

Congress's Power over Military Offices

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

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

*By defining duties, command relationships, and disciplinary mechanisms in this way, Congress may establish structures of executive branch accountability that promote key values, protect military professionalism, and even encourage or discourage particular results, all without infringing upon the President's ultimate authority to direct the nation's armed forces. These conclusions bear directly on recent legislative proposals to vest authority over cyber weapons, force withdrawals, or nuclear weapons in officers other than the President. They also enable a potent critique of the Supreme Court's recent insistence on a "unitary" executive branch in *Seila Law LLC v. Consumer Financial Protection**

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Bureau, and they shed new light on broader separation-of-powers debates over executive-branch structure, conventions of governmental behavior, the civil service's constitutionality, and Reconstruction's historical importance.

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Introduction

Recent events have highlighted office-holding's importance as a constraint on modern presidents. By vesting authorities in subordinate offices rather than the presidency, Congress may place friction between presidential desires and policy outcomes, even when the officer in question is subject to at-will removal. Doing so may help maintain agency adherence to legal requirements, ensure fidelity to agency statutory missions, and enable political enforcement of norms and conventions regarding appropriate conduct. Although examples of these effects stretch across American history, President Donald Trump's failure to fire a special prosecutor investigating his presidential campaign provides a salient recent illustration: Because the power to hire and fire special counsels belonged to the Attorney General, not the President, Trump likely could have ousted the prosecutor only by firing the Attorney General (or Acting Attorney General), but doing so would have risked political backlash.

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

1. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 769 (2008) (arguing that “the text, as reinforced by historical practice, makes a strong case for at least some variant of a ‘unitary executive’ within the armed forces, particularly as to traditional functions in armed conflicts”); Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 738 (2007) (“Unlike army generals, who may be commanded, the heads of departments the President appoints and the Senate confirms have the responsibility to decide the issues Congress has committed to their care—after appropriate consultation, to be sure—and not simply to obey.”). Scholars with broader views of presidential authority of course share this view. See, e.g., John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2280 (2009) (presuming that “[e]ven if inferior officers refused to carry out presidential orders, the

statements, and other documents across multiple administrations, has asserted remarkably broad theories of presidential command authority. Based on its asserted view that “[i]t is for the President alone, as Commander-in-Chief, to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces,”² the executive branch has claimed authority to ignore statutory limits on who may command U.S. forces in combat³ and even how many soldiers or sailors must compose particular units.⁴

This pro-presidential consensus is mistaken. It is true that the President, as Commander in Chief, must have some form of directive authority over U.S. military forces in the field, and military officers may often hold a duty to obey lawful presidential commands. This core presidential authority, however, leaves Congress with extensive power to structure the offices, chains of command, and disciplinary mechanisms through which the President’s authority is exercised. In particular, much as in the administrative context, Congress may vest particular powers and duties—authority to launch nuclear weapons or a cyber operation, for example, or command over particular units—in particular offices, even with respect to use of force. Furthermore, although the Constitution affords Presidents removal authority over these officers as a default means of command discipline, Congress may to some degree supplant and limit this authority by replacing it with alternative disciplinary mechanisms, such as criminal penalties for disobeying lawful orders. By defining duties, command relationships, and disciplinary mechanisms in this way, Congress may establish structures of executive branch accountability that promote key values, protect military professionalism, and even encourage or discourage particular results, all without infringing upon the President’s ultimate authority to direct the nation’s armed forces.

Commander-in-Chief Clause would seem to include the power to promote or demote officers and to make duty assignments”); cf. Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEXAS L. REV. 299, 384 (2008) (arguing that Congress “cannot create independent military officers or agencies, it cannot force the Commander in Chief to use officers that lack his confidence, and it cannot require the Commander in Chief to consult others prior to exercising his constitutional powers”).

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

3. *Id.* at 183.

4. Letter from the Assistant Attorney General, Office of Legislative Affairs, to Chairman Mac Thornberry, Committee on the Armed Services, U.S. House of Representatives and Chairman John McCain, Committee on the Armed Services, U.S. Senate (Nov. 8, 2017) [hereinafter “2018 NDAA Views Letter”], <https://www.justice.gov/ola/page/file/1010611/download> [https://perma.cc/3A5D-AAA7] (expressing views on the National Defense Authorization Act for Fiscal Year 2018, H.R. 2810, as passed by the Senate, and asserting that required “manning levels” for certain ships “would contravene the President’s indefeasible authority as Commander in Chief”).

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

By these lights, although my conclusions may be at odds with modern intuitions about the President’s Commander-in-Chief power, they have the virtue of according substantially not only with the Constitution’s plain text, but also with our government’s actual practice over the past 150 years—or so I will argue. Contrary to the widespread assumption that the President’s military command authority is unusually broad, an unusually thick overlay of statutes in fact regulates military office-holding at every stage. Statutes regulate military offices with respect to everything from appointments⁶ and promotions,⁷ to duties and assignments,⁸ to removals⁹ and other forms of discipline,¹⁰ often to a degree well beyond the norm for civil and administrative officers. Ironically, then, the frequent assumption that military affairs are an area of special presidential authority relative to civil governance may have it backwards in key respects.

Indeed, during at least one key historical period, Reconstruction, Congress went even further, vesting authority over governance of the defeated Confederacy in particular military officers and requiring that all Army orders go through a top general who was also protected from at-will removal.¹¹ As a practical matter, these measures went beyond simply structuring command relationships to encourage certain policy outcomes and came close to stripping the President’s command authority altogether.¹² Although some key decisions and scholarship, rather curiously, have treated such Reconstruction-era precedents as dangerous anomalies,¹³ we shall see

5. H. JEFFERSON POWELL, *TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR* 191–93 (2016) (describing this approach); *see also* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* xv–xvi (1991) (offering a similar theory).

6. *E.g.*, 10 U.S.C. §§ 531, 532 (2018).

7. *E.g.*, 10 U.S.C. §§ 611, 624 (2018).

8. *E.g.*, 10 U.S.C. §§ 125, 7065, 8062 (2018).

9. *E.g.*, 10 U.S.C. § 1161 (2018).

10. *E.g.*, 10 U.S.C. §§ 801–946a (2018).

11. *See infra* subsection II(B)(4)(a).

12. *See infra* subsection II(B)(4)(b).

13. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 585 (2014) (Scalia, J., dissenting) (questioning the value as precedent of Reconstruction-era recess appointments in part because they arose in “a period of dramatic conflict between the Executive and Congress that saw the first-ever

that other precedents set during that period have remained central to the military's practical operation ever since.¹⁴ Given Reconstruction's centrality to the modern constitutional order, as well as its resonance with our own era of unstable and conflicted politics, Congress's maximal assertions of power in that period warrant more respectful consideration, on this question among others.

The analysis offered here bears directly on numerous current controversies. In just the past few months, the Secretary of Defense apparently withdrew military forces from certain domestic security functions against the President's wishes,¹⁵ the Navy Secretary resigned rather than accept presidential interference with planned discipline for a wayward Navy SEAL,¹⁶ controversy erupted over an aggressive military strike against a senior Iranian officer in Iraq,¹⁷ and Congress created a new "Space Force" within the Department of the Air Force.¹⁸ In addition, one recent statute

impeachment of a sitting President"); *Powell v. McCormack*, 395 U.S. 486, 544 (1969) (characterizing Congress's "abandonment of . . . restraint" in employing its exclusion power as "among the casualties of the general upheaval produced in war's wake"); *Myers v. United States*, 272 U.S. 52, 164–65 (1926) (characterizing statutes limiting presidential removal authority as growing "out of the serious political difference between the two Houses of Congress and President Johnson"). See generally DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* 179 (2016) ("The story of this broader power struggle [between the President and Congress during Reconstruction] is now usually remembered . . . as an example of Congress taking things too far. In the decades after the trial, the story of congressional overreach burrowed into the national memory . . .").

14. See *infra* subsection III(A)(1)(b)(i) & section III(A)(2)(b).

15. Gordon Lubold, *Trump Wanted to Fire Esper over Troops Dispute*, WALL ST. J. (June 9, 2020, 6:34 PM), <https://www.wsj.com/articles/trump-wanted-to-fire-esper-over-troops-dispute-11591728235> [<https://perma.cc/258F-4H9F>] ("President Trump last week was on the brink of firing Defense Secretary Mark Esper over their differing views of domestic use of active-duty military, before advisers and allies on Capitol Hill talked him out of it, according to several officials."). Just as this Article was going to press, new controversy erupted over the Defense Department's role in failing to protect the Capitol from being stormed by riotous supporters of President Trump. See, e.g., Dan Lamothe, *Military Quick-Reaction Force Not Deployed During Storming of Capitol Because of a Lack of Planning, Defense Officials Say*, WASH. POST (Jan. 9, 2021, 2:57 PM), <https://www.washingtonpost.com/national-security/2021/01/09/military-quick-reaction-force-not-deployed-during-storming-capitol-because-lack-planning-defense-officials-say/> [<https://perma.cc/4BFL-QHCB>] ("A small quick-reaction force assembled by the Defense Department to assist if needed during protests in Washington on Wednesday did not immediately respond when a pro-Trump mob stormed the Capitol because of a lack of a prior planning with Capitol Police over how it might be deployed . . .").

16. Ashley Parker & Dan Lamothe, *Navy Secretary Forced Out by Pentagon Chief over Handling of Navy SEAL's War Crimes Case*, WASH. POST (Nov. 25, 2019, 7:12 AM), <https://www.washingtonpost.com/national-security/2019/11/24/pentagon-chief-asks-navy-secretarys-resignation-over-private-proposal-navy-seals-case/> [<https://perma.cc/9ZN2-9V6W>].

17. Isabel Coles, *Tensions Rise in the Middle East After U.S. Killing of Iranian Military Leader*, WALL ST. J. (Jan. 3, 2020, 6:50 PM), https://www.wsj.com/articles/u-s-strike-in-iraq-threatens-ties-with-vital-middle-east-ally-11578058413?mod=hp_lead_pos1 [<https://perma.cc/XVA5-KRBF>].

18. United States Space Force Act, Pub. L. No. 116-92, §§ 951–953, 133 Stat. 1561, 1561–64 (2019) (codified at 10 U.S.C. §§ 9081–83 (2018)).

vested authority over certain offensive cyber operations jointly in the President and Secretary of Defense, rather than the President alone.¹⁹ Another statute conditioned certain force withdrawals from South Korea on certifications by the Secretary,²⁰ though President Trump declared this provision unconstitutional in a signing statement.²¹ Some have even called for statutory limits on presidential discretion over nuclear weapons, among other things.²²

The validity of all these actions and proposals depends on the relative extent of congressional and presidential authority to define military officers' duties and their degree of independence from presidential dictates. Nor are such questions likely to fade away. So long as our politics remain erratic, conflicted, and polarized, it is not hard to image Congress employing its

19. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1642, 132 Stat. 2132 (2018) (codified at 10 U.S.C. § 394 note); *see also* Robert Chesney, *The Law of Military Cyber Operations and the New NDAA*, LAWFARE (July 26, 2018, 2:07 PM), <https://www.lawfareblog.com/law-military-cyber-operations-and-new-ndaa> [https://perma.cc/K7P7-UMKN] (noting peculiarity of “mak[ing] the ‘National Command Authority’ the relevant decision maker” rather than “just the [P]resident”); Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 434 (2020) (noting this provision “appears to dilute the delegation of power, at least as compared to a delegation to the President alone”).

20. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1254, 133 Stat. 1198, 1671–72 (2019) (providing that no funds authorized by the statute “may be used to reduce the total number of members of the Armed Forces serving on active duty who are deployed to South Korea below 28,500 until 90 days after” the Secretary of Defense certifies, among other things, that “[s]uch a reduction is in the national security interest of the United States and will not significantly undermine the security of United States allies in the region”).

21. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2019 DAILY COMP. PRES. DOC. 201900880 (Dec. 20, 2019) (indicating that “[s]everal provisions of the Act, including section[] 1254 . . . , purport to restrict the President’s authority to manage personnel, materiel, and logistical matters in the manner the President believes to be necessary or advisable for the successful conduct of military missions and foreign affairs” and will accordingly be “implement[ed]” in a manner “consistent with the President’s authority as Commander in Chief and as the sole representative of the Nation in foreign affairs”); *see also* Letter from Prim F. Escalona, Principal Deputy Assistant Attorney General, Office of Legis. Affairs, U.S. Dep’t of Justice to Senator James Inhofe, Chairman, Comm. on Armed Servs. (Nov. 27, 2019) [hereinafter 2020 NDAA Views Letter], <https://www.justice.gov/ola/page/file/1222061/download> [https://perma.cc/3LB7-W3KJ] (objecting to earlier version of this provision on the grounds that “[t]he President’s constitutional authority to deploy personnel and materiel cannot be conditioned . . . on certifications or waivers made by subordinate Executive Branch officials”).

22. *See, e.g.,* Dakota S. Rudesill, *Nuclear Command and Statutory Control*, 11 J. NAT’L SEC. L. & POL’Y (forthcoming 2021) (manuscript at 28–30); Richard K. Betts & Matthew C. Waxman, *The President and the Bomb: Reforming the Nuclear Launch Process*, FOREIGN AFFAIRS (Mar./Apr. 2018); Bruce Blair & Jon Wolfsthal, *Trump Can Launch Nuclear Weapons Whenever He Wants, with or Without Mattis*, WASH. POST (Dec. 23, 2018, 5:00 AM), <http://www.washingtonpost.com/outlook/2018/12/23/trump-can-launch-nuclear-weapons-when-ever-he-wants-with-or-without-mattis> [https://perma.cc/9D5B-GQTB]; Joseph Cirincione, *No President Should Have the Absolute Authority to Launch Nuclear Weapons*, WASH. POST (Dec. 1, 2019, 12:44 PM), <https://www.washingtonpost.com/opinions/2019/12/01/no-president-should-have-absolute-authority-launch-nuclear-weapons/> [https://perma.cc/694A-WY2B]; Editorial Board, *The President Alone Should Not Be Able to Start a Nuclear War*, SCI. AM. (Apr. 2020).

power to structure the military still more aggressively—nor to anticipate Presidents pushing back with aggressive theories of Commander-in-Chief power.

Beyond their immediate importance, the conclusions reached here have significant implications for broader separation-of-powers debates. First, although the Supreme Court recently suggested in *Seila Law LLC v. Consumer Financial Protection Bureau*²³ that “[t]he entire ‘executive Power’ belongs to the President alone” and that subordinate officers therefore “wield” authorities belonging to the President,²⁴ this view is wrong even for the military, which even the *Seila* dissenters presumed is an area of greater presidential authority.²⁵ *Seila* notwithstanding, Congress’s extensive authority to allocate military duties should put to rest the strongest versions of so-called “unitary” executive branch theory, under which all power vested in executive offices is thought to be necessarily vested in the presidency as well.²⁶

Second, the analysis highlights the importance of baseline constitutional understandings about office-holding to sustaining the superstructure of norms, expectations, and “conventions” about government behavior that recent scholarship has underscored as a key feature of responsive and accountable governance.²⁷ Third, recognizing Congress’s authority over military offices should strengthen arguments that parallel legal protections for officers and employees in the civil service are constitutionally valid.²⁸ Finally, the history addressed here should refocus scholarly attention on Reconstruction’s importance not only to the constitutional law of civil liberties, but also to operative understandings of separation of powers.²⁹

My analysis proceeds as follows. Part I provides background on constitutional debates over office-holding in general and military officers in particular. Among other things, Part I maps out major schools of thought regarding presidential authority over federal officers, explaining how the arguments developed here fit into those debates. Part II then addresses a first key question: whether Congress may assign particular duties and authorities to military offices other than the presidency. This Part advances the view that, contrary to frequent executive assertions and the undeveloped assumption of many scholars, Congress in fact holds extensive authority to assign authorities and responsibilities to particular offices, even if officers holding those positions are under a duty to obey lawful orders from the Commander

23. 140 S. Ct. 2183 (2020).

24. *Id.* at 2197 (quoting U.S. CONST. art. II, § 1, cl. 1).

25. *Id.* at 2233 (Kagan, J., dissenting).

26. *See infra* subpart IV(A).

27. *See infra* subpart IV(B).

28. *See infra* subpart IV(C).

29. *See infra* subpart IV(D).

in Chief. Part III turns to removal and argues that Congress may limit presidential removal of military officers provided it enacts alternative means of command discipline. Part IV briefly addresses the four broader implications described earlier. The Article ends with a conclusion reflecting on these constitutional principles' importance in our political moment.

I. Background on Military Offices and Appointments

Article II of the Constitution, as Jerry Mashaw has observed, gives remarkably little attention to administration.³⁰ The Constitution, to be sure, establishes a single President as head of the executive branch and "Commander in Chief" of the military.³¹ It also prescribes the appointment process for all "Officers of the United States."³² It says nothing explicit, however, about the President's authority to remove officers and contains maddening ambiguities about the degree of presidential control over federal administration. These gaps in the text have fostered long-running debates in scholarship, case law, and legislative practice over the precise content of the President's authority over the executive branch.

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

A. *Article II's Text and Its Ambiguities*

What does the Constitution say about military offices? To begin with, of course, Article II makes the President "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual Service of the United States."³³ Article I, however, gives Congress the power to "declare War," "raise and support Armies," "provide and maintain a Navy," and provide for calling the state militias into federal service.³⁴ It also empowers Congress to "make Rules for the Government and

30. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 30 (2012) ("The American Constitution of 1787 left a hole where administration might have been.").

31. U.S. CONST. art. II, § 1, cl. 1; *id.* § 2, cl. 1.

32. *Id.* § 2, cl. 2.

33. *Id.* § 2, cl. 1.

34. *Id.* art. I, § 8.

Regulation of the land and naval Forces.”³⁵ It does the same for state militia forces when in federal service, except that the states retain power over “the Appointment of the [militia] Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”³⁶

More generally, the Constitution’s Appointments Clause provides that all “Officers of the United States” must be appointed by the President with Senate advice and consent, unless Congress provides by law for appointment of an “inferior Officer” by the President alone, the head of a department, or a court of law.³⁷ In addition, Congress holds overall authority to structure the executive branch by virtue of the Necessary and Proper Clause. Though better known for granting Congress authority to enact laws “necessary and proper for carrying into execution” Congress’s other enumerated legislative powers, the Necessary and Proper Clause grants Congress the same authority with respect to “all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.”³⁸ On the other hand, Congress lacks the power to impeach and remove military officers. Although certain officers “shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors,” this clause applies only to “[t]he President, Vice-President, and all civil [i.e., nonmilitary] officers of the United States.”³⁹

Long-running debates address Congress’s authority to structure civil and administrative offices under these and other related provisions.⁴⁰ Although the Constitution’s plain text says nothing at all about removal of executive officers through means other than impeachment, the First Congress debated the issue at length. It apparently concluded, in its celebrated “Decision of 1789,” that presidents have constitutional authority to remove executive officers they appoint.⁴¹ Subsequent Supreme Court decisions have rejected requiring Senate or congressional approval for removal of an executive officer,⁴² but approved tenure protections for certain civil or

35. *Id.* § cl. 14.

36. *Id.* § cl. 16.

37. *Id.* art. II, § 2, cl. 2.

38. *Id.* art. I, § 8.

39. *Id.* art. II, § 4 (emphasis added).

40. See generally HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 29–32 (2015) (discussing debates over presidential supervisory authority during Washington’s presidency).

41. *Id.* at 30–32; see also Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1075 (2006) (arguing that members of Congress who voted for statutes creating executive departments in 1789 “knew that they were endorsing the President’s right to remove [executive] officers by virtue of his executive power”). I discuss this historical debate and its implications in more detail below in subsection III(A)(1)(a).

42. *Bowsher v. Synar*, 478 U.S. 714, 720–21 (1986); *Myers v. United States*, 272 U.S. 52, 176 (1926).

administrative positions.⁴³ In its recent synthesis in *Seila*, which invalidated tenure protections for an officer charged with interpreting and enforcing multiple financial consumer protection statutes, the Court characterized its past decisions as allowing tenure protections only “for multimember expert agencies that do not wield substantial executive power, and . . . for inferior officers with limited duties and no policymaking or administrative authority.”⁴⁴

Apart from the question of what removal authority presidents hold, the question why they hold any such power at all is equally vexed. Some authorities, including the majority opinion in *Seila*,⁴⁵ base this power on the so-called Vesting Clause, which vests “the executive power” in the President;⁴⁶ others locate it in the Take Care Clause, which obligates the President to “take Care that the Laws be faithfully executed”;⁴⁷ and still others argue that removal authority may be inferred from appointment authority.⁴⁸

As a rough approximation, judges and scholars who have addressed presidential removal authority with respect to administrative offices fall in three main camps. A first perspective characterizes Article II as requiring a “unitary” executive branch in which the President holds indefeasible power to remove all executive officers.⁴⁹ A second view maintains that while presidents hold removal authority as a default, Congress may restrict or regulate that power by statute when doing so is functionally justified.⁵⁰ Finally, a third account maintains that Congress may impose removal limitations as a matter of near-plenary discretion over administrative

43. *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935).

44. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199–2200 (2020).

45. *Id.* at 2197.

46. *E.g.*, Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1840 (2006).

47. *See, e.g.*, MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 165–66 (2020) (advocating removal power rooted in the Take Care Clause); *cf. Seila*, 140 S. Ct. at 2228 (Kagan, J., dissenting) (acknowledging that the Take Care Clause’s text “requires . . . enough authority to make sure ‘the laws [are] faithfully executed’—meaning with fidelity to the law itself, not to every presidential policy preference”).

48. *See, e.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 233 (1839) (discussing removal power as incidental to appointment power).

49. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (arguing that the President’s “executive Power” entails removal authority); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008) (discussing the unitary executive theory); MCCONNELL, *supra* note 47 (advocating at-will removal power with respect to civil officers based on the Take Care Clause).

50. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (upholding for-cause removal limitation for independent prosecutor).

design.⁵¹ As we shall see, parallel questions arise in the military context, but the arguments are less well developed, some textual theories for civil officers are not readily applicable, and the Commander-in-Chief Clause raises distinct questions.⁵²

A related and overlapping debate concerns Congress's authority to vest particular authorities in particular executive offices other than the presidency. On this question, the predominant scholarly view holds that Congress may vest civil and administrative powers and duties in offices other than the President.⁵³ Proponents of this view maintain that the Appointments Clause and Necessary and Proper Clause grant Congress the power to create offices and vest them with particular duties and authorities—duties and authorities that may then be exercised only by those officers, not by the President personally. On the other hand, proponents of a strong “unitary” executive branch argue that the President, as a Chief Executive endowed with “executive power” and obliged to ensure faithful execution of the laws, necessarily holds authority to control subordinate executive officers’ functions or even personally discharge those officers’ duties.⁵⁴ Though

51. See, e.g., *Seila*, 140 S. Ct. at 2227 (Kagan, J., dissenting) (emphasizing Congress’s “broad authority to establish and organize the Executive Branch”); PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 34–35 (2009) (“Congress may structure the agencies to prevent the President from exercising his own supervisory control over their policy discretion.”).

52. See *infra* Part III.

53. See, e.g., HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 456–59 (2006) (discussing historical support for this view); HAROLD J. KRENT, PRESIDENTIAL POWERS 22–23, 56–57 (2005) (noting that “Congress over the past two centuries has delegated authority to officers independent of the president, and the president has never exerted close control over all law enforcement nor over administration of governmental policy”); MCCONNELL, *supra* note 47, at 349–50 (advocating congressional authority to vest duties in civil offices as a limited qualification of unitary presidential control of the executive branch); SHANE, *supra* note 51, at 143–44 (arguing that the President is properly an “overseer” rather than the “decider” with respect to the federal bureaucracy); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465 (1987) (Congress “may provide that the President may not substitute his judgment (or the judgment of a member of his staff) for that of the official to whom Congress has delegated decisionmaking power”); Robert B. Percival, *Who’s in Charge?: Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2490 (2011) (“If an agency head refuses to accommodate the President’s policy preferences, there is no constitutional problem with the President removing him from office. But this does not imply that the President has the authority to dictate the substance of agency decisions that regulatory statutes entrust to agency heads.”); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1210, 1234–36 (2014) (“[R]emoval provides the necessary and sufficient constitutional mechanism for ensuring presidential control and the possibility of direction”); Strauss, *supra* note 1, at 698 (arguing that “absent actual congressional delegation of decisional authority to the President, his role is limited to executive oversight of the agency on which that authority is statutorily conferred”).

54. See, e.g., CALABRESI & YOO, *supra* note 49, at 4 (“All subordinate nonlegislative and nonjudicial officials exercise executive power, and they do so only by implicit or explicit delegation from the president. They are thus all subject to the president’s powers of direction and control.”);

significant pre-*Seila* case law supported the former view,⁵⁵ the *Seila* majority opinion appears to embrace the latter theory. It asserts that “[t]he entire ‘executive Power’ belongs to the President alone” and characterizes subordinate executive officers as mere assistants to the President, “whose authority they wield.”⁵⁶

As with removal, precisely the same questions may arise with respect to military officers, but these issues have received far less attention in that context. Even leading proponents of congressional authority in the civil and administrative context have presumed that the military is different,⁵⁷ and presidents, as noted earlier, have repeatedly claimed a plenary authority to reassign military duties.⁵⁸ Yet the textual basis for this distinction is unclear. Although the President is the military’s Commander in Chief under Article II, the Appointments and Necessary and Proper Clauses apply by their terms to military offices, and Congress holds specific authority not only to raise armies and maintain navies, but also to enact rules for their governance.

