

NOTES

RECAPTURING THE WAR POWER

The United States's ever-growing military participation in world affairs and the unconventional challenges of the War on Terrorism have sparked debate over the roles of Congress and the President in the initiation of military hostilities, the deployment of the armed forces abroad, and matters of national security. As the United States adapts its national defense to the security challenges of the future, it must not forget the original structural constraints and responsibilities established by the Constitution — not simply because it is the contract that binds us as a nation, but also because of the intelligence and continuing relevance of the structures of power that it created. Massive advances in military technology, as well as the United States's position as the world's sole superpower (a stark departure from the founding era), can make historical arguments related to the war power seem antiquated. Can one still argue for an originalist perspective without advocating a return to muskets and cavalry? An examination of the text and history of the war power can inform responses to new challenges and potential reforms to the system of divided war power. A better understanding of philosophical, political, and practical considerations that led to the Constitution's allocation of powers will allow these considerations to shape the adaptation of structures of power.

The buildup of a massive standing army since the end of World War II has altered the original balance of war power between Congress and the President, leading to what some scholars have termed “abdication” of congressional responsibilities.¹ But what responsibility does the Constitution impose on Congress for overseeing the war power? This Note focuses on the differences between the Army and the Navy Clauses with respect to constitutional constraints on congressional appropriations and how these differences shape the separation of powers in the war context. It goes on to argue that these differences illustrate the broad structural tension between the executive and legislative roles in war and discusses strategies through which Congress can use these structural differences to rebalance its role in military affairs. Part I argues that Congress's spending power, not its power to declare war, forms the basis for its primary and most effective war power. Part II explores the difference in congressional appropriations limits between the Army and the Navy as created by the Constitution.

¹ See, e.g., LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING (2000); see also JOHN HART ELY, WAR AND RESPONSIBILITY 47–67 (1993) (discussing abdication in the context of the Vietnam War).

Part III examines how this difference affects presidential autonomy with respect to the Army and the Navy and argues that this difference informs the intended character of presidential authority in foreign policy. Part IV presents a series of proposals rooted in considerations of original structure that are geared toward Congress reeffectuating its exercise of the war power.

I. MILITARY APPROPRIATIONS AS CONGRESS'S PRIMARY WAR POWER

Although scholars continue to debate whether the Declare War Clause requires the President to obtain some form of statutory authorization before initiating offensive military action,² they generally agree that Congress retains an important warmaking tool in the form of the appropriations power.³ Congress is the sole source of funding for the Army and the Navy, and it alone holds the power to call the Militia into federal service.⁴ Thus, the Commander-in-Chief only has as many soldiers under his command as Congress decrees.

Professor Philip Bobbitt argues that the best understanding of the “war power” examines that power not as a unitary authority placed in either the executive or legislative branch, but rather as a sequence of decisions that are alternately allocated to Congress and to the President. Congress’s military spending acts as the catalyst to the exercise of concurrent power: “[T]he pattern of required cooperation in war [is] sequential[;] . . . one branch can act within certain boundaries, thereby having an impact on the choices open to the other branches but not determining the outcome of those choices.”⁵ The power is first lodged in the legislative branch; with it Congress can choose to provide an

² Compare ELY, *supra* note 1, at 3–10 (arguing that the President is constitutionally required to obtain congressional approval before initiating offensive hostilities), and LOUIS FISHER, PRESIDENTIAL WAR POWER 14–15 (2d ed. 2004) (same), with ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 80–96 (1991) (arguing that the President has the authority to initiate hostilities without congressional authorization), and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 170–75 (1996) (same). Professors Curtis Bradley and Jack Goldsmith have observed that, whether or not it is required by the Declare War Clause, “based on political branch practice since the Founding, . . . a force authorization is *necessary* to . . . authorize the President” to conduct war even in the event of a war declaration. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057–66 (2005).

³ See, e.g., H. JEFFERSON POWELL, THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS 110 (2002) (“Congress’s power over spending is the source of the legislature’s ultimate power to counterbalance the executive branch and therefore to deter the possibility of executive waywardness or tyranny.”); sources cited *supra* note 2.

⁴ U.S. CONST. art. I, § 8, cls. 12, 15.

⁵ Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1388 (1994) (reviewing ELY, *supra* note 1).

Army for the President to command. The power then passes to the Executive's enumerated Commander-in-Chief power, with a reservation contained in the Army Clause that Congress revisit the question of continuing material support at least once every two years.⁶ Thus, "[a]s a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommissioning them or by forbidding their use in pursuit of a particular policy at any time."⁷ Congress should accordingly take appropriations statutes seriously and recognize them as its main check on executive exercise of military power because authorization through appropriations "is a valid means [of authorization] in and of itself."⁸

Constitutionally and historically, military appropriations statutes do indeed amount to authorizations for the President to use military forces to protect the country, and they also provide a check against executive abuses. Appropriations by their nature "are the constitutional equivalent of authorizations."⁹ The Appropriations Clause demands that appropriations be "made by Law"¹⁰ in the same manner as other federal statutes, only after bicameral approval and presentment to the President.¹¹ Indeed, the Supreme Court has stated that appropriations statutes may "stand[] as confirmation and ratification of the action of the Chief Executive"¹² and that "Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly."¹³ Thus, legislation through appropriations provides Congress with another method by which it can "properly chang[e] the law that the president must enforce" without interfering with the President's duty to enforce the laws.¹⁴

⁶ Cf. *id.* at 1392 ("[S]tatutes — defense appropriation acts, defense authorizations — can serve as the basis on which the President may validly commit U.S. forces without further returning to Congress for fresh mandates beyond those given by statute.")

⁷ *Id.* at 1390.

⁸ *Id.* at 1396.

⁹ Neal E. Devins, *Regulation of Government Agencies Through Limitations Riders*, 1987 DUKE L.J. 456, 480. There is no apparent reason this would not be as true in the military context as in other administrative contexts.

¹⁰ U.S. CONST. art. I, § 9, cl. 7.

¹¹ See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 110 (1994). Professors Banks and Raven-Hansen also point out that the holding of *INS v. Chadha*, 462 U.S. 919 (1983), in which the Supreme Court deemed that a one-house veto was unconstitutional because it violated the constitutional requirements of bicameralism and presentment, also suggests its inverse: "those bills that satisfy the requirements [of bicameralism and presentment] carry the force and effect of law." BANKS & RAVEN-HANSEN, *supra*, at 110.

¹² *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947).

