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The Land and Naval Forces Clause

Dakota S. Rudesill

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THE LAND AND NAVAL FORCES CLAUSE

*Dakota S. Rudesill**

Abstract

What is the constitutional textual basis for key statutes that constrain the national security apparatus and condition the President's ability to direct it – statutes that are neither spending limitations, nor war declarations or authorizations for the use of military force (AUMFs), nor militia laws? There are a series of such statutory frameworks, including the Uniform Code of Military Justice (UCMJ), Posse Comitatus Act and its relatives (particularly parts of the Insurrection Act), Foreign Intelligence Surveillance Act (FISA), the covert action statute, anti-torture laws, and the War Powers Resolution. The best or at least strong additional textual footing for these statutes, this article argues, is Article I, Section 8, Clause 14 of the Constitution. This clause gives Congress the power “To make Rules for the Government and Regulation of the land and naval Forces.” Although the common assumption is that this Land and Naval Forces Clause is a single enumerated power, this article theorizes the Clause as providing Congress

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two powers: a well-recognized Internal Regulation power over military justice and other internal affairs of the national security apparatus, and also an External Government power over operations. This article analyzes the Clause's text, counter-authoritarian origins, and its constitutional interpretation since the Founding Era. This article argues for the Clause's constitutional rediscovery and embrace as primary textual footing for a series of vital statutory frameworks that govern the military and the Intelligence Community at the intersection of liberty and security, and regarding the use of force and cyber operations. Ultimately, the Clause's power is contingent: Congress must use it and other legal actors must give life to its statutes and constitutional values for it to be meaningful.

Table of Contents

Introduction	393
I. Internal Regulation.....	398
II. External Government.....	408
A. Text.....	409
B. Origins.....	416
1. British and American Origins.....	417
2. First Iteration: The Clause in the Articles of Confederation	420
3. Second Iteration: The Clause in the Constitution....	423
C. Constitutional History: Citation to the Clause in the Three Branches	433
1. Legislative Branch.....	434
2. Executive Branch	441
3. Judicial Branch	445
III. The Clause Rediscovered: Constitutional Footing for Statutory Frameworks.....	450
A. Internal Regulation	452
1. Uniform Code of Military Justice (UCMJ).....	452
2. National Defense Authorization Acts (NDAAs)....	452
B. External Government.....	453
1. Posse Comitatus Act and Domestic Relatives.....	453
2. Foreign Intelligence Surveillance Act (FISA).....	457
3. Covert Action	461

2018]	THE LAND AND NAVAL FORCES CLAUSE	393
	4. Interrogation	463
	5. War Powers Resolution	464
IV.	The Clause Rediscovered: Contemporary Importance.....	467
	A. In Context of New Lawmaking Dynamics	467
	B. In Context of Change in the Security Environment, Especially Growing Cyberization.....	472
	C. In Context of Volatile Politics and Policy	475
V.	Conclusion	480

INTRODUCTION

Article I, Section 8, Clause 14 of the United States Constitution provides Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” This Land and Naval Forces Clause¹ is textually located within the wheelhouse of Congress’s legislative powers regarding national security. The Clause has been understood since the Founding to grant Congress authority over military justice, and it has been cited by the Supreme Court in landmark cases.² This provision’s full history and significance beyond the military justice context, however, are unappreciated, in some respects ambiguous, and insufficiently studied.³

1. There is no consensus on what to call the Clause. The Supreme Court recently referenced *part of it* (as explained below) as the “Military Regulation Clause.” See *United States v. Kebodeaux*, 570 U.S. 387, 394-95 (2013). Other cases simply quote it, or give the Clause different names. See, e.g., *United States v. Ali*, 71 M.J. 256, 272 (C.A.A.F. 2012) (“Rules and Regulations Clause”) (Baker, J., concurring). Some scholars reference “the Government and Regulation power.” See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 332 (2008). Others reference the “Rules for the Government and Regulation Clause.” See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1082-83 (2008) [hereinafter *Lowest Ebb Part II*]. Some practitioners call it the Make Rules Clause. I term it the Land and Naval Forces Clause to emphasize its subject matter and distinct language versus other Article I, Section 8 war powers.

2. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (Clause cited along with others providing Congress national security powers, in case rejecting President’s order regarding trials of post-9/11 detainees as violation of UCMJ); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) (Clause cited in canonical national security separation of powers case).

3. This article, like other articles focused on individual clauses of the Constitution, employs common interpretive approaches without being about constitutional interpretation. See Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 857 (2007) (article on Define and Punish Clause not intended to resolve larger originalist debates); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1054 (2013) (article on Necessary and Proper Clause does not endeavor to engage with originalist conversation in systematic fashion or set out originalist theory). Reserving the interpretive methodological implications of this study for a future work, this article does close textual and structural analysis, including intratextual work; considers a range of originalist evidence that bears on Framers understanding and original public meaning (different methodological focuses between which this article does not choose); gathers and analyzes relevant parts of the constitutional record, including via empirical analysis of legislative citations and

This article urges the constitutional rediscovery of this neglected “cryptic” Clause⁴ – rediscovery of its text, counter-authoritarian purposes, constitutional history, and the growing contemporary importance of statutes written pursuant to it. Relying on the Clause, Congress can restrain the national security apparatus and the President’s use of it regarding military justice and discipline, espionage, cyber operations, and regarding surveillance, interrogation, and other liberty infringements.

The conventional assumption is that the Clause – which we will also reference as the Forces Clause, or Clause 14 – provides a single enumerated power.⁵ This article theorizes the Forces Clause as containing two powers.

The well-established understanding of the Forces Clause is what this article conceives as the Internal Regulation power. It provides Congress authority over the internal affairs of the national security apparatus, from writing the military’s criminal code to regulating training, organizational, and personnel matters.⁶ The “land and naval Forces,” broadly conceived, include not just the uniformed military, but individuals and organizations that support and operate in concert with them, inside and also beyond what is today the Department of Defense.

The Supreme Court has not yet explicitly articulated a second understanding of the Forces Clause but has invited it. In his canonical *Youngstown* (1952) concurrence, Justice Robert Jackson hinted at such a power.⁷ More recently, in a case related to Congress’s Internal Regulation power, *United States v. Kebodeaux* (2013), the Court edited the Clause’s text to exclude the term “Government,” focusing the Court’s analysis instead only on Congress’s power to “make Rules for the . . . Regulation of the land and naval Forces.”⁸ This article takes up the Court’s implicit

analysis of doctrinally key cases; and on the basis of all of these addresses the constitutional ethos of the Clause.

4. The Supreme Court has observed the Clause’s language is “cryptic.” See *Reid v. Covert*, 354 U.S. 1, 21 (1957). Professor Prakash remarks that the Clause is “seemingly unremarkable” but enormously important. Prakash, *supra* note 1, at 331.

5. Article I provides Congress enumerated powers and implicit subordinate powers necessary for their exercise. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) (“The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819) (necessity of implied powers); Mikhail, *supra* note 3, at 1128-32 (discussing implied and unenumerated powers). My argument is that the Forces Clause can be understood to provide two enumerated powers that carry such implied and auxiliary powers, for example to organize and control the sizable civilian intelligence apparatus that supports the “land and naval Forces.”

6. See, e.g., *Loving v. United States*, 517 U.S. 748, 767 (1996) (Clause provides Congress authority to regulate military justice, a power “no less plenary” than others in Article I).

7. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 643-44 (Jackson, J., concurring).

8. See *United States v. Kebodeaux*, 570 U.S. 387, 394-95 (2013) (Forces Clause and Necessary and Proper Clause allow Congress to require former servicemember convicted of sex crime to register as

challenge. On the basis of both hints and strong signals in the text, originalist evidence, and subsequent constitutional record, this article theorizes the Clause as carrying a second power we can ground in the term “Government.” What this article terms the External Government power provides Congress legislative authority to write statutory “Rules” controlling operations of the national security apparatus that involve third parties, both at home and abroad.⁹ Locating this power in the Forces Clause fills a gap and addresses a reliance interest: this operations-controlling power of Congress is reflected in a series of longstanding and important statutory frameworks, and the Forces Clause’s sibling clauses in Article I, Section 8 are in many instances less easily read to provide it. These statutory frameworks are in relevant part not appropriations conditions, nor war declarations or authorizations for the use of military force (AUMFs) that approve armed conflicts, nor militia laws.

This article makes several contributions to our understanding of the Forces Clause.

First, this article makes clear that the Forces Clause is an important part of the national security Constitution.¹⁰ The Clause concerns nothing less than civilian legislative control over the national security apparatus. It reflects the commitment of the Framers to checks on a chief Executive and standing military they feared held inherent authoritarian potential.

Second, this article focuses squarely on the Forces Clause and deepens our understanding of it in its constitutional context. This article analyzes the Clause’s text, examines its origins and constitutional history to the present day, and theorizes and explores its dual understandings. In contrast, to date the Forces Clause has rarely received the thorough substantive treatment in the legal literature accorded other constitutional provisions.¹¹ Often, courts and scholars cite the Forces Clause seriatim

sex offender under statute of general applicability not limited to current or former military personnel).

9. Several scholars view the Clause as providing power over not just discipline of “the land and naval Forces” but over operations as well. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 188 (2005) (Clause provides power to limit and proscribe President’s use of force, if not prescriptively direct it); DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS 22-24* (2016) (legislative power in Clause to limit military operations); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 140 (2001) (“Congress has complete power to command or govern the army and navy, not merely the power to regulate them”); Prakash, *supra* note 1 (Clause provides Congress power to direct military operations and control all aspects of the military and war). Cf., JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1197 (4th ed. 1873) (conceiving Clause entirely in its military justice and discipline aspect); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 155, 159-60 (2005) (denying existence of congressional power to limit presidential use of the military via statute).

10. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990) (discussing concept).

11. Other important provisions have been the focus of one or a series of scholarly articles. See, e.g., Mikhail, *supra* note 3 (Necessary & Proper Clause); David J. Barron & Martin S. Lederman, *The*

with other constitutional provisions, without distinction.¹² Where courts and scholars have made substantive inquiries, they have illuminated the Clause in partial fashion. The Forces Clause has been well cited for what this article conceives as its Internal Regulation power over military justice, and some originalist scholars have posited what this article conceives as the External Government power – but the originalists often stop with the Founding Era.¹³ All Article I powers relevant to national security operate in context with Executive powers (especially those of the Commander in Chief, analyzed under the *Youngstown* framework), a general subject that has also received extensive inquiry.¹⁴ Without recapitulating that separation of powers scholarship, this article explores the work the Forces Clause in particular is doing.

Third, this article provides empirical analysis of citation to the Forces Clause. The recent legislative record is especially rich, reflecting both Internal and External theories of the Clause. It also reflects inconsistency and confusion. In dozens of bills, Members of Congress are relying on the Forces Clause for legislative authority over Executive branch

Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689 (2008) [hereinafter *Lowest Ebb Part I*]; Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1; Kent, *supra* note 3 (Define and Punish Clause); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 187-94 (1940).

12. For seriatim references, *see, e.g.*, H.R. REP. NO. 103-357, at 128 (1993) (Conf. Rep.) (discussing section 654 of the National Defense Authorization Act for Fiscal Year 1994, citing the Clause along with Army and Navy Clauses as constitutional authority for statutory “Don’t Ask, Don’t Tell” policy banning openly gay and lesbian individuals from the military); *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (example of undistinguished seriatim citation, along with four other Article I, Section 8 provisions); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y. 455, 461-62 (2005) (including Forces Clause in a list of constitutional clauses, “all of which suggest that Congress was well within its constitutional authority in banning torture”).

13. The judicial originalist treatments are a line of military justice cases. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 767 (1996). Three scholars have given the Forces Clause focused analysis in originalist works centered on broader topics: AMAR, *supra* note 9 (discussing Clause in full treatment of the Constitution’s text and origins); Barnett, *supra* note 9 (engaging with meaning of the Clause’s term “Regulation” in article about the Commerce Clause); Prakash, *supra* note 1 (most extensive academic originalist analysis to date of the Forces Clause in article about overlapping and exclusive Article I and II powers). For other scholarly mentions, *see, e.g.*, JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 268 (2007) (mention of Clause in connection with Posse Comitatus Act); WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT 28, 34 (2016) (Clause mentioned in discussion of law regarding domestic military operations); LOUIS FISHER, PRESIDENTIAL WAR POWER 7 (2d ed. 2004) (one of 10 listed Article I, Section 8 clauses vesting war powers generally in Congress); W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 118 (1992) (Clause mentioned as potential authority for Congress to regulate covert action); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 733 & nn.129-30, 787-88 (courts have construed Clause broadly regarding internal discipline of armed forces and in *Hamdan* extended it to detainee treatment; Executive power theorists ignore key drafting history).

14. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11; *Lowest Ebb Part II*, *supra* note 1 (extensive treatment of constitutional clashes of Article I and II powers).

activities outside of the national security apparatus – authority the Clause does not provide.

Fourth, this article urges recognition of the Clause as providing the best or at least strong additional constitutional footing for vitally important national security statutory frameworks (recognizing that statutes can rely on more than one textual provision for their constitutionality).¹⁵ The Internal Regulation power is not only the primary textual basis for the Uniform Code of Military Justice (UCMJ) (as is well understood), but also provides authority, in concert with other Article I clauses, for voluminous annual authorization acts that regulate in detail the military and national security bureaucracy. The Forces Clause’s External Government power, meanwhile, is reasonably and best understood to provide primary authority for a series of statutory frameworks at the center of the national security regulatory regime. These include the Posse Comitatus Act and its relatives (closely linked other laws regarding domestic use of military regulars, especially portions of the Insurrection Act), the Foreign Intelligence Surveillance Act (FISA), the covert action statute, detainee treatment laws (including the statutory ban on torture), and the War Powers Resolution. These External Government statutes place limits on how the Commander in Chief may employ “the land and naval Forces.” These statutes provide “Rules” that resonate with the Clause’s counter-authoritarian purposes and with the Constitution’s ethos – its meta-project – of balancing liberty and security in a manner that protects both.

Fifth and finally, this article contributes to the understudied and related subjects of intelligence and the Constitution, and cyber operations and the Constitution. The “land and naval Forces” plainly subjects the large military intelligence establishment inside the Defense Department to Congress’s “Rules,” as it does the military’s U.S. Cyber Command. The Clause should also be understood to give Congress legislative control over the two independent, non-military intelligence agencies: the Central Intelligence Agency (CIA) and Office of the Director of National Intelligence (ODNI). Several of the key statutory frameworks that this article argues can be grounded in the Forces Clause – most notably FISA and the covert action statute – govern the intelligence apparatus. Meanwhile, Congress’s growing, bit-by-bit government of cyber operations finds its best constitutional footing in the Forces Clause, as well.

Although today the Force Clause’s significance is often lost outside of the military justice community, it is due for constitutional rediscovery.

This article begins in Part I with a summary of what is settled and what

15. *See, e.g.,* United States v. Kebedeaux, 570 U.S. 387 (2013) (Forces Clause and Necessary and Proper Clause operate together to provide authority for statute).

is enduringly less clear about the well-established Internal Regulation power. Part II analyzes the constitutional record of explicit engagement with the Clause for evidence of an External Government power. The Constitution's text, Founding Era evidence, and subsequent citation record in the three branches indicate that it is not imperative but is reasonable to understand the Clause to provide Congress two powers.

With the reasonableness of a dual reading established, Part III focuses on the important work the Clause should be understood to be doing in the modern national security legal regime. The Forces Clause should be cited by courts and other participants in the constitutional law conversation not only as the primary constitutional textual basis for the UCMJ, but also as constitutional authority for a series of statutory frameworks governing use of force, surveillance, and interrogation.

Part IV continues the argument for the Clause's constitutional rediscovery. This Part appraises the Clause's contemporary relevance in our time of new lawmaking dynamics (including declining congressional use of its legislative powers, expanding Executive power, and production of secret law), change in the national security environment and particularly its growing cyberization, and increasingly volatile politics and policy. These trends reveal the value of the guardrails provided by laws written pursuant to the Clause. They make Congress's ability to write further such "Rules" more important.

This article's Conclusion emphasizes that the Clause's power, like all powers of Congress, is contingent. Congress must use it, and other legal actors must give life to its statutes whether or not courts are involved, or risk its loss. In the national security space, most constitutional citation, practice, and decisions escape judicial review because of secrecy, problems of standing, and other judicial doctrines and practical impediments. Our constitutional order therefore depends on the integrity, commitment to the rule of law, and knowledge of leaders, legislators, lawyers, and personnel in the field. Their work – on matters as seemingly unexciting as Department of Defense personnel management, and as potentially consequential as covert actions, cyber attack, and nuclear weapons – will better reflect constitutional values to the extent it is informed by rediscovery of the dual powers of Article I, Section 8, Clause 14.

In this regard, this article is doing more than simply answering the Supreme Court's implicit question in *Kebedeaux*, correcting Congress's misunderstanding of the Clause, and contributing to the constitutional conversation about the Forces Clause, intelligence, cyber, and other matters. This article's analysis is important because enhancing our knowledge of the Clause deepens appreciation for its constitutional values of counter-authoritarian legislative control over the national security

enterprise, an apparatus of colossal resources and power that both protects and inherently imperils liberty. Deeper appreciation for the Clause in turn puts the statutes that rely upon it on firmer constitutional footing. Of course, a statute can rely on an Article I clause even if Congress cites no clause, if the statute does not reflect the precise language of a clause, or if the statute's purpose differs from the spirit motivating a clause's inclusion in the Constitution.¹⁶ But Congress and other legal actors strengthen the constitutional standing of statutes when, through citation and analysis, they ground statutes on constitutional textual provisions that share the legislation's animating purposes. In this instance, citation to the Clause in connection with vital statutory frameworks will underscore the constitutionality of laws that protect people – here and abroad – from the ability of the national security apparatus, under presidential direction, to surveil, covertly influence, interrogate, detain, adjudicate, and kill.

I. INTERNAL REGULATION

The text of the Land and Naval Forces Clause does not mention military justice, nor military discipline, nor the internal affairs of the national security apparatus. But it has been clear since the Founding that the Clause provides Congress expansive power over military justice and discipline. Questions endure at the margins about the scope of what this article conceives as the Internal Regulation power regarding some aspects of military justice, control of the national security apparatus beyond the military justice system, and in the context of the President's powers.

In his classic mid-Nineteenth Century *Commentaries on the Constitution*, Justice Joseph Story wrote that regarding military justice and discipline, “[t]he whole power is far more safe in the hands of Congress than of the executive.”¹⁷ The rationale for this power's assignment to Congress by the Framers was essentially counter-authoritarian, protecting Americans who serve in (or find themselves in the hands of) the federal armed forces. Unless the elected representatives of the people (and at that time the chosen Senate representation of the state legislatures)¹⁸ could control military discipline, “the most summary and severe punishments might be inflicted at the mere will of the executive.”¹⁹ Military courts were also viewed in the Founding Era as

16. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-71 (penalty to compel purchase of health insurance constitutional as a tax under Art. I, § 8, cl. 1). The “question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Id.* at 570.

17. STORY, *supra* note 9.

18. *See* U.S. CONST. amend. XVII (direct election of Senators), *superseding, id.* art. I, § 3, cl. 1-2 (selection of Senators by state legislatures).

19. STORY, *supra* note 9. In two dissents, Justice Story provided further brief comments on his

less forgiving to defendants than civilian courts.²⁰ Congressional authority over military courts provided a democratic feedback mechanism for the people. Although early Congresses tended not to cite the Constitution chapter and verse, the early Congresses passed military justice codes using the language of the Forces Clause: the Army “shall be governed by the rules and articles of war” that Congress writes, and the Navy is subject to Congress’s “rules and regulations” for its “Better Government.”²¹

The subsequent constitutional history of explicit citation to the Forces Clause in Congress (in connection with the separate Army and Navy codes and the Uniform Code of Military Justice (UCMJ) that replaced them in 1950, and related legislation), in the Executive branch, and in the courts makes clear that Congress’s power over military justice flows primarily from the Forces Clause,²² and in some circumstances in connection with other congressional powers.²³ The courts continue to emphasize that the Clause has counter-authoritarian purposes, that

understanding of the Clause. He viewed the power to govern and regulate the armed forces as incident to the power to Raise and Support Armies and Provide and Maintain a Navy, and that the Forces Clause was added by the Framers *ex abundanti cautela*. Similarly, the Declare War power in Story’s view necessarily includes the Marque and Reprisal and Regulate Captures powers, and these separate enumerated powers were in like fashion added by the Framers in an abundance of caution. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 151 (1814) (Story, J., dissenting); *cf.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (presumption against surplusage in reading the Constitution). Justice Story also observed that the Forces Clause’s powers cannot be assumed by states if the federal government does not use them. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 68-69 (1820) (Story, J., dissenting). Story in neither dissent elaborated on the extent or number of the powers the Forces Clause provides.

20. See 3 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 208 (Yale Univ. Press 1911) (1819); Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 319 (1957).

21. See An Act to Recognize and Adapt to the Constitution of the United States the Establishment of Troops Raised Under the Resolves of the United States in Congress Assembled, Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96 (repealed 1790); An Act for the Punishment of Certain Crimes Against the United States, Act of Apr. 30, 1790, ch. 9, §§ 1-13, 1 Stat. 112, 119-21. These statutes re-enacted military justice codes written prior to the Constitution. See Am. Art. of War of 1775 and 1776, reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 953-71 (2d ed. 1920). See also WINTHROP, *supra*, at 21-24 (early history of U.S. military justice); An Act for the Better Government of the Navy, Act of Apr. 23, 1800, ch. 33, 2 Stat. 45. For other notable code statutes that used the language of the Clause in their enacting clauses, see Am. Art. of War of 1806, § 1; and Am. Art. of War of 1874, § 1342, reprinted in WINTHROP, *supra*, at 976, 986. Use of the terms “Government” and “Regulation” likely reflects overlapping definitions of the terms (see Part IIA in main text).

22. See discussion the record of citation to the Clause in the three branches, discussed in Part II *infra*; Uniform Code of Military Justice, ch. 169, 64 Stat. 109 (1950) (codified as amended at 10 U.S.C. § 801-946 (2016)); earlier military justice codes cited in *supra* note 21; *Loving v. United States*, 517 U.S. 748, 767 (1996) (authority over military justice flows from Forces Clause); WINTHROP, *supra* note 21, at 17 (military justice codes are enacted pursuant to Forces Clause).

23. See, e.g., *Reid v. Covert*, 354 U.S. 1, 21-23 (1957) (“limited and extraordinary” circumstances exist in which non-military person is effectively part of the military, and in those instances military jurisdiction rests not on the Necessary and Proper Clause expanding the reach of the Forces Clause, but on the Forces Clause plus the larger grant of war powers being operative); and *infra* notes 30-31.

statutes written to it overcome presidential action, but also that Congress may delegate and shares its authority with the Executive.²⁴

Several issues are well-settled. For example, the question of whether the Bill of Rights applies to military justice was resolved in the twentieth century. Beyond the Fifth Amendment's carve-out of "cases arising in the land or naval forces" regarding grand juries, the Constitution is textually not clear about whether the Bill of Rights protects service members from actions by the political branches, especially pursuant to the Commander in Chief and Forces Clauses. Congress by statute, and the civilian appellate court that handles military justice appeals, provided and sometimes exceeded several guarantees of the Bill of Rights, and then the Supreme Court endorsed the Bill's application as well, with allowance for specific aspects of military service and the separate military justice system.²⁵ Even though the Bill of Rights applies generally and doctrine continues to evolve, the Supreme Court emphasizes that Congress retains "primary responsibility for the delicate task of balancing the rights of [service members] against the needs of the military."²⁶ Statutes written pursuant to the Forces Clause "ordering military affairs" are entitled to the "highest deference" by courts.²⁷

Additionally, it is now well-settled that the reach of military jurisdiction is grounded in the status of the defendant, in two broad categories. One category includes prisoners of war, other alleged enemy fighters, or other persons in the hands of the military in the field.²⁸ A

24. See *Loving*, 517 U.S. at 765-68.

25. See *Solorio v. United States*, 483 U.S. 435, 447-48 (1987) (collecting rights affected by statute pursuant to Forces Clause); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (right to counsel protects service members, operating differently in the military justice system); *Calley v. Callaway*, 519 F.2d 184, 202-03 n.30 (5th Cir. 1975) (UCMJ statute and courts "extended the constitutional rights of servicemen beyond those accorded to civilians," for example regarding notice and discovery). The Supreme Court applied the Bill of Rights to service members after many years of doubt, conflicting dicta, and originalist argument. See *Parker v. Levy*, 417 U.S. 733, 743 (1974) (Bill of Rights applies with allowances for military context); *Burns v. Wilson*, 346 U.S. 137, 142-43, 146-47, 149, 152-55 (1953) (dicta endorsing Bill's application); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137-38 (1866) (Chase, C.J., concurring) (skeptical dicta); Henderson, *supra* note 20, at 293-94 (discussing conflicting jurisprudence and arguing that Framers did believe the Bill should apply); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 23-32 (1958) (arguing Framers did not intend Bill to apply, presenting originalist evidence about service member access to counsel).

26. See *Loving*, 517 U.S. at 767 (quoting *Solorio*, 483 U.S. at 447).

27. See *id.* at 768.

28. Enemy fighters (and certain other accompanying personnel) can be prosecuted in military courts *inter alia* for violations of the laws of war under several articles of the UCMJ. See UCMJ, arts. 2, 18, 21 (2016) (see 10 U.S.C. §§ 802(a)(9), 802(a)(13) (prisoners of war)), 818(a) (general courts-martial jurisdiction "to try any person who by the law of war is subject to trial by a military tribunal"), 821 (military commissions, provost courts, and other military tribunals may try offenses under statute or the law of war). Also, enemy fighters may be prosecuted under the Military Commissions Act of 2009, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. § 948c) (2009) ("Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter"). See

second category includes persons formally or functionally in the federal “land and naval Forces.”²⁹ Generally, to minimize the scope and use of military jurisdiction beyond those in uniform, the Supreme Court has made clear that civilians generally may not be subject to military justice if the civil courts are open and operating.³⁰ Civilian dependents of military personnel generally may not be court-martialed pursuant to the Forces Clause, even when they murder service members.³¹ As a general matter, neither may former service members.³² Civilian employees and military contractors are also usually not subject to court martial.

Beyond its core grant of authority to Congress over the U.S. military’s criminal code as applied to current U.S. military personnel, there is both clarity and some ambiguity regarding the wider sweep of the Internal Regulation power.

It is clear that the Forces Clause provides Congress expansive power to regulate the internal affairs of the military apparatus beyond military justice. That is, to set personnel policies and to control the supporting bureaucracy (originally the Departments of War and the Navy, and today

also Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006) (President bound to follow Congress’s statutes on military justice and detainees written pursuant to the Forces Clause and other Article I, section 8 clauses).

29. The Supreme Court sees military status as reflecting the “natural meaning” of the land and naval forces referenced in the Forces Clause and the Fifth Amendment. After a doctrinal experiment with service-connection of the offense, the status of the defendant has for three decades been the test instead. *See* Solorio v. United States, 483 U.S. 435, 439-41 (1987) (military status), *overturning* O’Callahan v. Parker, 395 U.S. 258 (1969) (service connection); *but cf.*, *Solorio*, 483 U.S. at 456-57 (Marshall, J., dissenting) (arguing that military status is an overbroad test). Some courts will finely parse definitions of being “in” the military or “the land and naval Forces.” *See, e.g.*, United States v. Ali, 71 M.J. 256, 269 (C.A.A.F. 2012).

30. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866). In a concurrence with three others, Chief Justice Chase engaged with the Forces Clause, asserting that the Clause provides authority for military trial of military personnel without a jury, but also that “soldiers or civilians, unless in cases of a controlling necessity,” may not be tried absent an act of Congress. *Id.* at 139-40 (Chase, C.J., concurring); *but see* Hamdan v. Rumsfeld, 548 U.S. 557, 590-93 & n.23 (2006) (reserving question of whether Chief Justice Chase was correct that President has independent authority to convene military commissions). Chief Justice Chase wrote that Congress could have authorized military trial of a civilian, but pursuant to the Declare War and Army Clauses, not the Forces Clause. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139-42. *See also* Coleman v. Tennessee, 97 U.S. 509, 514 (1878) (“hostility of the American people to any interference by the military with the regular administration of justice in the civil courts” was well known at Founding).

31. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1, 19-23 (1957) (plurality) (on rehearing, Court holds that Forces Clause does not provide court-martial authority over civilians who murdered their service member spouses while posted overseas, because of protections of Fifth and Sixth Amendments).

32. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (limiting military justice jurisdiction over civilians to “least possible power adequate to the end proposed,” a test not met regarding former service member who is therefore a civilian “entitled to have the benefit of safeguards afforded those tried in the regular courts”); *see also* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 285 (1960). However, Congress pursuant to the Forces Clause and the Necessary and Proper Clause may require former service members to register as sex offenders. *See* United States v. Kebodeaux, 570 U.S. 387, 393-95 (2013).

the Department of Defense).³³ Congress has done this detailed regulation throughout the republic's history, from First Congress laws "for regulating the Military Establishment" to frequent congressional citation to the Clause in recent decades in connection with legislation concerning military property, organization, awards, personnel benefits, and service conditions, including sexual orientation stipulations.³⁴

Because the Clause has often been cited *seriatim* and undistinguished with other clauses, or no clause has been cited at all, however, it is less clear precisely how much of this personnel and bureaucratic regulation authority comes particularly from the Forces Clause and how much is shared with or flows instead from its sibling clauses in Article I, Section 8, especially the powers to raise and support Armies and to provide and maintain a Navy.³⁵ Similarly indeterminate *vis-à-vis* the powers rooted in other clauses are the precise contours of the powers regarding conscription that the courts have also traced in part to the Forces Clause, and organizing forces raised through enlistment or conscription.³⁶

33. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (Clause allows the Congress "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline"); *McCarty v. McCarty*, 453 U.S. 210, 232-33 (1981) (Clause provides Congress authority over military retirement pay that can preempt state divorce rules); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 890 (1961) (Clause and its Article I, Section 8 siblings allow Congress to control access to military installations).

