The Judges' Book

Volume 6 Article 6

2022

Constitutional Law: Congress's Power Over Military Offices

Zachary S. Price

Constitutional Law

Congress's Power Over Military Offices

Zachary S. Price[1]

Introduction

Congress's power to structure administrative agencies and executive offices is an important constraint on modern presidents. In particular, 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. As one example illustrating this power's significance, President Donald Trump did not fire the special prosecutor investigating his presidential campaign because the power to fire belonged to the Attorney General (or Acting Attorney General), not the President.

Although scholars of administrative law have long recognized the importance of this congressional power and debated its proper contours, parallel questions regarding military offices 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. For its part, the executive branch, in legal opinions, signing 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

---

[1] Excerpted and adapted from Zachary S. Price, *Congress's Power Over Military Offices*, 99 TEX. L. REV. 491 (2021).

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

U.S. forces in combat and even on how many soldiers or sailors must compose units.

This pro-presidential consensus is mistaken. It is true that the President, as Commander in Chief, has some directive authority over U.S. military forces in the field, and military officers hold a duty to obey lawful presidential commands. But Congress retains the power to structure the offices, chains of command, and disciplinary mechanisms through which the President's authority is exercised. Just as in the administrative context, Congress may vest powers and duties—authority to launch nuclear weapons or a cyber operation, for example, or command over units—in specified offices, even regarding the use of force. Further, although the Constitution gives presidents removal authority over these officers as a default means of command discipline, Congress may to some degree supplant or 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 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, though perhaps at odds with modern intuitions about the President's Commander-in-Chief power, accord with both the Constitution's plain text and the broad contours of actual practice over the past 150 years. To demonstrate this point, this chapter first discusses the text and history supporting congressional authority to assign military duties by statute and then turns to support for limiting presidential power to terminate military officers at will.

Congress's Power to Structure the Military by Assigning Duties to Particular Offices

The constitutional text and historical practice support inferring broad congressional authority to structure the military by assigning duties to particular offices.

A. Support from Constitutional Text and Structure

Although Article II makes the President "Commander in Chief," Article I 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. It also empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." More generally, the Constitution's Appointments Clause provides that "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, a department head, or federal court. In addition, Congress holds overall authority to structure the executive branch by virtue of the Necessary and Proper Clause, which empowers it to pass legislation necessary and proper to carrying into execution "all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

With respect to powers vested in civil and administrative offices, the prevailing scholarly view is that the President is ultimately an "overseer" and not a "decider."[3] In other words, although the President may oversee how officers discharge their duties, and perhaps remove them from office for unsatisfactory performance, authorities vested in an officer by statute ultimately belong to that officer, not the President. On this view, Congress holds authority not only to create offices as the Appointments Clause contemplates, but also, in conjunction with the Necessary and Proper Clause, to vest those offices with functions and duties that then belong to the individual officer, not the President.

With respect to the military, the executive branch has repeatedly asserted that Congress has no power to set military duties. "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 S. Black wrote to

[3] Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

President James Buchanan in 1860,[4] and later presidents have nodded in agreement.[5] Commentators have largely agreed.[6]

---

[4] Mem. of Capt. Meigs, 9 Op. Att'y Gen. 462, 468 (1860).

[5] *See, e.g.*, Legal Auth. Supporting the Activities of the Nat'l Sec. Agency Described by the President, 30 Op. O.L.C. 1, 37–38 (2006) ("[A]n act of Congress, if intended to constrain the President's discretion in assigning duties to an officer in the army, would be unconstitutional."); Stmt. on Signing the Nat'l Defense Auth. 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 U.S. 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 U.S., 40 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").

[6] *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) ("[T]he 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."); Strauss, *supra* note 3, at 738 ("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."); John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2280 (2009) ("Even if inferior officers refused to carry out presidential orders, the Commander-in-Chief Clause would seem to include the power to promote or demote officers and to make duty assignments."); *cf.* Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. 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").

