CONGRESSIONAL AUTHORITY TO REGULATE MILITARY OPERATIONS

LULU MANSOUR*

> "When you have to do something as part of your duty that is incredibly unpleasant, knowing that you followed a widely understood and respected rule set helps you live with the consequence of those actions."
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> – Geoffrey Corn, Lt. Col., U.S. Army (Ret.)[1]

This Note makes the case for congressional authority to regulate military operations through the formal adoption of statutory rules of engagement. Authority over the conduct of hostilities is traditionally thought to be within the exclusive province of the Commander in Chief. The constitutional text and historical evidence from the early republic, however, confirm that Congress may regulate in this space. Yet the practical exercise of such congressional power must be weighed against the President's independent duty to interpret and implement the law and Constitution.

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* Associate, Covington & Burling. U.S. Marine. J.D., University of California, Berkeley; Harvard Law School. B.A., University of California, San Diego. The author thanks Professor Jack L. Goldsmith for inspiring this Note and his incisive feedback, Professors John Yoo, Cass Sunstein, Naz Modirzadeh, Jonathan Wroblewski, Stephen Sachs, and Eugene Fidell; thank you to my fellow students of the Harvard Law School Government Lawyer Course, various active duty and retired military personnel, Lucy Cox of U.C. Berkeley for her diligent research assistance, the JLPP Notes team of Christian Carson, Janson Requist, Susannah Cray, Blake Shiplett, James Nyberg, and Sean-Michael Pigeon for their careful oversight, and the Harvard Law School Library staff. The author's observations, analysis, and conclusions do not represent the opinions or policies of any part of the U.S. government, the author's employer, or its clients.

[1] Colin Jones, *What's Legally Allowed in War*, NEW YORKER (Apr. 25, 2025), https://www.newyorker.com/news/the-lede/whats-legally-allowed-in-war?_sp=ae90e566-be9a-4e92-9948-70867093500e.1745610767201 [https://perma.cc/C8N7-8TPN].

While often discussed in relation to judicial supremacy and broader questions of constitutional interpretation, this Note borrows the doctrine of presidential departmentalism and sketches how it constrains, but does not entirely hamstring, Congress's ability to legislate in this domain. Past Presidents have interpreted their Commander in Chief authority expansively, treating it as extending beyond battlefield command and implementation discretion (arguably the President's core, preclusive authority) to include broader governance of military operations. Historically, such interpretations have prevailed notwithstanding Congress's concurrent authority.

This persistent pattern may suggest the Framers envisioned a constitutional structure that permits executive primacy in operational control within a system of shared war powers. Still, Congress retains meaningful constitutional mechanisms (including by the enactment of standing rules of engagement) through which it can influence the conduct of military operations.

INTRODUCTION

The Constitution allocates war powers between Congress and the President, but the precise contours of that allocation are unsettled. In particular, Congress's role in shaping the extent to which the military can use force in an armed conflict remains contested. Some have argued that Article I control over the conduct of military operations would unconstitutionally interfere with the Commander in Chief's broad, exclusive discretion to manage military campaigns.[2] Others have suggested that the Constitution empowers Congress to regulate almost every aspect of military conduct so long as it does not usurp the President's central command function, that is, by legislating direct orders to troops.[3]

This Note asks whether Congress may constitutionally regulate the conduct of military operations by enacting rules of engagement

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[2] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, U.S. Dep't of Just., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), https://www.justice.gov/olc/file/886061/download [https://perma.cc/B5Q J-FPMA] [hereinafter OLC August 2002 Opinion]. While this memorandum was withdrawn, the arguments are still operative. *See* Jack L. Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 194 (2010) (discussing withdrawal of this memorandum and another titled Memorandum for William J. Haynes II, Gen. Counsel, Dep't of Defense, from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, U.S. Dept' of Just., Re: *Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003)); *see also* William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916) ("Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.").

[3] *See* Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008) ("[T]he only Commander in Chief power that Congress cannot override is the President's power to command."). *But cf.* Saikrishna Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 364 (2008) (suggesting that "the office of the Commander in Chief does not imply any exclusive [military] powers"). *See generally* 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 (2008) [hereinafter Barron & Lederman, *Original Understanding*]; David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1055–98 (2008) [hereinafter Barron & Lederman, *Constitutional History*] (reviewing the modern history of presidential assertions of preclusive war powers).

(ROE) without intruding on the President's command prerogatives. In analyzing the constitutional text and historical evidence from the time of the framing, this Note argues that Congress holds such authority, though its exercise is tempered by the doctrine of presidential departmentalism. In other words, even if Congress holds concurrent authority with the presidency to determine the general methods by which the military operates, the exercise of that authority must be understood in light of executive branch or presidential departmentalism—a doctrine with roots in Madisonian and Jeffersonian thought, later developed by executive officials and scholars.[4] As used here, presidential departmentalism refers to the President's independent constitutional duty to interpret and implement the law and Constitution as he understands them. Such interpretive independence, reinforced by over two centuries of executive branch practice—and a judiciary reluctant to intervene in matters of foreign affairs and national

[4] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 106 (2004) (first quoting James Madison, "[b]ut, I beg to know, upon what principle it can be contended that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments"; and then quoting Thomas Jefferson, "each of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question"); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 22–23 (2007) (observing that Presidents who seek to "reconstruct the inherited constitutional order . . . are likely to . . . reject the idea that the Court is the ultimate expositor of constitutional meaning. Historically, these are the presidents who have asserted the authority to ignore the Court's constitutional reasoning and act upon their own independent constitutional judgments. In other words, reconstructive presidents tend to be departmentalists."); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 490–91 (2018) ("The concepts of judicial supremacy, departmentalism, and popular constitutionalism possess an enduring relevance in efforts to understand the distribution of power under the Constitution of the United States." Fallon continues that "[o]ur system is not, never has been, and probably never could be one of pure judicial supremacy. Presidents have defied or credibly threatened to defy judicial rulings in the past. Presidents may do likewise in the future. *Moreover, it would be a mistake to say categorically that such presidential conduct is inherently unconstitutional or necessarily incompatible with the ideal of the rule of law*." (emphasis added)).

security—limits the practical reach of congressional authority. But it does not categorically foreclose Congress's ability to regulate military operations through statutory enactments that align with precedent respecting the President's interpretive prerogatives, as well as through other constitutionally grounded mechanisms, including appropriations, investigations, and oversight.

Traditional constitutional war powers scholarship has not deeply examined whether Congress may regulate the procedures governing military operations. For decades, scholarly attention has centered on the scope of unilateral executive authority to plunge the nation into limited hostilities without seeking prior congressional authorization.[5] This Note, however, shifts focus from the *jus ad bellum* question of who may lawfully commence hostilities to the *jus in bello* question of who may lawfully regulate the conduct of hostilities already commenced. Because regulating hostilities (or military operations) naturally overlaps with military command discretion, this Note engages the Commander in Chief Clause only to the extent necessary to show how Presidents' historically expansive interpretations of Article II have, in practice, narrowed Congress's ability to exercise its own authority in this domain. That said, this Note does not argue the merits of whether the Commander in Chief Clause affords the President preclusive military powers enabling him to disregard lawful statutes, nor does it seek to define the full scope of the President's "regulatory"

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[5] *See, e.g.*, ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS (1976) [hereinafter SOFAER, ORIGINS]; JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW (2d ed. 1989); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Abraham D. Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 12; Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 CORNELL L. REV. 45 (2007).

authority to promulgate supplemental rules for the military.[6] Here, "preclusive" means "that the Commander in Chief's discretion on such matters is not only constitutionally prescribed but is *preclusive* of the exercise of Congress's Article I powers."[7]

Instead, this Note focuses narrowly on the scope of Congress's positive constitutional authority to enact legislation regulating the operational procedures of the armed forces during campaigns outside the United States. A similar focus appears in a recent two-part article by Professor Daniel Maurer, who likewise argues that Congress may enact ROE in areas outside the executive's core zone of discretionary operational judgement.[8] Yet, the methodological frameworks of the two works differ: civil relations theory and interbranch practice ground Maurer's analysis, not the original understanding of the Constitution's text. Maurer builds his argument using a functionalist "military-agency test," which distinguishes between discretionary operational decisions, presumptively within the President's exclusive domain, and those that implement legal obligations under domestic and international law, within Congress's domain.[9]

By contrast, this Note proceeds from an originalist methodology. It argues that Congress is constitutionally equipped to legislate

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[6] Prakash, *supra* note 3, at 356 ("In the absence of any congressional regulation of discipline, the Commander in Chief may create general orders and rules.").

[7] Barron & Lederman, *Original Understanding*, *supra* note 3, at 694 (emphasis in original); *see also* Barron & Lederman, *Constitutional History*, *supra* note 3, at 1055–98 (arguing that the Commander in Chief Clause does not confer preclusive military powers). Preclusive authority is sometimes also referred to as "exclusive," "indefeasible," or "nonregulable" authority.

[8] Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force: Are Rules of Engagement Within the Preclusive Core of the President's War Powers?*, 84 OHIO ST. L.J. 1393 (2024) [hereinafter Maurer, *Part I*]; Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force, Part II: Rules of Engagement and a "Military-Agency Test" for the Separation of War Powers*, 85 OHIO ST. L.J. 893, 951 (2025) [hereinafter Maurer, *Part II*] ("To the extent that specific content within the ROE does not categorically fit within the military-agent's traditional zone of discretionary command responsibility and judgment, it is properly left open to congressional interest, oversight, intervention, and legislation.").

[9] Maurer, *Part II*, *supra* note 8, at 942–50.

procedures governing military operations, such as ROE, and that such statutory regulation comports with constitutional text, legal history, and fundamental separation of powers principles. But this Note will also show that the doctrine of presidential departmentalism tempers and defines the boundaries of congressional authority in this domain. The Framers designed the Constitution to afford the executive branch a degree of command and implementation discretion that lies beyond legislative control. Just as Congress enjoys substantial authority to regulate the federal courts, "[t]here is a limit—a 'core'—of the federal judicial power that no statute can regulate," and a similar constitutional boundary exists as between Congress and the presidency in matters of warmaking.[10] Sensitive to the Framers' careful allocation of war powers, the formulation set forth below aligns with each branch's constitutionally conferred authority, thereby sustaining fidelity to the separation of powers.

This Note proceeds in four parts. Part I surveys the expansion of preclusive military authority under Article II, with particular attention to the post-9/11 era and how the executive branch has shaped the constitutional order through broad interpretation of its warmaking authority. Part II turns to the conceptual foundations of ROE. Part III examines the original understanding of the Government and Regulation Clause. Part IV then illustrates how presidential departmentalism has historically shaped the boundaries of congressional authority in this space.

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[10] *See* Barron & Lederman, *Original Understanding*, *supra* note 3, at 728 (discussing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), where the Court limited Congress's power to enact retroactive legislation in cases where a final judgment has been rendered); *see also* Hayburn's Case, 2 U.S. 409 (1792) (holding that final judicial decisions rendered by an Article III court are not subject to congressional revision); United States v. Klein, 80 U.S. 128, 146–47 (1871) (limiting Congress's ability to an extent to enact retroactive legislation while a case is pending appeal).

I. BUSH-ERA EXPANSION OF ARTICLE II PRECLUSIVE MILITARY AUTHORITY

To grasp why this area of constitutional law merits more scrutiny than it has received, some brief background is necessary. Following the attacks of September 11, 2001, President George W. Bush asserted broad, preclusive authority over military actions, citing a legitimate need for a rapid, decisive response against a decentralized enemy.[11] In an opinion assessing the legality of statutory restrictions on the President's authority to interrogate captured enemies, the Bush Administration tendentiously insisted that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[12] Such a sweeping conclusion suggested that any federal law purporting to limit the President's authority over military operations could be

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[11] *See, e.g.*, WHITE HOUSE, NATIONAL SECURITY STRATEGY 5 (2002), https://2009-2017.state.gov/documents/organization/63562.pdf [https://perma.cc/PX69-5KZJ] ("The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. . . . We make no distinction between terrorists and those who knowingly harbor or provide aid to them. [The war against terrorism] will be fought on many fronts against a particularly elusive enemy over an extended period of time."); George W. Bush, *President Discusses Global War on Terror* (Sep. 5, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060905-4.html [https://perma.cc/UUF4-QACL] ("The greatest threat this world faces is the danger of extremists and terrorists armed with weapons of mass destruction—and this is a threat America cannot defeat on her own."); George W. Bush, Speech at United States Military Academy at West Point Commencement (June 1, 2002), *in* SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH 129 (2008), https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf [https://perma.cc/TX73-6JF4] ("All nations that decide for aggression and terror will pay a price. We will not leave the safety of America and the peace of the planet at the mercy of a few mad terrorists and tyrants. We will lift this dark threat from our country and from the world.").