34. For detailed regulation of the military in the Founding Era, *see, e.g.*, An Act for Regulating the Military Establishment of the United States, Act of Apr. 30, 1790, ch. 10, §§ 1-13, 1 Stat. 119, 121 (creation and detailed organization of army subject to "such rules and articles" of war written by Congress); An Act for Continuing and Regulating the Military Establishment of the United States, and for Repealing Sundry Acts Heretofore Passed on that Subject, Act of Mar. 3, 1795, ch. 44, §§ 4, 9, 1 Stat. 430, 430-31 (it is "a condition of the enlistments of the cavalry, that they shall serve as dismounted dragoons, when ordered to do so"; troops on western frontier get additional rations of "two ounces of flour or bread, and two ounces of beef or pork" plus salt); An Act to Provide a Naval Armament, Act of Mar. 27, 1794, ch. 12, 1 Stat. 350 (authorizing naval force with specified numbers of ships, canon, and crew, and ration stipulations varying by day of the week); An Act to Amend the Act Intituled [sic] "An Act to Amend and Repeal, in Part, the Act Intituled An Act to Ascertain and Fix the Military Establishment of the United States, Act of May 22, 1798, ch. 46, § 2, 1 Stat. 557, 557 (regarding pay and duties of a named officer with the rank of Major); An Act for the Better Government of the Navy, Act of Apr. 23, 1800, ch. 33, § 1, arts. II, IX, 2 Stat. 45, 45-46 (military justice code also stipulating religious services and prohibiting the stripping of clothes from crew of captured ships). Distinguishing the authority that flows from the Forces Clause versus the Army and Navy Clauses is especially challenging in legislation passed by early Congresses because Founding Era legislators were often both in the same laws regulating federal armed forces and legally creating or blessing them under the new Constitution. Similarly, some of the provisions in the military justice codes concerning detainees, including the 1800 naval code *supra* and the modern UCMJ, could find primary or additional footing in the Captures Clause. For legislation providing detailed regulation of the armed forces in recent years, see Parts II.C.1, III.A.2, and IV.B below.

35. *See* U.S. CONST., art. I, § 8, cl. 12-13. These clauses are usually referenced here as the Army Clause and Navy Clause, and are also known as the Raise and Support Armies Clause and the Provide and Maintain a Navy Clause.

36. *See* *Perpich v. Dep't of Defense*, 496 U.S. 334, 343-44, n.16 (1990) (authority for drafting National Guard personnel into the Army of the United States provided by the Army, Navy, Forces, Declare War, and Necessary and Proper Clauses, and statutes enacted pursuant to them, such as 39 Stat. 211 § 111, (1916), operating separately from but in connection with the Militia Clauses); *Rostker v. Goldberg*,

Another frontier of the Internal Regulation power involves whatever authority the Clause provides over “the land and naval Forces” beyond the Army and Navy (and their outgrowths, the Air Force and Marine Corps).

An exception to the ban on court martial of non-military personnel, based in Article 2(a)(10) of the UCMJ, operates where civilians so closely accompany and operate with the military in the field during times of hostilities that they become effectively part of the military.³⁷ The Supreme Court has indicated that this military jurisdiction flows from Forces Clause authority and in some instances from the operation of other powers in the Constitution, as well.³⁸ Article 2(a) of the UCMJ also provides military jurisdiction over several categories of individuals who are outside the uniformed military but so closely associated that they can in the judgment of Congress be punished by court martial as such. These persons at the penumbral edges of “the land and naval Forces” include retirees entitled to pay, retired reservists receiving military hospital care, non-military prisoners serving sentences imposed by court martial – and also members of the National Oceanic and Atmospheric Administration, the Public Health Service, “and other organizations, when assigned to and serving with the armed forces.”³⁹

A number of important parts of the national security apparatus have

453 U.S. 57, 59-60, 80 (1981) (rejecting Due Process challenge to a male-only draft registration under the Selective Service Act, on the basis of the Forces, Army, and Navy Clauses); *Arver v. United States*, 245 U.S. 366, 377 (1918) (Selective Draft Cases) (wartime conscription authority found in Army, Navy, Declare War, Necessary and Proper, and Forces Clauses). The Court does not clarify whether the Forces Clause provides some authority for conscription itself, or for merely regulating it. *Id.* It is also indeterminate precisely how much Forces Clause authority operates more generally in connection with the Army and Navy Clauses. *See, e.g.*, An Act for Regulating the Military Establishment of the United States, Act of Apr. 30, 1790, ch. 10, §§ 1-12, 1 Stat. 119, 119-21 (1790) (size, organization, pay, clothing, rations, oath, and other stipulations for U.S. land forces).

37. *See* UCMJ, art. 2(a)(10), 10 U.S.C. § 802(a)(10) (2016). This exception has roots in early American military justice codes, which were following the pre-Independence British Articles of War. *See* Art. of War, sec. XIV, art. XXIII (1765) (British); Am. Art. of War, art. XXXII (1775) (first American articles of war); UCMJ, art. 2(10) (1950) (first UCMJ); *id.* art. 2(10), 10 U.S.C. § 802(a)(10) (2016) (modern article); *see also* WINTHROP, *supra* note 21, at 941, 956 (reprinted Articles of War).

38. *See* *Reid v. Covert*, 354 U.S. 1, 21-23 (1957) (plurality); *United States v. Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012) (civilian contractor accompanying U.S. military in Iraq could be tried under UCMJ art. 2(a)(10)); *id.* at 272-76 (Baker, C.J., concurring) (agreeing that civilian contractor defendant was sufficiently “in the armed forces” for purposes of UCMJ, but emphasizing that war powers of the Congress and the President beyond the Forces Clause needed to be implicated – as here – for an extraordinary extension of military jurisdiction over a civilian during hostilities).

39. *See* UCMJ art. 2, 10 U.S.C. § 802(a) (2016) (persons subject to UCMJ). *See also* UCMJ, art. 5, 10 U.S.C. § 805 (2016) (“This chapter applies in all places”). *See also* Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 (2000) (persons “employed by or accompanying the Armed Forces outside the United States” may be tried in the civilian Article III courts for crimes outside the United States, providing a commonly used alternative to military jurisdiction in UCMJ art. 2(a)(10), 10 U.S.C. § 802(a)(10) (2016)).

supported federal regulars⁴⁰ since the Founding, and are regulable under the Forces Clause. Examples include the naval auxiliary (the modern Coast Guard), the intelligence community, privateers (the Founding Era’s glorified pirates and perhaps today’s contractors), and the bureaucracy that aids former military personnel.⁴¹ Such an understanding would be consistent with the Coast Guard’s inclusion under military justice jurisdiction, along with the other federal personnel and contractors accompanying and aiding the armed forces.⁴² Notably, the vast majority of U.S. intelligence agencies, personnel, and funding have been housed within the Department of Defense and its predecessors, and are frequently regulated by Congress through the same policies and legislation.⁴³ The Office of the Director of National Intelligence (ODNI) and Central Intelligence Agency (CIA) – although civilian entities – are nevertheless closely associated with the armed forces: their funding flows through Department of Defense appropriations, the CIA supports military operations analytically, and CIA officers often accompany the military in the field.⁴⁴ Also, Congress in our time has frequently invoked the Clause as constitutional authority for bills concerning the Department of Veterans Affairs (for more on the Clause in Congress, see Part II.C below).⁴⁵ Ultimately, the Forces Clause’s authority over “land and naval Forces” beyond the military and Pentagon is logical and well established – if not precisely demarcated.

Finally, the extent of Clause’s Internal Regulation power in relation to

40. “Regulars” in military parlance means the primary, often standing, armed forces, as distinguished from militia or other reserve forces, and supporting auxiliaries (e.g., intelligence, medical).

41. One could add militia to this list. However, the two Militia Clauses immediately following the Forces Clause can be read to provide similar and separate powers over the militia, as discussed *infra* in Part II.A.

42. See UCMJ art. 2(a), 10 U.S.C. § 802(a)(10) (2016).

43. See, e.g., the annual National Defense Authorization Acts (NDAAs), discussed in Parts III and IV.

44. See Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SEC. J. 241, 258-62 (analyzing Congress’s process for providing funding for intelligence and other classified activities). Regarding Congress’s powers over intelligence, the context is textual ambiguity: the term is not in the Constitution. General skeptics of Article I power over intelligence point to Federalist 64’s observation that in the context of treaty negotiations persons possessing “useful intelligence” will be more comfortable sharing it with the President than Congress. See THE FEDERALIST NO. 64 (John Jay). But that is not a full argument against the ability of Congress to control the intelligence instrument via statute. Instead, it points toward restricting confidential information flows to Congress. That may impinge on congressional oversight, but does not defeat the entire notion of congressional regulation of intelligence. On the other hand, there are powerful accountability and self-government reasons to allow the elected representatives of the people to control the intelligence apparatus. There is by now also the precedent of thick practice: a longstanding record of Congress legislating regarding the intelligence apparatus, annually and repeatedly. See Part III *infra* for further discussion.

45. See, e.g., H.R. 558, 112th Cong. (2011) (renaming Department of Veterans Affairs medical center), 157 CONG. REC. H552 (Feb. 8, 2011) (statement of Rep. Neugebauer). For additional discussion of the constitutional record regarding citation to the Clause, see Part II.C below.

the powers of the Executive branch is reasonably well established, but continues to be defined.

Under Professor Saikrishna Bangalore Prakash's originalist construction of Article I and II war powers, Congress's rule-writing powers under the Clause include exclusive authority over military justice; concurrent "regulation" power with the President over training, procedures, maneuvers, deployments, uses of force, and treatment of prisoners; and also concurrent power over types of war, escalation and de-escalation thereof, and war objectives.⁴⁶ Prakash assembles evidence that the Framers understood that Congress has sole rule-writing power regarding military justice, and that Congress would always prevail over the Commander in Chief wherever their directives regarding training, discipline, or maneuvers might conflict.

This view is attractive. It reflects the Constitution's commitment to civilian and legislative control over the military. It reflects the conduct of the archetypical Commander in Chief – George Washington – who perceived authority to act regarding military justice and discipline, but also an obligation to obey Congress.⁴⁷ Prakash's view significantly aligns with the authoritative analysis of the constitutional record compiled by Professors David Barron and Marty Lederman, who conclude that the President is bound by statute regarding military justice but at the very least always retains what they term the superintendence role: the Commander in Chief sits atop the military chain of command.⁴⁸ Without revisiting their extensive work, it suffices to note the reliability of their broad conclusions that Congress and President acting together put the Commander in Chief's power at its apex,⁴⁹ the President may act regarding the internal affairs of the national security apparatus when Congress is silent,⁵⁰ and the President generally must observe legislated limitations provided they do not negate the Constitution's positioning of the President at the head of the military chain of command.⁵¹

46. See Prakash, *supra* note 1, at 328-50.

47. For example, troops under Gen. Washington's command took British prisoners, and Washington convened a military tribunal in 1780 in the face of silence in the American Articles of War about whether a British officer could be tried in military court for being a spy. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 590-92 (2006). Washington carefully followed Congress's often detailed directives even when he disagreed. See BARRON, *supra* note 9, at 9-13 (congressional instructions on confinement conditions).

48. See Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11; Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1.

49. See *Loving v. United States*, 517 U.S. 748 (1996) (upholding President's definition of aggravating factors in military capital case pursuant to delegation of authority from Congress pursuant to Forces Clause).

50. See *supra* note 47.

51. There is reasonable disagreement about whether constitutional questions are raised by a statute dating to the Civil War Era that restricts the ability of the President to relieve a commissioned officer in

The Supreme Court endorsed this *Youngstown*-grounded view of shared power in wartime regarding military justice and detainees in the landmark national security separation of powers case *Hamdan v. Rumsfeld* (2006).⁵² The Court invoked the Forces Clause and Justice Jackson's famous *Youngstown* concurrence in rejecting the military commissions President George W. Bush created after the 9/11 terrorist attacks as at odds with the UCMJ. But *Hamdan*'s citation to the Clause was seriatim with other Article I, section 8 powers, without specific focus on the Clause itself.⁵³ The result is continued doctrinal ambiguity at the margins of the Clause's ambit. *Hamdan* implicated both Congress's core Internal Regulation power over military justice and the External Government power regarding treatment of detainees captured during military operations. But the extent of the powers rooted in the Forces Clause, as distinct from those provided by other provisions of Article I, section 8 remains imprecise.⁵⁴ Similar uncertainty surrounds the extent of the President's independent powers to convene military commissions absent legislation.⁵⁵ The *Hamdan* Court sided with Congress in this clash of Article I and II powers regarding military justices and specifically military commissions, but questions about how completely Congress's Internal Regulation power overcomes a defiant Commander in Chief will continue to arise. Against the backdrop of expansive congressional power and judicial deference, answers to the questions raised here will continue to evolve through the ongoing interaction among the branches of

peacetime without a court martial. See Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1, at 1111-12 (questioning constitutionality); Kent H. Barnett, *Avoiding Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1400 (2012) (Forces Clause and First Militia Clause provide authority for the statutory restriction).

52. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring).

53. See *Hamdan*, 548 U.S. at 591.

54. The Supreme Court has made clear that the Forces Clause, along with other clauses, provides Congress rule-writing authority regarding not just the most common example of military justice, the court martial, but also regarding a more extraordinary wartime tribunal, the military commission. See *Hamdan*, 548 U.S. at 590-96 & n.23. However, the courts have treated the authority to convene military commissions differently. In addition to reserving the question of the President's independent authority to convene military commissions (*see id.* at 590-93 & n.23), the Supreme Court has signaled that Congress's authority to grant the President power to convene military commissions flows mainly from the Declare War and Army Clauses, because the adjudicative work done by commissions is incident to war and commissions can adjudicate matters (from war crimes by enemy forces to quotidian crimes committed by residents of territories occupied and administered by the U.S. military) not usually tried by court martial or outside court martial jurisdiction. See *Hamdan*, 548 U.S. at 590-92 & n.21, *citing Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring) (speculating that the Forces Clause provides authority, but grounding it in Declare War and Army Clauses), and WINTHROP, *supra* note 21, at 831 (seeing authority for military commissions primarily in Declare War and Army Clauses, but noting that the Define and Punish Clause can provide authority as well). See also *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (emphasizing authority in Define and Punish Clause, operating in connection with Forces Clause rules).

55. See *Hamdan*, 548 U.S. at 590-93 & n.23.

government.

II. EXTERNAL GOVERNMENT

In quoting what it termed the Military Regulation Clause in the military justice-related case *United States v. Kebodeaux*, the Supreme Court without explanation edited Article I, section 8, clause 14 down to Congress's power to "make Rules for the . . . Regulation of the land and naval Forces."⁵⁶ This Part takes up the Court's implicit reservation of the meaning of the omitted textual term "Government" and the implication of a second power.

A word about the scope of our inquiry is in order. This analysis does not seek to revisit separation of powers doctrine generally. It does not ask whether Congress has, from *any source*, the power to limit the President in national security matters through non-appropriations statutes. The principle that statutes can bind the President is a precept of the *Youngstown*-informed majority view of separation of powers, as it is of the minority congressionalist separation of powers view that Congress almost always wins. Only the minority presidentialist view – that the winner is almost always the Commander in Chief – disputes the binding power of statute generally. Congress's ability to legislate hard law regarding national security is well understood to flow from multiple provisions of Article I, Section 8 (e.g., Define and Punish, Declare War, Captures, Marque and Reprisal, Army, Navy, and Militia Clauses),⁵⁷ the Constitution's structure and spirit, and from the gloss of constitutional history. The Forces Clause may provide some authority too for militia laws and authorizations for the use of military force (AUMFs) blessing war-scale armed conflicts, but this analysis generally sets them aside because they find their primary constitutional textual footing in the Militia and Declare War Clauses, respectively.⁵⁸

This Part explores the case for locating an External Government power in the Forces Clause, capable of binding the President and the national security apparatus via statutes that are not appropriations, militia laws, nor war authorizations. This Part also explains why locating an External Government power in the Clause is reasonable even if the Supreme Court has not yet clearly and squarely articulated it, given the Constitution's text and structure (discussed in Part II.A), the Clause's origins and counter-authoritarian purposes (discussed in II.B), and the constitutional history of clear citation to the Clause in the three branches (discussed in II.C). This body of constitutional evidence does not demand the conclusion that

56. See *United States v. Kebodeaux*, 570 U.S. 387, 394-95 (2013).

57. See U.S. CONST. art. I, § 8, cl. 10-13, 15-16.

58. See U.S. CONST. art. I, § 8, cl. 11, 15-16.

there is an External Government power flowing from the Forces Clause, but does suggest that a dual-power reading of the Clause is reasonable and indeed attractive.

A. Text

Constitutional analysis begins with the text and structure of the document. Close reading of the document's terminology and organization indicates that the Forces Clause is distinctive and clearly provides Congress with the power to bind "the land and naval Forces." A fair reading employing usual textual tools discerns dual powers in the Clause, ones that this article theorizes as Internal Regulation and External Government powers. Finally, it is reasonable to understand the ambit of the phrase "the land and naval Forces" to extend beyond the military and its justice system.

The interpretive principle that each part of the Constitution ought to be presumed to be doing distinct work is well established, often articulated as a rule or canon against surplusage.⁵⁹ The Supreme Court has said that this presumption applies to the Forces Clause.⁶⁰ A similar intratextual principle is that differences and similarities in language in the Constitution should be presumed to be meaningful.⁶¹ These principles are not ironclad rules but do inform reasonable inferences about the meaning words may bear.

Here, when read alongside its siblings and other provisions of the Constitution, and with the benefit of Founding Era dictionaries, the text of the Forces Clause provides strong indications of the distinctiveness and power of the lawmaking authorities it grants to Congress.

59. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.")

60. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549-50 (2012) (in discussion of meaning of "regulate" in Commerce Clause, observing that if the Forces Clause is read to allow creation of the military it would render the Army and Navy Clauses superfluous); cf., *United States v. Stanley*, 483 U.S. 669, 682, & n.6 (1987) (Forces Clause is a specific grant of power to Congress, but one that is superfluous if one reads the Necessary and Proper Clause broadly enough to embrace its powers).

61. Intratextualist analysis is common, with proponents and critics. Compare Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (argument for intratextualist reading) and Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000) (critique endorsing clause-focused interpretation over an intratextualism that assumes coherence and consistency in the Constitution), or William M. Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007) (critique emphasizing instead constitutional drafting history). See also Eugene Volokh, *Words That Have Different Meaning in Different Parts of the Constitution*, VOLOKH CONSPIRACY (Aug. 7, 2011, 6:10 PM), <http://volokh.com/2011/08/07/words-that-have-different-meaning-in-different-parts-of-the-constitution/> (assume consistent usage in Constitution subject to rebuttal by originalist contextual evidence). This article's analysis includes both intratextualist analysis and focus on the words, origins, and constitutional history of a particular provision.

The Clause is situated inside the primary fount of Congress's legislative authorities: Article I, Section 8. This section has, at its core, a potent grant of national security powers. The Forces Clause – Clause 14 – is preceded by four sibling clauses also concerning the military and foreign affairs. Clause 10 gives Congress the power to define and punish “Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”; Clause 11 allows Congress to declare war, grant letters of marque and reprisal to privateers, and make rules regarding captures; Clause 12 accords the national legislature the power to raise and support armies; and Clause 13 says Congress may “provide and maintain a Navy.”⁶² Immediately following Congress's Clause 14 power to “make Rules for the Government and Regulation of the land and naval Forces” are two other sibling military clauses, the dual Militia Clauses. Clauses 15 and 16 empower Congress to take the militia out of the hands of the states for federal purposes, and to control their composition, training, and operations when on federal duty.⁶³ The Militia Clauses are followed by another sibling military clause, Clause 17, which enables Congress to purchase and control land from the states “for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”⁶⁴ Earlier powers in Section 8 are relevant to national security as well, particularly the powers to tax and spend for “the common Defence and general Welfare, borrow money, and regulate commerce.”⁶⁵ Article I, Section 8 concludes with a buttressing and gap-filling Necessary and Proper Clause, enabling Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers” and all other powers of the federal government and its components.⁶⁶

In short, the Forces Clause benefits from powerful placement and association, and uses distinct terminology suggesting it is doing distinct work in the document. Notably, whereas the Army and Navy Clauses provide authority for creation and upkeep of national military forces, and the Declare War and Marque and Reprisal Clauses allow Congress to endorse the use of force, the Forces Clause uses different language – language that is facially about the imposition of legal controls.

The specific terminology of the Clause clearly indicates this controlling power may be executed through binding law.

The word “rule” in Samuel Johnson's oft-cited 1755 dictionary⁶⁷ is

62. U.S. CONST. art. I, § 8, cl. 10-13.

63. U.S. CONST. art. I, § 8, cl. 15-16.

64. U.S. CONST. art. I, § 8, cl. 17.

65. U.S. CONST. art. I, § 8, cl. 1-3.

66. U.S. CONST. art. I, § 8, cl. 18.

67. Founding Era dictionaries cited in this article described as “the most useful and authoritative” by Antonin Scalia and Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 423-25 (2013), include 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE

defined as “Government; empire; sway, supreme command.”⁶⁸ The Clause’s “Rules,” therefore, would be embodiments of state power, obligating compliance.⁶⁹ Elsewhere in the Constitution, the term has similarly strong implications. For example, in the Bicameralism and Presentment Clauses, “Rules and Limitations” reference provisions of the Constitution itself – as binding a law as the republic can create.⁷⁰ Each house of Congress “may determine the Rules of its Proceedings” – a legislative self-government power the Constitution does not qualify.⁷¹ Congress has the power to “establish a uniform rule of naturalization” – power over immigration.⁷² The Captures Clause and Territory Clause also use the word “Rules” to hand Congress legislative power, in the latter instance regarding territories that in the republic’s early years geographically dwarfed the states.⁷³ Finally, note that the Seventh Amendment, part of the Bill of Rights, references “the rules of the common law.”⁷⁴ Everything the Constitution’s text tells us, in sum, clearly indicates that when Congress makes “Rules” pursuant to Clause 14 it is making hard law.

A common Founding Era dictionary defined “govern” as “to rule, manage, look to, take care of.”⁷⁵ “Government” as a noun elsewhere in the Constitution, references the entire U.S. government, a public institution with power to make law.⁷⁶ In the Second Militia Clause,

(London, 1775); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, 25th ed. 1783); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (12th ed. 1760); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). *See also, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 646-48 (2008) (citing JOHNSON for term “bear arms”).

68. JOHNSON, *supra* note 67. *See also* 2 ASH, *supra* note 67 (Rule as noun defined as “An instrument [sic] by which lines are drawn or measured [sic]; a precept, a canon; regularity, propriety of behavior; government; sway, dominion”; as a verb, rule means “to manage, to govern,” and “To have power, to have command”).

69. For use in another Founding Era context, *see, e.g.*, Sims Lessee v. Irvine, 3 U.S. (3 Dall.) 425, 430 (1799) (surveyor must follow “laws and rules of government”).

70. U.S. CONST. art. I, § 7, cl. 2-3 (the passage “Rules and Limitations” in clause 3 references requirements for passage of a bill in clause 2).

71. U.S. CONST. art. I, § 5, cl. 2.

72. U.S. CONST. art. I, § 8, cl. 4.

73. U.S. CONST. art. I, § 8, cl. 11; *id.* art. IV, § 3, cl. 2. The Captures Clause is universally understood to concern captures of ships and goods, and is interpreted by many commentators and the Supreme Court also to provide authority over captures of people. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 590-91 (2006) (Captures Clause listed seriatim among several Article I powers in case concerning war prisoners); Brown v. United States, 12 U.S. (8 Cranch.) 110, 126 (1814). *But see* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201-02 (2004) (Captures Clause concerns only property).

74. U.S. CONST. amend. VII. Variation in capitalization ought not be regarded as significant. Usage during the Founding Era was inconsistent and stylistic. *See* Denys P. Myers, *History of the Printed Archetype of the Constitution of the United States of America*, 11 GREEN BAG 2d 217, 239 (2008).

75. BAILEY, *supra* note 67.

76. *See* U.S. CONST. art. I, § 8, cl. 17-18; *id.* art. II, § 1, cl. 3; *id.* art. IV, § 4; *id.* amends. I, XII,

“governing” indicates congressional power to control the militia when called into federal duty.⁷⁷

Distinguishing “Government” and “Regulation” is challenged by overlapping definitions from the Founding Era. The 1783 edition of Samuel Johnson’s dictionary defined “govern” as to “regulate, to influence, to direct . . . to manage, to restrain,” while another dictionary of the time defined “regulate” as “to set in order, to govern, direct, or guide.”⁷⁸

The Clause’s term “regulate” occurs at two other places in the Constitution of 1789 in usages that signal lawmaking power: Congress has the power to “regulate Commerce” and “regulate the Value” of money.⁷⁹ “Regulate” takes adjectival form in the Second Amendment, which provides a right to bear arms in relation to “a well regulated militia.”⁸⁰ Meanwhile, a dictionary from near the end of the Founding Era included as its second definition to “put in good order; as to regulate the disordered state of a nation or its finances.”⁸¹ All of these intratextual and dictionary references support the same original public meaning of the Clause’s language: power to make “the land and naval Forces” orderly and subject to legislated policies and standards.⁸²

XXIII.

77. U.S. CONST. art. I, § 8, cl. 16.

78. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 7th ed. 1783); BAILEY, *supra* note 67, *quoted in* Prakash, *supra* note 1, at 331 n.168. Professor Randy Barnett argues that Congress did not adopt the understanding of “regulation” that includes “government.” Barnett grounds this conclusion about the Commerce Clause’s term “regulate” in the Forces Clause’s terminology. *See* Barnett, *supra* note 9, at 140. This is circular reasoning, however, if one looks to the Commerce Clause to understand the Forces Clause.

79. U.S. CONST. art. I, § 8, cl. 3, 5. *See also* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (“regulate” in the Commerce Clause means “to prescribe the rule by which commerce is to be governed”). Professor Barnett’s review of the records of state constitutional ratification debates shows that, in “stunning uniformity” the references suggest “regulation” meant “subject to a rule” or “make regular,” but not the extinguishing of something pre-existing or otherwise created. Barnett, *supra* note 9, at 142. *Cf.*, Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 972-73 (2003) (“regulation” in Article III, section 2 Supreme Court appellate jurisdiction context “connotes adjustment, but not radical change”). In the Commerce Clause context, Barnett maintains that the original public meaning of “regulate” therefore would not sustain the federal government extinguishing domestic commerce. Barnett, *supra* note 9, at 146. For our purposes, we can observe that Barnett’s research suggests that the Forces Clause’s “Regulation” term was generally understood by the people to mean disciplining the military but not extinguishing it – power Congress instead had under the Army and Navy Clauses, the Army Appropriations Clause (a sub-clause of the Army Clause), and the general Appropriations Clause. *See* U.S. CONST. art. I, § 8, cl. 12, 13; *id.* art. I, § 9, cl. 7.

80. U.S. CONST. amend. II. For a modern originalist construction, see *District of Columbia v. Heller*, 554 U.S. 570, 597 (2008) (“the adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training,” citing Johnson’s dictionary of 1783).

81. WEBSTER, *supra* note 67.

82. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751 (2009) (original public meaning is leading originalist theory).

Despite the overlapping meanings of “to regulate” and “to govern” in Founding Era dictionaries, the Forces Clause may be fairly read to use these words with regard to two enumerated powers, ones that we can – consistent with the Court’s recent parsing – associate separately with the Clause’s dual active words “Government” and “Regulation.”⁸³

First, the Forces Clause’s language supports an inference of two powers because clauses akin to the Forces Clause, that have multiple key terms, also provide multiple powers. The two active words at the core of Clause 14 are “Government and Regulation.” Clauses 12 and 13 of Article I, Section 8 each have one word suggesting creation of military forces, and another word about upkeep (“raise and support Armies” and “provide and maintain a Navy”).⁸⁴ The two active terms are doing different things. Similarly, Professor Randy Barnett finds a parallel between the Forces Clause and Article III, Section 2, which provides the Supreme Court appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.” Barnett sees in “Exceptions” a power of prohibition lacking in “such Regulations,” in part based on the same meaningful variation or rule-against-surplusage rationale that inferentially distinguishes the Forces Clause’s “Government and Regulation” terms.⁸⁵

In contrast, other clauses that authorize a single action typically have a single verb or other active word. The Declare War Clause is one example. The Commerce Clause is another, and its verb – “regulate” – is present in the Forces Clause, along with a second active word. Lacking reason to dispute application of the presumption against surplusage, textually we can reasonably infer two powers in the Forces Clause.

Additionally, the theory that the Forces Clause contains two powers is buttressed by the language of its sibling in Article I, Section 8, Clause 16, the Second Militia Clause.⁸⁶ Clause 16 authorizes two kinds of federal legislative work. One is “organizing, arming, and disciplining, the Militia,” to include making state appointment of officers and state training of the militia subject “to the discipline prescribed by Congress.” The other power in Clause 16 is “governing such Part of [the militia] as may be employed in the Service of the United States.”⁸⁷ The first passage clearly gives Congress power over the Internal Regulation of the state militias, while the second concerns something else and uses the same

83. In the Clause, “Govern and Regulate” are nominalizations – verbs made into nouns by their usage, but still retaining an active implication in context.

84. U.S. CONST. art. I, § 8, cl. 12-13.

85. Barnett, *supra* note 9, at 140. Among scholars, Barnett gets the closest to associating the two distinct powers separately with the words Government and Regulation.

86. *Accord* Prakash, *supra* note 1, at 331 n.171 (clauses provide “much the same power”).

87. U.S. CONST. art. I, § 8, cl. 16.

“govern” terminology found in Clause 14 in connection with the militia being “employed” by the federal government. It is easy, therefore, to infer that this second part of the Second Militia Clause is about controlling operations of the militia beyond the gates of the fort. It is also easy to see resonance with the linguistic structure of the Forces Clause. Clauses 14 and 16 textually read not just as parallel military clauses but as symmetrical fraternal siblings, providing both Internal Regulation and External Government powers over different parts of the military establishment. Clause 14 allows congressional management of the standing federal “land and naval Forces” addressed in predecessor Clauses 10 through 13, while Clause 16 allows congressional management of the federalized militia addressed in Clauses 15 and 16.