¹³ *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

¹⁴ BANKS & RAVEN-HANSEN, *supra* note 11, at 112. For an example of an opinion advising the President that appropriations constituted authorization to use military force, see Authorization

Founding-era understanding supports the contention that spending was Congress's primary method of participating in warmaking. In a 1789 letter to James Madison, Thomas Jefferson wrote: "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."¹⁵ Jefferson's comment emphasizes military spending as a major legislative check on the war power, equating the power of "letting . . . loose" the "Dog of war" with the payment of military appropriations. Madison shared Jefferson's opinion of the importance of the power of the purse, describing it as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."¹⁶

Professor John Yoo points out that the debate over a congressional check on executive warmaking arose during the Virginia ratification process and that the Federalists responded to the antifederalist challenge by citing not Congress's power to declare war, but rather congressional control over military spending.¹⁷ Early historical practice and court decisions support this reading. In 1797, following what became known as the XYZ Affair, the United States began its first undeclared war — a naval war with France. Congress authorized the war through a series of statutes enlarging the Army and the Navy, approving and funding various military construction projects, authorizing the President to raise troops, voiding existing treaties with France, and empowering the President to capture French warships.¹⁸ In *Bas v. Tingy*,¹⁹ the Supreme Court relied largely on these statutes and recognized this conflict as an "imperfect,"²⁰ "partial," and "limited" war,²¹ but nonetheless validly authorized, even though no declaration of war had been made:

In March 1799, congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of France

. . . .

for Continuing Hostilities in Kosovo, 2000 OLC LEXIS 16, at *1-33 (Dec. 19, 2000) [hereinafter Kosovo Opinion], available at <http://www.usdoj.gov/olc/final.htm>.

¹⁵ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) (footnote omitted).

¹⁶ THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

¹⁷ See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1656-58 (2002).

¹⁸ CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 170 (2003).

¹⁹ 4 U.S. (4 Dall.) 37 (1800).

²⁰ *Id.* at 40 (opinion of Washington, J.) (emphasis omitted).

²¹ *Id.* at 43 (opinion of Chase, J.).

... [T]he degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war.²²

The Court recognized, however, that Congress had also placed constraints on presidential action through those authorizations. Justice Chase noted that “Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases.”²³ Similarly, in *Little v. Barreme*,²⁴ the Court held that Captain Little of the frigate *Boston* had violated a nonintercourse law by capturing a Dutch vessel on a voyage from a French port. Although Little was acting under orders, he was found liable for damages since Congress had legalized capture only of ships voyaging to French ports.²⁵

In the early days of the Civil War, President Lincoln’s emergency-driven response demonstrated a robust concept of presidential war power — but one that at the margins still acknowledged Congress’s role, especially in the area of appropriations.²⁶ In his 1861 appeal to Congress, Lincoln used language that seemed to equate military appropriations with legal authorization for the use of military force: “It is now recommended that you give the *legal* means for making this contest a short, and a decisive one; that you place at the control of the government, for the work, at least four hundred thousand men, and four hundred millions of dollars.”²⁷

Recent examples of congressional war authorization through appropriations include the Korean War and the Vietnam War. Notably, a federal appellate court upheld presidential action in Vietnam as supported by Congress via appropriations legislation. In *Orlando v. Laird*,²⁸ the Second Circuit stated:

Congress has ratified the executive’s initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia

. . . .

. . . The framers’ intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operations in Southeast Asia.²⁹

²² *Id.* at 41 (opinion of Washington, J.).

²³ *Id.* at 43 (opinion of Chase, J.).

²⁴ 6 U.S. (2 Cranch) 170 (1804).

²⁵ *See id.* at 176–79.

²⁶ *See* DANIEL FARBER, LINCOLN’S CONSTITUTION 115–43 (2003).

²⁷ Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 246, 254 (Roy P. Basler ed., 1989) (emphasis added).

²⁸ 443 F.2d 1039 (2d Cir. 1971).

²⁹ *Id.* at 1042–43.

The Second Circuit later reiterated this statement. In *DaCosta v. Laird*,³⁰ it found that “there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive.”³¹ In a subsequent proceeding, the court found joint authorization between “the Executive by military action and the Congress, by not cutting off the appropriations that are the wherewithal for such action.”³² These holdings had plenty of appropriations money to back them up: billions of dollars clearly earmarked for the Southeast Asian conflict were appropriated during the course of the Vietnam War.³³ And Congress did not have the excuse that these appropriations occurred before its decision to withdraw authority to conduct the war: after the repeal of the Gulf of Tonkin Resolution, Congress continued to appropriate funds for military activities in Southeast Asia and continued to extend the draft.³⁴ The Vietnam conflict ultimately ended when Congress pulled the plug on funding for the war.

Congress attempted to prevent the President from relying on appropriations legislation as authorization for war in section 8(a) of the War Powers Resolution.³⁵ Section 8(a) provides that authorization “shall not be inferred . . . from any provision of law . . . including any provision contained in any appropriation Act” unless the provision specifically authorizes initiation of hostilities.³⁶ Since its enactment, however, Presidents have relied on supplemental appropriations for military operation as authorization to continue hostilities after the sixty-day period allowed by section 5(b).³⁷ Notably, the Office of Legal Counsel advised President Clinton in May 1999 that the supplemental appropriations authorized continuing hostilities in Kosovo. In a subsequent memorandum, the Assistant Attorney General argued that section 8(a)(1) is likely not binding on future Congresses that enact appropriations statutes demonstrating a clear intent to authorize

³⁰ 448 F.2d 1368 (2d Cir. 1971) (per curiam).

³¹ *Id.* at 1369.

³² *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973).

³³ May 1965 supplemental appropriations for \$700 million were approved by the House by a vote of 408–7 and by the Senate by a vote of 88–3; they were followed by September 1965 supplemental appropriations of \$1.7 billion. In early 1966, Congress approved additional supplemental appropriations for \$4.8 billion, which passed in the House 393–4 and in the Senate 93–2. Furthermore, the Senate rejected appropriations riders limiting executive authority to send draftees to Southeast Asia. See *BANKS & RAVEN-HANSEN*, *supra* note 11, at 120–21.

³⁴ In fact, Congress voted 113 times on war-related proposals between July 1966 and July 1973. See *id.* at 121.

³⁵ 50 U.S.C. § 1547(a) (2000).

³⁶ *Id.*

³⁷ See *id.* § 1544(b).

continuing hostilities because the later statute would supercede or constitute an implied partial repeal of the prohibition.³⁸

II. THE “TWO YEAR” DISPARITY

The funding mechanisms through which Congress shapes military policy are embedded in the Army and Navy Clauses of Article I.³⁹ The Constitution does not treat the military as a unitary entity. Rather, the three branches — the Army, the Navy, and the Militia⁴⁰ — are governed by separate clauses. The textual differences between the clauses are not superficial; they go to the essence of the war power’s structure. The Framers designed the military branches independently of one another in a manner that reinforces the division of the concurrent war power between the legislative and executive branches.⁴¹ The text of the Army and Navy Clauses reflects the Framers’ intent to extend the separation of powers they had created elsewhere in the Constitution to military affairs.