Resolving these questions—the degree of congressional authority to limit removal power and assign duties with respect to military functions—will be the focus of this Article. Again simplifying greatly, most administrative law scholars embrace either the unitarian view on both questions (advocating an indefeasible removal power as well as a presidential

SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 184–92 (2015) (arguing the President holds plenary directive authority over executive officers and may revise their determinations); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 598–99 (1994) (indicating that the President may “completely withdraw [an officer’s] authority should he feel that an officer is no longer exercising authority consistent with his views” and then personally “make all those decisions previously vested by statute in the now constitutionally disempowered officer”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243–44 (1994) (arguing that the President “necessarily has the power to nullify discretionary actions of subordinates”); Adam White, *The D.C. Circuit’s “Trump Card” for Executive Orders*, NOTICE & COMMENT BLOG (Mar. 13, 2017), <http://yalejreg.com/nc/the-d-c-circuits-trump-card-for-executive-orders/> [<https://perma.cc/QSF6-6GGG>] (suggesting that executive agencies may be obligated to follow presidential directives).

55. See, e.g., *Myers v. United States*, 272 U.S. 52, 135 (1926) (indicating that the President “may properly supervise and guide [executive officers’] construction of the statutes under which they act”); *Portland Audubon Soc’y v. Endangered Species Comm’n*, 984 F.2d 1534, 1537 (9th Cir. 1993) (holding that ex parte communications between the White House and responsible executive officials may be improper). See generally Strauss, *supra* note 1, at 708–13 (surveying case law).

56. *Seila*, 140 S. Ct. at 2197 (quoting U.S. CONST. art. II, § 1, cl. 1).

57. See, e.g., Strauss, *supra* note 1, at 737–38 (distinguishing military officers from other executive officers); cf. Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 324 (2016) (challenging the “hard version” of unitary executive branch theory under which Presidents hold “plenary authorit[y], which Congress may not limit, . . . to direct how [administrative officials] shall exercise any and all discretionary authority that those officials possess under law,” but conceding that “the President enjoys such control over subordinate personnel who assist the President in performing specific constitutionally enumerated tasks, such as negotiating treaties or commanding the military”).

58. See *supra* notes 2–4 and accompanying text; *infra* notes 80–81 and accompanying text.

power to revise or control subordinates' actions)⁵⁹ or else the non-unitarian view on both (advancing the second or third view described above on removal while also defending congressional authority to define officers' duties).⁶⁰ At least one scholar maintains the intermediate position that the President holds indefeasible removal authority but Congress may vest statutory duties in particular offices.⁶¹

With respect to the military, I will defend yet another position: Congress may assign powers and duties to offices, and it may also displace presidential removal authority, but only if it provides a robust alternative disciplinary mechanism for effectuating presidential command authority. In other words, the President, unlike in civil settings according to non-unitarian accounts, must have some form of directive authority over the military. But Congress may nevertheless vest duties in particular offices other than the presidency, so long as it provides either removal authority or some other robust disciplinary mechanism for securing compliance with lawful presidential directives as to how those duties are exercised. As a practical matter, these congressional powers may enable Congress to place the Secretary of Defense, other civilian officers within the chain of command, or even regular military officers in much the same position as the Attorney General or Treasury Secretary under current governing statutes: those officers may hold powers that only they can exercise, but the President can fire or threaten to fire or punish them to get his or her way. As we shall see, this constitutional understanding has historically enabled Congress to structure the military and impose procedural constraints in ways that effectively constrain presidents' choices and shape policy outcomes.

I will return later to this position's implications for administrative law debates. To lay groundwork for these arguments, however, two other key Article II ambiguities warrant brief attention. Whereas the removal and duty questions have received at least an uneasy resolution in the civil and administrative context but remain underexplored with respect to the military, these next two issues have the opposite character: relative clarity with respect to the military despite considerable debate outside it.

59. *E.g.*, Calabresi & Prakash, *supra* note 54, at 598–99.

60. *See, e.g.*, SHANE, *supra* note 51, at 34–35 (advancing “pluralist” model of the executive branch in which “the degree of policy control the President may exercise is up to Congress, which is limited, in turn, only by the Constitution’s constraints on the scope of the national legislative authority”); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 107–08 (2006) (“In our system, . . . while the President may sometimes exercise independent organizational power, it is largely Congress that decides what departments to create, how to organize those departments into various authorities and agencies and whether to create agencies outside of any department.”).

61. MCCONNELL, *supra* note 47, at 349–50.

B. Which Positions Are Offices?

The first such question is who counts as an “officer of the United States” under the Appointments Clause in the first place. To be clear, this question is not essential to resolving the duty-assignment and removal issues addressed here. In principle, Congress might hold equivalent authority to assign duties and limit termination with respect to nonofficer employees as well. Yet the Supreme Court suggested in its 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*⁶² that removal and appointment questions might be linked,⁶³ and in any event, clarifying terms at the outset may help avoid confusion in discussing key governing authorities regarding military officers.

Under governing case law, the Supreme Court has generally considered a position an office if it entails both a degree of permanence—“tenure and duration,” as opposed to ad hoc or temporary responsibility—and some exercise of “significant authority under the laws of the United States.”⁶⁴ As a matter of current practice, within administrative agencies, only the most senior officials—agency heads, assistant heads, deputy assistant heads, and the like—have typically been understood to meet these twin criteria. Prompted, however, by recent scholarship suggesting that the Framers viewed a wider range of positions as offices,⁶⁵ litigants and commentators have begun raising challenges to existing statutory arrangements.⁶⁶ In 2018, in *Lucia v. SEC*, the Supreme Court entered this fray but offered little clarification.⁶⁷ Rather than adopting any new general framework for identifying “significant authority,” the Court in *Lucia* held narrowly on the

62. 561 U.S. 477 (2010).

63. *Id.* at 506 (reserving the question “whether ‘lesser functionaries subordinate to officers of the United States’ must be subject to the same sort of control as those who exercise ‘significant authority pursuant to the laws’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam))).

64. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (citing *United States v. Germaine*, 99 U.S. 508, 511–12 (1879), for the first requirement and *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), for the second). The Executive Branch has generally applied this same framework, see, for example, The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 141–42 (1996), but an Office of Legal Counsel opinion during the George W. Bush Administration adopted a similar framework focused instead on whether the position is “continuing” and entails an exercise of “sovereign power.” Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73–74 (2007).

65. See generally Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443 (2018) (exploring the original public meaning of “officer”); James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and “Officers of the United States”*, 42 HARV. J. L. & PUB. POL’Y 872 (2019) (similar); Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501 (2018) (addressing understanding of early attorneys general).

66. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018) (addressing whether certain administrative law judges are “officers”).

67. *Id.* at 2052.

facts of the case that the administrative law judges in question were officers under the Appointments Clause because a closely analogous precedent had so held.⁶⁸

In contrast to this general ferment with respect to administrative offices, in the military setting, statutes, executive practice, and judicial opinions all point to a clear, and unusually broad, understanding of who counts as an Appointments Clause officer. As the Justice Department's Office of Legal Counsel put it in a recent opinion, all "[c]ommissioned military officers are 'Officers of the United States' for purposes of the Appointments Clause of the Constitution, and each promotion of a military officer from one grade level to the next is considered a separate appointment to a new office."⁶⁹ Accordingly, within the military, the operative understanding of "officer" converges with ordinary usage, ensuring that all commissioned officers, from generals and admirals down to lieutenants and ensigns, must either be appointed by the President with Senate consent or else, if Congress so provides, by the President alone or the Secretary of Defense. Further, although promotion within grade is viewed as a mere change in duties and not a change in office, a promotion from one grade to the next requires a new appointment in accordance with the Appointments Clause.

As noted, in *Free Enterprise Fund*, the Supreme Court suggested, without resolving the issue, that tenure protections might be more permissible for employees than for Appointments Clause officers.⁷⁰ To the extent that inference is sound (and it may well not be), the points discussed here with respect to military officers may bear on current debates over civil-service protections post-*Lucia*—a point I return to in Part IV.⁷¹ The key point for the moment is that a very broad set of officials, stretching from the upper ranks of the Defense Department down to nearly the most junior officers, qualify as Appointments Clause officers.

C. *How Are Officers Appointed?*

Another unusual, but seemingly settled, feature of military office-holding relates to appointment qualifications. Despite the broad definition of Appointments Clause "officers" with respect to the military, in practice

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

69. Promotions of the Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008, 32 Op. O.L.C. 70, 71 (2008) (internal citations omitted); *see also* 10 U.S.C. § 531 (2018) (providing for appointment to new officer grades); *Weiss v. United States*, 510 U.S. 163, 170 (1994) (indicating that military officers must be appointed in accordance with the Appointments Clause); *Dysart v. United States*, 369 F.3d 1303, 1306 (Fed. Cir. 2004) (same).

70. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 (2009) (holding that double-layer tenure-protection is unconstitutional for officers but might be permissible for employees).

71. *See infra* subpart IV(C).

military appointments are highly regulated. Even at the highest level, statutes establishing military offices are rife with qualification requirements that limit the pool of eligible appointees. At the very top, the Secretary of Defense may not have served on active duty in the military within the past seven years.⁷² Similar or more onerous requirements apply to Assistant Secretaries and other senior civilian offices.⁷³ Requirements for regular military officers are often even more restrictive. By their terms, governing statutes limit candidates for promotion to those included on lists of qualified officers prepared by boards of other military officers based on their assessment of junior officers' performance.⁷⁴ Although presidents may remove candidates from the lists, in effect this statutory framework limits their choice of nominees to individuals recommended by other military officers.⁷⁵

The executive branch has never fully accepted these statutes. In a series of legal opinions, executive-branch lawyers have asserted that "Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it cannot control the President's discretion to the extent of compelling him to commission a designated individual."⁷⁶ In other words, in the executive branch's view, "the President must retain sufficient discretion in selecting nominees for Executive Branch offices"; Congress cannot limit the choice too narrowly.⁷⁷ Presidents, moreover, appear to have occasionally acted on this understanding by appointing

72. 10 U.S.C. § 113(a) (2018).

73. *See, e.g.*, 10 U.S.C. § 136 (2018) (requiring at least seven years in civilian life for the Under Secretary of Defense for Personnel and Readiness); *id.* § 137 (same for Under Secretary of Defense for Intelligence); *id.* § 135 (same plus "significant budget, financial management, or audit experience in complex organizations" for the Defense Department Comptroller).

74. *E.g.*, 10 U.S.C. §§ 611, 616–618, 624 (2018); *see also* 10 U.S.C. § 9082(a) (2018) (requiring appointment of the Chief of Space Operations from the general officers of the Air Force). Statutes of this sort stretch back to the nineteenth century. *See, e.g.*, Act of Apr. 21, 1864, 13 Stat. 53 (directing that "no line officer of the navy, upon the active list, below the grade of commodore, nor any other naval officer, shall be promoted to a higher grade, until his mental, moral, and professional fitness to perform all his duties at sea shall be established to the satisfaction of a board of examining officers to be appointed by the President of the United States").

75. *See* 10 U.S.C. § 618(d) (2018) (allowing the President or, in some cases, the Secretary of Defense to remove names from lists recommended for promotion by promotion boards); *id.* § 624 (providing for officers' appointments to more senior positions from promotion lists based on approved promotion-board reports).

76. Issuance of Commission in Name of Deceased Army Officer, 29 Op. Att'y Gen. 254, 256 (1911).

77. Promotions of the Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008, 32 Op. O.L.C. 70, 75 (2008). The Executive Branch applies the same standard to nonmilitary appointments. *See, e.g.*, Constitutionality of Statute Governing Appointment of United States Trade Representative, 20 Op. O.L.C. 279, 280 (1996) ("Any power in the Congress to set qualifications 'is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.'" (quoting Civil Service Commission, 13 Op. Att'y Gen. 516, 520–21 (1871))).

unlisted individuals.⁷⁸ With these limited exceptions, however, the Executive Branch appears to have acquiesced to a remarkable degree to this quite restrictive process for making certain military appointments. Subject to some residual presidential discretion that remains ill-defined, Congress has effectively confined and professionalized the selection of individuals who may hold certain key positions within the military.⁷⁹

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

II. Assignment of Duties

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

78. *See, e.g.*, Promotion of Marine Officer, 41 Op. Att’y Gen. 291, 293 (1956) (upholding President’s authority to temporarily appoint an individual outside the statutory framework for promotions because “the President may not be bound in his selection of an officer or group of officers merely because in the opinion of others they are better qualified for promotion”). Former President and then-future Chief Justice William Howard Taft argued in a lecture on presidential powers that although such promotion statutes are constitutionally valid, “[n]o court and no other authority . . . can compel the President to make a nomination, and the only method of preventing his appointing someone other than the one specified by law is for the Senate to refuse to confirm him, or for Congress to withhold an appropriation of his salary, or for the Comptroller of the Treasury to decline to draw a warrant for his salary on the ground of his ineligibility under the law.” WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 128 (1916).

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

S. Black wrote to President James Buchanan in 1860,⁸⁰ and later presidents have nodded in agreement.⁸¹

Commentators seem largely to have agreed as well. Even a leading proponent of congressional power over nonmilitary offices argues the military is categorically different: Although “the heads of departments the President appoints and the Senate confirms have the responsibility to decide the issues Congress has committed to their care—after appropriate consultation, to be sure—and not simply to obey,” “army generals” may simply “be commanded.”⁸² Similarly, a leading account of congressional authority over use of military force asserts in a footnote that although Congress may vest particular duties in military officers, this congressional authority may be limited to “certain internal functions apart from the conduct of war.”⁸³ Some with broader theories of presidential power have embraced

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

81. See, e.g., 2018 NDAA Views Letter, *supra* note 4, at 4 (invoking the Black’s Attorney General opinion to indicate that “Presidents have asserted [the] authority [to assign military duties to particular personnel] since at least 1860”); Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 30 Op. O.L.C. 1, 37–38 (2006) (disclosing white paper on surveillance activities that cites *Meigs* for the proposition that “an act of Congress, if intended to constrain the President’s discretion in assigning duties to an officer in the army, would be unconstitutional”); Statement on Signing the Energy and Water Development Appropriations Act, 2004, 2 Pub. Papers 1659 (Dec. 1, 2003) (“The executive branch shall construe provisions of the Act that direct the Secretary of a military department to perform the Secretary’s duties through a particular military officer in a manner consistent with . . . the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”); Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 Pub. Papers 226 (Feb. 10, 1996) (“[T]he Congress deleted the restriction on the President’s authority to make and implement decisions relating to the operational or tactical control of elements of the U.S. armed forces, a restriction which clearly infringed on the President’s constitutional authority as Commander in Chief.”); Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 184 (1996) (“Whatever the scope of this authority in other contexts, 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.”); Training of British Flying Students in the United States, 40 U.S. Op. Att’y Gen. 58, 61–62 (1941) (observing that the President’s “authority” as Commander in Chief “undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country”); see also 2020 NDAA Views Letter, *supra* note 21, at 3 (“The President’s constitutional authority to deploy personnel and materiel cannot be conditioned . . . on certifications or waivers made by subordinate Executive Branch officials.”); Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att’y Gen. 484, 490 (1940) (calling it “of questionable constitutionality” to “prohibit action by the constitutionally created Commander in Chief except upon authorization of a statutory officer subordinate in rank,” but ultimately finding it “unnecessary” to resolve this issue).

82. Strauss, *supra* note 1, at 737–38.

83. David J. Barron & Martin S. Lederman, *The Commander in Chief Clause at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 986–87 n.164 (2008); see also *id.* at 1102–06 (discussing presidential command authority and suggesting that “[t]he ‘independence’ that is permissible in [certain] areas [of civil administration] . . . might be constitutionally dubious with respect to similarly consequential positions of authority in the military establishment”). More

Buchanan's view explicitly. Professor John Yoo, for example, argues that "[e]ven if inferior officers refused to carry out presidential orders, the Commander-in-Chief Clause would seem to include the power to promote or demote officers and to make duty assignments."⁸⁴

This view is mistaken. Presuming that the President can personally discharge all military duties or reassign them at will is at odds not only with the constitutional text and structure, but also with both contemporary and historical practice. Instead, the text and history support broad congressional power to vest military duties and authorities in offices, even if presidents, to a greater degree than in civil administration, must have some means of removing or disciplining officers who defy presidential directives.

This conclusion may matter. Outside the military, scholars have recognized that "[f]iring [an officer to get the President's way] typically has much higher political cost to the President than (successfully) directing an official's exercise of discretion."⁸⁵ In consequence, legal understandings of where powers are legally vested "likely influences the relative bargaining positions of the [officer] and the President."⁸⁶ Similar benefits could flow from vesting military functions in particular offices, even if the President ultimately holds authority to direct officers to exercise those authorities in a particular way. Indeed, in keeping with that assumption, Congress in recent years has adopted several measures vesting key authorities, most notably authority over certain cyber operations and withdrawals from South Korea, in the Secretary of Defense, or in the Secretary in combination with the President, rather than the President alone.⁸⁷ Some have proposed measures to

generally, these authors indicate that the President's Commander-in-Chief title "suggests that, at least with respect to certain functions, Congress may not (by statute or otherwise) delegate the ultimate command of the army and navy (or of the militia when in the service of the national government) to anyone other than the President," but they acknowledge that "the full extent of this preclusive prerogative of superintendence remains uncertain." Barron & Lederman, *supra* note 1, at 769; cf. Mark Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437, 482 (2015) (arguing that the President's Commander-in-Chief authority likely includes power to form a "functional combatant command" to address climate change).

84. Yoo, *supra* note 1, at 2280 (calling these powers "central components of a president's ability to decide on strategy and tactics and ensure that the officers who are in place will carry them out"); cf. MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 253 (2007) ("[T]he commander-in-chief clause shows that Congress cannot assign ultimate command responsibilities to someone other than the President . . ."); John Harrison, *The Executive Power* 19 (June 2019) (unpublished manuscript), <https://ssrn.com/abstract=3398427> ("The Commander in Chief Clause . . . excludes . . . independent discretion in lower-level commanders.").

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

86. *Id.*

87. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1642, 132 Stat. 2132 (2018) (codified at 10 U.S.C. § 394 note); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-29, § 1254, 133 Stat. 1198, 1671-72 (2019).

limit unilateral presidential responsibility for nuclear weapons launches,⁸⁸ and other more mundane proposals and enactments govern assignment of forces to particular ships, units, or commands.⁸⁹ Whatever the wisdom of such constraints—a point I return to below⁹⁰—they all raise directly the constitutional question considered here.

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

A. Text, Structure, and Current Practice

1. Congressional Authority Over Nonmilitary Duties.—Let me begin with the general argument for congressional authority to allocate and define nonmilitary officers' powers. Although *Seila*'s reasoning casts doubt on this understanding, the prevailing scholarly view, supported by substantial pre-*Seila* case law, holds that the President is ultimately an “overseer” and not a “decider,” in Peter Strauss's memorable formulation, with respect to powers vested in civil and administrative offices.⁹¹ In other words, although the President may oversee how other officers discharge their responsibilities, and perhaps remove them from office if their performance is unsatisfactory, authorities vested by statute in a particular officer ultimately belong to that officer, not the President.⁹² On this view, Congress holds authority not only to create offices as the Appointments Clause contemplates, but also, by virtue of that power and the Necessary and Proper Clause, to vest those offices with particular functions and duties that then belong to the individual officer, not the President.

Article II's text reinforces this conclusion in two places. First, by empowering the President to seek “the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,” the Opinions Clause implies that “duties” may belong to other “officers,” even if those officers are subject to presidential supervision.⁹³ Second, by requiring the President to “take Care that the Laws be faithfully executed,” the Take Care Clause implies that officials other than the President may sometimes be doing the executing.⁹⁴

88. See *supra* note 22.

89. See 2018 NDAA Views Letter, *supra* note 4, at 3–4 (discussing provisions to that effect).

90. See *infra* subpart II(C).

91. Strauss, *supra* note 1, at 737–38. For discussion of competing views on removal, see *supra* subpart I(A).

92. Strauss, *supra* note 1, at 737–38.

93. U.S. CONST. art. II, § 2, cl. 1; Strauss, *supra* note 1, at 702–03.

94. U.S. CONST. art. II, § 3, cl. 3; Strauss, *supra* note 1, at 703.

Seila notwithstanding, and despite one early Attorney General opinion to the contrary,⁹⁵ substantial practice and precedent support this understanding.⁹⁶ On some accounts, as noted, this view of congressional authority over duty assignment further supports congressional power to limit presidential direction and supervision.⁹⁷ But even when the President may remove the officer in question at will, Congress's power to vest duties in offices serves important practical purposes.

In particular, to the extent they hold authority to remove officers and replace them with someone more pliable, Presidents may ultimately be able to get their way. But needing to remove an officer to do so raises the political stakes, enabling what I have called the "fire alarm function" of office-holding.⁹⁸ If the officer believes the action the President seeks would be unlawful or profoundly unwise—as, for example, when President Andrew Jackson sought to require removal of treasury funds from the Bank of the United States, or when President Richard Nixon demanded termination of a special prosecutor—the officer may resign or force his or her own termination, thereby elevating the issue's political salience and bringing maximum scrutiny and pressure to bear on the President.⁹⁹ The simple expedient of vesting authorities in a particular office other than the presidency may thus enable political enforcement of legal requirements and conventional understandings that surround particular government functions. Insofar as the position requires Senate confirmation, furthermore, the appointment process may ensure that only people with particular skills or a particular outlook and proven sense of responsibility discharge the authorities of particular offices, such as the Attorney General, Secretary of the Treasury, or Environmental Protection Agency Administrator.

2. *The Theory Extended to Military Duties.*—Could this same constraint on presidents extend to military functions? For the most part, yes. Contrary to scholarship and executive branch assertions suggesting otherwise, there is no compelling textual, structural, or historical reason to distinguish military

95. See Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469–71 (1855) ("[N]o Head of Department can lawfully perform an *official* act against the will of the President . . ."). But see The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823) ("[I]t could never have been the intention of the constitution . . . that he should in person execute the laws himself.").

96. See, e.g., Strauss, *supra* note 1, at 705–15 (collecting precedents and examples).

97. See, e.g., *id.* at 710–11 (discussing precedent supporting this view).

98. Zachary Price, *The Fire Alarm Function of Office-Holding*, TAKE CARE BLOG (June 19, 2017), <https://takecareblog.com/blog/the-fire-alarm-function-of-office-holding> [<https://perma.cc/45QJ-9QN3>].

99. See, e.g., MCCONNELL, *supra* note 47, at 349 (arguing that firing certain officials may carry a high political cost); Stack, *supra* note 85, at 295–96 ("President Nixon's efforts to remove Archibald Cox as special prosecutor made apparent the political costs of firing an officer that refuses to heed the President's policies.").

offices from other positions when it comes to statutory assignment of duties and functions. Indeed, if anything, the case for such congressional authority with respect to the military is stronger. Congress, if it chose, could vest control over nuclear weapons, or offensive cyber capabilities, or a particular component of the Army, Navy, or Air Force in a particular officer who could then be subject to removal, and perhaps other forms of command discipline,¹⁰⁰ for disobeying presidential directives but who would ultimately be personally responsible for discharging the function in question.

Why? To begin with, the language governing office-holding in the Appointments Clause and Necessary and Proper Clause makes no distinction between military and nonmilitary offices. Both types of positions must be “established by Law” under the Appointments Clause,¹⁰¹ and in both cases, Congress holds authority to enact “all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.”¹⁰² To the extent these provisions give Congress authority to define civil officers’ functions and the organizational hierarchy within which they operate, Congress holds precisely the same authority with respect to the military.

In fact, even if one doubted Congress’s power to allocate statutory authorities with respect to civil and administrative officers, as the Supreme Court appeared to in *Seila*,¹⁰³ Congress’s specific constitutional powers with respect to the military provide a still stronger warrant for inferring such congressional power in that context. Congress, again, holds specific constitutional authority to “raise and support Armies,” “provide and maintain a Navy,” and “make Rules for the Government and Regulation of the land and naval Forces.”¹⁰⁴ Assigning duties and responsibilities within the military chain of command may be a potent means of governing and regulating the military; indeed, as we shall see, it is one that Congress has routinely employed as a means of shaping and controlling the nation’s armed forces.

As a matter of plain text, furthermore, a provision assigning some responsibility or command to a particular office can readily be described as a “Rule[]” regarding the military’s “Government,” if not also its “Regulation,” even if this constitutional language might more immediately call to mind legislation prescribing a military code of conduct and procedures for military justice. For that matter, such a provision might also be characterized as a valid condition that Congress has imposed on the army or

100. *See infra* Part III.

101. U.S. CONST. art. II, § 2, cl. 2.

102. U.S. CONST. art. I, § 8.

103. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207 (2020).