Finally, it is reasonable to read the Forces Clause’s text to extend beyond military justice and discipline, and indeed, beyond the uniformed military.⁸⁸

The Forces Clause uses the expansive language of making “Rules” for “Government and Regulation” in place of specific mention of military justice. The Clause also does not include any of the terminology found elsewhere in the Constitution that concerns adjudications: court, crimes, trial, prosecution, testimony, punishment, etc.⁸⁹ The Clause’s general phrasing likewise reaches beyond the more specific terms in the Second Militia Clause of “organizing, arming, and disciplining.”⁹⁰

88. The Fifth Amendment has language similar to the Forces Clause, with potential intratextual implications. The notion that the Forces Clause’s authority over “the land and naval Forces” is largely parallel to, rather than overlapping, with the authority over the militia discussed in the Militia Clauses in Article I, section 8 is supported by the interpretive rule that every provision is doing distinct work, by the different language in the clauses, and by the language of the Fifth Amendment, which excepts from its general grand jury requirement “cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend. V. No separate reference to the militia would be necessary if the militia were understood by the Framers to be part of the land and naval Forces.

On the other hand, note that the Fifth Amendment’s exception to the grand jury requirement for “cases arising in the land or naval forces, or in the militia” potentially could suggest that “land and naval Forces” in the Forces Clause means only the military, because of the good reasons not to expand military justice and its lack of grand juries and other defendant protections beyond the military. However, UCMJ jurisdiction has long included the Coast Guard, an entity beyond “Armies” and “a Navy.” Additionally, military jurisdiction is not exclusive – current and former service members, (then and now) in many cases face criminal liability in civilian courts in which the protections of the Bill of Rights apply in full. Third, as noted in Part I, from the first American Articles of War to the modern UCMJ, some non-military personnel closely associated with the armed forces have been subject to military jurisdiction. A plausible interpretation is that the Fifth Amendment’s grand jury carve-out for “cases arising in the land and naval forces” has instead meant (and means) cases *prosecuted through the military justice system*, not *any case involving* members of “the land and naval Forces” as more fully understood in the Forces Clause.

89. See U.S. CONST. art. I, § 3, cl. 7 (liability for “Indictment, Trial, Judgment and Punishment” despite impeachment); *id.* art. III (references in article concerning the judiciary); *id.* amend. V (grand juries with exception for cases arising in the “land or naval forces”; criminal cases); *id.* amend. VII (trial by jury); and *id.* amend. VIII (cruel and unusual punishments).

90. The Second Militia Clause’s term “disciplining” was described by one of its drafters to mean “penalties, and every thing necessary for enforcing penalties.” That suggests a military justice meaning

Additionally, the words “land and naval Forces” are facially broader than the “Armies” and “a Navy” referenced in Clause 14’s immediate sibling clauses. Notably, in its modern doctrine the Supreme Court has said that the “natural meaning” of “the land and naval Forces” is the uniformed military – but has done so in its military justice jurisprudence, where there are good policy reasons to limit military penal authority and the question of the Clause’s scope beyond military justice is not presented.⁹¹ One can agree with the Court that civilian spouses and children of military personnel should not be subject to court martial for quotidian crimes and still read the Clause’s text more comprehensively for congressional control over the larger national security apparatus. The Clause could reasonably be read to give Congress legislative power over other “land and naval Forces”: privateers granted letters of Marque and Reprisal, a coast guard auxiliary to the Navy, and the irregular forces such as spies and saboteurs who had operated covertly in connection with the Army and Navy regulars since the War of Independence.⁹² Other people professionally assisting the Army and Navy sensibly could be subject to Congress’s “Rules,” such as civilian personnel employed in supporting (and not merely related to) current and former military personnel – either directly as federal employees or as contractors.⁹³ Of course, all of these categories of land and naval forces outside the regular uniformed military could be subject to Congress’s management under other Clauses, as well (e.g., the Coast Guard under the Commerce Clause, and all under the Necessary and Proper Clause). But that does not exclude them from the ambit of the Forces Clause,

that may not have meant as much as the Forces Clause’s term “Regulation” might embrace. *See* 5 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 464-65; 2 FARRAND, *supra* note 20, at 385; U.S. CONST. art. I, § 8, cl. 14, 16. If the drafters meant that the Forces Clause would involve only military justice and discipline, it is reasonable to think they simply would have repeated this term from the Second Militia Clause.

91. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1, 19 (1957). *But see* *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960) (suggesting potential broader scope).

92. *See* *Kent*, *supra* note 3, at 915-16 & nn.330-32 (“relatively uncontroversial” that the Forces Clause could operate regarding privateers authorized to fight for the United States under the Marque and Reprisal Clause, and their captures, governed under the Captures Clause).

The First Congress federalized colonial lighthouses and authorized a fleet of 10 cutters to enforce tariff laws – the precursors of the modern Coast Guard. *See* *Historian’s Office*, U.S. COAST GUARD, http://www.history.uscg.mil/history/articles/h_USCGhistory.asp (last updated Dec. 21, 2016).

93. One might also add the militia, when on federal duty, in a supporting role to legislation enacted pursuant to the Militia Clauses. As part of its work via the Militia Clauses to make the militia standardized and interoperable with the active component, Congress could subject the militia to “Rules” written for the active force pursuant to Forces Clause. *See* *Perpich v. Dep’t of Defense*, 496 U.S. 334, 343-44 (1990) (discussing militia laws and foundation in Clauses 14 and 16).

An alternative or additional source of regulatory power over the personnel beyond those the army and navy is the Necessary and Proper Clause. But that regulation is reasonably accommodated here, and, therefore, reliance on the Necessary and Proper Clause is necessary.

as well, nor does that mean that the Forces Clause is not the strongest constitutional footing for related statutory “Rules.”

In short, the words and structural placement of the Forces Clause provide strong signals and support reasonable inferences as to its original meaning. The document’s words set parameters for the meaning the Clause can bear.

Nevertheless, the text is not sufficient for a full understanding. Originalist interpretation is improved by contextual analysis, to include evidence bearing on historical context, purposes, drafting history, and Founding Era practice.⁹⁴ All inform our sense of how the Framers and the public would have understood the Clause. Having established that the Constitution’s text reasonably suggests both Internal Regulation and External Government powers based in the Clause, and that the Clause provides legislative authority beyond the uniformed military and its justice system, we turn to the Clause’s origins.

B. Origins

The Land and Naval Forces Clause reflects the republic’s commitment to the prevention of tyranny through civilian control of the military, the rule of law, separation of powers, and checks and balances.⁹⁵ Among the organs of government, military forces and especially standing forces under the command of a single leader present inherent authoritarian risk. A tyrannical leader imperils the liberty of the people and their capacity for self-government, and also the rights of the People who serve in the armed forces. The powers provided by the Forces Clause to the elected representatives of the People are, therefore, a limitation on executive power and a check against military dictatorship, reflecting a separation and sharing of military powers in the Constitution that in England were first held exclusively by the crown.

This Part reviews the origins of the constitutional text analyzed in Part II.A. This discussion primarily focuses on the emergence of an External Government power associated with the Forces Clause. Because the External Government and the more well-established Internal Regulation

94. “[Q]uestions about the locus of authority over national security and the use of the armed forces should start not from ‘clause-bound interpretation’ of particular constitutional provisions, but from an overall understanding of the Constitution of foreign affairs. Individual clauses must be read in light of the overall constitutional structure” and purpose. H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 154 (2002).

95. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The 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. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”)).

understandings are associated with the same Clause, however, this analysis necessarily references them both in tracing its origins. This section of Part II also identifies key questions about the Clause's meaning that will be explored through review of the constitutional record in Part III.C below, and Parts IV and V that follow.

1. British and American Origins

The Federalist and other Founding Era documents are replete with references to ancient Greece and Rome⁹⁶ and their ultimate loss of liberty.⁹⁷ Equal to the Framers' fear of foreign threats was their concern about tyranny at the federal level, or at the state level because of a weak union (such as under the Articles of Confederation) that would lead to constant strife among the states.⁹⁸ Benjamin Franklin's famous observation that the Constitutional Convention had yielded "a republic, if you can keep it" spoke to the Framers' hopes and fears.⁹⁹

The English experience loomed large. The Framers were disturbed by competition in England between crown and parliament regarding control over the military. In English antiquity, the king held virtually all relevant powers: to raise military forces, fund them through taxes, discipline them, command them in battle, and issue edicts with the force of law. Authority migrated to Parliament in response to abuses of authority, foreign military misadventures, and growing republican sentiment, evolving to a condition of shared power.¹⁰⁰

The Magna Carta of 1215 established in principle Parliament's supremacy.¹⁰¹ Four centuries later, the Petition of Right of 1628 objected to military exercises infringing on the rights of the people in language later echoed in the Declaration of Independence of the American colonies.¹⁰² The Parliament acquired independent authority to raise armies, and the legislature's own forces fought and defeated those of the

96. Both Federalists and Anti-Federalists wrote under Roman pseudonyms.

97. See, e.g., THE FEDERALIST NO. 18 (James Madison & Alexander Hamilton) (examples of weak ancient confederations); THE FEDERALIST NO. 41 (James Madison) ("the liberties of Rome proved the final victim to her military triumphs"). See also CARL J. RICHARD, GREEKS AND ROMANS BEARING GIFTS: HOW THE ANCIENTS INSPIRED THE FOUNDING FATHERS (2008).

98. See, e.g., THE FEDERALIST NO. 41 (James Madison) (danger of inter-state conflict); THE FEDERALIST NO. 6 (Alexander Hamilton) (war among states would be frequent and violent); THE FEDERALIST NO. 8 (Alexander Hamilton) (constant state or threat of war imperils liberty).

99. See 3 FARRAND, *supra* note 20, at 85.

100. For survey of English constitutional history regarding the domestic role of the military, see BANKS & DYCUS, *supra* note 13, at 15-19.

101. See *English Translation of Magna Carta*, para. 61, BRITISH LIBRARY, bl.uk/magna-carta/articles/magna-carta-english-translation.

102. See Eng. *Petition of Right*, art. VI (1628), <http://www.constitution.org/eng/petright.txt>; THE DECLARATION OF INDEPENDENCE paras. 11-13 (U.S. 1776).

king in the English Civil War of the 1640s. After restoration of the crown in 1660, concern about military abuses informed the English Bill of Rights' ban in 1688 on a peacetime standing army without the consent of Parliament.¹⁰³ The Bill of Rights more generally subordinated the crown's use of the sword to the laws of Parliament, which by the purse by the Seventeenth Century.¹⁰⁴ By the time of the American Revolution, the crown retained primary authority mainly over diplomacy, and the ability to direct the armed forces abroad. At home, law enforcement and military matters were generally separated.¹⁰⁵

Expanding parliamentary control over the law and over the armed forces included greater legislative regulation of military justice and discipline. The longstanding practice from the 1200s to 1600s had been for the king to issue articles of war specific to a particular campaign. These rules concerned military justice and the conduct of the campaign, and included rules on the treatment of prisoners and non-combatants. These articles typically expired at the end of the war or campaign. Reflecting the defaults of civilian authority and no standing army, the common law and civil courts otherwise had jurisdiction over offenses by military personnel.¹⁰⁶ In response to crises of the 1600s, including brutal military justice against soldiers and civilians during the English Civil War, Parliament after the Bill of Rights had the ability to control military justice. Parliament generally left most crimes by soldiers in peacetime to the civil courts, but the Mutiny Acts allowed for court martial for mutiny and sedition.¹⁰⁷ This decision by Parliament was facilitated by grudging recognition that Britain needed a standing army in peacetime, and by agreement that the army needed to be strictly disciplined (to include punishment for political disorder: mutiny and other challenges to civil and military authorities). The record in the 1600s and 1700s shows an iterative series of moves by Parliament and the crown to adjust the scope of crimes punishable by military justice, the severity of punishments, and the allocation of shared power over the military. Parliament also provided implicit and explicit legislative sanction for the crown to control military justice and discipline abroad.¹⁰⁸

“Abroad” included the American colonies, where objections to British Army abuses were a catalyst of independence. The colonists complained

103. See *Eng. Bill of Rights*, § 6 (1689), http://avalon.law.yale.edu/17th_century/england.asp.

104. See *id.* §§ 4, 6; WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 11-17 (1994).

105. See BANKS & DYCUS, *supra* note 13, at 15-19.

106. See *Loving v. United States*, 517 U.S. 748, 760-62 (1996) (citing WINTHROP, *supra* note 21, at 17-18); 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (1765); MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 25-27 (1713).

107. See *Loving*, 517 U.S. at 762-64.

108. See *Loving*, 517 U.S. at 764-76; WINTHROP, *supra* note 21, at 18-21.

of general warrants and other writs that authorized invasive searches, and of harsh military justice imposed on colonial militia and civilians.¹⁰⁹ The Declaration of Independence criticized the King for making “the military Independent of and superior to the Civil Power.”¹¹⁰ The colonists assailed, in essence, executive elevation of the military – and indeed, a standing army in peacetime – over American civil authority.

The language of the Forces Clause is evident in the new nation’s earliest legal authorities. To counter the potential for tyranny, they provided for legislative control of the military’s operations, discipline, and commanders.

On June 14, 1775, the Continental Congress called for a military force from several colonies to be raised, and stipulated an enlistment oath pledging soldiers “to conform, in all instances, to such *rules* and *regulations*, as are, or shall be, established for the *government* of the army” (emphasis added, here and hereafter).¹¹¹ The Continental Congress then appointed a committee of five, including George Washington, to draft “*Rules* and *regulations* for the *government* of the army” – American Articles of War, which were enacted later that month.¹¹² Three days later, on June 17, Congress commissioned Washington as General and “Commander in chief [of] the army of the United Colonies,” and required him to “*regulate* [his] conduct in every respect by the *rules* and disciplines of war . . . and punctually to observe and follow such orders and directions” from the Congress or a committee thereof.¹¹³ The Continental Congress’s approach to Washington’s service as Commander in Chief during the War of Independence would range from micromanagement (with congressional delegations at times in the field issuing directives) to grants of expansive power.¹¹⁴ Washington carried his congressional

109. See Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 *Ind. L.J.* 979, 989-993, 1002 n.131 (2011).

110. THE DECLARATION OF INDEPENDENCE (U.S. 1776); for general discussion see BANKS & DYCUS, *supra* note 13, at 5.

111. 2 *JOUR. CONT. CONG.* 90 (1775) (emphasis added, here and hereinafter).

112. 2 *id.* at 89-90. These first Articles of War were enacted on June 30, 1775. *Id.* at III.

113. 2 *id.* at 96.

114. See JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* 93 (2004) (congressional delegations at the front, giving Gen. Washington orders). In winter and spring 1776-77, while driven from the national capital in Philadelphia, Washington was invested by Congress “with full, ample, and complete” powers to raise and equip the national army; the takings power; and power “to arrest and confine persons who refuse to take the continental currency, or are otherwise disaffected to the American cause” 6 *J. CONT. CONG.* 1045-46 (Dec. 27, 1776). Some commentators then and since have characterized this as Washington’s “dictatorship.” See e.g., Patrick Henry, *Speech to the Virginia Ratifying Convention, June 5, 1788*, reprinted in PATRICK HENRY, III PATRICK HENRY 485; *Virginia Convention Debates, June 9, 1788*, IX DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1058 (John P. Kaminski & Gaspare J. Saladino eds., 1990); Brian Logan Beirne, *George vs. George vs. George: The Commander-in-Chief Power*, 26 *YALE L. & POL’Y REV.* 265, 285 (2008). Dictatorship was a time-limited power that the republican Roman Senate would, in a moment of peril,

commission in his pocket throughout the war, took considerable time communicating with the Continental Congress, and carefully followed its guidance.¹¹⁵

In June 1776, the Continental Congress appointed John Adams, Thomas Jefferson, and three others to a “committee on [British] spies” and directed them to revise the Articles of War of the prior year.¹¹⁶ Like the 1775 code, the amended Articles contained “*rules and regulations*” for the army.¹¹⁷ The Articles did not simply regulate the military internally and reorganize the Articles, but via a resolution added at the end also concerned detainees: court martial and potential capital punishment for espionage.¹¹⁸ These Articles of War were with some adjustments based on British rules, and were amended and re-affirmed under the new nation’s constitutions – the first of which was the Articles of Confederation.¹¹⁹

2. First Iteration: The Clause in the Articles of Confederation

Article IX of the 1778 Articles of Confederation was a long and disorderly compilation of enumerated powers is analogous to Article I, Section 8 of the Constitution, and contained the Forces Clause’s first iteration. Article IX granted the Confederation Congress “the sole and exclusive right and power of . . . making rules for the government and

confer for a short period on a single leader, most famously Cincinnatus. Washington’s style of leadership, retirement from command of the Continental Army, and later retirement from the presidency drew comparisons at the time to the self-restrained Roman general and farmer. See RON CHERNOW, WASHINGTON: A LIFE 444, 457 (2010).

115. See BARRON, *supra* note 9, at 6-17; CHERNOW, *supra* note 114, at 456 (Washington parted with the commission only when surrendering it to the Continental Congress at the end of the war); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 774-80.

116. WINTHROP, *supra* note 21, at 22 (directive to the committee). See also 1 THE WORKS OF JOHN ADAMS 224-25 (Charles Francis Adams ed., Boston, Little Brown & Co. 1856) http://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s9.html (reporting on June 5, 1776, Continental Congress Committee on Spies resolution that all persons in the colonies owe allegiance and are guilty of treason if levying war against the colonies or adhering to the British crown, and urging colonial legislatures to pass laws for their punishment).

117. See Am. Art. of War of 1775, art. I; Am. Art. of War of 1776, § I, art. 1, *reprinted in* WINTHROP, *supra* note 21, at 953, 961.

118. The resolution was passed Aug. 21, 1776 (and ordered printed after the revised Articles approved the prior day), and evolved over time as discussed in WINTHROP, *supra* note 21, at 765-71. See also Am. Art. of War of 1775, art. XXVIII (court martial of soldiers giving intelligence to the enemy); and Am. Art. of War of 1776, § XIII, art. 19 (court martial and potential capital punishment for “Whosoever” gives “intelligence to the enemy”), *reprinted in* WINTHROP, *supra* note 21, at 955, 967.

119. See WINTHROP, *supra* note 21, at 17-23. See also United States v. Lee, 4 C.M.R. 185 (A.B.R. 1952). The Articles of War were amended under the Articles of Confederation, most extensively in 1786. See WINTHROP, *supra* note 21, at 972-75 (reprinted 1786 amendments to the Articles regarding military justice). For re-enactment of the Articles by the First Congress under the Constitution, see Act of Sept. 29, 1789, *supra* note 21.

regulation of . . . land and naval forces, and directing their operations.”¹²⁰

The Constitution’s Army, Navy, and Militia Clauses had ancestors in the Articles of Confederation, as well. The Navy Clause was most similar: Congress, under the Articles, could “build and equip a navy” for the nation.¹²¹ But ground forces were handled differently. Congress could merely “agree upon the number of land forces, and . . . make requisitions from each state for its quota” of army regulars, who would proceed to locations as directed by Congress pursuant to two Marching Clauses.¹²² State legislatures shared officer appointment power with Congress,¹²³ but the legislatures alone would “raise the men, and clothe, arm, and equip them, in a soldier-like manner, at the expense of the united states,”¹²⁴ which was dependent on the states for money.¹²⁵ Reflecting profound fear of tyranny, the Articles of Confederation had no independent Executive. Instead, the Articles allowed Congress to appoint various subordinate officials, including “commanders in chief” to lead the armed forces.¹²⁶ The Articles provided little legal basis for a standing national army in peacetime.¹²⁷ And indeed, the Confederation Congress had trouble getting funding from the states for the armed forces, and rejected Washington’s recommendation of creation of a small standing national army to secure the frontier in cooperation with state militia.¹²⁸ The Articles envisioned “a firm league of friendship” of sovereign, free, and independent states that would bear the primary burden for the confederation’s defense.¹²⁹ The Articles accordingly bound the states to “always keep up a well regulated and discipline militia, sufficiently armed and accounted” with ready stores.¹³⁰ With permission of Congress, the

120. ART. OF CONFED. OF 1781, Art. IX. Because the Articles are punctuated so inconsistently and not well organized, one can reasonably wonder how much language one should regard as part of the Articles’ version of the Forces Clause. In expanding order, one could include in the Clause just the “government and regulation” passage; also the “directing their operations” passage; or add language before a semicolon but after a dividing dash (“-”) on officer appointment and commissioning. The best approach is to exclude officer appointment, recognizing that the Articles often divide clauses with semicolons. For similar construction of the Clause, *see, e.g.*, BANKS & DYCUS, *supra* note 13, at 28. Note also that the Articles make three references to Congress’s power to direct forces. In addition to the Forces Clause, at two other places Article IX states that land forces provided by the states “shall march to the place appointed, and within the time agreed on” by Congress.

121. ART. OF CONFED. OF 1781, art. IX.

122. *Id.*

123. *Id.* arts. VII, IX.

124. *Id.* art. VI.

125. *Id.* art. VIII (“a common treasury, which shall be supplied by the several states” as directed by Congress, under the “authority and direction of the legislatures”).

126. *Id.* art. IX.

127. *Id.*

128. BANKS & DYCUS, *supra* note 13, at 29.

129. ART. OF CONFED. OF 1781, art. II, III.

130. *Id.* art. VI.

states could have their own warships and armies in times of peace and independently wage war.¹³¹

What did the Forces Clause mean in the Articles?

Intratextual and intertextual analysis shows that the Articles of Confederation used the term “regulate” and its variations in a manner akin to the Constitution, equally suggestive of lawmaking power. (The term “government” appeared only in the Forces Clause in the Articles). The Confederation Congress could regulate currency, post offices, and trade with Native Americans.¹³² Congress could also regulate state-commissioned vessels of war and state-issued letters of marque and reprisal after a war declaration by Congress.¹³³ “Rules” established what “shall be legal” in the capture and disposition of adversary vessels and their contents.¹³⁴

The powers conferred by the Forces Clause and the larger power to decide to go to war were neither laterally separated nor shared powers at the national level under the Articles of Confederation, because there was no separate executive.¹³⁵ But they were differentiated. This was done mechanistically through a supermajoritarian voting threshold. The Forces Clause, like most other legislative powers, could be exercised by simple majority vote of the states in Congress, with each state having one vote. In contrast, nine of the thirteen states had to vote for Congress to exercise the Articles’ powers to declare or “engage in a war,” in addition to the related matters of marque and reprisal, raising national military forces, appointing commanders in chief, approving treaties and alliances, and appropriating funds.¹³⁶

131. *Id.* arts. VI, IX. Art. VI provided permission in the form of a general ban on states having warships and regular land forces in peace or engaging in war, with an exception for congressional authorization. A further exception is that states could engage in war if “actually invaded by enemies” or if made aware of imminent attack by Native Americans “and the danger is so imminent as not to admit of a delay till the united states in Congress assembled, can be consulted.” States could also commission warships and grant letters of marque and reprisal without a congressional war declaration, “unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in Congress assembled shall determine otherwise.” Similarly, the Articles allowed Congress to give the states permission to engage in international diplomacy; enter into international alliances and treaties; and, enter into “any treaty, confederation, or alliance . . . between them.”

132. *Id.* arts. IX, VI.

133. *Id.* art. VI.

134. *Id.* art. IX.

135. In contrast, power over regulars was shared with the states under the Articles, due to the dependence of the national government on troops, equipage, and money from the states, and the national/state shared authority over appointment of army officers. In another contrast with the Constitution, under the Articles the national government had no textual power over the militia. The Articles’ sole reference was its Article VI requirement for the states to maintain militia and keep them ready.

136. ART. OF CONFED. OF 1781, art. IX. The nine-state supermajority threshold would not have been adjusted if the confederation had grown to fourteen or more states with the accession of Canada to

Internal Regulation and External Government powers and the Forces Clause's counter-authoritarian purposes were evident. As noted, the Confederation Congress via amendment re-enacted the Continental Congress's Articles of War and controlled military operations.¹³⁷ The Articles' Forces Clause gave Congress complete control of these national forces, including the power of "directing their operations."¹³⁸ Two Marching Clauses stipulated that the Congress could command state-raised forces to "march to the place appointed, and within the time agreed on" by Congress.¹³⁹ Powers under the Forces Clause and the two Marching Clauses could be delegated to committee.¹⁴⁰ As implemented during the War of Independence, this arrangement (and Washington's famous self-restraint)¹⁴¹ ably functioned in counter-authoritarian fashion: the country did not succumb to authoritarian rule or revert to monarchy. But Washington, other commanders, and many other observers were frustrated by the often slow, questionable, and cumbersome command-by-legislative-committee.¹⁴²

3. Second Iteration: The Clause in the Constitution¹⁴³

a. Transition from Articles of Confederation to Federal Constitution

The Articles' command structure was one of its several national security deficits.¹⁴⁴ Congress could not compel the states to provide

the Articles, or admission of other states with the permission of nine states. *Id.* art. XI. It was one of the Articles' many defects that, due to the specification of *nine* states, if the confederation grew larger than eighteen states new states could be admitted even if a majority of states were opposed.

137. See *supra* note 119 (1786 amendments to Am. Art. of War of 1776); Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 404-05 (2017) (examples of Confederation Congress management of military and diplomatic matters, including direction of forces to protect against Native Americans).

138. *Id.* art. IX.

139. *Id.*

140. *Id.* art. X.

141. Washington famously squelched discussion among his officers of mutiny against Congress, resisted calls for him to become king, and surrendered his commission and the presidency voluntarily. One biographer puts it well: "His instincts were the antithesis of a demagogue's: he feared his own influence and agonized over exerting too much power." He labored to set precedents of restraint. CHERNOW, *supra* note 114, at 442, 434-36, 455-56.

142. See BANKS & DYCUS, *supra* note 13, at 30.

143. A short-lived third iteration of the Clause was its inclusion in the Confederate States of America's 1861 Constitution, modeled on the U.S. Constitution. The Clause appeared there in identical location and form (capitalization varied). See CONST. OF THE CONFEDERATE STATES OF AMERICA, art. I, § 8, cl. 14.

144. In addition to the pieces on national security discussed in footnotes below, see THE FEDERALIST NOS. 3-5 (John Jay), 6-7 (Alexander Hamilton). For arguments generally by the Constitution's advocates against the Articles and for the revised union, see THE FEDERALIST NOS. 15-17

troops or money for a national military. The national government could not command the largest military forces: the state militias. There were threats to the union and threats of disunion: the British, French, and Spanish empires, in addition to Native American tribes, threatened from the outside, and might be emboldened by American military weakness and play separately armed states off against one another. Hamilton warned in *Federalist No. 8* that the country under the Articles faced disunion, which risked large standing state armies and “War between the States.”¹⁴⁵ These would engender a continual state of fear and alarm, empowering state executives and their militaries and inevitably undermine democracy and the rights of the People.¹⁴⁶ Even so, concern about a tyrannous national government continued to run deep. The Framers’ solution was a “large republic,” with a federal government strong enough to protect the country’s security and obviate the need for militarized states, and sufficiently limited to protect liberty.¹⁴⁷ The Constitution mitigated risks associated with a national chief executive and a national army via internal structural limits on federal powers (via separation of powers, checks and balances, and federalism) and potentially enforceable legal limits (memorialized during the Founding Era in the Bill of Right’s protection of the rights of the people and the states).¹⁴⁸

The Forces Clause was carried forward into the Constitution by way of an amendment to the original draft of the Committee of Detail, without

(Alexander Hamilton), 18-20 (James Madison & Alexander Hamilton), 21-22 (Alexander Hamilton).

145. See THE FEDERALIST NO. 8 (Alexander Hamilton).

146. See *id.*:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

In the context of public skepticism of standing armies, Hamilton smartly argued in No. 8 against the state standing armies that would result from disunion. Knowing that a national army could be created under the Constitution, he also argued that a national army would not necessarily be required. Instead, the union could primarily rely on its national navy and federalizable state militia, and the military efficiencies of a union’s scale and distance from Europe. Ultimately, Hamilton argued that, the country would need a net smaller military as a union than in dis-union. In other essays, he made the case for a national government able to raise a national army and direct state militias. See THE FEDERALIST NOS. 24-29 (Alexander Hamilton).

147. See THE FEDERALIST NO. 14 (James Madison) (regarding a large republic).

148. See THE FEDERALIST NO. 47 (James Madison) (“accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny”). For scholarly discussion of the internal and external limits, see AMAR, *supra* note 9; BANKS & DYCUS, *supra* note 13, at 7; see generally PETER M. SHANE, MADISON’S NIGHTMARE (2009); U.S. CONST. amends. I-X.

comment or debate.¹⁴⁹ Or, at least most of the Clause survived: the phrase “directing [military] operations” was omitted. This “directing” language reappeared nowhere else in the new document. Two proposals that would have given it to the Constitution’s new Executive were defeated.¹⁵⁰ Other changes included deletion of the Articles’ Marching Clauses, which also had given Congress directive power.¹⁵¹ Meanwhile, a commander in chief was no longer one or more appointees of the Congress, but rather an identity of the new President.¹⁵² Congress could create peacetime forces including a Navy and Armies raised directly from the people.¹⁵³ Congress could pay for them itself via federal taxes and appropriations, but would have to act affirmatively every two years to fund the Army or it would disappear.¹⁵⁴ Congress now had the power of “calling forth the Militia,” of “governing” it on federal duty, and of “organizing, arming, and disciplining” it.¹⁵⁵

b. Implications Generally

What were the implications for the Forces Clause in the Constitution?

First, the Clause, along with new congressional powers to create and fund regular federal forces and put state militias on federal duty, continued to reflect the counter-authoritarian ethos of the Founding Era, despite creation of the Executive. These powers were not handed to this new Executive, nor to states that the Framers worried could lose their “republican form of government.”¹⁵⁶ The Forces Clause stayed with Congress.

If anything, the Clause now mattered more. The Constitution’s new

149. See 5 ELLIOTT, *supra* note 90, at 443; 2 FARRAND, *supra* note 20, at 330 (the Clause “was added from the existing Articles of Confederation”); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 786.

150. These were the New Jersey Plan (a multi-member Executive could “direct all military operations”) and Hamilton’s plan (a “supreme Executive authority” would “have the direction of war when authorized or begun”). For discussion, see Barron & Lederman, *Lowest Ebb Part I*, *supra* note 13, at 787-88.

151. The other textual change to the Clause – different capitalization – is unimportant. See Myers, *supra* note 74.

152. U.S. CONST. art. II, § 2, cl. 1; *id.* art. II, § 1, cl. 1. The usual original understanding and practical reality is that the military is part of the Executive Branch. Another view is that the military is a sort of fourth branch under the Constitution, a national rather than Executive agency. See Geoffrey S. Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOU. L. REV. 553 (2007).

