not so in fact.” Letter from Thomas Paine to George Washington (July 30, 1796), in 20 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 515, 515 (David R. Hoth & William M. Ferraro eds., 2019) [hereinafter PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES]. After all, Washington “had no control over, or direction of, the army to the northward . . . ; nor of that to the South.” *Id.* Paine assumed that if an officer lacked control over the entire army, he was not a genuine commander in chief. But Paine was clearly wrong, for no one else ever denied that Washington had been a commander in chief. One could be a commander in chief—a chief commander—without authority to direct all military operations.

<sup>153</sup>. Commission, *supra* note 100, at, at 3-4.

<sup>154</sup>. EDWARD J. LARSON, THE RETURN OF GEORGE WASHINGTON, 1783-1789, at 3-4 (2014).

<sup>155</sup>. See *id.* at 6 (quoting King George III).

<sup>156</sup>. *Id.* at 4.

shed little light. What seems reasonably clear is that few could have thought that the Clause reflected a conceptual shift in thinking about CINCs. After all, the Clause did not create a new creature divorced from the past. Rather, it borrowed from the exceedingly familiar, vesting in the presidency the powers of a chief commander.

Though the Virginia Plan said nothing specifically about the Executive's military authority, the New Jersey Plan proposed that national "Executives" would have power to "direct all military operations."<sup>157</sup> This was a form of remote direction, for none of these executives could command "any enterprise" in person. The Pinckney Plan apparently would have made a "President," "by Virtue of his Office," the "Commander in chief of the Land Forces of U.S. and Admiral of their Navy."<sup>158</sup> Hamilton envisioned a "Governor" that would "have the intire direction of War when authorised or began."<sup>159</sup>

It was perhaps implicit that a new national executive, whatever its composition, would direct the military. Speaking in the wake of the Virginia Plan, which said nothing about military control, Pierce Butler said that a unitary executive would be necessary to direct military operations.<sup>160</sup> Butler thereby assumed that the Executive—whether singular or plural—could direct the military. Prior to the Convention, the Essex Result, a Massachusetts tract on constitutional principles, said that, among other things, "[t]he executive power is to marshal and command her militia and armies for her defence, [and] to enforce the law."<sup>161</sup> Publius similarly observed that the "power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority."<sup>162</sup> In sum, because direction of the military was

<sup>157.</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 242, 244 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

<sup>158.</sup> *The Pinckney Plan*, in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 157, at app. D at 595, 604, 606. Max Farrand reconstructed this version of the Pinckney Plan because the plan that Pinckney produced long after the Convention did not conform to what he said at the Convention. *Id.* at 601-04.

<sup>159.</sup> Alexander Hamilton, *Alexander Hamilton's Plan*, in 1 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 254 (Merrill Jensen ed., 1976).

<sup>160.</sup> See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 157, at 92; see also 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 157, at 52 (comments of Gouverneur Morris) ("It is the duty of the Executive to appoint the officers & to command the forces of the Republic . . .").

<sup>161.</sup> Theophilus Parsons, *The Essex Result* (Apr. 29, 1778), reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 324 (Oscar Handlin & Mary Handlin eds., 1966).

<sup>162.</sup> THE FEDERALIST No. 74, *supra* note 26, at 479 (Alexander Hamilton); see also THE FEDERALIST No. 75 (Alexander Hamilton), reprinted in 16 DOCUMENTARY HISTORY OF THE

a familiar feature of the executive power, no one could have been surprised that the Convention put the Commander-in-Chief Clause in Article II.

Of course, the Convention empowered Congress, too. Besides the power to declare war,<sup>163</sup> Congress had the power to govern and regulate the military,<sup>164</sup> a power that Congress possessed under the Articles.<sup>165</sup> Yet the Convention failed to replicate Congress's power of "directing their operations."<sup>166</sup> The omission of the latter phrase might suggest that Congress lost the power to regulate operations. In fact, Congress may direct operations via its broad power to make "[r]ules for the Government and Regulation of the land and naval Forces,"<sup>167</sup> the power mentioned earlier in this Section. The terms "govern" and "regulate" signify authority to direct and manage.<sup>168</sup> Hence, when Congress directs operations, it makes rules for the military's government and regulation. Considering other grants to Congress, the power of "directing operations" was redundant and hence perhaps not worth duplicating in the Constitution.

After the Constitution emerged from Philadelphia, some Anti-Federalists admitted that the President should be able to "give orders, and have a general superintendency."<sup>169</sup> What troubled them was the power to command in person.<sup>170</sup> One Anti-Federalist warned that the President would be "by profession

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RATIFICATION, *supra* note 18, at 481 (John P. Kaminski & Gaspare J. Saladino eds., 1986) ("[T]he employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate."); JAMES MONROE, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (1788), reprinted in 1 THE WRITINGS OF JAMES MONROE, app. II at 347, 381 (Stanislaus Murray Hamilton ed., New York, G.P. Putnam's Sons 1898) (describing military command as naturally belonging with the Executive).

<sup>163</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>164</sup> *Id.* art. I, § 8, cl. 14.

<sup>165</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

<sup>166</sup> *Id.*

<sup>167</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>168</sup> See *Govern*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/govern> [<https://perma.cc/CV3T-FGFD>]; *Regulate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/regulate> [<https://perma.cc/VS68-PV92>].

<sup>169</sup> The Virginia Convention Debates (June 18, 1788) (statement of George Mason), in 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 1378 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

<sup>170</sup> See Luther Martin, *Genuine Information IX*, BALT. MD. GAZETTE (Jan. 29, 1788), reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 495 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

a military man,”<sup>171</sup> suggesting that Presidents had a martial occupation and would be influenced by it. Another had something of the opposite worry: a President might be unfit for command but might nonetheless attempt to lead on the battlefield.<sup>172</sup> Others prophesized that Presidents might use force to stay in power because CINCANS might lack Washington’s virtue.<sup>173</sup> The solution was to check personal command. George Mason suggested that the President should take personal command only with congressional consent.<sup>174</sup> “A Georgian” proposed that the President should be Commander in Chief only with the Senate’s consent.<sup>175</sup>

Federalists replied that there was no cause for concern. Hamilton said “[i]t 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.”<sup>176</sup> Others noted that without Congress, there would be neither a military nor any funds for it.<sup>177</sup> How many legions would the Commander in Chief have? As many, or as few, as Congress saw fit to create and continue.

Missing is any sense that the Commander-in-Chief Clause marked a shift, tectonic or otherwise, from prevailing practices or conceptions. In borrowing the exceptionally familiar, the presumption must be that the Constitution incorporated the familiar. In *Federalist No. 74*, Hamilton said that the Clause’s propriety was evident and that it was “consonant to the precedents” found in

<sup>171.</sup> “Philadelphiensis II,” PHILA. FREEMAN’S JOURNAL (Nov. 28, 1787), reprinted in 14 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 252 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (emphasis omitted).

<sup>172.</sup> “A Georgian,” GAZETTE OF THE STATE OF GA. (Nov. 15, 1787), reprinted in 3 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 241 (Merrill Jensen ed., 1978).

<sup>173.</sup> See “An Old Whig V,” PHILA. INDEP. GAZETTEER (Nov. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 542 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

<sup>174.</sup> The Virginia Convention Debates (June 18, 1788) (statement of George Mason), *supra* note 169, at 1378.

<sup>175.</sup> “A Georgian,” GAZETTE OF THE STATE OF GA. (Nov. 15, 1787), reprinted in 3 DOCUMENTARY HISTORY OF THE RATIFICATION 236, *supra* note 18, at 241 (Merrill Jensen ed., 1978).

<sup>176.</sup> THE FEDERALIST NO. 69, *supra* note 18, at 389 (Alexander Hamilton).

<sup>177.</sup> See U.S. CONST. art I, § 8, cl. 12 (granting Congress the sole power to “raise and support Armies”); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 322-23 (2008) (arguing that Congress has the primary power to constitute and disband the army through this clause).

the state constitutions.<sup>178</sup> “[L]ittle need be said to explain or enforce it,” meaning that it was recognizable.<sup>179</sup>

Interestingly, Hamilton went out of his way to suggest that the Massachusetts and New Hampshire CINC clauses were anomalous. In *Federalist* No. 69, he observed that several state constitutions made their governors commanders in chief. Nonetheless, “it may well be a question whether those of New-Hampshire and Massachusetts, in particular, do not in this instance confer larger powers upon their respective Governors, than could be claimed by a President of the United States.”<sup>180</sup> In other words, the President likely would have less powers than the CINCs of those states.<sup>181</sup>

Crucially, there is little to support the idea that the Clause granted operational autonomy. First, consider the Clause in isolation. Nothing about a “commander in chief” would have signaled any such autonomy in 1787. The Continental Congress’s many commanders in chief lacked a sphere of operational autonomy because Congress directed them. Further, some of these commanders in chief—the departmental CINCs—were directed by George Washington, at least after 1779. The other commanders in chief most recognizable—the Crown’s commanders in chief in America—also lacked a protected sphere. They were subject to the directions of other commanders in chief, the Crown, and Parliament.

Second, consider the other side of the equation. Congress would have the powers to declare war, raise and support the armed forces, and regulate and govern the armed forces. The power to declare war encompassed the authority to order the use of force, including limited uses of force. The power to raise and support the armed forces obviously impacts a CINC’s ability to use those forces. If money is the sinews of wars, soldiers and sailors are the bones and armaments are the muscles. Without soldiers, sailors, arms, and funds, the CINCAN is neutralized. Finally, the power to govern and regulate the military is a broad authority to control the conduct and use of the military. As the Federal Farmer observed, Congress could “make all laws . . . for forming and governing

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<sup>178</sup>. THE FEDERALIST NO. 74, *supra* note 26, at 479 (Alexander Hamilton).

<sup>179</sup>. *Id.*

<sup>180</sup>. THE FEDERALIST NO. 69, *supra* note 18, at 389 (Alexander Hamilton).

<sup>181</sup>. We can only speculate, but Hamilton may have supposed that the Massachusetts CINC could do certain things that others CINCs could not. Perhaps Hamilton thought the Massachusetts CINC had broader powers to use the militia outside of Massachusetts. Or maybe Hamilton thought that while the President could not impose rules of discipline on the army and navy, the Massachusetts Governor could. For a list of authorities of the Massachusetts CINC, see MASS. CONST. pt. 2, ch. 2, § I, art. VII.

the military, and for directing their operations.”<sup>182</sup> In sum, Congress had several express authorities to call upon as it directed the military and its CINC.

To be sure, one might cite snippets from the Founding Era to support the notion that the President would control operations. James Iredell of North Carolina noted that “[t]he secrecy, dispatch and decision which are necessary in military operations, can only be expected from one person. The President is therefore to command the military forces.”<sup>183</sup> Charles C. Pinckney, a delegate to the Philadelphia Convention and a former general, remarked that Presidents ought to be eligible for reelection so that they might continue, without interruption, to “direct our military operations.”<sup>184</sup> Some Anti-Federalists said similar things or perhaps implied that Congress would be impotent. For instance, George Mason objected that the Commander in Chief was “to command without any controul.”<sup>185</sup> Robert Miller of North Carolina said the President would have great influence over the military “and was of [the] opinion, that Congress ought to have power to direct the motions of the army. He considered it as a defect . . . that it was not expressly provided that Congress should have the direction of the motions of the army.”<sup>186</sup>

The observations that the President would command the military are hardly remarkable – the Constitution itself provides as much! Further, to say that the President could direct military operations, as many did, does not deny that Congress could as well. George Mason’s claim that the President would “command without any controul”<sup>187</sup> was refuted by George Nicholas. Though the

<sup>182.</sup> “Federal Farmer,” Letter XVIII (Jan. 25, 1788), reprinted in 17 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 360 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

<sup>183.</sup> The First North Carolina Convention Debates (July 28, 1788) (statement of James Iredell), in 30 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 325 (John P. Kaminski et al. eds., 2019).

<sup>184.</sup> The South Carolina House of Representatives Debates (Jan. 18, 1788) (statement of Charles C. Pinckney), in 27 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 18, at 157 (John P. Kaminski et al., eds., 2016).

<sup>185.</sup> The Virginia Convention Debates (June 18, 1788) (statement of George Mason), in 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 1379 (John P. Kaminski & Gaspare J. Saladino eds., 1993). Others made similar assumptions. “Tamony” claimed that, under the proposed Constitution, the President’s “command of a standing army is unrestrained by law or limitation.” Tamony, *To the Freeholders of America, VA. INDEP. CHRON.* (Jan. 9, 1788), reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 324 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

<sup>186.</sup> The First North Carolina Convention Debates (July 28, 1788) (statement of Robert Miller), *supra* note 183, at 331.

<sup>187.</sup> The Virginia Convention Debates (June 18, 1788) (statement of George Mason), *supra* note 169, at 1379.

President commands the armed forces, “the regulation of the army and navy is given to Congress. Our representatives will be a powerful check.”<sup>188</sup> This seems an unmistakable reference to the Government and Regulation Clause. Robert Miller’s lament that the Constitution did not expressly provide that Congress could direct the army’s operations<sup>189</sup> was answered immediately by Richard Dobbs Spaight. Spaight argued that Congress, “who had the power of raising armies, could certainly prevent any abuse of that [Commander-in-Chief] authority in the President,” suggesting that Congress might attach restrictive conditions on operations.<sup>190</sup> In any event, Miller’s complaint could be understood as an admission that Congress could direct military operations coupled with a suggestion that it would have been better had the subsumed power been “expressly” vested. That is surely right.

The last bit of evidence that Congress could continue to direct operations (and therefore command the CINCAN) comes from proposed amendments. Many state conventions discussed amendments. Four such proposals had a proviso designed to constrain legislative secrecy. The Constitution required each chamber to keep and publish a journal of proceedings, except such parts as a chamber believed ought to be kept secret.<sup>191</sup> The exception in the Articles of Confederation was narrower, limited to proceedings related to “treaties, alliances or military operations.”<sup>192</sup> The proposed amendments to the Constitution sought to limit the publication exception to, among other things, “military operations.”<sup>193</sup> These proposals suggest that Congress would continue to direct operations, as it had before. Congress would be discussing military opera-

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<sup>188</sup>. The Virginia Convention Debates (June 14, 1788) (statement of George Nicholas), in 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 1281 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

<sup>189</sup>. The First North Carolina Convention Debates (July 28, 1788) (statement of Robert Miller), *supra* note 183, at 331.

<sup>190</sup>. *Id.* (statement of Richard Spaight).

<sup>191</sup>. See U.S. CONST. art. II, § 1, cl. 3.

<sup>192</sup>. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 7.

<sup>193</sup>. See New York Recommendatory Amendments to the Constitution (July 26, 1788), reprinted in 37 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 262 (John P. Kaminski et al. eds., 2020); North Carolina Declaration of Rights and Amendments (Aug. 2, 1788), reprinted in 37 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 267 (John P. Kaminski et al. eds., 2020); Rhode Island Form of Ratification and Amendments (May 29, 1790), reprinted in 37 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 276 (John P. Kaminski et al. eds., 2020); Virginia Convention’s Proposed Amendments (June 27, 1788), reprinted in 37 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 254 (John P. Kaminski et al. eds., 2020).

tions – authorizing, forbidding, and directing them – and could judge that they ought to be kept secret.

Few dogs barked because there was no trespassing stranger. The unfamiliar may trigger woofs and howls, but something recognizable yields, for the most part, wagging tails. The replication of a familiar, commonplace, and subordinate status – Commander in Chief – did little to suggest autonomy. Furthermore, as before, only Congress could decide whether to wage war. As in the past, only Congress could raise and support the military. As under the Articles, Congress could govern and regulate the military. In sum, because of Congress's expansive military powers and because commanders in chief lacked a sphere of operational autonomy, the new Commander in Chief of the Army and Navy would be subordinate to national laws.

### *C. Operationalizing the Commander-in-Chief Clause*

A Prussian Field Marshall once remarked that no military plan survives first contact with the enemy.<sup>194</sup> The point is that the real world does not conform to the best-laid plans once the enemy thumps your nose. Despite all the preparation, one must improvise.

Perhaps no constitution works fully as it is meant to function, even in its early phases. Nevertheless, on the question of the Commander in Chief and its relation to Congress and the military, the original Constitution survived many early punches. The Republic's early years were marred by wars and rebellions of various intensities. As the nation weathered these crises, the government conformed to previous understandings. We see reaffirmation of two key points: there were multiple CINCs and each CINC could be commanded.

#### *1. A Host of Commanders in Chief*

The best evidence of the multiplicity of CINCs comes from statutes. In 1789, Congress reenacted the Northwestern Ordinance, an act that made the governor the “commander in chief” of the territory’s militia.<sup>195</sup> Three years later, in 1792, Congress organized the state militias, recognizing that each state

<sup>194</sup>. OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe ed., 4th ed. 2016), <https://www.oxfordreference.com/display/10.1093/acref/9780191826719.001.0001/q-oro-ed4-00007547;jsessionid=EB1EA3B18C366CF4B2A7364D10331308> [https://perma.cc/NQD7-23RG] (quoting Helmuth von Moltke).

<sup>195</sup>. Ordinance of 1787: The Northwest Territorial Government, § 6, *reprinted in* 1 U.S.C. at LVII (2018), *adopted and amended under the U.S. CONST. by Act of Aug 7, 1789, ch. 8, § 1, 1 Stat. 50 (1789).*

already had a “commander in chief.”<sup>196</sup> Per the Constitution, the President would command these state CINCs when they, and their militias, were federalized.<sup>197</sup>

Other statutes recognized that the regular military had multiple commanders in chief. On Washington’s last day in office, he signed a law that created an office of “brigadier” general and provided that “while commander in chief” the general would be entitled to extra rations.<sup>198</sup> In 1799, during the presidency of John Adams, Congress created Articles of War for its new navy and declared that presidents of courts-martial should send sentences to the “commander in chief of a fleet,” who could remit any death sentence issued.<sup>199</sup> The same law also gave the “commander in chief” a share of any prizes taken.<sup>200</sup> This was another reference to the commander of a fleet, not to the CINCAN, for the latter cannot accept any additional payments from Congress.<sup>201</sup>

That same year, Congress enacted several other statutes that also used “commander in chief” to reference someone other than the President. Congress authorized the “Physician-General” to create “directions” for the care of patients and the administration of hospitals.<sup>202</sup> But such rules were subject to alteration by the Commander in Chief *and* by the President.<sup>203</sup> Also in 1799, Congress provided that the “commander in chief” could decide where to station the paymaster general.<sup>204</sup> Finally, Congress stipulated that the commander in chief of the army could grant extra “ardent spirits” rations to soldiers,<sup>205</sup> a stimulant to morale, one supposes.