104. U.S. CONST. art. I, § 8, cl. 12–14.

navy it has raised or provided. At any rate, in cases implicating these provisions, the Supreme Court has emphasized the breadth of Congress's authority. "It is clear," the Court has ruled, "that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment"¹⁰⁵ Indeed, in a recent case, the Court upheld a statutory bar on military officers exercising certain civil governmental functions.¹⁰⁶ Far from indicating any constitutional difficulty, the Court characterized this provision as validly "designed to ensure civilian preeminence in government."¹⁰⁷

On the other hand, the Commander-in-Chief Clause's language might suggest a stronger directive power with respect to the military than the Take Care Clause provides for the civil service. The Take Care Clause, after all, obligates the President only to "take Care" that the laws are executed faithfully, whereas being Commander in Chief implies some power to issue affirmative commands. This distinction, however, relates to removal and other means of discipline—the question I address in Part III—and perhaps also to the strength of any presumption that officers are duty-bound to follow presidential directives in exercising statutory authorities. It does not affect Congress's power to assign duties in the first place. As to that question, the Take Care and Commander-in-Chief Clauses are parallel: both suggest that primary government power will at least sometimes be exercised by others. In other words, much as the obligation to ensure faithful execution implies that someone else may do the executing, serving as commander in chief implies having some military force to command.

The framers at the Philadelphia Convention in fact debated whether the President should even be allowed to exercise direct command over troops in the field.¹⁰⁸ Although President Washington did so during the Whiskey Rebellion,¹⁰⁹ the norm across American history has been to command troops

105. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983); *see, e.g., Loving v. United States*, 517 U.S. 748, 768 (1996) ("[W]e give Congress the highest deference in ordering military affairs."); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (holding that "[t]he Framers expressly entrusted . . . to Congress" the task of balancing the rights of servicemembers against the "overriding demands of discipline and duty"); *Dynes v. Hoover*, 61 U.S. 65, 78–79 (1857) (deriving Congress's "power to provide for the trial and punishment of military and naval offenses" from its constitutional authorities over the military).

106. *Ortiz v. United States*, 138 S. Ct. 2165, 2181–82 (2018) (addressing 10 U.S.C. § 973(b)(2)(A)).

107. *Id.* at 2172. For discussion of this statutory "civil office ban," *see generally* Stephen I. Vladeck, *Military Officers and the Civil Office Ban*, 93 IND. L. J. 241 (2018).

108. *See* Barron & Lederman, *supra* note 1, at 787 ("[T]here were some delegates who wished to restrict the President from commanding the army and navy in person, as the New Jersey Plan had prescribed, but that proposal failed.").

109. PRAKASH, *supra* note 54, at 160. Presidents Madison and Lincoln apparently considered leading armies in the field but decided against it. BARRON, *supra* note 13, at 93, 151.

only indirectly, through orders to subordinate commanders in the field—a practice that reinforces the institutional separation between presidential command and actual military activity that the text itself implies.¹¹⁰ *The Federalist Papers*, likewise, emphasized only that the President would be the military's overall commander. Stressing that the President would be “in substance much inferior to” the British King with respect to military powers, the *Federalist* No. 69 observed that the American President's Commander-in-Chief power “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.”¹¹¹

Apart from the Commander-in-Chief Clause, another possible basis for inferring plenary presidential authority over military duties is the Vesting Clause. A favorite empty vessel for proponents of broad presidential authority, this clause grants “[t]he executive Power” to the President.¹¹² But even if the clause carries substantive import, as opposed to serving as a mere placeholder for more specific grants of power in Article II, there is no reason to think it confers preclusive authority to personally exercise military powers vested specifically in other offices. For one thing, some recent scholarship suggests the framers would have understood the term “executive power” to refer exclusively to an authority to execute the law, a meaning with no relevance to military command.¹¹³ If correct, this view would suggest that unitarian arguments for personal presidential authority over civil or administrative authorities need not carry over to the military; only civil administration involves “executive power” in the plain sense of executing federal law.

But even if this interpretation of the Vesting Clause is wrong and the term “executive power” carries broader meaning, as indeed some early authority regarding foreign affairs suggests,¹¹⁴ the Commander-in-Chief

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

111. THE FEDERALIST NO. 69, at 347, 349 (Alexander Hamilton) (Ian Shapiro ed., 2009); see also John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 614–16 (2011) (emphasizing the breadth of Congress's regulatory authority over the military as reflected in early practice and the original understanding).

112. U.S. CONST. art. II, § 1.

113. Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173–74 (2019).

114. See *Pacificus* No. 1 (June 29, 1792) (Alexander Hamilton) (suggesting that the President had the power to issue the Proclamation of Neutrality); Thomas Jefferson, *Opinion of Thomas Jefferson* (Apr. 24, 1790), in 5 THE PAPERS OF GEORGE WASHINGTON 343 (Dorothy Twohig et al. eds., 1996) (referencing the Vesting Clause and observing that “[t]he transaction of business with foreign nations is Executive altogether”).

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

3. *Contemporary Statutes.*—Further support for congressional authority over allocation of military duties may be found in current statutes. Executive branch bluster notwithstanding, the military establishment's actual governing architecture is replete with provisions assigning particular functions to particular offices. To give just a few examples, the Chairman of the Joint Chiefs of Staff is the "principal military adviser" to the President and certain cabinet secretaries, but is barred by law from "exercis[ing] military command over the Joint Chiefs of Staff or any of the armed forces";¹¹⁵ the Army's Judge Advocate General is "the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army" and "shall direct the members of the Judge Advocate General's Corps in the performance of their duties";¹¹⁶ the commander of the unified special operations command is responsible for various functions involving special operations forces;¹¹⁷ the commanders of other unified combatant commands hold authority over certain forces and missions assigned to them by the President;¹¹⁸ the Undersecretary of Defense for Intelligence holds responsibility, subject to the Secretary of Defense's direction, for certain intelligence functions and operations;¹¹⁹ and the brand new Chief of Space Operations prepares certain plans and supervises certain forces, subject to the Air Force Secretary's direction.¹²⁰

The Commander-in-Chief Clause might well support presuming that these officers, perhaps unlike their counterparts in civil administration, are duty-bound to follow presidential directives in carrying out their duties, or else accept removal or other discipline for failing to do so. But even so, these statutes carry no implication that the president holds plenary constitutional authority to personally discharge the functions in question or reallocate military responsibilities at will. On the contrary, all these statutes presume

115. 10 U.S.C. § 151(b)(1), 152(c) (2018).

116. 10 U.S.C. § 7037(c)(1)–(2) (2018).

117. 10 U.S.C. § 167 (2018).

118. 10 U.S.C. § 164 (2018).

119. 10 U.S.C. § 137 (2018).

120. 10 U.S.C. § 9082(c) (2018).

that when the Senate confirms individuals for particular offices, those individuals (or validly appointed substitutes) will perform those responsibilities and not others.

In the statutes themselves, to be sure, Congress has often provided a degree of flexibility. In general, for example, the Secretary of Defense holds broad authority to assign duties and responsibilities within the department (as do commanders and service secretaries within their commands and services).¹²¹ But these statutes also impose limits. For example, except when the President considers it “necessary because of hostilities or an imminent threat of hostilities,” the Secretary of Defense may not “substantially transfer[], reassign[], consolidate[], or abolish[]” any “function, power, or duty vested in the Department of Defense, or an officer, official, or agency thereof, by law”—and even when the President orders a more significant reassignment or consolidation, the change lasts only until the emergency justifying it has passed.¹²² This statute would make no sense if Congress lacked power to prescribe duties and functions with respect to the military; the statute’s implicit constitutional theory is that Congress may calibrate by law the degree of flexibility in reallocating assigned military duties and authorities. Indeed, even statutes granting flexibility to the President, Secretary of Defense, and other senior officials negatively imply that Congress could withhold such flexibility if it wished.

Governing statutes also often specify that functions should be performed subject to direction from the President, the Defense Secretary, or some other senior officer, a pattern that might suggest congressional support for broad presidential prerogatives of command.¹²³ As Kevin Stack has argued with respect to administrative statutes, however, the “longstanding and active congressional practice of granting authority to officials expressly subject to the control of the President” may suggest, by negative inference, that duties vested without such qualifications belong to the particular officer alone, even if that officer is subject to removal for disobedience.¹²⁴ Even if the same negative inference does not apply with equal force in the military context given the Commander-in-Chief Clause, it at least undercuts any suggestion

121. *See, e.g.*, 10 U.S.C. § 113(d) (2018) (“Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.”).

122. 10 U.S.C. § 125 (2018).

123. *See, e.g.*, 10 U.S.C. § 125(b) (2018) (“[I]f the President determines it to be necessary because of hostilities or an imminent threat of hostilities, any function, power, or duty vested by law in the Department of Defense, or an officer, official, or agency thereof, including one assigned to the Army, Navy, Air Force, or Marine Corps by section 7062(b), 8062, 8063, or 9062(c) of this title, may be transferred, reassigned, or consolidated.”); *id.* § 162(b) (specifying the chain of command for combatant commands “[u]nless otherwise directed by the President”).

124. Stack, *supra* note 85, at 268, 284.

that Congress's specification of directive power in some statutes reflects an assumption that presidents necessarily hold authority to exercise all military powers vested in other offices.¹²⁵

As a matter of fact, in at least a few places, Congress has gone so far as to specifically preclude command discipline, thus effectively insulating officers performing certain specified functions from any directive control. Officers serving on courts-martial, for example, are specifically protected from command influence or retaliation,¹²⁶ and the Judge Advocates General are protected from any interference with their authority to provide independent legal advice.¹²⁷ Likewise, judges on the Court of Appeals for the Armed Forces, a non-Article III court that reviews court-martial rulings, are removable only for cause during their fifteen-year terms.¹²⁸ In a recent statute, Congress even restricted considerably the convening officer's authority to alter or override a court-martial's conviction and sentence.¹²⁹ These changes effectively vest exclusive authority over certain military-justice functions in the particular officers serving as jurors or judges on a given court-martial.

These examples may well reflect a particular concern, rooted in due process, to afford a neutral decision-maker in military tribunals.¹³⁰ But Congress has also guaranteed independence with respect to at least one function with concrete effects on military performance: service on the promotion boards that effectively determine who occupies the military's higher ranks.¹³¹ In addition, as noted, one provision addressed in a recent Supreme Court decision specifically precludes many military officers from "hold[ing], or exercis[ing] the functions of, [certain] civil office[s] in the Government of the United States."¹³² At the level of senior civilian leadership, furthermore, Rebecca Ingber has recently highlighted that Congress quite frequently rejigs procedures, command relationships, and

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

126. 10 U.S.C. § 837 (2018).

127. 10 U.S.C. § 7037 (2018).

128. 10 U.S.C. § 942 (2018).

129. Military Justice Act of 2016, Pub. L. No. 114-328, § 5322, 130 Stat. 2894, 2925 (2016); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 133-66, § 1702(b), 127 Stat. 672, 956-57 (2013). *See generally* 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE & PROCEDURE § 17-9 (10th ed. 2018) (discussing the effect of the Military Justice Act of 2016 and the National Defense Authorization Act for Fiscal Year 2014 on the ability of the convening authority to set aside findings and sentences).

130. The Court in *Free Enterprise Fund* suggested that removal limitations may be particularly appropriate for officers with adjudicative functions. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010).

131. 10 U.S.C. § 616(f) (2018).

132. 10 U.S.C. § 973(b) (2018); *Ortiz v. United States*, 138 S. Ct. 2165, 2172 (2018).

even allocation of duties within the country's national security apparatus as a backdoor means of shaping policy outcomes.¹³³ Again, one recent provision goes so far as to vest authority over certain cyber operations jointly in the President and Secretary of Defense, rather than the President alone;¹³⁴ another requires certain certifications from the Secretary of Defense before the President may withdraw forces from South Korea.¹³⁵ Such provisions would be meaningless if presidents could simply assume and redelegate duties within the military command structure as they saw fit.

B. *Historical Debates*

History adds still more support for congressional authority to vest military duties in particular offices. Without attempting any comprehensive account, briefly considering several salient episodes across time highlights both the extent of debate over these questions and the ultimate weakness of the executive branch's current stated view. To the extent historical practice illuminates constitutional meaning, as the Supreme Court has repeatedly assumed it does,¹³⁶ this history reinforces textual, functional, and originalist arguments for congressional authority to assign military duties to particular offices.

1. *Early Statutes and Practice.*—To begin with, some of the earliest military-organization statutes specified that senior officials held particular authorities but exercised them subject to presidential direction. A 1798 statute, for example, established the office of Secretary of the Navy and specified that the Secretary's "duty . . . shall be to execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States."¹³⁷ The same statute, moreover, specifically transferred these authorities from the previously created office of Secretary of War to the newly created position of Secretary of the Navy, making clear that the Secretary of War could no

133. See generally Ingber, *supra* note 19, at 399 (discussing Congress's frequent "restructur[ing] [of] the decision-making process *inside* the executive branch in order to preference decision makers and processes more likely to favor their preferred outcomes").

134. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1642, 132 Stat. 2132, 2132 (2018) (codified at 10 U.S.C. § 394 note).

135. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1254, 133 Stat. 1198, 1671–72 (2019).

136. *E.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

137. Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553.

longer exercise them.¹³⁸ This statute's sharp division between Army and Navy commands would persist, with only limited interruptions—and important institutional consequences¹³⁹—until 1947.¹⁴⁰ Other early statutes referred, albeit obliquely, to top military officers in the Army and Navy serving as “commander in chief” with respect to particular operations.¹⁴¹

Provisions for presidential control in these and other statutes might be understood to endorse a broad view of presidential control over military functions. As with modern statutes, however, the very specification of presidential directive power in these provisions more naturally implies congressional authority to withhold or modify, or at least regulate, such power if Congress so desired.¹⁴² Indeed, Congress's specification of such authority in the 1798 statute seems especially telling, given that Congress extensively debated presidential removal authority less than a decade earlier—and ultimately used indirect language to indicate that the President held removal authority by virtue of Article II rather than congressional grace.¹⁴³

Early statutes also vested particular duties in particular subordinate offices; an 1813 law, for example, assigned certain duties relating to military supplies to a “superintendent general of military supplies,” appointed by the President with Senate approval, who would act “under the direction of the Secretary for the War department.”¹⁴⁴ At the very least, such duty assignments and the repeated clarifications and revisions in early statutes—transferring powers from the Secretary of War to the Navy Secretary,¹⁴⁵ for example, and specifying ranks and authorities within both the Army and Navy¹⁴⁶—provide strong historical support for Congress's authority to define the authorities and relationships of offices within the military under the

138. *Id.* § 5, 1 Stat. at 554 (repealing “so much of” a prior statute creating the department of war “as vests any of the powers contemplated by the provisions of this act, in the Secretary for the department of War”).

139. JAMES R. LOCHER III, VICTORY ON THE POTOMAC: THE GOLDWATER–NICHOLS ACT UNIFIES THE PENTAGON 16–19 (2004).

140. *See infra* section II(B)(7).

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

142. *See* Stack, *supra* note 85, at 268, 284 (arguing that statutes expressly conferring presidential directive authority “support the negative inference that when Congress simply delegates to an agency, without conditioning the delegation on the President’s approval, the statute denies the President directive authority”).

143. *See infra* subsection III(A)(1)(a).

144. Act of Mar. 3, 1813, ch. 47, §§ 2, 3, 5, 2 Stat. 816, 816, 817 (codified at 1 Rev. Stat. § 219 (2d ed. 1875)).

145. Act of Apr. 30, 1789, ch. 35, 1 Stat. 553.

146. *E.g.*, Act of Apr. 30, 1790, ch. 10, 1 Stat. 119 (repealed 1795).

Appointments and Necessary and Proper Clauses, just as it does for nonmilitary administration.¹⁴⁷

For its part, the Executive Branch early on seems also to have accepted Congress's authority to structure the military by defining officers' duties. An 1815 report to Congress from Secretary of War James Monroe appeared to consider it beyond doubt that "a provision for . . . actual command is an object of legislative regulation," whereas "the selection of the person to whom [the command is] committed" is a matter of "executive discretion."¹⁴⁸ In 1820, an Attorney General opinion by William Wirt observed that the President, as Commander in Chief, "may suspend, modify, or rescind, at pleasure, any order issued by the lieutenant-colonel of the marine corps, or any other subordinate officer."¹⁴⁹ Yet he went on to recognize an exception to this rule "where a direct authority has been given by Congress to an officer to perform any particular function—for example, for a commanding officer to order courts-martial in certain cases."¹⁵⁰ This opinion further concluded that because the Marine Corps was a component of the Navy, the Navy Secretary could issue orders to it, unless in a particular operation the President chose to relay his own orders to Marine officers through the War Department.¹⁵¹

In 1822, another Attorney General opinion observed that the President could determine "what should constitute a brigade, or what should be a command according to brevet rank," but only "[i]n the silence of the law."¹⁵² A third opinion in 1829 likewise observed that the President could "designate posts or stations among which the army should be distributed," but "if Congress thought proper to assume the power, and expressly to specify a certain number of military stations for the peace establishment, inhibiting their increase or diminution, . . . the authority of the President would be superseded."¹⁵³

An episode two decades later suggests that these constraints remained real and powerful throughout the antebellum period. Though disgruntled with his top general, Winfield Scott, during the Mexican–American War, President James K. Polk apparently considered himself powerless to displace

147. See PRAKASH, *supra* note 54, at 162, 166 (explaining that "Americans [in the early Republic] were quite familiar with the idea that there could be multiple commanders in chief in a single branch of the military," each of which "enjoyed circumscribed military authority").

148. JAMES MONROE, *RELATIVE POWERS OF THE GENERAL AND STATE GOVERNMENTS OVER THE MILITIA*, S. REP. NO. 13-142 (1815), *reprinted in* 1 *AMERICAN STATE PAPERS: MILITARY AFFAIRS* 604, 605–07 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

149. Power of the Secretary of the Navy Over the Marine Corps, 1 Op. Att'y Gen. 380, 381 (1820).

150. *Id.*

151. *Id.* at 382.

152. Brevet Pay of General Macomb, 1 Op. Att'y Gen. 547, 548 (1822).

153. Brevets' Pay and Rations, 2 Op. Att'y Gen. 223, 232 (1829).

Scott without authority from Congress to appoint a different general in a superior grade.¹⁵⁴ Scott, Polk complained in his diary in 1847, “acted with so little discretion since he assumed the command” that certain confidential plans were revealed; “[h]is vanity [was] such that he could not keep the most important secrets of the Government which were given to him”; and he was “wasting himself in most extravagant preparations, and . . . making such a parade before the public in all he does that there is danger that the objects of the campaign may be entirely defeated.”¹⁵⁵

Polk accordingly asked Congress to authorize appointment of a Lieutenant General with overall command of army forces. “An efficient organization of the army,” Polk argued in a message to Congress, “would require the appointment of a general officer to take command of all our military forces in the field.”¹⁵⁶ Yet Congress, following heated debates, rejected the proposal.¹⁵⁷ Polk then felt his hands were tied. “I have asked

154. See CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 126 (1921) (discussing this episode as evidence that “no officer can be appointed by the President until Congress has created the grade and made provision for it”).

155. Diary Entry of James K. Polk (Feb. 27, 1847), in 2 *THE DIARY OF JAMES K. POLK* 393–94 (Milo Milton Quaife ed., 1910).

156. CONG. GLOBE, 29th Cong., 2d Sess. 105 (Jan. 4, 1847) (message to Congress from President Polk).

157. 1 *THE ENCYCLOPEDIA OF THE MEXICAN-AMERICAN WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY* 638–39 (Dr. Spencer C. Tucker ed., 2013). In congressional debates, Representatives and Senators took slightly different views regarding the extent of Polk’s existing authority to determine command precedence. One proponent of the Lieutenant General proposal argued that the President was bound to give seniority to the existing Major General with the earliest date of commission (apparently Scott)—an outcome this Senator considered “exceedingly undesirable” given the “numerous forces as are now to be combined, and in such extensive operations as are to be carried on.” CONG. GLOBE, 29th Cong., 2d Sess. 175 (1847) (statement of Sen. Dix) (“At least four of these generals [in the field] have the same rank, that of major general, the highest rank in the service; and precedence among them in their respective arms is, therefore, to be determined by their date of commission.”); see also CONG. GLOBE, 29th Cong., 2d Sess. 155 (1847) (statement of Rep. Jacob Thompson) (“The very composition of the army seems to me to suggest the propriety of the appointment of a leader to direct the movements of the different divisions and brigades . . .”). An opponent (who supported an alternative proposal) suggested Polk could give a different general precedence only by withdrawing others from the campaign. CONG. GLOBE, 29th Cong., 2d Sess. 522 (1847) (statement of Rep. Garrett Davis) (“He may designate any one of these major generals, by brevet or otherwise, to act as commander-in-chief of our army in the field in Mexico. But, in order to do so, he must withdraw from the service those who now outrank him.”); see also CONG. GLOBE, 29th Cong., 2d Sess. 184 (1847) (statement of Sen. Badger) (“The President of the United States may assign to the present major general commanding our army the whole control, under him, of all the operations of this war . . . [or] may confine the present senior major general of the army to a particular district, to a narrow command, or to a small body of troops . . .”). By contrast, one Representative suggested that an existing statute gave the President flexibility to designate commanders for particular campaigns from among the existing officer corps, though he conceded that he did “not know that [such a designation] ha[d] ever been done” and that “it is considered by some that there is ambiguity upon this subject, and the practice of the country has been otherwise.” CONG. GLOBE, 29th Cong., 2d Sess. 525 (1847) (statement of Rep. Sims). The

Congress for authority to select a commander in whom I have confidence,” Polk wrote in his diary, “and some weeks ago they refused it.”¹⁵⁸ Polk thus complained to posterity: “My situation is most embarrassing. I am held responsible for the War, and yet I am required to entrust the chief command of the army to a Gen'l in whom I have no confidence.”¹⁵⁹

2. *Captain Meigs and the Washington Aqueduct*.—Perhaps because this early practice appears unsupportive, the urtext for plenary presidential authority over military duties is instead an 1860 Attorney General opinion regarding Captain M.C. Meigs and his work on the Washington, D.C., aqueduct.¹⁶⁰

A self-confident and ambitious officer who went on to serve as Union army quartermaster during the Civil War, Meigs had been overseeing the aqueduct project since 1853.¹⁶¹ He came into conflict, however, with President Buchanan's Secretary of War over the latter's political favoritism in awarding contracts.¹⁶² To forestall termination of the aqueduct project, Meigs personally (and insubordinately) lobbied congressional allies for funding. Congress obliged by including provisions in an appropriations statute that not only provided \$500,000 for the aqueduct but also required that it be completed according to Meigs's plans and under his supervision.¹⁶³ Indeed, although an initial version of this legislation would have accomplished its goal obliquely by requiring that “the Chief Engineer of the Washington Aqueduct . . . shall be as heretofore an officer of the corps of Engineers not below the rank of Captain and having experience in the design and construction of Bridges & aqueducts,”¹⁶⁴ the final version brazenly referred to Meigs by name. It required that the appropriated funds were “to

debate did not suggest, however, that the President could simply designate a preferred commander without regard to rank or existing statutory restraints. *See, e.g.*, CONG. GLOBE, 29th Cong., 2d Sess. 526 (1847) (statement of Rep. Schenk) (responding to Rep. Sims's argument by stating, “Had [Congress] no right to say whether the army should be placed under such an officer as was now proposed, or should be left as it was! He thought they had, and he desired the army to remain as it was”).

158. Diary Entry of James K. Polk, *supra* note 155, at 394.

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

160. Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468–69 (1860).

161. HARRY C. WAYS, *THE WASHINGTON AQUEDUCT* 10 (1996).

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

163. WAYS, *supra* note 161, at 37; WEIGLEY, *supra* note 162, at 103.

164. WEIGLEY, *supra* note 162, at 103.

be expended according to the plans and estimates of Captain Meigs, and under his supervision.”¹⁶⁵

In a statement to Congress, President Buchanan objected to this provision. Buchanan explained that he would consider it precatory because he “deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and order its officers to any duty he might deem most expedient for the public interest.”¹⁶⁶ His Attorney General issued an opinion to similar effect. “As commander-in-chief of the army,” Attorney General J.S. Black opined, “it is your right to decide according to your own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have power of appointment.”¹⁶⁷ In accordance with its view of the proviso, the administration initially appointed a different officer to serve as chief engineer, retaining Meigs only as the aqueduct’s disbursing officer and charging him with “keep[ing] such general supervision of the works as to assure himself that they are being constructed according [his] plans and estimates.”¹⁶⁸ After Meigs disobeyed orders to approve certain payments, however, the Secretary of War ordered Meigs to leave Washington and assume command of a fort in Florida.¹⁶⁹ Meigs nevertheless had the last laugh. Within four and a half months, following replacement of the Secretary of War and Attorney General, Meigs was ordered back to Washington to resume control of the project.¹⁷⁰

This rather odd episode from an undistinguished administration has taken on an improbable precedential importance in later executive-branch imaginings. The Trump Administration, for example, recently cited the Meigs signing statement and Attorney General opinion in a letter asserting that Congress lacks authority to prevent reduction in personnel levels for certain ships.¹⁷¹ The Clinton Administration similarly relied heavily on the Meigs precedent to conclude that Congress could not forbid placing U.S. forces under U.N. command.¹⁷²

165. WAYS, *supra* note 161, at 37.

166. James Buchanan, Statement to the House (June 26, 1860), in 7 COMPILATION OF MESSAGES & PAPERS OF THE PRESIDENTS 3128–29 (James D. Richardson, ed., 1897).

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

168. *Id.* at 464.

169. WAYS, *supra* note 161, at 39; WEIGLEY, *supra* note 162, at 105, 107–09.

170. WAYS, *supra* note 161, at 40–41.

171. 2018 NDAA Views Letter, *supra* note 4, at 4 (expressing views on the National Defense Authorization Act for Fiscal Year 2018, H.R. 2810).

172. Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 185, 187 & n.7 (1996); *see also* Nevitt, *supra* note 83, at 459–60 (citing the Meigs signing statement to indicate that Congress has “largely been unsuccessful” in using “its appropriations power to thwart the President’s command and organization authority”).

On examination, however, even granting it precedential force, the Meigs example is ambiguous and provides only weak support for any notion of plenary presidential authority over assignment of military duties. For one thing, notwithstanding broad language about presidential authority over duties in the statement and opinion, the proviso's constitutional deficiency could be understood much more narrowly. By vesting particular responsibilities in a particular individual, rather than a particular office, Congress infringed upon the President's appointment and removal powers, effectively requiring him, contrary to the principles discussed earlier, to place a particular individual in a particular office.¹⁷³ Furthermore, neither President Buchanan's signing statement nor the Attorney General opinion ultimately resolved the constitutional question. Both read the statute (admittedly counter-textually) as merely stating Congress's "preference." For both these reasons, the executive's resistance to the provision need not signify that presidents can reallocate military responsibilities as they see fit, without regard to the office-holding structure Congress has enacted.¹⁷⁴

In actual fact, notwithstanding Meigs's temporary reassignment, the administration at least partially complied with the statute's text. Before leaving Washington, Meigs deposited all remaining aqueduct funds in the U.S. Treasury and advised the Treasury Secretary that any disbursements without his approval would violate the governing appropriation.¹⁷⁵ The Army nevertheless paid out substantial sums (some \$150,000 out of the \$500,000 appropriation) during Meigs's absence, but upon his return Meigs made good on his view of the law by declining to approve payment of \$5,600 in remaining open claims for work done in his absence.¹⁷⁶

173. See *supra* subpart I(C); see also Barron & Lederman, *supra* note 83, at 987 n.164 (noting this deficiency in the statute). Congress does appear to have successfully assigned military duties to particular individuals on at least two other occasions. WAYS, *supra* note 161, at 37–38.

174. Professors Barron and Lederman have further called it "unlikely Black even intended to imply that Congress could not assign particular military functions to particular *offices*," Barron & Lederman, *supra* note 83, at 986 n.164, because in a later opinion regarding the execution of federal laws, Black opined that "[i]f . . . an act of Congress declares that a certain thing shall be done by a particular officer, it cannot be done by a different officer." *Power of the President in Executing the Laws*, 9 Op. Att'y Gen. 516, 519 (1860). As noted, however, Black's opinion on Meigs does state that the Commander in Chief has the "right to decide according to [his or her] own judgment what officer shall perform any particular duty. . . ." *Captain Meigs*, 9 Op. Att'y Gen. at 468. In addition, in a subsequent opinion regarding the aqueduct, Attorney General Black observed that Meigs "is not authorized to withhold payment which the Secretary of War or the engineer-in-chief has ordered him to make, though he himself may differ from his superior officers about the justice of the debt" and that "[h]e cannot make distinctions between orders of that kind, and choose which he shall obey and which he shall dishonor." *Washington Aqueduct*, 9 Op. Att'y Gen. 493, 494 (1860).

175. WEIGLEY, *supra* note 162, at 108–09.

176. CALABRESI & YOO, *supra* note 49, at 158–59; WAYS, *supra* note 161, at 41; Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 949–51 (1994).

A foundational precedent for plenary presidential authority over military duties thus offers no compelling reason to disregard earlier, more cogent examples that support Congress's authority to assign particular military duties and authorities to particular offices.

3. *The Civil War*.—During the Civil War, President Lincoln claimed authority to allocate particular command responsibilities to individual officers within the military hierarchy.¹⁷⁷ Indeed, along with promotions and firings, assigning and reassigning particular commands was one of Lincoln's main means of controlling the progress of military campaigns.¹⁷⁸ Lincoln, however, appears to have exercised this authority within prescribed statutory structures, not in defiance of them. While applicable statutes often granted the President authority to organize military units,¹⁷⁹ they dictated the military's overall structure, prescribing, for example, the precise numbers of officers in particular ranks and the general composition of particular units.¹⁸⁰

At least some of these statutes, moreover, conferred particular duties on particular offices,¹⁸¹ and on at least one occasion, Lincoln declined a general's request for command authority over certain bureaus because

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

178. *Id.* at 109, 111.

179. *See, e.g.*, Act of July 17, 1862, ch. 201, § 9, 12 Stat. 597, 598 (1862) (granting president discretion to organize army corps); Act of July 22, 1861, ch. 9, § 2, 12 Stat. 268, 269 (1861) (authorizing president to form volunteers into army regiments).

180. *See, e.g.*, Act of July 4, 1864, ch. 253, 13 Stat. 394 (1864) (reorganizing army quartermaster-general's office); Act of Mar. 3, 1863, ch. 82, 12 Stat. 758 (1863) (authorizing conferral of brevet ranks); Act of Mar. 2, 1863, ch. 78, 12 Stat. 699 (1863) (authorizing additional general officer appointments); Act of Mar. 2, 1863, ch. 68, 12 Stat. 743 (1863) (reorganizing the army corps of engineers and ordinance department); Act of July 17, 1862, ch. 201, § 10, 12 Stat. 597, 599 (1862) (prescribing organization of certain army corps); Act of July 16, 1862, ch. 183, 12 Stat. 583 (1862) (specifying naval officer grades, the number of positions in each grade, and the class of ship subject to command by each grade of officer); Act of July 5, 1862, ch. 134, 12 Stat. 510 (1862) (dividing the Navy Department into nine bureaus to be led by "chiefs" with four-year terms); Act of Aug. 3, 1861, ch. 42, §§ 2–3, 12 Stat. 287 (1861) (prescribing composition of adjutant-general's office and army corps of engineers); Act of July 29, 1861, ch. 24, 12 Stat. 279 (1861) (specifying number and composition of regular army regiments); Act of July 25, 1861, ch. 19, 12 Stat. 275 (1861) (specifying number of officers in each grade for the Marine Corps); Act of July 22, 1861, ch. 9, §§ 2–4, 12 Stat. 268 (1861) (specifying organization and number of officers for regiments and authorizing certain general officer appointments); *see also* Act of July 28, 1866, ch. 299, 14 Stat. 332 (1866) (same for peacetime army); Act of July 25, 1866, ch. 231, 14 Stat. 222 (1866) (specifying organization and number of officers in each grade for peacetime navy).

181. *See, e.g.*, Act of Mar. 3, 1863, ch. 75, §§ 5, 7, 12 Stat. 731, 732 (1863) (requiring of appointment of provost-marshals and obligating them to arrest deserters); Act of July 16, 1862, ch. 183, § 3, 12 Stat. 583 (1862) (specifying the relative rank of naval officers and the grade of naval officer required, "as near as may be," to command each class of ship).

of statutory constraints.¹⁸² One Civil War-era statute specified that transportation of troops, munitions, and other military property was to occur “under the immediate control and supervision of the Secretary of War and such agents as he may appoint.”¹⁸³ Others specifically granted authority to detail three naval officers to the War Department for inspecting transport vessels,¹⁸⁴ “assign the command of the forces in [a particular] field or department” between officers of the same grade “without regard to seniority of rank,”¹⁸⁵ and transfer certain gunboats from the War Department to the Navy,¹⁸⁶ thus implying in each case that the President lacked such powers without statutory authorization. Likewise, late in the war, Lincoln specifically obtained statutory authority to appoint a Lieutenant General who could “be authorized, under the direction, and during the pleasure of the President, to command the armies of the United States.”¹⁸⁷ This law again implied that, as President Polk recognized during the Mexican–American War,¹⁸⁸ the President otherwise lacked such power to grant one general precedence over all others in the field.¹⁸⁹

4. *Reconstruction.*—After Lincoln’s death, amid its intense conflict with President Andrew Johnson over Reconstruction policy, Congress asserted its powers still more aggressively. In particular, it passed several laws that assigned particular duties of great importance to particular military officers. In context and in their practical operation, these laws specifically aimed to constrain President Johnson’s policy choices, notwithstanding Johnson’s ultimate authority in most cases to remove and replace the officers in question.

182. See GOSS, *supra* note 177, at 174 (“When Grant sought control over the various bureaus that supplied the army, Lincoln told him that he could not legally change the military organization . . .”).

183. Act of Jan. 31, 1862, ch. 15, § 4, 12 Stat. 334 (1862).

184. Act of Feb. 12, 1862, ch. 21, 12 Stat. 338 (1862).

185. Act of Apr. 4, 1862, No. 25, 12 Stat. 617 (1862).

186. Act of July 16, 1862, ch. 185, 12 Stat. 587 (1862).

187. Act of Feb. 29, 1864, ch. 14, 13 Stat. 11, 12 (1864). Nine days later, President Lincoln appointed Ulysses Grant to this position and “delegated an unprecedented level of authority to his new commanding general.” GOSS, *supra* note 177, at 165; see also RON CHERNOW, GRANT 337–44 (2017) (discussing the appointment).

188. See *supra* notes 154–59 and accompanying text.

189. GOSS, *supra* note 177, at 173 (discussing “the congressional effort to revive the rank of lieutenant general in order to promote Grant over all the generals in the army”). But cf. CHERNOW, *supra* note 187, at 335–36 (indicating that Grant expected to “outrank and supersede” other officers by virtue of the promotion but also noting then-Congressman James Garfield’s view in congressional debates that “Lincoln already had full authority to name a new general in chief”). The Lieutenant General rank had previously been held only by George Washington and (by Brevet) Winfield Scott. *Id.* at 330.

a. Statutory Architecture.—To begin with, in the Military Reconstruction Act of March 2, 1867, which established requirements for readmission of former rebel states, Congress divided those states into five military districts and declared it the “duty of the President to assign to the command of each of [these] districts an officer of the army, not below the rank of brigadier-general.”¹⁹⁰ The Act gave these district commanders “the duty . . . to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals.”¹⁹¹ In addition, “when in his judgment it may be necessary for the trial of offenders,” the Act gave each district commander the “power to organize military commissions or tribunals for that purpose,” and it specified that “all interference under color of State authority with the exercise of military authority under this act, shall be null and void.”¹⁹²

On the same day that Congress enacted this law over President Johnson’s veto, the President reluctantly signed an Army appropriations statute requiring that “all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the army,” who was then Civil War hero and former Lieutenant General Ulysses Grant.¹⁹³ This statute further provided that the General of the Army’s headquarters were to remain in Washington, D.C. and that he “shall not be removed, suspended or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate.”¹⁹⁴ Any orders issued contrary to this statute’s requirements were deemed “null and void”; any officer issuing instructions contrary to those requirements was “deemed guilty of a misdemeanor in office”; and any army officer who knowingly “transmit[ted], convey[ed], or obey[ed]” an order issued in violation of the statute was to be liable for imprisonment for between two and twenty years.¹⁹⁵

In debates over this law, opponents deemed it an unconstitutional interference with the President’s command authority. One representative complained that, in the event of an invasion or insurrection in which the General of the Army was “averse to any action being taken,”

[t]he President, who is made Commander-in-Chief of the Army and Navy by the Constitution of the United States, is by this provision

190. Act of Mar. 2, 1867, ch. 153, § 2, 14 Stat. 428, 428 (1867).

191. *Id.* § 3.

192. *Id.*

193. Act of Mar. 2, 1867, ch. 170, § 2, 14 Stat. 485, 486–87 (1867). “[I]n case of inability,” such orders were to be issued through the General of the Army’s “next in rank.” *Id.*

194. *Id.*

195. *Id.*

estopped from sending any other general there to repel the forces which may be attempting to come upon our soil, or to put down any insurrection that might take place within any of the States.¹⁹⁶

Echoing the Buchanan Administration's position with respect to Captain Meigs, another Representative complained, "It has always, so far as my reading has taught me on the subject, been conceded to [the President] that he was entitled, as Commander-in-Chief, to assign to officers whatever duty in his judgment he thought they ought to be called upon and were best qualified to perform."¹⁹⁷ To do otherwise, this Representative complained, "is not a practicable thing," and he "[wa]s inclined to think" it "wholly nugatory, so far as it attempts to restrain the action of the President or the action of the General of the Army."¹⁹⁸ The Representative continued,

I never heard it urged seriously anywhere . . . that the Congress of the United States shall prescribe to what particular duty an officer shall be assigned, and may by legislation tie up the hands of the President in such a way that he cannot assign an officer to the particular kind of duty to which, in his judgment, that officer is adapted.¹⁹⁹

A third Representative called the proposed law

a proposition to restrict the office and control the power of the President of the United States; to tear away from him by a single act of this Congress his powers under the Constitution of the United States, which makes him Commander-in-Chief of the Army and Navy of the United States.²⁰⁰

Despite these constitutional objections, Congress enacted the law, specifically declining to remove the rider.²⁰¹ Its actions thus signaled institutional rejection of arguments that the law violated the President's Commander-in-Chief power. For his part, President Johnson complained in his signing statement that the law "deprives the President of his constitutional functions as Commander in Chief of the Army."²⁰² He issued a proclamation advising military officers of their duty to obey orders from him and others in

196. 37 CONG. GLOBE, 39th Cong., 2d sess., 1353 (statement of Rep. Le Blond).

197. *Id.* at 1354 (statement of Rep. Niblack).

198. *Id.*

199. *Id.*

200. *Id.* at 1355 (statement of Rep. Wright).

201. *Id.* at 1404 (House rejects amendment to delete provision in question); *id.* at 1744, 1752 (final passage in House and Senate).

202. Andrew Johnson, Message to the House (Mar. 2, 1867), in 8 COMPILATION OF MESSAGES & PAPERS OF THE PRESIDENTS 3670 (James D. Richardson ed., 1897).

the chain of command,²⁰³ and he later urged Congress to repeal it.²⁰⁴ Yet in practice Johnson complied with the statute's terms.²⁰⁵

Later in the spring and summer of 1867, Congress passed further Military Reconstruction Acts adding to the district commanders' duties, overriding a presidential veto each time.²⁰⁶ The third of these statutes, enacted on July 19, 1867, specifically confirmed a power to displace putative state officials that district commanders and other occupation officials had already been exercising.²⁰⁷ The district commanders, the Act provided, "shall have power, subject to the disapproval of the General of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of [the first Military Reconstruction Act] shall require it, to suspend or remove" officials claiming governmental power under nonfederal (i.e., state) authority.²⁰⁸ The district commanders could appoint other individuals, or detail army officers, to act in such suspended or removed officials' place.²⁰⁹ The Act further provided that "the General of the army of the United States shall be invested with all the powers of suspension, removal, appointment, and detail" granted by the Act to district commanders,²¹⁰ and it specified that "no district commander . . . shall be bound in his action by any opinion of any civil officer of the United States."²¹¹

b. Practical Operation.—Grant and other generals who favored reconstructing the South made deliberate use of the powers conferred on them by these statutes. Even before Congress enacted specific protections for his position, Grant employed his position atop the army hierarchy to influence on-the-ground policy.²¹² In one instance, as the historian Gregory

203. G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 72 (1898).

204. Andrew Johnson, Fourth Annual Message to the House and Senate (Dec. 9, 1868), in 9 COMP. MESSAGES & PAPERS OF THE PRESIDENTS 3870, 3871–72 (James D. Richardson ed. 1897).

205. CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 91 (1998).

206. Act of Mar. 11, 1868, ch. 25, 15 Stat. 41 (1868); Act of July 19, 1867, ch. 30, § 2, 15 Stat. 14 (1867); Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867).

207. For contemporaneous discussion of district commanders' exercise of this power, see The Reconstruction Acts, 12 Op. Att'y Gen. 182, 187, 193–96 (1867).

208. Act of July 19, 1867, ch. 30, § 2, 15 Stat. 14, 14.

209. *Id.*

210. *Id.* § 3, 15 Stat. at 15.

211. *Id.* § 10, 15 Stat. at 16. The Act also specified that its provisions "shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out." *Id.* § 11, 15 Stat. at 16.

212. Congress did not create the position of General of the Army until July 1866, but Lieutenant General Grant was already the most senior officer. Act of July 25, 1866, ch. 232, 14 Stat. 223; CHERNOW, *supra* note 187, at 573–74.

Downs recounts, Grant “decided unilaterally” that an Attorney General opinion addressing the scope of military jurisdiction following Memphis riots in May 1866 applied only in Tennessee—a decision that effectively allowed commanders elsewhere to continue following earlier orders to try offenders in military commissions.²¹³ In April 1867, following enactment of the first two Military Reconstruction Acts, Grant denied that even he could direct the district commanders in exercising the powers vested in them by statute. As he wrote to one district commander, “My views are that District Commanders are responsible for the faithful execution of the reconstruction Act of Congress, and that, in Civil matters, I cannot give them an order.”²¹⁴

One district commander for Louisiana and Texas, the “short, brave, and often thoroughly unpleasant” Civil War hero Philip Sheridan,²¹⁵ employed his powers particularly aggressively. Having earlier dismissed numerous officials in New Orleans whom he blamed for a notorious 1866 massacre,²¹⁶ Sheridan took steps to remove more officials in spring 1867 following passage of the first Military Reconstruction Acts.²¹⁷ When President Johnson responded to protests from Louisiana Governor J. Madison Wells by overruling those firings, Sheridan doubled down, removing the New Orleans city council and police chief as well as Governor Wells himself.²¹⁸ Grant wrote to Sheridan: “I have no doubt myself that the removal of Governor Wells will do great good in your command if you are sustained, but great harm if you are not sustained. I shall do all I can to sustain you in it.”²¹⁹

For his part, President Johnson procured an Attorney General opinion construing the district commanders’ authority narrowly and specifically denying their power to remove state and local civilian officials.²²⁰ But “Grant told his commanders to treat the memorandum as an advisory opinion, not an order, and suggested they ignore it.”²²¹ A month later, in July 1867, Congress passed the Third Military Reconstruction Act, which confirmed not only the district commanders’ authority to remove local officials, but also, as noted,

213. GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* 148 (2015).

214. Letter to Bvt. Major Gen. John Pope (Apr. 21, 1867), in 17 *THE PAPERS OF ULYSSES S. GRANT* 117, 117 (John Y. Simon ed., 1991).

215. RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865-1896* 112 (2017).

216. DOWNS, *supra* note 213, at 182.

217. *Id.* at 184.

218. *Id.*; CHERNOW, *supra* note 187, at 589.

219. Letter to Maj. Gen. Philip H. Sheridan (June 7, 1867), in *PAPERS OF ULYSSES S. GRANT*, *supra* note 214, at 185.

220. The Reconstruction Acts, 12 Op. Att’y Gen. 182, 187, 189 (1867); CHERNOW, *supra* note 187, at 589.

221. DOWNS, *supra* note 213, at 183; *see also* CHERNOW, *supra* note 187, at 589 (indicating that Grant let district commanders “know they could freely interpret [the opinion] as they chose”).

Grant's view that civil officers' opinions did not bind the commanders.²²² Armed with this statutory authority, and disgusted by ongoing terrorist violence against freedpeople in Texas, Sheridan removed Texas governor James W. Throckmorton in late July.²²³ Though backed by Grant, Sheridan did so in defiance of Johnson.²²⁴

Johnson responded by removing the "tyrant" Sheridan and transferring him to other duties.²²⁵ Because of the March 1867 General of the Army provision, however, Johnson could issue the removal order only through Grant. Though Grant ultimately relayed the order, he took advantage of his position to "argu[e] with Johnson and warn[] the president that Sheridan was 'universally, and deservedly, beloved by the people who sustained this government through its trials.'"²²⁶ What is more, presumably because the Third Reconstruction Act specifically vested the General of the Army with the district commanders' "powers of suspension, removal, appointment, and detail,"²²⁷ Grant reconsidered his earlier view that he could not direct the commanders' performance of their duties and specifically ordered Sheridan's successor not to reinstate the officials removed by Sheridan.²²⁸

In an August letter to President Johnson, Grant wrote: "The Act of Congress of July 19th 1867 [the Third Military Reconstruction Act] throws much of the responsibility of executing faithfully the reconstruction laws of Congress, on the General of the Army. I am bound by the responsibility thus imposed on me."²²⁹ Grant thus insisted that he was "authorized . . . by Acts of Congress" to approve Sheridan's prior orders and "instruct[] his successor to carry out those orders."²³⁰ "I emphatically decline," Grant further emphasized, "yielding any of the powers given the General of the Army by

222. Act of July 19, 1867, ch. 30, §§ 2, 10, 15 Stat. 14, 14, 16; *see also supra* note 213 and accompanying text.

223. WHITE, *supra* note 215, at 112–13.

224. *Id.* at 113.

225. *Id.* Johnson removed another district commander at the same time. DOWNS, *supra* note 213, at 184–85.

226. ALLEN C. GUELZO, RECONSTRUCTION: A CONCISE HISTORY 52 (2018) (quoting Letter from Ulysses S. Grant (Aug. 1, 1867), in 12 THE PAPERS OF ANDREW JOHNSON 447 (Paul H. Bergeron ed., 1995); *see also Washington News*, N.Y. TIMES, Aug. 20, 1867, at 1, <https://www.nytimes.com/1867/08/20/archives/washington-news-the-order-for-gen-sheridans-removal-issued-gen.html> [<https://perma.cc/K8YX-SQWX>] (reporting that after receiving a "positive order" to transfer Sheridan to different duties, "Grant visited the President . . . and entered his earnest protest against the movement, but the President was immovable" and Grant relayed the order to Sheridan the next day).

227. Act of July 19, 1867, ch. 30, § 3, 15 Stat. 14, 15 (1867).

228. CHERNOW, *supra* note 187, at 596; DOWNS, *supra* note 213, at 185.

229. Letter from Ulysses S. Grant (Aug. 26, 1867), in THE PAPERS OF ANDREW JOHNSON, *supra* note 226, at 512.

230. *Id.*

the laws of Congress.”²³¹ Grant also wrote to Sheridan in September. “I feel that your relief from command of the 5th District is a heavy blow to reconstruction . . .,” Grant complained. “I felt it my duty . . . to do all I could to keep you where you was until the laws which you were executing so faithfully were carried through and your District restored to the Union.”²³²

The House of Representatives eventually impeached President Johnson for, among other things, attempting to remove Secretary of War Edwin Stanton in violation of another March 1867 statute, the Tenure of Office Act.²³³ Much as the 1867 appropriations rider did for the General of the Army, that statute precluded removing certain senior officers without Senate consent.²³⁴ Another impeachment article accused Johnson of planning to circumvent the General of the Army provision, though no evidence at trial showed that Johnson had in fact done so.²³⁵ The Senate ultimately failed to convict on any counts, in part because key Republican Senators doubted whether requiring Senate approval for removal of executive officers was constitutional.²³⁶ After Ulysses Grant himself became President in 1869, Congress repealed the General of the Army provision,²³⁷ and it repealed the Tenure of Office Act altogether two decades later.²³⁸

c. Interpreting Reconstruction Examples.—This history offers powerful support not only for Congress’s authority to vest military duties in particular offices, but also for that power’s practical importance. Though denied the power to remove Grant as General of the Army without Senate consent, Johnson could—and did—appoint and remove district commanders at will.²³⁹ Grant, moreover, seems to have respected his ultimate obligation to relay direct orders from the President to the commanders. Nevertheless, Congress’s enactments, as interpreted by Grant and other generals, gave military officials considerable latitude to shape initial Reconstruction policy, often placing the President in a reactive posture. At the same time, those statutes placed considerable friction between Johnson’s wishes and on-the-ground actions, enabling Grant and Sheridan, among others, to elevate issues’

231. *Id.* at 512–13.

232. Letter to Maj. Gen. Philp H. Sheridan (Sept. 8, 1867), in PAPERS OF ULYSSES S. GRANT, *supra* note 214, at 316, 317.

233. Act of March 2, 1867, ch. 154, 14 Stat. 430, 430–31 (1867). For an account of Johnson’s attempted removal of Stanton, see WHITE, *supra* note 215, at 92–94.

234. Act of March 2, 1867, ch. 154, 14 Stat. 430, 430.

235. MAY, *supra* note 205, at 91.

236. BRUFF, *supra* note 40, at 174–75.

237. Act of July 15, 1870, ch. 294, § 15, 16 Stat. 315, 319 (1870).

238. Act of Mar. 3, 1887, ch. 353, 24 Stat. 500 (1887).

239. *Cf.* State of Mississippi v. Johnson, 71 U.S. 475, 499 (1866) (observing that the district commanders’ “duties must necessarily be performed under the supervision of the President as commander-in-chief”).

public salience and even defy the President temporarily so as to pursue instead their understanding of congressional policy. Finally, even if Johnson could ultimately get his way, his need to employ removal to do so helped ensure political backlash against controversial actions. These constraints on Johnson mattered. As Professor Downs argues, although Reconstruction ultimately ended in the tragic failure of Jim Crow, Military Reconstruction, while it lasted, “was in a basic way a success,” and it left important legacies, including ratification of the Reconstruction Amendments.²⁴⁰

Some might dismiss these examples as relating more to domestic governance than the military. In some sense, of course, the army during Reconstruction functioned as a form of civilian government; indeed, the Military Reconstruction Acts allowed military officers to displace state and local officials and govern in their stead. Yet dismissing these examples as more akin to civil administration would misunderstand the legal theory on which the entire occupation was predicated. Congress did not employ ordinary tools of federal civil administration to govern the defeated Confederacy in 1867. Instead, congressional majorities viewed the army’s presence in the South as akin to a foreign military occupation.²⁴¹ In other words, Congress presumed it could govern the defeated Confederacy through the military precisely because the federal government’s war powers remained active, even after the Confederacy’s nominal defeat.²⁴² Congress’s enactments during this period thus reflect exercises of congressional power to regulate the President’s Commander-in-Chief power with respect to military officials exercising military duties.