Yet the textual arguments for congressional power to assign military duties are at least as strong. The language governing office-holding in the Appointments Clause and Necessary and Proper Clause makes no distinction between military and nonmilitary offices. And even if one doubted Congress's power to allocate statutory authorities among civil and administrative officers, Congress's specific constitutional powers over the military strengthen the inference of 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." Assigning duties and responsibilities within the military chain of command may be a potent means of governing and regulating the military, and 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." The Supreme Court has confirmed the breadth of Congress's authority: "It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment . . . ."[7]

Perhaps the Commander-in-Chief Clause's language suggests 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" implies some power to issue affirmative commands. But with respect to whether Congress may assign duties by statute, the provisions are indistinct: both suggest that primary government power will be exercised by others. In other words, just as the obligation to ensure faithful execution implies that someone else besides the President does the executing, serving as commander implies having something to command. The framers at the Philadelphia Convention debated whether the President should even be allowed to exercise direct command over troops in the field. Although President Washington did so during an uprising in western Pennsylvania known as the Whiskey Rebellion, the norm across American history has been to command troops only indirectly, through orders to subordinate commanders in the field.

---

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

This practice reinforces the institutional separation between presidential command and actual military activity that the text itself implies.

B. Historical Practice in Statutes and Executive Behavior

As for government practice, statutes today regulate military offices with respect to everything from appointments and promotions to duties, assignments, removals, and other forms of discipline, often to a degree well beyond the norm for civil and administrative officers.

Historically, Congress has repeatedly exercised broad authority to structure the military by defining the duties of offices and the command relationships between them. Some of the earliest military-organization statutes specified the authorities that senior officers held. One early statute, for example, transferred navy-related authorities from the previously created office of Secretary of War to the newly created position of Secretary of the Navy, making clear that the Secretary of War could no longer exercise them. This statute's sharp division between Army and Navy commands persisted, with only limited interruptions, and with important institutional consequences, until 1947.

Some of those early statutes specifying officer authorities also specified that they would be exercised according to presidential direction. Although specifications for presidential control might be understood to endorse a broad view of presidential control over military functions, the very specification of presidential directive power more naturally implies congressional authority to withhold or modify, or at least regulate, such power if Congress so desires.

Other statutes vested duties in subordinate offices. In 1813, for example, Congress assigned 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." The executive branch seems to have accepted this congressional power to structure the military by defining officers' duties. In 1820, the Attorney General concluded that although the President generally "may suspend, modify, or rescind, at pleasure, any order issued by the lieutenant-colonel of the marine corps, or any other subordinate officer," that presidential authority was limited "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."[8] During the Mexican-American War, President James K. Polk complained in his diary that he could not give any general in whom he had confidence overall command of military forces because doing so would be at odds with statutes specifying military-command relationships. During the Civil War, although President Lincoln claimed authority to allocate command responsibilities to individual military officers, he abided by statutes conferring particular duties on particular offices.

After the Civil War, Congress went further by vesting Reconstruction-governance authority in specified military officers and requiring that all Army orders go through a top general who was protected from at-will removal. As a practical matter, these statutory directives not only structured command relationships but also encouraged policy outcomes; they came close to stripping the President's command authority altogether. Although Congress has not gone so far since, these aggressive statutes could indicate a latent power to define military relationships in ways that sharply limit presidential control.

Half a century later, the United States' rise to global preeminence prompted a renewed set of congressional debates over military organization. During World War I, the so-called Overman Act gave the President just the sort of command flexibility that modern presidents have claimed as a matter of constitutional right. But Congress repealed this authority after the war, despite an executive-branch proposal to retain similar executive flexibility. During World War II, Congress renewed the Overman Act's key provisions, once again conferring broad authority to structure military-command relationships, but once again only for the duration of the war.

After World War II, Congress consolidated the War and Navy Departments by placing them within the newly created Department of Defense (initially called the National Military Establishment) in the National Security Act of 1947. This statute 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

---

[8] Power of the Sec'y of the Navy Over the Marine Corps, 1 Op. Att'y Gen. 380, 381 (1820).

direction of the Secretary of Defense; and authorized the Joint Chiefs of Staff (developed during World War II and codified in this Act) to establish unified commands among services. At the same time, the Act imposed multiple impediments to direct presidential control over the services.

Then in the Goldwater–Nichols Department of Defense Reorganization Act of 1986, Congress, building on some intervening amendments to the 1947 Act, authorized the President, "through the Secretary of Defense," to establish "combatant commands" with authority over forces in different regions. Under the Act, military commanders drawn from the different services exercise command authority over specified units, which may also be drawn from multiple different services. The legislation's entire purpose was to break down prior command relationships and replace them with new ones better suited (Congress hoped) to achieving the nation's military and foreign-policy objectives. Neither this statute nor the protracted political struggle necessary to enact it would have made sense if Congress lacked power to define and allocate duties and authorities within the military. Thus, the Goldwater-Nichols Act, like the many statutes proceeding it, reflects broad congressional authority to organize the military by assigning duties to particular offices, even at the expense of the President's ability to achieve desired objectives.

