

Response: Directing Military Operations

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I agree with much of what Saikrishna Prakash writes in *The Separation and Overlap of War and Military Powers*,¹ so I'll focus on an important specific disagreement. *Separation and Overlap* says that the President has no exclusive military powers (as does a recent lengthy article by David Barron and Martin Lederman in the *Harvard Law Review*).² I disagree. On my reading of the Constitution, the President alone has power to direct battlefield operations.

For context, consider an eighteenth-century example. In September 1776, General George Washington, while commanding the Continental Army around New York City, realized that his beleaguered forces could no longer hold off the British attack. Washington wanted to burn the city as he retreated to deny the British a base for the coming winter. "Had I been left to the dictates of my own judgment," he later wrote, "New York should have been laid in ashes." But Washington, though nominally the army's commander in chief, did not have the final word. The Continental Congress, America's national governing body, directed Washington that "no damage" be done to the city during the retreat. Against his better judgment and the advice of his best general, Nathanael Greene, Washington complied.³

America had no formal constitution in 1776, but Washington was the Congress's appointee, and the Congress represented all of the power of the national government—such as it was—at the time. So Washington rightly regarded the Congress's order as binding. But what if the same circumstances replayed after 1789, under the new Constitution, with Washington now cast as President faced with an order of the new Congress?

In my view, Congress's hypothetical no-burn order would be unconstitutional and the President could ignore it. This is not—or not only—because the Constitution makes the President the titular Commander in Chief. Washington was the titular Commander in Chief in 1776. Thus Barron and Lederman's analysis, which undertakes to show that the Commander in Chief Clause standing alone grants no exclusive power, is somewhat incomplete. The question involves not only the scope of the President's power, but also the scope of Congress's power.

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1. Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEXAS L. REV. 299 (2008).

2. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine and Original Understanding*, 121 HARV. L. REV. 689 (2008).

3. See DAVID MCCULLOUGH, 1776, at 203–07 (2005). As it happened, some five days after the British occupied the city, a fire of unknown origin destroyed much of it.

The great merit of *Separation and Overlap* is that by canvassing all of the Constitution's grants of military powers, it provides a framework with which to approach these sorts of questions. As Professor Prakash outlines, the President's executive and Commander in Chief powers give the President authority to direct military operations. So, as he recognizes, the question is whether Congress has a similar authority, and if so, whether it would override the President's authority.

So far, so good—but then having identified the key question, *Separation and Overlap* gives the wrong answer. There is only one constitutional power of Congress that could even arguably convey a comprehensive power over battlefield commands: Congress's power “to make Rules for the Government and Regulation of the land and naval Forces.”⁴ In Professor Prakash's view, this clause gives Congress all-encompassing military power. Below, I briefly explain why I think this is mistaken.

I. The Executive and Legislative Military Powers

The Constitution's Government and Regulation Clause comes directly from parallel language in the Constitution's predecessor, the Articles of Confederation. But there is a critical difference. Under the Articles, the Continental Congress had the power of “making rules for the government and regulation of the said land and naval forces, *and of directing their operations.*”⁵

On its face, this language seems to envision two distinct categories of military power: (i) making rules for government and regulation, and (ii) directing operations. And if there are two distinct categories, that is effectively fatal to the claim that the Constitution's Government and Regulation Clause gives Congress all aspects of military command.

Looking further back in history, we can see why the Articles' drafters thought it appropriate to include two powers instead of one. William Blackstone's influential 1765 account of the English legal system described a legislative military power held by Parliament and an executive military power held by the king.

The king, Blackstone said, was “generalissimo” or first general and, by this power, commanded the armed forces. Parliament, however, had the power to provide for military offenses and punishments through “articles of war” and related statutes, which Blackstone variously described as the power of “regulation,” “ordering,” or “government” of the armed forces. With respect to the navy, according to Blackstone, Parliament's power was exclusive, but with respect to the army, the king also had some power to

4. U.S. CONST. art. I, § 8, cl. 14. I leave aside, as Professor Prakash mainly does, the question as to whether Congress could accomplish much of the same thing through its appropriations power.