More generally, some might dismiss Reconstruction examples as aberrational, given the period of crisis in which they arose. Reconstruction today is often considered America’s “second founding,” a “rebirth of freedom” in which three key amendments and a host of statutes sought to purge the founding sin of slavery and establish a racially egalitarian republic.²⁴³ Nevertheless, some court decisions and scholarship have remained curiously dismissive of separation-of-powers precedents from this

240. DOWNS, *supra* note 213, at 180; *see also id.* at 247–49 (discussing the long-term consequences of Military Reconstruction, including the southern states’ compelled ratification of the Fourteenth and Fifteenth Amendments).

241. DOWNS, *supra* note 213, at 7–8 (explaining that Congress addressed concerns about military governance in a republic by creating “a bounded, exceptional time” in which the federal government employed war powers to govern the defeated Confederacy).

242. *Id.*; *see also* WHITE, *supra* note 215, at 83–84 (discussing how Congress employed war powers to impose reforms during Reconstruction).

243. *See generally* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019) (generally advancing this view).

period, at times characterizing Congress's efforts to constrain President Johnson as aberrant and illegitimate.²⁴⁴

But even if Reconstruction is not the best model for constitutional governance in ordinary times, precedents from this period should not all be lightly dismissed. On the contrary, they might reflect a latent toolkit of congressional powers that Congress can deploy if hostility to a given president arouses it to do so. Indeed, the Johnson impeachment's failure might indicate a capacity for self-correction that should weigh against wholesale suspicion of Reconstruction-era separation-of-powers precedents other than removal limitations.²⁴⁵

From that point of view, the Military Reconstruction Acts and the General of the Army rider warrant more serious consideration as valid precedents. Holding aside for the moment the restrictions on Grant's removal, these provisions simply exercised Congress's power to design the military command structure and vest particular duties in particular offices. Unlike the Meigs rider, none of these laws, by their plain terms, required any particular individual to perform the functions in question; nor for that matter did they vest direct control over the military in any officer other than the President. On the contrary, all of these statutes simply vested particular authorities and responsibilities—issuing orders to the Army or controlling military occupation—in particular officers.

As we have seen, this vesting of duties strengthened these officers' bargaining position in policy disputes with the President, and Grant and others in fact employed their authorities to shape on-the-ground policy. In the event of an impasse, moreover, resignation or removal, or perhaps a court martial for insubordination, might have been the President's only means of getting his way. But building such friction into the command structure could constitute a valid exercise of Congress's powers to govern the military and pass laws necessary and proper to discharging other officers' powers. In combination with earlier examples, this history suggests that such measures are not an unconstitutional imposition on the President's Commander-in-Chief authority.

244. See *supra* note 13; see also BRUFF, *supra* note 40, at 175 ("The judgment of history has been that Johnson was right, that the [Tenure of Office Act] was an unconstitutional infringement on the President's control over the executive branch."); CALABRESI & YOO, *supra* note 49, at 178 ("[R]ather than remove Johnson for unconstitutionally impeding Reconstruction and threatening congressional authority, Congress responded by passing unconstitutional legislation that would tie Johnson's hands with respect to the removal power."); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 744–45 (photo. rpt. 1979) (1920) (referring to the "political history" surrounding enactment of an 1866 statute limiting presidential removal of military officers as a factor counting against the law's constitutionality).

245. Cf. BRUFF, *supra* note 40, at 175 (noting that "the Johnson acquittal provided some precedential support for the constitutional unity of the executive branch under presidential command").

5. *World War I*.—A half century later, the United States' rise to global preeminence in the two World Wars and the early Cold War prompted a renewed set of congressional debates over military organization.²⁴⁶

During World War I, the so-called Overman Act gave the President just the sort of command flexibility that modern presidents, invoking the *Meigs* opinion, have claimed as a matter of constitutional right. Under this statute, the President held authority

to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act.²⁴⁷

Those purposes specifically included “successful prosecution of the war” and “the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces.”²⁴⁸ By its terms, the Overman Act expired six months “after the termination of the war by the proclamation of the treaty of peace,” at which point “all executive or administrative agencies, departments, commissions, bureaus, offices, or officers” reverted to “the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding.”²⁴⁹

In congressional debates, some of the Act's proponents suggested it was necessary only for civil and administrative functions. “I understand,” one Senator said, “the powers proposed to be confided to the President under the Overman bill are chiefly executive powers and not those which he has as Commander in Chief of the Army and Navy.”²⁵⁰ Yet President Wilson

246. At least one significant debate occurred in the interim, when Congress rejected a proposal by the Theodore Roosevelt Administration to consolidate powers in the Secretary of War. BARRON, *supra* note 13, at 192. In 1903, a joint order by the War and Navy Secretaries established a “Joint Board” to facilitate cooperation between the army and navy. *See* 1 VERNON E. DAVIS, *THE HISTORY OF THE JOINT CHIEFS OF STAFF IN WORLD WAR II* 1 (1972) (discussing Joint Board's establishment). Reflecting the statutory separation between the two services, however, this board was “an advisory body for the purpose of making recommendations jointly to the War and Navy Secretaries looking toward the coordination of the policies and action of the armed forces. It had no executive functions, and its pronouncements had official force only when approved by the two Secretaries.” *Id.* at 15.

247. Overman Act, Pub. L. No. 65-152, § 1, 40 Stat. 556, 556 (1918).

248. *Id.*

249. *Id.* §§ 1, 6, 40 Stat. at 556–57.

250. 56 CONG. REC. 5404 (1918) (statement of Sen. Shields). Another Senator argued more explicitly that “[t]he President as Commander in Chief of the Army and Navy can practically assign such members of the Army or such officers as he sees fit to such positions as he sees proper to place

proposed the Overman Act in the first place to counter a proposed law that would have created a special “war cabinet” and required the President to “exercise” essentially all war-related authorities “conferred on him by the Constitution and the laws of the United States” through this new body.²⁵¹ Even some of the Overman Act’s proponents, moreover, recognized that then-existing statutes “conferred [certain powers] directly upon [the service secretaries or their subordinates], so that in these matters these officers are not subject to the control or direction by the President.”²⁵² Meanwhile, at the other extreme, one Senator argued the Overman Act was entirely unnecessary because the President had constitutional authority to reallocate all executive functions.²⁵³ As a contemporaneous scholar observed, “[t]he majority in Congress” effectively repudiated that view.²⁵⁴ The majority

felt . . . that the act was not only justified in order to avoid suspicion or necessity of the President setting himself up as a dictator and doing the same things without definite authority of law, but also that it was necessary to secure the proper coordination of effort on the part of the agencies entrusted with carrying on the various war activities of the government²⁵⁵

In any event, on the very day he signed the Act into law, Wilson invoked the statute as authority for an executive order redistributing certain functions

them in.” 56 CONG. REC. 4577 (1918). This Senator, however, appeared to view this power as a function of presidential removal authority:

It is as useless and senseless to say that the President is handicapped in [controlling the ordinance, a function then vested by statute in a particular officer] as it is to say that the colonel of a regiment on independent duty is handicapped by some regulation which gives a first sergeant certain powers when he can change that first sergeant and put his own man in at any instant. . . . [T]he President possesses the power either as President in his civil capacity or as Commander in Chief of the Army and Navy to put into practically every position except those great independent tribunals and boards a man who will do exactly what the President wants done.

Id.

251. 56 CONG. REC. 1077 (1918) (reading of bill). For background on this proposal and Wilson’s support for the Overman Act as a response, see BERDAHL, *supra* note 154, at 172–73; BARRON, *supra* note 13, at 222–24; and DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR IN AMERICAN SOCIETY* 124–25 (1980).

252. 56 CONG. REC. 5406 (1918) (statement of Sen. Shields) (discussing the provisions cited in *supra* note 144).

253. 56 CONG. REC. 4520 (1918) (statement of Sen. Knox) (stating that he thought the President “has the authority to require every executive officer and every department of the Government to do anything that he directs to be done in order to prosecute this war to a successful conclusion” and “has the power to delegate from one Cabinet officer to another the discharge of any particular duty that he thinks such a Cabinet officer can discharge better than the one upon whom it would normally be incumbent”). *But see* 56 CONG. REC. 4525 (1918) (statement of Sen. Fletcher) (“[I]f there is a statute which says that [certain] duties must be performed by a certain officer, then, of course, the President can not assign those duties to some other officer or appoint some other officer to perform those duties . . .”).

254. BERDAHL, *supra* note 154, at 175.

255. *Id.*

of the Army's Chief Signal Officer and requiring designation of a new Director of Military Aeronautics by the Army's chief commander.²⁵⁶ Although he invoked his status as Commander in Chief along with the statute as authority for the executive order, the order's directives were to expire six months after the war's end—a limitation that conformed with the Overman Act and thus implied dependence upon it.²⁵⁷

When the war did end, the military sought to preserve the organizational flexibility it had gained. Thus, in 1919, the War Department proposed legislation that, among other things, would have preserved presidential authority to flexibly reallocate military duties and functions.²⁵⁸ Opponents decried this proposed consolidation of power as antithetical to republican government; a blistering report by one Senator decried “the spirit displayed by its framers throughout the whole bill—a consuming desire for despotic, unrestricted power—militarism run mad.”²⁵⁹ The proposal died. Congress instead largely prescribed the Army's structure itself in the National Defense Act of 1920.²⁶⁰

6. *World War II.*—At the start of World War II, just days after the Pearl Harbor attack, Congress reenacted the Overman Act's key provisions in a new war powers statute, again providing for the law's sunset six months after the war's end.²⁶¹ Like Wilson, President Roosevelt invoked this statute along with his constitutional authority as Commander in Chief to reorganize certain military functions. In his case, he signed executive orders restructuring command arrangements in both the Army and Navy, in each case directing

256. Woodrow Wilson, Executive Order (May 20, 1918), in 17 COMPILATION OF MESSAGES & PAPERS OF THE PRESIDENTS 8513, 8513–14 (1927).

257. *Id.* at 8516.

258. 58 CONG. REC. 3600 (1919) (recording the War Department's transmission of a bill that would require the President to “merge” existing War Department offices and then grant the President “authority to make such distribution or redistribution of the duties, powers, functions, records, property, and personnel of such previously existing departments, bureaus, and offices as he may deem necessary for the efficiency of the military service,” as well as “authority to prescribe the duties, powers, and functions of officers of the services, units, and organizations” authorized for the Army); see also 1 WAR DEP'T, ANN. REP. 1919, at 478, app. at 480 (proposing this legislation).

259. STAFF OF S. COMM. ON MILITARY AFFAIRS, 66TH CONG., ARMY REORGANIZATION BILL: ANALYTICAL & EXPLANATORY STATEMENT 8 (Comm. Print 1919) (statement of Sen. George E. Chamberlain).

260. National Defense Act of 1920, Pub. L. No. 66-242, 41 Stat. 759 (1920). In an earlier controversy during the Theodore Roosevelt administration, Congress rejected a proposal to “abolish the office of the commanding general and to vest more power in the secretary of war” based on similar fears that such legislation would pave the way to dictatorship. BARRON, *supra* note 13, at 192.

261. First War Powers Act, 1941, Pub. L. No. 77-354, §§ 1–5, 401, 55 Stat. 838, 838–39, 841 (1941); see, e.g., 87 CONG. REC. 9838 (1941) (statement of Sen. Van Nuys) (“The bill was prepared in the Department of Justice . . . Title I of the bill reenacts the measure . . . commonly known as the Overman Act, which was approved May 20, 1918.”).

that changes would expire six months after the war's end—a sunset that again implied reliance on statutory rather than constitutional authority.²⁶²

Despite the President's organizational flexibility, however, pre-War institutional structures continued to hamper coordination. In particular, Army–Navy rivalries and coordination problems repeatedly marred combat performance; the British Air Marshal observed that “[t]he violence of interservice rivalry in the United States had to be seen to be believed and was an appreciable handicap to their war effort.”²⁶³ To address these challenges, Roosevelt designated one admiral as his Chief of Staff and improvised a coordinating body of “joint chiefs” to advise him and oversee operations.²⁶⁴ He also gave the Army and Navy precedence in different theaters and in some instances placed units from one service under the command of officers from the other.²⁶⁵ Though all these actions admittedly could reflect broad assertions of Commander-in-Chief power, they could also be supported by the 1941 War Powers Act; the President never issued any formal order establishing the Chief of Staff position or the joint chiefs.²⁶⁶ In any event, Roosevelt's organizational arrangements failed to quell interbranch friction. In effect, pre-War statutory arrangements, though superseded for the duration of the war, continued to limit presidential coordination of the armed forces.²⁶⁷

7. *The National Security Act of 1947.*—After the war, to address the inter-service coordination problems, the executive branch once again proposed a

262. Franklin D. Roosevelt, Reorganization of the Navy Department and the Naval Service, EXEC. ORDER NO. 9096 (Mar. 12, 1942), in 1942 THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 157 (Samuel I. Rosenman ed., 1st ed. 1950); Franklin D. Roosevelt, The President Reorganizes the Army and the War Department, EXEC. ORDER NO. 9082 (Feb. 28, 1942), in 1942 THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 140–41 (Samuel I. Rosenman ed., 1st ed. 1950).

263. LOCHER, *supra* note 139, at 20–21.

264. DALE R. HERSPRING, THE PENTAGON & THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH 24–25 (2005).

265. *Id.* at 23–26, 31, 41; James R. Locher III, *Has It Worked?: The Goldwater-Nichols Reorganization Act*, 54 NAVAL WAR COLLEGE REV., Autumn 2001, at 95, 96.

266. HERSPRING, *supra* note 264, at 24; *see also* EDGAR F. RAINES, JR. & MAJOR DAVID R. CAMPBELL, THE ARMY AND THE JOINT CHIEFS OF STAFF: EVOLUTION OF ARMY IDEAS ON THE COMMAND, CONTROL, AND COORDINATION OF THE U.S. ARMED FORCES, 1942–1985, at 18–19 (1986) (noting that “[t]he legal basis of the authority exercised by the wartime Joint Chiefs of Staff was, to say the least, ambiguous” because “President Roosevelt never issued an executive order clearly delineating the organization's functions as he certainly had the power to do under the First War Powers Act”). For a detailed history of the Joint Chiefs' origins and organizational evolution, *see* DAVIS, *supra* note 246.

267. In August 1944, then-Vice Presidential candidate Harry Truman wrote in a popular magazine, “Proof that a divine Providence watches over the United States is furnished by the fact that we have managed to escape disaster even though our scrambled professional military set-up has been an open invitation to catastrophe.” RAINES & CAMPBELL, *supra* note 266, at 37; *see also id.* at 37–42 (discussing clashing Army and Navy plans for post-War military reorganization and Truman's commitment to unification).

statutory consolidation of military functions.²⁶⁸ Recognizing that post-War rivalry with the Soviet Union would necessitate continued mobilization and an effective global deterrent, Congress took action this time in the National Security Act of 1947.²⁶⁹ But even this reorganization fell short of the degree of flexibility sought by the President and some military leaders.²⁷⁰ Among other changes, the 1947 statute merged the War and Navy Departments into a single new agency, the National Military Establishment (later renamed the Department of Defense), to be headed by a new Secretary of Defense.²⁷¹ It also created the Air Force as a distinct service; established separate Secretaries of the Army, Navy, and Air Force with authority over their respective services, subject to the general direction of the Secretary of Defense; and authorized the Joint Chiefs to establish unified commands combining forces from multiple services.²⁷² Though significant, these changes deliberately stopped short of complete consolidation, and the Act imposed multiple impediments to direct presidential control over the services.

For one thing, to address renewed fears about militarism and dictatorship and appease concerns about preserving distinct service identities, Congress included statutory definitions of each service's functions in the Act.²⁷³ It also sharply limited the new Defense Secretary's authority, giving the office power to set general policies but not to issue direct commands,²⁷⁴ though subsequent amendments in 1949, 1953, and 1958 expanded the Secretary's authority and gave the President greater control over unified

268. *Id.* at 43, 98.

269. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947).

270. RAINES & CAMPBELL, *supra* note 266, at 98.

271. National Security Act of 1947 §§ 201–202, 61 Stat. at 499–500.

272. *Id.* §§ 205–208, 211(b)(3), 61 Stat. at 501–05.

273. *Id.* §§ 205(e), 206(b), 207(f), 61 Stat. at 501–03. Senators and Members of Congress repeatedly expressed concerns about militarism in the Act's legislative history. *See, e.g.*, 93 CONG. REC. 9435 (1947) (statement of Rep. Hoffman) (“[T]o permit immediate or gradual growth of military control of war management is to follow the path of militarism—to disaster.”); 93 CONG. REC. 8297 (1947) (statement of Sen. Gurney) (responding to “some who express a fear that the creation of this office [the Secretary of Defense] will lead toward dictatorship”); 93 CONG. REC. 8316–8317 (1947) (statement of Sen. Robertson) (expressing concerns that the bill will foster militarism); H.R. REP. NO. 80-961, at 7 (1947) (additional views of Clare E. Hoffman, Chairman) (“A careful reading of the bill, of the hearings, and a realization of the implications justify the conclusion that the possibilities of a dictatorship by the military are in this legislation.”). More practical worries about loss of Navy prestige and congressional influence over procurement and basing decisions appear also to have motivated Congress's weakening of the proposed consolidation. *See* Locher, *supra* note 265, at 98.

274. National Security Act of 1947 § 202, 61 Stat. at 500 (granting limited duties to the Secretary and providing specifically that the Army, Navy, and Air Force Departments “shall be administered as individual executive departments by their respective Secretaries”).

commands.²⁷⁵ Some critics of the 1947 law, including the Marine Corps Commandant, worried that unification of the services would cause a withering and eventual abolition of the Marine Corps and naval aviation, despite those components' distinguished contributions to the recent Allied victory.²⁷⁶ Congress addressed such concerns by adding specific statutory protections for marines and aviators within the Navy.²⁷⁷ Finally, building on the jerry-rigged joint command structure developed during the war, the Act formally established the National Security Council and Joint Chiefs of Staff.²⁷⁸ In another nod to militarism fears, however, the statute limited these bodies to advisory rather than command functions.²⁷⁹

Amid all these changes, Congress recognized and preserved the President's constitutional authority as Commander in Chief. Some legislative history even appeared to take a broad view of this presidential power. For instance, a Senate committee report observed that "[t]he creation of such an official [as the Secretary of Defense] in no way reduces the responsibility and authority of the President who, by the Constitution, remains both the Commander in Chief, and also the source of all executive power in the Government."²⁸⁰ Similarly, during floor debates, Senators and Representatives recognized the President's ultimate constitutional power; some, for example, justified the new position of Defense Secretary as a measure aimed at easing the President's workload, rather than displacing his command authority.²⁸¹

Nevertheless, as a practical matter, this statute, like earlier enactments, presumed broad congressional authority to structure the offices and command relationships through which presidential power would be exercised. Indeed, neither the Act itself nor the extensive debate surrounding

275. Locher, *supra* note 265, at 99; Gregg Garbesi, *U.S. Unified Command Plan*, in AMERICA'S VICEROYS: THE MILITARY AND U.S. FOREIGN POLICY 17, 37–38 (Derek S. Reveron ed., 2004).

276. See, e.g., *National Defense Establishment (Unification of the Armed Services): Hearing on S. 758 Before the S. Comm. on Armed Serv.*, 80th Cong. 411–13 (1947) (statement of Gen. A.A. Vandegrift, Commandant, United States Marine Corps).

277. National Security Act of 1947 § 206(b), (c), 61 Stat. at 501–02.

278. *Id.* §§ 101, 211, 61 Stat. at 496–97, 505.

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

280. S. REP. NO. 80-239, at 11 (1947) (reporting the bill from the Senate Committee on Armed Services).

281. See, e.g., 93 CONG. REC. 8297 (1947) (statement of Sen. Gurney) ("It is universally recognized that all our forces are subject to the direction of the President as constitutional Commander in Chief. . . . But all of us know full well that the overburdened Chief Executive of our Government . . . cannot possibly discharge [the] responsibility [of directing all military subordinates] with a modern military organization."); H.R. REP. NO. 80-961, at 4 (1947) (explaining that "[t]he complexity and magnitude of the President's task in peace and war are such that your committee believes it is a generally accepted fact that he needs a full-time civilian official to assist him in the performance of his onerous duties as Commander in Chief of the armed forces," and determining that "[t]he Secretary of Defense fills this need").

it would have made much sense if the President held constitutional authority to simply reorganize military forces and command structures as he saw fit. Stating the constitutional theory implied by the bill itself, one Congressman observed in floor debate, “I would remind you that the responsibility for the organization and maintenance of our Army and Navy is not one which the Constitution places upon the Commander in Chief. It is one which is imposed upon the Congress”²⁸²

Even the executive branch appeared to acknowledge this view. Early in the legislative debates, it submitted a joint statement from the War and Navy Secretaries calling for legislation with particular features, including provisions to ensure that “[t]he armed forces shall be organized” into separate services and that “[e]ach [service] shall be under a Secretary and, under the over-all direction of the Secretary of National Defense, shall be administered as an individual unit.”²⁸³ Likewise, the same Senate committee report that referred to the President as the “source of all executive power” observed that “[t]he safeguard against militarism in this country is not to be found in the costly confusion and inefficiency of uncoordinated executive agencies with confused lines of authority.”²⁸⁴ With this assertion, the report seemingly acknowledging that Congress could create, if it wished, just such confused and inefficient agency relationships within the military. More directly, a House committee report observed that “[t]he specific powers given the Secretary of Defense have been carefully delineated in the bill so that there can be no doubt as to the kind and scope of the powers he will exercise.”²⁸⁵ This report thus asserted unambiguously that Congress may define, and limit, the military authorities of officers other than the President.

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

8. *The Goldwater–Nichols Act of 1986*.—A last major military reorganization took place in 1986, when Congress sought to update and improve the 1947 structure by enacting the Goldwater–Nichols Department of Defense Reorganization Act.²⁸⁶ Building on earlier amendments to the 1947 Act, this statute authorized the President, “through the Secretary of Defense,” to establish so-called “combatant commands” with authority over forces in particular regions of the globe.²⁸⁷ Under the structure established by

282. 93 CONG. REC. 9419 (1947) (statement of Rep. Cole).

283. Letter to the President from Robert P. Patterson, Secretary of War, and James Forrestal, Secretary of the Navy (Jan. 16, 1947), in S. REP. NO. 80-239, at 5.

284. S. REP. NO. 80-239, at 11, 16.

285. H.R. REP. NO. 80-961, at 4.

286. Pub. L. No. 99-433, 100 Stat. 992 (1986).

287. *Id.* § 211, 100 Stat. at 1012–13 (codified at 10 U.S.C. §§ 161, 162).

the Act, military commanders drawn from the different services would exercise command authority over particular units, also drawn from different services and assigned to the command by the service secretaries as directed by the Secretary of Defense; these combatant commanders would then bear responsibility for achieving military objectives within the region under their charge.²⁸⁸ Though earlier statutes had also allowed such unified commands, Goldwater–Nichols strengthened the combatant commanders' position and authority in various ways.²⁸⁹ In particular, the Act relegated the service secretaries—officers who once held exclusive command authority over entire branches of the military—to an essentially supportive role, with power over training, equipping, and disciplining their respective services but no power of actual military command.²⁹⁰ Finally, the Act made additional adjustments to the National Security Council, consolidating authority in the Chairman of the Joint Chiefs while allowing other Joint Chiefs to express dissenting views.²⁹¹

As with the National Security Act of 1947, neither this statute nor the hard-fought “victory on the Potomac” that was necessary to enact it would have made much sense if Congress lacked power to define duties and authorities within the military apparatus.²⁹² The legislation's entire purpose was to break down prior command relationships and replace them with new ones better suited (presumably) to achieving the nation's military and foreign policy objectives.²⁹³ Again, even the Executive Branch appeared to acknowledge congressional authority to make such changes. In a statement of executive views early in the legislative process, President Reagan cautioned that any new statute “must not infringe on the constitutionally protected responsibilities of the President as Commander in Chief.”²⁹⁴ He explained: “Any legislation in which the issues of Legislative and Executive responsibilities are confused would be constitutionally suspect and would not

288. *Id.* § 211, 100 Stat. at 1012–16 (codified at 10 U.S.C. §§ 162, 164, 165).

289. *See* Garbesi, *supra* note 275, at 39, 41 (observing that “Goldwater-Nichols reinforced the intent of previous reforms by clearly spelling out in the legislation what was often left unsaid” and that the law had “a profound effect on strengthening the power of the combatant commanders,” who “[p]reviously[] . . . had difficulty directing their component commanders . . . in joint operations”).

290. Mark P. Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 929 & n.128 (2019); *see also* Andrew J. Bacevich, *Elusive Bargain: The Pattern of U.S. Civil-Military Relations Since World War II*, in *THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II* 207, 245 (Andrew J. Bacevich ed., 2007) (describing the “drastically diminished” influence of the service secretaries).

291. Goldwater–Nichols Act § 201, 100 Stat. at 1004–10 (codified at 10 U.S.C. §§ 151–55).

292. *See supra* note 139.

293. *See generally* Locher, *supra* note 265 (examining the background and effects of the Act).