Congress's Power to Limit Removal of Military Officers

The constitutional text and history also support congressional authority to limit removal of military officers, as long as Congress provides robust alternative means of command discipline to the President and other officers in the chain of command.

Under current statutes, although presidents and others in the chain of command often have authority to relieve an officer of certain duties, such as command of a ship or unit, they do not have authority in peacetime to unilaterally remove an officer from the service altogether. These statutes give effect to the President's authority as Commander in Chief by providing for court martial or other discipline of officers who disobey lawful commands, but, at the same time, the statutes protect military careers and officers' professionalism by preventing peacetime termination without cause. Nothing in the constitutional text or structure suggests that

such limitations on removal are invalid when the President's command authority can be fulfilled through effective alternative forms of discipline.

As for historical practice, Congress has generally barred peacetime removals without cause since 1866,[9] and both the executive branch and the courts appear to have accepted these laws' validity.[10] This longstanding practice, combined with the textual inference that the President may remain Commander in Chief despite lacking removal authority, suggests that Congress could go still further and impose similar limitations even during wartime.

Implications for Current Proposals and Controversies

Congress's broad authority over military offices carries important implications for current disputes. In recent years, the Secretary of Defense apparently withdrew military forces from certain domestic-security functions against the President's wishes, the Navy Secretary resigned rather than accept presidential interference with planned discipline for a wayward Navy SEAL, controversy erupted over an aggressive military strike against a senior Iranian officer in Iraq, and Congress created a new "Space Force" within the Department of the Air Force. In addition, one recent statute vested authority over certain offensive cyber operations jointly in the President and Secretary of Defense, rather than the President alone. Another statute conditioned force withdrawals from South Korea on certifications by the Secretary, though President Trump declared this provision unconstitutional in a signing statement. Advocates have called for statutory limits on presidential discretion over nuclear weapons, among other things. 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. Under a correct understanding of

---

[9] *See, e.g.*, 10 U.S.C. § 1161(a) ("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.").

[10] *See, e.g.*, United States v. Perkins, 116 U.S. 483 (1886); Boatswain in Navy—Revocation of Warrant, 28 Op. Att'y Gen. 325, 328 (1910).

congressional and presidential powers over military offices, statutes assigning duties to positions and limiting at-will removal should be binding on presidents, even with respect to operational military functions.

These conclusions also inform broader separation-of-powers debates. For example, the Supreme Court recently suggested in *Seila Law LLC v. Consumer Financial Protection Bureau* that "[t]he entire 'executive Power' belongs to the President alone" and that subordinate officers therefore "wield" authorities belonging to the President.[11] But this view is wrong even for the military, let alone civil administration. Congress's extensive authority to allocate military duties should put to rest the strongest versions of the so-called unitary-executive-branch theory, under which all power vested in executive offices is thought to be necessarily vested in the President as well. Similarly, the longstanding career protections for military officers—requiring a court martial or other due process before any peacetime removal—reinforce the constitutional validity of parallel career protections for the civil service, even if the Supreme Court concludes that a broader range of positions qualify as "offices" under the Constitution's Appointments Clause.

Conclusion

Disputes about congressional and presidential authority over the military are unlikely to fade away. As long as our politics remain erratic, conflicted, and polarized, Congress is likely to assert power to structure the military, while presidents will push back with aggressive theories of the Commander-in-Chief power. Yet our Constitution's text and structure, read in light of longstanding practice, support broad congressional authority to allocate military duties and authorities to offices other than the President. Although the President as Commander in Chief holds constitutional authority to direct how such functions are discharged, Congress can preclude the President himself from performing those functions and instead allocate them to another officer. Congress likewise can replace the President's default removal authority with other sufficiently robust mechanisms of

[11] 40 S. Ct. 2183, 2197 (2020).

disciplinary control, such as criminal punishment for disobedience through courts martial.

Congress, in short, 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, despite the Constitution's commitment of Commander-in-Chief power to the President.

* * *