Because Presidents signed each of these laws, the executive branch understood that there were multiple commanders in chief. But this is not mere inference. Documents confirm as much. Washington’s diary referenced Henry Lee of Virginia as “Commander in Chief,” likely because Lee led the militias sent to tame the Whiskey Rebellion.<sup>206</sup> In a letter to the Secretary of War, Washington

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<sup>196.</sup> Act of May 8, 1792, ch. 33, §§ 4, 6, 1 Stat. 271, 273.

<sup>197.</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>198.</sup> Act of March 3, 1797, ch. 16, § 4, 1 Stat. 507, 508.

<sup>199.</sup> Act of March 2, 1799, ch. 24, § 1(49)-(50), 1 Stat. 709, 714.

<sup>200.</sup> *Id.* § 6(2), 1 Stat. at 715.

<sup>201.</sup> See U.S. CONST. art. II, § 1, cl. 7.

<sup>202.</sup> Act of March 2, 1799, ch. 27, § 1, 1 Stat. 721, 721.

<sup>203.</sup> *Id.* § 5, 1 Stat. at 722.

<sup>204.</sup> Act of March 3, 1799, ch. 48, § 15, 1 Stat. 749, 753.

<sup>205.</sup> *Id.* § 22, 1 Stat. at 754.

<sup>206.</sup> 6 THE DIARIES OF GEORGE WASHINGTON 195 (Donald Jackson & Dorothy Twohig eds., 1979).

described Anthony Wayne, leader of the newly created Legion of the United States and charged with leading operations against the Northwestern Confederacy,<sup>207</sup> as the army's "commander in chief."<sup>208</sup>

Although I have painted a picture of clarity in which it was obvious that there were many commanders in chief, there was some confusion. Consider an intriguing episode involving President John Adams and George Washington during the Quasi-War.

For years, France had waged a naval war against its fellow Republic, capturing hundreds of vessels.<sup>209</sup> In May of 1798, Congress belatedly authorized the President to appoint an army "commander," to be commissioned as a "lieutenant-general."<sup>210</sup>

In July, Adams nominated George Washington to be "Lieutenant General and Commander in Chief of all armies raised, or to be raised, in the United States."<sup>211</sup> One senator, writing to Thomas Jefferson, noted that "[b]y some [senators], it was supposed that the Constitution had made the President Commander in ch[ie]f of the Armies, and that that power could not be transferred to another."<sup>212</sup> Others objected to the "stile."<sup>213</sup> But senators were told that Adams had chosen that wording "for its peculiar propriety."<sup>214</sup> While the President was Commander in Chief, that was no more than what all "chief Executive Magistrates (King &c) in Europe are understood to be and yet they all

<sup>207.</sup> See William Hall & Saikrishna Bangalore Prakash, *The Constitution's First Declared War: The Northwestern Confederacy War of 1790–95*, 107 VA. L. REV. 119, 140 (2021).

<sup>208.</sup> See Letter from George Washington to James McHenry (July 1, 1796), in 20 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 152, at 34. The Secretary of War also referred to Wayne as the CINC. See Letter from Henry Knox to George Washington (Dec. 4, 1794), in 17 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 152, at 233 n.1 (David R. Hoth & Carol S. Ebel eds., 2013) (Henry Knox writing to James Wilkinson saying that the President believes the "Commander in chief" (Wayne) should grant leaves of absence).

<sup>209.</sup> Gregory E. Fehlings, *America's First Limited War*, 53 NAVAL WAR COLL. REV. 101, 108 (2000).

<sup>210.</sup> Act of May 28, 1798, ch. 47, § 5, 1 Stat. 558, 558.

<sup>211.</sup> 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 284 (D.C., Duff Green 1828).

<sup>212.</sup> Letter from Henry Tazewell to Thomas Jefferson (July 5, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 440, 440 (Barbara B. Oberg ed., 2008) [hereinafter PAPERS OF THOMAS JEFFERSON].

<sup>213.</sup> Letter from Stevens Thomson Mason to Thomas Jefferson (July 6, 1798), in 30 PAPERS OF THOMAS JEFFERSON, *supra* note 212, at 445 (Barbara B. Oberg ed., 2008).

<sup>214.</sup> *Id.*

appoint Commanders in chief of their forces.”<sup>215</sup> The objections were overruled,<sup>216</sup> and the Senate unanimously consented.<sup>217</sup> Washington was to be “chief Commander of the Armies.”<sup>218</sup>

The doubting senators seemed unaware of customs and usages. The practice under the Continental Congress and Great Britain, not to speak of the laws of Congress, proved that one could have multiple CINCs.<sup>219</sup> Moreover, though John Adams’s observation was correct, he might have taken it further. While monarchs and the topmost general in an army were both CINCs, the same was true of colonels and captains.<sup>220</sup> Finally, Adams might have noted that as the topmost appointed army general, Washington would be a “commander in chief” regardless of what a message to the Senate might say. The recitation of a specific phrase in a letter or commission was unnecessary to render someone a commander in chief.

Per his commission, Washington was to “carefully and diligently . . . discharge the Duty of *Lieutenant General & Commander in Chief* by doing and performing all Manner of Things thereunto belonging.”<sup>221</sup> Commander-in-Chief Washington served at “pleasure” and was “to observe . . . such Orders and Directions” that President Adams might issue.<sup>222</sup>

Commander-in-Chief Washington insisted on selecting his staff officers. The question of their rank rankled for months. Washington had determined that Alexander Hamilton, Charles Pinckney, and Henry Knox should be made major generals, in that order.<sup>223</sup> The grade (that is, the office) mattered, for major general was higher than brigadier general, etc. But so did the precedence within a grade – what they called “rank.”<sup>224</sup> Washington wanted Hamilton to

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<sup>215.</sup> *Id.*

<sup>216.</sup> Letter from Henry Tazewell to Thomas Jefferson, *supra* note 212, at 440.

<sup>217.</sup> *Id.*

<sup>218.</sup> *Id.*

<sup>219.</sup> See *supra* Sections II.A, II.C.

<sup>220.</sup> See *supra* notes 89-90 and accompanying text.

<sup>221.</sup> Letter from George Washington to John Adams (July 13, 1798), in 2 THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES 402, 402 n.1 (W.W. Abbot ed., 1998) [hereinafter PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES].

<sup>222.</sup> *Id.*

<sup>223.</sup> *Id.*

<sup>224.</sup> *Id.*

have the highest rank.<sup>225</sup> Adams, long ill-disposed toward Hamilton, thought that Knox should have that honor.<sup>226</sup> This upset Washington.<sup>227</sup> But he was delicate. “To increase the Powers of the Commander in Chief—or to lessen those of the President of the United States . . . was most foreign from my heart,”<sup>228</sup> he assured the President.

Adams was miffed too. Adams predicted that the nation “has not yet heard the last of jealousies and rivalries. We have already on the list all the Ambition of Pompey, Caesar and Antony . . .”<sup>229</sup> Nonetheless, Adams promised that if controversies arose, they would be settled by “you [Washington] as Commander in Chief.”<sup>230</sup> If officers appealed to the President, he promised to confirm Washington’s judgments.<sup>231</sup> The CINCAN would have a CINC’s back.

The rankling reemerged when, in March of 1799, Congress “abolished” the “present office and title of Lieutenant-General” and created a new office.<sup>232</sup> There was to be a “commander of the army of the United States” to be “commissioned by the style ‘General of the Armies of the United States.’”<sup>233</sup> Congress had fired Washington!<sup>234</sup> But the obvious expectation was that Adams

<sup>225.</sup> *Id.* To be clear, nothing Washington did (or could do) would ensure that Hamilton would take over as CINC should Washington’s tenure end. Outside the case of a recess appointment, Adams and the Senate would decide who would succeed Washington.

<sup>226.</sup> *Id.*

<sup>227.</sup> Letter from George Washington to John Adams (Sept. 25, 1798), in 3 PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES, *supra* note 221, at 39 (W.W. Abbot & Edward G. Lengel eds., 1999).

<sup>228.</sup> *Id.*

<sup>229.</sup> Letter from John Adams to Oliver Wolcott, Jr. (Sept. 24, 1798), in THE ADAMS PAPERS (forthcoming), <https://founders.archives.gov/documents/Adams/99-02-02-3021> [<https://perma.cc/XW9Q-GPF5>].

<sup>230.</sup> Letter from John Adams to George Washington (Oct. 9, 1798), in 3 PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES, *supra* note 221, at 88 (W.W. Abbot & Edward G. Lengel eds., 1999).

<sup>231.</sup> *Id.*

<sup>232.</sup> Act of Mar. 3, 1799, ch. 48, § 9, 1 Stat. 749, 752.

<sup>233.</sup> *Id.*

<sup>234.</sup> The Supreme Court has held that Congress cannot remove officers “performing executive functions” by statute. See *Bowsher v. Synar*, 478 US 714, 720 (1986). But Congress did so in 1799. To my knowledge, no one at the time objected that Congress had breached the Constitution. I have argued that Congress has constitutional power to remove officers by disestablishing offices. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006).

would appoint Washington to an office with a higher grade— a “General” without the modifiers.<sup>235</sup>

Before passage, Adams discovered that the bill did nothing but change the title. It gave no additional authority to the new office.<sup>236</sup> Adams complained, “[A]re you going to appoint him general over the President?”<sup>237</sup> He was not “so blind” that he could not see the effort “to annihilate the essential powers given [to] the president.”<sup>238</sup> Asked to explain, Adams said it was obvious and declined to go into details.<sup>239</sup> The famously sensitive and jealous Adams was mistaken, at least as a legal matter. In the absence of some indication that Congress was trying to curb Adams, the increase in grade was immaterial. Whether “Lieutenant General” or “General,” the officer would be subordinate to the CINCAN.

As far as I can tell, Washington never ceased being the de facto commander in chief despite being fired and never receiving the new office. Some say he died as “lieutenant general.”<sup>240</sup> Adams apparently never nominated Washington, even after the Senate reconvened in December.<sup>241</sup> Washington perished on December 14, 1799.

Washington eventually got his promotion. In 1976, Congress created a “General of the Armies,” with the officer to have a “rank and precedence” over all others, “past and present.”<sup>242</sup> Further, the President was “authorized and requested” to appoint George Washington to the post.<sup>243</sup> How Congress could authorize the President to appoint a dead person and also decree that no future Congresses could create a higher ranked office is rather uncertain. In 1978, the Secretary of the Army promoted Washington.<sup>244</sup> Washington was in no position to refuse.

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<sup>235.</sup> Letter from Theodore Sedgwick to Alexander Hamilton (Feb. 7, 1799), in 22 THE PAPERS OF ALEXANDER HAMILTON 469, 471 (Harold C. Syrett ed., 1975) [hereinafter PAPERS OF ALEXANDER HAMILTON].

<sup>236.</sup> *Id.*

<sup>237.</sup> *Id.*

<sup>238.</sup> *Id.*

<sup>239.</sup> *Id.*

<sup>240.</sup> See, e.g., Providing for the Appointment of George Washington to the Grade of General of the Armies of the United States, H.R. REP. NO. 94-1388, at 2 (Aug. 14, 1976).

<sup>241.</sup> *Id.* In the record of nominations sent by Adams to the Senate in December 1799, there is no mention of any nomination of Washington as General. 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES, *supra* note 211, at 325-30.

<sup>242.</sup> H.R.J. Res. 519, 94th Cong., 90 Stat. 2078 (1976).

<sup>243.</sup> *Id.*

<sup>244.</sup> Clifford L. Alexander, Jr., Sec'y of the Army, Orders 31-3 (Mar. 13, 1978).

While the episode reveals some confusion about the supposed uniqueness of a commander in chief, the bigger takeaway is that Washington, Adams, and successive Congresses recognized that there were multiple CINCs.

## *2. Directing Operations and Commanders in Chief*

When Americans think of “Commander in Chief” today, many imagine a status thick with sole discretion over objectives, strategy, tactics, and deployments. Neither of the first two Presidents understood “commander in chief” in this sense. Nor did early Congresses.

To begin with, one commander in chief could direct other CINCs. For instance, Washington directed the CINCs who led successive expeditions against the Northwestern Confederacy.<sup>245</sup> He also directed the CINC of the force sent to suppress the Whiskey Rebellion.<sup>246</sup> Likewise, President Adams could direct Lieutenant General Washington. After all, Washington’s 1798 commission stated that he was subject to the President’s orders.<sup>247</sup>

The idea that *Congress* may direct the army and navy, including the CINCAN, might seem less plausible in comparison. Indeed, the notion that the CINCAN has something of a monopoly on military operations is commonly voiced, even as the claim’s contours are uncertain. For instance, some scholars have argued that Congress cannot order battlefield advances and retreats.<sup>248</sup> Likewise, some lawyers have insisted that Congress cannot bar the mistreatment of prisoners.<sup>249</sup> During the Obama Administration, the President asserted that Congress could not mandate that prisoners be kept at certain locations.<sup>250</sup>

There were traces of such arguments in the late eighteenth century. During the Quasi-War, some legislators denied that Congress could specify what might

<sup>245</sup>. See Hall & Prakash, *supra* note 207, at 134–35.

<sup>246</sup>. Letter from George Washington to Henry Lee (Aug. 26, 1794), in 16 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 152, at 600–01 (Mark A. Mastromarino ed., 1996).

<sup>247</sup>. See Letter from George Washington to John Adams, *supra* note 221, at 402 n.1.

<sup>248</sup>. See Barron & Lederman, *A Constitutional History*, *supra* note 15, at 1019 n.307 (collecting scholarship supporting the view of the President’s exclusive control over troop movement and operations).

<sup>249</sup>. See Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1319 (2006) (discussing the Bybee Memorandum, *supra* note 5).

<sup>250</sup>. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 2 (Jan. 2, 2013) (signaling that the National Defense Authorization Act may be an unconstitutional violation of the separation of powers by seeking to curtail transfers of detainees from the Guantanamo Bay detention facility).

(or must) be done with the military. For instance, a Federalist argued that Congress “cannot prescribe the purposes for which [the army] shall be used.”<sup>251</sup> Once raised, “the const[itutio]n transfers the use of them to The President, which is paramount to any law limiting the use.”<sup>252</sup> House Speaker Jonathan Dayton said that Congress could not legislate that naval vessels could convoy merchant ships because that decision rested with the President alone.<sup>253</sup>

These sorts of arguments rested upon an inflated view of CINCs, ignored Congress’s broad military authority, and failed to account for longstanding practices. Recall that in Britain there were hundreds of CINCs, none of whom had any protected sphere of operational autonomy. The commissions issued to British CINCs noted that they had to honor orders from the Crown and, often-times, Parliament.<sup>254</sup> Further, most CINCs directed smaller units and were, in turn, directed by other commanders in chief.<sup>255</sup> A captain—a commander in chief—could be directed by colonels, generals, the Crown, and Parliament. Even the Crown had to honor laws limiting what might be done with Britain’s armed forces.

Likewise, during the Revolutionary War, there were many CINCs within the Continental Army, and Congress directed their operations and movements, often in intrusive ways. Moreover, now-Judge David Barron and Professor Marty Lederman note that many constitutions expressly made state commanders in chief subject to legislative control.<sup>256</sup> Apparently no state commander in chief was thought to have any exclusive military powers.<sup>257</sup> These materials fairly prove that in 1787, there was no sense that chief commanders enjoyed a protected sphere of operational autonomy.

But the most decisive argument in favor of pervasive congressional authority over military operations comes from dozens of early statutes and practices thereunder. From 1789 onwards, legislative direction of operations was routine. As discussed below, Congress directed troop placement, vessel patrols, and uses of force, including the proper targets in wartime.

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<sup>251.</sup> Notes on Federalist Arguments in Congressional Debates [after Aug. 3, 1798], in 30 PAPERS OF THOMAS JEFFERSON, *supra* note 212, at 471 (Barbara B. Oberg ed., 2008).

<sup>252.</sup> *Id.*

<sup>253.</sup> 8 ANNALS OF CONG. 1454-55 (Joseph Gales ed., 1851).

<sup>254.</sup> *Supra* Section II.A.

<sup>255.</sup> *Id.*

<sup>256.</sup> See Barron & Lederman, *Framing the Problem*, *supra* note 15, at 797.

<sup>257.</sup> *Id.* at 782.

During the Northwestern Confederacy War, Congress authorized the President to use the militia to protect the western frontier.<sup>258</sup> Further, Congress created three new army regiments to be deployed on the frontiers. The regiments were to be discharged as soon as peace was made with the tribes.<sup>259</sup> Congress granted additional rations of flour or bread, meat, and salt, but only to soldiers on the frontier.<sup>260</sup> In 1794, Congress authorized the President to call forth the militia to be used in four counties in Pennsylvania.<sup>261</sup> By implication, he could not deploy them elsewhere.

That same year, Congress created a corps of artillerists and engineers and authorized the President to station them in the field, on the frontiers, and coastal fortifications.<sup>262</sup> Congress also authorized the President to fortify about twenty ports and harbors and “garrison” them with soldiers and equip them with cannons.<sup>263</sup> These statutes suggest that Congress was permitting the CINCAN to deploy soldiers and equip fortifications.

The creation of a navy—more precisely the authority to build or purchase ships—also signaled congressional authority over operations. A 1794 act authorized the procurement of six vessels to protect commerce from Algerian corsairs.<sup>264</sup> The act automatically sunsetted if the United States and Algiers made peace.<sup>265</sup> It seems clear that if built, the ships were to sail in the Mediterranean. An act from 1798 authorized the President to procure ten more small vessels.<sup>266</sup> These vessels, which were not tied to any peace, were to be stationed “in such parts of the United States” as the President “may direct.”<sup>267</sup> Given the con-

<sup>258.</sup> Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96; *see also* Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 120, 121 (authorizing the President to call out state militiamen to protect the frontier).