A. *The Army Clause*

Article I provides for the establishment of a national military and for congressional military appropriations. Congressional power to establish a military and to spend public funds on defense is initially suggested in the first clause of section 8, which states that “Congress shall have Power To . . . provide for the common Defence.”⁴² Yet the Framers expressly decided to address military appropriations and their limits in the Army Clause as one of Congress’s enumerated powers.⁴³ The Army Clause states that Congress shall have the power “[t]o raise

³⁸ See Kosovo Opinion, *supra* note 14, at *33–51 (citing support from case law and scholarly works arriving at the same conclusion).

³⁹ U.S. CONST. art. I, § 8, cls. 12, 13.

⁴⁰ The Constitution states that Congress has the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and “to provide for organizing, arming, and disciplining the Militia.” *Id.* art I, § 8, cls. 15, 16. Given this Note’s focus on funding mechanisms, it considers the role of the Militia only briefly. See *infra* notes 47–52, 77, and accompanying text. For an excellent explanation of how the Framers envisioned the three clauses and military branches functioning together, see Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1024–25 (2003), upon which this section relies heavily.

⁴¹ See Delahunty, *supra* note 40, at 1024–25; Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 61, 61–94 (Richard H. Kohn ed., 1991).

⁴² U.S. CONST. art. I, § 8, cl. 1.

⁴³ See BANKS & RAVEN-HANSEN, *supra* note 11, at 110 (“The first textual reference to appropriation is the Army Clause, which is part of the itemization of Congress’s substantive law-making powers. Nothing in this itemization suggests that this appropriation power is any less substantive than any other.”).

and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁴⁴ The structure of the clause acknowledges that congressional military appropriations are central to the federal government’s ability to raise and support its own military force. Read in light of the Appropriations Clause,⁴⁵ which makes clear that Congress’s appropriations power is exclusive, the Army Clause gives Congress the sole power to create and maintain a federal, standing, professional land force, distinct from the state militias, under the President’s command.⁴⁶

The question whether to maintain standing armies was one of considerable sensitivity for the Framers. Hostility to standing armies was inherited from Britain and strengthened in the Colonies;⁴⁷ in the Declaration of Independence, colonists listed maintenance of a standing army during peacetime as one of King George III’s affronts.⁴⁸ At the same time, many expressed the view that standing armies, or at least the ability to raise armies quickly, were vital to the security of a modern state.⁴⁹ In the founding era, the Militia took the place of the Army as “an armed and trained land force that could be mobilized rapidly for the defense of the homeland or to quiet large-scale insurrections” in times of emergency.⁵⁰ The Federalists believed a large army was unnecessary because the Militia would bear the majority of the burden

⁴⁴ U.S. CONST. art. I, § 8, cl. 12.

⁴⁵ *Id.* art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

⁴⁶ *See id.* art. II, § 2, cl. 1.

⁴⁷ *See* LOIS G. SCHWOERER, “NO STANDING ARMIES!” 8 (1974); Delahunty, *supra* note 40, at 1030–34. Since ancient times, the crown had maintained the prerogative to “keep as many soldiers as he want[ed] so long as he pa[id] for them.” SCHWOERER, *supra*, at 76. But by granting to Congress the exclusive powers to “raise and support” armies and to appropriate under the Spending Clause, the Constitution indicates that the President may not use sources outside congressional appropriations to fund an army. Any attempt to circumvent the spending check is thus constitutionally impermissible.

⁴⁸ THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

⁴⁹ Delahunty, *supra* note 40, at 1034; *see also id.* at 1034–36 (citing statements by Alexander Hamilton, George Washington, James Madison, and other Founders in support of a small standing army).

⁵⁰ *Id.* at 1053. Notably, although the Militia is the force expressly designated to defend the homeland and to repel sudden attacks, it is called to federal service by Congress, not the President. Therefore, although the President would not need congressional authorization to repel sudden attacks with the Army, he would require congressional action to use the Militia for this purpose. In such a situation, Congress would presumably call forth the Militia immediately; however, should Congress not meet in time, individual state governors were recognized as having the power to call the state militias to repel sudden attacks or invasions of the state. Presumably, this mechanism would give Congress enough time to meet and issue the necessary order. Another possibility would be for the President to overstep his constitutional bounds in the event of an emergency. He would call the Militia to repel the invading force and go to Congress for retroactive authorization. Congress’s power to impeach the President for misuse of this authority should adequately deter abuse.

for defense.⁵¹ Experience in the Revolution, however, taught them that they could not rely on the Militia alone for the national defense and that massive militia reform, as well as the creation of some sort of professional federal army, were necessary.⁵²

Thus, the problem that the Framers encountered was one of “provid[ing] for the possibility of a standing professional army even in peacetime, while also guarding against the abuses to which such a military establishment was thought to be prone.”⁵³ The Framers’ solution was to fashion a system modeled after the British Bill of Rights of 1688, which prohibited keeping armies during peacetime except those the King could pay for himself. The British military funding structure provided the checks and balances on executive warmaking:

Parliament’s check on the King’s power of “making war,” therefore, was to deny him the means by which to do so — by holding the army down to a scale that made wars of conquest or adventure abroad a military impossibility. *However, once Parliament had raised and funded an army, it remained within the King’s prerogative how to dispose of it — and that prerogative included the use of the army in military engagements abroad against foreign powers.*⁵⁴

The Constitution adopts a similar balance between the President and Congress. The text imposes only one limitation on Congress’s power to create and maintain such a land force in peacetime: appropriations of funds for this service must be revisited regularly, at least once within the two-year cycle for elections to the House of Representatives. Within the Army Clause is a subordinate clause (the Two-Year Clause) indicating that “no Appropriation of Money to th[e] Use [of raising and supporting armies] shall be for a longer Term than Two Years.”⁵⁵ Congress’s otherwise plenary control over military funding and organization means that “Congress could fine-tune any conditions so as to enhance, or restrict, presidential authority over that army, and the *size* of a regular army could be calibrated so as to give Congress, or the President, varying degrees of effective control.”⁵⁶ Thus, in times of impending crisis, Congress could authorize greater funding for a

⁵¹ This belief was spurred by their conviction that America’s distance from Europe precluded a sudden large-scale invasion. RICHARD H. KOHN, *EAGLE AND SWORD* 85 (1975).