[12] OLC August 2002 Opinion, *supra* note 2, at 207. The congressional grant of authority to the President contained in the 2001 Authorization for the Use of Military Force arguably bolstered claims for expanded executive discretion. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 114 Stat. 224 (2001).

abrogated through an executive branch interpretation deeming it an unconstitutional infringement on the Commander in Chief power.

Indeed, several existing statutory restrictions conflicted with the Bush Administration's preferred method to operate against al Qaeda and the Taliban in the War on Terror.[13] This constitutional quandary led executive branch lawyers in the Office of Legal Counsel (OLC) to assert broadly, *inter alia*, that "Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war."[14] Underlying that proposition is the premise that Congress may not "interfere[] with the command of forces and the conduct of campaigns."[15] War powers scholarship subsequently became preoccupied with constitutional primacy battles over Congress's Declare War power and the Commander in Chief Clause. That focus, in turn, helped entrench a largely unexamined but generally accepted assumption that the President, by virtue of the Commander in Chief Clause, wields preclusive, indefeasible authority over the execution of combat operations, immune from congressional or judicial checks, a notion not even the champion of executive prerogative Alexander Hamilton endorsed.[16]

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[13] Most restrictions involved detention and interrogation tactics. Examples include the War Crimes Act, 18 U.S.C. § 2441 (2024), the federal criminal statutes, 18 U.S.C. §§ 2340–2340A (2024), and the Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2024).

[14] OLC August 2002 Opinion, *supra* note 2, at 203.

[15] *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring in the judgment).

[16] *Cf.* THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Hamilton writes that the President's power as Commander in Chief:

[W]ould be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature. *Id.* (emphases in original).

See also Hamdi v. Rumsfeld, 542 U.S. 507, 568–69 (Scalia, J., dissenting) ("Except for the actual command of military forces, all authorization for their maintenance and all

While claims of preclusive battlefield discretion rooted in the Commander in Chief Clause have surfaced at various points across administrations,[17] Bush-era legal reasoning emphasized the novelty of non-state terror networks' *modi operandi*.[18] Driven by their inability to defend military objectives through conventional means, these non-traditional militants flouted international norms by blending into the civilian population and exploiting them as human shields to gain military advantages.[19] The Bush Administration argued that confronting these insurgents—a new type of enemy willing to flagrantly disregard traditional battlefield decorum and ROE—necessitated a bold and flexible Commander in Chief. Only with the power to act swiftly and unencumbered by congressional restraints could the President wage a successful military campaign, or so the argument went.[20]

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explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II."). For a more comprehensive treatment and evidence undermining the assumption that the Commander in Chief Clause confers preclusive military powers, see Barron & Lederman, *Original Understanding*, *supra* note 3; Barron & Lederman, *Constitutional History*, *supra* note 3.

[17] *See infra* Part IV. Expansive executive branch claims of preclusive tactical authority and unilateral uses of military power emerged under the Truman Administration during the Korean War and have been invoked in one way or another through every subsequent administration except President Jimmy Carter's. *See* Barron & Lederman, *Constitutional History*, *supra* note 3, at 1097.

[18] *See* Barron & Lederman, *Original Understanding*, *supra* note 3, at 712–13. *See generally* JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

[19] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2049 (2005); Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. 307, 322 (2009) ("Human Rights Watch has documented the Taliban's widespread use of human shields, acts which undeniably violated international humanitarian law."); Richard Norton-Taylor, *Taliban Using Human Shields, Says Afghan Army General*, GUARDIAN (Feb. 17, 2010), http://www.guardian.co.uk/world/2010/feb/17/taliban-human-shields [https://perma.cc/RM6F-YJZK].

[20] *See, e.g.*, GOLDSMITH, *supra* note 18, at 183 ("Presidents throughout American history have used the threat of war or emergency to expand presidential powers in ways that later seemed unrelated or unnecessary to the crisis."); Barron & Lederman, *Original Understanding*, *supra* note 3, at 711 n.2 (citing President Bush's veto of the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability

Today, U.S. military officials view the war on terrorism as "child's play" compared to the strategic challenges that large-scale, multi-domain operations against an adversary like China might present.[21] Unlike non-state terrorist organizations, China is a global superpower with a vast reservoir of resources and human capital,

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Appropriations Act, 2007" in part because "it purport[ed] to direct the conduct of the operations of the war in a way that infringe[d] upon the powers vested in the Presidency by the Constitution, including as Commander in Chief of the Armed Forces."); JOHN C. YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 402 (2009) ("A branch headed by a single person, as Alexander Hamilton recognized, can act swiftly and decisively because it is not subject to the crippling decentralization of Congress. Emergencies and foreign affairs sit at the core of the purpose of the executive, and no President has successfully responded by passively following Congress's lead and forsaking his right to independent action.").

[21] Robert Kussart, *Sharpening the Asymmetric Advantage*, NCO J., Dec. 2024, at 1, 5, https://www.armyupress.army.mil/journals/nco-journal/archives/2024/December/Asymmetric-Advantage/ [https://perma.cc/JS8L-DG6G]; *see also* Gary M. Brito & Keith T. Boring, *Disrupted, Degraded, Denied, but Dominant: The Future Multi-Domain Operational Environment*, *in* DEEP MANEUVER: HISTORICAL CASE STUDIES OF MANEUVER IN LARGE-SCALE COMBAT OPERATIONS 233, 235 (Jack D. Kem ed., 2018), https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/deep-maneuver-lsco-volume-5.pdf [https://perma.cc/AZ8P-APAR] ("Enemies [like Russia and China] already are capable of synchronizing space and cyberspace means to locate and attack forces with precision weapons and use electronic warfare (EW) capabilities to disrupt or degrade Army information networks."); David H. Berger, *Preparing for the Future: Marine Corps Support to Joint Operations in Contested Littorals*, MIL. REV., May–June 2021, at 6, 8, https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/May-June-2021/Berger-Preparing-for-Future/ [https://perma.cc/B673-ECWY] ("Given the rapidly advancing capabilities of our pacing threat, the People's Republic of China (PRC), the joint force's historically dominant capability to sense and understand its operating environment will be vigorously contested or denied in every domain."); U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 6 (2025), https://media.defense.gov/2025/Dec/23/2003849070/-1/-1/1/ANNUAL-REPORT-TO-CONGRESS-MILITARY-AND-SECURITY-DEVELOPMENTS-INVOLVING-THE-PEOPLES-REPUBLIC-OF-CHINA-2025.PDF [https://perma.cc/R3HY-KLWX] ("China's historic military buildup has made the U.S. homeland increasingly vulnerable. China maintains a large and growing arsenal of nuclear, maritime, conventional long-range strike, cyber, and space capabilities able to directly threaten Americans' security.").

compounding the threat that the United States must prepare for.[22] In the same vein, emerging artificial intelligence-driven war technologies are reshaping the character of modern warfare, and future Presidents may be tempted to argue that the novel operational demands they generate warrant greater unilateral flexibility beyond existing constitutional frameworks for military action. Importantly for this Note's purpose, it is possible that a future administration could repurpose Bush-era assertions of preclusive executive authority in future military campaigns against a peer adversary who, like al Qaeda or the Taliban, may not play

[22] Naz K. Modirzadeh, *"Violent, Vicious, and Fast": LSCO Lawyering and the Transformations of American IHL*, 17 HARV. NAT'L SEC. J. 1 (2025) (describing the U.S. military's focus from counterterrorism and counterinsurgency to preparing for war with China through an examination of the Department of Defense's strategies for large-scale combat operations (LSCO)); *see also* David H. Berger, *The Case for Change: Meeting the Principal Challenges Facing the Corps*, MARINE CORPS GAZETTE, June 2020, at 8, 8, https://www.mca-marines.org/wp-content/uploads/The-Case-for-Change-2.pdf [https://perma.cc/58KT-XXCN] ("The passing of our Nation's 'unipolar moment' and the emergence of revisionist great power competitors in China and Russia, coinciding with a sea change in the character of warfare driven by social and technological change, demands that we move rapidly to adapt to the circumstances of a new era."); *United States Indo-Pacific Command: Hearing Before the S. Comm. on Armed Servs.*, 117th Cong. 2 (2021) (statement of Adm. Philip S. Davidson), https://www.armed-services.senate.gov/imo/media/doc/Davidson_03-09-21.pdf [https://perma.cc/MTB2-7DLS] ("A combat-credible, conventional deterrent posture is necessary to prevent conflict, protect U.S. interests, and to assure our allies and partners. Absent a convincing deterrent, the People's Republic of China (PRC) will be emboldened to take action . . . ."); *Remarks by Secretary of War Pete Hegseth at the Reagan National Defense Forum (As Delivered)*, DEP'T OF DEF. (Dec. 6, 2025), https://www.war.gov/News/Speeches/Speech/Article/4354431/remarks-by-secretary-of-war-pete-hegseth-at-the-reagan-national-defense-forum-a/ [https://perma.cc/MLB8-W7AJ] (stating that "we will continue to hunt and kill Islamist terrorists with the intent and ability to strike our homeland," but emphasizing that "[o]ur interests in the Indo-Pacific are significant, but also scoped and reasonable," and explaining that the United States must "balance China's growing power. This means ensuring none of our allies are vulnerable to sustained successful military aggression. This is what we mean by deterrence in the Indo-Pacific: not dominating China, but rather ensuring they do not have the ability to dominate us or our allies. It's common sense.").

by the traditional rules that govern the conduct of war.[23] New context; same old reasoning.

Consequently, as we navigate an era of warfare marked by rapid technological innovation and the accelerating military capabilities of peer competitors such as China and Russia, the question of whether the Constitution empowers Congress to regulate the operational conduct of the armed forces is increasingly urgent.

II. A PRIMER ON RULES OF ENGAGEMENT (ROE)

Any inquiry into Congress's authority to regulate military operations must first clarify what regulating military operations entails. Activities in war span a spectrum from high-level strategic

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[23] Barron & Lederman, *Original Understanding*, *supra* note 3, at 712 ("[T]he historical trend lines of executive claims to preclusive war powers make it hazardous to assume that future administrations will not themselves want to assert preclusive authority. . . . After all, aggressive claims to executive power left unchallenged have a history of begetting further and more aggressive claims."). It should be noted that this statement applies irrespective of whether international humanitarian law "exists." From personal experience as a U.S. Marine, warriors are ingrained with a combat ethos encompassing several values, one of which is respect for the enemy. We are taught to engage the enemy in a manner that is almost ceremonial. Chinese military doctrine, however, has increasingly challenged this ethos with doctrinal claims rooted in "unrestricted warfare." *See* ROBERT SPALDING, WAR WITHOUT RULES: CHINA'S PLAYBOOK FOR GLOBAL DOMINATION 74 (2022) (discussing the Chinese Communist Party's military doctrine in *Unrestricted Warfare* and noting that "[n]ow every civilian is a potential warrior or target, every aspect of modern life is a potential weapon, and every sphere of human activity is a potential battlefield."). *See generally* QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE (1999). In addition, although beyond the scope of this Note, this reasoning might apply in the context of recent statements made by President Donald Trump regarding Gaza, "that the United States 'will take over the Gaza Strip' and 'we'll own it,'" suggesting a unilateral use of troops to establish American occupation in the Middle East. *See* Michael D. Shear, Peter Baker & Isabel Kershner, *Trump Proposes U.S. Takeover of Gaza and Says All Palestinians Should Leave*, N.Y. TIMES (Feb. 4, 2025), https://www.nytimes.com/2025/02/04/us/politics/trump-gaza-strip-netanyahu.html?smid=url-share; *cf.* GOLDSMITH, *supra* note 18, at 183–84 ("The presidency in the age of terrorism—the Terror Presidency—suffers from many of the vices of [Arthur M.] Schlesinger's *Imperial Presidency*. . . . The best-intentioned and best-prepared presidents, exercising uncommon leadership and good judgment, will make mistakes in managing the difficult trade-offs between security and liberty that the seemingly endless terror threat presents.").

and policy decisions to the execution of individual kinetic engagements. Because ROE govern how force is applied across this spectrum, understanding the levels of war is essential. Military doctrine provides a useful framework for parsing these categories. The Marine Corps' foundational text, Marine Corps Doctrinal Publication 1, *Warfighting*, conceptualizes war across three levels—strategic, operational, and tactical—each corresponding to a distinct scope of decision-making:[24]

- **Strategic level** concerns national policy objectives and military strategy, "which is the application of military force to secure the policy objectives. Military strategy is thus subordinate to national strategy."[25] Strategy involves "establishing goals, assigning forces, providing assets, and imposing conditions on the use of force in theaters of war. Strategy derived from political and policy objectives must be clearly understood to be the sole authoritative basis for all operations."[26]
- **Operational level** links tactical action to strategic goals and "includes deciding when, where, and under what conditions to engage the enemy in battle—and when, where, and under what conditions to *refuse* battle in support of higher aims."[27]
- **Tactical level** concerns the execution of battles and engagements—the immediate application of combat power to achieve localized objectives.[28]

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[24] *See* U.S. MARINE CORPS, WARFIGHTING 28–32 (1997), https://www.marines.mil/portals/1/publications/mcdp%201%20warfighting.pdf [https://perma.cc/JU5T-VP7C].