<sup>259.</sup> Act of Mar. 5, 1792, ch. 9, §§ 2-3, 1 Stat. 241, 241; *see also id.* § 13, 1 Stat. at 243 (authorizing the President to call out the cavalry to protect the frontier).

<sup>260.</sup> Act of Jan. 2, 1795, ch. 9, § 6, 1 Stat. 408, 409.

<sup>261.</sup> Act of Nov. 29, 1794, ch. 1, § 1, 1 Stat. 403, 403.

<sup>262.</sup> Act of May 9, 1794, ch. 24, §§ 2, 6, 1 Stat. 366, 366, 367. Perhaps the broad grant was necessary because absent such language, readers might otherwise suppose that the corps was to be stationed along the frontier.

<sup>263.</sup> Act of Mar. 20, 1794, ch. 9, §§ 1-2, 1 Stat. 345, 345-46; *see also* Act of March 21, 1794, ch. 10, § 1, 1 Stat. 367, 367 (detailing the fortification of the port and harbor of Annapolis).

<sup>264.</sup> Act of Mar. 27, 1794, ch. 12, § 1, 1 Stat. 350, 350.

<sup>265.</sup> *Id.* § 9, 1 Stat. at 351.

<sup>266.</sup> Act of May 4, 1798, ch. 39, § 1, 1 Stat. 556, 556.

<sup>267.</sup> *Id.* § 2, 1 Stat. at 556.

straint, it seems that the President could not station these vessels on the high seas.

One of the most intrusive regulations of operations came from the congressional imposition of rules of “order and discipline.” These consisted of a manual regulating mundane, but essential, operations. With Washington’s approval,<sup>268</sup> Baron von Steuben created these rules in 1779 and the Continental Congress imposed them by resolution.<sup>269</sup> After the inauguration of the new federal government, Congress reimposed them on the army in 1789<sup>270</sup> and on the militia in 1792.<sup>271</sup>

The 172-page manual regulated marching, formations, the care of the wounded, encampments, and a host of other matters. Consider a passage about priming and loading:

*Prime and Load!* Fifteen motions.

1st. Come to the recover, throwing up your firelock, with a smart spring of the left hand, directly before the left breast, and turning the barrel inwards: at the same moment catch it with the right hand below the lock, and instantly bringing up the left hand, with a rapid motion, seize the piece close above the lock, the little finger touching the feather spring; the left hand to be at an equal height with the eyes, the butt of the firelock close to the left breast, but not pressed, and the barrel perpendicular.

2d. Bring the firelock down with a brisk motion to the *priming position*, as directed in the 4th word of command, instantly placing the thumb of the right hand against the face of the steel, the fingers clenched, and the elbow a little turned out, that the wrist may be clear of the cock.

3d. Open the pan, by throwing back the steel with a strong motion of the right arm, keeping the firelock steady in the left hand.

4th. Handle cartridge.

5th. Prime.

6th. Shut pan.

7th. Cast about.

8th. and 9th Load.

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<sup>268</sup>. See PAUL LOCKHART, THE DRILLMASTER OF VALLEY FORGE: THE BARON DE STEUBEN AND THE MAKING OF THE AMERICAN ARMY 186 (2008).

<sup>269</sup>. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96; see BARON VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES (New York, Evert Duyckinck 1807) (1779).

<sup>270</sup>. Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96.

<sup>271</sup>. See Militia Act of 1792, ch. 28, § 4, 1 Stat. 264, 264.

- 10th. and 11th Draw rammer.
- 12th. Ram down cartridge.
- 13th. Return rammer.
- 14th. and 15th. Shoulder.<sup>272</sup>

The comprehensive manual also supplied standing instructions for each army office, from the commandant to the foot soldier.<sup>273</sup> Commandants had to attend to the health and cleanliness of their soldiers, to keep men under supervision, and to choose noncommissioned officers wisely.<sup>274</sup> Privates had to practice marching to acquire a firm step and proper balance.<sup>275</sup> The manual thoroughly, even microscopically, directed operations, in peace and in war. Remember that, though army personnel generated the manual, it was Congress that had imposed it on the army and militia. Hence, even if the entire army and every state came to oppose some or all of the manual, officers, soldiers, and state militia men were lawfully bound to honor it. This was congressional regulation at a granular level.

During the Quasi-War with France, a partial naval war lasting from 1798 to 1800, Congress directed operations by authorizing some military measures and, implicitly, forbidding others. Congress began with a statute ordering the capture of French ships lurking near American waters.<sup>276</sup> Later, Congress authorized the navy and privateers to capture armed French vessels found on the high seas or in waters of the United States.<sup>277</sup> Merchant vessels owned by Americans and trading with France could be intercepted when going to, but not coming from, French ports.<sup>278</sup> Congress never authorized the capture of all French armed vessels, let alone all French vessels. Further, Congress never authorized a land or naval attack on France or her colonies.

George Washington, who knew a thing or two about CINCs, signed bills that directed military operations.<sup>279</sup> What Secretary of War Henry Knox said in the context of a potential war against Indian tribes – “Whatever [Congress] di-

<sup>272.</sup> STEUBEN, *supra* note 269, at 12.

<sup>273.</sup> *Id.* at 61-73.

<sup>274.</sup> *Id.* at 61.

<sup>275.</sup> *Id.* at 72.

<sup>276.</sup> Act of May 28, 1798, ch. 48, 1 Stat. 561, 561. The act also covered vessels acting “under pretence of authority” from France. *Id.*

<sup>277.</sup> Act of July 9, 1798, ch. 68, §§ 1-2, 1 Stat. 578, 578-79.

<sup>278.</sup> Act of Feb. 9, 1799, ch. 2, §§ 1, 5, 1 Stat. 613, 613, 615.

<sup>279.</sup> See, e.g., Act of May 8, 1792, ch. 33, §§ 4, 6, 1 Stat. 271, 272-73; Militia Act of 1792, ch. 28, 1 Stat. 264.

rect[s], will be executed by the Executive"—was true for all operations.<sup>280</sup> The second CINCAN, John Adams, likewise signed all the Quasi-War bills into law, never voicing any constitutional qualms. Moreover, I know of no cabinet officer who raised constitutional objections regarding the many bills that directed military operations.

In *Little v. Barreme*, the Supreme Court endorsed legislative control of operations.<sup>281</sup> Acting on orders from the President, Captain George Little had captured a ship believing that it was an American vessel that had come from a French port. The Court held that because Congress had authorized the seizure only of American ships heading to a French port, the Executive could not seize American ships coming from France.<sup>282</sup> Chief Justice John Marshall further concluded that the President's military order provided no defense to an action brought against Captain Little.<sup>283</sup> In other words, Congress could decide which military actions were lawful and, by implication, which were unlawful. In *Bas v. Tingy*, the question was whether France was an "enemy" within the meaning of federal capture laws.<sup>284</sup> In concluding that France was a nemesis, the Justices addressed congressional power over operations. Justice Samuel Chase noted that "[C]ongress may wage a limited war; limited in place, in objects, and in time. [I]f a partial war is waged, its extent and operation depend on our municipal laws."<sup>285</sup> Justice Oliver Paterson observed that "[a]s far as [C]ongress tolerated and authorised the war on our part, so far may we proceed in hostile operations."<sup>286</sup> In sum, the President had no autonomy over operations that Congress had to respect, for Congress could thoroughly regulate which were permitted and which were forbidden.

This would have been no less true had John Adams donned a bicorne with a black cockade and commanded the navy from the high seas. CINCAN or not, he was limited by congressional authorizations. He could not bombard France with cannon fire, attack her West Indies possessions, or land a force on French soil. By directing and authorizing some military operations, and not others, Congress was limiting what the Commander in Chief could order from the na-

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<sup>280</sup>. Letter from Henry Knox to William Blount (Dec. 29, 1794), in 4 AMERICAN STATE PAPERS 634, 635 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).

<sup>281</sup>. 6 U.S. (2 Cranch) 170, 177-78 (1804).

<sup>282</sup>. *Id.* at 178.

<sup>283</sup>. *Id.* at 179.

<sup>284</sup>. 4 U.S. (4 Dall.) 37, 39 (1800) (opinion of Moore, J.) (emphasis omitted).

<sup>285</sup>. *Id.* at 43 (opinion of Chase, J.).

<sup>286</sup>. *Id.* at 45 (opinion of Paterson, J.).

tion's capital. But it was also regulating how the Commander in Chief might wage war in the field.

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In the eighteenth century, commanders in chief were not quite a dime a dozen—not every soldier or sailor could be a chief commander. But CINCs were commonplace, with every sizable military having hundreds of them. They were ubiquitous because “commander in chief” meant no more than “chief command” of a military unit, be it a company, an expedition, a garrison, or an entire army or squadron. That is why Britain had hundreds of commanders in chief at any one time. Across the Atlantic, America also had many CINCs, both before and after the Constitution.

Furthermore, no CINC enjoyed autonomy over military operations, in war or in peace. As we have seen, the Continental Congress directed General Washington repeatedly and, in the states, the assemblies had the same relationship with their commanders in chief. Even the Crown saw Parliament, from time to time, constrain its authority over the military and the militia. And under the new Constitution, Congress repeatedly directed the military, and its CINCAN, with respect to matters such as loading guns, patrolling, proper enemy targets, and lawful theaters of combat. Neither Washington nor Adams ever objected to these laws on constitutional grounds. They knew that a chief commander had no legal grounds for protesting because CINCs were not seen as enjoying a sphere of operational autonomy.

This is not to claim that the CINCAN was wholly unexceptional. To the contrary, the CINCAN was special in the same way that the Crown or governors were exceptional: unlike garden-variety CINCs, each of these chief executives enjoyed *other* constitutional and statutory authority that enhanced their sway over the military. The next Part sketches the authority that flows from the CINC Clause and then discusses the considerable powers and influence that arises from other parts of the Constitution.

### III. WHERE THE PRESIDENT'S POWER OVER THE MILITARY BEGINS

Although this Article's primary focus is on the meaning of the the Commander-in-Chief Clause, its wider ambition is to lay out the metes and bounds of the President's military powers. Much of the CINCAN's authority, both legal and practical, comes not from the CINC Clause but from the rest of the Constitution. The CINCAN's concurrent status as President makes the CINCAN far more powerful and influential than conventional commanders like generals and admirals.

### A. *The Power that Arises from Being the CINCAN*

As CINCAN, the President has the powers of the first general and admiral. That is, after all, what Hamilton said.<sup>287</sup> While some discussed a “first admiral” in Britain,<sup>288</sup> there seems not to have been a “first general.” Given that there was no “first general” in America or Britain, it seems fair to say that Hamilton meant no more than that the President would have the authority of the highest-ranked (“first”) general and admiral. Using this idea of a topmost general and admiral as a framing device, we can sketch out the sort of command granted by the Clause to the President.

#### 1. Personal Command

When people thought of commanders in chief in the eighteenth century, they perhaps imagined someone who served in the field. CINCs headed expeditions, commanded forts, directed the army in battle, and led vessels at sea. This was in keeping with the Hamiltonian claim that the President was but a first general and admiral, for both generals and admirals command in person. Occasionally, they may be far from the battlefield. But in the eighteenth century they were often in the fray, at mortal risk like their subordinates.

The prospect of personal command was divisive.<sup>289</sup> It raised the specter that the Executive might use the military to crush opponents. Some states made their executives commander in chief but specifically forbade battlefield command unless the legislature consented.<sup>290</sup> Such constraints diminished the prospect that a chief executive might use the military to seize power.

The possibility of personal command would not have been so obvious had the Constitution said no more than that the President could “direct the army and navy,” for the latter phrase might have implied a purely remote form of control, with no participation in actual combat. In contrast, when you make someone “commander in chief,” you invite the assumption that the person will assume chief command near, or in the midst of, the scenes of warfare.

That modern Presidents sensibly chose to eschew field command should not blind us to this real aspect of the CINC Clause. Field command has been extremely rare, in part because most Presidents have had the sense to direct via orders to field officers. I know of only two instances where Presidents took

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<sup>287</sup>. THE FEDERALIST No. 69, *supra* note 18, at 389 (Alexander Hamilton).

<sup>288</sup>. See, e.g., 6 ENCYC. BRITANNICA 72 (James Moore ed., Dublin, James Moore 1791).

<sup>289</sup>. See *supra* text accompanying notes 170-173.

<sup>290</sup>. See PA. CONST. of 1776, § 20.

command in the field. Washington assumed personal command of the state militias raised to crush the Whiskey Rebellion. Although he donned a battle uniform, Washington's field command was largely symbolic because it was temporary. After serving in the field for almost a month, organizing and inspecting the troops, Washington handed over command to Henry Lee of Virginia.<sup>291</sup> Much later, President Abraham Lincoln took field command in 1862 for a week, directing an army detachment and naval forces near Hampton Roads, Virginia.<sup>292</sup> That was perhaps the last time a President served as something of a hands-on general and admiral.

## 2. *Command Authority*

Because the President is akin to a general and an admiral, the CINCAN may make all the decisions that a general or admiral might make with respect to the peacetime army and navy. Similarly, in time of war, CINCANS can make the interstitial decisions that are often left to generals and admirals. He can make these decisions from the comfort of sitting behind the Resolute Desk in the Oval Office, far from the scenes of conflict. Or he can make them from the position of a bunker on the front lines or onboard a ship in a naval armada.

According to a dictionary of the Founding Era,

a general is to regulate the march of the army, and their encampment, to visit the posts, to command parties for intelligence, to give out the orders and the [pass]word every night to the lieutenant and major generals: in day of battle he chuses the most advantageous ground, makes the disposition of his army, posts the artillery, and sends his orders by his aid de camps where there is occasion. At a siege, he causes the place to be invested; he views and observes it, orders the making of the lines of circumvallation and contravallation, and making the attacks: he visits often the works, and makes detachments to secure his convoys.<sup>293</sup>

<sup>291</sup>. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878, at 50-53 (David F. Trask ed., 1988).

<sup>292</sup>. See generally STEVE NORDER, LINCOLN TAKES COMMAND: THE CAMPAIGN TO SEIZE NORFOLK AND THE DESTRUCTION OF THE CSS VIRGINIA (2019) (describing this moment in the Civil War in depth).

<sup>293</sup>. *General of an Army*, MILITARY DICTIONARY (1778), *supra* note 90.

An admiral is “of the first rank and command in the fleet . . . [and] [a]lso an officer who superintends the naval forces of a nation.”<sup>294</sup> When at sea the admiral sets “the proper order of battle called the LINE. In this arrangement he is to make a judicious distribution of strength from the van to the rear.”<sup>295</sup> He also was to review the judgments of courts-martial.<sup>296</sup>

If one considers George Washington’s time as Commander in Chief of the Continental Army, these were precisely the types of decisions he made. He issued hundreds of “General Orders” to his army. Among other things, the General Orders contained admonitions, passwords, and directions.<sup>297</sup> The orders consisted of the nitty-gritty associated with command in the field.

The CINCAN likewise can issue such orders for the army and navy. The CINCAN can array the military’s assets and direct the actual battle. The CINCAN can make decisions about advances, retreats, encirclements, broadsides, etc. Again, the point is the “first General and Admiral”<sup>298</sup> can make the decisions that generals and admirals may make.

### 3. Repelling Attacks

As a person with the responsibilities of command, the CINCAN must do what military officers must do. Military officers are sometimes used to chastise foreign nations or to conquer them. But their most elemental duty is defense of national territory. Whether that obligation is made express or not, military of-

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<sup>294</sup>. *Admiral, WILLIAM FALCONER, AN UNIVERSAL DICTIONARY OF THE MARINE: OR, A COPIOUS EXPLANATION OF THE TECHNICAL TERMS AND PHRASES EMPLOYED IN THE CONSTRUCTION, EQUIPMENT, FURNITURE, MACHINERY, MOVEMENTS, AND MILITARY OPERATIONS OF A SHIP* (1780).

<sup>295</sup>. *Id.*

<sup>296</sup>. *Id.*

<sup>297</sup>. See, e.g., George Washington, *General Orders* (Nov. 11, 1775), reprinted by FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-02-02-0313> [<https://perma.cc/5APZ-8FKM>] (issuing order “as an Admonition”); George Washington, *General Orders* (Nov. 20, 1775), reprinted by FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-02-02-0369> [<https://perma.cc/3T9V-TH89>] (discussing instructions); George Washington, *General Orders* (Mar. 9, 1783), reprinted by FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/99-01-02-10799> [<https://perma.cc/56SC-VLJ7>] (giving “public admonition”); George Washington, *General Orders* (Mar. 17, 1776), reprinted by FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-03-02-0354> [<https://perma.cc/G5YJ-JBCE>] (giving parole and countersign).

<sup>298</sup>. THE FEDERALIST No. 69, *supra* note 18, at 389 (Alexander Hamilton).

ficers exist, at a minimum, to secure a nation's borders by repelling invaders. Just as a firefighter must fight fires even in the absence of an express obligation, a CINC, of whatever sort or rank, must defend her nation.

That is perhaps why discussions from the era assume that the Executive could repel sudden attacks. Debates at the Philadelphia Convention suggest that the Commander in Chief should repel invasions. The advocates of the Declare War Clause, James Madison and Elbridge Gerry, claimed that even though Congress would have the power to declare war, the President could still "repel sudden attacks."<sup>299</sup> Another delegate opposed their amendment, but agreed that the President should be able to repel attacks and not to commence war.<sup>300</sup>

Early practice also suggests that the Executive has authority to repel attacks. When the Creek and Chickasaw tribes declared war on the United States between 1792 and 1793, various governors wrote to the President seeking authority for offensive operations against the tribes.<sup>301</sup> Washington and his Cabinet agreed that only Congress could authorize offensive measures because only Congress could declare war.<sup>302</sup> At the same time, they concluded that repelling attacks was permissible.<sup>303</sup> Their conclusion is consistent with the view that, even though Congress had a monopoly on the power to declare war, Executives had an implicit duty to defend territory. Commanders in Chief, officers, and soldiers all have an obligation to defend the United States and may act to fulfill that duty without waiting for express congressional authorization.<sup>304</sup>

#### *B. The Power and Influence that Arise from Being President*

Because every CINCAN is also the President, CINCANS can wield other powers in order to bolster their legal and practical authority over the armed forces. In many respects, these other sources of authority are *far more significant* than the President's authority as CINCAN.