⁵² *See id.* at 137.

⁵³ Delahunty, *supra* note 40, at 1036. Professor Delahunty notes the problems typically attributed to standing armies: they posed a threat to liberty and were both wasteful and unnecessary. The United States’s geopolitical position resembled that of an island in many respects because of the ocean separating it from potential European rivals. Thus, it was thought that the United States “required only defensive forces, that is, a Navy and a militia, to serve as a homeland defense force.” *Id.* at 1033.

⁵⁴ *Id.* at 1038–39 (footnote omitted).

⁵⁵ U.S. CONST. art. I, § 8, cl. 12.

⁵⁶ Delahunty, *supra* note 40, at 1046.

larger federal army. Once the need had subsided, Congress could scale back Army spending and size.⁵⁷

As a practical matter, the two-year appropriations limitation prevents Congress from committing a future Congress to long-term military action and requires Congress to review foreign policy on an ongoing basis through its power of the purse. Hamilton described the two-year spending limitation in the Army Clause as follows:

The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence.⁵⁸

On its face, Hamilton's comment illustrates the Framers' distrust of standing armies and their intention to cultivate a legislative presumption against them. However, Hamilton's remark is directed toward Congress's ongoing legislative *obligation* to take policy positions on the record regarding military necessity and toward prohibiting delegation of such review to the executive branch. In other words, to the extent that the lack of a standing army was intended to check the President's ability to wage war, the Two-Year Clause may have prevented Congress from delegating to the executive branch the decision whether to continue a national military engagement.⁵⁹

B. *The Navy Clause*

The Navy Clause grants Congress the power "[t]o provide and maintain a Navy."⁶⁰ As under the Army Clause, once Congress has established the Navy, control passes to the President as Commander-in-Chief. But the Navy Clause differs from the Army Clause in one cru-

⁵⁷ See *id.* at 1043 ("[W]hen war was threatened or when the Nation had been invaded, Congress would have been expected to authorize larger federal land forces, but it would also have been expected to scale down those forces after the emergency had passed (one purpose, surely, of the biennial appropriation requirement).").

⁵⁸ THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 16, at 171-72; see also THE FEDERALIST NO. 41 (James Madison), *supra* note 16, at 259-60; Bernard Donahoe & Marshall Smelser, *The Congressional Power To Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202, 210 (1971).

⁵⁹ See Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 835 (1994) ("The power of the purse supplemented the Declaration of War power by allowing Congress to control war powers by specifying spending objectives or otherwise restricting spending *ex ante*. It also compensated for the possible failure of antecedent controls by giving Congress the *ex post* power of 'supply' — appropriations for supporting military forces — which allows the legislature to determine how long U.S. participation in war may continue.").

⁶⁰ U.S. CONST. art. I, § 8, cl. 13.

cial respect. Despite the clauses' proximity and similar structure, the Navy Clause does not contain any similar time limitation on the Navy's funding. Thus, once the Navy is placed under the President's control, there is no textual requirement of congressional oversight and reauthorization. This conspicuous omission indicates that the Framers expected the President to exercise greater autonomy in his command of the Navy than of the Army. Contrasting the language used to vest authority in Congress to create these two military entities likewise supports this conclusion. Congress is empowered to "raise and support Armies," suggesting that creating the force itself — raising the army — is expected to be a recurring congressional action. In contrast, the Navy Clause language, to "provide and maintain," suggests that once Congress has established the Navy, its expected action is one of ongoing maintenance, not reenactment.

There are two potential reasons for the difference between the clauses. First, the practical requirements of a navy were much different from those of even a sophisticated land force. Providing a navy meant considerable financial investment in shipbuilding. Shipbuilding also took time. A requirement that Congress reinitiate the Navy's mandate every two years would have encountered the serious practical problem that it would have been impossible to build and train a navy fleet in under two years.⁶¹ Such a limitation, then, might have prevented the country from having an effective navy altogether.

But the complete omission of any time limitation suggests that the reason went beyond the practicalities of time and money. It also reveals how the Framers conceived of the functions, dangers, and advantages of each branch. The notion that a navy, particularly one in the hands of a unitary executive, posed less of a threat to a republic than a standing army did and thus its existence would not need to be revisited by the people's representatives every two years, was generally accepted at the time.⁶² In addition, a naval force was essential to a budding mercantile nation's ability to protect itself and its trade from foreign enemies and pirates.⁶³ Thus, the second reason for the divergent treatment of the two branches was that the Framers viewed the Navy as less dangerous and more vital than the Army.

III. STRUCTURAL IMPLICATIONS

The young republic — a peripheral player with limited resources, heavily dependent on development of its foreign trade, and surrounded

⁶¹ Delahunty, *supra* note 40, at 1049 n.103.

⁶² *Id.* at 1049.

⁶³ See Kohn, *supra* note 41, at 65–66.

by potential enemies⁶⁴ — required an expert military strong enough to protect the homeland and its growing trade interests. Moreover, this military could not threaten liberty by placing too much power in the Executive or by creating a military caste. An important structural goal in crafting a concurrent war power was to ensure a vital role for Congress in war decisions while preserving the unity of political, military, and diplomatic command, as well as the “suppleness and discretion that only broad executive power could bring to times of crisis.”⁶⁵ To achieve these goals, the Framers crafted three distinct clauses to govern the three distinct military branches. Each service branch was constructed to strike the appropriate balance between the external threat of foreign attack and the internal threat to liberty. By requiring less congressional oversight of the Navy than of the Army, the Framers granted the President greater autonomy over the military entity they believed to be less threatening to liberty, but most crucial to protecting the country’s economic and foreign affairs interests. The President’s greater autonomy over the Navy comports with early descriptions of the President as the “sole organ” in foreign affairs.⁶⁶ In the founding era, commercial and naval encounters on the high seas were the principal method of intercourse with other nations, and thus the Navy would have been considered the central military tool in foreign affairs.

In a watershed foreign affairs decision, *United States v. Curtiss-Wright Export Corp.*,⁶⁷ the Supreme Court described an important distinction between the domestic and foreign spheres, the inward-looking and the outward-looking faces of the nation, affirming the supremacy of the Executive in foreign affairs:

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.⁶⁸

⁶⁴ See Delahunty, *supra* note 40, at 1025–28 (discussing strategic problems stemming from the United States’s geopolitical situation, including a weak military, a lack of material resources compared to established European powers, the risk of becoming a “mere commodity-exporting dependenc[y] within the British imperial trading system,” debts and conflicts remaining from the Revolution, and, especially, susceptibility to severe internal divisions).