5. ARTS. OF CONFEDERATION art. IX (emphasis added).

create offenses and punishments. Blackstone found the latter arrangement unjust because it made the king a lawmaker for the army, and lawmaking power, he thought, should always be reserved to Parliament.⁶

Thus, Blackstone outlined two distinct military powers: one was legislative, encompassing the general regulation of the conduct of military personnel through “rules” such as the articles of war and other standing laws defining offenses and punishments; the other was executive, encompassing command and direction of the armed forces in response to specific circumstances. These categories line up with the two distinct powers the Articles gave the Continental Congress: making rules for government and regulation (e.g., adopting the U.S. articles of war) and directing operations (e.g., telling Washington not to burn New York). Thus the Articles made clear that Congress had all the military power previously exercised by Britain: the government and regulation power associated with Parliament and the power of command associated with the king.

As has been widely recounted, the Articles’ Congress came under sharp and increasing criticism on structural grounds. It was unworkable in practice and indefensible in theory, critics said, because it combined executive and legislative power.⁷ Among other problems, the unwieldy multi-member Congress proved unable to manage executive tasks, including direction of the army. A large part of the constitutional project was to create separate legislative and executive branches and assign appropriate powers to each.

This broader account makes it perfectly plausible—indeed, likely—that the Constitution’s framers had an idea of executive and legislative military powers that they wanted to assign to the President and Congress respectively. Thus, the change in wording from the Articles to the Constitution is easily understood. Under the Articles, the executive and legislative military powers, though described separately, were exercised by the same branch, since there was only one branch. When the Constitution created the new Congress as a true legislative branch, naturally it gave Congress the legislative military powers, but not the executive ones. This change was accomplished by carrying over to Congress the Articles’ government-and-regulation power but *not* its directing-operations power.

Plenty of founding-era statements confirm the idea of a distinct power of directing military operations that is particularly “executive” in character. At the Philadelphia Convention, for example, the delegates famously debated whether Congress should have power to “make” or “declare” war. The delegates principally understood this debate to implicate who could *commence* war, and James Madison in particular wanted to use “declare” so that the President could “make” war in response to attacks. But

6. 1 WILLIAM BLACKSTONE, COMMENTARIES *254–55, *400–09.

7. MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 65–67, 115–19 (2007); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 272–78 (2001).

Massachusetts delegate Rufus King offered a related point: as Madison's notes recount, "that 'make' war might be understood to 'conduct' it which was an Executive function." At least one delegate, Connecticut's Oliver Ellsworth, was reportedly so persuaded by this observation that he changed his vote, and no one was recorded as arguing to the contrary that Congress should be able to "conduct" war (or that it already had this power under the Government and Regulation Clause).⁸

King's and Ellsworth's thinking seems to underlie an array of founding-era statements that *Separation and Overlap* acknowledges but discounts. Alexander Hamilton's *Federalist 74*, for example, defended the Constitution's assignment of military power to the President by arguing that

the direction of war peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.⁹

Hamilton did not suggest that Congress had a superior power to direct operations (as he likely would have, had such a view been plausible, as *Federalist 74* was written to counter claims that the Constitution's President was too powerful).

On this understanding, then, the power to direct military operations, assigned expressly to the Continental Congress under the Articles, is part of the President's executive and commander-in-chief power under the Constitution. It was not part of the government-and-regulation power the Constitution gave to Congress, and thus Congress has no basis for exercising it. The President has this power exclusively, not because the President's power trumps Congress's power, but because only the President has it.

We may ask, though, whether we can meaningfully distinguish between directing operations and making rules for government and regulation. Admittedly, the borders may not be precisely defined, but some basic parameters seem apparent. Making rules for government and regulation, consistent with Blackstone's description of Parliament's power, involves creating standing rules and punishments that generally control the behavior of individuals within the military. The paradigm is the articles of war, the military code for the English (and later American) militaries. In contrast, directing operations refers to contingent orders made in response to immediate battlefield situations. This Parliament did not do; command was, as Blackstone said, "the undoubted right of his majesty" and "both or either house of parliament cannot, nor ought to, pretend to the same."¹⁰

8. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 319 (Max Farrand ed., 1966).

9. THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003).

10. 1 WILLIAM BLACKSTONE, COMMENTARIES *254.

Returning to our initial example, it seems clear that the Congress's 1776 "no burn" order falls squarely within the category of directing operations. It was adopted in response to a particular battlefield contingency, not as a general rule of conduct. In practice, to be sure, these categories may overlap in the sense of affecting the same conduct: the rule "do not damage civilian property" may have the same effect as a command "do not set fire to this city during your retreat." But just because they overlap does not mean that one subsumes the other, nor that no purpose is served by separating them. The Constitution's requirement that Congress control the military through general rules, not through operational commands, substantially limits the kind of interference that plagued Washington in 1776.