[25] *Id.* at 28.

[26] *Id.*

[27] *Id.* at 30.

[28] *Id.* at 29 ("In war, tactics focuses on the application of combat power to defeat an enemy force in combat at a particular time and place. In non-combat situations, tactics may include the schemes and methods by which we perform other missions, such as enforcing order and maintaining security during peacekeeping operations.").

The connection between the levels of war and ROE is that ROE primarily operates at the strategic and operational levels, where they translate policy objectives and legal obligations into directives governing the use of force. At the tactical level, ROE influence the immediate application of combat power by warfighters, but they do so mainly as constraints that preserve unit-level judgment rather than as prescriptive directives.

The constitutional allocation of war powers interacts differently at each level. Congress's regulatory authority is most plausible at the strategic and operational levels, where it can set broad parameters for the use of force. But those levels must be understood as domains of concurrent authority shared with the presidency, since the President retains command prerogatives there, even as his discretion is often treated as exclusive at the tactical level.

A. The Law of Armed Conflict (LOAC) and ROE

ROE are "[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[29] They comprise the operational guidelines governing military operations. The ROE are subject to modification by the President, the Secretary of Defense, and operational commanders.[30] But importantly, "*[r]ules* of war are not

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[29] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 207 (2016) (defining "rules of engagement").

[30] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, TARGETING, at A-1 (2018) ("ROE are the means by which the President, [the Secretary of Defense], and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law."); *see also* Charlie Dunlap, *Is Independent, Nonpartisan Legal Advice from Military Lawyers on the Chopping Block?*, LAWFIRE (Feb. 22, 2025), https://sites.duke.edu/lawfire/2025/02/22/is-independent-nonpartisan-legal-advice-from-military-lawyers-on-the-chopping-block/ [https://perma.cc/3CBE-TY2X] ("To be crystal clear, [Judge Advocates, or military lawyers] ***advise*** on ROE but it is the product of civilian and military leaders' decisions. It is the [Secretary of Defense] and ultimately the President who bear responsibility for ROE." (emphasis in original)).

the same as *laws* of war."[31] The Department of Defense's (DoD) *Law of War Manual* defines the law of war, or the law of armed conflict (LOAC)[32] as:

> [T]hat part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. . . . [T]he law of war comprises treaties and customary international law applicable to the United States.[33]

The LOAC is *international*; it is made, construed, and altered by nation-states. By contrast, ROE are *domestic* mechanisms. They implement not only the LOAC, but also domestic law and policy preferences by regulating the military's actions on a more granular level. Put differently, ROE are not law but instead represent policy directives that "ensur[e] that U.S. military forces are at all times in full compliance with our obligations under domestic as well as international law."[34]

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[31] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 16 (3d ed. 2022).

[32] The law of war (LOW) is also known as the law of armed conflict (LOAC), or its civilian counterpart, international humanitarian law (IHL). *See id.* at 17–18. I will use the terms LOW or LOAC in this Note.

[33] U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 1.3 (2023); *see also* Barron & Lederman, *Constitutional History*, *supra* note 3, at 952 (observing that, early in the republic, "[t]he laws and usages of war were customary, but they were still understood to constitute a critical component of the legal structure within which the President exercised his war powers").

[34] Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F.L. REV. 245, 247 (1997). *But see* Modirzadeh, *supra* note 22, at 39–40 ("According to [large-scale combat operation (LSCO)] lawyers, it is untenable to fight under current targeting expectations. What exists in 2025 is not only the black-letter law of IHL but also a dense layering of policy preferences, interpretive practices, and normative expectations—many of which exceed (in the view of the U.S. government) what strict interpretations of treaty texts and customary rules require." Professor

Five principles comprise the foundations for the LOAC, which are operationalized through ROE. These principles are military necessity, distinction, proportionality, unnecessary suffering (humanity), and chivalry (honor).[35] In a broad sense, the LOAC prevents excessive uses of force and imposes threshold legal limits on the use of force. The LOAC provides the baseline for the development of ROE and thus its principles animate every ROE and establish the constraints within which ROE must be crafted.

ROE exist at three levels, from general to specific they are: (1) Standing ROE (SROE), (2) mission-specific ROE, and (3) circumstantial ROE. Each builds off the next. The SROE are derived from the LOAC and apply to "all military operations . . . outside US territory;"[36] mission-specific ROE are created by consulting both the SROE and the LOAC and apply to an operation or locality; circumstantial or situational ROE flow from the preceding three and apply when a situation arises unanticipated by the mission-specific ROE. Each level provides greater clarity for the warfighter in a particular context. In short, ROE are the chief mechanism by which a state's combatants execute international and domestic legal and policy obligations, and by design, they typically impose greater limitations on troops' battlefield conduct than the LOAC.[37]

Modirzadeh continues that "LSCOs are said to demand an approach that restores primacy to military imperatives, even if doing so means discarding humanitarian ideals that, while normatively powerful, are not legally mandated.").

[35] *See* U.S. DEP'T OF DEF., LAW OF WAR MANUAL, *supra* note 33, at §§ 2.2–2.6; NAT'L SEC L. DEP'T, JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 55–59 (2024), https://tile.loc.gov/storage-services/service/ll/llmlp/2024_Operational_Law_Handbook/2024_Operational_Law_Handbook.pdf [https://perma.cc/24LY-RNQ9] [hereinafter JAG HANDBOOK].

[36] JOINT STAFF OF THE JOINT CHIEFS OF STAFF, CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT / STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES 1 (2005).

[37] *See supra* note 29. This is a feature that civilian leadership and commanders alike routinely assert undermines confidence in combat. *See, e.g.*, PETE HEGSETH, THE WAR ON WARRIORS: BEHIND THE BETRAYAL OF THE MEN WHO KEEP US FREE 181 (2024) ("Makes me wonder, in 2024—if you want to win—how can anyone write universal rules about killing other people in open conflicts? Especially against enemies who fight like savages, disregarding human life in every single instance. Maybe, instead, we are just fighting with one hand behind our back—and the enemy knows it."); Charles Pede

B. ROE Application

As relevant here, the SROE comprise general guidelines that apply to all military operations outside U.S. territory. They are created and maintained by the Pentagon's joint staff of civilian and military leadership.[38] Mostly classified, each enclosure in the SROE provides instructions on the use of force and directives for maritime, air, land, space, and information operations.[39] Because every U.S. military operation must comport with the policies and procedures contained in the SROE, these enclosures serve as a commander's blueprint when formulating mission-specific and circumstantial ROE. Put differently, the SROE provide broad governing principles, and mission-specific and circumstantial ROE are their operational implementations.

In the event that U.S. forces engage in an unexpected armed conflict, the SROE immediately apply and remain in effect unless and until mission-specific ROE are issued.[40] The SROE thus provide commanders with instant guidance to execute the operation.[41] When time is not a constraint, "the SROE are mined to make up

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& Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MIL. REV., Mar.–Apr. 2021, at 6, 17 ("Twenty years of COIN and CT operations have created a gap in the mindset . . . for commanders, soldiers, and even the public." The authors continue that this "space between what the law of war actually requires, and a growing expectation of highly constrained and surgical employment of force born of our own recent experience coupled with our critics' laudable but callow aspirations—left unchecked, threatens to unnecessarily limit a commander's legal maneuver space on the LSCO battlefield."); Dunlap, *supra* note 30 ("While all ROE must comply with the law, in virtually every case ROE contains limits not legally required; in fact, policy limitations—*not* the law—are typically the source of consternation.").

[38] JOINT STAFF OF THE JOINT CHIEFS OF STAFF, *supra* note 36, at 2 ("The [Secretary of Defense] approves and the Chairman of the Joint Chiefs of Staff (CJCS) promulgates SROE and SRUF for US forces."). Because this Note is focused on ROE outside of U.S. territory, I am purposefully omitting discussion of the Standing Rules for the Use of Force, which apply only within U.S. territory.

[39] *Id.*; *see also* JAG HANDBOOK, *supra* note 35, at 116–30 (2024) (providing unclassified extracts of the SROE).

[40] *See* JOINT STAFF OF THE JOINT CHIEFS OF STAFF, *supra* note 36, at 2.

[41] *See* SOLIS, *supra* note 31, at 377.

mission-specific ROE." [42] Commanders identify the SROE relevant to their operation, and layer in strategic and policy requirements to create mission-specific ROE appropriate to fulfill the mission's objective. Decision-makers are bound by both the SROE and mission-specific ROE in the relevant operation, with the former binding in the event of conflict.

To effectuate unit-level application, mission-specific ROE are condensed into a simplified, highly accessible format before being disseminated to subordinate units. By the time they reach a warfighter on the ground, "the ROE are a card in his pocket."[43] If the conditions on the ground rapidly change, demanding a departure from mission-specific ROE, commanders can request circumstantial ROE in real time.[44]

At this point, two features of ROE are important to highlight. First, "ROE are not tactical in nature; that is, they do not instruct combatants on *how* a mission is to be executed. Tactics and ROE are complementary but not synonymous."[45] For instance, the SROE might instruct a commander to refrain from using certain munitions during breach operations. The parameters of the SROE are then incorporated into mission-specific ROE. But that still leaves commanders free to exercise their military judgment in planning the finer tactical execution of a mission. The SROE simply set forth broad, but legally binding, parameters for operational conduct from which commanders must draw. The SROE, then, might be within congressional purview insofar as they do not dictate strategic or tactical maneuver on the battlefield, a province typically understood to fall within the President's exclusive command authority.

Second, there is no explicit statutory authority or executive order that provides for the creation and promulgation of SROE.[46] Yet

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[42] *Id.* at 376.

[43] *Id.* at 378.

[44] *Id.*

[45] *Id.* at 373.

[46] *See* Maurer, *Part I*, *supra* note 8, at 1406 (noting only internal DoD memoranda provide that the Secretary of Defense has directed the Chairman of the Joint Chiefs of

troops who violate any ROE are subject to prosecution under the Uniform Code of Military Justice,[47] usually for failure to obey a lawful order.[48]

Anchoring the general rules by which combatants conduct war within statutory rules of engagement furnishes a high-level strategic point of orientation for integrating military necessity with humanitarian restraint. But this approach must be carefully balanced against the President's authority to make sensitive tactical decisions as Commander in Chief. To illustrate, if Congress enacts what is currently the Department of Defense's standing order mandating that only munitions (1)–(10) may be used in certain operational contexts, it would still give the executive ample discretion in how to select and employ those munitions.

In sum, this brief primer provides a framework for conceptualizing how ROE regulate military operations. Because the SROE function as the general blueprint from which mission-specific and circumstantial ROE are derived, this Note uses the SROE as the principal example of what a congressional enactment governing the conduct of military operations would look like.

III. CONSTITUTIONAL ANALYSIS

This Part considers the source of Congress's authority to regulate military operations. Section A sets forth the relevant provisions of the Constitution and identifies Congress's express power to legislate under the Government and Regulation Clause.[49] Section B examines the original understanding of that Clause. Section C surveys historical practice. Together, these materials indicate that

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Staff to promulgate guidance to implement the LOW consistent with 10 U.S.C. § 163); *see also* 10 U.S.C. § 163(b)(1) (delegating that "[t]he Secretary of Defense may assign to the Chairman of the Joint Chiefs of Staff responsibility for overseeing the activities of the combatant commands" including by promulgating SROE); JAG HANDBOOK, *supra* note 35, at 106–07.

[47] *See generally* 10 U.S.C. §§ 801–946a.

[48] 10 U.S.C. § 892.

[49] U.S. CONST. art. I, § 8, cl. 14.

Congress may enact SROE pursuant to the Government and Regulation power.

A. The Constitutional Text

The Constitution allocates war powers to both Congress and the executive. Article I, Section 8 grants Congress a range of war-related authority: the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"[50] the Constitution empowers Congress to "raise and support Armies"[51] and "provide and maintain a Navy;"[52] it gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[53] to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[54] and to "provide for organizing, arming, and disciplining the Militia."[55] Other relevant authority Congress enjoys includes the appropriations power[56] and the power under the Necessary and Proper Clause[57] to pass laws "to carry into execution the powers conferred on [them]."[58]

In contrast to Congress's vast enumerated powers, Article II declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual service of the United States."[59] Article II also vests the President with "the executive

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[50] *Id.* art. I, § 8, cl. 11.
[51] *Id.* art. I, § 8, cl. 12.
[52] *Id.* art. I, § 8, cl. 13.
[53] *Id.* art. I, § 8, cl. 14.
[54] *Id.* art. I, § 8, cl. 15.
[55] *Id.* art. I, § 8, cl. 16.
[56] *Id.* art. I, § 9, cl. 7.
[57] *Id.* art. I, § 8, cl. 18.
[58] McCulloch v. Maryland, 17 U.S. 316, 324 (1819).
[59] U.S. CONST. art. II, § 2, cl. 1.