<sup>299.</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 157, at 318.

<sup>300.</sup> *Id.*

<sup>301.</sup> See Prakash, *Unleashing the Dogs of War*, *supra* note 15, at 98-100.

<sup>302.</sup> *Id.*

<sup>303.</sup> *Id.* at 98, 100.

<sup>304.</sup> There is a lurking question, namely whether Congress can constrain this implicit duty to defend. While Congress has rather broad authority over the military, one might doubt whether it can provide by law that no CINCAN can order the use of defensive force without first securing congressional approval.

### 1. *The Executive Power*

We have seen that someone could be a commander in chief of an entire army but lack control over every army unit. That describes the Commanders in Chief of the British Army, as they lacked control over the artillery and other departments. It also describes the Commander in Chief of the Continental Army, George Washington. As previously discussed, despite receiving a 1775 commission as “Commander in Chief of the army of the United Colonies and of all the forces raised or to be raised by them,” Washington did not control the entire army. Instead, Congress created regional commands, each with its own commanders in chief. These CINCs were autonomous from Washington, an autonomy that apparently ended in 1779. Furthermore, there were army institutions, like inspectors general, who also were independent of Washington.<sup>305</sup>

Nothing in the CINC Clause suggests that it eliminates the possibility that Congress might make army institutions independent of the CINCAN. It replicates a known office with known limits. The CINC Clause makes the President the chief commander. It arguably does not convey supremacy or control over the entire army and navy.

Instead, that supremacy—the ability to direct every element of the army and navy—likely comes from the Vesting Clause of Article II.<sup>306</sup> The “executive power” includes the ability to direct the common force against external forces and threats. As Thomas Rutherford wrote in the mid-eighteenth century, “The second branch of executive power, which is called external executive power, or may, if we like the name better, be called military power, is the power of acting with the common strength or joyn force the society to guard against such injuries as threaten it from without.”<sup>307</sup> Recall that Hamilton had said the same in *Federalist No. 74*.<sup>308</sup> In sum, the better reason for why the President can control the entire army is that the President has the “executive power.”

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<sup>305</sup>. See *supra* text accompanying footnotes 145–147 (discussing inspector general).

<sup>306</sup>. U.S. CONST. art. II, § 1, cl. 1. Professor Julian Mortenson has argued that the Vesting Clause is an empty vessel, merely the power to execute the law, or a set of “disaggregated powers.” Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1273, 1278, 1332–33 (2020). The materials from the era support the last claim.

<sup>307</sup>. 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS 54 (Cambridge, W. Thurlbourn 1756).

<sup>308</sup>. See THE FEDERALIST NO. 74, *supra* note 26, at 479 (Alexander Hamilton); see also THE FEDERALIST NO. 75, *supra* note 162, at 481 (Alexander Hamilton) (“[T]he employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate.”).

Similarly, the President's power to remove military officers does not stem from the CINC Clause. Rather the removal power comes from the Vesting Clause. As noted earlier, the CINC of the Continental Army lacked power to remove officers, save for when Congress granted authority.<sup>309</sup> Hence, Washington was forced to work with officers that sometimes undermined him. Because the Constitution vests the executive power with the CINCAN, it empowers the President to remove military officers. Indeed, early Attorney General opinions referenced the executive power as the source of removal authority over the military.<sup>310</sup>

## *2. The Appointment Power*

While some commanders in chief had the power to appoint, the CINC of the Continental Army did not.<sup>311</sup> Specifically, the office of CINC did not come with authority to appoint, as the Continental Congress had retained that power for itself. This meant that Washington was forced to work with officers that were not of his choosing for much of the war. There were pockets of appointment authority grounded in specific resolutions. Sometimes Congress gave Washington temporary authority, say over six months, to appoint.<sup>312</sup> Other times Congress ceded an indefinite power to appoint to certain sorts of officers.<sup>313</sup>

<sup>309.</sup> See, e.g., 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 1045-46 (1906) (granting the Commander in Chief six-month authority to, among other things, displace all officers below brigadier general); 13 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 354 (1909) (granting the Commander in Chief authority to displace “cloathier”); Resolution (June 7, 1777), in 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 426-27 (1907) (granting the Commander in Chief and department commanders authority to displace paymasters).

<sup>310.</sup> See, e.g., Mil. Power of the President to Dismiss from Serv., 4 Op. Att'y Gen. 1, 1-2 (1842); The Claim of Surgeon Du Barry for Back Pay, 4 Op. Att'y Gen. 603, 609-10 (1847).

<sup>311.</sup> See BRUCE CHADWICK, GENERAL WASHINGTON'S WAR: THE FORGING OF A REVOLUTIONARY LEADER AND THE AMERICAN PRESIDENCY 153 (2005) (observing that Congress appointed and promoted, not Washington).

<sup>312.</sup> See, e.g., 6 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 1045-46 (1906) (giving Washington six-month authority to, among other things, appoint and displace all officers below brigadier general); see also CHADWICK, *supra* note 311, at 258-61, 284-85, 376-77 (discussing controversies associated with congressional power to appoint and Washington's frustration with seeing more qualified officers passed over).

<sup>313.</sup> See, e.g., 15 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 1358 (1906) (giving commanders, including the commander in chief, authority to appoint officers in battalions).

The Constitution strengthened the CINCAN's hand because the President may appoint all military officers. Ordinarily he must secure the Senate's consent. But there are two exceptions, one for temporary "recess" appointments and one for when Congress grants unilateral authority to appoint "inferior officers."<sup>314</sup> As vacancies arise, by death, resignation, or removal, the President chooses suitable candidates. In sum, the President has a tight hold over the military because no one may assume office without his approval, and no one will likely remain in their post without it.

### 3. *The Veto Power*

As discussed at length throughout this Article, Congress has considerable legislative power over the armed forces. But because these powers are exercisable by lawmaking, the President has a role to play. Specifically, the President may veto legislation on policy and constitutional grounds.<sup>315</sup> The President's objections will prevail unless supermajorities in both chambers vote to override them.<sup>316</sup> In many cases, a veto enables the President to thwart legislation that would otherwise lawfully compel, or constrain, uses of force. The veto empowers the President to obstruct bills increasing, or decreasing, the size of the army and navy. The President may frustrate proposals regulating, or deregulating, the military.

Relatedly, because the Presentment Clause gives the President ten days to consider bills,<sup>317</sup> the Clause ensures that the President may delay the enactment of any legislation. A President can take ten days and allow the bill to become law with his signature or otherwise. Alternatively, a President can consider a bill for ten days, return it with objections, and then wait for Congress to decide whether it will attempt an override. This power to delay legislative action yields a certain latitude and flexibility, for Presidents can ensure that Congress cannot legislate with rapidity.

The first Commander in Chief under the Constitution, George Washington, wielded the veto pen to derail an attempt to disband a squad of dragoons.<sup>318</sup> It was the second of his two vetoes and the only one issued on policy

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<sup>314.</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>315.</sup> *Id.* art. I, § 7, cl. 2.

<sup>316.</sup> *Id.*

<sup>317.</sup> *Id.*

<sup>318.</sup> George Washington, Veto Message (Feb. 28, 1797), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 211-12 (James D. Richardson,

grounds. Though Washington generally deferred to Congress on matters of legislation, modern CINCs use veto threats to shape the bills that pass Congress, affecting both what is included and what is omitted. Thus, CINCs can influence, and sometimes thwart, bills, including those that are meant to curb their discretion or counteract their misreading of existing law. When a CINC has a veto, it becomes difficult to check that commander.<sup>319</sup>

#### *4. The Duty to Inform and the Power to Propose*

The President has a continuous duty to supply information to Congress via the State of the Union Clause<sup>320</sup> and has the power to recommend legislation pursuant to the Recommendations Clause.<sup>321</sup> Both give the President the ability to frame the legislative agenda for Congress and hence they cede the President a certain influence over the first branch.

Washington was reticent to propose specific measures.<sup>322</sup> Yet he repeatedly gave information to Congress, information that implied certain military measures were necessary or useful.<sup>323</sup> He also delicately urged that Congress pass measures related to the military.<sup>324</sup> These reports and suggestions were influential.

ed., New York, Bureau Nat'l Literature 1899) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS] (informing Congress of the reasons motivating his veto).

<sup>319</sup>. The veto relates to the making of new law. But the President can soften the blow of some existing laws. Using the pardon power, the President can diminish the rigor of military punishment via commutations and can forgive offenses altogether. See U.S. CONST. art. II, § 2, cl. 2. Further, the President has authority over prosecutorial resources and can issue directions to prosecute or not. See generally Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (arguing that the text, history, and structure of the Constitution show that the President is the chief prosecutor of all federal crimes). All in all, the President's sway over the implementation of military law is considerable.

<sup>320</sup>. U.S. CONST. art. II, § 3, cl. 1.

<sup>321</sup>. *Id.*

<sup>322</sup>. PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 15, at 246.

<sup>323</sup>. See, e.g., Hall & Prakash, *supra* note 207, at 136-37.

<sup>324</sup>. George Washington, Address of August 7, 1789, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 60 (proposing Congress pass measures related to the militia); George Washington, First Annual Address (Jan. 8, 1790), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 65 (proposing Congress pass measures to afford protection to the frontiers); George Washington, Second Annual Address (Dec. 8, 1790), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 82 (discussing the establishment of a militia); George Washington, Eighth Annual Address (Dec. 7, 1796), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 202-03 (recommending the establishment of a military academy).

Modern Presidents use information and proposals more aggressively. By selecting what information to share, Presidents try to steer Congress. Consider President Ronald Reagan's Strategic Defense Initiative (informally called the "Star Wars program").<sup>325</sup> Reagan helped inaugurate a multibillion-dollar spending spree on space weapons.<sup>326</sup> His vision arguably culminated in the new Space Force. Or consider President George W. Bush's desire to wage war against Saddam Hussein. By telling Congress about alleged connections with Al-Qaeda and by playing up intelligence about Iraq's chemical weapons programs,<sup>327</sup> the President swayed Congress. By proposing an open-ended authorization for the use of military force, President Bush received something of a blank check from Congress, a check that is still paying decades later.

### 5. *The Influence that Comes from Congressional Structure and Politics*

Finally, a President's considerable sway over the military also reflects the complicated structure of Congress. Though Congress has sweeping legislative power over the military and its use, the lawmaking process seems not to have been designed to facilitate lawmaking. As McNollgast has observed, the process has a number of "vetogates," junctures and structures that make it possible to kill bills.<sup>328</sup> Bicameralism, presentment, and the implicit requirement of passing the exact same text—each of these make it extremely difficult to pass legislation. The influence of committee chairs and the power of congressional leadership also serve to stymie bills, for if either the committee or congressional leadership disdain a bill, it becomes rather challenging to enact it. A wag might say that the lawmaking process seems intended to *stymie* legislation.

Relatedly, the party ties across the first two branches work in the President's favor.<sup>329</sup> Presidents are party chiefs and can count on the backing of their

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<sup>325</sup>. Ronald Reagan, Address to the Nation on Defense and National Security (Mar. 23, 1983), <https://www.reaganlibrary.gov/archives/speech/address-nation-defense-and-national-security> [https://perma.cc/9XMG-TJZC].

<sup>326</sup>. Jay Finegan, *Star Wars, Inc.: Whether It's Ever Even Deployed, the Space Shield Is Already a \$19-Billion Growth Industry, INC. MAG.* (Apr. 1, 1987), <https://www.inc.com/magazine/19870401/3487.html> [https://perma.cc/3BB9-ZG69].

<sup>327</sup>. George W. Bush, Remarks by the President on Iraq (Oct. 7, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html> [https://perma.cc/QCG5-MCWJ].

<sup>328</sup>. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992).

<sup>329</sup>. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314–15 (2006).

allies in Congress.<sup>330</sup> This generally means that upwards of forty percent of each chamber is poised to defend the President and oppose any legislation meant to curb the incumbent's actions or discretion. When one chamber is controlled by allies, as is often the case, legislative action against the President is often infeasible. Party alliances often neuter congressional attempts to curb executive overreach.

The more difficult it is to pass legislation, the more freedom of action the CINCAN enjoys. Imagine that the President acts on a flawed reading of her constitutional or statutory authority over the military. Most Americans believe that the action is illegal, meaning not authorized by the Constitution or law. Nonetheless, even if a supermajority of the people favors legislative action to humble the CINCAN, the many chokepoints and the partisan ties make it almost impossible to enact such legislation. Similarly, House impeachment<sup>331</sup> and a possible Senate trial<sup>332</sup> will consume precious legislative resources and will almost always go nowhere. When the House is controlled by the President's allies, there will be no impeachment. If, however, the House impeaches, it will be all but impossible to convict a President in the Senate.

In sum, Congress's structure and its partisan composition make it difficult for it to curb or sanction the CINCAN. Every modern President takes actions grounded on this reality, meaning that they are more willing to take contested or controversial measures. They are fully aware that their rival branch's power is often more theoretical than real. Congress is complicated; like the elephant described by the blind men, it has many discordant features and powers.<sup>333</sup> In terms of its interactions with the modern executive, it has an undeniable lumbering gait.

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The President's military authority and influence stems from multiple constitutional provisions and certain nonconstitutional factors. These various provisions and factors cede the President a measure of control over military matters that far outstrips the authority that arises from the CINC Clause. That is why Washington as CINCAN enjoyed far more military authority and sway than Washington as CINC of the Continental Army. As Presidents have become more confident on matters of policy and as they have become party chieftains, their influence over law and policy has only increased, including their sway over military legislation and policy.

<sup>330</sup>. PRAKASH, *LIVING PRESIDENCY*, *supra* note 15, at 79-82.

<sup>331</sup>. U.S. CONST. art I, § 2, cl. 5.

<sup>332</sup>. *Id.* art I, § 3, cl. 6.

<sup>333</sup>. Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 841-42 (2018).

It is far easier (and quicker) to assert that the President can do something vis-à-vis the military because the President is the CINCAN than it is to say that the President can do something because of the veto power, the appointment power, the removal power, etc. In other words, people often will rely upon a shorthand and assume that the CINC Clause is the source of the President's power and influence. But the reality is far more complicated.

#### **IV. WHERE THE PRESIDENT'S POWER OVER THE MILITARY ENDS**

The list of military actions beyond the reach of the CINCAN is quite extensive, and I will not attempt to catalog every such act. Instead, this Part addresses several prominent claims, both modern and ancient, about the scope of the Commander-in-Chief Clause and presidential power. It considers the assertions that Presidents may start wars, employ emergency powers, constitute military courts, select the commanders of military units, and control the treatment of prisoners.

##### *A. Waging War*

Does a CINCAN have authority to use military force against other nations? During the Trump Administration, the Office of Legal Counsel argued that President George Washington waged war against Indian tribes without congressional approval.<sup>334</sup> The episode was meant to support an assertion that “since the earliest days of the Republic,” Presidents have authorized military operations against foreign nations.<sup>335</sup> Relatedly, some scholars have claimed that the original Constitution authorizes Presidents to wage war without congressional permission.<sup>336</sup>

The OLC’s argument was fatally flawed. Prior to the onset of the protracted war against the Northwestern Confederacy, Congress exercised its power to declare war without using either the words “declare” or “war,”<sup>337</sup> something it has done many times since. By failing to carefully consider congressional statutes

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<sup>334</sup>. Apr. 2018 Airstrikes Against Syrian Chem.-Weapon Facilities, 42 Op. O.L.C. 1, 6 (May 31, 2018).

<sup>335</sup>. *Id.*

<sup>336</sup>. See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 170 (1996) (arguing that the original Constitution permitted Presidents to start wars without congressional sanction).

<sup>337</sup>. Hall & Prakash, *supra* note 207, at 124 (arguing that Congress authorized warfare against the Wabash Indians).

before and during the war, the OLC missed the extent to which Congress controlled the war's conduct. There was a congressionally sanctioned declared war, at least as the Constitution uses "declare war."

Relatedly, the scholarly argument for the proposition that Presidents can wage war rests on a crabbed reading of "declare war." In the eighteenth century, any statement or action that evinced a decision to wage war was itself a declaration of war.<sup>338</sup> That is why the dismissal of ambassadors, the recognition of rebel governments, and the massing of troops along a border were seen as declarations of war.<sup>339</sup> The strongest declaration of war was the commencement of hostilities, as with a naval bombardment or land invasion.<sup>340</sup> Such hostile acts signaled a recourse to warfare to settle disputes. These sorts of informal declarations of law were the most common means of signaling that war was afoot, with a formal (written) declaration sometimes issued months after the informal declaration.<sup>341</sup> As British Prime Minister Robert Walpole put it, "[O]f late most Wars have been declar'd from the Mouths of Cannons."<sup>342</sup> What he said in the early part of the eighteenth century remained true throughout the rest of it.

In ceding the power to declare war to Congress, the Constitution granted it the power to decide whether war ought to be waged.<sup>343</sup> Further, the power to declare war included the power to determine the rights of enemy nationals and to command the military to wage war against the enemy.<sup>344</sup> Congress would have to use words to wage war because it acts via words.

Presidents played three roles in decisions to wage war. One was informational. Presidents might supply Congress data about the state of the union, particularly the mood of other nations, those menacing war and those who had declared it.<sup>345</sup> Another function was recommendatory. Presidents might suggest that Congress declare war.<sup>346</sup> The last role was to serve as a check. Presi-

<sup>338</sup>. Prakash, *Unleashing the Dogs of War*, *supra* note 15, at 53.

<sup>339</sup>. *Id.* at 54.

<sup>340</sup>. *Id.* at 48.

<sup>341</sup>. *Id.*

<sup>342</sup>. *Id.*

<sup>343</sup>. *Id.* at 50.

<sup>344</sup>. Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 107-08 (2008).

<sup>345</sup>. See U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union . . .").

<sup>346</sup>. *Id.* (explaining that the President may "recommend to their Consideration such Measures as he shall judge necessary and expedient").

dents might veto hasty, ill-advised, or overbroad declarations.<sup>347</sup> Whether their vetoes would prevail was a function of their objections, their sway within Congress, and the size of the majority coalitions. Congress might insist upon war, despite presidential opposition.