153. U.S. CONST. art. I, § 8, cl. 12-13.

154. *Id.* art. I, § 8, cl. 12; *id.* art. I, § 9, cl. 7.

155. *Id.* art. I, § 8, cl. 15-16.

156. The First Militia Clause allowed the federal government to take the militia away from a state that had lost its “republican form of government” or was on its way. See *id.* art. I, § 8, cl. 15 (Second Militia Clause); see also *id.* art. IV, § 4 (Guarantee Clause).

Executive – a head of state chosen nationally, with the power to veto Congress’s acts and the authority to command a national military that the national government could raise and fund on its own¹⁵⁷ – heightened concern about tyranny at the national level.¹⁵⁸ That in turn enhanced the importance of the checking power provided by the Forces Clause and its Article I siblings.

Second, Congress’s new authority over the militia buttressed the significance of work done pursuant to the Forces Clause. Regulation of militia discipline pursuant to the Second Militia Clause would happen in the context of Congress’s regulation of national regulars under the Forces Clause. These powers could be synergistic.¹⁵⁹ Congress now had independent authority to craft an interoperable, standardized American military, composed of both regular and reserve components.

Third, the Internal Regulation power over military justice and discipline clearly survived the Clause’s transfer to the new Constitution. There are no indications in the Founding record that the power lapsed, or now stemmed from any other clause.

However, few signals about the scope (much less definitions) of the terms “Government,” “Regulation,” and “land and naval Forces” were provided beyond the intratextual clues in other provisions of the document.

c. Implications: External Government Power

The new Constitution also did not plainly state its implications for the External Government power. Did the power survive, and if so, in what form? While partly circumstantial and inevitably incomplete, overall the Founding Era evidence is consistent with a reading of the Forces Clause that conveys to Congress an External Government power.

To begin, what should we make of removal of the Forces Clause’s prescriptive power in the Articles of Confederation of “directing operations,” the deletion of the other Marching Clauses, and the creation

157. Professors Barron and Lederman note that the method of choosing the President and the presentment requirement enhanced the power of the President and reduced the risk of legislative micro-management. See Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 791-92. Making it harder to govern and regulate, in the face of an independent Commander in Chief, made such work the Congress did accomplish by statute all the more important.

158. See, e.g., “An Old Whig,” *Essay V*, PHIL. INDEP. GAZETTER (Nov. 1, 1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 17, 37-38 (Herbert J. Storing ed., 1981) (Constitution’s new President has dangerous powers, having such an elected king risks tyranny).

159. Congress’s use of this synergistic power facilitated the evolution of the U.S. military into a “joint force” of interoperate active services and reserve components. The U.S. Army, for its part, conceives itself as a “total force” – a team of active, reserve, and National Guard (organized militia) personnel. See U.S. DEP’T OF THE ARMY, DIR. 2012-08, ARMY TOTAL FORCE POLICY 1 (Sept. 2012). Today’s “total force” sees the Guard deploy abroad on a regular basis.

of a new President with the identity of Commander in Chief? Presidentialist scholars argue that the result was a complete transfer of the power of military direction to the President, in preclusive form: Congress could not limit it by statute.¹⁶⁰ Professors Barron and Lederman respond persuasively that the evidence supports no consensus about whether Congress or the President would have “direction” power.¹⁶¹ As noted, the Constitutional Convention considered and rejected two plans that would have given it explicitly to the Executive. Instead, the Framers dropped “direction” from the document entirely.¹⁶² Deletion of the Marching Clauses supports no clear inference: their omission flowed from replacement of state power to raise armies with federal power.¹⁶³ Hamilton in *Federalist No. 69* mentioned a “direction” power residing with the President. However, Hamilton was likely referencing mainly the Commander in Chief’s position at the top of the military chain of command, for this reason: Hamilton *also* wrote that such direction was subject to law the same as were governors regarding state military forces under several state constitutions.¹⁶⁴ Madison similarly was at best equivocal, and if anything leaned toward the Forces Clause. In his Constitutional Convention notes (in one of the scant mentions of the Commander in Chief Clause there), Madison wrote that “direction” was to be an “executive function.”¹⁶⁵ Yet after the Clause was added and the entire document completed, Madison told the Virginia ratifying convention that *Congress* had “the direction and regulation of the land and naval forces.”¹⁶⁶ Note Madison’s substitution of the word “direction” for the textual term “Government” in his quotation of the Forces Clause.

160. See 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 Peacekeeping Operations*, 162 MIL. L. REV. 50, 72-76 (1999); *Oversight Legislation: Hearings Before the Select Comm. on Intelligence*, 100th Cong. 179-81 (1987) (written response to question for the record to Charles Cooper, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice), cited in Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 788 n.323.

161. See Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 787-89.

162. These were the New Jersey Plan (a multi-member Executive could “direct all military operations”) and Hamilton’s plan (a “supreme Executive authority” would “have the direction of war when authorized or begun”). See 1 FARRAND, *supra* note 20, at 242, 244, 292.

163. Compare ART. OF CONFED. of 1781 art. IX, with U.S. CONST. art. I, § 8, cl. 12.

164. See THE FEDERALIST NO. 69 (Alexander Hamilton) (the President had “nothing more than the supreme command and direction of the military and naval forces” but this power was no greater than found in one of several state constitutions that stipulated that military direction was subordinate to the law of the land).

165. See 2 FARRAND, *supra* note 20, at 319.

166. See 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282 (John P. Kaminski & Gaspare J. Saladino eds. 1993). “The record of the Virginia ratification debates is the only one in which are preserved significant remarks of the ratifiers concerning the provisions of the Constitution relating to the armed forces.” See Henderson, *supra* note 20, at 301.

Madison's usage naturally supports association of "Government" with a continued legislative congressional power over operations – and indeed continuation of a congressional prescriptive power. Taken together, the evidence from Hamilton and Madison suggests that Congress, through its Forces Clause authority, *could at the least limit* operations ordered by the President.

Professor Akhil Amar sees this view of the External Government power as reasonable, and in his originalist work goes a step farther. He adds that statutes "proscribing certain uses of the military may be easier to justify than laws prescribing highly specific uses of armed forces in certain tactical situations" – general rules over "the particulars of actual battle command."¹⁶⁷ Professors Barron and Lederman disagree, seeing such distinctions as conveniently attractive but unsupported by the originalist evidence and dodging the question of whether Congress can govern all land and naval forces operations, or if some irreducible minimum of Commander in Chief power remains.¹⁶⁸ An alternative view postulated by Professor Amar has been developed by Professor Prakash: concurrent authority for the President and Congress over military actions, but Congress wins if they disagree. The President can act without statutory authorization in times of peril, but must observe legislation enacted pursuant to the Forces Clause that not only limits but also commands the Commander in Chief and military.¹⁶⁹ The Prakash study, however, relies in significant part on Founding Era statutes that textually are not directive but rather permissive.¹⁷⁰

167. See AMAR, *supra* note 9, at 188 (original emphasis omitted).

168. See Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 750-60.

169. See AMAR, *supra* note 9, at 188; Prakash, *supra* note 1, at 336-37.

170. For example, Professor Prakash writes that Congress "ordered the military . . . to occupy parts of disputed territory in Florida" in 1811. See Prakash, *supra* note 1, at 336-37. However, the statute's text is merely permissive. An Act Relative to the Occupation of the Floridas, Jan. 15, 1811, 3 Stat. 471, reads in full in relevant part: the President is "*authorized*, to take possession of, and occupy, all or any part of the territory [of West Florida], *in case* an arrangement has been, or shall be, made with the local authority of the said territory, for delivering [the territory to the United States], *or in the event* of an attempt to occupy the said territory, or any part thereof, by any foreign government; and he *may* . . . employ any part of the army and navy of the United States which *he may deem necessary*" (emphasis added). The Act goes on to authorize, but not direct, the President to govern the territory if taken. (This statute was one of four initially unpublished statutes that represented a late Founding Era experiment in secret law. See Rudesill, *supra* note 44, at 256-57). Prakash, *supra* note 1, at 337, also analogizes Congress's power to order the use of force under the Forces Clause to its power to command the use of force via war declarations, but note that here again the text is permissive and authorizing, not directive. See An Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, 2 Stat. 129 (1802) (declaring war against the Barbary Pirates, authorizing the use of naval force "as may be judged requisite by the President," and authorizing captures and commissions to privateers); An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof and the United States of America and Their Territories, ch. 102, 2 Stat. 755 (1812) (President "is hereby authorized to use the whole land and naval force" and issue letters of marque and reprisal (emphasis added)).

Reading more into statutes than they can bear, however, does not mean that the presidentialist view of Professor John Yoo and others is correct. Professor Yoo contends that the original understanding of the Constitution was that the Congress in a regular statute cannot place operational limits on how the President may employ the armed forces. Presidential exercise of power to protect national security is limitable only by denial of funding, removal of the President through electoral defeat or impeachment, or via politics – which is to say, presidential self-restraint.¹⁷¹ Without engaging with the Forces Clause, Professor Yoo categorically denies an External Government power.¹⁷² This presidentialist viewpoint remains a minority view among scholars and jurists, however, because it is so at odds with the balance of originalist evidence.¹⁷³

It is not necessary for our purposes to revive in full the extensive originalist conversation. Suffice to underscore the following. First, the plain text does not dictate an understanding of the Commander in Chief Clause as providing a preclusive power that overcomes the Forces Clause or any other part of Article I. On the contrary, the textual phrase Commander in Chief referenced a top military officer who in both the British and American contexts had always been subject to legislative control.¹⁷⁴ Second, the power the presidentialist interpretation would

171. See YOO, *supra* note 9. Yoo makes an exception even to Congress's power of the purse. Congress cannot in Yoo's view defund some unspecified uses of the military because Congress cannot via statute abrogate the Commander in Chief power. This view is challenged by inclusion in the Constitution of a hard two year limit on the availability of appropriations for the army, debate in the Founding Era about whether the nation needed any standing military force, and by Congress's refusal to provide President Washington with more than a tiny force. See U.S. CONST. art. I, § 8, cl. 12; THE FEDERALIST NO. 29 (Alexander Hamilton) (a federal army "dangerous to liberty" will be unnecessary if the federal government can employ the militia for national defense); BARRON, *supra* note 9, at 43-49.

172. Professor Yoo's view was reflected in U.S. government arguments during the George W. Bush Administration in which Yoo served at the Justice Department's Office of Legal Counsel. See Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, for the Attorney General (Nov. 2, 2001), <http://www.justice.gov/sites/default/files/olc/legacy/2011/03/25/johnyoo-memo-for-ag.pdf> (redacted declassified memorandum on President's authority to order surveillance despite FISA statute); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens (June 27, 2002); Memorandum from John C. Yoo & Robert J. Delahunty, Office of Legal Counsel, U.S. Dep't of Justice, for Alberto R. Gonzales, Counsel to the President & William J. Haynes, II, General Counsel, Dep't of Defense, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001).

173. See generally Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11.

174. See THE FEDERALIST NO. 69 (Alexander Hamilton) (Commander in Chief would have "the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy" with powers inferior to those of the British King and many state governors); See BARRON, *supra* note 9, at 24 (strange for the Framers to use a term for a legislatively controlled officer "to signal their desire to depart from this history and free the president from all checks when it came to the conduct of war"); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 785-86 ("the evidence indicates a

provide to the President is so colossal as to have required the Founding generation to abandon almost completely its deep fear of tyranny and skepticism of executive and military power.¹⁷⁵ Of course, it did not. Their acceptance of a national Executive and potential national army was reluctant at best, had to be defended during ratification, and was understood to be cabined by a strong Congress with a long list of enumerated lawmaking powers, in addition to federalism and individual rights (later made explicit via the Bill of Rights).¹⁷⁶ Third, at the least, the presidentialist understanding of the Commander in Chief Clause – and perhaps of the Forces Clause, too – would be expected to engender intense debate that would have been reflected in the records of the Constitutional Convention. Yet the Conventions records show no assertions that the Constitution would free the Commander in Chief from regular statutes on military operations, laws of the kind the Continental and Confederation Congresses frequently passed. Indeed, the Convention records show little discussion of this new presidential identity at all – and no debate regarding the Forces Clause.¹⁷⁷ Rather, as mentioned, the Convention considered and rejected plans to give “direction” of the armed forces to the executive.

Finally, taken as a whole, the Founding Era constitutional history does not support the implication of the presidentialist view for our purposes: that the Constitution terminated the External Government power the Congress possessed under the Articles of Confederation. The opposite conclusion is demanded by the balance of the evidence presented by Professors Barron and Lederman. Their analyses provide the most comprehensive scholarly study of presidential and military action contrary to the express or implied will of Congress – *Youngstown* Category 3 – from the Founding through the George W. Bush Administration.¹⁷⁸ The history of the Constitution as applied – “gloss which life has written” on the cryptic constitutional text – shows that Washington and other Founding Era presidents did not make the sort of

relatively well-developed understanding that a ‘Commander in Chief’ could be subject to legislative control even as to tactical matters of war”).

175. Justice Jackson makes this point memorably. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

176. See THE FEDERALIST NO. 51 (James Madison); BARRON, *supra* note 9, at 18-33.

177. There “was no recorded discussion urging or suggesting any significant change” from the condition under the Articles of Confederation, which was commander in chief subordination to, and superintending the execution of military operations in accordance with, the will of Congress (emphasis added). Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 785-86.

178. See Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1; BARRON, *supra* note 9. Barron and Lederman’s study includes restrictions pursuant to other Clauses as well, including the Appropriations, Army and Navy, Militia, Commerce, Captures, and Marque and Reprisal Clauses. Even so, their study does review evidence concerning law rooted in the Forces Clause: statutes restricting internal and external military activities not concerned with matters governed by other Article I clauses.

expansive, preclusive claims of Commander in Chief power that are common now, and indeed such claims were rare before the mid-twentieth century.¹⁷⁹ From Congress's restriction of the 1790s undeclared war with France to a *naval* war forward, there is "surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control and a fair amount of evidence that affirmatively undermines it."¹⁸⁰ Professors Barron and Lederman find firm originalist support only for what they term a preclusive superintendence power of the Commander in Chief. That is, Congress cannot replace the President as head of the armed forces that Congress can create and fund (or not), short of removal from office after impeachment. The precise outlines of what presidential superintendence powers survive attempted statutory limitation or direction at the Commander in Chief's "lowest ebb" remain blurry – but ultimately the ebb is lower and the blur is smaller than claimed by presidentialists.¹⁸¹

An interpretive challenge is posed by the fact that a number of statutes that explicitly or implicitly cabin Commander in Chief authority may readily find constitutional grounding in multiple Article I provisions. For example, statutes authorizing and limiting aspects of the undeclared naval "quasi-war" with France involved action by private U.S. vessels against commerce benefitting France, and implicated the Captures, Marque and Reprisal, and Commerce Clauses, in addition to the Declare War Clause (if one understands the Declare War Clause to allow statutory forestalling

179. See Barron and Lederman, *Lowest Ebb Part II*, *supra* note 1, at 951-52 & 947-48, quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring). Regarding constitutional gloss, see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (examining acquiescence in inter-branch relations); BAKER, *supra* note 13, at 36-38 (gloss of practice vital to Constitution's meaning as applied); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527 (2003) (some in Founding generation expected that a "fixed" meaning of ambiguous constitutional provisions would develop via interpretation and practice); KOH, *supra* note 10, at 70 (1990) (quasi-constitutional custom reflects norms); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 144-46 (1984) (practice valuable in inter-branch interactions).

Scholars have also found that Presidents until World War II did not tend to make the now-common claim of independent authority to deploy forces whenever the President concludes it to be necessary for national defense (versus only in times of imminent peril that do not allow time to get a statute through Congress). Indeed, the opposite was the case: Presidents often disclaimed such unilateral authority and instead requested it from Congress. See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013). See also Peter M. Shane, *Rebalancing War Powers: President Obama's Momentous Decision*, SHANE REACTIONS (Sept. 1, 2013), <https://shanereactions.wordpress.com/2013/09/> (discussing Obama Administration's later aborted pursuit of congressional authorization to use force against Syrian regime in context of constitutional history and argument about war powers).

180. See Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1, at 965-72; Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 696.

181. *Accord Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) (unclear what exactly the Commander in Chief power involves but "[i]t undoubtedly puts the Nation's armed forces under presidential command").

of general war). Of course, power to govern operations may reasonably flow from multiple constitutional clauses. The question for us is the nature the External Government power flowing particularly from the Forces Clause.

A few points are in order. First, as in the Internal Regulation context, the Clause's External Government powers can act in concert with other clauses by providing congressional "Rules for . . . the land and naval Forces" as they execute activities and policies authorized under those separate provisions of the Constitution.¹⁸² Through the Forces Clause, Congress can control the Army that Congress can create under the Army Clause (also known as the Raise and Support Armies Clause; see Part III.B.1 below regarding the Posse Comitatus and Insurrection Acts). To take another example, the Secretary of the Navy's orders to privately owned ("public") armed ships – operating against shipping with France during the "quasi-war" pursuant to statutory authority stemming from the clauses mentioned above – implicated Congress's External Government authority under the Forces Clause because the vessels were at that moment functionally part of the "naval Forces" engaged in hostilities at the order of a military department.¹⁸³

Second, one can imagine situations in which the other national security clauses in their natural meaning require more stretching if they are to apply. One example is relying on Commerce Clause authority for statutes that are really about governing military intelligence collection targeting U.S. persons (see Part III.B.2 below regarding the Foreign Intelligence Surveillance Act (FISA)). Similar stretching would be reliance on the Necessary and Proper Clause for statutory limits on military deployments into harm's way without congressional authorization (see Part III.B.5 below regarding the War Powers Resolution).

Third, a richer understanding of how the Clause has operated will be facilitated by examination of how it has been explicitly construed by the

182. Other operative clauses include the Army, Navy, Declare War, Commerce, Captures, Guarantee, and even Marque and Reprisal Clauses. Regarding the latter, see Kent, *supra* note 3, at 915-16 & nn.330-32 ("relatively uncontroversial" that the Forces Clause allows Congress "to regulate...prizes and other aspects of private naval raiding and warfare," which was often a cause of or prelude to full-scale war and therefore needed to be controlled by Congress).

183. See *Little v. Barreme*, 6 U.S. (2 Cranch.) 170, 171 (1804). This case did not cite the Forces Clause but could have. During the undeclared naval war with France, the Congress in 1799 banned commercial voyages to France and authorized the President to order the Navy to seize ships sailing for France. The Court ruled that President Adams's instructions to the Navy to seize U.S. ships going to *and from* France were invalid because they went beyond Congress's authorization regarding naval operations. Implicated here could be congressional power under the Commerce Clause, the Declare War Clause, the Forces Clause, or all three – but none were cited by Chief Justice John Marshall. He also did not cite Article II, nor the presidentialist argument that this presidential power cannot be constrained. But Marshall did make clear that Congress does have what we conceive as an External Government power, whatever its textual basis in the Constitution.

branches after the Founding Era, how the branches have implicitly acted pursuant to it, and how the Clause is especially salient relevant today. It is these subjects to which we now turn, respectively, in Parts II.C, III, and IV.

C. Constitutional History: Citation to the Clause in the Three Branches

Moving beyond the Founding Era, this Part continues our review of the constitutional record by analyzing evidence of the Clause's explicit or otherwise clear citation and interpretation by each branch of the federal government. Because the Internal Regulation power is well established, this section focuses primarily on citations suggesting an External Government power. Discussion of references consistent with an Internal Regulation power are included for context. Reviewing the constitutional record for explicit reliance on the Clause reveals several patterns across the three branches.

First, all three branches – as one would expect – have clearly understood the Clause to provide an Internal Regulation power. They have frequently invoked it regarding its core concern, military justice. There is also evidence of additional Internal Regulation authority, to include personnel benefits for current and former personnel, and to regulate the broader national security apparatus beyond the Department of Defense and its predecessors. Frequent reliance on the Clause over many years for its Internal Regulation power is readily explained not just by wide acceptance of the existence of an Internal Regulation power, but by considerations of scale and function. The military justice system handles thousands of cases every year. These proceedings generate constitutional questions. Also, throughout the republic's history a considerable number of voting Americans have served in the land and naval forces, worked in its bureaucracy, or otherwise interacted with it, regularly generating legislative, administrative, and judicial action. Finally, it is the responsibility of the organs of government to manage the immense and expensive national security apparatus and continually modify it in response to the evolving security environment.

Second, explicit interpretation of the Clause to carry an External Government power has been rarer. Among the three branches, a congressional power rooted in the Forces Clause over national security operations is most often evident in citations to the Clause by Congress itself.¹⁸⁴ Engagements with the Clause by the Justice Department and by Justice Jackson in his landmark *Youngstown* concurrence have in the Article II and III branches kept open the doctrinal door to the External

184. Of course, Congress also produces vastly more bills, reports, and statements in the *Congressional Record* per year than the Justice Department and Supreme Court produce opinions.

Government understanding allowed by the Constitution's text and supported by the originalist record.

The third pattern is citations that do not clearly reflect either theory of the Clause or are unexplained. The record is replete with undifferentiated seriatim citations to the Forces Clause along with other clauses. Sometimes they merely suggest federal or congressional national security powers generally. Most interestingly, review of the constitutional record shows that many Members of Congress and their staffs in our time misunderstand the Clause.

As scholars have found in surveys of citations to other clauses that provide more than one power to Congress, the Article I, II, and III branches have not engaged with the Forces Clause in a holistic manner.¹⁸⁵ The Executive branch has been especially reluctant in published opinions to acknowledging an External Government power in the Clause. Of course, such a power would constrain its ultimate organizational client, the President, regarding military operations, and the Executive branch has tended to endorse stronger views of Executive power in more recent constitutional history. All three branches, however, have now recognized the Forces Clause to provide Congress legislative authority regarding treatment of captured personnel. Detainee issues straddle the Internal/External line, implicating both military justice rules and operational interactions with third parties who are not part of the U.S. national security apparatus.

This section examines the record of the Clause's *explicit or* clearly implied interpretation. This is in contrast with the work done in Part III, to follow: identification of statutory frameworks that *ought* to be interpreted to find constitutional footing in the Clause. This Part's three branch review proceeds in order of each branch's placement in the Constitution.

1. Legislative Branch

a. General Record

Since the Founding it has been common for legislation to be proposed and passed without citation to the specific constitutional authority upon which it relies.¹⁸⁶ Of course, some statutes by their topic – such as a war

185. See, e.g., Kent, *supra* note 3, at 861 (interpretations of the Law of Nations Clause by the three branches often partial, inconsistent, or shallow).

186. See, e.g., Prakash, *supra* note 1, at 345 (noting this phenomenon regarding Founding Era legislation concerning use of force). As noted in the Introduction, this practice continues today, and it is well-settled court doctrine that such citations are not necessary for a statute's constitutionality. Citations do, however, help us understand statutes and the Constitution, and strengthen statutes by rooting them

declaration – or plain text are obviously grounded in specific constitutional language. In the case of the Forces Clause, legislation concerning operations has incorporated the Clause’s terminology,¹⁸⁷ as have the texts of military justice codes throughout the republic’s history.¹⁸⁸

Digitized records show 556 explicit references to the Clause in the *Congressional Record* from 1789 to 1997, 205 references in committee hearings from 1824 to 2011, and 83 references in committee reports since 1817.¹⁸⁹ Bills and resolutions have been comprehensively digitized for the most recent decades, and show 47 references in legislative text over the two decades from 1989 to 2012. Congress’s reference rate exceeds that in Supreme Court opinions and available Justice Department opinions.¹⁹⁰

A large number of legislative references reflect an Internal Regulation power that extends well beyond military justice. For example, committee reports and Senate floor statements concerning amendments to the Military Selective Service Act – registration for the draft – invoked the Clause, in addition to the Army and Navy Clauses.¹⁹¹ In 1993 and 1994, during House discussion regarding the “Don’t Ask, Don’t Tell” law that

more firmly with the Constitution.

187. For example, see An Act Authorizing the Employment of the Land and Naval Forces of the United States, in Case of Insurrections, Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 (governing presidential employment of federal forces domestically); see also Part III.B.1 *infra* (discussing Insurrection Act). To provide another example, during the run-up to the War of 1812 the Senate passed a resolution that authorized the President to employ armed merchants and privateers in protecting commerce. The resolution additionally authorized the President to “issue instructions which shall be comfortable to the laws and usages of nations, for the *government* of the ships which may be employed in that service” (emphasis added). See 21 ANNALS OF CONG. 2022 (1810). One understanding of the resolution is that federally authorized armed merchants and other privateers became part of the Clause’s “land and naval Forces,” subject to Congress’s stipulations regarding the “Rules” governing their operations. That additional authority to protect commerce and enlist the non-government ships may have also come from the Commerce and the Marque and Reprisal Clauses, respectively, is of no matter. To this list one could add the Define and Punish and Law of Nations Clauses. See U.S. CONST. art. I, § 8, cl. 10.

188. See Am. Art. of War (1776); Rules for the Regulation of the Navy of the United Colonies of North-America (1775); An Act for the Government of the Navy, Act of Mar. 2, 1799, ch. 24, 1 Stat. 709; An Act for the Better Government of the Navy, *supra* note 21; Am. Art. of War (1806); Rules and Regulations for the Government of the United States Navy (1862); Uniform Code of Military Justice, *supra* note 22 (see especially delegated power to services to issue regulations such as in 10 U.S.C. § 6011). The Navy Code of 1800 in Article 37 over-rode Commander in Chief orders regarding officer dismissal.

189. Differences in time frames are due to differences in databases, which continue to develop as additional congressional materials are digitized. Details on file with author.

190. Data sets on file with author. Many of Congress’s references are in legislative history – statements, reports, and unenacted bills. Depending on one’s view of legislative history, these materials can have large or small influence on our understanding of the law. In contrast, the Article II and III branch opinions discussed *infra* have legal force (the former only within the Executive branch).

191. See S. REP. NO. 96-826, at 159-61 (1980) (bill would be constitutional under Army, Navy, and Forces Clauses); 126 CONG. REC. 13880-82, 13896 (1980) (statements of Sen. Warner & Sen. Hatfield). Original Act was known as the Elston Act, ch. 625, 62 Stat. 604 (1948).

would bar gay and lesbian Americans from openly serving in the Armed Forces for a decade and a half, supporters emphasized the plenary and exclusive power that the Clause provided to Congress to make rules about the organization, personnel policies, and discipline of the military.¹⁹² Similarly, legislation cited the Clause as authority for Congress to require military recruiter access to higher education institutions, and to bar veteran military burial benefits to sex offenders.¹⁹³

A smaller but significant number of references reflect an External Government power, stemming from the Clause or from the Clause *en bloc* along with other war-related clauses. For example, over the past half century, the Clause has been invoked in Congress regarding authorization for use of force generally and in Iran, setting goals for military involvement in Yugoslavia, requiring cessation of hostilities in Libya, and barring U.S. troops from serving under United Nations or foreign command.¹⁹⁴

b. Current Practice: Statements of Constitutional Authority

A House rule change allows systematic analysis of citation to the Clause during the three most recent completed Congresses (112th to 114th, 2011-16). This analysis shows frequent references consistent with both the Internal Regulation and External Government understandings, on a range of subjects. Frequent citations to the Clause for a rulemaking power over the entire U.S. government, however, suggests that Congress frequently misunderstands the Clause.

When Republicans assumed the majority in the U.S. House at the start of the 112th Congress, they created what became Rule XII(7)(c). It requires that all legislation introduced in the House must be accompanied by insertion of a statement of constitutional authority into the *Congressional Record*.¹⁹⁵ The new rule reflected a campaign promise of

192. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993).

193. See H. Con. Res. 36, 109th Cong. (2005) (access to higher educational institutions); H. Con. Res. 354, 109th Cong. (2006) (access to higher educational institutions); H.R. 5564, 110th Cong. (2008) (veteran burial benefits).

194. See S. REP. NO. 90-797 regarding S. Res. 187, 90th Cong. (1967) (introduction of forces into hostilities); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No 106-65, 113 Stat. 512 (1999) (setting goals for military intervention in Yugoslavia); H.R. 4797, 109th Cong. (2006) (U.S. forces under foreign command); S. Con. Res. 13, 110th Cong. (2007) (use of force against Iran); H.R. 1212, 112th Cong. (2011) (requiring halt to use of force in Libya).

195. U.S. HOUSE OF REPS., Rule XII(7)(c) (2016), <http://clerk.house.gov/legislative/house-rules.pdf>. The rule makes such statements for legislation received from the Senate optional at the discretion of the Chair of the House committee of jurisdiction. See Rule XII(7)(c)(2). I found no examples.

Extensive effort has been made to ensure that the data set constructed for this empirical study

greater textual fidelity to the Constitution, and particularly to an originalist view focused on narrow reading of federal powers.¹⁹⁶ Members (often via staff) decide which provisions to cite.¹⁹⁷ Members are not required to consult any person or office, including non-partisan providers of legal advice on Capitol Hill.¹⁹⁸

The constitutional authority statements are not analyses of whether a bill or resolution would be constitutional if enacted. Rather, they are simply bare citations to provisions of the Constitution.¹⁹⁹ They do not include explanations of what powers the constitutional provisions provide to Congress. The statements usually cite specific clauses. Sometimes they cite to Article I, Section 8 as a whole.

Empirical analysis and close reading of constitutional authority statements pursuant to Rule XII(7)(c) and their related bills and resolutions provide a window into how Congress currently understands the Clause.

In the three completed Congresses since the rule's advent (totaling six years), the Clause was cited in constitutional authority statements as grounding for 236 bills and joint resolutions in the House that could become law. As indicated in Table 1, below, Congress cited the Clause at a consistent rate, between 75 and 81 times per Congress. Congress cited the Forces Clause about two and a half times as often as the better-known Army Clause (91 citations), but only about one-fifth as frequently as the Commerce Clause (3,615 citations) upon which so much federal regulatory activity depends.

reflects comprehensive and systematic review of Congress's citation habits. The data can be regarded as reasonably accurate, even if it potentially may not include every citation to the Forces Clause in constitutional authority statements during the three Congresses studied. This is due to lack of uniformity in how Members of Congress word the statements they file in the *Congressional Record*. Members are not consistent in their names and description of constitutional clauses, quotes of their text, nor in their use of numerals (e.g., Arabic vs. Roman) to cite particular sections and clauses.

196. See Republicans in Congress, *A Pledge to America: A New Governing Agenda Built on the Priorities of Our Nation, the Principles We Stand for, and America's Founding Values* (2010), <http://gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf>.

