Waging War: The Clash Between Presidents and Congress 1776 to ISIS. By David J. Barron. New York, New York: Simon & Schuster, 2016. Pp. xiv, 560. Index.
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George Herman Walker Ruth was larger than life and, consequently, a huge draw for the New York Yankees. The Babe attracted so many fanatics that the Bronx Bombers were able to erect a new stadium, one that came to be known as the "House that Ruth Built." Alas, that storied stadium is no more, having been demolished for the new and improved Yankee Stadium.

Akin to the link between the old Yankee Stadium and Babe Ruth, Judge David Barron's commendable *Waging War: The Clash Between Presidents and Congress 1776 to ISIS* owes a peculiar debt to George W. Bush. Absent that president's embrace of a maximalist reading of the Commander in Chief Clause, *Waging War* perhaps would have gone unwritten. Additionally, one might suspect that without the pillorying of John C. Yoo, the Bush administration's most conspicuous lawyer, *Waging War* might never have seen the light of day. We would have been the worse for it.

Waging War amply reflects Judge Barron's wealth of experience and knowledge—a sitting judge on the U.S. Court of Appeals for the First Circuit, formerly professor at Harvard Law School, formerly Acting Assistant Attorney General at the U.S. Department of Justice, and former attorney advisor at the Office of Legal Counsel. The book, laden with rich descriptions of storied events, has twenty chapters and four parts. The four subparts are "Foundings," the "Civil War and its Aftermath," "World Wars," and "Cold War and Beyond." Barron is a gifted writer, and readers will find that the prose flows and the time flies. Readers will also marvel at the sheer effort Barron must have poured into examining how presidents (and Congresses) have waged war over two centuries. But *Waging War* is much more than merely a series of well-told legal tales.

Unlike other war-powers tomes, most of which focus on the commencement of war, this one considers the conduct of war. In particular, the book recounts how Congress has often micromanaged wars and how presidents (and their allies) have sometimes resisted, twisted, ignored, and nullified congressional statutes. Congress often wants a say in how wars are fought—from selecting objectives, to designing grand strategies, to dictating low-level tactics and practices. Modern commanders in chief are quick to resist, often citing the supposed cores and penumbras of their constitutional office.

While the latter stance has a certain "pedigree" grounded in the statements of "post-Cold War presidencies," Barron sides with the earlier practice (p. 421). Even though "[t]he guidance that history offers on this score is hardly crystal clear," the better view, Barron writes, is that presidents must obey congressional regulations about how to wage war (p. 420). Barron also believes that most presidents have been sagacious enough to honor this rule of congressional supremacy in waging war or at least pay lip service to it. Most commanders in chief have obeyed congressional decrees, discovered (or manufactured) wiggle room within them, or tendentiously misconstrued them. Few have gone so far as to openly proclaim that Congress cannot regulate the conduct of war (p. 425).

The core of the maximalist presidential claim is familiar, beguilingly simple, and closely tethered to the constitutional text: the Constitution establishes one and only one commander in chief. Pursuant to his office, the president may command the armies and navies as he wishes. This structure yields unity, energy, and responsibility. Contrariwise, if congressional statutes could constrain the executive's command, the executive would not be *commander* in chief—Congress would be. In this scenario, we would have supplanted a unitary, decisive commander in chief with the sorry spectacle of 535 joint-commanders-in-chief. The virtues of a single commander would be displaced by the drawbacks of a bizarre hydra that would direct the military in a tedious process of dilatory tactics, committee hearings, roll call votes, bicameralism, conference committees, and belated presentment. "Should we take Hamburger Hill? Let me check with Congress

and get back to you in a month or two." In short, the maximalist presidential view is that Congress can neither command nor commandeer the commander in chief.

Proponents of this theory typically concede that the commander in chief is not wholly unconstrained. Congress has its distinctive tools, also solidly grounded in text. First, Congress decides whether to "raise" armies and "provide" a navy.[1] Exercising that discretion, Congress can refuse to establish either (p. 43). This would make the commander in chief a sorry figure, for he would have no military forces to command. Second, Congress can leverage its power of the purse to influence the president's diktats. For instance, if Congress disapproves of the conduct of war or the handling of prisoners, it can cut off funding. But beyond the choices regarding whether to create armed forces and how best to fund them, Congress is something of a spectator. Having purchased the cars and filled them with gas, Congress has essentially handed the keys to the president; the former cannot tell the latter how to drive the cars or say where they ought to go.

Barron never makes much of a case for congressional authority, at least not in this book. His faint stabs toward text perhaps intimate that he thinks little of textualism. Indeed, the book's claim—that Congress can dictate the conduct of war—rests almost entirely on practice. Yet it is something of a mystery why Barron does not make more of the text in favor of his view. After all, the persuasive case for a legislature empowered to govern and regulate the armed forces comes from a constitutional clause that openly declares that Congress "can make rules for the Government and Regulation of the land and naval forces."[2] Rarely has a textual case been so simple and so overlooked. Having said this, perhaps this omission makes sense in a book published with a popular press—excessive attention to textual nuances and niceties may be too esoteric for most general readers. Stories matter more, one supposes.