Power,"[60] the power to "make Treaties,"[61] and the duty to "take Care that the Laws be faithfully executed."[62]

As for the third branch, no constitutional or statutory provision authorizes the federal judiciary to weigh in on the separation of powers issues arising from the concurrent regulation of military operations by the executive and legislative branches. But because Article III vests "the judicial Power"[63] in the federal courts and confers jurisdiction over cases "arising under this Constitution, the Laws of the United States, and Treaties,"[64] federal courts might have the authority to intervene in a dispute between the political departments on this point subject to threshold justiciability requirements.[65]

The enactment of SROE may be understood as prescribing general procedures that govern the actions of the armed forces across all military operations and contingencies.[66] Under Article I, Section 8, Congress has the power "[t]o make Rules for the Government and Regulation of the land and naval Forces,"[67] which is further amplified by the Necessary and Proper and Supremacy Clauses.[68] The plain text of the Government and Regulation Clause

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[60] *Id.* art. II, § 1, cl. 1.

[61] *Id.* art. II, § 2, cl. 2.

[62] *Id.* art. II, § 3.

[63] *Id.* art. III, § 1.

[64] *Id.* art. III, § 2, cl. 1.

[65] *But see* Ziglar v. Abbasi, 582 U.S. 120, 142–43 (2017) ("National-security policy is the prerogative of the Congress and President . . . 'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs' unless 'Congress specifically has provided otherwise.'" (quoting Department of Navy v. Egan, 484 U.S. 518, 530 (1988)); Trump v. CASA, Inc., 145 S. Ct. 2540, 2562 (2025) (noting that "federal courts do not exercise general oversight of the Executive Branch; they resolve cases and controversies consistent with the authority Congress has given them. When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too.").

[66] *See* JAG HANDBOOK, *supra* note 35, at 116 (discussing the purpose and applicability of the SROE).

[67] U.S. CONST. art. I, § 8, cl. 14.

[68] *Id.* art. I, § 8, cl. 18; *id.* art. VI, cl. 2. I thank Professor Eugene Fidell for his insight on "another string to Congress's bow" through the combination of these Clauses. The argument proceeds as follows:

therefore appears to encompass Congress's authority to enact such policies and procedures.[69]

Supreme Court case law reinforces this reading of the Clause, as illustrated by a decision recognizing Congress's "'broad constitutional power' to raise and regulate armies and navies."[70] Other cases likewise support Congress's authority to pass statutes governing military procedures.[71] If the Government and Regulation

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> *Premise 1:* Congress has power to legislate under the Necessary and Proper Clause on matters outside Article I, § 8. Maritime legislation, for instance, is an instance where congressional authority rests not on Article I, but on the grant of admiralty and maritime jurisdiction in Article III.
> *Premise 2:* ROEs serve many purposes, one of which is to mandate compliance with the Geneva Conventions, treaties, and customary international law ("CIL") principles (which include parts of the LOAC).
> *Premise 3:* The Geneva Conventions, treaties, and CIL principles are within the scope of the Supremacy Clause. U.S. CONST. art. VI, cl. 2.
> *Conclusion:* The combination of the Necessary and Proper Clause and Supremacy Clause serve as an additional basis for ROE despite the President's Commander in Chief power.

Compare Brown v. United States, 12 U.S. 110, 153 (1814) (Story, J., dissenting) (noting that the President "cannot lawfully transcend the rules of warfare established among civilized nations"), *with* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (analyzing the more general question whether the President is constitutionally required to follow CIL).

[69] Prakash, *supra* note 3, at 331–32 (setting forth eighteenth-century dictionary definitions of "govern" as "to rule, manage, look to, take care of" and "regulate" as "to set in order, to govern, direct or guide . . . to determine or decide" (quoting NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 25th ed. 1783))).

[70] *See* Rostker v. Goldberg, 453 U.S. 57, 65 (quoting Schlesinger v. Ballard, 419 U.S. 498, 510 (1975)).

[71] *See* Talbot v. Seeman, 5 U.S. 1, 28 (1800) ("The whole powers of war being, by the [C]onstitution of the United States, vested in Congress . . . ."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (noting that in the domestic context Congress's power to govern and regulate the armed forces "may to some unknown extent impinge upon even command functions"); *Ex parte* Quirin, 317 U.S. 1, 26 (1942) ("The Constitution thus invests the President, as commander in chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces . . . including those which pertain to the conduct of

Clause cedes Congress "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment," then it follows that Congress is authorized to legislate regulations akin to the SROE.[72] No contrary textual evidence contained in the Constitution suggests that the Framers intended to limit the scope of the Clause to non-operational matters.[73] Consequently, a statute codifying SROE would fit squarely within Congress's power to govern and regulate the military, and locating Congress's ability to do so in the Government and Regulation Clause[74] is therefore the most logical source of authority on which the remainder of this Note proceeds.[75]

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war."); United States v. O'Brien, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); Loving v. United States, 517 U.S. 748, 768 (1996) ("Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs." (citing Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981))).

[72] *See* Chappell v. Wallace, 462 U.S. 296, 301 (1983). While this case was in the context of military discipline, nothing in it can be read to suggest that the Court intended to cabin Congress's exercise of the Government and Regulation Clause to the discipline of U.S. troops.

[73] *See* Loving, 517 U.S. at 767 ("Under Clause 14, Congress, like Parliament, exercises a power of precedence over, not exclusion of, [e]xecutive authority . . . . This power is no less plenary than other Article I powers."); *see also* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 253 (2007) ("Congress has, if anything, *greater* textual power to regulate military personnel directly than it does for other executive branch personnel.").

[74] U.S. CONST. art. I, § 8, cl. 14.

[75] To a lesser extent, the Declare War and Marque and Reprisal Clauses may be other sources of authority Congress might draw upon to indirectly regulate military actions. Although beyond the scope of this Note, further indirect congressional regulation of military operations could be achieved through the Appropriations Power or other enumerated constitutional mechanisms. *See generally* Yoo, *supra* note 5; Lofgren, *supra* note 5; Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986); JENNIFER K. ELSEA, MICHAEL J. GARCIA & THOMAS K. NICOLA, CONG. RSCH. SERV., RL33837, CONGRESSIONAL AUTHORITY TO LIMIT U.S. MILITARY OPERATIONS IN IRAQ (2007).

B. Textual Origins and Original Understanding

The origins of the Government and Regulation Clause, together with Founding-era context surrounding its adoption, reinforce this textual reading. The Clause was adopted from Article IX of the Constitution's predecessor, the Articles of Confederation, without discussion at the Constitutional Convention.[76] Article IX vested in the Continental Congress the power of "making rules for the government and regulation of the . . . land and naval forces, and *directing their operations*."[77] In drafting the new Constitution, the Framers notably omitted the phrase "directing their operations" in the Government and Regulation Clause.[78] At the same time they created a new, independent branch of government, the office of the President, vesting him with all the executive power and designating him as Commander in Chief.[79]

A few plausible inferences may be drawn from these two actions. Start with the presidency. Perhaps the Framers intended to leave *all*

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[76] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 330 (Max Farrand ed., 1911); *see also* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1197 (5th ed. 1891) ("The clause was not in the original draft of the Constitution; but was added without objection by way of amendment. It was, without question, borrowed from a corresponding clause in the articles of confederation . . . .") [hereinafter STORY, COMMENTARIES].

[77] ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

[78] U.S. CONST. art. I, § 8, cl. 14 (granting Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces"). While that omission could reflect a deliberate drafting choice by the Framers, no evidence definitively explains why the phrase was removed; even so, its disappearance from the final constitutional text provides some insight into how the framers approached allocating authority to regulate military operations.

[79] U.S. CONST. art. II; *cf.* Morrison v. Olson, 487 U.S. 654, 705, 709 (1988) (Scalia, J., dissenting) ("To repeat, Article II, Section I, cl. I of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' As I described at the outset of this opinion, this does not mean *some* of the executive power, but *all* of the executive power." Scalia continues that "[i]t is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.").

operational matters exclusively to the new President,[80] whether through the Commander in Chief Clause,[81] the Vesting Clause,[82] or a combination of both. Yet, nothing in the Convention or ratification debates records suggests that any of the Framers assumed that Article II—in whatever combination of clauses one might imagine—bestowed upon the President preclusive authority over all operational conduct beyond commanding warfighters within a larger statutory framework established by the legislature to conduct hostilities.[83] Such an overinclusive interpretation creates tension with the plain text of the Government and Regulation Clause.[84]

To be sure, in response to antifederalist apprehensions raised by Tamony and Cato, Alexander Hamilton acknowledged that the

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[80] Barron & Lederman, *Original Understanding*, *supra* note 3, at 788 (referencing that the Reagan Administration's Office of Legal Counsel made this argument).

[81] U.S. CONST. art. II, § 2, cl. 1.

[82] *Id.* § 1, cl. 1.

[83] *See* THE FEDERALIST NO. 69, *supra* note 16, at 418 (Alexander Hamilton) (explaining that, at most, the Commander in Chief power would bestow upon the President powers enjoyed by the governors of Massachusetts and New Hampshire whose own constitutions tempered their authority through legislative control); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64–65, https://www.loc.gov/item/11005506/ [https://perma.cc/NX5Y-V9CZ] ("[Charles Pinckney of South Carolina] was for a vigorous Executive but was afraid the Executive powers of (the existing) Congress might extend to peace & war &c [sic] which would render the Executive a Monarchy, of the worst kind, towit an elective one."). While not dispositive of constitutional meaning, it is notable that proponents of a robust presidency, such as Alexander Hamilton and Charles Pinckney, expressed views inconsistent with any assumption that Article II conferred preclusive, indefeasible operational authority. Their concessions, though limited, are mildly probative insofar as they help illuminate Congress's ability to legislate general procedural guidelines for military operations without encroaching upon the President's core command functions.

[84] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 569 (Scalia, J., dissenting) ("Except for the actual command of military forces, all authorization for [the armed forces'] maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II."); *see also* Prakash, *supra* note 3, at 365 ("Where the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it." (quoting Printz v. United States, 521 U.S. 898, 920 n.10 (1997))).

President's authority as Commander in Chief "would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to *nothing more than the supreme command direction of the military and naval forces*[.]"[85] To further quell antifederalist concerns, Hamilton emphasized that where the President "would have a right to command," the English king "in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority."[86] While Federalist No. 69 is not dispositive as a definitive exposition of constitutional meaning, its role, along with the other Federalist Papers, in shaping the ratification debates suggests a rejection of the earlier inference that the Framers intended to leave all operational matters exclusively to the President. Rather, this discussion supports the view that the Framers did *not* envision an executive monopoly over operational regulation.

Moreover, the phrase "directing their operations" does not appear anywhere in Article II, either.[87] That the Framers extinguished the phrase entirely from the Constitution might imply overlapping authority for the regulation of military operations.[88] Or, perhaps, the Framers omitted it in Article I to avoid redundancy

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[85] THE FEDERALIST NO. 69, *supra* note 16, at 417–18 (Alexander Hamilton) (emphasis added). *But see* Yoo, *supra* note 5, at 277 (explaining that in order "[t]o downplay [a]ntifederalist concerns, the Federalists emphasized the separation of war powers between the branches, exaggerated the powers of the King, and highlighted the relative weakness of the President. In so doing, the Federalists engaged in rhetorical excess and intentionally distorted [a]ntifederalist arguments to permit their easy dismissal.").

[86] THE FEDERALIST NO. 69, *supra* note 16, at 422 (Alexander Hamilton) (emphasis in original).

[87] Judge Barron and Professor Lederman mentioned that the Committee on Detail received three proposals—the Philadelphia Convention Proposal, the New Jersey Plan, and Alexander Hamilton's plan—seeking to specify that the President would have explicit authority to direct military operations, none of which was incorporated in Article II. *See* Barron & Lederman, *Original Understanding*, *supra* note 3, at 788.