197. Members and staff can use a standard form when filing the statement of constitutional authority. Interview with Judiciary Committee Counsel, Aug. 16, 2016 (notes on file with author). Based on general practices in Congress on a variety of matters, we can be confident that in some offices the staff file bills and statements under the Member's name without the Member actually reviewing the filing firsthand or being aware of them. This is how decisions about bill introduction, cosponsorships, Member signatures on Dear Colleague letters, and issuance of press releases are frequently handled.

198. These include Senate Legal Counsel, House General Counsel, the Senate and House Legislative Counsel offices, and the House and Senate Parliamentarians.

199. For discussion, see Marc Spindelman, *House Rule XII: Congress and the Constitution*, 72 OHIO ST. L. J. 1317 (2011); KENNETH R. THOMAS & TODD B. TATELMAN, CONG. RESEARCH SERV., R41548, SOURCES OF CONSTITUTIONAL AUTHORITY AND HOUSE RULE XII, CLAUSE 7(C) (2011).

Table 1. Citations to Land and Naval Forces Clause in Congressional Record Constitutional Authority Statements Pursuant to House Rule XII(7)(c)

<i>Congress</i>	Reflecting Internal Regulation Understanding	Reflecting External Government Understanding	Reflecting Both Int. Reg. & Ext. Govt. Understandings	Reflecting a General National Security Understanding	Reflecting a General Government Rulemaking Understanding	Total Citations to Forces Clause	Citations to Commerce Clause	Citations to (Raise & Support) Army Clause	Total ²⁰⁰ Bills & Resolutions Introduced that could become law
112th (2011-13)	52	2	2	1	24	81	1,241	35	6,845
113th (2013-15)	45	4	2	0	24	75	1,183	31	6,016
114th (2015-16)	30	6	1	0	42	79	1,191	25	6,634
TOTALS	127	12	5	1	90	235	3,615	91	19,495

We can reasonably infer that the Internal Regulation understanding was evident in 127 total citations, versus only 12 citations for the External Government power. Recent legislation introduced in the House under Republican majorities, in other words, relies on the Clause to control internal discipline 10 times more often than it does to control the operations of “the land and naval Forces.”

What explains these patterns? Introduction of legislation that would find footing in the Internal Regulation understanding does not necessarily reflect a view that the External Government understanding cannot alternatively operate. Members of Congress frequently introduce legislation concerning the internal administration of the military and Defense Department because such a massive bureaucracy and its complex (and often perilous) activities impact the country and so many voters. A large number of these issues are addressed each year in the massive annual National Defense Authorization Act (NDAA) and the enormous Department of Defense Appropriations Act (DODAA). In contrast, the operational uses to which the military is put tend to be higher level national security policy questions that emerge less frequently, on which Congress commonly defers to the President, and therefore on which

200. In “bills and resolutions that could become law,” I include legislation originally introduced in the House that could satisfy bicameralism and presentment and become the law of the land. This includes bills (H.R.) and joint resolutions (H. J. Res.). It excludes simple (one chamber) resolutions (H. Res.) and concurrent resolutions (H. Con. Res.), because the former could control only one chamber and the latter could govern only the two chambers of Congress internally, but not anything outside Congress – including not the “land and naval Forces.” See Advanced Search for Legislation, Govtrack.us, <https://www.govtrack.us/congress/bills/browse?congress=112> (112th Cong.); <https://www.govtrack.us/congress/bills/browse?congress=113> (113th Cong.); and <https://www.govtrack.us/congress/bills/browse?congress=114> (114th Cong.).

Congress is less likely to legislate.

As one would expect, the Clause has been heavily cited in connection with military justice, the undisputed core of the Internal Regulation power.²⁰¹ However, Congress has been citing the Clause for legislative powers over military justice *less often* than in connection with bills regulating the organization, property, and personnel matters of the Departments of Defense and Veterans Affairs. Most commonly, these measures concern personnel benefits and military awards.²⁰² House Members also invoked the Clause quite often regarding former military personnel²⁰³ and federal property.²⁰⁴ In other words, Congress does not at all seem to regard the Internal Regulation power as narrowly limited to military justice and discipline, nor “the land and naval Forces” narrowly limited to current military personnel.

Consistent with the External Government understanding, the Clause has been invoked in support of legislation that would ban combat use of cluster munitions, condition use of lethal force against U.S. citizens (such

201. *See, e.g.*, H.R. 2227, 113th Cong. (2013), 159 CONG. REC. H3014 (June 3, 2013) (concerning criminal investigation of sex-related offenses).

202. *See, e.g.*, H.R. 237, 112th Cong. (2011) (concerning military housing benefits), 157 CONG. REC. H136 (Jan. 7, 2011); H.R. 4201, 112th Cong. (2012) (concerning child custody rights for military personnel), 158 CONG. REC. H1366 (March 16, 2012); H.R. 5792, 112th Cong. (2012) (require a report on ending exclusion of women from ground combat), 158 CONG. REC. H2812 (May 16, 2012); H.R. 5459, 113th Cong. (2014) (concerning award of the Medal of Honor to a particular individual), 160 CONG. REC. H7455 (Sept. 11, 2014).

203. *See, e.g.*, H.R. 168, 112th Cong. (2011) (concerning services to veterans), 157 CONG. REC. H42 (Jan. 5, 2011) (constitutional authority statement); H.R. 169 (concerning services to veterans).

I have scored several citations as consistent with the Internal Regulation understanding that regulate beyond a narrow understanding of “the land and naval Forces” as meaning only the uniformed military. Because they so clearly support the military, a fairly easy scoring decision is presented by legislation concerning civilian employees of the Defense Department. *See, e.g.*, H.R. 1642, 113th Cong. (2013), 159 CONG. REC. H2159 (2013) (concerning civilian employees and security clearances). Other bills for which Members of Congress invoke the Clause, however, begin to push at its limits. For example, several bills would prohibit disruption of a military funeral, relying on authority to “Govern and Regulate the land and naval forces” to regulate *public* interactions with events involving not simply former personnel but indeed deceased military personnel. *See* H.R. 961, 112th Cong. (2011), 157 CONG. REC. H1619 (March 8, 2011); H.R. 3755, 112th Cong. (2011), 157 CONG. REC. H10015 (Dec. 20, 2011). One is certainly sympathetic to efforts to protect the dignity of funerals for slain service members, but the Commerce Clause, and the Army, Navy, or Militia Clauses might be more solid constitutional textual hooks. Similarly, these might be better bases for legislation regulating non-government employment of National Guard personnel. *See* H.R. 1811, 112th Cong. (2011), 157 CONG. REC. H3219 (May 11, 2011). The Army, Navy, and Appropriations Clauses might be more appropriate constitutional textual bases for legislation to ensure that states that receive specified federal funds must consider training received by former military personnel when granting particular licenses. *See* H.R. 6008, 112th Cong. (2012), 158 CONG. REC. H3975 (June 21, 2012).

204. *See, e.g.*, H.R. 5478, 113th Cong. (2014) (concerning limitations on transfers of Defense Department property), 160 CONG. REC. H7617 (Sept. 16, 2014). It is not clear, but perhaps these citations reflect a view of the Forces Clause as not providing primary regulatory authority over government property – see instead U.S. CONST., art. I, § 8, cl. 17 (military property clause); *id.* art. IV, § 3, cl. 2 (Territory and Property Clause) – but instead over personnel and bureaucracies that manage it.

as via armed drone), amend the War Powers Resolution, direct removal of U.S. forces from Iraq and Syria, and authorize the Army to move against marauding invasive species in the Mississippi River.²⁰⁵ Here again, the data does not show Congress in recent years understanding the Forces Clause narrowly.

This analysis's most unexpected finding is that Congress has in recent years frequently cited the Clause in a way that is novel in constitutional history: for the proposition that the Forces Clause provides Congress a *general government rulemaking power, not limited to "the land and naval Forces."* These citations (90 over three Congresses) occurred at nearly three-fourths the rate of those reflecting an Internal Regulation understanding, and at a much higher rate than those reflecting External Government power. Many of these citations have supported legislation that does not reference national security activities or agencies. For example, the constitutional authority statement in connection with a bill that would bar the Federal Communications Commission from pursuing new internet regulations cited the Commerce Clause and "Clause 14 of Section 8 to make rules for the federal government."²⁰⁶ Other recent bills, relying on the Clause's power "To make Rules for the Government," have concerned the Consumer Financial Protection Bureau and the federally-designated Appalachian Region.²⁰⁷

What accounts for these abundant, unexplained, and unprecedented citations to the Clause? The lack of argument in the legislative record – or anywhere else – for this view of the Forces Clause suggests that these citations are strategic at best. On this legislative history alone, intent to

205. H.R. 881, 113th Cong. (2013) (banning cluster munitions), 159 CONG. REC. H816 (Feb. 23, 2013); H.R. 137, 114th Cong. (2015) (imposing procedural requirements on targeting U.S. citizens), 161 CONG. REC. H43 (Jan. 6, 2015); H.R. 560, 114th Cong. (2015) (amending War Powers Resolution regarding funding for U.S. military operations; note that this legislation would also readily find a constitutional textual hook with the Appropriations and Army Appropriations Clauses), 161 CONG. REC. H639 (Jan. 27, 2015); H.J. Res. 57, 114th Cong. (2015) (directing removal of U.S. forces from Iraq and Syria), 161 CONG. REC. H4431 (June 16, 2015); H.R. 4146, 112th Cong. (2012) (authorizing Army action against Asian Carp), 158 CONG. REC. H1209 (March 6, 2012).

Other citations support legislation that might be consistent with either the Internal Regulation or External Government understanding, or both. For example, the Clause was cited in connection with a bill concerning the military budget. *See, e.g.*, H.R. 413, 112th Cong. (2011) (concerning military budget, a subject that might in strict terms be related only to the Appropriations, Navy, and Army Clauses, but in a more holistic reading may also implicate the Internal Regulation or External Government understandings of The Forces Clause), 157 CONG. REC. H470 (Jan. 25, 2011).

206. *See* H.R. 96, 112th Cong. (2011), 157 CONG. REC. H44 (Jan. 5, 2011). The bill does have an exception for national security, but again note that the constitutional authority statement excludes the Clause's reference to the "land and naval Forces."

207. *See* H.R. 5491, 114th Cong. (2016); 162 CONG. REC. H3914 (June 15, 2016) (constitutional authority statement also cites to the Commerce and Necessary and Proper Clauses, regarding bill authored by then-Rep. Mick Mulvaney (R-SC), who now leads the Office of Management and Budget (OMB)); H.R. 101, 112th Cong. (2011), 157 CONG. REC. H44 (Jan. 5, 2011) (adding counties to the Appalachian Region).

create a new understanding of the Constitution is difficult to infer.²⁰⁸ A significant number of Members and staff in Congress may misunderstand the Clause.²⁰⁹

In sum, review of the overall record since the Founding and empirical analysis of the House legislative record in recent years show congressional engagement with the Forces Clause across the republic's history – indeed more frequent reliance upon it than the better-known Army Clause. In addition to citing the Forces Clause in ways that understand it to reach beyond current federal regular military personnel, Congress's engagement has reflected both Internal Regulation and External Government understandings.

2. Executive Branch

As in the Legislative branch, it is impossible to review every legally meaningful construction of or cite to the Forces Clause generated inside the Executive branch. Justice Department opinions, Office of Management and Budget (OMB) Statements of Administration Policy on legislation, and other opinions remain incompletely digitized and inconsistently published.²¹⁰ Additionally, the Executive branch is the least transparent branch regarding the legal authorities it produces. Despite the Federal Register Act, the Administrative Procedure Act, the Freedom of Information Act, and other sunshine laws, the Executive branch has many opportunities to avoid publication. The Attorney General and the Justice Department's Office of Legal Counsel (OLC), for example, write the "law of the Executive branch" and choose to publish some of their opinions, but are not legally required nor expected to publish all of their precedential opinions.²¹¹ Military courts publish only some of

208. If we presume that Congress does not hide elephantine changes to regulatory schemes in statutory mouseholes (*see* *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)), surely it does not hide major changes to constitutional law in *Congressional Record* mouseholes, either.

209. This novel reading would have other problems. Such a highly flexible reading of the Constitution would cut against the purpose of the House Rule in tethering legislation tightly to enumerated powers. It might make the Necessary and Proper Clause redundant. Also, the power to "make Rules for the government and regulation of the land and naval Forces" cannot plausibly mean "make Rules for the [entire] Government" without making "regulation of the land and naval Forces" redundant.

210. Regarding Office of Management and Budget Statements of Administration Policy (SAPs) on legislation, for example, the main database reaches back about 30 years. However, there are no documents for many years and only a handful for some others. Dozens of SAPs are typically issued every year as legislation moves through Congress. Many concern national security bills.

211. *See* David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010), <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (OLC exercises delegated Attorney General authority to provide "controlling advice to executive branch officials" and should anticipate publication but publication is not a legal requirement) [hereinafter BARRON OLC BEST PRACTICES MEMO].

their opinions, and internally binding legal interpretations by department and agency offices of general counsel – a vast body of legal opinion – are generally unpublished. Additionally, the President, OLC, other Justice Department offices, and other agencies generate legal authorities that are classified. Together with unclassified but unpublished legal authorities, these classified documents are a capacious body of Executive branch secret law.²¹² One would anticipate that citations to the Clause – a national security authority – are to be found therein.

Based on available legal authorities, it is clear that the Justice Department in its branch-binding opinions has tended to cite the Clause less often than Congress or the Supreme Court. But as in the other branches, the vast majority of citations are consistent with an Internal Regulation understanding. In the 36 published Attorney General and OLC opinions that have cited the Clause since the Founding, all but a small handful have reflected the Internal Regulation understanding.²¹³ As in the other branches, seriatim citations to the Forces Clause and other Article I clauses are also frequent.²¹⁴

Analysis of published Justice Department opinions shows a clear trajectory that mirrors the evolution of national security separation of powers doctrine more generally: a strong reading of Congress's Internal Regulation power under the Clause through the early 1900s, followed by a growing but not uniform presidentialist lean thereafter. OLC at the end of the first decade of this century re-admitted more room for the Clause to operate, and indeed to operate with dual powers.

In opinions citing the Forces Clause through the first decades of the 1900s, Attorneys General repeatedly sided with the Clause over the powers of the President and other Executive officials. Attorneys General rejected presidential and administrative action to disturb or revise the decisions of courts martial regulated under Forces Clause authority.²¹⁵

212. See Rudesill, *supra* note 44, at 283-300.

213. In Attorney General opinions issued between 1822 and 1947 that cite the Clause, 27 of 29 reflect an Internal Regulation understanding. Several other Attorney General opinions from the 1800s and 1900s engage with the Insurrection Act that incorporates the Clause's terminology, or with Congress's power to regulate the military, without explicitly mentioning the Clause or other Article I powers. In seven available OLC opinions written between 1947 and 2018 that cite the Clause, virtually all reflect an Internal Regulation understanding, with relatively recent embrace of an External Government understanding at least regarding detainees (discussed subsequently in this Part of the article). See U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, <https://www.justice.gov/olc> (last visited Sept. 2018). Review of the OLC site has been supplemented by searches on Hein, Westlaw, and Google.

214. See, e.g., Navy Regulations, 10 Op. Att'y Gen. 413, 414 (1862) (citing Army, Navy, and Forces Clause powers regarding the power to fix ranks); Martial Law, 8 Op. Att'y Gen. 365, 371 (1857) (cited Article I powers do not address martial law).

215. See Court Martial – Amendment of Record, 23 Op. Att'y Gen. 23 (1900) (Secretary of War cannot alter or act inconsistent with court martial regulated under Articles of War passed pursuant to Forces Clause); Case of Fitz John Porter, 17 Op. Att'y Gen. 297 (1882) (President cannot annul findings of court martial and renominate officer for former Army rank because inconsistent with Articles of War).

Another line of separation of powers opinions rejected presidential promulgation of a general code of regulations absent congressional authorization pursuant to the Clause, and sided with the Clause's power to write binding "Rules" regarding mustering troops, officer and cadet appointments, ranks, and terms of service.²¹⁶ A strong view of congressional power was also reflected in the single published Justice Department opinion during this time that cited the Clause in a way that reflected an External Government understanding not involving military justice: a Prohibition-era decision by the Attorney General that the President may not use the Navy to enforce the law absent an act of Congress.²¹⁷

By the late Twentieth Century, the Justice Department was citing the Clause less frequently, and in a manner consistent with a strong view of Executive power. Most references to the Forces Clause in available OLC documents in recent decades were issued by the Reagan and George W. Bush Administrations. They engaged with the Clause in the process of advancing their presidentialist view of separation of powers. During the Reagan years, the head of OLC argued to Congress that the Forces Clause did not provide authority to Congress to govern military operations because the phrase "and directing their operations" in the Clause's antecedent in the Articles of Confederation was shorn during the Constitutional Convention. OLC also indicated that Congress could use Forces Clause powers regarding the discipline of personnel involved in military operations and covert actions, but that no Article I power could

216. *See* Mustering Regulations, 26 Op. Att'y Gen. 6, 7-8 (1906) (Secretary of War cannot add volunteers to Army without statutory authority pursuant to Forces and Army Clauses); Navy Regulations, 10 Op. Att'y Gen. 413, 414 (1862) (power to fix ranks is legislative and resides in Forces Clause, in connection with Army and Navy Clauses); Navy Regulations, 6 Op. Att'y Gen. 10, 12 (1853) (former President Fillmore's general code of Navy regulations – spanning military justice, discipline, and other matters – was an invalid exercise of Article II powers in view of statute and Congress's power under Forces, Army, and Navy Clauses, cited as a single Article I, section 8 provision). For opinions giving precedence to the Forces Clause's authority regarding military appointments over the President's in Article II, see *Naval Service – Desertion – Pardon*, 31 Op. Att'y Gen. 225, 227 (1918) (presidential pardon of court martialled and separated service member does not remove disqualification for service under statute enacted pursuant to Army, Navy, and Forces Clauses); *Discharge from Military Academy – Re-Appointment*, 17 Op. Att'y Gen. 67, 68-69 (1881) (President cannot re-appoint discharged military academy cadet in defiance of statute based on Clause authority); cf., *Relief of Fitz John Porter*, 18 Op. Att'y Gen. 18, 26-27 (1884) (Congress's expansive power to regulate appointments by the President comes from the Forces Clause and perhaps also from one or more of the Declare War, Army, and Necessary and Proper Clauses, but Congress cannot tell the President which specific individuals to appoint). As in many legal authorities created by the Legislative and Judicial branches, in these opinions the multiple clauses cited are not distinguished. However, the Forces Clause is the common element, and it and its language are emphasized in several of the opinions. *See, e.g., id.*

217. *See* *Use of Naval Forces in the Enforcement of the National Prohibition Act*, 33 Op. Att'y Gen. 562 (1923). This opinion invoked the Forces and Navy Clauses, and implicitly endorsed a Forces Clause connection to the Insurrection Act, discussed in Part III.B.1 *infra*.

constrain “actual military operations.”²¹⁸ OLC again articulated this view regarding deployments during the George W. Bush Administration.²¹⁹ In the years following the 9/11 attacks, OLC maintained that the Clause provides authority for court martial and other discipline of U.S. personnel and for prosecution of enemy fighters in military commissions. However, due to “the President’s power to successfully prosecute war” under Article II, the Bush-era OLC also maintained that the Forces Clause’s power does not include writing laws on interrogation, military commissions, or other aspects of detainee treatment “considered an integral part of the conduct of military operations.”²²⁰ The Bush-era OLC added that the Forces Clause does not provide Congress power over rules of engagement in military operations.²²¹

As the first decade of this century drew to a close, the Justice Department changed course, re-admitting more room in OLC doctrine for the Internal Regulation power and re-opening the door to an External Government power of unspecified extent. In an extraordinary move during the last week of the George W. Bush Administration – timing that suggests reluctance to do it earlier – OLC withdrew or qualified the contents of a slate of post-9/11 opinions and announced that OLC had changed its interpretation of the Clause. While emphasizing the context of broad presidential authority, OLC stated that the Forces Clause would thereafter be understood by OLC to provide Congress “a basis to establish standards for, among other things, detention, interrogation, and transfer

218. *Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the S. Select Comm. on Intelligence*, 100th Cong. 84-85 (1987) (statement of Charles Cooper, Assistant Att’y Gen., OLC); Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1, at 1083 (discussion).

219. See Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice, to the Deputy Counsel for the President, Re: Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill 282 n.2 (Nov. 28, 2001), https://www.justice.gov/sites/default/files/olc/opinions/2001/11/31/op-olc-v025-p0279_0.pdf.

220. See Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice, to the Counsel to the President, Re: Legality of the Use of Military Commissions to Try Terrorists 244 (Nov. 6, 2001), <https://www.justice.gov/sites/default/files/olc/opinions/2001/11/31/op-olc-v025-p0238.pdf>; (Clause provided authority for establishment of military commissions, which Congress could then use under its Define and Punish Clause authority to try violations of the law of war, but could not intrude on presidential power); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice, for William J. Haynes II, General Counsel of the Dep’t of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States 13 n.13 (Mar. 14, 2003), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutsideunitedstates.pdf>; (preclusive power of President’s authority to prosecute war successfully); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, General Counsel, Dep’t of Defense, Re: The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations 4-6 (Mar. 13, 2002) (similar Executive power arguments), <https://www.justice.gov/olc/docs/memorandum03132002.pdf> [hereinafter OLC DETAINEE TRANSFER MEMO].

221. See OLC DETAINEE TRANSFER MEMO, *supra* note 220.

to foreign nations” of detainees.²²² (OLC also recognized the Captures Clause as another source of such authority, and the Define and Punish Clause as a source of authority for military commissions to try war crimes and to criminalize torture in accordance with international law.)²²³ Here, the OLC can be understood to endorse a vision of shared congressional and presidential power over the “land and naval Forces.” Although OLC could still refract separation of powers issues through an Article II lens in a manner favorable to its authorities and to its highest-ranking principal, the President, OLC was leaving behind strict presidentialism in national security separation of powers.²²⁴ OLC now disagreed with its earlier view that the Clause’s powers are limited to military discipline.²²⁵

Even so, OLC did not take the opportunity to articulate a holistic theory of the Forces Clause. Nor did OLC discuss whether it saw any Clause authority over military operations beyond detainee matters, an intersection of the Internal Regulation and External Government powers.²²⁶ Ultimately, as the Bush Administration departed, the Justice Department was responding to President Bush’s signing of legislation on interrogation and military commissions that restricted his powers and to the Supreme Court’s seriatim citation to the Forces Clause and other Article I, Section 8 powers in *Hamdan* (2006), in which the Court upheld the UCMJ statute over a contrary wartime presidential order.²²⁷

3. Judicial Branch

Review of federal court opinions shows frequent seriatim citations in which the Forces Clause has been invoked for general federal or congressional war powers, or for a specific power, without differentiation from its Article I, Section 8 siblings and other clauses cited.²²⁸ Many citations involve little or no analysis of the Clause’s meaning.²²⁹ Yet, as

222. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice, Re: Memorandum for the Files, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 5 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memostatusolcopinions01152009.pdf>.

223. See Bradbury memorandum, *supra* note 222, at 4-5.

224. See BARRON, OLC BEST PRACTICES MEMO, *supra* note 211 (guidance on alignment of OLC advice and administration preferences).

225. See Bradbury memorandum, *supra* note 222, at 5.

226. See *id.*

227. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006); Bradbury memorandum, *supra* note 222, at 2.

228. See, e.g., *Hamdan*, 548 U.S. at 591; *Fong Yue Ting v. U.S.*, 149 U.S. 698, 712 (1893) (Clause one of many national security powers of the federal government); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 890 (1961) (Clause cited without differentiation with others in Articles I and II for authority for the political branches to regulate access to military installations).

229. See, e.g., *United States v. Comstock*, 560 U.S. 126, 173-76 (2010) (Thomas, J., dissenting)

noted in the earlier textual analysis, the Supreme Court has said that the Clause is subject to the presumption against surplusage in reading the Constitution.²³⁰ Where courts have engaged with the Clause's meaning, the pattern in the other branches holds: the Clause is well cited for its Internal Regulation understanding. Additionally, the Court has signaled an External Government understanding, without articulating a holistic dual-power theory of the Clause. The Clause and its statutes are often discussed by the courts in connection with the Clause's counter-authoritarian purposes.

The Internal Regulation understanding of the Clause is reflected in a long line of cases in the Article III federal courts and the civilian federal military appeals courts – the Court of Appeals for the Armed Forces (CAAF), and its predecessor, the Court of Military Appeals (CMA), Article I courts created by Congress.²³¹ The Internal Regulation understanding is clear or implied in 50 of 62 Supreme Court majority or plurality opinions citing the Clause.²³² The CAAF and CMA citations concern military justice, at issue in the majority but not entirety of Article III court references reflecting an Internal Regulation understanding. The Supreme Court has deeply engaged the Clause's origins and meaning, the harshness of military justice and the President's control over it, and the scope of military court-martial jurisdiction.²³³ The Court's jurisprudence reflects concern about the “dangers of autocratic military justice” to the rights of soldiers and civilians, both foreign and domestic.²³⁴ It has described the President's power as Commander in Chief in the context of ultimate legislative control over the military, and emphasized the Constitution's separation of military and civilian justice.²³⁵ The courts have given clear signals that the Internal Regulation power extends beyond current military personnel.²³⁶

(passing reference to the Clause as authority for the military to create a hospital for mentally ill service members).

230. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549-50 (2012).

231. The CAAF, like the CMA before it, is a civilian appellate court between the military services and the Supreme Court. It is an “Article I” court, with judges appointed for terms. Its jurisdiction is limited to military justice. The CAAF discretionarily reviews the work of the courts of the military services headed by uniformed military judges. A denial of review by the CAAF, which occurs in the vast majority of cases, is not an endorsement of the service court's legal reasoning. Service court decisions are rarely invoked by the CAAF as controlling unless endorsed by the CAAF.

232. Data set on file with author. The Clause is cited in 17 concurrences and dissents.

233. See, e.g., *Loving v. United States*, 517 U.S. 748, 767 (1996); *Solorio v. United States*, 483 U.S. 435, 439-48 (1987).

234. See *Loving*, 517 U.S. at 765-66.

235. See *Reid v. Covert*, 354 U.S. 1, 23-28 (1957). This is a plurality opinion, but the sentiments strongly stated and quoted here are well reflected in military justice jurisprudence. See, e.g., *Loving*, 517 U.S. at 765, 767-68 (the Framers distrusted “not courts-martial *per se*, but military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless”).

236. In addition to the discussion that follows here in the main text, see, e.g., *supra* note 33 (Clause

In a decision that reflected Congress's UCMJ rules and spurred OLC's expansion of the Executive branch's understanding of the Clause's reach, the Supreme Court in *Hamdan* interpreted the Clause to provide Congress legislative power regarding treatment of the enemy. In this post-9/11 case, the Court invalidated a presidential order for military commission trial of a detainee as a violation of the UCMJ. The *Hamdan* Court underscored that even in wartime military matters the President may not disregard a properly enacted statute.²³⁷ Such authority comes from Congress's powers under the Declare War, Captures, Army, Define and Punish, and Forces Clauses.²³⁸ One could see the limitation power upheld in *Hamdan* as flowing *en bloc* from the cited clauses, together with the gloss of historical practice. A more textual approach would distinguish the particular authority provided by each clause in support of the UCMJ. For example, the Define and Punish Clause is operative regarding criminal charges, while the Forces Clause's Internal Regulation power provides authority for all relevant aspects of the military justice system. However, power over detainees straddles the Internal Regulation/External Government conceptual line. *Hamdan* stands as a rejection of the Commander in Chief's attempt to defy Congress's governance of his use of the military instrument in wartime regarding third parties (detainees).

Regarding both internal military matters and external operations (wherever such congressional powers originate), separation of powers doctrine holds generally that the President and Congress have overlapping and ultimately shared power.²³⁹ Both the Article I and II branches receive heightened deference regarding national security.²⁴⁰ Regarding military

provides Congress authority over military retiree pay and access to military installations).

237. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 & n.23 (2006). See also *Ex parte Quirin*, 317 U.S. 1, 25-28, 47 (1942). The *Quirin* Court invoked the Forces Clause along with other Art. I and II provisions that provide the federal government with war powers that make constitutional a military commission trying U.S. citizen as enemy combatants, but in *Quirin* the Court did not "inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents," as it did in *Hamdan*. For discussion of *Hamdan*, see, e.g., Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after Hamdan*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 933 (2007) (observing that after landmark *Hamdan* decision reflecting formalism in constitutional interpretation, greater attention must be paid to specific congressional powers).

238. See *Hamdan*, 548 U.S. at 591.

239. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress").

240. Regarding Congress, see *Loving*, 517 U.S. at 768 (Supreme Court gives "Congress the highest deference in ordering military affairs"); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (citing Clause as one of several Article I, Section 8 provisions providing powers over military warranting judicial deference because of lack of judicial competence on military matters). Regarding the President, see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-24 (1936) (framing the "sole organ" theory of presidential power in foreign affairs); *cf.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-92 (2015) (noting that while there is formidable presidential power in foreign affairs, "it is essential the

justice, the Courts have stated that Congress's authority under the Clause is "plenary" and "at its apogee," and in context of the Commander in Chief means that "Congress, like Parliament [at the Founding], exercises a power of precedence over, not exclusion of Executive authority."²⁴¹ The Supreme Court has blessed congressional delegations of power to the Commander in Chief in military justice cases, use of force, and other national security and foreign affairs matters.²⁴² The Court has held that the President also has some independent power to act alone in the absence of legislation,²⁴³ and has stood by its doctrinal position that Congress cannot direct the armed forces.²⁴⁴ But the courts have also long made clear that the Commander in Chief is subject to explicit and implicit legislative restriction.²⁴⁵ Since the mid-Twentieth Century, the Court's doctrine reflects the influence of Justice Robert Jackson's *Youngstown* concurrence, which places the President at the height of authority when acting consistent with statute, in a zone of twilight when acting when Congress has not, but able to rely only on whatever authority Congress cannot deny the President when the Commander in Chief acts contrary to the express or implied will of Congress.²⁴⁶ As discussed above in Part II.B, Professors Barron and Lederman present a strong case that the extent of that preclusive Commander in Chief power is quite limited, but this question remains contested by practitioners and scholars.