⁶⁵ *Id.* at 1029.

⁶⁶ 2 ABRIDGEMENT OF THE DEBATES OF CONGRESS 466 (New York, D. Appleton & Co. 1858). John Marshall, before his nomination and confirmation to the Supreme Court, famously declared that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations” and that “[t]he [Executive] is entrusted with the whole foreign intercourse of the nation.” *Id.* at 466–67; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (adopting Chief Justice Marshall’s famous phrase).

⁶⁷ 299 U.S. 304.

⁶⁸ *Id.* at 319.

Of course, in the larger federal system of sequential powers, this statement is misleading. Congress has an important voice in foreign affairs — articulated through military appropriations — that defines the outer scope of foreign policy.⁶⁹ Without money or military resources, the President’s effectiveness as the “representative of the nation” would be limited indeed. Early congressional debates over the Navy began with a three-year battle over the construction of just three ships⁷⁰ — an indication of the foreign policy implications of the Navy’s size and scope. The Navalists favored building a large ocean-going navy that could intimidate foreign heads of state and deter conflicts. The Antinavalists realized that the Navalist vision meant a more active role in world affairs, particularly European affairs, and balked at the construction of a battleship fleet.⁷¹ Jefferson, an Antinavalist, supported building a small fleet of gunboats that could help defend the coastline and warn of attack but could not compete with large ocean-going battleships. Antinavalists feared that a powerful navy would be too costly and would allow the President, who had largely autonomous control over the Navy once created,⁷² to get the country into mischief.

The outward-looking nature of the Navy does not, however, completely explain the structural difference between the Army and Navy Clauses. After all, the Army is oriented to foreign conflicts as well.⁷³ But the military realities underlying the Framers’ concerns that a standing army posed a threat to liberty — and their relative lack of concern with presidential conquest with a navy — were as true in the foreign arena as in the domestic. Just as the Navy, “even if supplemented by a force of marines, could hardly stage a *coup* and hold down the thirteen United States,” it is difficult to imagine it as the

⁶⁹ Furthermore, this statement from *Curtiss-Wright* discounts the Senate’s role in treaty-making, as well as Congress’s role in performing functions central to foreign affairs, such as declaring war, issuing letters of marque and reprisal, and defining and punishing offenses against the law of nations. A formalist might assert that the legislature and the Executive remain fairly strictly within their traditional domains, with the legislature delineating the financial and legal boundaries within which the Executive acts.

⁷⁰ See CRAIG L. SYMONDS, *NAVALISTS AND ANTINAVALISTS* 72–80 (1980).

⁷¹ See *id.* at 12–14 (describing the Navalists and Antinavalists); see also *id.* at 107 (“[T]he argument between those who advocated a gunboat force and those who favored a seagoing navy was not one of *capabilities* — both sides agreed that gunboats were useful only in coastal defense — it was over the *desirability* of attempting a larger role.”).

⁷² Of course, Congress retains the option to cut funding, to refuse to renew funding, or to embed its own time limit for funding within naval or other appropriations measures. Furthermore, should the President abuse his control over the Navy, Congress retains the power to impeach and remove the President.

⁷³ It is important to note, however, that the posse comitatus statute, which limits the President’s power to use the Army for domestic law enforcement, was not passed until 1878. See Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878). Lack of such a limitation on domestic use of the military perhaps explains some of the Framers’ nervousness that the President’s command of the Army was a possible domestic threat.

primary instrument of executive invasion and conquest, the sort of uncontrollable military action that concerned the Framers.⁷⁴ Congress could easily keep the force to a defensive size, and “naval engagements with the European maritime powers would likely involve only clashes at sea, not full-scale invasions of national territory.”⁷⁵ Full-scale invasions and land wars required Army involvement and thus more significant congressional oversight. Autonomous control over a professional Navy — but not over the Army — would thus allow the President to control ongoing foreign policy (within a congressionally defined scope) but reserve the decisions involving greater national commitment for further debate with Congress.⁷⁶

The Navy might also be considered a primarily defensive rather than an offensive force because it cannot invade and occupy territory alone. Although the Navy would be the first line of defense in the case of a transatlantic attack, the Militia was the military institution most responsible for homeland defense. The Militia Clause gave the President a trained military force capable of integration into military operations under a single national commander even in the absence of a large standing federal army. This power certainly increased the size and scope of the force available to the President’s command; however, there were three significant constraints on that power. First, an act of Congress is required to call the Militia into federal service. Because the President’s power over the forces is derived from Congress (not the Constitution), it is subject to whatever limitations Congress may apply. Also, because the Militias were decentralized state organizations whose officers were appointed by (and thus loyal to) the states rather than the federal government, they were a check against potential tyranny.⁷⁷

Curtiss-Wright correctly identified broad presidential autonomy in the area of foreign affairs under the Commander-in-Chief Clause.⁷⁸

⁷⁴ Delahunty, *supra* note 40, at 1049; *see also id.* at 1052 (“Vesting in the President the authority to *deploy* the Navy — once Congress had created it — did not tend to encourage wanton executive war-making. . . . [A] Navy without an army could not be used to conquer and annex a land mass . . . [.]”). An important counterexample illustrates the potential for domestic mischief with the Navy — that of Lincoln’s blockade of the South in the earliest days of the Civil War. *See infra* note 83. However, a secession crisis may be the exception that proves the rule that a President would be extremely unlikely to resort to use of the Navy as a military tool in the domestic sphere.

⁷⁵ Delahunty, *supra* note 40, at 1052.

⁷⁶ Similarly, Congress could choose to provide the President with different levels of legislative support through appropriations, issuance of letters of marque and reprisal, legislation defining offenses against the law of nations and other offenses affecting foreign affairs, and declarations of war.

⁷⁷ *See* Delahunty, *supra* note 40, at 1053–54.

⁷⁸ U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”).

Under even the narrowest reading of the clause, the President is the top military general of the federal armed forces and cannot be substituted in this capacity.⁷⁹ A broader reading, however, would allow the Commander-in-Chief power to balance the near-plenary congressional power to control the scope of presidential foreign policy through funding by affording the President total discretion to create and execute that policy within the limited resources allocated by Congress.⁸⁰ The Supreme Court has supported this broader reading, holding that the President has the authority to deploy forces abroad or otherwise to command an existing army and navy as he sees fit.⁸¹

Broad presidential autonomy to command a standing army and navy would allow the President to respond directly to emergency situations as needed. Early practice and contemporaneous statements suggest that the Framers anticipated emergencies might arise that would

⁷⁹ The extent to which Congress may use conditions on appropriations to control presidential exercise of the Commander-in-Chief power is unclear. In a memorandum addressing the Executive's power to place U.S. troops under United Nations control, Assistant Attorney General Walter Dellinger argued that Congress could not indirectly invade the President's constitutional authority by placing conditions on appropriations. See *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. Off. Legal Counsel 182 (1996). Although the narrowest reading of the Commander-in-Chief Clause would seem to prohibit Congress from conditioning funding as a way of forcing the President to cede tactical control of the Armed Forces, see, e.g., ELX, *supra* note 1, at 5, the extent to which such tactical control includes the day-to-day operations of the military, including number of troops deployed, location of deployments, and military strategy, remains uncertain, see BANKS & RAVEN-HANSEN, *supra* note 11, at 144-57.