[88] *But see id.* at 788 n.326 ("It is noteworthy that James Madison himself assured those in the Virginia ratifying convention that the *Congress* retained 'the direction and regulation of land and naval forces.'" (emphasis in original) (citing 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare J. Saladino eds., 1993))).

given the broad phrasing contained in the Government and Regulation Clause.[89] At the same time, some evidence by prominent war powers scholars indicates that the Vesting Clause "convey[s] all other unenumerated powers to the President."[90] Reasonable doubt emerges on either side of the coin.[91] In the end, though, it would be strange to conclude that enacting SROE—literal "Rules for the Government and Regulation" of the armed forces—is an unconstitutional exercise of Congress's power, given that the Framers still granted Congress that authority despite the uncertain significance of omitting "directing their operations."

Additional evidence suggests that, at the time the Constitution was being drafted, "directing operations" was ordinarily understood as leading or commanding troops on the battlefield. "The Congress of the Articles was not the Congress of the Constitution" in that the Continental Congress exercised executive, legislative, and judicial functions—a feature the Framers scrapped in the new Constitution.[92] For example, Continental Congress President John Hancock issued direct orders for public and private vessels during the Revolutionary War containing elaborate provisions on attacks, captures, and prisoner treatment.[93] If

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[89] *See* Prakash, *supra* note 3, at 373 ("[T]he terms 'govern' and 'regulate' indicate the powers to direct, manage, and rule. Hence, when Congress directs military operations, it *is* making rules for the government and regulation of the armed forces.").

[90] John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1678 (2002).

[91] This was one of the reasons Professor Maurer declined to engage with originalism, as he believed any result it would yield would be necessarily inconclusive. *See* Maurer, *Part II*, *supra* note 8, at 900–04. Yet, this friction within the constitutional order might have been the intended outcome, for "when the executive and legislature oppose one another, the branches either must work out a political compromise, or they must 'appeal to heaven'" *à la* John Locke and, later, Madison. Yoo, *supra* note 5, at 200 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 168 (J.W. Gough ed., 3d ed. 1966)).

[92] Yoo, *supra* note 5, at 236–38.

[93] Section I states that privateers "may, by Force of Arms, attack, subdue, and take all Ships and other Vessels belonging to the Inhabitants of Great Britain, on the High Seas . . . ."; Section VII required privateers to "send to Congress written Accounts of the Captures . . . ."; Section VIII required that at least one-third of the crew consist of "Land Men"; Section XI issued a warning that if privateers "shall do any Thing contrary to these Instructions," they would be subject to liability and commission forfeiture. *In*

"direct[ing] operations" was understood narrowly to encapsulate command authority, such as transmitting orders to senior military officers, then its omission from the Government and Regulation Clause might be probative only of the Framers' desire to centralize the chain of command in the President of the new Constitution.[94]

Furthermore, evidence from state ratifying conventions demonstrates the broad scope of the Government and Regulation Clause. For example, Massachusetts and New Hampshire proposed amendments, which were ultimately rejected, that would have confined the Clause to defining the contours of the military justice system.[95] This was not a radical interpretation for "the Continental Congress regulated military discipline, creating articles of war for both the Army and the Navy," as early as 1775, even before Article IX of the Articles of Confederation authorized it.[96] Therefore, while some delegates sought to limit the Clause to military discipline, pre-ratification practice was considerably

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Congress, Wednesday, April 3, 1776, LIBR. OF CONG., https://www.loc.gov/item/90898006/ [https://perma.cc/QLB6-KAHP]. While the order is not as specific as a five-paragraph order from a senior officer to a platoon commander detailing the situation, mission, execution, administration and logistics, and command and signal, it bears similarities to what an executive, civilian delegation would transmit to senior military officers. *See generally* REGULATIONS FOR THE FIELD EXERCISE, MANOEUVRES, AND CONDUCT OF THE INFANTRY OF THE UNITED STATES (Philadelphia: Fry and Kammerer, 1812) (detailing instructions for each rank of servicemember and how to issue orders).

[94] *Compare* ARTICLES OF CONFEDERATION of 1781, art. IX (vesting Continental Congress with the power to direct operations), *with* U.S. CONST. art. I, § 8, cl. 14 (omitting congressional power to direct military operations).

[95] 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 323, 326 (Jonathan Elliot ed., 2d ed. 1836) ("That no person shall be tried for any crime by which he may incur an infamous punishment or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."); *see also id.* at 328, 334 for similar formulations contained in the New York and Rhode Island proposals.

[96] Prakash, *supra* note 3, at 329 (citing 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 378 (Worthington Chauncey Ford ed., 1905) (entry for Nov. 28, 1775) (creating rules for the "Regulation of the Navy")); *see also* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 111–12 (Worthington Chauncey Ford ed., 1904) (entry for June 30, 1775) (creating articles of war for the Army); ARTICLES OF CONFEDERATION of 1781, art. IX, § 4.

broader. As the next Section explores, the Continental Congress used Article IX's Government and Regulation power to enact an intricate procedural manual regulating the armed forces' training and operations just four years later.[97] Additionally, no textual or structural evidence contained in the final draft of the Constitution purports to limit the scope of the Clause to military discipline; indeed, Justice Joseph Story cautioned that, if vested in the executive, it could permit "the most summary and severe punishments," underscoring how capacious the power was understood to be.[98] At most, it may be inferred that the Clause "*include[s]*" establishing a system of military justice, but nothing "demonstrate[s] that the ratifiers understood it to *exclude* everything else regarding military administration."[99] In short, evidence about the origins of the Government and Regulation Clause does not support a narrow reading that limits its scope to military discipline.

Even if one rejects the formulations above, the Framers' choice not to transfer phrases from the Articles into the new Constitution

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[97] *See* Prakash, *supra* note 3, at 332 n.173 (referencing 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 384–85 (Worthington Chauncey Ford ed., 1909) (entry for Mar. 29, 1779) (adopting Baron [von] Steuben's system of regulations for the Army)).

[98] An early treatise on the Constitution penned by Justice Joseph Story addresses the Government and Regulation Clause in the context of military discipline: "The [Government and Regulation] power is far more safe in the hands of Congress than of the executive; since, otherwise, the most summary and severe punishments might be inflicted at the mere will of the executive." STORY, COMMENTARIES, *supra* note 76, § 1197. But identifying one use of the Clause with matters of military discipline does not preclude other uses that the Framers might have considered in adopting the Clause which the history set forth in Part III.C, *infra*, demonstrates. In Justice Story's own words, the "ordinary" meaning controls "unless the context furnishes some ground to control, qualify, or enlarge it." John O. McGinnis & Michael B. Rappaport, *What is Original Public Meaning?*, 76 ALA. L. REV. 223, 275 (2024) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157 (Boston, Little, Brown, & Co. 1873)). In this case, context cannot be neglected. *See id.*

[99] Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 88 (1999).

is not definitive proof denying or circumscribing that grant of power to Congress.[100] Nor does it categorically prove that such operational authority was wholly transferred to the executive. Three considerations support the plausibility of concurrent authority shared with the presidency: (1) the Government and Regulation Clause grants Congress broad rulemaking authority, with no textual limitation excluding operational matters from its scope; (2) although "directing their operations" was omitted, the final constitutional text added no corresponding restriction on Congress's authority under (1); and (3) neither the Convention records nor the ratifying debates define the powers of the Commander in Chief in terms that imply exclusivity over all operational regulation. Thus, even if Congress's government and regulation power interacts with elements of Article II authority, it remains plausible that the Framers anticipated that the political departments would exercise overlapping authority in regulating military operations.[101] In other words, while "certain powers were designed to be exclusive to Congress or the President," others such as governing and regulating the conduct of the armed forces were plausibly designed to be concurrent.[102] Nothing in the text or debates substantiates the proposition that the Framers siloed operational regulation in one branch to the exclusion of the other.

C. Tracing History from the Early Republic

All three branches of government have often recognized the import of past practice in maintaining the constitutionally

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[100] *See* Prakash, *supra* note 3, at 373 ("Under the Articles, the Continental Congress had the power of 'exacting such postage on the papers passing thro[ugh] the [post office] as may be requisite to defray the expenses of the said office.' This grant of power is not found in the Constitution. Nonetheless, everyone understands that the power to create post offices and post roads includes such authority.") (first quoting ARTICLES OF CONFEDERATION of 1781, art. IX; and then quoting U.S. CONST. art. I, § 8, cl. 7).

[101] Indeed, Professor Lobel makes this argument. *See* Lobel, *supra* note 3, at 445.

[102] *Id.*

required[103] separation of powers. In Justice Felix Frankfurter's words: "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[104] According great weight to history in the context of foreign and military affairs is a sound practice, but the absence of precedent ought not to be taken to pretermit one branch or another from exercising its duly conferred constitutional authority.[105]

This Section sets forth a chronological sampling where Congress has regulated military operations, primarily from the early years of our government. Specifically, the history shows an active Congress controlling the operational procedures of the armed forces without interfering with the President's command and implementation discretion. Statutory analogs resembling segments of the SROE offend Chief Justice Salmon Chase's oft-invoked formulation that Congress cannot "interfere[] with the command of the forces and *the conduct of campaigns*"—the main premise underlying claims that

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[103] *But see* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994 (2011) (arguing that "the Constitution adopts *no freestanding principle of separation of powers*" (emphasis in original)).

[104] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *see also* Mistretta v. United States, 488 U.S. 361, 381 (1989) ("'[T]he Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.'" (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring))).

[105] *See Youngstown*, 488 U.S. at 610 (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *see also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." (emphasis in original)).

all such authority rests exclusively with the presidency.[106] Equally important, too, past practice disclaims the proposition that the Government and Regulation Clause is limited only to regulating the military justice system.[107]

1. Before the New Constitution

Briefly examining Parliament's role in regulating the conduct of military operations vis-à-vis the Crown will provide context for understanding the Framers' design for Congress under our Constitution. After all, "the Framers consciously acted in the context of the British Constitution, under which they had lived as English colonists," so it follows that a brief study of "the interaction between the Crown and Parliament will provide insight as to the type of relationship the Framers expected the President and Congress to share."[108]

Parliamentary regulation of the military's operational and administrative affairs was not a radical or isolated practice. Professor Saikrishna Prakash's treatment of the subject is instructive.[109] Parliament routinely regulated "the use of the militia overseas and the placement of the army on English soil."[110] In addition to enacting articles of war governing military discipline,[111]

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[106] *See* Barron & Lederman, *Original Understanding*, *supra* note 3, at 760–61 (quoting *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring in the judgment) (emphasis added)).

[107] Since some historical practice that follows does not expressly identify the source(s) of authority Congress relied upon to regulate military operations, this statement operates based on the assumption that Congress acted pursuant to the most logical source of authority to act in this area, which is the Government and Regulation Clause. *See supra* Part III.A.

[108] Yoo, *supra* note 5, at 197–98. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

[109] Prakash, *supra* note 3, at 321–40.

[110] *Id.* at 330.

[111] *Id.* at 328 (discussing that Parliament first enacted rules of discipline in 1648).

Parliament controlled training procedures[112] and prisoner treatment.[113] At the same time, English law delegated to the Crown "the sole supreme government, command and disposition of the militia, and of all forces sea and land, and of all forts . . ." and, eventually, the authority to regulate military discipline.[114] No matter how intrusive parliamentary lawmaking might have been regulating operational conduct, though, the Crown and subordinate executive officers still exercised substantial tactical discretion on the battlefield.

Even William Blackstone, the staunch English defender of brazen executive prerogative during wartime, acknowledged this point: "[Parliament] hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, *military*, maritime, or criminal . . . ."[115] Presumably, Parliament and the Crown possessed concurrent authority over the conduct of military campaigns, and more importantly, English antecedents reveal that legislative regulation of such conduct was not a novel practice. Granted, the English did not have an independent presidency, but English practice is relevant because "[i]n adopting elements of the British Constitution's checks and balances, the Framers reasonably could expect those elements to produce a relationship between the President and Congress similar to the one that they thought existed between Crown and Parliament."[116]

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[112] *Id.* at 325 nn.128–29 (referencing various English statutes dictating requirements for the militia's use and what equipment shall be employed for training and field exercises).

[113] *Id.* at 338 nn.213–15 (referencing English statutes as early as 1661 regulating the navy's treatment of prisoners).

[114] *Id.* at 326 n.136, 329 n.158.

[115] 1 WILLIAM BLACKSTONE, COMMENTARIES *160 (emphasis added).

[116] Yoo, *supra* note 5, at 208. Without assuming the extent to which the English framework informed the Framers' design of American government, we can modestly conclude that it impacted the development of our Constitution. *Compare* Lobel, *supra* note 3, at 420 (asserting that the Framers completely "rejected the British model of war

Fast forward to the mid-eighteenth century—around the Revolutionary period but before the ratification of the Constitution in 1788.[117] Under the Articles of Confederation, the Continental Congress played a substantial role in directing the military's operational affairs. Although caution is warranted in drawing inferences from this practice—given that the Continental Congress functioned as an assembly exercising both legislative and executive powers, which the Framers later separated—the history remains relevant as part of the background against which the Government and Regulation Clause was drafted and understood.[118]

In 1779, the Continental Congress adopted "a system of tactics and rules for the camp and on the march" for the Army and militia known as Baron von Steuben's *Regulations for the Order and Discipline of the Troops of the United States*.[119] Elaborate and thorough, von Steuben's regulations resemble the detailed operational frameworks found in current field manuals of branches of the armed forces.[120] Consider some chapters contained in the 190-page regulation. The first chapters cover how to form a company and a

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powers"), *with* Yoo, *supra* note 5, at 197 (contending that the new Constitution followed the English tradition).