294. RONALD REAGAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING HIS VIEWS ON THE FUTURE STRUCTURE AND ORGANIZATION OF OUR DEFENSE ESTABLISHMENT AND THE LEGISLATIVE STEPS THAT SHOULD BE TAKEN TO IMPLEMENT DEFENSE REFORMS, H.R. DOC. NO. 99-209, at 1–2 (1986).

meet with my approval.”²⁹⁵ But the very same statement went on to discuss the President’s goals without suggesting any constitutional difficulty with statutory assignment of duties and command relationships.

For example, President Reagan wrote:

Where the roles and responsibilities of each component of our defense establishment are necessarily placed in law, they must be clear and unambiguous, but not so constrained or detailed as to impair operational flexibility or the common sense of those in positions of responsibility. . . . [Laws] should establish sound, fundamental relationships among and between civilian and military authorities²⁹⁶

Elsewhere, he advocated strengthening the Secretary of Defense’s authority²⁹⁷ and “set[ting] apart and establish[ing] in law” the Joint Chiefs Chairman’s “unique position and responsibilities.”²⁹⁸ Reagan’s eventual signing statement on the final legislation indicated no constitutional objections.²⁹⁹

Much like President Reagan’s statement, some assertions in key legislative documents could imply that Congress believed a degree of command flexibility was constitutionally required. A key provision in the Act prescribed that “[u]nless otherwise directed by the President, the chain of command to a unified or specified combatant command runs—(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command.”³⁰⁰ Commenting on this provision, a conference committee report on the final legislation explained that “the conferees determined that the extremely important chain of command to the warfighting commands should be clearly prescribed.”³⁰¹ Accordingly, the report explained, the conference legislation “specif[ied] the normal chain of command,” but it did so “[w]ithout infringing upon the President’s authority as Commander in Chief to direct otherwise.”³⁰²

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

296. *Id.* at 3.

297. *Id.* at 4.

298. *Id.* at 5.

299. Ronald Reagan, Statement on Signing the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Oct. 1, 1986), <https://www.presidency.ucsb.edu/documents/statement-signing-the-goldwater-nichols-department-defense-reorganization-act-1986> [https://perma.cc/YFE7-YS29].

300. Goldwater–Nichols Act § 211, 100 Stat. at 1013 (codified at 10 U.S.C. § 162(b)).

301. H.R. REP. NO. 99-824, at 118 (1986) (Conf. Rep.).

302. *Id.*

Though seeming to assert robust authority to prescribe chains of command, this cryptic qualification by the conferees might imply that preserving presidential authority to alter command structures was constitutionally necessary; alternatively, it might suggest only that Congress saw fit to preserve such flexibility as a matter of prudence. Whatever the correct view, however, more specific assertions in the very same report contradict any inference of preclusive general presidential control over military duties. For example, the very next paragraph addressed separate provisions precluding the Chairman of the Joint Chiefs from exercising command authority.³⁰³ According to the report, “the conferees intend[ed] that (1) the JCS Chairman would not be part of the chain of command, and (2) the chain of command would not run through the JCS Chairman.”³⁰⁴ Likewise, an earlier Senate committee report indicated that its bill would preserve “the President’s authority as Commander in Chief” despite also specifically precluding any exercise of command authority by the Chairman of the Joint Chiefs.³⁰⁵

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

C. *Implications*

Congress’s broad authority to allocate military duties, reflected not only in the Constitution’s text and structure but also in legislative and executive practice across the Republic’s history, carries general implications for separation of powers that I will address later.³⁰⁶ This authority also, however, has immediate concrete significance.

To begin with, the understanding developed here places recent statutes assigning military functions to officers other than the President on rock-solid constitutional foundations. One recent example is the statute mentioned earlier that grants the President and Secretary of Defense joint authority over whether to undertake certain cyber operations.³⁰⁷ Another is the provision in the 2020 National Defense Authorization Act, to which President Trump objected on constitutional grounds,³⁰⁸ that requires certain certifications by

303. *Id.*

304. *Id.*

305. S. COMM. ON ARMED SERV., DEPARTMENT OF DEFENSE REORGANIZATION ACT OF 1986, S. REP. NO. 99-280, at 16–17 (1986).

306. *See infra* Part IV.

307. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1642, 132 Stat. 2132 (2018), 10 U.S.C. § 394 note.

308. Donald Trump, Statement by the President (Dec. 20, 2019), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-34/> [<https://perma.cc/KS5L-V73M>]; 2020 NDAA Views Letter, *supra* note 21, at 3.

the Defense Secretary before American troop levels in South Korea may fall below a prescribed threshold.³⁰⁹ If the President's executive power or Commander-in-Chief authority entailed preclusive personal authority over such governmental decisions, then vesting these military functions in an officer other than the President would be unconstitutional. But they do not, for all the reasons I have indicated. Such measures are meaningful, moreover, because, as with civil offices, the choice to vest these powers in a different officer may impose practical and political restraints on presidents even if they can ultimately get their way by firing or threatening to fire the officer in question.

By the same token, Congress might impose measures that go even further, giving the secretary or another senior officer authority over nuclear weapons, for example, or giving a particular officer authority over a particular theater of combat. Lower down the hierarchy, it could also impose more rigid restraints on particular commands so as to give the Senate greater say in who actually holds specified operational authorities in the event of a conflict. Congress imposed similarly severe constraints during Reconstruction, and more routine legislation at other times reflects the same constitutional understanding. So long as the President retains some means of effectuating his or her wishes—either by removing the responsible officers at will, or by employing other means of discipline afforded by statute—legislation placing a gap, and thus a potential source of friction, between the President's desire and actual government action in this manner is constitutional.

To the extent past Executive Branch opinions and statements suggest otherwise, the Executive Branch's assertions are mistaken. Perhaps the most thorough and thoughtful opinion in this vein is OLC's Clinton-era opinion concluding that Congress could not by statute preclude assignment of U.S. forces to a non-U.S. commander as part of a United Nations operation.³¹⁰ Although OLC reasoned that such authority is inherent in the President's power to command U.S. forces,³¹¹ the President's Commander-in-Chief power properly carries no such implication. For one thing, even if the President generally held broad authority over military assignments, it would not follow that the President's command authority entails a preclusive power to place U.S. forces under officers who are not themselves subject to

309. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-29, § 1254, 133 Stat. 1671 (2019).

310. Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 182–83 (1996).

311. *Id.* at 184 (“[T]here 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.”).

presidential command.³¹² Furthermore, and more to the point here, because Congress holds authority to define military officers' duties and command relationships, presidents lack authority to disregard such restraints; they must instead exercise command authority through the particular mechanisms Congress has provided. Accordingly, if Congress precludes assignment of U.S. forces to foreign commanders, thus effectively defining command of U.S. forces as an exclusive responsibility of American officers, then presidents lack constitutional power to override Congress' choice.

This constitutional analysis, of course, does not mean that limiting presidential command authority in these ways is necessarily prudent or wise. The best course may often be to retain clear presidential accountability for matters of war and peace and operational success or failure. Indeed, the broad and flexible authority over military responsibilities that Congress has generally provided to the President seems to reflect just that type of judgment. It might also be the case that binding presidential authority too tightly, particularly with respect to such weighty matters of national security, could risk undermining constitutionalism as a whole by tempting presidents to defy limits on their power during an emergency.³¹³ Under the constitutional analysis advanced here, however, such judgments are ultimately Congress's to make; the Constitution has not already made them for us.

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

III. Presidential Removal Authority

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

312. According to John Yoo, presidents had never before claimed that such authority was part of the Commander-in-Chief power. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 173, 175–76 (2005).

313. See generally Adrian Vermeule, *The Publius Paradox*, 82 MODERN L. REV. 1 (2019) (advancing this argument).

have given the question and its broader implications comparatively little attention.³¹⁴

In fact, the best view of the constitutional text and structure, interpreted in light of subsequent practice, supports a result with respect to military officers that administrative lawyers may find surprising. In the civil and administrative context, the removal debate has resulted (for the moment at least) in case law that generally supports presidential authority to remove officers but grants Congress limited authority to give certain positions tenure protection. With respect to the military, by contrast, longstanding practice supports allowing limits on presidential removal authority, at least during peacetime, even with respect to operational military functions, so long as Congress has provided by law for robust alternative means of command discipline. Presidents and those in the chain of command today may often have authority to relieve an officer of particular duties such as command of a particular ship or unit, but they do not have authority in peacetime to unilaterally remove an officer from the service altogether. In this Part, I first defend this understanding of Article II and then address its implications for congressional authority.

A. *Congress's Power to Limit Presidential Removal*

1. *The Constitutional Text and Structure*

a. *Removal as Default Commander-in-Chief Authority.*—As noted earlier, the extent of presidential removal authority is one of the oldest and most fraught debates in constitutional law. Although the Constitution says nothing specific about presidential removal, the First Congress apparently determined, following extensive debate, in its “Decision of 1789” that principal executive officers are at least presumptively subject to termination by the President.³¹⁵ At any rate, the debate resulted in a set of statutes that made no provision for removal but referred obliquely to presidential removal of the department head. Attorneys General and other commentators at the

314. Two recent treatments have briefly defended these removal limitations. See Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1399–1400 (2012) (arguing that the limitations are valid exercises of Congress’s power over military discipline and accord with other cases upholding removal limitations); Barron & Lederman, *supra* note 83, at 1105 (“Each of the branches has long accepted . . . that Congress can provide for courts-martial to have a decisive role, even countermanding the President’s judgments, in some personnel questions, including dismissal from the service.”); see also Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 U. CINN. L. REV. 391, 406 n.51 (2018) (noting “reasonable disagreement” over the question). Justice Breyer’s dissent in *Free Enterprise Fund* also called attention to removal limitations for military officers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 543 (2010). The majority, however, characterized this example as “far afield” from the questions at issue in the case. *Id.* at 507.

315. Prakash, *supra* note 41, at 1067–68.

time understood this outcome to imply a constitutional removal power for the President.³¹⁶

One department addressed in these statutes, albeit not the initial focus of debates, was the Department of War.³¹⁷ This early practice thus supports viewing at least the Defense Secretary and other senior civilian officials with responsibility for military functions as at least presumptively removable by the President. Even apart from this history, moreover, the constitutional text and structure offer particularly strong reasons to presume presidential removal power, at least as a default rule, with respect to all officers with military authority. The President, after all, is Commander in Chief. Whatever else this status entails, it must carry some constitutional power to ensure adherence to presidential commands. Presuming presidential authority to impose disciplinary measures other than removal or suspension, however, would violate more specific constitutional prohibitions on *ex post facto* laws and punishment without due process.³¹⁸ Removal and suspension, by contrast, hold a deep pedigree as basic aspects of command authority, even apart from the broader history of removal debates going back to the Decision of 1789.³¹⁹

The Constitution's exclusion of military offices from impeachment reinforces this inference. Lest the Constitution create a dangerous vacuum of military unaccountability, military officers must be accountable, directly or indirectly, to the President if they are not accountable to Congress through impeachment. Joseph Story's influential treatise thus explained military officers' exclusion from impeachment by reference to the alternative system of military discipline: "The very nature and efficiency of military duties and discipline require this summary and exclusive jurisdiction; and the promptitude of its operations are not only better suited to the notions of military men; but they deem their honour and their reputation more safe in the hands of their brother officers, than in any merely civil tribunal."³²⁰

It is true that, even without the Commander-in-Chief Clause, one might derive presidential removal authority from textual provisions invoked in other settings, such as the Vesting and Take Care Clauses. But those provisions seem less readily applicable to the military. By obligating the President to ensure faithful execution of the laws, the Take Care Clause arguably implies authority to remove officers who execute laws unfaithfully.

316. *Id.*; see also *infra* subsection III(A)(2)(a).

317. See Prakash, *supra* note 41, at 1023 & n.7.

318. See PRAKASH, *supra* note 54, at 158 (arguing the President lacks unilateral authority to impose such penalties).

319. See *id.* (arguing based on English practice that "the president can suspend or oust disobedient soldiers and sailors").

320. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 258–59 (1991).

As Saikrishna Prakash has observed, however, it is not obvious that most military functions constitute execution of the laws.³²¹ The military, to be sure, has at times performed law-enforcement functions, but since 1878 the Posse Comitatus Act and other statutes have limited such use of the armed forces.³²² A conventional military campaign, by contrast, amounts to law-execution only in the attenuated sense that it involves seeking to achieve some express or implied congressional objective.

Alternatively, removal authority might be part of the “Executive Power” conferred on Presidents by the Vesting Clause. Prakash generally endorses this view, arguing that “the Constitution’s grant of executive power encompasses a removal power” with respect to executive officers.³²³ But applying that view here requires presuming not only that the Vesting Clause has substantive content (rather than simply conferring the powers granted elsewhere in Article II), but also that it properly extends beyond law execution into other aspects of traditional executive authority. Some recent scholarship has called that view into question, at least as a matter of original meaning.³²⁴ In any event, whatever the correct interpretation of the Vesting Clause, the Commander-in-Chief Clause provides a specific textual anchor for presuming presidential removal authority with respect to military officers.

This conclusion nevertheless is not the end of the story, because here, as in other areas, the most difficult question is not whether Article II supports inferring presidential removal authority as a constitutional default, but whether the Constitution ever allows Congress to limit that authority. Despite all the reasons for generally inferring presidential removal authority, modern case law, at least, could support relaxing this requirement with respect to certain narrow functions, even within the military, such as those relating to military justice. Simplifying somewhat, after suggesting in one case that at-will presidential removal is essential for executive officers,³²⁵ the Supreme Court held during the New Deal that Congress may grant tenure protection to “quasi-legislative” and “quasi-adjudicative” offices such as multimember regulatory commissions, but not to “purely executive” offices.³²⁶ Half a century later, the Court qualified even that conclusion by holding that

321. Prakash, *supra* note 46, at 1837.

322. 18 U.S.C. § 1385 (2018). For a brief primer on current statutory restraints, see Nevitt, *supra* note 83, at 471–73.

323. Prakash, *supra* note 46, at 1815; *see also* Prakash, *supra* note 1, at 363 (“The [Constitution] grants the power to remove [military officers] via the grant of Executive power.”). Prakash has argued with respect to the military that Congress has broad authority to regulate the military, including how operations are conducted, but that within such statutory limits, the President as Commander in Chief “may direct military operations” and control officers through removal. *Id.* at 351.

324. *See generally* Mortenson, *supra* note 113 (arguing against this view of the Vesting Clause).

325. *Myers v. United States*, 272 U.S. 52, 117 (1926).

326. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627–28 (1935).

Congress could require for-cause removal for even a purely executive position such as a prosecutor if the office's responsibilities were relatively narrow and some particular functional need justified independence.³²⁷ In *Seila*, the Court characterized this case law as recognizing a general rule of at-will removal authority, subject to two limited exceptions: "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority."³²⁸

Under this framework, military offices would presumably be purely executive (and thus subject to at-will removal) as a general matter, but tenure protection could be justified for those with "limited duties," particularly in settings involving a functional need for independence. In keeping with this logic, as noted earlier, several adjudicatory military offices hold tenure protections of the sort associated with independent agencies and adjudicatory officers in the administrative context. Judges on the Court of Appeals for the Armed Forces, for example, are appointed to fifteen-year terms and removable only "by the President, upon notice and hearing, for (1) neglect of duty; (2) misconduct; or (3) mental or physical disability."³²⁹ Military judges are similarly protected against adverse treatment based on their rulings even though they are military officers within the chain of command.³³⁰

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

b. The Complicating Factor of Military Discipline

i. Statutory Architecture.—Since 1866, governing statutes have limited disciplinary removal of nearly all military officers in peacetime without a court martial. The current version of the governing statute provides: "No commissioned officer may be dismissed from any armed force except (1) by sentence of a general court-martial; (2) in commutation of a sentence of a general court-martial; or (3) in time of war, by order of the President."³³¹

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

328. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199–2200 (2020).

329. 10 U.S.C. § 942(c) (2018).

330. 10 U.S.C. § 826(c)(2) (2018).

331. 10 U.S.C. § 1161(a) (2018); *see also* 10 U.S.C. § 123(a) (2018) ("In time of war, or of national emergency declared by Congress or the President . . . , the President may suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioned officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard Reserve.");

At the same time, the Uniform Code of Military Justice makes disobedience of lawful orders, as well as other forms of insubordination, punishable by court-martial through sanctions including, when appropriate, removal from office.³³²

Today, “dismissal” is a term of art for a punitive separation, akin to the “dishonorable discharge” of enlisted personnel,³³³ and dismissal by a general court-martial sentence generally results in a loss of veterans’ benefits.³³⁴ Other statutes, however, more generally regulate involuntary separation. Apart from certain officers in an initial probationary status,³³⁵ officers in the regular military can generally be discharged against their will only if they are not promoted within certain periods,³³⁶ or if a board of inquiry composed of other officers determines, in accordance with applicable regulations, that their performance was substandard, that they committed “moral or professional dereliction,” or that their continued service is “not clearly consistent with the interests of national security.”³³⁷

Furthermore, when Congress first imposed limits on “dismissal” in 1866, the term carried no pejorative implication. Treatises and Attorney General opinions referred to presidential removals of military officers as dismissals.³³⁸ As a 1915 treatise explained, “Dismissal by executive order is

Kahn v. Anderson, 255 U.S. 1, 10 (1921) (indicating that the term “time of peace” in this statute requires “not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed”). Section 1161(b) also provides for an officer’s termination following an extended unauthorized absence or certain criminal convictions by a court martial or civilian court. 10 U.S.C. § 1161(b) (2018).

332. See 10 U.S.C. § 890 (2018) (willful disobedience); *id.* § 889 (disrespect toward superior officer). For a much earlier statute to similar effect, prescribing “death, or such other punishment as a court martial shall direct” for “[a]ny officer, seaman, mariner or other person [in the navy] who shall disobey the orders of his superior”, see Act of Mar. 2, 1799, ch. 24, § 1, 1 Stat. 709, 711 (1799).

333. 2 SCHLUETER, *supra* note 129, at § 16-17(C).

334. *E.g.*, 38 U.S.C. § 5303(a) (2018); United States v. Reed, 54 M.J. 37, 45 (C.A.A.F. 2000). See generally Major John W. Brooker, Major Evan R. Seamone & Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012) (examining the impact of involuntary and punitive discharges on benefits eligibility).

335. 10 U.S.C. § 630 (2018).

336. 10 U.S.C. §§ 631, 632 (2018).

337. 10 U.S.C. §§ 1181–82, 1184–87 (2018) (establishing review process to determine whether the service secretary may remove an officer from active duty); see also DEPARTMENT OF THE NAVY, OFFICE OF THE SECRETARY, SECNAV INSTRUCTION 1920.6D, ADMINISTRATIVE SEPARATION OF OFFICERS (2019), <https://www.secnave.navy.mil/doni/Directives/01000%20Military%20Personnel%20Support/01-900%20Military%20Separation%20Services/1920.6D.pdf> [https://perma.cc/8RGV-YH2M] (regulation governing administrative separation of Navy and Marine Corps officers). Apart from these procedures, the President or Secretary of Defense may also “drop from the rolls” an officer who has been absent without authority for three months. 10 U.S.C. § 1161(b) (2018); see also 10 U.S.C. § 804(d) (2018) (providing no right to trial for such discharges).

338. See, e.g., Claim of Surgeon Du Barry, 4 Op. Att’y Gen. 603, 608–09 (addressing “the power of the President to dismiss military or naval officers from the service without the sentence of a courtmartial” and equating this authority with removal of civil officers).

quite distinct from dismissal by sentence. The latter is a punishment; the former is removal from office.”³³⁹ Another treatise from 1920 elaborated that “a reproach upon [the officer’s] reputation” was “by no means an essential incident of an executive dismissal,” even if the terms “discharge” or “mustering out,” rather than dismissal, were typically employed for blameless separations from service.³⁴⁰ At any rate, during the Civil War, President Lincoln summarily dismissed officers “in a great number of cases, sometimes for the purpose of summarily ridding the service of unworthy officers, sometimes in the form of a discharge or muster-out of officers whose services were simply no longer required.”³⁴¹ Nineteenth-century statutes limiting presidential dismissal were thus understood at the time as congressional attempts to displace any presidential authority to summarily remove military officers from service.³⁴²

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

ii. Constitutional Questions.—But are such removal limitations constitutional? On the one hand, Congress not only holds authority to raise

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

340. WINTHROP, *supra* note 244, at 737; *see also* DAVIS, *supra* note 339, at 526 (indicating that the dismissal of an officer by executive order “may have involved no disgrace”). Winthrop did acknowledge that a nonpunitive dismissal without any adjudicatory process could neither impose any disability against future employment nor strip an officer of vested rights such as entitlement to pay. WINTHROP, *supra* note 244, at 739–40.

341. DAVIS, *supra* note 339, at 525 n.3; *see also* WINTHROP, *supra* note 244, at 737 (distinguishing summary presidential dismissals from punitive court-martial dismissals).

342. BERDAHL, *supra* note 154, at 128 (indicating that in “the acts of March 3, 1865, and July 13, 1866,” both discussed *infra* in notes 373–74 and the accompanying text, “Congress divested the President of his absolute power of removal at all times”); *see also* DAVIS, *supra* note 339, at 524–25, 527–28 (discussing this statutory change); WINTHROP, *supra* note 244, at 740 (same).

armies and provide navies, but also to establish “Rules for [their] Government and Regulation.”³⁴³ As a textual matter, prescribing mechanisms of military discipline is a straightforward exercise of Congress’s power to establish rules regulating the military. Given that the Constitution expressly assigns this power to Congress, any such statutory provision might override any competing presidential authority to exercise command discipline outside of statutorily prescribed limits. By the same token, statutory limits on discharging military officers might also constitute necessary and proper means of “raising” an army or “providing” a navy; after all, an unremoved officer necessarily remains available for service.

The Supreme Court’s broad holding, noted earlier, that “the Legislative Branch [has] plenary control over rights, duties, and responsibilities in the framework of the Military Establishment”³⁴⁴ could reinforce these textual inferences. As we have seen, furthermore, even absent specific statutes governing military discipline, early authorities like Joseph Story presumed that military discipline would generally occur through the judgments of “military men” rather than the President alone (or impeachment).³⁴⁵ As a practical matter, such disciplinary mechanisms may help sustain military professionalism and protect officers’ careers, thus limiting presidents’ ability to make military service a matter of personal allegiance. That objective accords strongly with the framers’ oft-stated fear that standing armies could undermine republican governance.³⁴⁶

On the other hand, the President does, once again, hold the constitutional status of Commander in Chief. Allowing removal only through courts martial could greatly burden this command prerogative if it meant that presidents could be stuck with officers in whom they had lost confidence. As one Senator put it in a debate discussed further below, “I can not conceive how discipline could be maintained in the Army if the President of the United States could not weed out the unworthy, the unfaithful, and the dishonest.”³⁴⁷ Avoiding exercises of government power without presidential accountability has been a key reason for inferring removal authority in other settings with

343. For an argument that this constitutional provision authorizing Congress to “make rules for the Government and Regulation of the land and naval Forces,” U.S. CONST. art. I, § 8, cl. 14, grants broad authority not only over internal military discipline, but also over the military’s external projection of force, see generally Rudesill, *supra* note 314. See also John C. Dehn, *Why a President Cannot Authorize the Military to Violate (Most of) the Law of War*, 59 WM. & MARY L. REV. 813, 886–89 (2018) (arguing that Congress may bind the President by statute to follow law-of-war restrictions on use of force).

344. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

345. See *supra* note 320 and accompanying text.

346. See, e.g., THE FEDERALIST NO. 26, at 128, 132–33 (Alexander Hamilton) (Ian Shapiro ed., 2009); THE FEDERALIST NO. 41, at 205, 208–09 (James Madison) (Ian Shapiro ed., 2009) (addressing concern).

347. 41 CONG. REC. 1082 (1907) (statement of Sen. Clay).

respect to core executive offices.³⁴⁸ The same functional concern might likewise support recognizing a constitutional removal power over military officials.

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

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

a. The Antebellum Understanding.—Although Presidents in the antebellum Republic appear to have claimed authority to remove all military officers at will, this practice's validity was repeatedly contested.

In an 1846 treatise on military law, Captain William C. De Hart argued that presidents lacked “the legal right . . . to dismiss from the service, without trial, a commissioned officer of the army or navy.”³⁴⁹ According to De Hart, the Decision of 1789 provided no authority for such removal power. Officers in civil departments, according to De Hart, “were appointed by the president as aids in the administration of the government, and for the proper and becoming exercise of all its powers he is justly held responsible.”³⁵⁰ Hence, in the 1789 debates, “it was, in reference to civil officers, conceded, that for the faithful execution of the law, the power of removal was incidental to that duty, and might often be requisite to fulfill it.”³⁵¹ By contrast, because military officers are subject to military discipline for disobedience, they are “the mere actors in a subordinate sphere.”³⁵² “[H]armony of opinions between them and the executive is not requisite for any administrative act or measure of government; and though the president is responsible to the nation for the general direction of military forces, yet he is not so for their individual conduct.”³⁵³ Nor, according to De Hart, was a power of immediate presidential removal practically necessary, “because the legally established tribunal [a court martial] can always be convoked for the doing of justice . . . in all cases of military delinquencies.”³⁵⁴

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

349. WILLIAM C. DE HART, *OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL* 228 (1846).

350. *Id.* at 230–31.

351. *Id.* at 231.