What Presidents could not do was declare war.<sup>348</sup> This was hardly obvious from the Constitution's text because a grant to an institution did not necessarily bar other institutions from exercising the same or similar power. The Congress's power to tax did not preclude the states from taxing. The Senate's power to remove upon an impeachment conviction did not exclude other means of removal, including unilateral executive removal and statutory removal.

Nonetheless, the vesting of the power to declare war with Congress reflected a careful judgment that before making war, the nation would have to undergo a consultative, deliberative process, one marked by numerous hurdles.<sup>349</sup> To wage war in a matter that satisfies the Constitution, one needs a majority in both chambers, something difficult to secure. More likely than not, one needs the approval of the chief executive.

I am aware of no Founder or early President who thought Presidents could declare war. Everyone who addressed the matter said that Presidents could not declare war. James Wilson observed that the Constitution "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . ."<sup>350</sup> In an unpublished letter, Rufus King and Nathaniel Gorham said much the same: the Constitution "requires the joint consent of both branches of Congress together with ye. Concurrence of the Presid[en]t[] to declare war."<sup>351</sup> Because war was undesirable and "always a great calamity, by increasing the Checks, the measure will be difficult."<sup>352</sup> These discussions clearly equate declaring war with going to war.

The first CINCAN agreed. In 1795, President Washington told an allied Indian tribe that if he gratified their desire for an attack on their rivals, he

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347. *Id.* art I, § 7, cl. 2.

348. Prakash, *Unleashing the Dogs of War*, *supra* note 15, at 50.

349. *Id.* at 97.

350. Pennsylvania Convention Debates (Dec. 11, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 583 (Merrill Jensen ed., 1976).

351. Rufus King & Nathaniel Gorham, Response to Elbridge Gerry's Objections (1787), in 4 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 190 (John P. Kaminski & Gaspare J. Sladino ed., 1997).

352. *Id.*

would enmesh the United States in a “general war.”<sup>353</sup> That would be unconstitutional. “[T]he power of making such a war belongs to Congress (the Great Council of the United States) exclusively. I have no authority to begin such a war without their consent.”<sup>354</sup> Having read the Constitution and having previously served as CINC of the Continental Army, Washington was well situated to understand that as CINCAN, he had no more authority to declare war than he had had during the Revolutionary War. If the Office of Legal Counsel wishes to rely upon Washington’s example, it ought to pay greater attention to what he said and did. Washington repeatedly abjured a power to take the nation to war.<sup>355</sup>

In some measure, Washington’s conclusion might have seemed obvious. No previous commander in chief, in Great Britain, her colonies, or the United States, had claimed a power to start a war on their own authority. Given the number of CINCs, the absence of such authority made sense. No one could imagine that every CINC of a regiment—every colonel—should be able to start a war. The decision to wage war was not to be exercised by a CINC,<sup>356</sup> even a CINC of the British Army or the American CINCAN.<sup>357</sup>

### *B. Wartime Emergencies*

It is sometimes said that CINCs must have the requisite legal authority to do what is necessary to prevail in wars. One prominent argument of this sort came from Major General Andrew Jackson. During the War of 1812, he declared martial law in New Orleans and suspended habeas corpus, as well as

<sup>353.</sup> George Washington, Address to the Chickasaw Nation (Aug. 22, 1795), in 18 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 152, at 577 (Carol S. Ebel ed., 2015).

<sup>354.</sup> *Id.*

<sup>355.</sup> See, e.g., PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 15, at 148 (quoting Washington as writing that “no offensive expedition of importance can be undertaken [against an Indian tribe] until after [Congress] shall have . . . authorized such a measure”).

<sup>356.</sup> Since scholars seem to have been unsure or confused about what a CINC is, they seem to have been unaware of the implications of claiming that a CINC could wage war. Once one realizes that a military has numerous CINCs, it becomes untenable to say that the President can start a war because he is the CINC. No one, at the Founding or today, believes that every CINC—that is, every chief commander—should be able to start a war.

<sup>357.</sup> The important exception was the Crown. But the British Crown could wage war on its own say because of its acknowledged power to declare war. That was the source of its power to put the nation into a state of war. As far as I can discern, the British Crown’s power to serve as a CINC did not grant it authority to initiate a war.

other civil liberties.<sup>358</sup> In his defense, he cited a commander's right to suspend constitutional principles in dire situations.<sup>359</sup> President Lincoln made a similar claim about the privilege of the writ of habeas corpus, arguing that the Commander in Chief "holds the power" to suspend it.<sup>360</sup>

Barron and Lederman cite Thomas Jefferson's expenditure of funds in the wake of a British naval attack.<sup>361</sup> The *Leopard* pounced on the *Chesapeake*, boarding her, and forcing the surrender of four of her crew.<sup>362</sup> The British tried all four, executing one.<sup>363</sup> In the wake of this insult, Jefferson spent funds that Congress never appropriated.<sup>364</sup> He cited necessity and the fact that Congress was not in session.<sup>365</sup>

Despite the undoubtedly appeal of necessity as a justification, Commanders in Chief lack legal authority, *ex officio*, to take whatever measures they believe necessary to weather wartime emergencies. We know this in part because, prior to the Constitution, state and continental commanders in chief were thought to lack emergency war powers.<sup>366</sup> These precursors to the CINCAN could not seize supplies, suspend the privilege of the writ of habeas corpus, or impose

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<sup>358.</sup> See MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES AND PARTISANSHIP 2 (2006).

<sup>359.</sup> See Letter from Andrew Jackson to the United States District Court, Louisiana (Mar. 27, 1815), in 3 THE PAPERS OF ANDREW JACKSON 322, 329 (Harold D. Moser, David R. Hoth, Sharon MacPherson & John H. Reinbold eds., 1991) [hereinafter PAPERS OF ANDREW JACKSON]; see also Letter from Andrew Jackson to Jean Baptiste Plauché et al. (Mar. 16, 1815), in 3 PAPERS OF ANDREW JACKSON, *supra*, at 312, 313-14 (Harold D. Moser, David R. Hoth, Sharon MacPherson & John H. Reinbold eds., 1991) (arguing that he, as "commander in chief," could not shrink from his duty to declare martial law where necessity required such a declaration).

<sup>360.</sup> Letter from Abraham Lincoln to Matthew Birchard and Others, *supra* note 32, at 303.

<sup>361.</sup> See Barron & Lederman, *Framing the Problem*, *supra* note 15, at 745 (citing Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 418, 418 (Albert Ellery Bergh ed., 1907)).

<sup>362.</sup> GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 94-95 (1997).

<sup>363.</sup> Robert E. Cray, Jr., *Remembering the USS Chesapeake*, 25 J. EARLY REPUBLIC 445, 465 (2005).

<sup>364.</sup> CASPER, *supra* note 362, at 94-95.

<sup>365.</sup> George Washington, Seventh Annual Address to Congress (Dec. 8, 1795), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 178.

<sup>366.</sup> Prakash, *Imbecilic Executive*, *supra* note 15, at 1366.

martial law.<sup>367</sup> Whenever they exercised such powers, it was pursuant to statutes.<sup>368</sup>

We can see this clearly in the case of Washington. He was made Commander in Chief in 1775. Periodically, Congress would grant him extraordinary powers over the army and the populace. Among other things, he was granted authority to take supplies, arrest Tories, and impose martial law.<sup>369</sup> These sweeping grants were hemmed in by two constraints. First, they were often geographically restricted, exercisable only within a radius around his camp.<sup>370</sup> Second, they were time constrained, expiring during a coming session of Congress.<sup>371</sup> Outside the radius and these periods, the CINC of the Continental Army lacked emergency powers.<sup>372</sup> He could not draw funds from the treasury, raise armies, suspend habeas corpus, seize property, or subject civilians to military law or trial.<sup>373</sup>

In the states, assemblies occasionally granted their chief executives temporary authorities of the sort that Washington enjoyed. A few states went further, at least in terms of the delegated authority. For instance, in South Carolina, the legislature gave the governor the power to “do all matters and things” deemed “expedient and necessary to secure the liberty, safety and happiness of [their] State.”<sup>374</sup> When such emergency authorities lapsed, as they invariably did, the state executives were “imbecilic” in that they lacked the powers they believed

<sup>367.</sup> *Id.* at 1389.

<sup>368.</sup> *Id.*

<sup>369.</sup> *Id.* at 1387.

<sup>370.</sup> *Id.*

<sup>371.</sup> *Id.*

<sup>372.</sup> *Id.* at 1386.

<sup>373.</sup> *Id.* at 1391.

<sup>374.</sup> An Ordinance for the Better Defence and Security of this State § 3 (1779), in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA, 470, 471 (Thomas Cooper ed., Columbia, A.S. Johnston 1838) [hereinafter STATUTES OF SOUTH CAROLINA]. Subsequent versions of the act scaled back this authority, barring the governor from executing people without trial. An Ordinance for the Better Defence and Security of this State § 2 (1780), in 4 STATUTES OF SOUTH CAROLINA, *supra*, at 505; An Ordinance for the Better Defence and Security of this State § 2 (1783), in 4 STATUTES OF SOUTH CAROLINA, *supra*, at 567. For a discussion of South Carolina’s measures, see Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1354 (2015).

necessary to prosecute the war.<sup>375</sup> They were unable to seize supplies, try collaborators in military courts, or detain civilians.<sup>376</sup>

As a general matter, the national and state statutes reflected the sense that desperate times require desperate measures. But for our purposes, they reflected the sense that it was for the legislature to adopt crisis measures for those desperate times. The legislature, and not a CINC, would identify when there were emergencies and ascertain which measures were requisite.

As a matter of constitutional law, state executives enjoyed limited emergency powers. Some could impose temporary embargoes and thereby save foods and goods for domestic populations.<sup>377</sup> And many of them could summon their legislatures.<sup>378</sup> While the President lacks an embargo power, the President likewise may summon Congress on “extraordinary [o]ccasions.”<sup>379</sup> The point of this authority was to allow the deciders in Congress to handle a crisis ex post. The President would summon Congress and give it a chance to pass whatever measures it saw fit. Additionally, Presidents may make recess appointments, something quite useful when the Senate was not in session.<sup>380</sup> Outside of these areas, the President lacked emergency powers.<sup>381</sup> Finally, Congress may enact laws ex ante that give the Executive extraordinary powers to be exercised in crises.<sup>382</sup> Congress might authorize the President to summon

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375. MACMILLAN, *supra* note 113, at 92 (quoting Letter from Joseph Reed to George Washington (May 17, 1781), in 2 LIFE AND CORRESPONDENCE OF JOSEPH REED 300, 302 (William B. Reed ed., Philadelphia, Lindsay & Blakiston 1847)).

376. Prakash, *Imbecilic Executive*, *supra* note 15, at 1385.

377. DEL. CONST. of 1776, art. VII (authorizing the executive to impose thirty-day embargoes of up to thirty days during the recess of the legislature and with the consent of the state’s privy council); MD. CONST. of 1776, art. XXXIII (authorizing the executive to impose embargoes of up to thirty days during recess of the legislature); N.C. CONST. of 1776, art. XIX; PA. CONST. of 1776, § 20 (1776) (same); S.C. CONST. of 1778, art. XXXV (authorizing the executive to impose thirty-day embargoes of up to thirty days during the recess of the legislature and with the consent of the state’s privy council).

378. DEL. CONST. of 1776, art. X; MD. CONST. of 1776, art. XXIX; PA. CONST. of 1776, § 20; VA. CONST. of 1776, cl. 30; S.C. CONST. of 1776, art. VIII; GA. CONST. of 1777, art. XX; N.Y. CONST. of 1777, art. XVIII; VT. CONST. of 1777, ch. II, § XVIII; S.C. CONST. of 1778, art. XVII; MASS. CONST. pt. 2, ch. II, § I, art. V.

379. U.S CONST. art. II, § 3.

380. U.S CONST. art. II, § 2, cl. 3.

381. The grant of executive power does not convey emergency powers to the President. State executives often had the “executive power” and yet none argued that it conveyed any crisis powers. Similarly, early Presidents did not argue that the Vesting Clause conveyed any emergency powers. See Prakash, *Imbecilic Executive*, *supra* note 15, at 1366, 1391, 1403, 1407.

382. *Id.* at 1373.

the militia should an invasion or rebellion erupt. Congress might authorize the President to expend money in the case of an invasion or rebellion. Perhaps Congress could even authorize the President to suspend the privilege of the writ in those two crises.

The structural point is that most lawful means of responding to an emergency rested with Congress, both before and after the Constitution. If the Executive believed additional measures were necessary, the Executive had the ability (*not* lawful authority) to act outside the bounds of law.<sup>383</sup> The Executive might unlawfully expand the army, expend funds, or detain individuals.<sup>384</sup> When Congress reassembled, it would decide whether “necessity” justified (excused) the Executive’s acts.<sup>385</sup> A legislative decision to ratify or endorse the crisis measures would be somewhat clear. Failing to impeach would be ambiguous.

When we look at the episodes mentioned earlier, we see how they fall into this framework. James Madison bluntly rejected Jackson’s plea of necessity, arguing that the drastic measures he took could be authorized only by Congress.<sup>386</sup> Besides, if General Jackson were right, every military commander had lawful authority to do whatever the crisis required. The claimed power would not be limited to the CINCAN. For his part, Thomas Jefferson never cited the Commander-in-Chief Clause as justification for his actions in the wake of the attack on the *Chesapeake*; rather he cited “necessity” and understood that Congress (or the public) would have to absolve him of his misdeed.<sup>387</sup> His was not a claim of legal authority but a justification for acting contrary to existing law.

Admittedly, President Lincoln’s assertion that the Commander in Chief could suspend habeas was outside this framework.<sup>388</sup> But his was a groundbreaking claim, with no basis in any prior practice or commentary. Every suspension in England and America, prior to the Civil War, was done by the legis-

<sup>383.</sup> *Id.* at 1368.

<sup>384.</sup> *Id.*

<sup>385.</sup> *Id.*

<sup>386.</sup> *Id.* at 1410 (citing Letter from Alexander J. Dallas to Andrew Jackson (July 1, 1815), in 3 PAPERS OF ANDREW JACKSON, *supra* note 359, at 375 (Harold D. Moser, David R. Hoth, Sharon MacPherson & John H. Reinbold eds., 1991) (“In the United States there exists no authority to declare and impose martial law, beyond the positive sanction of the Acts of Congress.”)).

<sup>387.</sup> Thomas Jefferson, Seventh Annual Address to Congress (Oct. 27, 1807), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 428.

<sup>388.</sup> For a general discussion of Lincoln’s suspension, see Saikrishna Bangalore Prakash, *The Great Suspender’s Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV’T L. REV. 575 (2010).

lature. And no one prior to Lincoln ever claimed that Presidents could suspend the writ of habeas corpus. Finally, if Lincoln's claim were correct, it would seem to legalize every emergency measure, including expending funds, trying civilians before military courts, or expanding the size of the army. Yet the President conspicuously did not make a broader claim, confining his argument to habeas suspensions.<sup>389</sup> Lincoln, the crafty country barrister, seduced himself into embracing a constitutional error.

### C. Military Courts

From time to time, executive-branch officials have claimed that Commanders in Chief can create military courts to try people for, among other things, violations of the laws of war and violations of congressional codes of military conduct. The executive branch argued as much in *Ex Parte Milligan*,<sup>390</sup> *Ex Parte Quirin*,<sup>391</sup> and *Hamdan v. Rumsfeld*.<sup>392</sup>

The better reading is that Presidents have no power to constitute courts. To create a military judge, one must either establish a new office or append new authority to an existing office. But the President, as a general matter, lacks the authority to create offices, much less departments or courts.<sup>393</sup> Nor can he freely affix duties and powers to an existing office, because doing so would effectively create a novel office. Where Congress nowhere authorizes military courts, the President cannot establish them. Where Congress creates some military courts, the President cannot erect additional tribunals to supplement them. Finally, the Executive cannot tinker with a court's jurisdiction because any such power would effectively grant the power to create courts.

In England and then Great Britain, the Crown had some authority to establish rules for the government and regulation of the armed forces.<sup>394</sup> On its own authority, it could create a criminal code applicable overseas and applicable

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<sup>389</sup>. Abraham Lincoln, Special Session Message (July 4, 1861), in 6 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 318, at 24–25 (1903).

<sup>390</sup>. 71 U.S. (4 Wall.) 2, 13–17 (1866) (argument for respondent).

<sup>391</sup>. 317 U.S. 1, 13–16 (1942) (argument for the United States).

<sup>392</sup>. Brief for Respondents at 20–23, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

<sup>393</sup>. See PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 15, at 172–75. For a discussion of congressional authority to create and structure military offices, see Zachary Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491 (2021). Respectfully, I disagree with some of Professor Price's claims, particularly his assertion that Congress can constrain the President's constitutional power to remove military officers.

<sup>394</sup>. Prakash, *Separation and Overlap*, *supra* note 15, at 321–22.

domestically during wartime.<sup>395</sup> But in peacetime on domestic soil, the Crown had no such authority. This explains why Parliament passed an annual Mutiny Act, which created criminal law for the military and authorized courts-martial.<sup>396</sup> Absent this act, the Crown could not enforce military rules on military personnel.<sup>397</sup> Nor could it use military courts. If these acts lapsed, the Crown had to rely upon domestic law and domestic courts to proceed against military personnel.

In America, the legislative control of crime and punishment of military personnel was always more comprehensive. To my knowledge, no President has ever claimed constitutional authority to create a code of criminal conduct for soldiers or sailors. And while Presidents have asserted that they have constitutional authority to create military tribunals to try enemy combatants, these are claims from the nineteenth, twentieth, and twenty-first centuries. In sum, whenever early Executives enforced military codes before military courts, they acted pursuant to congressional laws which created those codes and authorized those courts.

#### *D. Selecting Other Commanders in Chief*

In 1996, the OLC considered whether Congress could prevent the President from granting tactical and operational control over U.S. armed forces to the United Nations. The OLC argued that “there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces.”<sup>398</sup> The opinion concluded that if Congress enacted an appropriations rider into law, the Executive could ignore it on the grounds that the rider would unconstitutionally bar the President from giving operational and tactical control to United Nations personnel.<sup>399</sup>

<sup>395.</sup> *Id* at 328-29.