[117] Before the Continental Congress ratified the Articles of Confederation in 1781, the newly independent states managed their affairs through their own constitutional frameworks. However, "[u]nlike the federal Constitution, the state constitutions chose not to enumerate the powers of their legislatures . . ." so state constitutions will not be considered given the focus of the Government and Regulation Clause in this Note. Yoo, *supra* note 5, at 226.

[118] *See supra* Part III.B; *see also* Barron & Lederman, *Original Understanding*, *supra* note 3, at 774 ("[T]he Continental Congress was, in the words of one delegate, a 'deliberating Executive assembly.'"); Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994) ("[The Continental Congress] was merely an international assembly of ambassadors, sent, recallable, and paid by state governments with each state casting a single vote as a state.").

[119] G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 62 (1898).

[120] *See, e.g.*, U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS (2022); WARFIGHTING, *supra* note 24.

regiment,[121] how to march,[122] and how to operate a gun and bayonet.[123] Chapter thirteen sets forth meticulous procedures for "firing" organized by battalion, divisions, and platoons.[124] At the end, the regulations contain specific instructions for personnel ranging from Commandants and Captains to First Sergeants and Privates.[125] For example, detailed procedural guidance for sentry and patrol duty comprised much of the section for lower ranked personnel.[126]

Beyond Steuben's regulations and articles of war governing troop discipline, the Continental Congress micromanaged commanders in chief on the battlefield during the Revolutionary War, most notably George Washington. Soon after commissioning Washington as "General and Commander in chief, of the army of the United Colonies,"[127] the Congress appointed a committee to "prepare a plan for intercepting two vessels" bound for Canada.[128] On November 10, 1775, the Congress:

> *Resolved*, That General Washington be directed in case he should judge it practicable and expedient to send into that colony a sufficient force to take away the cannon and

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[121] FRIEDRICH WILHELM VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF TROOPS OF THE UNITED STATES 6–9 (1779), www.loc.gov/item/05030726/ [https://perma.cc/D64J-EN3A].

[122] *Id.* at 10–15.

[123] *Id.* at 16–30 ("The Manual Exercise").

[124] *Id.* at 64–66. For example, Chapter 13, Article 4, "Firing Retreating" states:

"When a battalion is obliged to retire, it must march as long as possible; but if pressed by the enemy, and obliged to make use of its fire, the commanding officer will order,

Battalion! Halt!

To the Right about, ---Face!

and fire by the battalion, division, or platoon, as before directed." *Id.* at 66 (formatting reproduced from original).

[125] *Id.* at 128–54.

[126] *Id.*

[127] 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 96, at 96 (entry for June 17, 1775).

[128] 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 96, at 277 (entry for Oct. 5, 1775).

> warlike stores and to destroy the docks, yards and magazines, and to take or destroy any ships of war and transports there belonging to the enemy.[129]

Such micromanagement hampered the War's progress. Eventually, the Congress delegated significant authority to Washington to command the military,[130] driving the Framers to vest the executive with ample command and implementation discretion in the new Constitution.[131] But, even after the War, the Continental Congress continued issuing operational guidance to U.S. forces and directing their movement against Indian attacks, suggesting a sustained legislative role.[132] Historical practice from the early Republic substantiates a warmaking framework that embraces Congress as an active participant in the military's operational affairs.

2. After the New Constitution's Adoption

After the new Constitution was adopted, Congress reenacted Steuben's regulations, solidifying its intent to remain involved in the military's operational affairs.[133] The First Congress mandated that U.S. military forces "shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established."[134]

Nevertheless, Congress's regulation of military operations divided Federalists and Democratic-Republicans soon after the Constitution's ratification. History leading into the Quasi War of

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[129] *Id.* at 348.

[130] *See* Barron & Lederman, *Original Understanding*, *supra* note 3, at 778–79.

[131] *Id.* at 778 ("[T]he exigencies of war quickly revealed that detailed control of the Commander in Chief was not the most efficient way to prosecute a war.").

[132] Prakash, *supra* note 3, at 326 n.138 (citing Act of Sep. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 (repealed 1790)).

[133] *Id.* at 333 (citing Act of Sep. 29, 1789, ch. 27, § 4, 1 Stat. 95, 96 (repealed 1790)).

[134] *See* Act of Sep. 29, 1789, ch. 27, § 4, 1 Stat. 95, 96 (repealed 1790).

1798–1800 is instructive. In 1794, Congress authorized the President to fortify the harbors and to place armaments at the fortifications, mirroring today's standing rules and limitations on the use of weapons and force—arms guidance—contained in the SROE.[135] When Congress created the Navy in 1797, it delegated to the President the authority to deploy vessels and initially limited crew formation and weapons placement.[136] Congress also imposed statutory restrictions on the use of military vessels for customs enforcement and specified the geographic location of the ships.[137] It additionally delineated which ships troops could capture during the war[138] and provided detailed prisoner treatment guidance.[139]

The most striking example demonstrating congressional power to enact something resembling the SROE can be found in a 1799 law in which Congress grounded its authority to act in the Government and Regulation Clause.[140] The first section comprehensively covers military discipline,[141] with the following sections supplying instructions for pay and prize.[142] Notably, the final section provides:

> "That no rules or regulations made by any commander in chief, or captain, in the service of the United States, for the stationing, designating of duty and government of the fleet, or any of the crews of any ship of war, shall be at variance with this act, but shall be strictly conformable thereto; and that every commander in chief and captain, in making private rules and regulations, and designating the duty of

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[135] *See* Act of Mar. 20, 1794, ch. 9, §§ 1–2, 1 Stat. 345, 346.

[136] Act of July 1, 1797, ch. 7, § 1, 1 Stat. 523, 523–24; *see also* Act of Apr. 27, 1798, ch. 31, § 1, 1 Stat. 552, 552.

[137] Prakash, *supra* note 3, at 335 (first citing Act of July 1, 1797, § 7, 1 Stat. 525; then citing Act of June 22, 1798, ch. 55, § 1, 1 Stat. 569, 569; and then citing Act of May 4, 1798, ch. 39, § 2, 1 Stat. 556, 556)).

[138] *See* Little v. Barreme, 6 U.S. 170, 170 (1804).

[139] Act of Mar. 3, 1799, ch. 45, 1 Stat. 743, 743 (repealed 1813).

[140] Act of Mar. 2, 1799, ch. 24, § 1, art. 45, 1 Stat. 709 (repealed 1800).

[141] *Id.* at 709–13.

[142] *Id.* at 713–16.

> his officers, shall keep in view also the custom and usage of the sea service most common to our nation.[143]

The statutory language demonstrates that Congress understood the Government and Regulation power to encompass more than defining the military's criminal regime; in fact, it could exercise control over the conduct of military operations; and it could demand that the relevant combatant commanders issue regulations comporting with the LOAC. The Court, too, recognized early on that both political branches have a role to play in the prosecution of war.[144]

Congress clearly understood its authority as extending beyond prescribing a military criminal code; yet the precise boundary of that power, particularly whether it reached into the President's command discretion, remained a point of contention. The House thoughtfully considered the issue in June 1797 when Albert Gallatin proposed an amendment to a resolution that would grant

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[143] *Id.* at 716–17.

[144] *Cf.* Little v. Barreme, 6 U.S. 170, 179 (1804) (affirming damages against a U.S. naval captain who seized a foreign vessel under presidential orders issued pursuant to an act of Congress). The Court held that the executive had misconstrued the statute, rendering the seizure unauthorized by federal law. The Court acknowledged the military prudence of the President's directive but concluded that Congress had at least implicitly prohibited the ordered action. *See id.* at 177–78; *see also* Bas v. Tingy, 4 U.S. 37, 43 (1800) (noting that Congress circumscribed President John Adams's authority to wage hostilities against France because there was "no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port . . . ."); Talbot v. Seeman, 5 U.S. 1, 28 (1801) (Marshall, C.J.) (emphasizing Congress's primacy in determining whether Captain Talbot lawfully seized a French armed vessel and stating that "the acts of that body can alone be resorted to as our guides in this enquiry"). To be sure, these cases fell within Congress's Article I, § 8 authority to "make Rules concerning Captures" and Article III's jurisdictional grant over admiralty and maritime cases, which the Court has recognized as authorizing federal common lawmaking. They nonetheless reflect another co-equal branch of government's affirmation that Congress exercises concurrent authority in this domain. *See* WILLIAM BAUDE, JACK L. GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 847 (8th ed. 2025).

the President control over publicly-owned vessels.[145] Gallatin suggested a requirement that "any vessel obtained by the President be stationed in the United States" to avoid conflicts outside American waters.[146] Harrison Gray Otis objected: "[t]he Legislative could say whether the vessels should be employed offensively or defensively, but to say at what *precise place* they were to be stationed, was interfering with the duty of the commander-in-chief . . . ."[147] The objection Otis raised illustrates that general operational rules were within Congress's province but that precise directives or orders were not. Mindful of foundational separation of powers principles, Otis's formulation "balance[d] institutional participation" between the political branches.[148]

The Senate similarly weighed these issues when objections like Otis's were lodged. Speaker Johnathan Dayton "moved to strike the clause relating to how the frigates should be employed," and others comparably rebuked the notion that Congress had the "right to direct public force."[149] On the other side of the aisle, John Nicholas "insisted upon it that [Congress] had a right to say the vessels should be kept in the river Delaware, if they pleased."[150] While the President may direct the troops' use of force, Nicholas pressed that it was not a blank check of unbounded discretion.[151] Congress, too, has power to direct warmaking through lawmaking.[152] Even Otis, despite objecting to legislative micromanagement, ultimately conceded the principle: "Congress had the right to direct the public force," but urged that it exercise that power sparingly "to demonstrate their confidence in the President."[153] In the end, the

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[145] That is, government-owned vessels. SOFAER, ORIGINS, *supra* note 5, at 147–48.

[146] *Id.* at 148.

[147] *Id.* (emphasis added).

[148] *See* KOH, *supra* note 5, at 112.

[149] SOFAER, ORIGINS, *supra* note 5, at 149.

[150] *See id.* at 149 (quoting 7 ANNALS OF CONG. 290 (1797)).

[151] *See id.*

[152] *See id.*

[153] *Id.* Another Federalist, Samuel W. Dana, contended that Congress has the power to regulate the deployment of troops but that alone was not reason enough to justify exercising it. *See id.* at 150.

resolution passed without the amendment.[154] Notwithstanding, Congress still identified "particular sorts of actions against French vessels, in particular locations, for particular purposes," effectively directing military operations.[155]

By the mid-nineteenth century, Congress's approach had evolved. While congressional regulation over the conduct of war seemed constitutionally misplaced to some legislators early on, that did not prevent future Congresses from acting. One statutory provision authorized the President to use the military to occupy domestic territory contingent upon the occurrence of specified events.[156] Another statute provided for "the better organization" of the United States Marine Corps, delegating to the President the authority to establish "laws and regulations . . . except when detached for service with the army by order of the President."[157] What Congress intended by including the phrase "except when detached for service with the army" is ambiguous, but it could be construed to preserve Congress's ability to prescribe organizational regulations for the Army and Navy in the operational context.[158] In any event, Congress's reluctance to act in the years up to, and including, the Civil War does not denote a forfeiture of authority.[159]

Perhaps the most significant discord between the political departments about the prosecution of war occurred during the Civil War era, though disputes about Congress's control of military

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[154] *Id.* at 150.

[155] Barron & Lederman, *Constitutional History*, *supra* note 3, at 967.

[156] *See id.* at 981 n.136 (referencing Act of Jan. 15, 1811, § 1, 3 Stat. 471, 471).

[157] *See id.* at 981 n.138 (referencing Act of June 30, 1834, ch. 132, § 4, 4 Stat. 712, 713).