II. Counterarguments

Separation and Overlap offers at least four main counterarguments, but none seems persuasive. First, it argues that the "directing operations" language in the Articles might have been superfluous and thus nothing should be concluded from its omission in the Constitution. It is true that the Articles were a bit wordy and that the Constitution's drafters worked hard to eliminate redundancies, but there is no evidence that anyone saw this particular language as redundant. The idea is just Professor Prakash's heroic speculation. No one at the time argued that the government-and-regulation power wholly subsumed the directing-operations power. As I have noted, quite a number of speakers saw directing operations as a distinct power closely associated with executive power, as it was under the English system.

Second, *Separation and Overlap* claims that Congress, after ratification, exercised broad power over military operations, especially by enacting minutely detailed articles of war and micromanaging the "quasi-war" with France. As an initial matter, Congress's expansive view of its own power, standing alone, may be somewhat weak evidence that the power was in fact expansive. But in any event, Congress did not exercise anything like complete power over directing military operations. Enacting articles of war—even very detailed ones—is consistent with my description of the government-and-regulation power. Articles of war are standing rules. They were, as we have seen, part of what Blackstone described as the legislative aspect of English military power. They are not comparable to the order not to burn New York in 1776. It is true that they affect how the military personnel conduct themselves in combat, but that was not the crucial distinction between executive and legislative military power. As to the quasi-war, Congress did not make contingent battlefield orders, and to the extent it appeared to be directing operations, it was more likely acting under its declare-war power to restrict the scope of hostilities (as Professor Prakash suggests). More significantly, Congress did not attempt anything like operational direction of the nation's first post-ratification conflict—against the native tribes in the Northwest—despite the fact that the U.S. War

Department launched two terribly mismanaged campaigns and twice returned in humiliation to Congress for more troops and supplies.¹¹

The third response is that Congress is not practically capable of battlefield interventions and thus the founders likely would not have regarded the possibility as a threat. This proposition seems factually unrealistic. Military campaigns have not always moved quickly—especially so in the eighteenth century. Stalemate is common, slow progress even more so.¹² Under the Constitution, the President can slow Congress down and force opponents to assemble a supermajority, but during extended military operations, this would not allow the President to prevail.

The fourth argument is, I think, the one Professor Prakash may regard as the most conclusive. There is, he says, no way to describe or police the boundary between standing rules and battlefield directions. If Congress wants a one-time intervention, it can frame its desires as a general rule and then repeal the rule once the immediate situation has dissipated. This view, I think, assigns too much consequence to bad faith. To be sure, it is often possible to draft evasions of a rule. That does not mean the rule does not exist, or that it cannot be sensibly applied in many situations. To return to the “don’t burn New York” scenario, Congress could pass a law that says the members of the U.S. military shall not, under any circumstances, burn any town to deny it to the enemy. Imposed as a standing rule, that is part of its government-and-regulation power. Congress might adopt the same rule during an imminent retreat from New York, with the intent of repealing it immediately thereafter. But, despite the subterfuge, the latter rule is not the same as the former; it is a battlefield intervention. We need not be so formalistic that we cannot tell one from the other, nor disclaim the ability to make distinctions just because Congress could try to disguise its actions.

III. Conclusion

In sum, the Constitution directs a division of military power: Congress passes standing laws providing general regulations of conduct as “Rules for the Government and Regulation” of the military; the President directs operations as part of the executive power. This division reflects a traditional division of executive and legislative military powers found in English law. It follows from the Constitution’s adoption-with-modifications of the language of the Articles of Confederation, and it makes the most sense of founding-era comments on the Constitution. Thus the President is the only entity with the power to direct battlefield operations, and congressional attempts to exercise that power would be unconstitutional.

11. RICHARD H. KOHN, *EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA* 91–157 (1975).

12. For instance, consider World War I, the elaborate sieges of the Thirty Years’ War, or Washington’s defense of New York.

It is also important to say in conclusion that the President's operational exclusivity is much narrower than sometimes suggested. President George W. Bush's legal advisors, for example, claimed that Congress cannot interfere with the President's battlefield discretion even by passing generally applicable standing laws (and reached this conclusion without even discussing the Government and Regulation Clause!).¹³ I agree with Professor Prakash (and Professors Barron and Lederman) that this view goes far beyond the original understanding. But the President nonetheless retains some exclusive power—even if some executive officials have overstated it.

13. See Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1236–45 (2005) (discussing memoranda prepared by the Office of Legal Counsel in 2002).