⁸⁰ See Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority To Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 490 (2002) (arguing that presidential power "is at its zenith" when the President is acting as Commander-in-Chief); see also Delahunty, *supra* note 40, at 1046 ("Congress could fine-tune any conditions so as to enhance, or restrict, presidential authority over the army [But] if an army were created unconditionally, the President's decisions whether, when, and how to deploy it would be matters of his good judgment.").

⁸¹ See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (stating that, in a crisis situation, the President alone must "determine what degree of force the crisis demands" (internal quotation mark omitted)); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . ."). Yet there remains some debate over the constitutionality of congressional conditions on appropriations. A federal court has only once struck down such a funding condition as unconstitutional. See *Nat'l Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671, 685 (D.D.C. 1988), *vacated sub nom.* *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (per curiam); see also Raven-Hansen & Banks, *supra* note 59, at 923-42 (discussing *National Federation of Federal Employees* and concluding that the funding condition at issue was constitutional). An appropriations condition removing the President as Commander-in-Chief of the federal military would clearly be unconstitutional. Beyond this most central requirement, however, it is likely that any such condition would be subject only to the general requirements that the Court has placed on other legislative funding conditions. Cf. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (discussing "several general restrictions" on Congress's spending power in the federalism context).

force the President to act before Congress could assemble.⁸² If Congress had not yet granted him sufficient resources, the President could take a risk — one he presumably would take only if responding to a true emergency — by acting unconstitutionally to respond to the crisis and asking Congress to ratify those actions after the fact.⁸³

IV. RESTORING ORIGINAL STRUCTURE TO THE MILITARY

The United States's current geopolitical situation and its military capabilities are very different from those of the founding era. In the 1790s, the United States military establishment did not exceed a few thousand members.⁸⁴ In September 2005, the Department of Defense reported a force of almost 1.4 million active duty personnel worldwide.⁸⁵ How can Congress effectively control policy through funding in an era when such tremendous resources already rest with the President? Congress has several options.

A. Overcome the “Rally Around the Flag” Effect

The most devastating criticism of proposals centered around congressional control of military action through funding is that they are not feasible because of the political difficulties of cutting defense fund-

⁸² See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24–26, 36–38 (1993) (describing instances in which the Framers and Presidents noted the power to violate the law in an emergency).

⁸³ See BANKS & RAVEN-HANSEN, *supra* note 11, at 37–38. This process was tested in April 1861, with the secession crisis exploding only a few weeks into Abraham Lincoln's presidency. See FARBER, *supra* note 26, at 12–21. Although Lincoln probably violated the obligation to seek approval for his potentially unconstitutional actions at the earliest opportunity by taking four months to approach Congress, see *id.* at 116, 118, 138, it may be anachronistic to judge the passage of time and availability of opportunities in an 1860s Washington, D.C., surrounded by enemies. Lincoln was purposefully oblique in detailing to Congress his extraconstitutional actions taken in response to the crisis — famously suspending the writ of habeas corpus, but also asking for volunteers to join the Army, calling up the Militia, appropriating funds for warmaking, and pursuing other actions that he admitted were of questionable constitutionality. See Lincoln, *supra* note 27, at 252; see also FARBER, *supra* note 26, at 118–19, 143. That a President on the verge of civil war admitted to taking actions of questionable constitutionality and placed himself at the mercy of Congress, however, presents a rather remarkable display of how the system could function. See FISHER, *supra* note 2, at 263. There is an important difference between this assertion and that underlying Professor Monaghan's article. Professor Monaghan suggests that such actions would be constitutional under his conception of “protective power,” see Monaghan, *supra* note 82, at 11, 36–38, whereas the approach advocated here acknowledges the unconstitutionality of the action and would force the President to answer to the consequences of having acted unconstitutionally should Congress subsequently disagree with the President's assessment of the crisis. Under these circumstances, patriotism and political pressure in favor of defending national security would operate strongly in the President's favor.

⁸⁴ See KOHN, *supra* note 51, at 229, 248.

⁸⁵ U.S. DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND COUNTRY (309A) 4 (2005), <http://web1.whs.osd.mil/mmjd/military/history/hstog05.pdf>.

ing, especially after a conflict has already started. One such political difficulty is the “rally around the flag” effect. Votes against military funding are frequently portrayed as showing a lack of support for men and women in uniform, not as exercising the central congressional tool for shaping foreign and military policy.⁸⁶ A recent example is the response to Senator John Kerry’s disastrous comments regarding his vote against supplemental funding for the invasion of Iraq after having initially voted to authorize the war effort.⁸⁷ If indeed Senator Kerry’s position on the wisdom of going to war had changed, he properly voted against additional funding that would have expanded the war’s scope. Senator Kerry still left himself open to criticism, however, for having voted for such open-ended military authorization in the first place if he was unwilling to cede such discretion to the President.

This example illustrates a central problem with Congress’s current two-tiered system of military funding. Congress and advocates of congressional primacy in war power seem to believe that forcing the President to seek a congressional authorization statute or a declaration of war — that is, a legal authorization — strengthens Congress’s control over presidential military initiatives. In fact, it may have the opposite effect. Statutory authorization or a declaration of war grants to the President the legal prerogative to engage in hostilities without necessarily the means to carry out that order, giving the President a political tool with which to force Congress’s purse at a subsequent date. A much more effective alternative is to authorize use of force through appropriations. Using this control mechanism, Congress authorizes only those actions it is willing to pursue fully, and through the appropriations process it can expressly limit the scope of authorization.

B. *Replace the War Powers Resolution*

The Two-Year Clause also indicates a maximum expiration date on authorized presidential deployment of Army forces. Once the appro-

⁸⁶ Cf. Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1065 (2005) (arguing that it is irrational for Congress to vote for appropriations out of an emotional aversion to “abandon[ing] the troops in the field” because “cutting off appropriations means that any sane president would withdraw the troops rather than leave them to fight defenseless”).