<sup>396.</sup> *Id.*

<sup>397.</sup> *Id.*

<sup>398.</sup> See Placing of U.S. Armed Forces Under U.N. Operational or Tactical Control, 20 Op. O.L.C. 182, 184 (1996).

<sup>399.</sup> *Id* at 184-86. An Attorney General opinion from 1860 said something similar. Congress had provided funds for an aqueduct, but only if Captain M.C. Meigs supervised construction. Jeremiah S. Black wrote an opinion addressed to President James Buchanan: “As commander in chief of the army it is your right to decide according to your judgment what officer will perform any particular duty, and as the supreme executive magistrate you have power of appointment.” Mem’l of Captain Meigs, 9 Op. Att’y Gen. 462, 468 (1860). Black went on to say that the appropriation condition was merely “a recommendation.” *Id.* at

What the OLC has claimed as undoubted is, in fact, dubious. The Commander in Chief of the Continental Army, George Washington, could not select who would “exercise tactical and operational control” over army forces.<sup>400</sup> Rather, he was forced to work with officers that Congress had appointed.<sup>401</sup> Nor did he have power, *ex officio*, to remove officers. Hence, we have good reason to suppose that the President’s status as CINCAN does not come freighted with authority to appoint and remove. As noted earlier, that authority comes from elsewhere in Article II.

When Congress creates offices, it typically appends certain powers and duties to each of them. The implication is that no other officer created by law can assume those duties. Hence, absent statutory authority, the Secretary of the Interior has no power to carry out functions assigned to the Defense Secretary. And, as noted earlier, the President cannot add new powers to an existing office, for that would constitute the creation of a new office, one not established by law.

The same rules hold true for officers within the army and navy. Imagine Congress creates a lieutenant generalship and three colonelships. The President nominates Tina Tenderfoot to serve as one of the colonels and nominates Franklin Foggy to be the general. The Senate consents to all appointments. The President makes the appointments. Per their offices, the general commands the colonels. It may be that, after some woeful experiences with these officers, the President wants to raise Tenderfoot and humble Foggy. Tenderfoot should have “tactical and operational control,” supposes the President. But absent a new appointment, the President cannot give such control to Tenderfoot. If the President could raise Tenderfoot to the higher office without a new appointment, the congressional creation of military offices would be irrelevant and the appointment to a particular military office would be immaterial.

Of course, by firing Foggy and recess appointing Tenderfoot, the President’s desires can prevail for a time. But unless the Senate consents to a regular tenure, via the Appointments Clause, Tenderfoot’s tenure as general will conclude at the end of the next Senate session.

Hence, the President has no absolute right, as CINCAN, to decide “the particular personnel who are to exercise tactical and operational control over U.S.

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<sup>469.</sup> Based on these conclusions, the Administration transferred Meigs to Key West and then proceeded to use the appropriated funds for the aqueduct. See Sherrod E. East, *The Banishment of Captain Meigs*, 40/41 RECS. COLUM. HIST. SOC’Y WASHINGTON, D.C. 97 (1940).

<sup>400.</sup> Prakash, *Separation and Overlap*, *supra* note 15, at 380.

<sup>401.</sup> *Id.*

forces.”<sup>402</sup> He could only have such a right if he had an absolute power to remove and an unconstrained power to appoint to offices. While the Constitution grants the former power, the CINCAN certainly does not have the latter.

#### *E. Regulating Prisoners of War*

In 2002, during the War on Terror, the Bush Administration wished to use certain coercive techniques against prisoners of war. The difficulty was that Congress had barred torture and other mistreatment of prisoners. The Bush Administration’s OLC concluded that Congress could not regulate the treatment or conditions of enemy confinement.<sup>403</sup> Like battlefield operations, these matters were committed to the sole discretion of the Commander in Chief.<sup>404</sup> The OLC was mistaken about battlefield operations, for as we have seen Congress has long directed them.

Once made public, the Bush Administration’s claims were roundly denounced. Yet the claim proved too tempting for the next Administration to abjure. In the wake of laws limiting prisoner transfers from Guantanamo Bay, executive officials in 2011 toyed with the idea of declaring that the restrictions were unconstitutional.<sup>405</sup> The Administration ultimately declined to take that step. By 2013, the President cast aside such hesitations. In a January 3rd signing statement, President Barack Obama said that certain provisions restricting the transfer of prisoners from Afghanistan “could interfere with my ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees in an active area of hostilities.”<sup>406</sup> If the situation called for it, “my Administration will implement [those provisions] to avoid the constitutional conflict.”<sup>407</sup> That is to say, he might ignore such restrictions. In 2015, the former White House Counsel, Greg Craig, penned an op-ed ar-

<sup>402.</sup> 20 Op. O.L.C. at 184.

<sup>403.</sup> Bybee Memorandum, *supra* note 5, at 46.

<sup>404.</sup> *Id.* at 31.

<sup>405.</sup> Charlie Savage, *Obama May Bypass Guantanamo Rules, Aides Say*, N.Y. TIMES (Jan. 3, 2011), <https://www.nytimes.com/2011/01/04/us/politics/04gitmo.html> [<https://perma.cc/W3NA-CP9W>].

<sup>406.</sup> *Statement by the President on H.R. 4310*, WHITE HOUSE (Jan. 3, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/03/statement-president-hr-4310> [<https://perma.cc/XV84-VYEV>] (suggesting that the National Defense Authorization Act may be an unconstitutional violation of the separation of powers).

<sup>407.</sup> *Id.*

guing that Congress could not dictate detention location.<sup>408</sup> Craig made a feeble attempt to draw a distinction between prisoner treatment and detention sites. Apparently, Congress could regulate the former but not the latter. Though this delicate distinction was drawn, there was no attempt to justify it.

Whether the prisoners are on the battlefield or far from the conflict, the legislature has plenary power to regulate detention, treatment, and situs. Congressional regulation of prisoner treatment predates the Constitution. For instance, in 1781, the Continental Congress *ordered* the Commander in Chief to engage in acts of retaliation against British soldiers should the British put to death, torture, or otherwise mistreat American prisoners or hostages.<sup>409</sup>

During the Quasi-War, France decreed that citizens of neutrals found onboard British vessels would be treated as pirates.<sup>410</sup> In response, Congress again made mistreatment obligatory. It “required [the President] to cause the most rigorous retaliation to be executed on any such [captured] citizens of the French Republic.”<sup>411</sup> Should Americans be jailed “with unusual severity,” tortured, or executed, French prisoners were to receive similar treatment.<sup>412</sup>

In the Second War of Independence—the War of 1812—Congress again resorted to retaliation. Early in the conflict, the British announced that they would treat any British-born combatants, found fighting for the United States, including naturalized Americans, as traitors.<sup>413</sup> In turn, Congress provided that should Britain commit “any violations of the laws and usages of war” against

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<sup>408</sup>. Gregory B. Craig & Cliff Sloan, Opinion, *The President Doesn't Need Congress's Permission to Close Guantanamo*, WASH. POST (Nov. 6, 2015), [https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839\\_story.html](https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839_story.html) [https://perma.cc/JYG8-FRP3].

<sup>409</sup>. See 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 28 (1912) (ordering the Commander in Chief to treat British prisoners as American prisoners were treated by the British); 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 539 (1906) (noting congressional resolutions authorizing the Commander in Chief to retaliate against the British). The regulation also extended to authorizing prisoner swaps. See 13 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 280 (1909).

<sup>410</sup>. Letter from Thomas Jefferson to Archibald Stuart (Feb. 13, 1799), in 31 PAPERS OF THOMAS JEFFERSON, *supra* note 212, at 34 (Barbara B. Oberg ed., 2008).

<sup>411</sup>. Act of Mar. 3, 1799, ch. 45, 1 Stat. 743, 743 (repealed 1813); see also DAVID A. WILSON, UNITED IRISHMEN, UNITED STATES: IMMIGRANT RADICALS IN THE EARLY REPUBLIC 86-87 (1998) (providing background on the act's historical context).

<sup>412</sup>. Act of Mar. 3, 1799, ch. 45.

<sup>413</sup>. ALAN TAYLOR, THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, AND INDIAN ALLIES 359 (2010).

Americans, the President was “authorized to cause full and ample retaliation to be made.”<sup>414</sup>

These acts illustrate the scale of congressional power over the military. Congress’s laws barring the mistreatment of combatants are entirely constitutional, as are its laws regulating prisoner transfers. When Presidents oppose congressional regulation of prisoners of war, their lawful option is to veto such bills and hope that Congress compromises or relents. Once enacted into law, the CINCAN must execute these regulations of prisoner treatment and detention.

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This Part only scratches the surface. It would take an entire article to discuss all the authorities said to arise from the CINC Clause, especially claims made in the last several decades. Even then, some executive assertions might not receive an adequate response. The recurring tendency is that whenever the Executive supposes that it must (or should) take some military action and there is no statutory warrant for it, a terse cite to the CINC Clause dissolves the difficulty. These claims always have a surface plausibility, especially to those who believe that CINCAN’s orders are urgently necessary. But the CINC Clause is not a font of endless military power. The powers of a chief commander end far sooner than most modern Presidents and their advisors suppose.

## V. LINGERING PUZZLES

In January 2021, after the events of January 6th but before the inauguration, the Chairman of the Joint Chiefs of Staff, General Mark Milley, received a call from House Speaker Nancy Pelosi.<sup>415</sup> She was worried that President Trump might wage war and use nuclear weapons. General Milley responded: “I can guarantee you 110 percent that . . . whether it’s nuclear or a strike in a foreign country . . . we’re not going to do anything illegal or crazy.”<sup>416</sup> If one call can secure such a pledge, perhaps Speakers ought to phone the Chairman more often.

The General held a meeting to review the procedures for launching a nuclear weapon. He reminded the attendees that only the President could order such a strike and that Milley himself had to be involved. “If you get calls,” General Milley said, “no matter who they’re from, there’s a process here, there’s a procedure. No matter what you’re told, you do the procedure. . . . And I’m part of

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<sup>414</sup>. Act of Mar. 3, 1813, ch. 61, 2 Stat. 829, 829-30.

<sup>415</sup>. BOB WOODWARD & ROBERT COSTA, PERIL, at xix (2021).

<sup>416</sup>. *Id.* at xxiii.

that procedure.”<sup>417</sup> Perhaps General Milley expected that if he was part of the process, he could dissuade the President. Or maybe the General would countermand any illegal order.

This Part considers puzzles, many of which relate to this episode. It first tackles the various functions served by the CINC Clause. It then considers whether the Commander in Chief is a distinct office, whether the CINCAN Clause serves to further civilian control, whether Congress can require consultation by the CINCAN, and whether Congress can create autonomous offices, soldiers, and units. Finally, it discusses the interplay between Congress’s considerable powers over the military and other presidential powers. Much of the discussion here is tentative and preliminary, for these questions merit greater consideration than I can provide here.

#### A. *The Functions of the Commander-in-Chief Clause*

Constitutional provisions can further any number of purposes. Among other things, they can (1) empower by granting some authority to a governmental entity; (2) constrain by denying some authority the government might otherwise enjoy; and (3) clarify matters or questions.

On some accounts, the Founders incorporated the Commander-in-Chief Clause because they thought it necessary to ensure that the President could direct the military. In other words, no CINC Clause would mean no presidential direction of the armed forces. I believe that this claim goes too far.

In my view, the CINC Clause principally clarifies. Article II, Section 1 conveys “executive [p]ower,” a grant that encompasses several related powers seen as “executive” by virtue of their historical association with executives in America and elsewhere.<sup>418</sup> Article II, Section 2 enumerates, explicates, and qualifies certain facets of the “executive [p]ower,” including the treaty power, the appointment power, and the authority to demand written opinions of the principal officers of executive departments.

One recognized facet of executive power was the authority to direct the military and militias. *The Essex Result*, an eighteenth-century Massachusetts document about the separation of powers referenced earlier, said that the “executive power is to marshal and command her militia and armies for her defence.”<sup>419</sup> There are other references to the executive power to direct a na-

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<sup>417</sup>. *Id.* at xxvii.

<sup>418</sup>. PRAKASH, LIVING PRESIDENCY, *supra* note 15, at 63-66.

<sup>419</sup>. Parsons, *supra* note 161, at 337.

tion's common strength, including Hamilton's discussion in *Federalist* No. 69.<sup>420</sup>

Furthermore, because the President is made Commander in Chief, he may command in person. Had the President merely been given the power to "direct" the military or had there been no specific Article II clause about the military, it would perhaps have been unclear whether a President could assume command in the field.

Although some modern scholars find this grant-explain-qualify structure bewildering and implausible, James Madison said that "[n]othing is more natural or common than first to use a general phrase, and then to explain and qualify it by a recital of particulars."<sup>421</sup> Alexander Hamilton made this exact point about Article II's structure. The "specification of certain particulars" in Article II should not be read to derogate from the Vesting Clause's generic grant of executive power.<sup>422</sup> Like many of the Article II clauses, the CINC Clause takes a potentially disputable authority and clarifies that Presidents will enjoy it.

Consider the Pardon Clause.<sup>423</sup> Had the Constitution not contained it, the President might have enjoyed pardon authority anyway. After all, the pardon power was associated with chief executives and was long seen as an "executive power."<sup>424</sup> Nonetheless, absent the Pardon Clause some might have denied that the President could pardon federal offenses. The presence of an express pardon power banishes these arguments. Similarly, even absent the CINC Clause, the President likely would have enjoyed authority to direct the military because such superintendence was a traditional attribute of the Executive.<sup>425</sup> Nevertheless, some might have contested such a claim. The Clause wholly eliminates any nagging doubts.

<sup>420</sup>. THE FEDERALIST No. 69, *supra* note 18, at 388-90 (Alexander Hamilton).

<sup>421</sup>. THE FEDERALIST No. 41 (James Madison), reprinted in 15 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 425 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

<sup>422</sup>. Alexander Hamilton, *Pacificus* No. 1, GAZETTE U.S. (Phila.), June 29, 1793, reprinted in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 235, at 39 (Harold C. Syrett ed., 1969).

<sup>423</sup>. U.S. CONST. art. II, § 2, cl. 2.

<sup>424</sup>. See PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 15, at 99-102 (describing the executive antecedents of the presidential pardon power).

<sup>425</sup>. *Id.* at 143-44.

By way of contrast, consider the removal of executive officers. Presidents have long asserted a constitutional power to remove.<sup>426</sup> Nonetheless, some deny that the Constitution authorizes the President to oust all executive officers. Had the Constitution contained a “Removal Clause”—the “President may remove all executive officers”—there would be no warrant for denying that the President could fire executive officers. The absence of such a clause has made the case for a presidential removal power more contestable.

To see how the CINC Clause clarifies, consider whether CINCANS may command *territorial* militias. On the one hand, some might deny that the President has such authority, for the CINC Clause does not say that the President is the CINC of territorial militias. On the other hand, perhaps the President may command the territorial militias under the Vesting Clause.<sup>427</sup> The point is that no one has cause to question whether the President can command the *state* militias (when federalized) because the Constitution makes that point clear. Sometimes, it is useful to add clarifying text out of an abundance of caution.

Secondarily, the CINC Clause *limits* as it clarifies. Per Hamilton, particular Article II authorities may “derogat[e] from the more comprehensive grant contained in the general clause, . . . [insofar as they are] coupled with express restrictions or qualifications.”<sup>428</sup> That is true with respect to the CINC Clause. The Crown and many state executives could direct the people assembled as the militia. Under the Federal Constitution, however, the President has no generic right to command the people. The Constitution makes clear that state militias are federalized only after Congress elects to do so and only for certain purposes. Hence, the President as CINCAN has no right to utilize the state militias at her discretion. Further, it may well be that the CINCAN cannot use the militia for certain purposes, for example, foreign wars.<sup>429</sup> After all, the Crown could not use the militia overseas,<sup>430</sup> and some may have wished to impose the same con-

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<sup>426</sup>. See Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1758 (2023).

<sup>427</sup>. The Constitution might be best read as incorporating two implicit rules relating to territorial militias. It might well be that only Congress can authorize the use of the territorial militias and when summoned, the CINCAN can direct them. Compare U.S. CONST. art. I, § 8, cl. 15 (granting Congress the power to “provide for calling forth the Militia”), with *id.* art. II, § 2, cl. 1 (articulating that the “President shall be Commander in Chief of . . . the Militia of the several States, when called into actual Service”).

<sup>428</sup>. Hamilton, *supra* note 422, at 39.

<sup>429</sup>. In other words, to say that Congress may authorize the use of state militias to execute federal law, repel invasions, and suppress insurrections is to perhaps imply that Congress cannot use the militias to fight foreign wars.

<sup>430</sup>. Militia Act 1786, 26 Geo. 3 c. 107, § 96 (Eng.).

straints on the federal government. In sum, the CINC Clause arguably constrains the otherwise broad grant of executive power found in the Vesting Clause.

#### *B. Title, Separate Office, or Status*

Is the CINCAN a military officer, a bona fide member of both the army and the navy? Or is the President merely given the power and duties of a commander in chief? There is yet a third alternative—is the President given a showy title with no real-world power or consequences? The categorization matters for impeachment, for military officers are not subject to impeachment. The classification also matters because if the CINCAN is in the military, Congress has broad powers to regulate the CINCAN’s personal conduct and to subject the CINCAN to military courts.

Despite its seeming implausibility,<sup>431</sup> it is worth considering the title theory—the third theory—as some posts come with hollow titles. The Massachusetts Constitution of 1780 said that the Governor’s “title” shall be “His Excellency.”<sup>432</sup> Idi Amin styled himself the “Lord of all the Beasts of the Earth and Fishes of the Sea.”<sup>433</sup> English and British monarchs claimed the title of “King of France” until 1801, long after England had lost dominion over any part of French soil.<sup>434</sup>

Some constitutional posts come with a title. “Senator” is the appellation of those in the Senate. The root “senex” might imply age and wisdom, as it did in Rome.<sup>435</sup> But our lived experience is that the title does not guarantee old age, much less wisdom. A senator’s duties, qualifications, and powers are mostly

<sup>431</sup>. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson said that the Clause’s words “imply something more than an empty title.” 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

<sup>432</sup>. MASS. CONST. pt. 2, ch. 2, § I, art. I (repealed 1918). The Georgia Constitution said its governor would be “styled ‘honorable.’” GA. CONST. of 1777, art. II, cl. 2. Perhaps borrowing from the Massachusetts Constitution, the Constitutional Convention’s Committee of Detail would have given the President the title of “His Excellency.” 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 157, at 185.