352. *Id.*

353. *Id.*

354. *Id.* at 233.

Echoing De Hart's view, terminated military officers repeatedly objected to being fired without a court martial. In several antebellum opinions, exasperated Attorneys General rejected this view, but the argument, zombie-like, kept coming back. In the first such opinion, in 1842, Attorney General Hugh Legare considered "whether the President of the United States may strike an officer from the rolls, without a trial by a court martial, notwithstanding a decision in that officer's favor by a court of inquiry ordered for the investigation of his conduct."³⁵⁵ "Whatever I might have thought of the power of removal from office, if the subject were *res integra*," Legare opined, "it is now too late to dispute the settled construction of 1789."³⁵⁶ That construction, according to Legare, treated removal as deriving "from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust."³⁵⁷

The Attorney General went on to draw the opposite inference from De Hart. "[I]f necessity is a sufficient ground" for inferring removal authority with respect to civil officers, Legare reasoned, then "[i]t is obvious that . . . the argument applies *a multo fortiori* to the military and naval departments."³⁵⁸ Furthermore, although it may be a "very peculiar hardship" to subject "brave and honorable men" holding military commissions to the "capricious despotism" of discretionary presidential removal, prior English practice, as well as the practice of other "nations jealous of their rights, and earnest in upholding and enforcing their laws against all prerogative," nonetheless recognized "the necessity of such a power in the commander in chief of their army and navy."³⁵⁹

Just a few years later, in 1847, Attorney General Nathan Clifford revisited the issue at greater length. He, too, relied principally on the Decision of 1789, declaring that "the question was distinctly settled by the Congress of 1789 in favor of the power of the President, so far as it relates to the civil officers of the government."³⁶⁰ This understanding, according to Clifford, "was acquiesced in at the time, and has since received the sanction of every department of the government."³⁶¹ Like Legare, moreover, Clifford viewed the Decision of 1789 as a gloss on the nature of executive power, though he seemed to recognize that Congress could impose some degree of tenure

355. Military Power of the President to Dismiss from Service, 4 Op. Att'y Gen. 1, 1 (1842).

356. *Id.*

357. *Id.* at 1–2.

358. *Id.* at 2.

359. *Id.*

360. The Claim of Surgeon Du Barry for Back Pay, 4 Op. Att'y Gen. 603, 609 (1847).

361. *Id.*

protection for civil officers,³⁶² and he also suggested that removal authority should normally be incident to appointment power.³⁶³ At any rate, he devoted much of his analysis to rejecting any distinction between civil and military officers with respect to their removability at will.³⁶⁴

Finally, in 1853, Attorney General Caleb Cushing reiterated the same conclusions all over again. “Reasons of a special nature may be deemed to exist,” he observed, “why the rule [of at-will presidential removal] should not be applied to military, in the same way it is to civil, officers; but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution.”³⁶⁵ Although military officers may “be deprived of their commissions by the decision of a court martial,” Cushing saw this possibility as equivalent to the impeachment option for civil officers.³⁶⁶ “The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President.”³⁶⁷

Curiously, none of these opinions relied squarely on the Commander-in-Chief Clause. On the contrary, these Attorneys General relied principally on the Decision of 1789 and the presumed equivalence of civil and military officers under the pertinent constitutional provisions. In any event, all concluded, over the repeated objections of disgruntled officers, that the President held constitutional authority to remove military officers at will.

By the time of the Civil War, then, presidential removal authority over military officers appeared to be settled; as noted, President Lincoln repeatedly discharged officers on his own authority, sometimes even after a court-martial acquitted them.³⁶⁸ In fact, in 1862, Congress codified this understanding. It enacted a statute providing:

362. *Id.* at 609 (“It is conceded that [civil officers of the government] are removable at pleasure in all cases under the constitution where the term of office is not specially declared.”).

363. *Id.* at 609–11.

364. *See id.* at 610 (finding it “difficult to appreciate the reasoning which seeks to affix a permanent tenure to military office, while it is admitted that all civil officers appointed under the same clause, with the exceptions specially provided for in the constitution, hold their places subject to the executive discretion”).

365. Military Storekeepers, 6 Op. Att’y Gen. 4, 6 (1853).

366. *Id.*

367. *Id.*

368. *See supra* note 341 and accompanying text. Military appointments and promotions during the Civil War were often self-consciously partisan. *See, e.g.,* Timothy J. Orr, “All Manner of Schemes and Rascalities”: The Politics of Promotion in the Union Army, in THIS DISTRACTED AND ANARCHICAL PEOPLE: NEW ANSWERS FOR OLD QUESTIONS ABOUT THE CIVIL WAR-ERA NORTH 81 (Andrew L. Slap & Michael Thomas Smith eds., 2013) (documenting the role of partisan patronage in Civil War military appointments); Andrew J. Polsky, “Mr. Lincoln’s Army” Revisited: Partisanship, Institutional Position, and Union Army Command, 1861–1865, 16 STUD. AM. POL. DEV. 176, 177–78 (2002) (same).

That the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service either in the army, navy, marine corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismissal would promote, the public service.³⁶⁹

Attorneys General in the years afterwards viewed this statute as confirming the earlier executive branch view. “This provision did not,” one wrote in 1868, “clothe the President with a new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him.”³⁷⁰ “So far as [the 1862 Act] gives authority to the President,” another wrote in an 1878 opinion addressing an 1861 dismissal, “it is simply declaratory of the long-established law.”³⁷¹

In the terms employed by some scholars today, legislative and executive practice thus appeared to have “liquidated” the Constitution’s meaning with respect to military removal authority, resolving any textual ambiguity on the question in favor of presidential power.³⁷² Even then, to be sure, it might have been unclear whether such power existed only in the absence of statutory restraints or even in the face of them. Whatever its scope, however, no sooner had this understanding crystallized than Reconstruction destabilized it.

b. The Reconstruction Watershed.—As the Civil War drew to a close, Congress abruptly shifted its view of military removals. First, in March 1865, it enacted a statute allowing any officer dismissed by presidential order to request a court-martial on the charges forming the basis for his dismissal.³⁷³ Then, in July 1866, amid its escalating political conflicts with President Andrew Johnson over Reconstruction policy, Congress went further. As a rider to an appropriations statute, Congress enacted a provision that not only repealed the 1862 statute on removals, but also imposed the following constraint on presidential authority: “And no officer in the military or naval service shall in time of peace, be dismissed . . . except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.”³⁷⁴ Thus, after effectively codifying the Executive Branch view of presidential authority in 1862, Congress adopted statutes at the start of Reconstruction

369. Act of July 17, 1862, ch. 200, § 17, 12 Stat. 594, 596 (1862).

370. Case of Colonel Belger, 12 Op. Att’y Gen. 421, 426 (1868).

371. Dismissal of Officer in the Marine Corps, 15 Op. Att’y Gen. 421, 422 (1878).

372. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (discussing “liquidation” as a theory of interpretation).

373. Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489 (1865) (requiring the President to convene a court-martial if a dismissed officer “shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed”).

374. Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92 (1866).

that effectively codified De Hart's alternative theory. Limitations on peacetime removal of military officers have remained in effect, with minor alterations, ever since.³⁷⁵

Given the context and the statutory exclusion of wartime dismissals, one might think these restraints, when enacted, were effectively governing a form of domestic civil administration. The Army, after all, was initially the federal government's main instrument for enforcing Reconstruction policy in the defeated Confederate states,³⁷⁶ and concerns that President Johnson might disrupt Reconstruction by demobilizing the Army or purging it of disloyal officers might explain this provision's enactment in 1866. The next year, Congress enacted the tenure protections for senior government officials discussed earlier.³⁷⁷ Again, however, Congress's legal theory for Reconstruction governance in the years immediately after the Civil War depended on war powers, not ordinary means of domestic federal governance.³⁷⁸ Accordingly, any notion that these tenure protections reflected a theory of civil rather than military administration is misplaced.

What is more, general restrictions on military dismissals have endured while those on the Secretary of War, General of the Army, and other cabinet officials have not. As noted, the House of Representatives ultimately impeached President Johnson for violating the Tenure of Office Act by removing the Secretary of War, but the Senate failed to convict in part because of constitutional doubts about the statute's validity.³⁷⁹ Following Ulysses Grant's election in 1868, Congress repealed the Army Chief rider and relaxed the Tenure of Office Act (eventually repealing it altogether in 1887),³⁸⁰ but the more general removal restrictions in the 1865 and 1866 statutes remained in effect. They thus continued to govern military removals well after the Army's withdrawal from the South and from law enforcement functions more generally. Indeed, they remain in place to this day, albeit as part of a more reticulated legal structure.³⁸¹ Even if such limitations apply

375. See 10 U.S.C. § 1161 (2018) (generally requiring court-martial sentence for peacetime dismissal of commissioned military officers); *supra* note 331 and accompanying text. A leading treatise on military law from 1920 characterized the 1866 Act as "the first instance, since the organization of the government under the Constitution, in which Congress has expressly prohibited the exercise by the President of the power of removal from office." WINTHROP, *supra* note 244, at 740. The 1866 law rendered the earlier 1865 provision effective only for wartime dismissals. DAVIS, *supra* note 339, at 528 n.1.

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

377. See *supra* notes 193–95 and 233–34 and accompanying text.

378. See *supra* notes 241–42 and accompanying text.

379. SIMPSON, *supra* note 376, at 125–27.

380. Act of July 15, 1870, ch. 294, § 15, 16 Stat. 315, 319 (1870) (repealing Army rider); *Myers v. United States*, 272 U.S. 52, 168 (1926) (discussing revision of Tenure of Office Act followed by full repeal in 1887).

381. See *supra* notes 331–37 and accompanying text.

only during peacetime, constraints on presidential removal authority could significantly constrain presidents' power to staff the military officer corps on which they will depend if war erupts.

c. Curious Judicial and Executive Decisions.—Rather surprisingly, case law appears not to squarely resolve these statutes' constitutionality, although courts and the Executive Branch appear to have largely acquiesced to their validity.

To begin with, in a century-old case addressing the 1866 statute's constitutionality, the Supreme Court upheld it, yet it did so based on reasoning that appears questionable in light of later decisions. Affirming the Court of Claims and adopting its reasoning, the Supreme Court held in *United States v. Perkins*³⁸² that a Naval Academy graduate was an officer and that statutory career protections thus prevented the Secretary of the Navy from unilaterally discharging him without cause.³⁸³ The Court reasoned that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest."³⁸⁴

Although *Perkins* thus supports the statute's validity, the Supreme Court described the case's holding narrowly in *Seila*. According to *Seila*, *Perkins*, along with *Morrison v. Olson*, which upheld tenure protections for an independent prosecutor,³⁸⁵ supports an exception to at-will presidential removal authority "for inferior officers with limited duties and no policymaking or administrative authority."³⁸⁶ Though appropriate to the naval cadet in *Perkins*, that description may well be inapplicable to other military officers with more significant duties who are also statutorily protected from peacetime removal. In addition, in *Free Enterprise Fund*, the Court held that two layers of tenure protection—protection for both the inferior officer and the superior officer with authority to remove him or her—is unconstitutional.³⁸⁷ Justice Breyer pointed out in dissent that military officers enjoy a form of two-layer protection insofar as they are removable only based on the judgments of other military officers serving on courts-martial or boards of inquiry who are also protected from at-will removal.³⁸⁸

More generally, *Seila*, *Free Enterprise Fund*, and other recent cases have focused on accountability to the President as the central constitutional value offended by removal limitations. In *Seila*, for example, the Court

382. 116 U.S. 483 (1886).

383. *Id.* at 484–85.

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

385. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988).

386. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199–2200 (2020).

387. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

388. *Id.* at 543 (Breyer, J., dissenting).

interpreted Article II's Vesting Clause to afford the President "power to remove—and thus supervise—those who wield executive power on his behalf."³⁸⁹ Even *Morrison* upheld removal limitations on an independent prosecutor only because they were functionally justified and the prosecutor's mandate was purportedly limited.³⁹⁰ It did not apply *Perkins*'s logic that Congress's discretion over appointment of inferior officers implies plenary discretion over criteria for their removal.³⁹¹

At the same time, a separate line of decisions appears to recognize constitutional difficulties with limiting presidential removal authority over military officers, but these decisions, too, employ reasoning that is difficult to square with later case law. Beginning in *McElrath v. United States*³⁹² in 1880, the Supreme Court interpreted the 1865 and 1866 statutes to allow replacement of an officer without a court-martial through confirmation of another individual to take the officer's place.³⁹³ As the Court explained in another decision that year, *Blake v. United States*,³⁹⁴ the 1866 statute reflected "the serious differences existing, or which were apprehended, between the legislative and executive branches of the government . . . , in the States lately in rebellion, of the reconstruction acts of Congress."³⁹⁵ Because "[m]ost, if not all, of the senior officers of the army enjoyed, as we may know from the public history of the period, the confidence of the political organization then

389. *Seila*, 140 S. Ct. at 2191–92.

390. *Morrison*, 487 U.S. at 671–72.

391. *Cf.* *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 614 (D.D.C. 2018) ("It is unlikely that the broad and dated language of *Perkins* survived" *Edmond v. United States*, 520 U.S. 651 (1997), "which demands that inferior officers be subordinate to superiors and does not contemplate allowing unremovable officers if 'for the public interest.'" (quoting *United States v. Perkins*, 116 U.S. 483, 485 (1886)), *appeal dismissed*, No. 18-3061, 2018 WL 5115521 (D.C. Cir. Sept. 17, 2018). Even applying *Perkins*'s reasoning, furthermore, that case's holding might not apply to other officers covered by removal limitations who, unlike the naval cadet in *Perkins*, were appointed by the President with or without Senate confirmation and not by a department head. *See, e.g.*, 10 U.S.C. § 624(c) (2018) (allowing appointment by the President alone for promotions to lieutenant or lieutenant (junior grade) in the Navy or First Lieutenant or Captain in the other branches but otherwise requiring Senate confirmation for promotions); *id.* § 531 (similar for original appointments). Insofar as officers appointed with Senate confirmation are nonetheless inferior officers whose appointment Congress could vest in the President alone or the Secretary of Defense, removal limitations might still be valid under the reasoning in *Perkins*. But on the other hand, one might argue that activating the authority to limit removal should require making an affirmative choice to vest appointment authority in the Secretary or President alone. *Cf.* *Myers v. United States*, 272 U.S. 52, 161–62 (1926) (explaining that "[w]hether the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone would make his power of removal in such case any more subject to Congressional legislation than before is a question this court did not decide in the *Perkins* Case" and suggesting that "[u]nder the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it").

392. 102 U.S. 426 (1880).

393. *Id.* at 437–39.

394. 103 U.S. 227 (1880).

395. *Id.* at 235.

controlling the legislative branch of the government [i.e., the Republican Party],” Congress expected that those officers “would carry out the policy of Congress, as indicated in the reconstruction acts, and suppress all attempts to treat them as unconstitutional and void, or to overthrow them by force.”³⁹⁶ The Court thus presumed that the statute’s purpose was to prevent willful presidential depletion of the force, not replacement of some officers with others confirmed by the Senate.³⁹⁷

Although in these and later decisions the Court expressly avoided resolving any constitutional questions,³⁹⁸ its reading of the statute might be understood as a saving construction aimed at preserving presidential authority over the officer corps. If so, however, the Court solved one constitutional difficulty only by creating a worse one, at least from the point of view of later cases. In its landmark 1926 decision in *Myers v. United States*, the Supreme Court invalidated a provision directly conditioning removal of an inferior executive officer on Senate approval, yet its reasoning extends equally to provisions conditioning removal on Senate approval of a successor.³⁹⁹ In fact, the *Myers* majority characterized provisions of the Tenure of Office Act⁴⁰⁰ that allowed removal of officers only upon confirmation of a Senate-approved successor as no different from the removal condition at issue in the case.⁴⁰¹

For its part, the Executive Branch likewise applied the statute without recognizing any difficulty in at least one legal opinion. In 1910, Attorney General George Wickersham declined to apply Attorney General Cushing’s 1853 opinion on presidential removal authority because it was written “long before the enactment [in the 1866 statute], which forbids the dismissal except

396. *Id.* at 235–36.

397. *Id.* at 237 (“There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace [officers] by the appointment of others in their places.”).

398. See *Wallace v. United States*, 257 U.S. 541, 545 (1922) (noting statutory construction and observing that “[t]he validity of these acts has never been directly passed on by this court in any case”); *Mullan v. United States*, 140 U.S. 240, 245–46 (1891) (applying statutory construction from *Blake* and *McElrath*); *Blake*, 103 U.S. at 236 (expressing no opinion as to whether “the power of the President and Senate . . . could be constitutionally subjected to restrictions by statute”); *McElrath v. United States*, 102 U.S. 426, 437 (1880) (likewise avoiding constitutional questions).

399. *Myers v. United States*, 272 U.S. 52, 176 (1926).

400. Act of Mar. 2, 1867, ch. 154, § 1, 14 Stat. 430, 430 (1867) (generally providing that all civil officers “shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified,” but providing that “the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney General” would hold their offices throughout the appointing president’s term unless removed “by and with the advice and consent of the Senate”).

401. See *Myers*, 272 U.S. at 176 (holding that “the Tenure of Office Act . . . , in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so”).

upon sentence of a court-martial. This is a limitation upon the power of removal from office of one who had been legally appointed.”⁴⁰² To the same effect, Attorney General Henry Stanberry opined in 1866 that Congress’s initial statute allowing court-martial override of presidential removals was valid.⁴⁰³ As a matter of practice, furthermore, presidents in the decades since appear to have complied routinely with these limitations on their removal power. Although a leading treatise on military law in 1920 asserted that the 1866 statute was unconstitutional given the contrary view “firmly established” in antebellum practice,⁴⁰⁴ at least one leading practice manual today does not even indicate any possible constitutional problem.⁴⁰⁵

d. An Illuminating Later Debate—Plus a Telling Modern Example.—As for Congress, it extensively debated the scope of presidential removal authority with respect to the military at least one other time after Reconstruction, and its apparent conclusions are illuminating, if again not entirely decisive. A more recent incident, moreover, highlights the value of current statutory protections for officers and enlisted personnel.

To start with the congressional debate, in November 1906, President Theodore Roosevelt impulsively dismissed 167 African-American soldiers in three infantry companies based on reports that some men in the companies had engaged in a “riotous disturbance,” leading to one death, while stationed in Brownsville, Texas.⁴⁰⁶ The evidence supporting these allegations was weak or nonexistent, and historians have judged them to be false; in fact, the soldiers were likely framed by racist town residents who wanted the companies relocated.⁴⁰⁷ Nevertheless, and despite considerable political controversy at the time, Roosevelt obtusely resisted calls to reinstate the men pending a more thorough investigation.⁴⁰⁸

This sorry episode is relevant here because congressional opposition to Roosevelt’s action prompted extensive debate in the Senate over the President’s authority to dismiss military personnel without a court martial. Leading the opposition efforts, Ohio Senator and Civil War veteran Joseph Benson Foraker introduced a resolution to call for a Senate investigation of

402. *Boatswain in Navy—Revocation of Warrant*, 28 Op. Att’y Gen. 325, 328 (1910).

403. *Restoration of Dismissed Military and Naval Officers*, 12 Op. Att’y Gen. 4, 4–5 (1866). For some background regarding this opinion, see Barron & Lederman, *supra* note 83, at 1017.

404. WINTHROP, *supra* note 244, at 744–45.

405. See 6 C.J.S. *Armed Services* § 110 (Mar. 2019) (“[C]ompliance with applicable statutory and regulatory requirements is necessary before an officer validly can be discharged, dismissed, separated, or released from service.”).

406. EDMUND MORRIS, *THEODORE REX* 453–55, 467 (2001).

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

408. MORRIS, *supra* note 406, at 474, 554.

the President's action.⁴⁰⁹ In support of the resolution, Foraker argued at length on the Senate floor that the President lacked legal authority to fire the soldiers without a court martial. As a constitutional matter, Foraker asserted:

[N]o one can question that the Congress has power to prescribe by law what rules and regulations shall govern the Army as to its organization, as to the size of the Army, its maximum, its minimum, as to the number of infantry regiments, the number of cavalry regiments, the number of artillery regiments, and the number of batteries, and the number of men in each of these units of organization; and how, Mr. President, particularly, men shall be enlisted and men shall be discharged from the Army, the terms and conditions upon which they shall be enlisted, the rights that shall accrue to them on account of their service—long service, faithful service—whether or not they shall be recognized by the Government and be rewarded by the Government. All that rests with Congress as part of that power. As a part of that power it is competent for the Congress of the United States to provide that no man shall be summarily discharged from the Army after he has regularly enlisted except upon certain terms and conditions⁴¹⁰

Foraker argued that then-governing statutes in fact imposed such limitations on presidential discharge of enlisted men, much as the 1866 Act did for officers.⁴¹¹

Foraker ultimately succeeded in getting his investigation but only after he agreed to modify the resolution so as not to question the President's legal authority. In the resolution's final form, the Senate resolved to authorize a committee to "ascertain all the facts" regarding the incident, but did so "without questioning the legality or justice of any act of the President."⁴¹² Foraker thus obtained his investigation at the cost of abandoning his legal theory.⁴¹³

Nevertheless, the practical import of this vote is more ambiguous than the Senate resolution might suggest. Though Foraker's most articulate opponents disagreed with his analysis of presidential authority, they pointedly did so on statutory rather than constitutional grounds. In particular,

409. EVERETT WALTERS, JOSEPH BENSON FORAKER: AN UNCOMPROMISING REPUBLICAN 235–36 (1948).

410. 41 CONG. REC. 568 (1906) (statement by Sen. Foraker).

411. *Id.*

412. 41 CONG. REC. 1434 (1907); 41 CONG. REC. 1512 (1907).

413. Sadly, the investigation ultimately came to naught. Over the dissent of four Senators, including Foraker himself, the investigative committee upheld the President's action. MORRIS, *supra* note 406, at 511. Foraker then proposed a bill to create a military board of inquiry to investigate the terminations. But though Congress ultimately enacted a substitute that convened a board to consider the soldiers' eligibility for reenlistment, the board in the end concluded that only fourteen of the men could reenlist. WALTERS, *supra* note 409, at 245–46.

Senator John Coit Spooner of Wisconsin argued, despite professing sympathy for the discharged soldiers,⁴¹⁴ that the President held statutory authority to terminate their enlistments.⁴¹⁵ Accordingly, Spooner argued, “[i]t is not necessary to discuss whether the President, as Commander in Chief possesses inherent power to terminate the contract of enlistment.”⁴¹⁶ But even Spooner acknowledged Congress’s extensive power to regulate and structure the military. At one point, he observed:

The grounds upon which men may be discharged [from the Army] is within the constitutional capacity of the Congress. Whether any man can be discharged for offense without a trial is entirely within the constitutional competency of Congress. Whether the President shall be given the right to dismiss an officer at will without trial is for Congress to say.⁴¹⁷

Furthermore, despite adding language on presidential authority to Foraker’s resolution, the Senate rejected several substitute resolutions that would have asserted more directly that the President held authority to order the discharges.⁴¹⁸ Thus, although President Roosevelt claimed initially to the Senate that he discharged the soldiers in “the exercise of my constitutional power and in pursuance of what, after full consideration, I found to be my constitutional duty as Commander in Chief of the United States Army,”⁴¹⁹ the Senate pointedly declined to endorse this view and its claimed power to investigate the discharges arguably cast doubt upon it.

Overall, then, to quote Edward Corwin, this incident illustrates not only “the President’s residual power over the forces” but also that power’s “limits.”⁴²⁰ At most, it leaves ambiguous whether the President holds preclusive authority to remove military personnel, at either the officer or enlisted level, in the face of statutory restrictions requiring a court martial.

Decades later, another racial incident played out differently—precisely because governing statutes gave enlisted personnel clear protection. In 1972, after a number of African-American sailors on a particular ship occupied the ship’s mess decks to angrily protest real or perceived discrimination against them, President Richard Nixon relayed to the Chief of Naval Operations

414. 41 CONG. REC. 1084 (1907) (statement of Sen. Spooner).

415. 41 CONG. REC. 1134 (1907) (statement of Sen. Spooner).

416. *Id.* (statement of Sen. Spooner). On the merits, Spooner asserted that the Senate lacked power to override a discharge decision within the President’s power and that, in consequence, it also lacked competence to conduct the requested investigation. 41 CONG. REC. 1086 (1907) (statement of Sen. Spooner).

417. 41 CONG. REC. 105 (1906) (statement by Sen. Spooner) (addressing earlier resolution requesting documents relating to the discharges from the Executive Branch).

418. 41 CONG. REC. 1503, 1508, 1511–12 (1907).

419. 41 CONG. REC. 549 (1906) (message from President Theodore Roosevelt).

420. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984* 295 (5th rev. ed. 1984).

(CNO) through his National Security Adviser Henry Kissinger that he “wanted the . . . protesters to receive dishonorable discharges immediately if not sooner.”⁴²¹ Because of statutory due process requirements for such punishment, the CNO considered this order “clearly illegal” and refused to carry it out.⁴²² In response, the President apparently ordered the Secretary of Defense to fire the CNO, but the Secretary refused as well.⁴²³ Thus, in this case, statutory limitations on punitive discharge, combined with the need to carry out directives through the chain of command, effectively protected enlisted personnel against a president’s vengeful commands.