For our inquiry, Justice Jackson's canonical concurrence is especially salient. It provides the strongest jurisprudential signal from the Supreme Court that what this article theorizes as an External Government power can be rooted in the Forces Clause.

The Forces Clause, Justice Jackson wrote, may allow Congress "to some unknown extent impinge upon even command functions" of the Commander in Chief.²⁴⁷ The President's powers are akin to those

congressional role in foreign affairs be understood and respected.").

241. See *Solorio v. United States*, 483 U.S. 435, 441, 446, 447 (1987) (also listing the Army and Navy Clauses as putting congressional power at its apogee); *Loving*, 517 U.S. at 767 (1996); *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878).

242. See, e.g., *Loving*, 517 U.S. at 756-60, 767-68 (1996) (Forces Clause authority over military justice may be delegated); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (post-9/11 AUMF authorized force and triggered President's war powers); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (upholding delegation of power to President regarding arms trade).

243. See *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (upholding blockade of Southern States instituted by President Lincoln without ex ante legislative authorization or declaration of war).

244. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 ("Congress cannot direct the conduct of campaigns") (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring)).

245. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch.) 170, 171 (1804).

246. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-37 (Jackson, J., concurring). For key analyses, see Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11; Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1; Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401 (2010); KOH, *supra* note 10.

247. See *Youngstown*, 343 U.S. at 643-44 (Jackson, J., concurring). These should be read broadly

possessed by “the topmost officer of the army and navy,” who is subject to statute. Justice Jackson invoked the Commander in Chief’s limitation by the Clause in an alarming External Government context: seizure of civilian industry within the United States for military supply, pursuant to the Commander in Chief power and in defiance of the stated or implied will of Congress. In this regard, Justice Jackson emphasized Congress’s enactment of statutes barring law enforcement by the military but authorizing enforcement of certain rights (laws that in the next Part we address as the Posse Comitatus Act and its domestic relatives).²⁴⁸ The Justice framed his discussion of the Clause in counter-authoritarian terms. These statutes reflect the Constitution’s policy of congressional control of “utilization of the war power as an instrument of domestic policy,” one crafted by Framers who “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.”²⁴⁹ “No penance,” Justice Jackson warned, “would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.”²⁵⁰

Justice Jackson’s opening in *Youngstown* of a doctrinal door to a Forces Clause carrying an External Government power perhaps explains the Court’s unexplained edit of the Clause’s text to exclude the word “Government” in 2013 in the *Keboeaux* military justice-related case.²⁵¹ Nevertheless, courts have not yet explicitly stated that the Clause includes multiple powers. “[D]oubts . . . about the extent of Congress’s power under Clause 14” persist.²⁵²

Uncertainty is perpetuated by how infrequently the courts review separation of powers issues in national security. Barriers to adjudication include secrecy and the classification of information about military and intelligence activities, together with standing, justiciability, state secrets, and executive privilege doctrines.²⁵³ These factors were evident in *Laird*

abroad and narrowly at home. *Id.* at 645.

248. *See id.* at 644-45 & nn.12, 13. Justice Jackson mentions the Third Amendment and Militia Clauses between discussion of the Forces Clause and citation to these statutes on domestic use of the military. However, the Third Amendment is inapposite to these statutes and Jackson observes that the Founders saw the militia as the primary federal instrument of military power. These statutes do not rely on these other constitutional provisions because they do not concern quartering of troops, and to the extent they govern federal regular forces. In this regard, as Justice Jackson’s discussion implies, and as Part IV.B discusses, these statutes rely instead on the Forces Clause.

249. *See Youngstown*, 343 U.S. at 644, 650 (Jackson, J., concurring).

250. *See id.* at 646.

251. *See United States v. Keboeaux*, 570 U.S. 387, 394-95 (2013).

252. *See Solorio v. United States*, 483 U.S. 435, 441 (1987).

253. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013) (petitioners lack standing to challenge FISA Amendments Act provision because they cannot show surveillance by classified program); *Dep’t of the Navy v. Egan*, 484 U.S. 518 (1988) (judicial deference regarding classification); *United States v.*

v. Tatum, a 1972 case in which the Court ruled that petitioners lacked standing to challenge military surveillance within the United States.²⁵⁴ Justice William O. Douglas in dissent stated his belief that Congress lacked constitutional authority to write legislation that would allow such military operations – and addressed his claim specifically to the Forces Clause.²⁵⁵ Justice Douglas wrote that the Clause is a “grant of authority to the Armed Services to govern themselves, not the authority to govern civilians.”²⁵⁶ It is significant in this context that six years later, in the Foreign Intelligence Surveillance Act (FISA) of 1978, Congress created a framework statute for national security surveillance of U.S. persons within the United States.²⁵⁷ As discussed in the next Part, Congress understood that this intelligence collection would be carried out in significant part by the Defense Department’s National Security Agency (NSA) – and provided a thick set of rules to govern this liberty-implicating activity of “the land and naval Forces.”

It is to statutory frameworks based on the Forces Clause that we now turn.

III. THE CLAUSE REDISCOVERED: CONSTITUTIONAL FOOTING FOR STATUTORY FRAMEWORKS

The prior Parts have explained that the Constitution’s text, the Founding Era evidence, and the constitutional record of explicit citation reasonably allow a dual reading of the Forces Clause. This Part sets forth the considerable and important work that the Clause can, and indeed should, be understood to be doing in the modern national security legal regime. The Clause’s role is in some instances explicit but in many others it is *implicit*, because the Clause has not always been recognized as authority for the constitutionality of a series of important laws. Understanding that statutes are on firmer footing the closer they are tied to the Constitution’s text, and that legislation can rely for authority on more than one clause, this Part maintains that the Clause – via its Internal Regulation and External Government powers – provides the best or at

Nixon, 418 U.S. 683 (1974) (qualified executive privilege); *United States v. Reynolds*, 345 U.S. 1 (1953) (state secrets privilege). See also *Dellums v. Bush*, 752 F.Supp. 1141, 1144 n.4 (D.D.C. 1990) (Members of Congress had standing in suit to prevent President from using military force but case, which cites Forces Clause, not ripe).

254. See *Laird v. Tatum*, 408 U.S. 1 (1972) (petitioners lack standing to complain of chilling of free speech).

255. See *id.* at 16-19 (1972) (Douglas, J., dissenting). Justice Douglas, joined by Justice Marshall, also cites the Army and Navy Clauses but focuses on the Forces Clause.

256. *Id.* at 18-19.

257. Seven days before the *Laird* decision was decided, the Court invited Congress to provide national (“domestic”) security surveillance warrants. See *United States v. U.S. Dist. Court (“Keith”)*, 407 U.S. 297, 322-24 (1972).

least additional strong constitutional textual footing for a set of statutory frameworks at the heart of the national security legal regime.

The source of Congress's authority to legislate regarding the intelligence apparatus has been insufficiently explored by scholars and practitioners to date. This Part argues that the Clause provides legislative authority for several of the statutory frameworks Congress uses to govern and regulate the Intelligence Community (IC). The IC today is a sprawling enterprise of 17 elements with a roughly \$70 billion annual budget. It supports, extends beyond, and can operate in the field with or independently of the uniformed military and Department of Defense.²⁵⁸ Nine IC elements are within the Department of Defense and its military services, six others are located in the cabinet Departments of Energy, Justice, Homeland Security, State, and the Treasury, and two agencies are entirely independent: the CIA, and the Office of the Director of National Intelligence (ODNI).²⁵⁹

For Congress and for Americans generally, there is a reliance interest at stake: these statutory frameworks that govern the military, its bureaucracy, the IC, and their contractors have long been in force, implemented, and reflective of the Clause's counter-authoritarian placement of ability to control "the land and naval Forces" with Congress. Passage, implementation, interpretation, and amendment of these statutes have contributed to the Constitution's practice gloss for many years. These statutes are not necessarily unconstitutional without the Forces Clause. Arguments for their constitutionality can be advanced on the basis of gloss or on the basis of their necessary incidence to other enumerated powers in Article I. But this Part's argument is that the Clause provides the best or at least strong additional constitutional footing for these statutory frameworks, and in so doing reinforces their constitutional legitimacy and their power to bind the Executive branch even in the face of presidential disagreement.

258. See Exec. Order No. 12,333 (1981), *amended by* Exec. Order No. 13,470 (2008), § 1.7 (Intelligence Community Elements). For budget figures, see MICHAEL E. DEVINE, CONG. RESEARCH SERV., R44381, INTELLIGENCE COMMUNITY SPENDING: TRENDS AND ISSUES 8-9 tbl.1 (2018) (national and military intelligence programs for fiscal 2017 totaled \$73 billion), <https://fas.org/sgp/crs/intel/R44381.pdf>.

259. The Defense Department IC elements include the Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency (NSA), and the intelligence arms of the Army, Navy, Air Force, and Marines. The conventional understanding that the Coast Guard is part of the Department of Homeland Security in times of peace and part of the Department of Defense in times of war is simplistic. In times of peace (and undeclared war), many Department of Defense and military authorities govern the Coast Guard.

A. Internal Regulation

1. Uniform Code of Military Justice (UCMJ)

Little more needs be said about the UCMJ, the framework statute for military justice.²⁶⁰ It is undisputed that the Clause provides Congress authority to write it. The Second Militia Clause provides additional authority for the UCMJ as it pertains to the militia, and other provisions – such as the Army, Navy, and Necessary and Proper Clauses – also provide supplemental constitutional authority to the extent a military justice code is naturally incident to having a military. However, the UCMJ is all the more legitimate constitutionally – and more clearly able to withstand a contrary Commander in Chief – because this body of military rules is so tightly linked to the Forces Clause. The Commander in Chief’s ability to intervene in military justice matters such as defining offenses, trial procedures, and punishments is circumscribed. These aspects of this framework statute reflect the legislative control and counter-authoritarian purposes of the Forces Clause by protecting against any potentially abusive discipline of the part of the American people who serve in the land and naval forces.

2. National Defense Authorization Acts (NDAAs)

The annual NDAA is one of the longest, most detailed, and multifarious bills passed by Congress every year.²⁶¹ It authorizes spending subject to appropriations, and sets policy for the Department of Defense, the military services, the multi-agency Military Intelligence Program (MIP), and nuclear weapons activities of the Department of Energy. It concerns everything from organization of the national security apparatus to training to personnel benefits. Taken together, we can understand the NDAAs as comprising a framework statute, one that is regularly updated and that builds upon the National Security Act of 1947.²⁶² In addition to the Forces Clause, NDAAs commonly include provisions that can find primary or secondary textual footing in the Common Defense, Commerce (in relation to the Coast Guard and counter-drug activities), Army, Navy, Militia, Forts and Magazines,

260. See 10 U.S.C. § 801 *et seq.* (2016).

261. For example, the National Defense Authorization Act for Fiscal Year 2017 ran 970 pages of enacted bill text. It had a joint explanatory statement of the conferees (the final legislative report associated with the bill) that totaled 572 pages. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016); H. Rept. No. 114-840, 114th Cong. (2016) (joint explanatory statement of the conferees).

262. See National Security Act, Pub. L. No. 80-253, 61 Stat. 495 (1947) (reorganizing national security apparatus after World War II). Much of the Act is codified as amended in titles 10 and 50 U.S.C.

Necessary and Proper, and Appropriations Clauses. Congress uses NDAs to amend the UCMJ, most recently in a significant revision in the NDA for 2017.²⁶³ The NDAs in recent years often include provisions regarding detainees – an issue at the intersection of the Internal Regulation and External Government powers²⁶⁴ – such as the Military Commissions Act of 2009 and recent prisoner-related amendments to the 9/11 Authorization for the Use of Military Force (AUMF).²⁶⁵ Finally, although most of the Forces Clause work done in the NDAs reflects the Internal Regulation understanding, the NDA is also a vehicle for changes to the law that govern military operations and rest on the External Government understanding of the Forces Clause. Provisions regarding counter-terror kill/capture operations and cyber attack are two recent examples, discussed below.²⁶⁶ The NDAs are, in short, intensively doing the work of the Forces Clause. The power of the NDAs as legal instruments is reinforced by their grounding on the Clause and alignment with its purpose of subjecting the national security apparatus to law written by the elected representatives of the people.

B. External Government

The following statutory frameworks constitute much of the core of the national security legal regime. They are not funding restrictions, war declarations or authorizations for the use of military force (AUMFs) blessing armed conflicts, nor militia laws. Neither are they caught up in creating and sustaining the federal military. They instead reflect exercise of the External Government power of the Forces Clause: congressional limits on the operations of the “land and naval Forces,” reflecting counter-authoritarian purposes.

1. Posse Comitatus Act and Domestic Relatives

The Clause is sometimes mentioned as authority for the Posse Comitatus Act (PCA).²⁶⁷ A full explanation has not been offered, however, of the work the Forces Clause should be understood to be doing

263. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2968 (2016) (Military Justice Act of 2016).

264. The Captures, Law of Nations, and Declare War Clauses are also implicated by these provisions.

265. See, e.g., National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190, 2574-2614 (2009) (Military Commissions Act of 2009); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021-22, 125 Stat. 1298, 1562-64 (2011) (detainee provisions).

266. See Part III.B.3 and Part IV.B *infra*.

267. See 18 U.S.C. § 1385 (2012); BAKER, *supra* note 13, at 268 (Clause as authority for PCA).

in providing for the constitutionality of the PCA and what we can think of as its domestic relatives.

The Posse Comitatus statute has unfortunate origins as an effort to curtail use of federal Army regulars in the post-Civil War occupied South to protect the new Fifteenth Amendment right of emancipated African-Americans to vote, in the face of violent resistance.²⁶⁸ In its modern incarnation, the PCA has become what Professors William Eskridge and John Ferejohn conceive as a “super-statute”: its importance goes beyond the statute books and commands normative force in the public mind, structuring understandings about the nature of law and government authority.²⁶⁹ The PCA is widely understood to stand for separation of military and law enforcement activities, and against the idea of military government. Indeed, the PCA has so powerfully shaped perceptions of statutory limits on domestic military operations that senior military and civilian leaders responsible for acting pursuant to it often misunderstand it.²⁷⁰ In reality, the PCA’s amended text now operates as a default ban on active duty federal armed forces engaging in law enforcement, unless some other law provides such authority.

The PCA is neither a war declaration nor major force authorization, it is not about commerce, and it limits the federal military, not the militia (in its organized modern form, the National Guard) on state duty.²⁷¹ Its ties to the Forces Clause are plainly evident in the legislative history: the PCA was a response to use of Insurrection Act (see below) statutory authority that referenced “the land and naval forces,” and one of the first drafts of the PCA used the same Forces Clause terminology.²⁷² Ultimately the provision that passed had a standing restriction related to use of the Army, in addition to a funding ban, and was enacted as part of an appropriations act.²⁷³ In modern form, the PCA is not an appropriations restriction. It also does not find an easy hook in the Guarantee Clause (Article IV, Section 4 of the Constitution); the PCA is not authorizing federal troops to intervene in states to guarantee their

268. Posse Comitatus Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2012)).

269. See William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

270. See, e.g., BANKS & DYCUS, *supra* note 13, at 92 (general in charge of troops deployed to deal with 1992 Los Angeles riots misunderstand PCA and Insurrection Act).

271. The PCA has been interpreted to apply to militia (the modern National Guard) while on *federal* duty. See *United States v. Gilbert*, 165 F.3d 470 (6th Cir. 1999). Under statute, the militia of the United States is divided into two classes: “the organized militia, which consists of the National Guard and Naval Militia,” and “the unorganized militia,” which generally includes “all able-bodied males” ages 17 to 44. See 10 U.S.C. § 246 (2016).

272. See 7 CONG. REC. 3586 (1879) (Atkins amendment); for discussion, see Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before any More Damage is Done*, 175 MIL. L. REV. 86, 109-13 (2003).

273. See Posse Comitatus Act of 1878, *supra* note 268.

republican form of government. Instead, the PCA restricts law enforcement activity by the military. The PCA governs military interactions with the people in civil settings inside the United States, powerfully resonating with the civilian legislative control and counter-authoritarian purposes of the Forces Clause.

The PCA retains its super-statutory normative sway despite exceptions that provide the federal government significant leeway to use the armed forces domestically. One exception is the statute's exemption for cases and circumstances "expressly authorized by the Constitution." The scope of any Article II presidential constitutional power implicitly referenced here is unclear. But, of course, the PCA statute also reflects *Congress* exercising *its* constitutional powers, here pursuant to the Clause.

The Insurrection Act is especially noteworthy as a statutory domestic relative, antecedent, and modern exception to the PCA.²⁷⁴ It can find significant constitutional textual footing in the Forces Clause's External Government power. Generally, the Insurrection Act governs use of the military by the President in the event of uprisings and other disturbances inside the country. The title and text of the original 1807 statute both explicitly referenced the language of the Forces Clause.²⁷⁵ A century and

274. See 10 U.S.C. §§ 251-55 (2016). Discussed in BANKS & DYCUS, *supra* note 13, at 43-45, 53. Congress recently renumbered the Insurrection Act within Title 10 of the U.S. Code. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, 2497, § 1241(a)(2) (2016) (10 U.S.C. §§ 331-35 renumbered as §§ 251-55, ch. 13). (Congress the following year designated unrelated provisions concerning auditing as 10 U.S.C. §§ 251-55, as well, in ch. 9A. See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283, 1537-42, § 1002(b)(1) (2017)). Another modern domestic relative of the Posse Comitatus Act is the Stafford Act. See 42 U.S.C. §§ 5121-5207 (2013) (federal response to disasters), particularly § 5170b(c)(1) (President may direct Defense Department to perform emergency efforts for up to 10 days "essential for the preservation of life and property").

275. See An Act Authorizing the Employment of the Land and Naval Forces of the United States, in Case of Insurrections, ch. 39, 2 Stat. 443 (1807). This 1807 law concerned domestic unrest and involved federal regular forces. What came to be known as the Insurrection Act is a repeatedly amended amalgamation of the 1807 statute and other laws, several of which concerned the militia. See An Act to Recognize and Adapt to the Constitution of the United States the Establishment of Troops Raised Under the Resolves of the United States in Congress Assembled, Act of Sept. 29, 1789, ch. 25, 1 Stat. 95, 96 (repealed 1790); Militia Act of 1792, ch.33 1 Stat. 271 (1792); Calling Forth Act of 1792 (ch. 28, 1 Stat. 264 (1792), sunsetted in 1794 and replaced by the Calling Forth Act of 1795, ch. 28, 1 Stat. 424 (1795)). The 1795 law was in turn amended – and the 1807 statute implicitly amended – by the so-called Lincoln Law, which set out conditions under which the President could call out either militia or federal regulars to counter "unlawful obstructions, combinations, or assemblages, or rebellions." See 12 Stat. 281 (1861), discussed in BANKS & DYCUS, *supra* note 13, at 43-45, 67. The Lincoln Law was not formally a war declaration, but some Declare War Clause authority may reasonably have operated in addition to First Militia Clause and Forces Clause authority because the Lincoln Law provided authority for conduct of what was plainly a war against the secessionist states. The Guarantee Clause might also be understood to provide authority, to the extent one could argue that the secessionist states lacked "a Republican Form of Government" due to slavery (but of course the Guarantee Clause along with the rest of the Constitution went into effect with the understanding that slavery was legal).

A number of related laws followed after the Civil War. They enabled and often conditioned use of federal regular troops domestically. For example, Congress invoked the language of the Forces

a half later its text “land or naval force[s]” was changed to “armed forces,” but the modern statute’s ability to find footing in the Forces Clause endures.²⁷⁶ Section 252 of Title 10 of the U.S. Code provides in relevant part that:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.²⁷⁷

The statute’s state militia provision in Section 252 is plainly grounded on the First Militia Clause.²⁷⁸ In contrast, Section 252’s operation regarding federal regular troops (“such of the armed forces”) cannot rely on the Constitution’s militia authorities, nor easily on the Guarantee Clause. The First Militia Clause concerns only the militia, and the Guarantee Clause in relevant part includes a requirement for state application for federal help “against domestic Violence” before the President can act – a requirement not found in Section 252. The Guarantee Clause is restricted to “domestic Violence,” while Section 252 allows use of federal troops to deal with a more capacious set of conditions: “unlawful obstructions, combinations, or assemblages.”²⁷⁹

Section 252 is an enabling law, but the Insurrection Act also imposes a limitation on the Commander in Chief: the President cannot employ the armed forces against just any unrest that in his or her view amounts to “unlawful obstructions, combinations, or assemblages, or rebellion

Clause in a statute that made state or local racial discrimination unlawful and allowed federal judges and marshals and the President to call out “the land or naval forces” and militia to enforce the law. *See* An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication (Civil Rights Act of 1866), ch. 31, 14 Stat. 27 (1866). For discussion of these Reconstruction era laws and how they led to the first posse comitatus statute, see BANKS & DYCUS, *supra* note 13, at 69-73.

276. *See* Act of Aug. 10, 1956, Pub. L. No. 84-1028, 70A Stat. 1, 15, §§ 331-34 (entitled an Act “To revise, codify, and enact into law” titles 10 and 32 of the U.S. Code, entitled “Armed Forces” and “National Guard,” respectively). By the 1950s the U.S. military also included the Air Force, and accordingly the term “armed forces” had come to be used more commonly than “land and naval forces.”

277. *See* 10 U.S.C. § 252 (2016).

278. *See* U.S. CONST. art. I, § 8, cl. 15.

279. Of course, if a disturbance were denying a state “a Republican Form of Government,” or operating in coordination with “Invasion,” the Guarantee Clause might provide authority to deploy federal regulars without the state request mentioned in the second half of the Guarantee Clause in connection with “domestic Violence.” *See* U.S. CONST. art. IV, § 4. The Guarantee Clause does not specify use of the military, but force is also the most obvious way the federal government could displace a despotic state government or protect states against invasion or domestic unrest.

against the United States.” Rather, the President may only use force under Section 252 where the federal laws cannot be enforced “by the ordinary course of judicial proceedings.” This is a significant, counter-tyrannical limitation. Finally, Section 254 also requires the President to “immediately order the insurgents to disperse and retire peaceably to their abodes.”²⁸⁰ This is not a huge impediment to use of force, but is another process requirement Congress has imposed on the Commander in Chief before the part of the federal government most dangerous to liberty – the federal armed forces – may be used inside the country.²⁸¹

2. Foreign Intelligence Surveillance Act (FISA)

FISA was enacted in 1978 in response to the Church-Pike congressional investigations of intelligence abuses.²⁸² It is by its terms the “exclusive” authority for surveillance of U.S. persons for foreign intelligence purposes, with review by the Foreign Intelligence Surveillance Court (FISC). FISA has been heavily relied upon and consistently reaffirmed – by Congress via repeated amendments, through generally consistent presidential compliance (with the salient exception of the immediate post-9/11 period), and via thick daily agency practice involving agencies and the FISC. Thousands of particularized electronic surveillance and physical search warrants have been issued by the Foreign Intelligence Surveillance Court it created. Since the 2000s, FISA has also governed daily bulk sifting, collection, analysis, and distribution of trillions of electronic communications, including those of U.S. persons

280. *See* 10 U.S.C. § 254 (2016).

281. Note, too, Section 251. Like Sections 252-54, Section 251 involves both militia and other (federal regular) armed forces. *See* 10 U.S.C. § 251 (2016). However, Section 251 concerns insurrection against a state, while Section 252 concerns uprisings against federal authority and Section 253 concerns defiance of federal law “[with]in a state.” Additionally, Section 251 is unique within the Insurrection Act in requiring a state request, in accord with the Guarantee Clause’s stipulation. For that reason, Section 251 regarding federal regulars is best understood to be grounded primarily on the Guarantee Clause. (Meanwhile, the First Militia Clause and the Guarantee Clause provide constitutional authority for the militia aspects of Section 251.) Of course, federal regular forces operating pursuant to Section 251 would still be subject to the law Congress using Forces Clause authority generally (e.g., the military criminal code, and FISA).

If under 10 U.S.C. § 252 the obstruction or rebellion against federal authority comes from a state government, the Fourteenth Amendment could be understood as well to provide some constitutional footing for this part of the Insurrection Act. *See* U.S. CONST. amend. XIV, §§ 1, 5. These parts of the Fourteenth Amendment more clearly provide primary authority for the next Section, 253, which references not only insurrection and domestic violence within a state but “conspiracy” and deprivation of “any part or class of its people . . . of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse” to act.

282. *See* S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Foreign, and Military Intelligence, S. REP. NO. 94-755 (1976) [hereinafter the CHURCH COMMITTEE REPORT]; REP. OTIS PIKE, CIA: THE PIKE REPORT (ed. 1997) (original date 1977) [hereinafter the PIKE COMMITTEE REPORT].

and others not suspected of any link to foreign powers or international terrorist organizations.

Intelligence collection pursuant to FISA is vast, but the constitutional conversation about FISA has been more limited. Discussion has focused mainly on whether FISA is permissible in view of the Fourth Amendment's limits on searches and seizures, the President's Commander in Chief authority, or Article III's requirements for federal courts.²⁸³ In contrast, the question of the source of Congress's authority to enact FISA's body of rules governing intelligence collection has been relatively neglected. Sometimes, Members of Congress will invoke the Forces Clause as authority for FISA-related legislation.²⁸⁴ Other times, no particular Article I power is cited. Indeed, two of the three major legislative reports regarding the original 1978 FISA statute – strong legislative history – cited no enumerated power and instead invoked the *Youngstown* framework to defend FISA's constitutionality in the most general terms.²⁸⁵ Where textual hooks are identified, analysis of the legislative record shows that provisions other than the Forces Clause are usually cited.²⁸⁶ Like the sponsor of the major post-Snowden FISA reform bill that became law in 2015, the USA FREEDOM Act, defenders of FISA's constitutionality often rely on the Commerce Clause or the Necessary and Proper Clause.²⁸⁷ Some rely on the Fourth Amendment.²⁸⁸

To be sure, it is not unreasonable to find footing for FISA in more than

283. See, e.g., H.R. REP. 95-1283, at 24-25, 111-16 (1978) (House committee report on original FISA discussing Article II and Fourth Amendment issues, and minority Art. II and III objections); Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, U.S. Dep't of Justice, to Sen. Charles Schumer 2 (July 10, 2006), <http://lawculture.blogs.com/lawculture/files/NSA.Hamdan.response.schumer.pdf> (disputing constitutionality of FISA in view of Art. II); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015) (discussing Art. III concerns with FISA).

284. See, e.g., National Security Surveillance Act of 2006, S. 2453, 109th Cong. (2006); see also S. 3876, 109th Cong. (2006); Terrorist Surveillance Act of 2006, S. 3931, 109th Cong. (2006); see also S. 3929, 109th Cong. (2006).

285. See H.R. REP. 95-1720, at 35 (1978) (Conf. Rep.) (FISA operates in *Youngstown* framework); H.R. REP. 95-1283 (1978) (*id.*, House committee report).

286. Article I, section 8 provisions other than the Forces Clause were cited in all of the statements of constitutional authority inserted into the *Congressional Record* pursuant to House Rule XII(7)(c) regarding the nearly three dozen bills to amend FISA introduced in the House from 2011-2016. Data set of legislation on file with author. See also Part II.C.1 *supra*.

287. See *supra* note regarding congressional authority statements in *Congressional Record* associated with USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (2015) and other FISA-related legislation, where Art. I provisions other than Forces Clause are cited; S. REP. 95-701, at 16 (1978) (Senate committee report on original FISA cites Art. I, § 8 and particularly Necessary and Proper Clause as authority for FISA in *Youngstown* context); Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 735-36 n.143 (citing Commerce and Necessary and Proper Clauses, in addition to Forces Clause).

288. See, e.g., FISA Court in the Sunshine Act, H.R. 2440, 113th Cong. (2013), 159 CONG. REC. H3928 (requiring transparency measures regarding secret Foreign Intelligence Surveillance Court constructions of law, enabled by both the Fourth Amendment and the Commerce Clause).

one provision of the Constitution.²⁸⁹ And as noted at the outset of this article, the courts have made clear that a statute can find constitutional footing on an Article I provision even if that provision is not cited by Congress, if the provision's terminology is not used, and if the real purpose of the statute diverges from the reasons the clause was included in the Constitution. Statutes are more legitimate normatively, however, the closer they may be tied to the Constitution's text and the ethos of relevant provisions. With this in mind, the Forces Clause deserves to be recognized as the best constitutional textual grounding for FISA.

First, FISA is not about commerce. It is true that FISA's text references "transmission of interstate and foreign communications," and that the Supreme Court has held that the Commerce Clause does provide Congress power to permit government interception of phone calls.²⁹⁰ For these reasons, the Commerce Clause reasonably offers some authority.²⁹¹ But the Forces Clause is the best constitutional footing because FISA's primary purpose is not to regulate the economy. The statute instead governs surveillance (primarily of U.S. persons, but also of non-U.S. persons) for foreign intelligence purposes, by the military (in addition to the FBI or other actors). At the time of FISA's enactment and through the present day, the vast majority of foreign intelligence surveillance has been conducted by the National Security Agency (NSA), a component of the Department of Defense, headed by a four-star general officer. The NSA is a vital part of the "land and naval Forces," providing signals intelligence (SIGINT) to the armed forces under the Military Intelligence Program (MIP) and to the President, National Security Council, Congress, Justice Department, and other intelligence consumers through the National Intelligence Program (NIP).²⁹² FISA regulates and promotes commerce only incidentally, by governing the companies and information infrastructure through which communications flow and providing rules that say that one's commercial communications will not be surveilled unless certain criteria are met.

FISA's overarching purpose is to balance security and liberty as they

289. In addition to the Commerce Clause and Necessary and Proper Clause (see *supra*), other provisions sometimes cited in constitutional authority statements pursuant to House Rule XII(7)(c) as authority for amendments to FISA are Art. I, § 1 (see, e.g., Government Surveillance Transparency Act, H.R. 2736, 113th Cong. (2013), 159 CONG. REC. H4725 (2013)) and Art. I, § 1, cl. 1 (see, e.g., Presidential Appointment of FISA Court Judges Act, H.R. 2761, 113th Cong. (2013), 159 CONG. REC. H4826 (2013)). These vest the legislative power in Congress, and grant it authority to "provide for the common Defence and general Welfare." These broad provisions may reasonably be read to provide some authority for FISA, but are not as squarely on point as the Clause in its External Government understanding.