<sup>433</sup>. Colm O’Regan, *The Rise of Inflated Job Titles*, BBC NEWS (July 17, 2012), <https://www.bbc.com/news/magazine-18855099> [<https://perma.cc/36R9-YYNG>].

<sup>434</sup>. KENNETH J. PANTON, HISTORICAL DICTIONARY OF THE BRITISH MONARCHY 199 (2011). English and British monarchs had maintained this claim for centuries after England’s defeat in the Hundred Years’ War and the loss of their last French holdings. *Id.*

<sup>435</sup>. “Senator” is derived from the Latin word “senex,” meaning “old man.” See *Senator*, 14 OXFORD ENGLISH DICTIONARY 964 (2d ed. 1989).

found in Article I.<sup>436</sup> One wonders whether members of the upper chamber have ever claimed powers by virtue of their title alone.

There might be circumstances where the Clause confers something of an empty title. If Congress creates neither an army nor navy, the Clause seems to grant something of an ornamental tag. Contemporary America's martial might makes us forget more modest beginnings and alternative conceptions of the public good. Some at the Founding opposed standing armies, regarding them as a threat to liberty.<sup>437</sup> Of more importance, there was no navy under the Constitution until the late 1790s.<sup>438</sup> Accordingly, one could say that for much of the 1790s, "Commander in Chief of the Army and Navy" was, at least partially, an empty title.

As noted earlier, a second possibility is that the Clause grants an actual military office—that of the Commander in Chief of the Army and Navy—to the President. Perhaps there is a civil office of the President and a military office of Commander in Chief. The separate-office theory may suggest that Congress can regulate the CINCAN just as it could a general or a sailor, via its rules for the military's government and regulation. Congress might regulate swearing and adultery by the President, along with a host of behaviors that might ordinarily be thought to be beyond Congress's powers. Congress also might subject Presidents to courts-martial. Finally, this reading at least leaves open the possibility that commanders in chief cannot be impeached for their military actions, for the category of impeachable personnel does not extend to military officers.<sup>439</sup>

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<sup>436</sup>. See, e.g., U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *Id.* art. I, § 3, cl. 1 ("[E]ach Senator shall have one Vote.").

<sup>437</sup>. See, e.g., Patrick Henry, Speech to the Virginia Ratifying Convention, *The Virginia Convention Debates* (June 5, 1788), in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 18, at 957 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (arguing that the Constitution would provide for "[a] standing army . . . to execute the execrable commands of tyranny").

<sup>438</sup>. An Act to Provide a Naval Armament, ch. 12, 1 Stat. 350 (1794); see also U.S. NAVY'S SIX ORIGINAL FRIGATES, NAVAL HIST. & HERITAGE COMMAND, <https://www.history.navy.mil/content/history/nhhc/browse-by-topic/ships/original-frigates.html> [https://perma.cc/M8D2-QZ7B] (discussing the Third Congress's establishment of the U.S. Navy).

<sup>439</sup>. U.S. CONST. art. II, § 4, cl. 1 ("The President, Vice President and all *civil* Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (emphasis added)); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 789 (1833) (arguing that "civil" in the Constitution "seems to be in contradistinction to *mili-*

The separate-office theory perhaps best comports with eighteenth-century practices, insofar as all commanders in chief were rather clearly in the military. Further, the separate-office theory would perhaps be most consistent with Publius saying that the President would be the “first General and Admiral” of the military.<sup>440</sup> Nonetheless, the claim seems flawed because Article II contemplates only one office. The “Office of President” is mentioned multiple times, as is the shorthand “Office.”<sup>441</sup> These uses suggest that there is but one office, what we call the presidency. There is no separate office of the Commander in Chief.

The best reading is that the Clause attaches the status of being a commander in chief to the presidency. Concretely the President enjoys, *ex officio*, the powers and duties of a Commander in Chief of the Army and Navy. The Clause partially mimics the 1776 Virginia Constitution’s treatment of its governor. The governor had the sole “direction” of the militia, which effectively made the governor a leader of the militia.<sup>442</sup> Similarly, the CINC Clause makes clear that the President enjoys authority to direct the military, in person or far from the battlefield.

### C. A Civilian Commander?

To say that the President enjoys the authority of a military commander but does not occupy a separate military office is to leave one fundamental matter unresolved. Does the Clause mark the President as a military figure, or does it instead place a civilian leader atop the military? The correct answer influences how one perceives the Constitution’s treatment of civilian and military authority. Some regard the Constitution as evincing a strong preference for civilian control of the military. They argue that the Commander-in-Chief Clause helps ensure as much.<sup>443</sup> Under this view, because civilian Presidents command the

tary, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service”).

<sup>440</sup> THE FEDERALIST No. 69, *supra* note 18, at 389 (Alexander Hamilton).

<sup>441</sup> See, e.g., U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

<sup>442</sup> VA. CONST. of 1776, cl. 12.

<sup>443</sup> See Barron & Lederman, *Framing the Problem*, *supra* note 15, at 800; Michael D. Ramsey & Stephen I. Vladeck, *Commander in Chief Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/345> [<https://perma.cc/8WXC-WDDC>]; HAROLD HONGJU KOH, THE NA-

military, civilians direct the armed forces. For instance, Justice Jackson reasoned that the Framers' "purpose of lodging dual titles in one man was to ensure that the civilian would control the military . . . ."<sup>444</sup>

The common claim that the President helps to ensure civilian control of the military suffers from two problems. First, even if Presidents hold no distinct military office, we must nonetheless consider whether inauguration day transforms a civilian into a soldier and sailor. By virtue of their status as CINCANS, are Presidents constitutionally inducted into the military? By utilizing a conspicuously martial phrase—Commander in Chief—the Constitution arguably enrolls Presidents into the military. To my knowledge, every previous "commander in chief" prior to the Founding was a member of the military. That usage invites the inference that CINCANS are part of the military. In contrast, had the Constitution merely said that the "President shall direct the Army and Navy," there would be no strong reason to surmise that the President was part of the military. All in all, the common assertion that the CINCAN is a civilian is hardly obvious.

Second, the claim conflates the familiar with the required. It is true that no commissioned officer, enlisted soldier, or sailor has ever simultaneously served as President; but the Constitution does not expressly forbid it. There are three requirements for President: a natural-born citizen, thirty-five years of age, and fourteen years of residency.<sup>445</sup> There is a bar found in Article I: no one can serve as President and as a member of Congress.<sup>446</sup> There is no property requirement; there is no clergy bar; and there seems to be no military exclusion.

Generals Winfield Scott and George McClellan ran for President while retaining their offices. Scott ran as a Whig and McClellan as a Democrat.<sup>447</sup> Both lost the general election.<sup>448</sup> While McClellan resigned his military commission on election day, Scott stayed in office and served his opponent, Franklin Pierce.<sup>449</sup>

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TIONAL SECURITY CONSTITUTION 77 (1990); Luban, *supra* note 15, at 490-91, 508-09, 514.

**444.** *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

**445.** U.S. CONST. art. II, § 1, cl. 5.

**446.** *Id.* art. I, § 6, cl. 2.

**447.** JOHN S.D. EISENHOWER, AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT 327-28 (1997); STEPHEN W. SEARS, GEORGE B. MCCLELLAN: THE YOUNG NAPOLEON 353-56 (1999).

**448.** EISENHOWER, *supra* note 447, at 330; SEARS, *supra* note 447, at 385.

**449.** EISENHOWER, *supra* note 447, at 332; SEARS, *supra* note 447, at 359, 385.

Civilian control of the military stems from multiple sources outside of Article II. First, if the people favor a civilian President, they will shun military candidates. This will cause officers to run only after resigning. The last general to serve, Dwight D. Eisenhower, quit the army prior to running.<sup>450</sup> Conceivably, this reflected his impression that the people would not stomach an active-duty officer serving as President. Perhaps modern Americans are more likely to cotton to *retired* heroes than to active-duty ones. They like citizen Ike more than General Ike.

Second, Congress has precluded military officers from serving in certain positions within the Department of Defense.<sup>451</sup> The Secretary of Defense must hail from “civilian life.”<sup>452</sup> There are similar requirements for the Deputy Secretary of Defense and the many Undersecretaries of Defense.<sup>453</sup> Congress has tried to ensure that the military must have a significant layer of civilian control, whatever the President’s military status.

Lastly, *Congress* ensures civilian control. Legislators cannot serve in the military.<sup>454</sup> So, each representative and senator must be a civilian. Via its considerable powers to declare war and govern and regulate the military, Congress enacts laws that command and constrain the military. Congress’s long tradition of regulating the military and wars bespeaks a persistent desire for a form of civilian control—legislative control.<sup>455</sup> This congressional power over the military coupled with the exclusion of military officers from the House and Senate ensures that civilians fix military policy, at least in its broadest and most important aspects.

#### *D. Advice*

As noted earlier, Congress’s extensive power to regulate military operations primarily arises from its Article I, Section 8 power to govern and regulate the military.<sup>456</sup> But Congress also enjoys the power to enact necessary-and-proper laws to carry federal powers into execution. The potential sweep of these two authorities raises delicate questions related to the intersection of other presi-

<sup>450</sup>. STEPHEN E. AMBROSE, EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 1890-1952, at 524-28 (1983).

<sup>451</sup>. 10 U.S.C. § 113 (2018).

<sup>452</sup>. *Id.* § 132.

<sup>453</sup>. *Id.* §§ 133a, 133b, 135, 136, 137.

<sup>454</sup>. U.S. CONST. art. I., § 6, cl. 2.

<sup>455</sup>. See, e.g., 50 U.S.C. § 22 (2018).

<sup>456</sup>. U.S. CONST. art. 1, § 8, cl. 14.

dential powers. First, consider a relatively modest burden. Can Congress impose a requirement that the CINCAN seek advice prior to making certain military decisions? To return to the Milley episode, could Congress require the President to consult with the Chairman of the Joint Chiefs of Staff prior to using nuclear weapons?

The Continental Congress favored such consultations. General Washington's first set of instructions required him to consult with a "Council of War."<sup>457</sup> Washington held many councils, consisting of senior officers, to discuss vital matters, including whether to attack or withdraw.<sup>458</sup> Often their advice led him to abandon his initial impulses, as when they counseled against marching across ice to attack Boston.<sup>459</sup> The Commander in Chief would report these deliberations to Congress,<sup>460</sup> and the advice of his councilors shielded him from criticism.<sup>461</sup>

Multiple constitutional provisions, besides the Commander-in-Chief Clause, seem relevant. As noted, Congress may make laws necessary and proper for implementing federal powers and has the power to govern and regulate the armed forces.<sup>462</sup> Moreover, the Opinions Clause gives the President the right, but not the obligation, to seek advice from the topmost executive officers.<sup>463</sup> In contrast, two Clauses—the Appointments<sup>464</sup> and Treaty Clauses<sup>465</sup>—oblige the President to secure a form of advice (such as "we advise that the

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<sup>457.</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 101 (1905) (enjoining Washington to use circumspection and advise with "your council of war").

<sup>458.</sup> See LINDSAY M. CHERVINSKY, THE CABINET: GEORGE WASHINGTON AND THE CREATION OF AN AMERICAN INSTITUTION 6, 17, 20 (2020). Chervinsky notes that Washington's war councils formed the model for his later consultations with his executive-department Secretaries. *Id.* at 6.

<sup>459.</sup> *Id.* at 19.

<sup>460.</sup> See, e.g., Letter from George Washington to John Hancock (Feb. 18-21, 1776), in 3 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 127, at 335 (Philander D. Chase ed., 1999); Letter from George Washington to Joseph Reed (Feb. 26, 1776), in 3 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 127, at 127 (Philander D. Chase ed., 1999).

<sup>461.</sup> CHERVINSKY, *supra* note 458, at 20-22, 31-33.

<sup>462.</sup> U.S CONST. art. I, § 8, cl. 14, 18.

<sup>463.</sup> *Id.* art. II, § 2, cl. 1. The most thorough piece on the Opinions Clause does not address whether Congress can demand, by law, that the President consult with others prior to taking actions. See Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 661 (1994).

<sup>464.</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>465.</sup> *Id.*

President appoint” the nominee or “we advise the treaty’s ratification”) from senators before taking certain actions.<sup>466</sup>

It may be that Congress cannot require the President to consult others prior to vetoing, pardoning, or nominating. The Necessary and Proper Clause may not extend so far. The President may voluntarily consult others before taking a momentous step—vetoing a bank bill or pardoning Richard Nixon—and perhaps ought to do so. But perhaps Congress cannot insist upon prior consultations. It may be that the Opinions Clause implicitly signals that the choice of getting an opinion, or not, rests with the President alone. Congress cannot force the President to get advice.

Nonetheless, perhaps military soundings are distinct and subject to different rules. Congress has additional authority here, for it can create rules for the military’s government and regulation.<sup>467</sup> This power is considerable and perhaps encompasses the power to insist that the CINCAN consult with others prior to exercising military authority. Perhaps Congress governs and regulates the military when it demands that consultations precede certain military decisions.

Further, commanders in chief do not seem to have an absolute right to command without consultation. Recall that Congress insisted that Washington consult with a council, and neither Washington nor anyone else objected that the consultation requirement was inconsistent with Washington’s status as a CINC.<sup>468</sup> Instead, someone is a CINC, or has the powers of one, even if they must consult with others. Indeed, councils of war were commonly imposed on military commanders.<sup>469</sup> The motivation behind war councils is the intuition that decision making will generally improve if the decider first receives advice from knowledgeable and wise individuals.

So perhaps Congress could oblige the CINCAN to consult with the National Security Council prior to using nuclear weapons. Likewise, maybe Congress can insist that the President consult with the “principal officers of the executive departments” prior to deploying ground troops. Congress might even

<sup>466.</sup> *Id.*

<sup>467.</sup> *Id.* art. I, § 8, cl. 14.

<sup>468.</sup> Instructions from the Continental Congress, *supra* note 135, at 21.

<sup>469.</sup> CHERVINSKY, *supra* note 458, at 17 (discussing the British tradition of war councils); ANTOINE HENRI DE JOMINI, THE ART OF WAR 57–58 (Greenhill Books 1996) (1862) (discussing the longstanding use of councils of war by different national armies).

be able to demand that consultations with Congress precede the withdrawal of troops from Europe, Korea, or the scenes of an active war.<sup>470</sup>

### E. Consent

A closely related question is whether Congress can condition the President's military decisions on the *consent* of third parties. This issue likewise arose during the Revolutionary War. The question was whether Washington was bound to honor the Council of War's determinations or was required merely to take its temperature. A 1775 congressional resolve said that Washington was to attack Boston "if General Washington and his council of war" agreed on the matter.<sup>471</sup> That text certainly suggested that the attack could occur only if Washington and his war council concurred.

Two years later, when Washington asked Congress whether he was generally bound to follow his Council's advice, Congress rejected the idea. "[I]t never was the intention of Congress, that he should be bound by the majority of voices in a council of war, contrary to his own judgment."<sup>472</sup> Further, every "commander in chief in every department" was told that "though he may consult the general officers under him, . . . he is not bound by their opinion, but ought finally to direct every measure according to his own judgment."<sup>473</sup>

But this was a matter of intent, not power. The Continental Congress had the power to impose this condition. Congress could have insisted that each of its commanders in chief first secure the majority consent of a war council. In England and then Great Britain, Parliament and the Crown had forced commanders in chief to consult with war councils and secure their consent prior to taking particular actions.<sup>474</sup> That is, there was not only a tradition of creating war councils that could be used to secure advice but also a practice of sometimes insisting that commanders in chief secure consent prior to taking certain actions. Given these practices, it is easy to see why Washington supposed that Congress meant for him to honor the wishes of a war-council majority. "Ad-

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<sup>470</sup>. It is worth noting that the War Powers Act requires consultations with members of Congress before and after the insertion of troops into hostilities or imminent hostilities. See 50 U.S.C. § 1542.

<sup>471</sup>. 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 443-45 (1905).

<sup>472</sup>. 7 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 196-97 (1907).

<sup>473</sup>. *Id.* at 197.

<sup>474</sup>. See David Gates, *The Transformation of the Army 1783-1815*, in THE OXFORD ILLUSTRATED HISTORY OF THE BRITISH ARMY 133, 144 (David Chandler & Ian Beckett eds., 1994) (observing that the Commander in Chief shared military responsibilities with other officials and operated as principal military advisor to the Crown).

vice” and “advice and consent” are adjacent concepts, and one can easily confuse a requirement of advice seeking with a bar on actions taken without the consent of those advisers.

Does the Constitution permit our Congress to impose a requirement of advice and consent upon the President? The CINC Clause poses no bar because if many prior commanders had to secure conciliar approval, then it seems that a requirement of obtaining consent does not undermine one’s status as a commander in chief. In other words, someone is a commander in chief even if they must secure the consent of someone else prior to acting.

What about congressional authority to impose such a requirement? This is harder than the question of consultation because the constraint is more considerable. My tentative view is that Congress can insist that the President secure the consent of others. Using its Govern and Regulate Power, perhaps Congress can insist that the President secure the consent of others prior to using the military. Likewise, perhaps Congress can require that Presidents obtain the agreement of others prior to moving assets, placing troops near hostile zones, or engaging with an enemy.

I know of no early federal statute that sought to force the President to secure such prior consent. But there is an analogous statute. The Militia Act of 1792 authorized the President to use the militias to enforce federal laws:

[W]henever the laws of the United States shall be opposed . . . by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.<sup>475</sup>

Even if the CINCAN thought it crystal clear that the ordinary civil means of enforcement were inadequate, the President could not unilaterally summon the state militias to suppress the “combinations.”<sup>476</sup> Rather, the crucial precondition was that a federal judge had to conclude that laws could not be enforced by ordinary means.

The Act lacked the familiar “advice and consent” formula. Rather, it is written as if the judiciary would be the first mover, that judges would notify the President of the powerful combinations. Nonetheless, Congress may have rec-

<sup>475</sup>. Militia Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795).