⁸⁷ In October 2002, Senator Kerry voted for a joint resolution authorizing the use of military force against Iraq. See 148 CONG. REC. S10,342 (daily ed. Oct. 10, 2002). A year later, Senator Kerry voted against a bill appropriating \$87 billion of supplemental funding to the wars in Iraq and Afghanistan. See 149 CONG. REC. S12,821 (daily ed. Oct. 17, 2003). When asked to explain the discrepancy between his first and second votes, Senator Kerry attempted to split hairs, claiming he had supported the funding in committee (voting for an amendment that failed in the Senate) but opposed the bill because of financing issues. See Glen Johnson, *Kerry Blasts Bush on Protecting Troops*, BOSTON GLOBE, Mar. 17, 2004, at A1. His comment, “I actually did vote for the \$87 billion, before I voted against it,” left him open to charges of having flip-flopped on the issue. See Matea Gold, *Kerry’s Vision Not Clear, Analysts Say*, L.A. TIMES, Nov. 4, 2004, at A14.

priations term lapses, the President cannot constitutionally continue a military action without receiving further appropriations and approval from Congress.⁸⁸ A similar provision in the War Powers Resolution imposes a sixty-day limit on the President's use of military force without congressional approval, with the further condition that Congress can by concurrent resolution order the President to withdraw the troops before the sixty days expire.⁸⁹ This provision is "almost certainly unconstitutional" because it violates the presentment requirement.⁹⁰ The two-year term functions in somewhat the same way — granted, with a much longer period than sixty days — but without running afoul of the presentment requirement.

The Two-Year Clause contains several distinct features that give Congress the powers it sought when it enacted the War Powers Resolution. First, military appropriations and appropriations riders are within Congress's plenary power over federal spending, and they allow Congress to shape the policy choices available to the executive branch. Second, nonspecific military appropriations do not necessarily give the President a blank check: Congress can reset the clock within the two-year time limitation by amending existing appropriations statutes or by enacting specific appropriations statutes that contain riders limiting their applicability. Whereas a principal practical critique of the War Powers Resolution has been that the President has the ability to circumvent the sixty-day clock by interpreting the trigger provisions to his advantage,⁹¹ in the appropriations context Congress controls both the clock's trigger (by passing the appropriations measure) and the authorization's expiration (by deciding its term).

C. Increase Congressional Initiative and Control over Military Affairs and Military Appropriations

To rebalance the war power, Congress must take more initiative and responsibility for military appropriations. A good start would be to engage in appropriations debate as a body instead of delegating much of the responsibility for shaping the debate to the President and the Armed Services and Appropriations Committees. An initiative in

⁸⁸ Enforcement of this limitation, however, would be left to Congress through its political tools and impeachment power. The political question doctrine and lack of an appropriate original structural role for the courts in the warmaking process keep the judicial branch largely out of the issue. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."); Yoo, *supra* note 2, at 182–86 (discussing how the Supreme Court has employed several doctrines to avoid "becoming embroiled in war powers disputes"). For this system to work, however, Congress must aggressively exercise its powers.

⁸⁹ See War Powers Resolution, 50 U.S.C. § 1544(c) (2000).

⁹⁰ Yoo, *supra* note 2, at 181 n.64 (citing *INS v. Chadha*, 462 U.S. 919, 944–59 (1983)).

⁹¹ See, e.g., ELY, *supra* note 1, at 123–25.

this direction would be to redesign the committee system. In the Senate, for instance, the current standing Committee on the Armed Services could revert to the original select committee system: from 1789 to 1816, the Senate relied on temporary “select” committees, the jurisdiction and membership of which were reviewed periodically.⁹² Because of the possibility of frequent changes in their jurisdiction and membership, these committees were responsive to the Senate majority that created them. In December 1816, the Senate created several permanent standing committees, including committees with responsibility for foreign affairs, military affairs, the Militia, and naval affairs.⁹³ Although these standing committees allow their members to gain expertise, the long-term effect of the standing committee system has been a change in the origin of policies. Whereas under the select committee system the Senate as a whole determined each committee’s agenda, today’s standing committees set the agenda for the Senate as a whole.⁹⁴ If indeed war and military affairs are the business of the entire Senate, then rather than delegate that business to specialized members, the entire Senate could better educate itself in the intricacies of this most important area, participate in the debate, and choose committee and subcommittee members committed to that common agenda.

A much more drastic (and potentially problematic) course of action would be to decrease presidential control over the military budget by having Congress draft the budget itself. The President has drafted a budget and presented it to Congress since only 1921.⁹⁵ This process gives the President the ability to shape the debate and largely determine the scope of foreign policy as well as spending amounts and distribution. The current system allows the Department of Defense — the entity most knowledgeable about its own needs, but also with the most to gain from increased defense spending — to play a significant role in developing the budget. A congressionally drafted budget, in contrast, could gain in restraint what it would lose in precision.

D. Address Long-Term Military Investments

Effective operation of the two-year limit on Army appropriations may require instituting a presumption of unconstitutionality for continuing military action beyond that limit without congressional reauthorization through appropriations. To render the Two-Year Clause effectual in the age of a standing army and significant investment in

⁹² U.S. Senate, Senate Committees, <http://www.senate.gov/artandhistory/history/common/briefing/Committees.htm> (last visited Mar. 12, 2006).

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *See* Budget and Accounting Act of 1921, ch. 18, § 201, 42 Stat. 20, 20 (current version at 31 U.S.C. § 1105 (Supp. III 2003)).

physical infrastructure, the President would not be allowed to use equipment and weapons (including long-term investments) funded under the Army Clause beyond the temporal limits of congressional authorization.⁹⁶ For example, the Army enters into contracts to pay patent royalties in exchange for the construction of weaponry and other equipment even when the payments are almost certain to continue for more than two years. The basis for these actions is an opinion written by Solicitor General Henry Hoyt in 1904, stating that such contracts do not violate the two-year funding limitation.⁹⁷ Solicitor General Hoyt's opinion appears technically correct as applied to contracts that need not be renewed and do not commit funds beyond the appropriations period — a maximum of two years.⁹⁸ Although Solicitor General Hoyt cited no authority for this opinion, it has been used to justify subsequent attempts to circumvent the constitutional limitation on military funding. In the years following World War II, the Attorney General's office considered the question of what to do with equipment purchased that has a life far beyond the congressional appropriations period. Attorney General Tom Clark argued that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended."⁹⁹ In reaching this conclusion, however, Attorney General Clark improperly relied on Solicitor General Hoyt's opinion that no legal objection existed because these appropriations did not fall under the meaning of military "support" as intended in Article I.¹⁰⁰ Attorney General Clark's conclusion, while proper in the case of the Air Force (for reasons discussed below), improperly

⁹⁶ The modern Army also makes significant, multiyear investments in equipment, and thus its practices do not reflect the perspective that the Constitution provides a two-year limitation. Congress has not acted to stop such investments and their use beyond the appropriations period. Although completely restricting the President's ability to use existing Army matériel is an unsatisfying solution, perhaps a less restrictive alternative would be to require the Army to structure its obligations and uses such that it is dependent on appropriations from Congress once every two years. Alternatively, nonspecific Department of Defense authorizations might be interpreted to authorize continued use and maintenance of existing weaponry and equipment.