290. See 50 U.S.C. § 1801(l) (2015); *Weiss v. United States*, 308 U.S. 321, 327 (1939).

291. The legislative authority provided by the Commerce Clause and Necessary and Proper Clause is more important where FISA activity is being conducted by entities that cannot easily be considered part of the "land and naval Forces," such as the FBI.

292. See Exec. Order No. 12,333, § 1.12(b) (2008).

pertain to national security.²⁹³ FISA permits collection of the communications of U.S. persons by military and civilian personnel under the ultimate (but importantly not immediate) supervision of the President on a showing of probable cause that the target is a foreign power or agent thereof.²⁹⁴ It also imposes court order and other requirements to protect Fourth Amendment rights.²⁹⁵ FISA's rules were imposed by Congress in response to a history of unrestricted Executive branch national security surveillance that involved well-documented privacy violations and other abuses. These included dragnet collection of the communications of U.S. persons by NSA without suspicion, and targeting of non-violent war protesters, civil rights advocates, and political and bureaucratic adversaries of senior government officials for surveillance.²⁹⁶ FISA, in short, is a statute that precisely reflects the Forces Clause's counter-tyrannical ethos and its mechanism (under the External Government understanding) of limiting in a non-appropriations statute the operational uses to which the President can put the land and naval forces.²⁹⁷

FISA does impose obligations on companies involved in inter-state and international commerce and therefore, again, it is reasonable to see some support for FISA provided by the Commerce Clause.²⁹⁸ But as a normative matter, the Commerce Clause should be regarded as a supporting secondary constitutional authority, for the reasons just mentioned. Additionally, a FISA planted only on the Commerce Clause would suggest that many of the military's most sensitive and vital operations could be restricted significantly for purposes of commercial regulation. That may be the right answer, or it may not. In any event, the External Government understanding of the Forces Clause is a stronger foundation.

The Necessary and Proper Clause has been cited as constitutional authority for Congress to regulate intelligence activities, including by the

293. See H.R. REP. 95-1283, at 22 (1978) (House committee report on original FISA states that bill represents balancing of security and liberty); S. REP. 95-701, at 6-7 (1978) (Senate committee report quotes President Carter to same effect).

294. See 50 U.S.C. § 1805(a)(2)(A) (2018). Foreign powers and agents thereof include groups, entities, and persons involved with international terrorism and proliferation of weapons of mass destruction. See 50 U.S.C. § 1801(a)-(b) (2018).

295. See Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*

296. See CHURCH COMMITTEE REPORT and PIKE COMMITTEE REPORT, *supra* note 282.

297. The Attorney General, Justice Department, and FBI have key roles under FISA. But the vast majority of FISA collection is conducted by the NSA. The Justice Department and FBI roles in relation to NSA collection are largely procedural requirements imposed by Congress and the courts. To whatever extent this work and the reality that FBI and other agencies can conduct surveillance pursuant to FISA might begin to stretch reliance on the Forces Clause, other clauses can be understood to provide supplementary constitutional support. The point is NSA's large role and therefore the prime reliance the FISA statute must place on the Clause.

298. See, e.g., Barron & Lederman, *Lowest Ebb Part I*, *supra* note 11, at 736 n.143.

Senate Select Committee on Intelligence in its report on what would become the original FISA.²⁹⁹ But the Necessary and Proper Clause is principally a general, catch-all, backstopping source of legislative authority. The closer a statute is tethered to a more specific enumerated power, the firmer its constitutional footing.

FISA can be understood to apply the Fourth Amendment's reasonableness and warrant requirements to national security surveillance. But the Fourth Amendment is not an affirmative grant of authority to Congress as are the enumerated legislative powers of Article I, Section 8.³⁰⁰ The Fourth Amendment on its face also does not provide authority to Congress to balance Fourth Amendment rights and Commander in Chief powers. This is more easily understood as the work of the Forces Clause.

In short, several provisions of the Constitution are relevant to FISA but the Clause, in its External Government understanding,³⁰¹ represents the firmest constitutional grounding for statutory restrictions on surveillance of U.S. persons for national security purposes by the intelligence collection apparatus the President supervises.

3. Covert Action

Although there is no explicit mention of intelligence in the Constitution's text, there is no question that the collection, analysis, dissemination, and consumption of intelligence, along with conducting counter-intelligence (spy vs. spy) and foreign intelligence liaison relationships, are constitutional. Intelligence is an inevitable incident to military forces and diplomacy. Most intelligence activities – with the FISA exception explained immediately above – therefore readily find constitutional grounding in the Army, Navy, Militia, and Commander in Chief Clauses, in addition to the nation's foreign relations work under the direction of the President. But what of covert action – that is, clandestine direct action, sometimes called active measures – and particularly Congress's ability to control such “black ops” by national security actors acting at presidential direction?

Covert action was an administrative creature under presidential control for most of the republic's history. It was carried out abroad and also

299. *See* S. REP. 95-701, at 35, 72 (1978).

300. When the Supreme Court invited Congress to enact what became FISA, the Court did not specify the constitutional authority for such a statute. *See* *United States v. U.S. Dist. Court (“Keith”)*, 407 U.S. 297, 323-24 (1972).

301. The Clause's Internal Regulation power might apply as well, to the extent FISA is a set of internal rules for a military SIGINT agency. It also includes a criminal penalty for violation. However, FISA is more readily understood as concerning operations, which is the work of the External Government power.

within the United States without any statutory framework until the National Security Act in the mid-20th Century. The 1970s saw revelations of covert actions targeting non-violent protest inside the United States and other First Amendment-protected political activity, and the 1980s Iran-Contra scandal exposed accountability problems at the highest levels. The modern covert action statute enacted in response imposes stringent targeting limitations and process requirements that are explicitly binding on the President.³⁰²

The statute begins prohibitively: “[t]he President may not” authorize covert action unless the President takes a series of accountability steps.³⁰³ The President must determine any covert action is “necessary to support identifiable foreign policy objectives of the United States and is important to the national security,” put that determination in a written finding, report that finding to the congressional intelligence committees (including the legal basis for the covert action), and keep the committees apprised and file notification of meaningful change to the covert operation.³⁰⁴ Defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly,” covert action may not be “intended to influence United States political processes, public opinion, policies, or media.”³⁰⁵

Other national security clauses or the Necessary and Proper Clause may reasonably provide Congress regulatory authority,³⁰⁶ but the Forces Clause should be recognized not only as permissible constitutional footing for this framework statute’s restrictions on the President, but the covert action statute’s primary constitutional hook. The “land and naval Forces” may reasonably embrace both military regulars and other accompanying forces such as intelligence personnel. The statute anticipates that military or non-uniformed intelligence personnel may carry out covert actions.³⁰⁷ The Forces Clause is a more appropriate source of authority for such operations than the Declare War Clause because covert action is not necessarily war and need not involve force. Influencing “conditions” is much broader, to include information

302. For discussion of what led to the modern framework statute, see REISMAN & BAKER, *supra* note 13.

303. 50 U.S.C. § 3093(a) (2014).

304. *Id.* § 3093(a)-(d) (2014).

305. *Id.* § 3093(e)-(f) (2014).

306. See REISMAN & BAKER, *supra* note 13 (mention of Clause along with Necessary & Proper).

307. The statute is activity rather than actor focused. The common but wrong perception that covert actions are non-military and exclusively a CIA activity are grounded in an administrative authority. Exec. Order No. 12,333 (2008) creates a presumption that the CIA will carry out covert actions, but with exception – which was reportedly used in the most prominent U.S. clandestine operation in recent decades, the 2011 joint CIA/military operation that killed Osama bin Laden.

operations or even lethal action that does not rise to the level of armed conflict. Additionally, this framework statute's limitations strongly reflect the civilian legislative control and counter-authoritarian purposes of the Forces Clause. The statute's restrictions and transparency requirements on the President are among the most stringent in any part of the national security legal regime, imposed in response to serious abuses of executive power.³⁰⁸

Finally, military and intelligence activities have converged in recent years, particularly in the area of clandestine direct action.³⁰⁹ The raid that killed Osama bin Laden, for example, was evidently carried out under the covert action authority with CIA direction, but on-the-ground and in-the-air action was conducted primarily by the military.³¹⁰ Meanwhile, intelligence agencies actively assist clandestine military operations conducted under the authority of the Defense Department, and the Defense Department increasingly reports to Congress about such operations in a manner increasingly similar to that Congress has required for covert actions.³¹¹ As this military/intelligence convergence continues, the constitutional legitimacy provided to the covert action statute by the Forces Clause grows.

4. Interrogation

Collecting intelligence facilitates both covert and overt action, which in turn may result in detention and interrogation of detainees. These activities are governed and regulated by Congress pursuant to statutes that find strong constitutional authority in the Forces Clause, among other clauses. The statutory framework includes the Detainee Treatment Act, the Military Commissions Act, and the collection of statutes that ban torture.³¹²

308. As noted in Part III.B above, OLC during the Reagan Administration believed that the Clause would apply in what we conceptualize as an Internal Regulation sense to covert action, but denied any External Government power from any Article I source. See *supra* note 218 and accompanying text. The intelligence committees emphasized in response that they had never accepted such arguments. See H.R. REP. NO. 102-166, at 28 (1991) (Conf. Rep.); see also Barron & Lederman, *Lowest Ebb Part II*, *supra* note 1, at 1084 n. 589.

309. See Robert S. Chesney, *Military-Intelligence Convergence and the Law of the Title 10/50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539 (2012).

310. See *id.* at 539-41; CHARLIE SAVAGE, *POWER WARS* 257-71 (2016).

311. See 10 U.S.C. § 130f (2018); Robert S. Chesney, *Expanding Congressional Oversight of Kill/Capture Ops Conducted by the Military: Section 1036 of the NDAA*, LAWFARE (Dec. 8, 2016, 6:25 PM), <https://www.lawfareblog.com/expanding-congressional-oversight-killcapture-ops-conducted-military-section-1036-ndaa>.

312. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801-07, 123 Stat. 2190, 2574-2614 (2009) (Military Commissions Act of 2009). For the Detainee Treatment Act and other torture statutes, and discussion of other relevant constitutional provisions, see *infra* note 313 and accompanying text.

The torture ban finds strong authority in the External Government power of the Forces Clause. It applies to the entire U.S. government, but is focused on military and intelligence forces.³¹³ It restricts what they can do, and what the President can order them to do, regarding enemy fighters and others from whom national security information is sought. The original torture ban pre-dates 9/11, and has been re-enacted and broadened twice since. The statutes include a ban on cruel, inhuman, and degrading treatment, and generally restrict all U.S. government actors to the U.S. Army Field Manual's list of approved interrogation techniques, none of which involve the use of force.³¹⁴ Here again, the resonance of this statutory framework with the legislative control and counter-authoritarian purposes of the Clause is strong. Short of loss of life, the threats of confinement for national security purposes and torture are the most serious predations against liberty an individual can contemplate if faced with a tyrannous President in command of "land and naval Forces."

5. War Powers Resolution

The War Powers Resolution (WPR) of 1973 is the framework statute for use of force abroad.³¹⁵ At its core, the WPR requires Congressional notification when the President introduces U.S. forces into situations in which hostilities are imminent, the withdrawal of U.S. forces after 60 days (with an additional 30 day period to effectuate withdrawal) unless Congress has declared war or statutorily authorized the military operation, consultation with Congress throughout, and a ban on inference of

313. See 18 U.S.C. §§ 2340, 2340A; 42 U.S.C. § 2000dd (2006) (prohibition); Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1002, 1003, 119 Stat. 2680, 2739-44 (2005) (non-appropriations law appended to the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006) (limiting Defense Department interrogation to techniques in the Army Field Manual and barring "cruel, inhuman, and degrading treatment or punishment" of any "individual in the custody or under the physical control" of the U.S. government); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045(a), 129 Stat. 725, 977-79 (2015) (extending requirement to follow the Army Field Manual to the entire U.S. government). These statutes may reasonably be understood to operate in connection with the Define and Punish, Captures, and Treaty Clauses of the Constitution, as well as the Forces Clause. U.S. CONST. art. I, § 8, cl. 10-11, 14; *id.* art. II, § 2, cl. 2. See also Bradbury memorandum, *supra* note 222, at 4-6 (OLC in 2009 decided that Define and Punish and Forces Clauses provide Congress authority to govern interrogation, disagreed with prior view that Captures Clause does not). Torture is barred and indeed a war crime under international law. Articles 2 and 4 of the Convention Against Torture call on state parties to enact laws to prevent and criminalize torture. See United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment arts. II, IV, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

314. See DEP'T OF THE ARMY, FIELD MANUAL 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006), <https://fas.org/irp/doddir/army/fm2-22-3.pdf> (listing permitted interrogation methods).

315. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973); 50 U.S.C. §§ 1541-1548 [hereinafter WPR].

authorization from appropriations.

Enacted over President Richard Nixon's veto in response to the Vietnam War and Nixon's introduction of U.S. military forces into Cambodia, the WPR's constitutionality has been contested since it was proposed.³¹⁶ Its text cites the Necessary and Proper Clause.³¹⁷ However, the Forces Clause is the stronger textual grounding. First, the WPR is a non-appropriations, non-war declaration statute that imposes legal limits on the operational use of the armed forces by the President. This is the essence of Clause's External Government power. Second, the Necessary and Proper Clause, as noted, is primarily a gap-filling statute. An enumerated power that provides particular substantive authority for legislation is firmer footing.

The Declare War Clause reasonably provides some support for the WPR, but not exclusive nor even necessarily the best constitutional authority. Of course, war is in the title of the WPR. It is risked by the operations the WPR governs. However, the primary work done by the WPR is the Forces Clause's External Government work of limiting military operations. In contrast, the primary work of a war declaration is authorizing military operations and announcing the most intense state of belligerence between international parties. The WPR also concerns "hostilities," a statutorily undefined term but one reasonably understood to embrace military operations less intense than war.³¹⁸ I therefore argue that the WPR is best understood as a "Rule" Congress has written for "the Government . . . of the land and naval Forces." Separate congressional action under the Declare War Clause is, by the WPR's terms, a means of releasing the President from the WPR's strictures.

Executive branch interpretative precedents regarding military operations in Kosovo (1999) and Libya (2011) and against the so-called Islamic State (2014-present) have in recent decades served to limit the WPR's reach.³¹⁹ All post-enactment presidents have disputed the WPR's

316. See, e.g., Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984) (defending); Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281 (1997) (defending); ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 107-33 (1983) (contesting); YOO, *supra* note 9, at 159-60 (contesting).

317. WPR, *supra* note 315, at § 2(b).

318. *But see* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Testimony Regarding U.S. Military Involvement in Libya, June 28, 2011 [hereinafter Koh SFRC Testimony] (arguing in defense of the Obama Administration continuing U.S. military involvement in Libya beyond 60-90 clock by arguing that the Libya mission was not sufficiently intense to trigger the WPR).

319. The Clinton Administration OLC interpreted appropriations for combat operations in Kosovo in 1999 beyond the WPR's 90-day clock as a constructive amendment to the WPR, despite the WPR's facial ban on inference of force authorization from appropriations in § 8(a)(1), 50 U.S.C. § 1547(a)(1). See *Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327, 339 (2000), <https://www.justice.gov/file/19306/download>. The Obama Administration viewed military operations in Libya in 2011 as too limited to be considered "war" and trigger the WPR's restrictions. See *Authority to*

constitutionality except Carter and Obama.³²⁰ However, all Presidents since Gerald Ford have observed the WPR's requirements the vast majority of the time.³²¹ The WPR remains the framework statute for use of force – one for which the Forces Clause provides the best authority.

The statutory frameworks discussed in this Part are core elements of the national security regulatory regime. They all resonate with the Clause's counter-authoritarian purposes, limiting what the national security apparatus can do and what the Commander in Chief can operationally order them to do. Each statute cited above relies on the External Government understanding to check the military and the President. The UCMJ and the statutes concerning intelligence collection (FISA and the interrogation laws) protect the civil liberties of the people, the NDAA provides the elected representatives of the people control over the national security apparatus, and the Posse Comitatus Act, the Insurrection Act, and the WPR ensure that Congress can write rules for use of military force. These Forces Clause-based statutes do their work without exposing Congress to politically toxic allegations of “de-funding the troops” by denying or limiting funding for specific activities pursuant to the Appropriations Clause, or by de-funding-by-legislative-inaction the entire Army pursuant to the Army Appropriations Clause's limitation on Army appropriations to two years.³²² The Forces Clause in its External Government power is often overlooked as the basis for the

Use Force in Libya, 35 Op. O.L.C. 1 (2011); Koh SFRC Testimony, *supra* note 311. With Congress unwilling to act on the President's request for new statutory authorization, and the President preferring not to assert Commander in Chief authority, the Obama Administration relied on the 9/11 (2001) and Iraq (2002) AUMF statutes as authority for operations against the so-called Islamic State. For discussion, see Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7, 12-19 (2016), http://lawfare.s3-us-west-2.amazonaws.com/staging/2016/TWQ_Summer2016_Goldsmith-Waxman.pdf; Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOU. L. REV. 971, 1021 (2016) (“Congress is unwilling to vote even to authorize an expanded war against ISIL that most Members seem to support”).

320. See, e.g., President Richard M. Nixon, Veto of the War Powers Resolution, 1973 Pub. Papers 311 (Oct. 24, 1973) (arguing WPR unconstitutional); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 40A Op. O.L.C. 185, 190 (1980) (Carter Administration OLC finds 60 day clock constitutional); Robert Chesney, *An Overview of Harold Koh's Testimony on the WPR at Today's SFRC Hearing*, LAWFARE, (June 28, 2011, 11:48 AM) <https://www.lawfareblog.com/overview-harold-kohs-testimony-wpr-todays-sfrc-hearing> (State Department Legal Advisor Harold Hongju Koh testified that Obama Administration believes WPR is constitutional).

321. Presidents who dispute the WPR's constitutionality have reported to Congress “consistent” with the WPR. See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2012).

322. See U.S. CONST. art. I, § 9, cl. 7; *id.* art. I, § 8, cl. 12. The Army Appropriations Clause potentially functions as a last resort default off-switch through which each two-year Congress has the ability to simply appropriate nothing for the Army and thereby eliminate it in at most two years, removing the federal government's largest land force from the hands of a tyrannous or otherwise unfit Commander in Chief.

constitutionality of these laws, and that should change. Other statutes – for example on the military chain of command or force emplacement in peacetime – might find root in the Clause, as well.³²³ The growing body of congressionally-written rules for cyber operations are another important and emerging example, as discussed below. The Clause is ripe for constitutional rediscovery.

IV. THE CLAUSE REDISCOVERED: CONTEMPORARY IMPORTANCE

Several contemporary trends are increasing the importance of the authority the Forces Clause provides Congress, and the statutory frameworks that find textual footing in the Clause. That is especially true regarding the Clause’s External Government power and the statutes that reflect its exercise. Congress’s ability to write “Rules” for the national security apparatus pursuant to the Clause takes on special salience in view of current lawmaking dynamics that make legislation harder to enact, change in the national security environment and especially its increasing cyberization, and increasingly volatile U.S. policy and politics since 9/11. Each trend resonates with larger global erosion in norms, increasing contentiousness and conflict, and accelerating rate of change. Physics teaches that as linear velocity, mass, and angular momentum increase, so too does torque. As in a high-performance automobile or aircraft, the crash risk created by rising torque makes restraints more important. So too in our legal order. In our increasingly volatile age, the guardrails provided by the Forces Clause’s statutory “Rules” are especially valuable.

A. In Context of New Lawmaking Dynamics

The Forces Clause and its statutes matter more because of an inter-related series of recent government lawmaking process trends. Against the backdrop of enduring barriers to judicial review of national security matters, Congress is legislating less, the Executive power is growing, and creation of secret law has become regularized in all three branches, including in Congress pursuant to the Forces Clause.

First, since the mid-2000s, the legislative process in Congress has become characterized by what some scholars generously term “unorthodox lawmaking.”³²⁴ Another fair characterization is that

323. See, e.g., 10 U.S.C. § 162 (military chain of command, from President to Secretary of Defense to combatant commanders of the unified joint warfighting commands), § 163 (Chairman of the Joint Chiefs of Staff is senior military advisor to the President, NSC, and Secretary of Defense, but is not in the chain of command).

324. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U. S. CONGRESS 52 (4th ed. 2012) (rate of bypassing of committees and other empirical data); Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115

Congress has become dysfunctional. It is less able to give legislation and nominations thorough procedural review under the traditional “regular order” and invest them with bi-partisan buy-in. As partisanship has risen, transparency into legislative process has increased; seemingly all issues have become nationalized and made instantly accessible thanks to information technology; and Members of Congress have become less willing to compromise and more extreme in their tactics. Compromise legislation on major issues facing the country has become harder to craft and pass. Filibusters and holds have gone from rare exceptions in the U.S. Senate to formidable counter-majoritarian barriers to a large number of bills, motions, and nominations (and then both parties while in the majority have successively narrowed long-standing Senate rules allowing the filibuster, enabling one party to act on its own). The number of bills enacted per session has plummeted.³²⁵ Those that do reach enactment often have skipped many usual legislative process stages. Their legislative history is tangled and gap filled.³²⁶ Annual funding legislation is commonly enacted late or not at all. Brinksmanship has driven up the number of omnibus bills – amalgamations of many bills that are drafted, combined, and passed amid haste and disorder.

The net effect is that it has become harder for Congress to act. Updating FISA after major surveillance scandals in 2005 and 2013, for example, took two full years.³²⁷ Additionally, Congress’s inability to do its regular appropriations work on schedule and its aversion to “tying the hands of the military” during an age of endless war have left Congress less deft in using its power of the purse as a check on the

COLUM. L. REV. 1789, 1799-1800, 1803, 1839 (2015) (discussing tangled legislative history for omnibus bills); Rudesill, *supra* note 44, at 365-66 (discussing the difficulty associated with understanding the law and legislative history produced by unorthodox lawmaking as a form of secret law).

325. See, e.g., Drew Desilver, *Congress Still on Track to be Among Least Productive in Recent History*, PEW RESEARCH CENTER (Sept. 23, 2014), <http://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history/> (analysis of number and types of bills passed per Congress).

326. The legislative history since the late 1970s of three annual national security bills – the Intelligence Authorization Act, National Defense Authorization Act, and Department of Defense Appropriations Act – provide an illuminating case study in the legislative process’s severe disruption. See Rudesill, *supra* note 44, at 367-90 (in-text discussion, and tables tracking the three Acts).

327. See FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (update to FISA after 2005 leak of warrantless content surveillance); USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (update to FISA after Edward Snowden’s 2013 leak of FISC orders authorizing bulk collection of telephony metadata); See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html?_r=0 (original story reporting warrantless wiretapping outside FISA); Secondary Order, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc., on behalf of MCI Communication Services, Inc., No. BR 13-80 (FISA Ct. Apr. 25, 2013), <http://epic.org/privacy/nsa/Section-215-Order-to-Verizon.pdf> (FISC order leaked by Snowden).

Executive. The recent Iraq War, for example, was for most of its duration enormously unpopular but never de-funded. Indeed, no national security program of any prominence has been de-funded since Congress's action in 2003 to bar funds for the Total Information Awareness domestic surveillance program.³²⁸ A decade later, a left/right effort to de-fund the NSA bulk telephony metadata collection revealed in 2013 by Edward Snowden failed in the House.³²⁹

Additionally, Congress has not simply stopped formally declaring wars, but is unable to pass new authorizations for the use of military force (AUMF) when abundantly warranted.³³⁰ An early bellwether was Congress's inability in 1999 to pass a war declaration, to pass an AUMF, or to cut off funding for U.S. participation in NATO's war against Serbia to protect Kosovo. More recently, Congress has shown no ability to pass a new AUMF explicitly authorizing ongoing U.S. use of force against Al Qaeda affiliates in Yemen, Somalia, and North Africa (2010 onward); against Libya's Qaddafi regime (2011); against Syria's al-Assad regime (threatened in 2013, and carried out in 2017 and 2018); and against ISIL (2014 to present). Instead, with congressional acquiesce, administrations of both parties have invoked the President's Article II Commander in Chief power, and also invoked 9/11 and Iraq War AUMFs that are more than a decade and a half old and have been relied upon for authority to fight ISIL and other entities that did not exist when those statutes were passed.³³¹

328. See, *Congress Dismantles Total Information Awareness Spy Program*, ACLU (Sept. 25, 2003), [https://www.aclu.org/news/congress-dismantles-total-information-awareness-spy-program-aclu-applauds-victory-calls?redirect=national-security/congress-dismantles-total-information-awareness-spy-program-aclu-applauds-victory-\(praising-de-funding-of-Total-Information-Awareness-\(TIA\)\)](https://www.aclu.org/news/congress-dismantles-total-information-awareness-spy-program-aclu-applauds-victory-calls?redirect=national-security/congress-dismantles-total-information-awareness-spy-program-aclu-applauds-victory-(praising-de-funding-of-Total-Information-Awareness-(TIA))); DOD Appropriations Act for 2004, Pub. L. No. 108-87, § 8131(a), 117 Stat. 1054, 1102 (2003) (statute de-funding TIA); see also H.R. REP. NO. 108-283, at 327, 344 (2003) (Conf. Rep.) (report language regarding TIA).

329. See H. AMEND. 413 to H.R. 2397, 113th Cong. (2013), 159 CONG. REC. H5028 (2013) (roll call vote on de-funding bulk telephony metadata collection), <https://www.congress.gov/amendment/113th-congress/house-amendment/413/text>; H. R. REP. NO. 113-170, at 11, 29 (2013) (Reps. Justin Amash (R-MI) and John Conyers (D-MI) amendment to de-fund bulk telephony metadata collection defeated in U.S. House 205-17).

330. The last war declaration was during World War II. See Act of June 5, 1942, ch. 325, 56 Stat. 307 (Declaring a state of war between the Government of Rumania and Government and the people of the United States). The most recent AUMFs were passed in 2001 and 2002, regarding Al Qaeda and others responsible for the 9/11 attacks and authorizing the invasion of Iraq, respectively. See Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for the Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

331. The Obama Administration unsuccessfully sought new AUMFs from Congress. In contrast, the Trump Administration indicated that existing authorities are "sufficient" and that it "is not seeking revisions to the 2001 AUMF or additional authorizations to use force." See Charles Faulkner, Bureau of Legislative Affairs, U.S. Dep't of State, Letter to Senator Bob Corker, Chairman, U.S. Senate Foreign Relations Committee (Aug. 2, 2017), <https://assets.documentcloud.org/documents/3911844/8-2-17-Corker-Response.pdf>. Regarding military operations against ISIL, the Trump and Obama Administrations have invoked the 9/11 and Iraq AUMFs, even though ISIL often fights Al Qaeda and the

In this context and where major laws are hard to pass, the statutory frameworks grounded in the Forces Clause that are already on the books and new updates to them – non-appropriations, non-AUMF statutes that govern and regulate national security activities – grow in importance.

Executive power growth makes these statutory frameworks matter more, too, along with the Forces Clause that underlies them. Executive power has been growing for more than a century, with acceleration in recent years.³³² The Executive branch has pushed against the limits of Clause-based statutes discussed in Part III, via new interpretive and practice precedents. The George W. Bush Administration did so (e.g., regarding surveillance and interrogation) under the aegis of its expansive minority theory of executive power and in service of post-9/11 urgency to collect intelligence. The Obama Administration broadly interpreted the President's authority to act (particularly in Libya and against ISIL) after concluding Congress was incapable of acting due to its politics.³³³ The Trump Administration has deployed some of the same theories.³³⁴ The WPR has seen significant interpretive narrowing, particularly regarding military operations in Libya and against ISIL.³³⁵ The Executive branch's resistance to the

government of Iraq. See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities 42 Op. O.L.C. 1, 11, 13 n.4 (May 31, 2018) (slip op.), https://www.justice.gov/sites/default/files/opinions/attachments/2018/05/31/2018-05-31-syrian-airstrikes_1.pdf (published Trump-era OLC opinion on legal authority to combat ISIL), *citing* Authority to Use Military Force in Iraq (2014) (unpublished Obama-era OLC opinion on legal authority to combat ISIL in Iraq); see also THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 15-16 (2016) (published Obama-era White House report), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf. Regarding strikes against Syria's al-Assad regime, the Trump Administration has relied on an expansive conception of the President's Article II powers. See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra*; President Donald Trump, Letter to the Speaker of the House and President Pro Tempore of the Senate, April 8, 2017, <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/>. The Trump State and Defense Departments additionally argue that at least the 2017 strikes on the Syrian regime for using chemical weapons were authorized by the 9/11 AUMF as necessary to protect U.S. and allied forces battling ISIL. Pro-democracy Syrian forces backed by the United States have been fighting ISIL and the Syrian government. See Mary K. Waters, Assistant Secretary for Legislative Affairs, U.S. Dep't of State, Letter to Senator Tim Kaine at 1-2 (Feb. 12, 2018), *available at* <https://www.documentcloud.org/documents/4383185-Kaine-Trump-ISIS-war-power-letters.html>; David J. Trachtenberg, Deputy Under Secretary of Defense for Policy, Letter to Senator Tim Kaine at 2 (Jan. 29, 2018), *available at* <https://www.documentcloud.org/documents/4383185-Kaine-Trump-ISIS-war-power-letters.html>.

332. Factors certainly relevant include growth in the administrative state and rise of the "imperial presidency," increasing congressional willingness to delegate rulemaking to agencies and judicial tolerance of such delegations, increasing partisanship, and court expansion of judicial power. For criticism see SHANE, *supra* note 148, at 3 *et seq.*; LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER (2017).

333. See *supra* note 319.

334. See *supra* note 331.

335. See discussion above in Part III.B.5.

Forces Clause's statutes serves to underscore the importance of existing statutory frameworks if the President is to be restrained meaningfully.