B. Implications

What to make of this history? At this point, despite considerable ambiguity and mixed signals, the overall pattern of conduct by all three branches suggests general acquiescence to Congress’s authority to limit, at least during peacetime, presidential removal without a court martial or other procedural protections governing promotions and administrative discharges. The theory suggested in *Perkins* in the late nineteenth century to explain this practical result, however, appears internally unsatisfactory and inconsistent with subsequent case law, while the limiting construction reflected in *McElrath* and its progeny only exacerbates the statute’s arguable constitutional problems.

An alternative theory, suggested by De Hart’s antebellum treatise and reflected in subsequent congressional debates, offers a better explanation for the statute’s validity: Although Congress generally may not displace the President’s command authority altogether, it can displace the specific enforcement mechanism of removal, even with respect to personnel discharging operational functions, so long as it provides a robust alternative disciplinary mechanism for effectuating the President’s directives.⁴²⁴ Removal, in other words, may be “sufficient” to ensure adequate presidential control of military officers, but it is not also “necessary”; Congress may displace it with alternative disciplinary mechanisms.⁴²⁵ By authorizing

421. HERSPRING, *supra* note 264, at 211 (quoting ELMO R. ZUMWALT JR., ON WATCH: A MEMOIRE (1976)).

422. *Id.*

423. *Id.* at 211–12.

424. *Cf.* MCCONNELL, *supra* note 47, at 165 (“In the military, unlike the civil service, disobedience to lawful orders is actually a criminal offense and may be punished by flogging (as of 1789), imprisonment, or even death—making a plenary power of removal unnecessary for maintaining the discipline of the chain of command.”).

425. *Cf.* Rao, *supra* note 53, at 1208, 1244–47 (advocating this view for civil officers). Paralleling the analysis here in some respects, Rao defends for-cause removal limitations for certain inferior civil officers, so long as insubordination is understood to provide cause for termination. *Id.* at 1244–47. She does not address the military specifically, however, and appears to extend this

courts-martial to punish disobedience and insubordination, Congress has preserved strong incentives to comply with lawful commands—indeed, incentives arguably stronger than any that exist in civil administration. At the same time, however, Congress has protected officers' positions from arbitrary removal by precluding such punishment without military due process, even if the President has lost confidence in a particular officer for reasons other than such disobedience.⁴²⁶

Though generally alien to debates in the civil and administrative context, the Supreme Court hinted at this view in *Free Enterprise Fund*. There, although declining to opine on removal limitations for military officers, the Court distinguished them from the double-layer tenure protection at issue in the case by noting that military officers “are broadly subject to Presidential control through the chain of command and through the President’s powers as Commander in Chief.”⁴²⁷ In any event, understanding discipline as a constitutionally adequate substitute for removal here accords with the constitutional text and structure at least as well as arguments for inferring preclusive presidential removal authority.

This view also, at least potentially, establishes a valuable equilibrium well-suited to the military context. While strongly enforcing a general norm of command discipline, it ensures that officers who disobey directives they perceive to be unlawful will lose their position only if the military justice system fails to back up their judgment. In addition, insofar as the function at issue is vested in their individual office, officers could resist carrying out directives they consider profoundly unwise, on pain of potentially incurring later punishment for insubordination.⁴²⁸ President Nixon’s inability to obtain a punitive discharge for protesting sailors illustrates how valuable this legal structure may be in protecting military careers and preventing unlawful orders from taking effect.

Amid the exigencies of war or another declared emergency, Congress has preserved a different equilibrium that more strongly favors command authority, making dismissal by court-martial optional rather than

theory only to situations in which “the appointment of [the] officer is vested in the head of a department.” *Id.* at 1246. That limitation would exclude some military officers whom current law protects from removal without a court martial.

426. Current statutes do permit review and eventual removal of officers due to deficient performance. 10 U.S.C. §§ 1181, 1182, 1184 (2018); *see also supra* subsection III(A)(1)(b)(i).

427. *Free Enter. Fund v. Pub. Co. Accounting Bd.*, 561 U.S. 477, 507 (2010).

428. In his study of military “shirking,” Peter Feaver reports that court-martial “conviction rates remained high throughout the Cold War,” although “these high rates probably reflect a selection effect, as commanders pursued courts-martial only in the cases where they were fairly certain that the convictions would hold.” PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 167 (2005) (citing other studies).

mandatory.⁴²⁹ Even outside such contexts, moreover, presidents and other senior officers within the chain of command generally hold authority to relieve officers of particular duties, such as command of a ship or unit. Nevertheless, Congress's choice to restrict discharging officers without cause in peacetime provides important career protection to officers and may in some instances place valuable friction between presidential directives and on-the-ground actions. For all the reasons discussed, this statutory structure should stand on solid constitutional ground; any argument to the contrary is mistaken.

Could Congress go further and require courts-martial for removal even during wartime or a declared emergency? Although in principle the deterrent effect of criminal sanctions should still suffice to ensure obedience, preventing displacement of a recalcitrant or incompetent officer in battlefield circumstances could more concretely interfere with the President's ultimate constitutional authority to direct military operations. Yet this problem could itself be solved by providing (or presuming) some mechanism for temporary suspension or relief from specific duties without permanent removal. Peacetime limitations on removal already mean that presidents may enter an emergency with an officer corps they would not have chosen; to quote one Defense Secretary's glib aphorism, "You go to war with the army you have—not the army you might wish to have."⁴³⁰ Extending removal limitations beyond peacetime into war, if Congress so chose, would thus be more a change of degree than of kind and should also be constitutional.

IV. Office-Holding Beyond the Military

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

429. One early treatise, arguing that the President held constitutional removal power but should generally allow dismissal by court-martial, identified the benefits of this balance:

A mode of proceeding is interwoven with the military organization of great benefit to the sound constitution of the army. Although the president is unquestionably authorized to deprive any military officer of his commission at pleasure, yet the established practice is, to allow the individual, whose conduct has given dissatisfaction, an opportunity of explaining and vindicating it, by means of a regular tribunal, before he is dismissed, suspended, or even reproved. The same usage prevails in the navy.

WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 165 (photo. reprinted 2003) (2d ed. 1829).

430. DONALD RUMSFELD, *RUMSFELD'S RULES* 316 app. B (2013).

A. Interring the Unitary Executive Branch

First and foremost, Congress's broad authority over military offices should undermine the strongest versions of "unitary" executive-branch theory. Under this theory, all executive power necessarily vests in the President, even when placed by statute in a particular subordinate officer, and presidents accordingly may direct how statutory duties are performed or even (on some accounts) perform those duties personally on their own.⁴³¹ One early Federalist treatise-writer went so far as to assert that "the president is not confined in his executive functions to the use of a particular department"; governmental actions "are equally [the President's] acts, whether they emanate from [one department], or any other department."⁴³² According to a more recent statement of this view, the President, as the unitary receptacle of executive power, necessarily holds authority to "completely withdraw" any executive power vested in a subordinate officer.⁴³³ "Once [the President's] authority is withdrawn," on this account, "the President must make all those decisions previously vested by statute in the now constitutionally disempowered officer, at least until the officer leaves office (and a new officer is appointed) or Congress, by statute, allows some other executive officer to act as the President's agent over those matters."⁴³⁴

The Supreme Court seemed to embrace this theory in its recent *Seila* decision. Though this reasoning was not essential to its result, the Court characterized the President as the sole repository of "executive Power" and subordinate officers as mere assistants to the President, "whose authority they wield."⁴³⁵ To the extent *Seila* thus implies that the President can always exercise executive powers personally, or even redelegate them at will within the Executive Branch, the analysis presented here shows that *Seila* is mistaken even for the military, which has conventionally been assumed to be an area of maximum presidential power. In fact, history and practice confirm that Congress can vest particular military functions and duties in particular officers, who then must themselves perform those functions and duties. What is more, even if it cannot create the same sort of tenure protection afforded to independent administrative agencies, Congress can calibrate the sanctions for those officers' disobedience, either leaving in place the default mechanism of removal or providing more robust forms of punitive discipline.

Perhaps unlike in the civil and administrative context, military officers are normally subject to presidential directive authority by virtue of the President's position as Commander in Chief. In the civil and administrative

431. See *supra* note 54 and accompanying text.

432. RAWLE, *supra* note 429, at 165–66.

433. Calabresi & Prakash, *supra* note 54, at 598–99.

434. *Id.* at 599.

435. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020).

context, background normative and constitutional principles may or may not support presuming such presidential power,⁴³⁶ and non-unitarians maintain that Congress may, through tenure protections, altogether displace presidential control over exercises of legal discretion with respect to civil administration.⁴³⁷ Some history and practice suggests Congress could go that far for the military as well, at least in some contexts. During Reconstruction, as we saw, Congress made the General of the Army removable only with Senate consent,⁴³⁸ and even today certain military judges enjoy tenure protection and officers involved in certain appointment selections and military justice functions are insulated from command discipline in their discharge of those functions.⁴³⁹

But even if the President, as Commander in Chief, must hold power to issue binding commands with respect to most military functions, Congress's authority to vest duties and calibrate sanctions for disobedience still undermines any account of the military as strongly unitary. As a practical matter, by vesting authority in a particular officer, especially a civil officer within the military chain of command such as the Secretary of Defense, and providing removal as the President's means of effectuating directives, Congress may create a legal structure that is functionally little different from vesting power in a civil officer, such as the Attorney General or Secretary of Agriculture, without granting those officers tenure protection.

Again, history provides examples not only of Congress adopting such structures, but also of such structures mattering. Early nineteenth-century statutes vesting certain military support functions in the Secretary of War⁴⁴⁰ arguably displaced direct presidential control over those functions.⁴⁴¹ At the least, they rendered the secretaries answerable to the President only through removal for their performance of those functions. During Reconstruction, though district commanders were removable at will, statutes vesting substantial military powers in those officers, particularly when interpreted by then-General Grant to preclude direction from him or the President in performance of those functions, gave enterprising generals like Philip

436. Compare Stack, *supra* note 85, at 295 (arguing against presumed directive authority), and Percival, *supra* note 53, at 2490 (same), with Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (arguing in favor), and Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 728–30 (2016) (summarizing the debate and defending Kagan's view).

437. *E.g.*, *Seila*, 140 S. Ct. at 2224–27 (Kagan, J., dissenting).

438. See *supra* notes 193–95 and accompanying text.

439. See *supra* notes 126–29 and accompanying text.

440. See *supra* notes 144 and 183 and accompanying text.

441. 56 CONG. REC. 5406 (1918) (statement of Sen. Shields) (characterizing these functions as not subject to presidential “control or direction” absent new legislation such as the then-proposed Overman Act).

Sheridan substantial power to shape on-the-ground developments.⁴⁴² In the Nixon Administration, the Secretary of Defense and CNO could block an unlawful order to discharge enlisted personnel without proper cause.⁴⁴³ And more recently Defense Secretary Esper's position in the chain of command reportedly enabled him to resist President Trump's directive to deploy troops to suppress domestic unrest.⁴⁴⁴

Furthermore, much as in civil and administrative contexts, prudent exercise of Congress's power to structure chains of command can meaningfully shape executive policy and impose constraints on presidential action, even if officers are ultimately subject to command discipline. For good or ill, the Goldwater–Nichols structure of combatant commands creates different incentives and pathologies from the pre-World War II structure of separate War and Navy Departments.⁴⁴⁵ Likewise, in the 1947 National Security Act, Congress could preserve the Marine Corps and Naval Aviation, with their distinct competences and esprit de corps, by legislating their continued existence.⁴⁴⁶

These conclusions with respect to the military should only strengthen arguments that Congress holds power to assign duties and structure disciplinary mechanisms in civil administration. Having taken the unitary theory's strongest fortress, non-unitarians might now more easily conquer the territory beyond. Yet the argument should give pause even to those, apparently including Chief Justice Roberts and a majority of the Supreme Court, who remain committed to a unitary Executive Branch in civil administration. From that point of view, civil administration might be distinguished from military examples on various grounds, including Congress's specific textual powers, longstanding practice, and the special functional need for civilian oversight. But drawing such distinctions would require a considerable shift in the current terms of debate: it would suggest that, contrary to much modern commentary and executive-branch bluster, Congress's power to structure the military is especially strong, not especially weak.

B. Convention and Constraint

A second, related implication bears on current debates over maintaining responsive and accountable government amid turbulent and polarized politics. Recent scholarship has highlighted the importance of “convention,” as opposed to hard constitutional law, in our federal government's practical

442. *See supra* subsection II(B)(4)(b).

443. *See supra* notes 421–23 and accompanying text.

444. *See supra* note 15 and accompanying text.

445. *See supra* section II(B)(8).

446. *See supra* section II(B)(7).

operation. Conventions, in this sense, “are extrajudicial unwritten norms that are enforced by the threat of political sanctions, such as defeat in re-election, retaliation by other political institutions and actors, or the internalized sanctions of conscience.”⁴⁴⁷ As recent work has emphasized, norms and understandings of this sort may do important work buffering maximal interbranch conflict within our separation-of-powers system, thus enabling smoother and more responsive governance.⁴⁴⁸ By the same token, conventions may help preserve important values and policy commitments—apolitical law enforcement, for example, or stable monetary policy—even when elected officials have a short-term political interest in violating them. Insofar as tribal politics encourage political actors to play for the win in each case even at the expense of good governance, these effects may be particularly important in our era of acute polarization.⁴⁴⁹

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

Even without any legal separation between the President’s wishes and actual discharge of governmental authorities, the President’s practical dependence on governmental agents to carry out desired policies might impede unilateral presidential power. As one study of civil–military relations proposes, when the military’s preferences diverge from the President’s, officers face a choice between obeying or dragging their feet based on their “expectations of whether shirking will be detected and, if so, whether civilians will punish them for it.”⁴⁵⁰ Even if some potential for such resistance

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

448. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 8–9, 106 (2018) (emphasizing importance of “forbearance” to the stability of American democracy).

449. For a sampling of political science literature on current polarization, see generally ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* (2018); MORRIS P. FIORINA, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE* (2017); and NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2d ed. 2016).

450. FEAVER, *supra* note 428, at 3.

is inevitable, however, Congress can ratchet this potential up or down through its choices of administrative design and allocation of military duties to particular offices. Doing so may then increase or decrease the chances that conventions will develop regarding particular officers' performance of their duties.

By contrast, if all powers of government could be exercised by the President personally, then the President would be limited only by his or her individual electoral accountability and by the need to find some officer willing to carry out presidential directives. From this point of view, Congress's underlying power to vest authorities in offices may be vitally important to sustaining stable, responsive, and public-spirited government in our era, in both military and civil or administrative contexts. Indeed, this power may well be even more important to those goals than the more contested authority to limit at-will removal, though the latter has received far more scholarly attention.⁴⁵¹

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

It is also true that norms and conventions themselves may be either good or bad. While some norms of government behavior protect the public interest, others may impair it or otherwise deserve repudiation. In particular, too strong a norm of military independence from civilian control could be frightening in its implications.⁴⁵²

Nor are current arrangements necessarily optimal. In fact, one recent appraisal has condemned the current structure of military office-holding

451. Adrian Vermeule has argued that agencies' real independence is itself a matter of convention rather than statutory law. Vermeule, *supra* note 447.

452. In one famous example, during the Korean War, General Douglas MacArthur defied President Truman's policies regarding conduct of the war. FEATHER, *supra* note 428, at 128–29. In another example, Air Force General Curtis LeMay reportedly indicated during the Cold War that he would not necessarily abide by civilian limitations on launching nuclear weapons—a prospect that, absent legislation vesting such authority, would appear undesirable, to put it mildly. *Id.* at 129. In one scholar's assessment, Truman's firing of MacArthur “proved crucial in shaping military expectations of punishment throughout the Cold War.” *Id.* at 164.

under the Goldwater–Nichols Act as pathological.⁴⁵³ Current statutory arrangements, according to this critique, give combatant commanders too much effective authority over foreign policy, while also giving the service secretaries too little incentive to match procurement policies to the fighting forces’ real needs.⁴⁵⁴ On the other hand, amid current political vicissitudes, some policy inertia could conceivably carry benefits as well as costs.⁴⁵⁵ But whatever Goldwater–Nichols’s ultimate merits, this critique of the law highlights, once again, the powerful effects of agency design on policy outcomes, even in areas of presumed presidential prerogative like the military.

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

C. *Securing the Civil Service*

A third implication relates to the federal civil service. Recent scholarship has called attention to an arguable mismatch between current appointments practice and the range of positions apparently treated as “officers of the United States” under the Appointments Clause as a matter of original usage and early practice.⁴⁵⁶ In its 2018 *Lucia* decision, the Supreme Court confronted this question but effectively sidestepped it,⁴⁵⁷ leaving the door open to further waves of litigation challenging administrative actions by

453. Nevitt, *supra* note 290, at 988–89. For other critical appraisals of the statute, see, for example, Derek S. Reveron & Michelle D. Gavin, *America’s Viceroys*, in *AMERICA’S VICEROYS: THE MILITARY AND U.S. FOREIGN POLICY*, *supra* note 275, 1, 2–3 and Christopher M. Bourne, *Unintended Consequences of the Goldwater-Nichols Act*, *JOINT FORCE Q.*, Spring 1998, at 99–100.

454. See Nevitt, *supra* note 290, at 948–49, 965–67 (advancing this view).

455. Cf. HERSPRING, *supra* note 264, at 372 (discussing General Wesley Clark’s ability to shape policy in the Kosovo conflict because “he knew he had the authority of Goldwater–Nichols behind him”); Stephen D. Wrage, *U.S. Combatant Commander: The Man in the Middle*, in *AMERICA’S VICEROYS: THE MILITARY AND U.S. FOREIGN POLICY*, *supra* note 275, at 185, 185–86 (arguing that concerns about the combatant commanders’ influence on foreign policy are overblown because the commanders have limited authority and are highly accountable).

456. See generally Mascott, *supra* note 65 (analyzing the original meaning of “officers of the United States” as it relates to current doctrine); Phillips et al., *supra* note 65 (same).

457. See *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) (criticizing the majority for relying on precedents that “do not provide much guidance” rather than look to the original public meaning).

civil-service officials.⁴⁵⁸ At the same time, the Court in *Free Enterprise Fund* suggested without deciding that removal limitations may be more suspect for officers (whether principal or inferior) than for employees,⁴⁵⁹ and following the *Lucia* decision, President Trump issued an executive order casting doubt on competitive exam-based appointments for certain civil officers.⁴⁶⁰

The military history discussed here suggests that any expansive inferences about removal from *Lucia* and the Appointments Clause would be overdrawn.⁴⁶¹ As discussed earlier, the set of military positions subject to the Appointments Clause is generally broader than in the civil service. Whereas today only the most senior civilian positions are typically filled in accordance with the Appointments Clause, current governing authority uniformly treats all commissioned military officers as “officers of the United States” under the Appointments Clause.⁴⁶² As OLC observed in a Clinton-era opinion, this mismatch is difficult to explain: “It is at least arguable . . . that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees [rather than officers].”⁴⁶³ To the extent that is true and recent historical scholarship is correct, military practice may have preserved a broader early understanding of “officers” even as practice diverged elsewhere.⁴⁶⁴

458. See Jennifer L. Mascott, “Officers” in the Supreme Court: *Lucia v. SEC*, CATO SUP. CT. REV., 2017–2018, at 305, 336 (discussing pending litigation and noting a “potential torrent” of further cases).

459. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 (2010); see also *id.* at 540–41 (Breyer, J., dissenting) (“I still see no way to avoid sweeping hundreds, perhaps thousands of high-level Government officials within the scope of the Court’s holding, putting their job security and their administrative actions and decisions constitutionally at risk.”).

460. Excepting Administrative Law Judges from the Competitive Service, Exec. Order No. 13843, 3 C.F.R. 844 (2019).

461. Cf. Mascott, *supra* note 65, at 548–58, 563–64 (noting that “in modern practice we seem to have settled on the expectation that any Article II officer appointment is necessarily a political one” but suggesting that this inference may not be sound).

462. See *supra* subpart I(B).

463. The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 144 n.54 (1996).

464. See Mascott, *supra* note 65, at 528–30 (discussing early statutes regarding the military). Military practice might be distinguished from civil administration on various grounds. In particular, one might interpret current practice as reflecting an implicit view that any authority to command military forces in combat, even down to the level of platoons and similar units, is categorically “significant” for Appointments Clause purposes. See Constitutional Separation of Powers, 20 Op. O.L.C. at 144 n.54 (“Even the lowest ranking military or naval officer is a potential commander of United States forces in combat—and, indeed, is in theory commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.”).

OLC has also offered two other theories, though they seem less compelling. First, the Office has observed that “[c]ertain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today.” *Id.* This theory may have some utility in explaining why certain clerical and administrative positions are no longer treated as offices. In an era of electronic communications and records, for example,

Whatever the scope of Appointments Clause officers, however, military practice should put to rest arguments that an expanded definition of this term in civil and administrative contexts necessarily undermines civil service protections that currently govern the hiring, firing, and disciplining of administrative staff. On the contrary, as we have seen, robust statutory constraints on appointment, promotion, and removal have long applied to military officers. There is accordingly little reason to think the Appointments Clause precludes applying comparable restraints on nonmilitary office-holding.

With respect to hiring (appointments), historic Executive-Branch opinions have in fact suggested that precisely the same degree of limitation is permissible for civil and military offices.⁴⁶⁵ One treatise writer early in the twentieth century even defended civil-service appointment constraints based on historic military analogues.⁴⁶⁶ Accordingly, to the extent the statutory structure for military offices has successfully professionalized the appointment process while also preserving an appropriate degree of ultimate presidential discretion, the broader structure of military statutes could provide a model for doing the same even if courts ultimately embrace an expanded reach for the Appointments Clause within the civil service.⁴⁶⁷

As a matter of fact, some civil-service statutes already require cause to terminate some officers and employees but treat insubordination as cause for

routine bookkeeping and paperwork functions may lack sufficient responsibility and discretion today to warrant treatment as offices, even if under different technological conditions they carried greater significance. But the theory seems not to explain military practice terribly well. Even on the battlefield, given changes in transportation and communications technology, junior military officers today are probably more closely controlled and supervised than were their predecessors. Second, the Office suggested that military appointments reflect a subconstitutional practice rather than a controlling understanding of what the Constitution itself requires. *Id.* On this view, although Congress has consistently chosen to require appointment of military officers in a manner consistent with the Appointments Clause, it could just as well allow appointment of at least some commissioned military officers by other means. This view could readily reconcile military and nonmilitary practice, but it encounters the difficulty that neither the Executive Branch nor the courts have understood the military appointment process to be optional. As noted, both have instead defined the category of “Officers of the United States” to include all commissioned military officers, and Congress’s own unbroken practice supports that understanding. *See supra* note 69 and accompanying text.

465. *See, e.g.*, Civil-Service Commission, 13 Op. Att’y Gen. 516, 516, 520–21, 524 (1871) (indicating that Congress’s authority “to prescribe qualifications [for offices] is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment”).

466. 2 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1180 (1910).

467. Justice Breyer called attention to removal limitations for both military officers and civil-service officials in his *Free Enterprise Fund* dissent. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 543 (2010) (Breyer, J., dissenting).

termination or other discipline through an administrative process.⁴⁶⁸ If such structures are permissible for the military, as I have argued, then they should be even more defensible for the civil service. After all, no constitutional provision as specific as the Commander-in-Chief Clause prescribes presidential command authority over civil and administrative functions. Indeed, insofar as civil offices are created and defined entirely by statute, subject only to a requirement that the President retain authority to ensure faithful execution of the laws, Congress should hold still broader authority to limit the President's authority to remove such officers at will.

Again, appointment and removal protections might or might not be appropriate or valid for all positions within civil administration. For the upper reaches of the civil service, as in the military, accountability concerns, if not hard constitutional doctrine, might support preserving greater discretion with respect to appointments and removals. Likewise, just as in the military setting, removal restrictions even for officers lower in the bureaucracy might be valid only if sufficiently robust alternative disciplinary mechanisms are available. I will not attempt to resolve all such questions here. Nor do I express any view on whether professionalization is more or less appropriate with respect to the military or the civil service. At present, concerns about corrupting administrative expertise through partisan appointments may appear paramount to some, yet at other times in the past concerns about degrading military competence through patronage appointments were at least as salient.⁴⁶⁹

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

D. Reconstruction's Centrality

A last broad implication of my analysis relates to Reconstruction and the widespread neglect, if not deprecation, of its lessons for separation of powers. As my analysis throughout has highlighted, Reconstruction proved to be a watershed for key features of military office-holding and the constitutional understandings surrounding it. Furthermore, despite departing in some ways from earlier understandings, many of these changes have proven to be enduring and time-tested features of constitutional governance

468. For discussion of these statutes and relevant case law, see Barnett, *supra* note 314, at 1374–75, 1379–80.

469. See GOSS, *supra* note 177, at xi–xix (discussing “political generals” during the Civil War).

ever since. Nor are these changes alone in having such continuing importance: among other things, key limitations on military involvement in law enforcement,⁴⁷⁰ on spending in excess of annual congressional appropriations,⁴⁷¹ and on military officers performing civil duties⁴⁷² date from this period.

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

Conclusion

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

470. Act of June 18, 1878, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385) (Posse Comitatus Act).

471. Act of June 12, 1870, § 7, 16 Stat. 230, 251 (1870) (codified as amended at 31 U.S.C. § 1341) (Anti-Deficiency Act).

472. Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319 (1870) (codified as amended at 10 U.S.C. § 973(b)) (Civil Office Ban).

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