[158] *See id.*

[159] *See, e.g.*, Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 916 (1989) (observing that, in the context of the Court not declaring a single law unconstitutional during the period between *Marbury* and *Dred Scott*, that "in neither case does power evaporate with lack of experience"); SCHLESINGER, *supra* note 5, at 50–51 ("For its part, Congress was content to leave [military action] to the executive—either by delegation, as in an act of 1819 authorizing the Navy to take action against pirates or an act of 1862 authorizing the Secretary of the Navy to make regulations concerning, among other things, the protection of American citizens in danger abroad, or without any congressional action at all."). The bottom line is that mere nonuse of a constitutional power does not terminate it.

operations were secondary to those concerning the scope of its authority to regulate the President's exercise of his war powers.[160] Still, parts of the Senate's debates over the Second Confiscation Act of 1862—which authorized the seizure of Southern rebels' property and emancipated certain categories of slaves—are illustrative.[161] Senators Edgar Cowan and Orville Browning, for example, expressed the same syllogistic reasoning used by the Bush Administration that the Commander in Chief's unbounded battlefield discretion implies that the whole ambit of military operations is within his preclusive authority.[162] Proponents of the bill and moderate Republicans, like Senator Jacob Howard, agreed that Congress could not micromanage tactical details on the ground, but held that broader statutory regulation of the military's operational conduct was constitutionally permissible.[163] How could Congress be responsible for the creation of the Army and Navy yet completely powerless over their deployment? Congress passed the bill—though not in reliance on its Government and Regulation power.[164]

After the Civil War, Congresses did not regulate military operations to the same extent or with the same vigor. From

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[160] *See* Barron & Lederman, *Constitutional History*, *supra* note 3, at 1009 ("The Habeas Corpus Act of 1863 is the prime example of a Civil War Statute that *tempered* the exercise of the President's war powers . . . ." (emphasis in original)). Judge Barron and Professor Lederman also reference the Second Confiscation Act of 1862 as an example of legislation that was "largely animated by the opposite notion—that the President had been insufficiently aggressive in exercising his war powers." *See id.*

[161] Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590; *id.* §9, 12 Stat. at 591.

[162] *See* Barron & Lederman, *Constitutional History*, *supra* note 3, at 1012–13.

[163] *See id.* at 1013–14; *see also* Lobel, *supra* note 3, at 434.

[164] It should also be noted that the Republicans' dissatisfaction with the war prompted the establishment of the Joint Committee on the Conduct of the War, which in the end only "micromanag[ed] the conduct of the war by use of the threat of negative publicity and exposure of malfeasance, rather than through statutory or other formal enforcement mechanisms." Barron & Lederman, *Constitutional History*, *supra* note 3, at 1010. After the Civil War, the Reconstruction Congress enacted an appropriations rider, Act of Mar. 2, 1867, ch. 170, § 2, 14 Stat. 485, 486–87, and a supplement to a court-martial law, Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92. Both were instances of Congress acting to regulate the operational conduct of the military through different grants of power. *See id.* at 1021.

Reconstruction to the modern day, Congress has controlled the military's operational affairs through the appropriations power,[165] through statutory authorizations for the use of force,[166] and through its authority to define offenses against the law of nations in statutes like the War Crimes Act.[167] But using other constitutional avenues to regulate operations does not abrogate future legislative action grounded in the Government and Regulation Clause. The Constitution's text and early history refute such a contention. At most, Congress's choice not to extensively legislate in a field in which the President and his subordinates maintain expertise reflects sound policy.[168]

In sum, the statutory record reveals early Congresses actively directed military operations. Further, there is no evidence that these statutes unconstitutionally interfered with the Commander in Chief's tactical command discretion to execute his will within those restrictions.

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[165] *See, e.g.*, Posse Comitatus Act, § 15, 20 Stat. 145, 152 (1878) (barring the use of the Army for law enforcement purposes); Act of Mar. 3, 1909, ch. 255, 35 Stat. 753, 773–74 (barring expenditures for the Marine Corps unless eight percent of the men on board vessels are Marines); Department of Defense Appropriations Act, 1970, Pub. L. 91171, § 643, 83 Stat. 469, 487 (1969); Special Foreign Assistance Act of 1971, Pub. L. 91652, § 7a, 84 Stat. 1942, 1943 (1971).

[166] *See, e.g.*, Lobel, *supra* note 3, at 439–41 (citing Senate Joint Resolution 159, 98th Cong. (1983), Pub. L. No. 98-119, § 6, 97 Stat. 805, 807); *see also* Joint Resolution of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7. *See generally* Bradley & Goldsmith, *supra* note 19.

[167] U.S. CONST. art. I, § 8, cl. 10; War Crimes Act, Pub. L. No. 104-192, § 2(a) (1996) (codified at 18 U.S.C. § 2441 (2000)).

[168] *See* Barron & Lederman, *Constitutional History*, *supra* note 3, at 952 (observing in the first seven decades of constitutional practice that "Congress often made the unsurprising policy judgment that the President should be afforded broad discretion in deciding how to fight wars"). *But see* SCHLESINGER, *supra* note 5, at 283 ("Expertise? The test of expertise was in judgments it produced; and no episode in American history had been more accompanied by misjudgment, misconception and miscalculation than the war in Vietnam.").

IV. IMPLICATIONS

To anchor this *Part*, a brief recap is useful. Part I traced the post-9/11 era expansion of preclusive military authority under Article II as forging a constitutional order in which executive claims of operational control are often treated as dispositive. Part II explained how ROE function and why the SROE provide the most realistic statutory model for congressional regulation of the armed forces. Part III drew on the constitutional text and historical evidence surrounding the Government and Regulation Clause to show that Congress holds concurrent authority with the presidency to legislate certain operational rules.

This Part turns to the doctrine of presidential departmentalism—traditionally considered alongside the doctrine of judicial supremacy and broader questions of constitutional interpretation[169]—to explain how the President's independent interpretive authority circumscribes and constrains, but does not eliminate, Congress's ability to regulate military operations. While departmentalism limits the practical reach of congressional power, Congress retains meaningful constitutional tools through which it can influence the conduct of operations: it may enact rules (such as the SROE), exercise its power of the purse, and conduct oversight. Section A examines how presidential departmentalism has operated in practice, both historically and institutionally, to constrain Congress's otherwise valid authority in this space; Section B outlines realistic mechanisms through which Congress may assert its role.

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[169] *See generally* WHITTINGTON, *supra* note 4; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON (1993); Fallon, *supra* note 4.

A. Presidential Departmentalism as a Limitation on Congress's Power

Broadly, departmentalism is "the Jeffersonian idea that each branch of government has an equal authority and responsibility to interpret the Constitution when performing its own duties."[170] From this idea emerges the general proposition that the President may decline to enforce a law he views as unconstitutional.[171] Nonenforcement authority, which has received some judicial approval in specific contexts,[172] generally presupposes that the President must first interpret the Constitution in order to deem a law unconstitutional. A parallel proposition is in order: Congress likewise possesses equal and independent authority to interpret and implement the Constitution in accordance with its own views.[173]

Yet, departmentalism manifests asymmetrically in the context of constitutional war powers.[174] For interpretive independence exercised by the presidency is most authoritative in areas that implicate core Article II responsibilities, such as military command.[175] This Note proceeds on the assumption that the

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[170] WHITTINGTON, *supra* note 4, at xi. *See generally* KRAMER, *supra* note 4.

[171] Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994); *see also* Easterbrook, *supra* note 159, at 906.

[172] Myers v. United States, 272 U.S. 52 (1926); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); Freytag v. Comm'r, 501 U.S. 868, 906 (1991) (Scalia, J., concurring).

[173] *See* Easterbrook, *supra* note 159, at 911–12 (listing "non-controversial" examples such as "voting against a bill on constitutional grounds," "vot[ing] for a bill that the Court has held unconstitutional," "impeach[ing] and remov[ing] from office all who violate the Constitution," and the most conceptually interesting, "the extraordinary power to interpret *and change the meaning of* the 14th and 15th Amendments" (emphasis in original)).

[174] *See supra* Part I.

[175] Command and implementation discretion, an Article II power, naturally overlaps with regulating the military's operations, a power the presidency shares with Congress. *Cf. supra* Part II & III. It's important to acknowledge the distinction as claims to the former have often been comingled with claims to the latter. *See infra* notes 176–81 and accompanying text.

President interprets his Commander in Chief authority expansively,[176] a persistent feature of presidential constitutional interpretation, as discussed in Part I, *supra*. Command and implementation discretion—which is arguably the exclusive purview of the presidency under Article II—naturally overlaps with regulating the conduct of the military's operational affairs, both in garrison and on the battlefield, which is a concurrent authority shared between the presidency and Congress.[177] The latter, while constitutionally shared between the political branches, is often subsumed by the President's own understanding of his Commander in Chief authority.[178] Consider, for example, the Bush administration's OLC's assertion:

> Congress cannot interfere with the President's exercise of his authority as Commander in Chief to control the conduct of operations during a war. . . . [T]he President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. Any construction of criminal laws that regulated the President's authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions whether Congress had intruded on the President's constitutional authority. . . . In our view, Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. In fact, the general applicability of these statutes belies any argument that these statutes apply to persons under the direction of the President in the conduct of war.[179]

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[176] By expansively, I mean that the President treats not only battlefield command and implementation discretion, but also the governance and regulation of military operations, as part of his core, preclusive Article II authority.

[177] *See supra* Part III.

[178] *See supra* note 12–14 and accompanying text.

[179] Memorandum for William J. Haynes II, Gen. Counsel, Dep't of Defense, from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Just., Re: *Military*

Although this memorandum was later withdrawn, its reasoning continues to permeate the executive branch.[180] When Presidents make such sweeping assertions, they typically invoke the Commander in Chief authority in combination with other Article II powers, often without regard to Congress's concurrent authority. In doing so, Presidents transform a constitutionally shared domain—the regulation of military operations—into one of purely executive responsibility.[181] This Part is thus limited to instances in which the President, by his own interpretation of how he must implement his own constitutional grant authority, asserts control over the conduct of hostilities.

Moreover, historical episodes—from Lincoln's wartime decisions and Truman's actions during Korea, to Vietnam, the Iran-Contra affair, and post-9/11 military actions—illustrate a persistent pattern of presidential initiative to which Congress has frequently,

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Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) at 13 (first citing Memorandum for Daniel J. Bryant, Assistant Att'y Gen., Off. of Leg. Affairs, from Patrick F. Philbin, Deputy Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Just., Re*: Swift Justice Authorization Act* (Apr. 8, 2002); then citing Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Just., Re: *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sep. 25, 2001) at 6; and then citing Memorandum for Andrew Fois, Assistant Att'y Gen., Off. of Leg. Affairs, from Richard L. Shiffrin, Deputy Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Just., Re: *Defense Authorization Act* (Sep. 15, 1995)). I cite these underlying OLC memoranda to illustrate that the 2003 opinion expressly draws on, and perpetuates, the same reasoning developed in earlier opinions.

[180] *See, e.g.*, Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 39, 41–48 (2018); Authority to Use Military Force in Libya, 35 Op. O.L.C. 20 (2011); Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82 (2014); Memorandum for William J. Haynes II, Gen. Counsel, Dep't of Defense, from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Just., Re: *The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (Mar. 13, 2002); *see also supra* note 2 (observing withdrawal of both interrogation memos).

[181] *See* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, Gen. Counsel, Dep't of Defense, from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Counsel, Dep't of Just., Re: *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002) at 12.

even reluctantly, deferred. Such historical institutional practice, even from this small sampling, reflects how presidential interpretive prerogative, while not negating Congress's authority, shapes the environment in which congressional action (or inaction) is understood and acted upon.[182]

One might reasonably ask: why didn't Congress use its authority and act more aggressively after Lincoln's wartime expansions or in the wake of the Iran-Contra scandal? Instead, following the Civil War, Congress began leveraging other tools in its constitutional arsenal rather than directly regulating operations.[183] This postwar congressional restraint may reflect something other than mere abdication of duty. It suggests an institutional recognition that the presidency, through its independent legal interpretation and practice, has assumed a leading role in regulating military operations.[184] Congressional restraint is also formative: it fortifies the constitutional order shaped by strong deference to the executive's interpretation of its own authority.

In this sense, a cyclical dynamic emerges in which Congress's reluctance to regulate the conduct of hostilities strengthens the President's interpretive dominance; that dominance, in turn, makes congressional action increasingly difficult to assert. For Congress to

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[182] *See* SKOWRONEK, *supra* note 169, at 55 (1993) (observing that "the political foundations of presidential action have become increasingly independent over time . . . the institutional universe of political action has gotten thicker all around—at each stage in the development of the office there are more organizations and authorities to contend with, and they are all more firmly entrenched and independent.").

[183] *See supra* notes 165–67 and accompanying text.

[184] *Cf.* SKOWRONEK, *supra* note 169, at 52–53 ("Different types of presidential political politics . . . periodize the distinctive political and institutional resources which the office routinely makes available to incumbents in the exercise of their powers. In doing so, they also illuminate its practical working relationships with the other branches and the standard operating procedures that define routine responsibilities and bind the government together." Skowronek continues by categorizing emergent structures of presidential power based on mode of governmental operations—patrician (1789–1832), partisan (1832–1900), pluralist (1900–1972), and plebiscitary (1972–present)—and ascribes presidential strategies to each in a table. Together, this table represents the historical development of the presidency.).