In addition to Congress's inability to use its legislative power and expanding Executive power, there has been a third change in lawmaking dynamics that makes the Clause and its statutes matter more. Creation of unpublished national security legal authorities – national security secret law – has in recent decades become well established in all three branches of the federal government. These include classified legislative addenda given the force of law by Congress (a regular and expanding practice since the late 1970s), secret presidential orders and precedential Justice Department memoranda, and classified orders of the Foreign Intelligence Surveillance Court (FISC) created nearly 40 years ago.³³⁶

On the one hand, Congress can rely on Clause authority when it writes classified addenda in the National Defense Authorization Acts (NDAAs) and Intelligence Authorization Acts (IAAs). Congress's secret law can manage secret law in the other two branches, as well as manage secret fact (classified offices, programs, operations, etc.). According to media reports, Congress has used classified provisions to govern lethal drone operations – to do the Forces Clause's External Government work in secrecy's most deadly shadows.³³⁷

On the other hand, against the darkened backdrop of secret law and secret fact, the Clause's Public Law provisions provide an instrument for policy change by the elected representatives of the people. The Clause's Public Law statutes also provide public standards by which the legality of secret government activity can be measured – both for holders of security clearances in classification's darkest corners and for the public when secret activities are revealed.³³⁸

336. See Rudesill, *supra* note 44 (study finding secret law claim credible regarding all three branches); WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 52, 65 (1994) (discussion of examples of Congress's use of classified legislative addenda).

337. See Greg Miller, *Lawmakers Seek to Stymie Plan to Shift Control of Drone Campaign from CIA to Pentagon*, WASH. POST (Jan. 15, 2014), https://www.washingtonpost.com/world/national-security/lawmakers-seek-to-stymie-plan-to-shift-control-of-drone-campaign-from-cia-to-pentagon/2014/01/15/c0096b18-7e0e-11e3-9556-4a4bf7bcbd84_story.html.

338. Caveats are in order. One is that the observations above of course apply to all publicly observable law that limits the Executive Branch. The Forces Clause and its statutes are especially important, however, because they do such important work. A second caveat is that public statutes, if they are to be meaningful, demand adherence to a Public Law Supremacy Principle: that any secret law is subordinate to public law, and does not grow government authority beyond what it facially appears to the public. See Rudesill, *supra* note 44, at 337-41.

*B. In Context of Change in the Security Environment, Especially
Growing Cyberization*

While Congress has become less responsive and the U.S. political culture has become more divided and acrimonious, the global security environment has become more volatile. Compared to the relatively stable American-designed post-World War II and post-Cold War orders, the world is increasingly chaotic, dynamic, and perilous. The very nature of war, conflict, and security are changing. The United States today faces a national security environment dominated by disruptive trends. These include protracted low-intensity conflict with a metastasizing and adaptive terrorist global insurgency, and galloping growth in the varieties, complexity, and accessibility of robots, from remotely piloted militarized drones to autonomous weapons systems that potentially think and kill on their own.³³⁹ As all aspects of security, society, and economics become more cyberized – that is, computer dependent – the United States also confronts a daily deluge of cyber attacks that straddle the blurry lines among espionage, war, crime, and terrorism. According to the U.S. military, permanent U.S. cyber superiority “is not possible due to the complexity of cyberspace.”³⁴⁰ Meanwhile, congressional legislation is not keeping up. As noted, the appropriations process through which U.S. forces are funded and managed is often a (black) comedy of legislative errors, missed deadlines, and panic-passed omnibus bills. Meanwhile, force authorizations dating to 2001 (9/11) and 2002 (Iraq) are silent about dramatically changed conflicts in Afghanistan and the middle east, and about new technologies.

The changing nature of the national security context in which “the land and naval Forces” operate is increasing the importance of the existing “Rules” Congress has provided pursuant to the Forces Clause. Looking to the future, to the extent that Congress does legislate, its Forces Clause legislative authority will prove only more relevant and useful. Through these authorities Congress can update the authorities, processes, and organization of the national security apparatus without having to depend on funding limitations via the disrupted appropriations process, and without having to wait for legislation authorizing wars. Authorizing armed conflicts or making major amendments to AUMFs written pursuant to the Declare War Clause plainly now require a 9/11-scale catastrophe, and a formal war declaration would require an even larger

339. See, e.g., Daniel R. Coats, Director of National Intelligence, Statement for the Record: Worldwide Threat Assessment of the U.S. Intelligence Community, Senate Select Committee on Intelligence (May 11, 2017), <https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf>.

340. See U.S. Joint Chiefs of Staff, Joint Publication 3-12: Cyberspace Operations, at I-2 (2018).

prompt.

Congress's active government of cyber operations in recent years provides a case study in the utility of Forces Clause authority. In the wake of the United States engaging in the first publicly known major state use of a cyber weapon against Iran's nuclear program, and after creation of the U.S. Cyber Command (USCYBERCOM), Congress in a series of enactments has stipulated authorities, processes, and reporting requirements for Defense Department offensive cyber operations.³⁴¹ Congress has piece by piece built a structure similar in some ways to the covert action statute, via a patchwork of provisions in annual NDAs. Congress in the NDAA for 2012 affirmed presidential authority to direct the Defense Department to carry out offensive operations in cyberspace, while also subjecting the Pentagon's cyber weapons to the law of armed conflict, to other existing Defense Department law and policy, and to another Clause framework statute, the WPR.³⁴² Congress has subsequently underscored Defense Department authority to use cyber capabilities to defend the United States – and U.S. persons.³⁴³ Creating reporting requirements for military cyber operations similar to those in two other Force Clause statutes, the covert action statute and the WPR, Congress has also required the Secretary of Defense to report to Congress on individual cyber operations within 48 hours and file quarterly reports on cyber programs and their legality³⁴⁴ Most recently, Congress has legislated that the Defense Department may “take appropriate and proportional action in foreign cyberspace” against Russia, China, North Korea, or Iran, if such a state is executing an “ongoing campaign of attacks . . . in cyberspace, including attempting to influence American

341. U.S. Cyber Command has been operational for nearly a decade. President Trump announced that it would be elevated to the status of a unified combatant command, on par with other warfighting commands such as U.S. Central Command. See The White House, Office of the Press Secretary, Statement by President Donald J. Trump on the Elevation of Cyber Command (Aug. 18, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/18/statement-donald-j-trump-elevation-cyber-command>.

342. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 954, 125 Stat. 1298, 1551 (2011); 10 U.S.C. § 111 note.

343. See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1642(a), 129 Stat. 1116 (2015) (codified as amended at 10 U.S.C. § 394 (2018)). This statute was moved from 10 U.S.C. § 130g by the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1631, 132 Stat. 1636 (2018) [hereinafter 2019 NDAA].

344. See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1631(a), 131 Stat. 1283, 1736-37 (2017) (codified as amended at 10 U.S.C. §§ 395, 396 (2018)). This statute was moved from 10 U.S.C. §§ 130j, 130k by the 2019 NDAA, *supra* note 335, at § 1631 (report required within 48 hours of on off-battlefield cyber operations, quarterly reports on review of legality under international law of cyber weapons, and report within 48 hours on use of such weapons). See also National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 939, 126 Stat. 1632, 1888 (2013), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1632(a), 131 Stat. 1283, 1738 (2017) (codified at 10 U.S.C. § 484) (quarterly report required on military cyber operations, including their legality).

elections.”³⁴⁵ Additionally, Congress provides that clandestine military cyber operations may be conducted as a “traditional military activity,” and therefore subject to military-related law rather than the espionage-focused covert action statute.³⁴⁶ Congress has also stipulated that the military cyber operations it is governing may include operations that fall short of “war”: operations that do not rise to the WPR’s threshold of “hostilities,” are not “in areas in which hostilities are occurring,” and are not uses of force.³⁴⁷

In short, rather than waiting for Congress to invoke its other enumerated Article I powers via a formal declaration of cyber war, a freestanding cyber AUMF, or funding restrictions, Congress has used NDAA’s to permit operations by the military’s cyber force subject to a set of legislated rules. These include following other law (e.g., the law of armed conflict), *not* applying still other law here (the covert action statute), observing Congress’s stipulations even when the cyber operations are legally and geographically not part of hostilities, and providing Congress transparency regarding cyber weapons that will only become more powerful and more potentially imperiling to liberty as the world becomes ever more cyberized. None of the NDAA cyber provisions cite constitutional authority for their enactment. But the NDAA cyber laws – an emerging new statutory framework – are on their strongest constitutional footing when understood as Congress making “Rules for the Government . . . of the land and naval Forces” in cyberspace, reflecting the Forces Clause’s External Government power.

As the threat environment, technology, and U.S. government capabilities rapidly evolve – in cyberspace and other more traditional domains – Congress will assuredly continue to refine its new cyber rules, update the more longstanding statutory frameworks discussed in Part III, and write new provisions as new issues are presented. With a need to respond quickly to changing and perilous circumstances, a trend of increasing Executive power, and enduring barriers to judicial review of national security activities, one can also expect pushback by presidents and agencies. This suggests renewed *Youngstown*-contextualized clashes

345. See 2019 NDAA, *supra* note 343, at § 1642.

346. See 2019 NDAA, *supra* note 343, at §§ 1632, 1642. The covert action statute excludes “traditional . . . military activities” from its reach. See 50 U.S.C. § 3093(e)(2) (2014). The 2019 NDAA provision resolved a legal debate inside the Executive Branch. For discussion, see Robert Chesney, *The Law of Military Cyber Operations and the New NDAA*, LAWFARE (July 26, 2018, 2:07 PM), <https://www.lawfareblog.com/law-military-cyber-operations-and-new-ndaa>.

347. See 2019 NDAA, *supra* note 343, at §§ 1632 (codified at 10 U.S.C. § 394) (cyber operations less than “hostilities” and off-battlefield), 1295 (general provision stipulating that the NDAA’s provisions may not be understood to authorize the use of force against Iran or North Korea, presumably limiting the cyber operations authorized under the NDAA to something less than a use of force regarding two of the four countries listed in section 1642).

between the Commander in Chief and the Clause's External Government power (perhaps in concert with congressional national security powers provided by the Common Defense, Declare War, Army, Navy, Militia, or Appropriations Clauses). In the process, additional practice precedent will be set and the Forces Clause's contours illuminated. In what is a contest as much for public support as for judicial acceptance, Congress will be helped by explicitly citing the Forces Clause as authority for its enactments. Especially in these volatile times, the legitimacy of legislation will be stronger if seen as reflecting use of enumerated constitutional powers and embodying their animating ethos.

C. In Context of Volatile Politics and Policy

Congress's declining legislative productivity and the evolving nature of the national security threat environment resonate with a third overarching trend that is increasing the salience of the Forces Clause and statutes grounded on it. In a time of growing contentiousness and eroding norms, the country's politics and policy as they relate to national security have become much more volatile. In this context, the "Rules" the Clause allows Congress to write are functioning as stabilizing guardrails.

It is beyond the scope of this article to diagnose in depth the causes of this contentiousness and volatility. Suffice for our purposes to note that it correlates with a number of disruptive developments in the past two decades. These include the arrival of a horrifying and enduring terrorism threat on 9/11, U.S. involvement in two costly and still open-ended wars thereafter, the most severe economic shock since the Great Depression in 2008-10 amid years of stagnation in economic prospects for most people, and technology-driven revolutionary expansion in the amount and interactiveness of information about public affairs. These globe-spanning developments have especially impacted the United States because they started here, and because they have disrupted the country's long run of global preeminence, prosperity, and political stability. Political swings at the polls are now wider.³⁴⁸ Politicians and elected leaders say things and suggest policies that for a long time had been outside the mainstream of political discourse.

Volatility is making law more important, and especially statutes that resonate with the Clause's purposes in allowing the elected representatives of the people to control the national security apparatus that the Chief Executive wields.

348. For example, a majority of U.S. federal elections since the Iraq War began (2006, 2008, 2010, 2014) have been "wave elections" with one party overwhelmingly prevailing over the other, after a long prior run starting in the late 1980s in which most elections were either on balance status-quo or closely decided (1988, 1990, 1996, 1998, 2000, 2002).

A salient example is detainee treatment. The George W. Bush Administration's efforts after 9/11 to carry out trials and interrogation of detainees – captured both domestically and abroad – were at odds with longstanding detainee treatment norms and with statutes that find footing in the Clause, particularly the UCMJ and original anti-torture statute. As noted above, the Courts in *Hamdan* upheld the UCMJ in the face of contrary presidential trial order and cited *inter alia* the Clause. Congress – with backing from Bush's successor, Obama – affirmed military justice process protections and the torture ban. Obama's successor, Donald Trump, campaigned on bringing back torture. Once in office, Trump faced Forces Clause-based statutory "Rules" for the "land and naval Forces" that prohibit it. They keep the legal baseline centered where it was before the alarming terrorist attacks of 9/11 and recent years.³⁴⁹

The bruising election cycle that resulted in Trump's election coincided with and has been followed by more domestic unrest with racial and political overtones than the country has witnessed since the Civil Rights Era and protests against the Vietnam War.³⁵⁰ The Posse Comitatus Act and parts of the Insurrection Act, based in the Clause, would operate regarding any new domestic federal military deployments, just as they did in the 1950s, 1960s, and 1970s. Such Clause-based statutes keep the law tethered to longstanding norms. That is important in the context of frequent articulations of concern about an authoritarian turn in American politics³⁵¹ and polls showing declining support for democracy and regular

349. Trump repeatedly endorsed torture, even if it does not work because suspected terrorists "deserve it." See Jenna Johnson, *Donald Trump on Waterboarding: 'If it Doesn't Work, They Deserve It Anyway,'* WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/?utm_term=.fa9f1526cb9a. As President, Trump has appointed a Secretary of Defense and CIA Director who are on record against torture. See Amy Davidson Sorkin, *Mike Pompeo and the Question of Torture*, NEW YORKER (Jan. 12, 2017), <http://www.newyorker.com/news/amy-davidson/mike-pompeo-and-the-question-of-torture> (Defense Secretary and CIA Director opposed to torture).

350. Examples include race-related unrest in Baltimore, Maryland and Ferguson, Missouri prior to the election, politically-related violence in Seattle, Washington and Washington, D.C., thereafter, and violent clashes in Charlottesville, Virginia in August 2017 that involved neo-Nazis and individuals violently resisting them. In contrast to this spate of violence, the 1992 riots in Los Angeles following the Rodney King verdict provided an intense but isolated event.

351. Commentators concerned about a rising authoritarian tendency in American politics and increasing potential for domestic unrest point to stoking of fear of foreigners and minorities, threats to "get tough" with terrorists and other adversaries, demonization of urban elites, encouragement of violence at political rallies, threats to jail political opponents, allegations of corruption against scientists other professionals, and discrediting of the press and civil servants. Trump is not alone in doing these things, but they are part of his style and consequently he has been a focus of sharp criticism from normally sedate commentators. See, e.g., Orin Kerr, *Imagining a Trump Justice Department*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/22/imagining-a-trump-justice-department/?utm_term=.a519f6d20751 (conservative legal thought leader describes Trump as a "fascist thug"); Susan Hennessey & Benjamin Wittes, *Is Trump a Russian Agent? A Legal Analysis*, LAWFARE (July 27, 2016, 1:46 PM), <https://lawfareblog.com/trump-russian-agent-legal-analysis> (centrist national security experts view Trump as acting in the interest of authoritarian Russia); David Luban, *The Case*

elections.³⁵²

Volatility has been evident in politics and policy regarding foreign military deployments and traditional alliances, as well. President George W. Bush ordered U.S. forces into Afghanistan and reduced them before invading Iraq, President Obama withdrew from Iraq and surged forces into Afghanistan before drawing them down, followed by President Trump who campaigned on withdrawal from these conflicts but has presided over expanded U.S. military operations in both theaters. Obama involved U.S. forces in Libya and relied on covert action against Syria's al-Assad regime, while Trump criticized the Libya operation and potential strikes on the al-Assad regime as a candidate, and then once in office reportedly cancelled the covert action and launched overt strikes against the al-Assad regime. Operating here are not simply the 9/11 and Iraq AUMFs and the President's Article II authority, but also the covert action statute and WPR. Congress could go beyond these existing Forces Clause-based statutes to provide additional "Rules" for the "land and naval Forces."

Pursuant to the Clause, Congress can also provide law to stabilize force emplacements that undergird U.S. treaty commitments to its allies. After seven decades of unwavering support for NATO by U.S. Presidents, Trump has undermined confidence in the U.S. commitment to the

Against Serving, JUST SECURITY (Nov. 14, 2016), <https://www.justsecurity.org/34404/case-serving-trump/> (left-leaning thought leader writes that "The nightmare scenario is that Trump and his allies aim at an authoritarian Big Man presidency"). Trump has praised authoritarians who have used lethal force against political opponents, journalists, and pro-democracy demonstrators. For coverage of statements during the campaign, see Nicole Hensley, *President Trump Defends Putin as a 'Killer' in 'O'Reilly Factor' Interview*, N.Y. DAILY NEWS (Feb. 4, 2017, 11:27 PM), <http://www.nydailynews.com/news/politics/president-trump-defends-vladimir-putin-killer-article-1.2964475>; Marc Fisher, *Donald Trump and the Expanding Power of the Presidency*, WASH. POST (July 30, 2016), https://www.washingtonpost.com/politics/donald-trump-and-the-dangers-of-a-strong-presidency/2016/07/30/69cfc686-55be-11e6-b7de-dfe509430c39_story.html?utm_term=.44dd9b499551 (Trump signals expanding executive authority); Kerr, *supra* (Trump praised Chinese government's 1989 bloody crackdown on pro-democracy protesters).

352. See Maggie Koerth-Baker, *Democracy, Meh?*, FIVETHIRTYEIGHT (Dec. 2, 2016), <https://fivethirtyeight.com/features/democracy-meh/> (roughly 30 percent of U.S. millennials think it is imperative to live in a democracy, a decline from prior trends); Ariel Malka & Yphtach Lelkes, *In a New Poll, Half of Republicans Say They Would Support Postponing the 2020 Election if Trump Proposed It*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/?utm_term=.dcedb50e24ca.

alliance.³⁵³ The reception in Congress has been chilly.³⁵⁴ Although other members of the Trump Administration have worked to reassure allies and facilitated a continuing U.S. military presence to counter Russia,³⁵⁵ if the Commander in Chief were to overrule them Congress could via statute pursuant to the Forces Clause legislate a ban on withdrawal of U.S. forces.³⁵⁶

Legislation could provide “Rules” for the most powerful “land and naval Forces,” tactical (short-range) nuclear forces in Europe and strategic (long-range) nuclear forces based in the United States, both of which are part of NATO’s deterrent.³⁵⁷ Following five presidents who have kept U.S. tactical nuclear forces in Europe while working to reduce U.S. nuclear forces overall, President Trump has both implicitly called into question the future of the U.S. tactical nuclear emplacement in Europe via his criticism of NATO, and explicitly called for expanding U.S. nuclear forces overall.³⁵⁸ There is statutory precedent for

353. See Zachary Cohen, Michelle Kosinski & Barbara Starr, *Trump’s Barrage of Attacks ‘Beyond Belief,’ Reeling NATO Diplomats Say*, CNN (July 12, 2018), <https://www.cnn.com/2018/07/11/politics/trump-nato-diplomats-reaction/index.html> (Trump criticism of NATO undermining confidence in U.S. commitment to alliance); Rainer Buergerin & Toluse Olorunnipa, *Trump Slams NATO, Floats Russia Nuke Deal in European Interview*, BLOOMBERG (Jan. 15, 2017, 5:00 PM), <https://www.bloomberg.com/politics/articles/2017-01-15/trump-calls-nato-obsolete-and-dismisses-eu-in-german-interview> (similar, before Trump inaugurated, with suggestions of deal with Russia on European security).

354. See National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1248(a), 132 Stat. 1636 (2018) (affirming U.S. “ironclad commitment” to NATO); S. Vote No. 149 (passed 97-2), 115th Cong., 164 CONG. REC. S4868-69 (daily ed. July 10, 2018) (motion to instruct conferees on NDAA to reaffirm the commitment of the United States to NATO); Joe Gould, *Congress Would Stop Trump from Leaving NATO, Key Senators Say*, DEFENSENEWS (July 19, 2018), <https://www.defensenews.com/congress/2018/07/19/congress-would-stop-trump-from-nato-exit-key-senators-say/> (Senators support NATO and attempt to reassure NATO allies that Congress could stop presidential withdrawal).

355. See, e.g., Soraya Sarhaddi Nelson, *Pence and Mattis Commit to NATO, But Ask Europe for More Help*, NPR (Feb. 18, 2017, 7:54 AM), <http://www.npr.org/2017/02/18/515921413/pence-and-mattis-commit-to-nato-but-ask-europe-for-more-help> (Trump cabinet members emphasize U.S. support for NATO).

356. This would set up a *Youngstown* Category 3 clash, of the kind that continues to be disputed and has been analyzed more generally by scholars including Barron and Lederman. Congress could additionally or alternatively act pursuant to authority provided by the Appropriations Clause, and perhaps the Common Defense Clause, as well.

357. See NORTH ATLANTIC TREATY ORGANIZATION, DETERRENCE AND DEFENSE POSTURE REVIEW § 9 (2012). U.S. tactical nuclear forces are operationally deployed in five European NATO countries, while a strategic triad of bombers, intercontinental ballistic missiles (ICBMs), and submarines are operational from bases inside the United States. See Hans M. Kristensen & Robert S. Norris, *United States Nuclear Forces*, 73 BULL. OF THE ATOMIC SCIENTISTS 48-57 (2017) (discussing current U.S. tactical and strategic forces); Dakota S. Rudesill, *Regulating Tactical Nuclear Weapons*, 102 GEO. L.J. 99, 107-19, 141-43 (2013) (analyzing history, forces, and doctrine of U.S. nuclear capabilities).

358. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 22, 2016, 8:50 AM), <https://twitter.com/realDonaldTrump/status/811977223326625792> (“The United States must greatly strengthen and expand its nuclear capability until such time as the world comes to its senses regarding nukes”).

congressional rule-making regarding nuclear forces: Congress in the 1990s prohibited the retirement of nuclear-capable strategic bombers.³⁵⁹ Also, the WPR facially governs all “forces” by not stipulating it applies only to conventional forces.³⁶⁰

In the context of President Trump’s exchange of nuclear threats with North Korea,³⁶¹ pursuant to the Forces Clause the Congress could enact a 115th Congress bill to prohibit the first use of nuclear weapons absent specific congressional authorization in a war declaration, unless nuclear weapons have already been launched against the United States.³⁶² Of

359. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1302(e), 110 Stat. 2422, 2700-02 (1996) (barring retirement of B-52H bombers). The NDAs for 1996 through 1999 also barred funding for retirement of planned strategic nuclear forces pending Russian ratification of the START II treaty (which never came). See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1404, 110 Stat. 186, 490 (1996) (original force retirement ban); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1302(a)-(d), 110 Stat. 2422, 2700-02 (1996) (ban, with waiver); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1948, 1948-50 (1997) (ban, with waiver); National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 2171, 2171 (1998) (extending provision in NDAA for 1998). The 1996 and 1997 NDAs, like the potential statutes I postulate, do not direct the emplacement of forces, but rather prevent their removal.

Congress in recent years has in provisions that are not funding restrictions required retention of sufficient warheads to arm U.S. land-based nuclear forces fully. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1057, 127 Stat. 622, 864-65 (2013).

In addition to the Forces Clause, Article I’s Army and Navy Clauses would operate regarding a bar on dismantlement of nuclear-capable missiles, submarines, and aircraft, and their warheads. Congress would be insisting on them as part of the forces Congress is providing. See U.S. CONST., art. I, § 8, cl. 12, 13. These other clauses may operate too regarding statutes on force emplacement – operational deployment – but this most clearly reflects the External Government understanding of the Forces Clause.

360. See WPR, *supra* note 315.

361. See Dan Lamothe, *If Trump Wants a Nuclear Attack Against North Korea, His Military Advisors Have Other Options*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/08/10/if-trump-wants-a-nuclear-attack-against-north-korea-his-military-advisers-have-few-other-options/?tid=ss_tw&utm_term=.d9df1b2a9e28 (quoting views that all presidential orders on nuclear weapons must be followed, in wake of President Trump threatening North Korea with “fire and fury” in response to its missile and nuclear weapons programs and threats to the United States and its allies).

362. See Restricting First Use of Nuclear Weapons Act of 2017, H.R. 669, 115th Cong. (2017); Restricting First Use of Nuclear Weapons Act of 2017, S. 200, 115th Cong. (2017). A somewhat similar proposal was rejected by the Senate in 1972. See FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? ix (Peter Raven-Hansen, ed. 1987). A variant of this idea was offered by the Federation of American Scientists (FAS) in 1971: absent a declaration of war, no first use without the assent of a congressional committee. This proposal raises a number of interesting constitutional questions, from whether nuclear weapons are constitutionally special to whether the FAS proposal involves a legislative veto. For discussion of this idea’s constitutional aspects, see *id.* A variation on the FAS idea would be for Congress pursuant to the Forces Clause write a rule for the nuclear forces it provides under the Army and Navy Clauses: the affirmative assent to a presidential first use order by one or more of a top military officer, the Secretary of Defense, or the Attorney General before the President’s launch order is transmitted. See, e.g., Richard K. Betts & Matthew C. Waxman, *The President and the Bomb: Reforming the Nuclear Launch Process*, 97 FOR. AFF. 119 (2018) (recommending the Secretary of Defense and Attorney General must confirm the order and its legality). An order thus not confirmed presumably would be an illegal order that must be refused. Presidential defiance would create a *Youngstown* Category 3 dispute of the greatest severity.

course, a Commander in Chief who wanted to use nuclear weapons first might argue that an imminent threat existed even if nuclear warheads were not incoming toward the United States. The President could also be expected to argue that new threatening facts had arisen since the bill's enactment, and therefore the statute was no longer factually apposite and the Commander in Chief power allowed a first strike.³⁶³ Resolution of such a constitutional crisis in a manner that both protects the nation and honors the Constitution's counter-authoritarian ethos would depend on the constitutional knowledge and ethical integrity of the President and the Commander in Chief's advisors and subordinates, considerations that will be informed by a full understanding of the Forces Clause.

V. CONCLUSION

This article is focused on a particular, too often neglected provision of the Constitution. It draws distinctions among clauses and powers. It is an overdue inquiry, but being clause-focused this article also inevitably is to some degree a formalistic account. One may reasonably view the Constitution more holistically, giving primary effect to its purposes, ethos, and interpretive history. The strongest constitutional analysis, like the strongest statutory interpretation, draws both on considerations of formal text and structures, and on spirit and gloss. Regarding the Land and Naval Forces Clause, all of these considerations augur toward the Clause vesting in Congress dual powers, having a broader ambit than the uniformed military (notably, to include the non-military intelligence enterprise), and reflecting counter-authoritarian legislative control over a national security apparatus with powers of surveillance, covert influence, detention, interrogation, and use of military force domestically and worldwide, to include cyber operations and nuclear weapons.

The statutory frameworks at the heart of the national security legal regime that find textual grounding in the Forces Clause are important to the republic at any moment. There are constant and enduring operational pressures and political incentives for the Executive branch to disregard the law and its liberty/security balancing work. The statutory frameworks grounded on the Forces Clause are of special importance, however, in a time of chronic national insecurity: war without end against transnational terrorist networks and within cyberspace, and the alarm and constant engagement of the national security apparatus they produce. These statutory frameworks safeguard liberty in the atmosphere of uncertainty and fear that national insecurity, together with dysfunctional government

363. Essentially, the argument would be that the new facts put the President's pre-emptive nuclear strike in *Youngstown* Category 2 rather than Category 3, and the President could rely on Article II authority against imminent threats as recognized in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

and volatile politics, produces. Such anxiety was not, of course, unknown to the Framers. As Justice Jackson wrote, the Framers “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.”³⁶⁴ The Constitution they crafted includes checks on a chief Executive the Framers both gave command of the federal military and viewed as carrying inherent authoritarian risk – checks that include regular elections, Congress’s power of the purse, the Bill of Rights, and the Land and Naval Forces Clause.

This is accordingly a moment for the Clause’s constitutional rediscovery, and particularly its External Government power. Nothing in the text, in our founding history, or in subsequent interpretation of the Constitution by the three branches of government precludes a sensible reading of the Clause that encompasses grants of both internal and external powers. On the contrary, the best reading of the constitutional record is that the Clause does provide Congress dual powers. And as Congress has used its constitutional powers from the Founding through the most recent legislation, it has repeatedly written vitally important statutes that find constitutional textual footing in the Clause – including in its External Government power.

Courts ought to take up the Supreme Court’s implicit invitation in *Kebodeaux* to construe the meaning of the term “Government” in the Forces Clause. Courts should explicitly recognize the powers the Clause confers over operations in the field, and over the intelligence portion of the national security apparatus. But judicial rediscovery of the Clause will not be enough. Clearer congressional understanding of the Clause, and more consistent citation to it, also will not be enough. The vast majority of national security practice escapes judicial review due to secrecy and standing doctrines. It escapes congressional action due to workload and other institutional challenges. Rather, our constitutional order depends instead in the first place – and often the last – on the integrity, knowledge, and constitutional values of individuals applying law to fact in national security law’s informal practice settings.³⁶⁵ In tense Situation Room meetings run by an inevitably action-focused and security-focused Commander in Chief, to busy U.S. Capitol hallways, to forces in the field facing little time and real peril – and from unclassified conversations to briefings in classification’s darkest corners – leaders, legislators, lawyers, and personnel in the field will serve their country

364. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

365. See BAKER, *supra* note 13, at 32-33 (discussing the roles of informal process and individual integrity in making constitutional law meaningful in the national security context; “legal values as much as the law govern the practice of national security law”).

better to the extent they carry a richer understanding of the legal architecture. That includes a rediscovered and fully appreciated Article I, Section 8, Clause 14 of the Constitution. This article's analysis allows greater appreciation for the Clause's constitutional values of counter-authoritarian legislative control over the national security apparatus. Greater appreciation for and more frequent citation to the Clause in connection with these values in turn puts the statutes – the “Rules” – that rely upon it on firmer constitutional footing.

Congress's authority to govern and regulate the land and naval forces and control their Commander in Chief is contingent. The Forces Clause does not stipulate a one-way ratchet toward greater liberty protections. Congress could choose not to use the Forces Clause's authority. Congress could acquiesce to harsh presidential discipline of the military, authoritarian employment of it against the people, or reckless use of it in cyberspace or abroad. Congress could use the Clause's authority to weaken FISA, the Posse Comitatus Act, and other liberty-protecting laws. Or, Congress could choose to use the Clause's authority actively – and more explicitly and consistently – to balance liberty and security considerations in a manner that protects both. The Clause's potential, like the republic's fate, ultimately resides with Congress and the love of liberty among the people the Article I branch represents, governs, and protects.³⁶⁶

366. *Accord, Youngstown*, 343 U.S. at 654 (Jackson, J., concurring) (“We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”).