<sup>476</sup>. *Id.*

ognized that the Executive would be the primary mover and perhaps ask judges to make the finding. As compared to judges, executives might be better positioned to decide whether powerful combinations were obstructing the laws.

In fact, that is how the Act worked. In 1794, Washington held a meeting with his aides to discuss what should be done with respect to four counties in Western Pennsylvania.<sup>477</sup> Rowdy Pennsylvanians opposed to an excise tax on liquor had accosted the marshal and collector, and people feared that the ordinary means of execution were ineffective. After cabinet deliberations, the Attorney General, Edmund Randolph, handed over documents to Justice James Wilson. Randolph claimed that he was told “not to express to [Wilson] the most distant wish in the President, that the certificate [of obstruction by combinations] should be granted.”<sup>478</sup> The documents were to speak for themselves. Wilson made the certification.<sup>479</sup>

Again, this statute did not enact a typical advice-and-consent situation. Presumably a judge could reach a conclusion about obstructions of the laws without any movant supplying evidence. Nonetheless, I read the Militia Act of 1792 as supplying some support for the proposition that Congress can limit the military actions of the Commander in Chief by requiring that he receive the assent of some third party. Congress could have expressly declared that the President could call forth the militia only after the Supreme Court (or a Justice) provided “advice and consent” for the proposition that the ordinary means of law execution were inadequate.

I believe that Congress might similarly constrain the use of the army or navy. For instance, perhaps Congress could provide that when somebody—the principal officers in the executive departments—declares there is an invasion, the President may increase the size of the army and navy and withdraw Treasury funds to purchase military supplies. Conditions on the military’s use or constraints on its augmentation appear to be useful rules for its “Government and Regulation.”

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<sup>477</sup>. Conference Concerning the Insurrection in Western Pennsylvania (Aug. 2, 1794), in 17 PAPERS OF ALEXANDER HAMILTON, *supra* note 235, at 9 (Harold C. Syrett ed., 1972).

<sup>478</sup>. Letter from Edmund Randolph to George Washington (Aug. 5, 1794), in 16 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 152, at 523-24 (Mark A. Mastromarino ed., 1996).

<sup>479</sup>. Conference Concerning the Insurrection in Western Pennsylvania, *supra* note 477, at 10-11 n.9.

### F. The Unitary Executive

During Reconstruction, Congress provided that the “General of the army” could not be removed without the Senate’s approval, meaning that the President could no longer remove the General unilaterally.<sup>480</sup> If the President wanted to move the “General of the army” away from Washington, the Senate would have to concur.<sup>481</sup> These were Congress’s means of ensuring that Ulysses S. Grant had some measure of independence from President Andrew Johnson.

Even though Congress can constrain military discretion by, for instance, forbidding certain uses of the military, it may seem obvious that what the Reconstruction Congress did was unconstitutional. On this view, Congress lacks constitutional authority to create an independent admiral or soldier because the CINC Clause stands as an insuperable barrier. Any statute that creates an independent military office would detract from the President’s status as Commander in Chief of the *entire* army and navy. Hence all soldiers or sailors, whatever their grade, must serve under the direction of the CINCAN. Had not two of the most famous commissions – both to Washington – obliged soldiers to heed his commands?<sup>482</sup>

But the question is more difficult than one might suppose. As with everything else in this Article, it involves matters of definition and questions of authority. Does the phrase “commander in chief” bar independence of those ranked below in the military hierarchy? Does Congress have legislative power to create independent generals and admirals?

Analogous issues came up in America’s first war. As noted earlier, though Washington was made CINC of the entire army, Congress created separate regional departments, or commands, where it appointed other commanders in chief, moved them hither and thither, and directed them as it saw fit. Washington’s control over these commanders seems to have been thin, save for when they ventured near his main army. As noted earlier, it was not until 1779 that Congress did away with separate commands by unifying control in Washington.<sup>483</sup> Via this move, Washington was finally established as “commander in

<sup>480</sup>. An Act Making Appropriations for the Support of the Army, ch. 170, § 2, 14 Stat. 485, 486-87 (1867), *repealed* by Act of July 15, 1870, ch. 294, § 15, 16 Stat. 315, 319 (1870).

<sup>481</sup>. *Id.*

<sup>482</sup>. Commission from the Continental Congress, *supra* note 127, at 6-7; Letter from George Washington to John Adams, *supra* note 221, at 402 n.1.

<sup>483</sup>. 13 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 109-10 (1909).

chief of *all* the Continental army.”<sup>484</sup> He now had power to “superintend and direct the military operations in all the departments.”<sup>485</sup> In part, the new resolution reflected a decision to “place all operational and strategic planning” in his hands, meaning that Congress would be less intrusive.<sup>486</sup>

During the Revolutionary War, Washington never complained that he lacked control over the entire army. He perhaps understood the British practice, adverted to earlier. Recall that there were British military units and officers not subject to the direction of the British Army CINC. For instance, the artillery and engineers were under the control of a “Master General of Ordnance.” The creation and existence of these independent military fiefdoms did not negate or detract from the British Army CINC. More precisely, the British Army CINC was a CINC notwithstanding the independence—from him—of essential British Army units and officers.

The better view, it seems to me, is that our Congress cannot insulate a portion of the military from presidential control. The reasons lie not in the CINC Clause but in the structure of the Constitution. To begin with, the Vesting Clause grants the President constitutional authority to direct all executive officers, civil and military.<sup>487</sup> Independent of the CINC Clause, the Vesting Clause creates a chain of command, with every officer, civil and military, answerable to (and removable by) the Chief Executive.<sup>488</sup> Presidents have long wielded such authority. For instance, Washington instructed U.S. attorneys<sup>489</sup> and gave military directions to other commanders in chief.<sup>490</sup>

Relatedly, I do not regard Congress as having power to divest that which the Vesting Clause confers.<sup>491</sup> I would not read the Govern and Regulate Clause as if it granted Congress the power to divest the powers granted by the Article II Vesting Clause. And I do not believe the Necessary and Proper Clause grants power to divest constitutional powers allotted to the branches. While Parliament and state assemblies could abridge the powers of their executives

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<sup>484</sup>. BENJAMIN LEE HUGGINS, WASHINGTON’S WAR, 1779, at 19 (2018) (emphasis added).

<sup>485</sup>. 13 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 110 (1909).

<sup>486</sup>. HUGGINS, *supra* note 484, at 19.

<sup>487</sup>. PRAKASH, IMPERIAL FROM THE BEGINNING, *supra* note 15, at 184-89.

<sup>488</sup>. U.S. CONST. art. II, § 1, cl. 1.

<sup>489</sup>. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 553-56 (2005).

<sup>490</sup>. See, e.g., Hall & Prakash, *supra* note 207, at 168.

<sup>491</sup>. Professor Bamzai and I made a similar argument about removal. The indefeasibility of the President’s power to remove arises from a grant of power to remove and the absence of congressional authority to divest powers granted by the Constitution. See Bamzai & Prakash, *supra* note 426, at 1782-89.

and judiciaries,<sup>492</sup> our Constitution does not grant Congress the power to refashion and reconfigure constitutional powers. Put another way, generally speaking, the Constitution's various allocations of powers are not defaults that Congress may alter via ordinary legislation.

Three cautionary notes are requisite. First, whether executive officers must obey *all* presidential instructions (or alternatively resign) is not an easy question. What if the subordinates regard the instructions as contrary to statutes or the Constitution? Similar questions could be asked about the relationship between superior and inferior courts—must district court judges, as a matter of constitutional law, follow the precedents and orders of judges higher in the judicial department, even when they regard those materials as grounded in mistaken readings of the law?

It may well be that the Constitution requires blind obedience from soldiers, with Congress able to relax that requirement using its power to regulate the armed forces. Or it may be that the Constitution never requires officers, of whatever sort, to obey an order they regard as unconstitutional or illegal. That is a topic I will leave for others. But in any event, as in the case of civilian officers, the President's control of the military is subject to the Constitution, the limits found in laws, and the constitutional constraints that attach to serving as Chief Executive and CINCAN. If the President perceives that the Constitution or laws limit presidential power, the President must honor those constraints.

Second, when the Continental Congress required Washington to hold war councils, implicit in the command was a requirement that the officers be able to speak their minds. This signals a measure of independence, for Washington could not command them to give certain advice. If our Congress can require consultations, or even consent, then it would likewise follow that the CINCAN cannot compel the advice givers to give the counsel she desires.

The Constitution itself signals that on two matters, at least, the President's "principal officers" must supply their own views and not merely parrot the President. When they give the President opinions, the Constitution contemplates no ability on the part of the President to dictate the content of those opinions. Similarly, when the principal officers decide whether the President is unable to carry out the office of the presidency under the Twenty-Fifth Amendment, these officers must make their own judgment and pay no heed to the President's views on the matter. My point is that if Congress can require advice or advice and consent, Congress can likewise require that the advice reflect truly independent judgment.

<sup>492.</sup> *Id.* at 1782-83.

Third, there is at least one statutory area where the Commander in Chief has no power to command members of the military. The military justice system has long assumed the independence of the members of the courts-martial, be they members of the jury or military judges. Specifically, the entire system is premised on these military officers deciding questions of law and fact and doing so without presidential interference.

By law, the President has always had a limited role. For instance, under the 1806 Articles of War, in times of peace, the President could reject any capital sentence and certain sentences meted out to commissioned officers.<sup>493</sup> Further, every sentence pertaining to general officers had to be presented to the President for acceptance or rejection.<sup>494</sup> The rules of review suggested that most sentences need not receive any presidential review. The modern system is similar, with presidential approval required for any capital sentence.<sup>495</sup> In sum, presidential involvement is a limited, one-way ratchet favoring leniency. The laws clearly assume that the CINC cannot direct officers and soldiers as they judge cases.

It may be that this sphere is unique because it involves the weightiest matters, namely life and liberty. In other words, the partial and episodic independence of military personnel participating in adjudication may stem from the perceived requirements of due process. If that is so, the independence of officers in court-martial proceedings perhaps cannot be used to justify other enclaves of autonomy, much less the creation of a wholly independent general or admiral.

#### *G. Presidential Powers*

I have claimed that Congress cannot shatter executive unity by creating independent armies, navies, generals, or admirals. Though there was such a tradition of independence in Britain and America and though such a system would not transgress the CINC Clause, our Constitution, taken as a whole, forbids such autonomy. The Constitution grants certain powers to the Executive and does not grant Congress carte blanche to qualify, constrain, or strip away those powers.

There are related questions about whether Congress can regulate other presidential powers as they relate to the military. For instance, can Congress bar vetoes of military bills? Some might suppose that stripping away the veto

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<sup>493</sup>. An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, art. 65, 2 Stat. 359, 367 (1806).

<sup>494</sup>. *Id.*

<sup>495</sup>. 10 U.S.C. § 857(a)(3) (2018).

with respect to martial matters results in a sounder government of the military. Likewise, can Congress pass a statute forbidding pardons of military officers? Such a law might be thought to generate better military discipline.

Despite the superficial plausibility of such claims, I would not read the Govern and Regulate Power this broadly. While Congress can limit the CIN-CAN's discretion over the military, by providing rather specific and detailed military statutes, I do not regard Congress's powers over the military as empowering Congress to defease or limit the President's *other* Article II authorities, including the powers to veto, appoint, or remove. Under the rubric of regulating the armed forces, Congress may not forbid the pardoning of sailors.

My argument here somewhat tracks the Supreme Court's reasoning in *Buckley v. Valeo*.<sup>496</sup> In *Buckley*, Congress argued that because it could regulate federal elections,<sup>497</sup> it could create the Federal Election Commission and appoint its commissioners. Thus, Congress asserted that it could use its power to regulate elections to make an exception to the Appointments Clause. The Court properly rejected the claim.<sup>498</sup> The Court found it implausible that the Federal Elections Power, plenary though it was, included authority to circumvent the Appointments Clause.

The same is true of any congressional attempts to use the Govern and Regulate Power to create military exceptions related to the veto, appointments, removal, and similar powers, or so I would maintain. The power to govern and regulate the armed forces is quite broad and empowers Congress to create a host of useful, even intrusive, military rules. But Congress cannot leverage that power to override or undermine grants found in Article II, including the President's powers to appoint, direct, and remove. Put another way, the Govern and Regulate Power is a power to regulate the military and does not encompass authority to curb or usurp the President's other constitutional powers.

## **CONCLUSION**

Robert Frost said that good fences make good neighbors. Whether true of neighbors or not, the point applies to the three federal branches and the Commander-in-Chief Clause in particular. We must have definitions of that Clause that enjoy some measure of rigidity and precision. Absent such metes and bounds, the Commander-in-Chief Clause will become untethered and something of a wandering clause, capable of swallowing up new authorities as the

<sup>496.</sup> 424 U.S. 1 (1976) (per curiam).

<sup>497.</sup> *Id.* at 12-13, 133.

<sup>498.</sup> *Id.* at 126-33.

insistent needs of crises, real and imagined, cause the CINCAN to press the Clause into service.

At the Founding, the fences were more rigid and precise. First, commanders in chief were not rare figures endowed with extraordinary powers. While the Constitution made the President the principal or first commander, the President was hardly the only commander in chief, for every military leader atop a company, brigade, or other unit was its CINC. Second, no commander in chief was thought to enjoy any enclave of autonomy. Every British and American CINC was subject to control and direction by others, including by legislatures. Even the Crown faced Parliamentary regulation.

These historical insights allow us to see what the CINC Clause does, and does not, mean. The powers granted to the nation’s “first General and Admiral,” just like those granted to other generals and admirals, are significant but not boundless. The CINCAN may establish camps, regulate the conduct of marches, and direct patrolling vessels, just as other military commanders may; what he may not do, though, is declare war or martial law, raise armies and navies, or create a criminal code. Relatedly, just as the Clause does not establish the President as an autarchic military figure, it does not diminish Congress’s broad authority over the military and warfare. Congress retains the ability to command warfare, direct voyages, regulate encampments, and choose military targets. Finally, the President wields significant nonmilitary powers and influence that complement his status as CINC. The President can appoint all military officers<sup>499</sup> and can, by virtue of the Vesting Clause, direct and remove them.<sup>500</sup> Furthermore, the veto, the lawmaking process, partisanship within Congress, and legislative prudence will conspire to guarantee that the President has an outsized say on military legislation. These sources of power and sway far overshadow those granted by the CINC Clause.

Today the Commander-in-Chief Clause has taken on a grander meaning. With executives, both chief and subordinate, eschewing any measure of rigidity and precision, the Clause has become a second Sweeping Clause. While the Clause has hardly swallowed the entire Constitution, no one should doubt that earlier borders have been erased by aggressive advisers and well-meaning CINCANS.

To begin with, the Clause is a sharp and shiny sword. Vis-à-vis Congress, the Executive wields the Clause to slash through laws that direct the military. The Commander in Chief (and not Congress) may decide who leads military units, how to treat prisoners, and where and how to fight the enemy, or so the

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<sup>499</sup>. U.S. CONST. art. II, § 2, cl. 2 (granting the power to appoint officers).

<sup>500</sup>. *Id.* art. II, § 1, cl. 1 (granting “[t]he executive Power”).

executive insists. These muscular CINCAN claims are voiced sporadically, for the executive branch often seems unbothered by congressional regulation. There are, after all, many military laws in the Statutes at Large and U.S. Code. But when congressional laws pinch—when the Executive desires freedom of action in the moment—the temptation to draw the sword and cleave the statute often proves irresistible. The Executive will insist that Congress is no commander in chief, and that Congress cannot diminish or demote the CINCAN. Such claims will seem plausible, especially to copartisans and to those who oppose the legislative rule at issue.

The Clause also serves as a daunting shield, to be wielded in real courts and the court of public opinion, to defend actions that invade individual rights, and to fend off the charge that the President is acting contrary to laws and the Constitution. Establishing military courts, suspending habeas corpus, seizing private property—these and other invasions of private rights are justified with a citation to the presumed authorities of a CINC. Because the Constitution says little about emergencies and because some alleged crises are genuine, some such defenses are successful.

The reasons for the metastasis of the CINCAN are many. First, the United States has vast security and economic interests overseas. The Executive seeks to protect America's allies and millions of overseas citizens via unilateral, swift action. Presidents do not want to plead with Congress in the wake of every overseas crisis. Second, modern weaponry and delivery systems have made the world a smaller, more dangerous place. To some, preemptive measures are indispensably necessary. Wars of preemption are more likely if the Executive can act unilaterally, without having to go to Congress. These two reasons reflect changed circumstances.

Third, there is a military-legal complex—composed of high officers and legal advisers—that regularly advances the CINC Clause as a source of broad, indefeasible power. Their power and discretion are parasitic on the Executive's, so they tend to favor greater presidential power. Fourth, the “claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy.”<sup>501</sup> In other words, the assertion that the President must have constitutional power to handle some crisis is beguiling and often persuasive. These two factors relate to motive and opportunity.

Fifth, Congress is reluctant to enact standing laws that authorize executive action overseas, with respect to allies, hostages, or property, primarily because legislators do not wish to take the blame for unpopular operations. No con-

<sup>501</sup>. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring).

gressional permission slips means no legislative responsibility. Sixth, modern courts have largely eschewed resisting the Executive's military claims, thereby eliminating the *in terrorem* effects that accompany judicial review. When the courts are absent, the Executive tends to accrete power. Finally, to our modern eyes the Clause seems a far-reaching grant of authority, one that demands deference to the Executive not only on military matters but also on the meaning of the Clause itself. As a result, the Clause has been reimagined to favor executive autonomy. There is no foolproof means of preventing this drift, particularly where there are numerous reasons to repurpose and reconceive the text to suit new circumstances.

In sum, if (1) our recurring overseas crises demand (and justify) action, (2) there is a faction intent on using the Clause to accrete power and autonomy, (3) no one can judge where the Clause begins and ends, and (4) there is little prospect of congressional legislation or judicial pushback, the pool of powers said to flow from the Clause will swell over time. Because little beyond surface plausibility is necessary, there will be a recurring temptation to rely upon the Clause.

For Presidents, their aides, and their allies, the allure of the Commander-in-Chief Clause has proven irresistible. We have moved from a first general and admiral—a chief commander—to *The Commander in Chief*, an expression and a way of thinking that signals singularity and exclusivity and that has yielded some measure of dominance and portends still greater ascendency.