"move the needle" in this domain would require not just legislative pushback, but a fundamental remolding of the constitutional order.

Congress, despite possessing this authority, has historically chosen to act—or not act—in ways that carry interpretive significance for the development of institutional norms within the executive branch.[185] This pattern of legislative restraint has contributed to, and reinforced, a constitutional order in which the President's interpretation of his own authority over such rules is *the* operative authority—a constitutional understanding that the President possesses broad, and perhaps preclusive, authority to regulate the rules governing military operations.[186] In other words, Congress has enabled its own inertia and informed the scope of executive power in this domain at least as much as the presidency itself. Expansive claims of broad preclusive authority over military actions did not arise while Congress was sleeping; they emerged in a constitutional landscape shaped jointly by executive interpretation of what the Constitution requires of the presidency *and* congressional acquiescence.

The doctrine of presidential departmentalism thus helps illuminate Congress's contribution to its own limitations in regulating the conduct of hostilities, limitations for which it must be accountable. Departmentalism is not merely a theory of constitutional interpretation but a lived practice that defines the scope of authority, not only between the executive and judicial branches but also between the executive and legislative branches.

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[185] *See supra* Part III; *see also* SKOWRONEK, *supra* note 169, at 73 (observing "[t]he plasticity of institutional arrangements and their susceptibility to the personal will of a reconstructive leader"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("[C]ongressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) (observing that a "long-continued [executive branch] practice, known to and acquiesced by in by Congress, would raise a presumption" that the practice is permitted).

[186] *See supra* Part I.

Perhaps this dynamic between the political branches is how the Framers intended for the allocation of war powers to operate notwithstanding each branch's duly conferred authority.[187] In any event, departmentalism helps explain why Congress has often chosen to work around, rather than directly confront, presidential control over the conduct of hostilities.

B. Fidelity to Separation of Powers Through Realistic Congressional Mechanisms

Historical constitutional practice has defined the bounds of congressional authority, but it has not rendered that authority inert. Congress still retains mechanisms to influence the conduct of operations—including through the enactment of SROE—provided the rules respect the limiting, precedential dynamic imposed by the President's interpretive prerogative.

Part III established that the Constitution, as originally understood, affords Congress the power to codify the policies and procedures contained in the SROE. These rules are not battlefield commands or hyper-technical tactical requirements; rather, they are standing guidelines subject to careful revision by military and civilian leadership for mission-specific ROE.[188] This formulation accords with the Framers' effort to reform and replace the structure of government and apportionment of powers inherited from England and the Articles of Confederation with a democratic republic grounded upon once-radical tenets of separation of powers and checks and balances. On the contrary, "it would be an alarming doctrine, that [C]ongress cannot impose upon any executive officer any duty they may think proper, *which is not repugnant to any rights secured and protected by the [C]onstitution*."[189]

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[187] *Cf.* LOCKE, *supra* note 91, § 168 (noting that executive "prerogative" is bound to raise "an old question" of how judgment ought to be exercised when the executive and legislature conflict and that the answer lies in "appeal[ing] to heaven").

[188] *See supra* Part II.B & Part III.

[189] Kendall v. United States *ex rel*. Stokes, 37 U.S. 524, 610 (1838) (emphasis added).

To effectuate congressional SROE, Congress could resurrect its Civil War-era Joint Committee on the Conduct of War[190] and muster civilian and military experts to draft legislation. Two analogies from the structure of the Uniform Code of Military Justice (UCMJ) help illustrate the feasibility of statutory SROE. First, as the UCMJ establishes uniform substantive and procedural rules governing military justice, Congress could ordain a corollary set of secret operational procedures to govern military operations. These rules would automatically apply outside the United States' contiguous territory until relevant operational commanders adopt mission-specific ROE consistent with Congress's mandate. Second, the President could prescribe additional provisions by executive order that apply concurrently with the standing rules, much as past Presidents have elaborated on the UCMJ through the Manual for Courts-Martial.[191]

In a perfect world, neither branch could object to the other's exercise of duly conferred constitutional authority to act so that fidelity to the separation of powers is sustained. Congress can provide a general statutory baseline while the presidency retains operational judgment, supplying a stable legal framework within which independent executive interpretation can refine in practice. But, even in the reality in which friction and conflict among the political departments is bound to occur, "[t]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power."[192] Normalizing Congress's authority to act and manage the military's operational affairs in concert with the executive branch after decades of congressional abdication should be the goal, not perfect equilibrium.

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[190] *See supra* note 164.

[191] *See, e.g.*, Exec. Order No. 14130, 89 Fed. Reg. 105343 (Dec. 27, 2024) (elaborating on the processes contained in the UCMJ). It is beyond the scope of this Note to examine the source and scope of the President's regulatory authority to promulgate supplemental rules for the military.

[192] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Of course, in parallel with enacting SROE, Congress retains several constitutional tools to influence military operations, foremost among them being its power of the purse.[193] Congress may limit appropriations necessary for specific military operations, withhold appropriations that authorize the deployment or continued presence of troops,[194] or condition funding on compliance with some conditions (though the enforceability of this may be uncertain).[195] As James Madison recognized, "[t]he purse is in the hands of the representatives of the people. They have the appropriation of all monies. They have the direction and regulation of land and naval forces. They are to *provide* for calling forth the militia—and the president is to have the command . . .", underscoring Congress's control of funding as a fundamental check on the President's authority to conduct military operations.[196]

Furthermore, congressional committees, principally the House and Senate Armed Services Committees, can conduct hearings and investigations to oversee executive compliance and, if Congress enacts SROE, require the Defense Department to provide periodic implementation reports from commanders on the ground. Congress can also limit troop deployments[197] and, as a matter of

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[193] U.S. CONST. art. I, § 8, cl. 12.

[194] *Id.*; *cf.* THE FEDERALIST NO. 69, *supra* note 16, at 465 (Alexander Hamilton) (observing that "the raising and regulating of fleets and armies . . . would appertain to the Legislature").

[195] *See, e.g.*, George W. Bush, Message to the House of Representatives, 153 CONG. REC. H4315 (May 2, 2007), available at http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070502-1.html [https://perma.cc/LPZ6-JKRT] (vetoing the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 on the grounds that Congress was unconstitutionally "direct[ing] the conduct of operations of war in a way that infringes upon the powers vested in the presidency by the Constitution, including as commander in chief of the Armed Forces").

[196] *See* James Madison, Speech on the Power of Congress to Regulate the Militia (June 14, 1788) *in* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-11-02-0085 [https://perma.cc/Y7V6-F9QD].

[197] 38 Stat. 1078 (limiting tours of duty to two years in the Philippines under the 1915 Army Appropriations Act).

legal status, refuse to "change a state of peace into a state of war."[198] Provided Congress is willing to exercise them, these tools, while not supplying the kind of general, prospective operational guidance that statutory SROE might, would remain influential and enable Congress to shape executive decision-making and accountability.

V. CONCLUSION

This Note has confronted growing concerns[199] about an increasingly unitary executive—a concern sharpened by the prospect of conflict with China[200] and a persistent presidential narrative denying Congress any meaningful role in regulating military operations.[201] "For, unless the American democracy figures out how to control the Presidency in war and peace without

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[198] U.S. CONST. art. I, § 8, cl. 11; United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) ("[I]t is the exclusive province of [C]ongress to change a state of peace into a state of war.").

[199] *See, e.g.*, Steven J. Lepper & Eugene R. Fidell, *The Crisis in Uniform: The Danger of Presidential Immunity for the U.S. Military*, JUST SEC. (Oct. 6, 2025), https://www.justsecurity.org/121919/military-law-despite-presidential-immunity/ [https://perma.cc/N6GL-9LX5]; David A. Graham & J. Michael Luttig, *The Coming Election Mayhem*, ATLANTIC (Oct. 28, 2025), https://www.theatlantic.com/press-releases/archive/2025/10/atlantics-december-cover-the-coming-election-mayhem/684716 [https://perma.cc/KZ6K-93QB]; John Kruzel, *'Unitary Executive' Theory May Reach Supreme Court as Trump Wields Sweeping Power*, REUTERS (Feb. 14, 2025), https://www.reuters.com/legal/unitary-executive-theory-may-reach-supreme-court-trump-wields-sweeping-power-2025-02-14/ [https://perma.cc/PB2A-2BDG]; James Petrila & John Sipher, *How the Supreme Court's Immunity Ruling Could Really Backfire*, WASH. POST (July 25, 2024), https://www.washingtonpost.com/opinions/2024/07/25/supreme-court-immunityruling-cia [https://perma.cc/P2J9-KYPX]. *See generally* Bob Bauer & Jack L. Goldsmith, *Trump's Impact on Executive Power, Eleven Months In*, EXEC. FUNCTIONS (Dec. 18, 2025), https://www.execfunctions.org/p/trumps-impact-on-executive-power [https://perma.cc/PKJ8-BWFL] ("Trump has been most consequential in creating a more-unitary-than-ever executive with much more power to incapacitate disliked parts of the government than previously realized.").

[200] *See supra* notes 21–22 and accompanying text.

[201] *See supra* Parts I & IV.

enfeebling the Presidency across the board, then our system of government will face grave troubles."[202]

Congress's constitutional authority to regulate military operations has long been shared with the presidency. Yet modern practice has entrenched executive interpretive dominance, and congressional inaction has compounded that dynamic. The result is a constitutional landscape in which presidential departmentalism functions as the operative framework, and presidential control over *all* operational conduct is treated as settled (perhaps even preclusive and indefeasible) in practice, even if not compelled by constitutional design.

Where the threshold inquiry of whether Congress has the authority to act in a domain—even one often presumed to be only within the President's prerogative—is satisfied, Congress's historical deference to the presidency is significant. While authority enables action, its existence does not demand its use; that distinction between possessing power and choosing to exercise it is instructive. While Congress may have diluted its exercise of this authority over the past two centuries, the authority nonetheless persists, and presidential initiative does not categorially bar congressional action. Except where the Constitution makes presidential authority exclusive, the President remains subject to congressional regulation.

In his autobiography, Theodore Roosevelt posited that his "executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or *imposed by Congress under its constitutional powers*."[203] Roosevelt's account implicates 'the executive Power,'[204] and the Take Care Clause,[205] which

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[202] SCHLESINGER, *supra* note 5, at x.

[203] THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 371–72 (1913); *see also* SCHLESINGER, *supra* note 5, at 33 ("What restrained [] early Presidents was not only their respect for the Constitution. It was also that they saw constitutional principles in political context and understood that there were unwritten as well as written checks on unilateral presidential initiative in foreign affairs.").

[204] U.S. CONST. art. II, § 1, cl. 1.

[205] *Id.* § 3.

together secure the President's fidelity to the Constitution and to duly enacted laws.[206] The oath following the Supremacy Clause, that all federal and state executives, legislators, and judges shall "support this Constitution"[207] likewise guarantees the President's and his subordinates' "steward[ship]"[208] of federal law. As Commander in Chief, then, the President has a constitutional duty to enforce lawful congressional mandates regulating troops' operational conduct should Congress enact SROE.

Retired Lieutenant Colonel Geoffrey Corn's observation underscores why a statutory baseline for ROE matters: "[w]hen you have to do something as part of your duty that is incredibly unpleasant, knowing that you followed a widely understood and respected rule set helps you live with the consequences of those actions."[209] Romantic and idyllic as it may seem, establishing a standing statutory framework of operational guidance—one that executive branch leadership refines through mission-specific and circumstantial ROE—carries the potential to encourage greater and more consistent fidelity to the LOAC and its principles anchored in honor and respect for the nature of war. On the battlefield, this means that warfighters can discharge their duty of service to these United States with steady confidence that the rules governing their conduct are neither arbitrary nor improvised. Even if they do not know the legal architecture, they operate within a system calibrated to balance military necessity with touchstone humanitarian considerations, whose legitimacy derives from Congress's judgment and the executive's implementation. Such a framework affirms honor as a core principle of the warrior ethos and also underscores the limits honorable warfare demands, so that wars are not waged immeasurably nor blood spilled vainly *ad infinitum*.

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[206] *See* 1 JAMES MADISON, THE CONSTITUTIONAL CONVENTION OF 1787, at 52–53 (Gaillard Hunt ed., 1908) (writing that the President shall have "a general authority to execute the national laws"); *see also* SCHLESINGER, *supra* note 5, at x ("[W]e need a strong Presidency—but a strong Presidency *within the Constitution*." (emphasis in original)).

[207] U.S. CONST. art. VI, § 3.

[208] *See* ROOSEVELT, *supra* note 203, at 389.

[209] *See supra* note 1.