⁹⁷ 25 Op. Att'y Gen. 105, 108 (1904).

⁹⁸ Granted, this interpretation poses a serious problem with respect to military patent licenses and incentives to purchase privately developed weaponry and equipment. Such commitments do seem to run afoul of the Two-Year Clause. The military reality, however, is that such patents are vital to the development of modern weaponry. Solicitor General Hoyt's opinion suggests that intellectual property, as opposed to physical items, does not constitute "support" within the meaning of the Army Clause. A potential loophole that might allow the President to circumvent this problem would be for the Navy to engage in such intellectual property transactions, and in turn lease the technology to its sister service.

⁹⁹ 40 Op. Att'y Gen. 555, 555 (1948) (quoting General Counsel of the Air Force) (internal quotation mark omitted).

¹⁰⁰ *See id.* (stating that Solicitor General Hoyt "carefully considered" this same issue and "came to a sound conclusion").

subverts the limitation on presidential power implied by the Two-Year Clause in the case of large-scale Army equipment and infrastructure. Indeed, if the Army could be fully equipped in one year such that the Executive would not need funds for another ten years, Congress's ability to shape warmaking policy through spending would be severely marginalized during that period. A more effective limit would be for Congress to include, as a rider to its military appropriations bills, a clause requiring the President to cease use of the matériel at the end of the appropriations period unless Congress reauthorizes such use. Authorization for continued use of existing equipment and infrastructure could easily either be inserted as a blanket reauthorization attached to the next appropriations bill or be tailored as Congress sees fit.¹⁰¹

E. Reorganize the Service Branches

The Air Force likely is no longer subject to the Army Clause because, in September 1947, Congress divorced it from the Army and made it a separate military branch.¹⁰² As the modern military force that most parallels the structure of the Navy at the time of the Founding — that is, requiring significant long-term infrastructure, constituting a largely outward-looking and crucial tool of trade and foreign affairs, and allowing the President to engage in battles but not land occupations — the Air Force should properly be considered as governed by the Navy Clause, with no time limit on appropriations. Under this conception, the President would be able to carry out targeted bombing campaigns as he saw fit without necessarily seeking congressional authorization.

The Marines, meanwhile, were historically and are currently a part of the Navy, and thus the President is constitutionally authorized to command them under the less stringent structure of the Navy Clause. As the Marine Corps has expanded in size and effectiveness, however, it has begun to resemble a traditional army — with the drawbacks and dangers associated with such a force. In light of this expansion, Congress might seek to reduce the size of the Marine Corps or reorganize it as an independent branch governed under the Army Clause. The elite training and flexibility of the Marine Corps have made it an especially important force in modern warfare. As the country faces new dangers and requires unconventional military tactics to defend against them,

¹⁰¹ Disagreement among members of Congress is unlikely to leave the nation defenseless because of political pressure to reach a compromise and not to abandon troops already deployed. In the event of a congressional impasse, the President would still have full use of Navy and Air Force resources until a compromise could be reached.

¹⁰² See National Security Act of 1947, Pub. L. No. 80-253, §§ 207–208, 61 Stat. 495, 502–04; Evolution of the Department of the Air Force, <https://www.airforcehistory.hq.af.mil/PopTopics/Evolution.htm> (last visited Mar. 12, 2006).

Congress might consider designing new military institutions (or reshaping existing ones) to meet these challenges. For example, should Congress determine that the President needs small, flexible police teams at his immediate disposal for small-scale operations essential to national security, it could create such a force under the Navy Clause to confer additional presidential discretion.

F. Restore the National Guard to Its Citizen-Soldier Status

In 1903, Congress renamed part of the Militia and reorganized it into a reserve force for the Army. Militia forces provided a majority of American troops during the Mexican War, the beginning of the Civil War, and the Spanish-American War,¹⁰³ and National Guard forces constituted an increasingly large portion of overseas military forces in the twentieth century. The National Guard constituted forty percent of combat divisions in France during World War I,¹⁰⁴ and when mobilized in World War II, the Guard doubled the size of the regular Army.¹⁰⁵ Today, National Guard members, along with Army Reservists, constitute about forty percent of frontline fighting forces in Iraq, and as of September 30, 2004, over 90,000 members of the National Guard had been deployed overseas in the war on terrorism.¹⁰⁶ Although the National Guard has made an invaluable contribution to our national defense both at home and abroad, Congress might consider restricting the President's power to deploy National Guard units overseas. Such a measure might be necessary to prevent the President from circumventing the personnel limits that Congress imposes through the appropriations process.

V. CONCLUSION

The Constitution grants Congress tremendous power to shape warmaking and foreign policy. It is up to Congress to exercise this power through the proper constitutional channels. Although the United States's geopolitical position has changed dramatically since the Founding, many of the concerns underlying our separated and sequenced war powers — the fear of executive overreach and provocation of conflict, as well as the need for unitary and swift decisionmaking in the areas of foreign affairs, national defense, and protection of commerce abroad — continue to be relevant today. To achieve bal-

¹⁰³ About the National Guard, <http://www.ngb.army.mil/about/index.asp> (last visited Mar. 12, 2006).

¹⁰⁴ *See id.*

¹⁰⁵ About the Army National Guard, <http://www.ngb.army.mil/about/armyguard.asp> (last visited Mar. 12, 2006).

¹⁰⁶ *National Guard Recruitment Plunges*, CBS NEWS, Dec. 17, 2004, <http://www.cbsnews.com/stories/2004/12/16/national/main661555.shtml>.

ance between the executive and legislative branches, political strengths and weaknesses must be imposed on both sides. Congress cannot act as Commander-in-Chief, nor can the President commit to foreign policy that he does not have the resources to support. Knowledge of the sequence will allow each branch to play its proper role and to shape policy in the correct constitutional fashion. By restoring and building on these original structural processes to solve problems, rather than simply discarding them in favor of ill-considered fixes such as the War Powers Resolution, the government can develop new solutions to meet the challenges of the future.