The first chapter of "Foundings" begins before the Constitution, with the War of Independence. Barron recounts how the Continental Congress appointed George Washington as commander in chief in 1775. Despite granting him this office, Congress supposed that Washington could be commanded in many ways. Barron focuses on two episodes. During the War, Washington sought approval from Congress to destroy Manhattan in order to prevent the British from quartering there. Congress, however, ordered him to spare the city. Washington honored what he regarded as a "capital error[]" (p. 7). The second congressional command related to retaliation. In particular, Congress decreed that if American prisoners were mistreated, British prisoners would experience a similar fate (pp. 10–11). Again, Washington complied with congressional instructions (pp. 11–12). From these episodes, Barron concludes that the Continental Congress could command the commander in chief (p. 14).

This first chapter is good. And yet Barron misses much that is helpful to his claims. Had Barron dug deeper into the British past and spent more time on the statutes that the Continental Congress adopted, he would have found motherlodes of useful information relating to commanders in chief. As I have documented elsewhere, early British and American history fairly proves that someone can be styled a commander in chief and still be under the command of someone else.[3]

First, in British practice, a commander in chief was merely an office associated with the command of a military unit.[4] That is why small military units, including platoons and brigades had commanders in chief. Bigger units had them as well, such as the commander in chief of the Army in Canada or the commander in chief of North America.[5] The office did not signify anything other than command of a particular unit. In particular, it did not signify any autonomy, for a commander in chief of a platoon remained

[1] U.S. Const. Art. I, § 8, cl. 12.
[2] *Id.*, § 8, cl. 14.
[3] Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 Tex. L. Rev. 299 (2008).
[4] *Id.* at 352–53.
[5] *Id.* at 353.

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subordinate to higher officers in the chain of command. And all of them were subordinate to the Crown.[6] Indeed, Great Britain had hundreds, if not thousands, of commanders in chief, each subordinate to others, and none with any autonomy arising from the title or office.[7] In other words, British history demonstrates that every British "commander in chief" was subject to the commands of others.

Second, Americans adopted the same understanding. Washington was not the only commander in chief during the Revolutionary War.[8] Besides the commander in chief of the Navy (who Congress eventually sacked), there were multiple commanders in chief within the American army.[9] Again, none of these were autonomous. They were all subject to congressional control.[10] The directions from Congress flowed freely and though Washington hardly agreed with all of them, he never claimed that congressional direction undermined his office. To the contrary, he invariably honored congressional directions. He was a creature of Congress, in every sense.

Third, the statutes that Congress passed yield significant clues as to the scope of authority. Congress authorized the commander in chief to seize property, try civilians before military tribunals, and implement martial law.[11] Congress also sometimes made a dictator of Washington, albeit within a circumscribed geographical jurisdiction.[12] But each of these grants was short-term, thereby making it clear that when the authority lapsed, so did the extraordinary grants of authority. In other words, commanders in chief could not seize property, try spies, try civilians, or rule by decree absent special congressional authority. Washington himself noted as much.[13]

If the origins of the office and practice before the Constitution signal that a commander in chief could be commanded by others, that strongly suggests that the founders, at least, did not regard the office as invested with autonomy from congressional commands. While a commander in chief could surely command others, others in turn could command him.[14]

In the second chapter, Barron turns to the Constitution and its creation. His discussion of the Philadelphia Convention is brief. He notes that the delegates focused on the initiation, and not the conduct, of wars (p. 22). As far as the Constitution's text goes, he observes that while it granted Congress authority to "set rules and regulations to govern the armed forces," the Constitution omitted any reference to congressional power of "directing the[] operations" of the armed forces—a power granted to the Continental Congress under the Articles (pp. 22–23). Does this mean that Congress cannot direct the armed forces? "Uncertainty" abounds, Barron says, for the framers never granted the president the power to "direct the conduct of war," despite their consideration of text to do so (p. 23). Moreover, even though the delegates (including James Madison) "clearly wanted" the president "to oversee the armed forces," Congress had the power "to enact laws" and the president a duty to execute them (*id.*). A final uncertainty arises because the founders "were all but silent" about conflicts between presidential and congressional commands to the armed forces (p. 23).

Turning to the ratification debates, Barron claims that the Anti-federalists mostly played up the powers of the presidency (it was a monarchy, they claimed) and stoked fears that the president might command the army in person and unleash terror against the people (pp. 26–27). Alexander Hamilton's response was to declare that though both the British king and the American president "were named commanders in chief," the similarities ended there because

[6] *Id.* at 368.
[7] *Id.* at 353.
[8] *Id.* at 369.
[9] *Id.* at 369, 370, n. 384.
[10] *Id.* at 369.
[11] *See* Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1388–89 (2013).
[12] *Id.* at 1419.
[13] *Id.* at 1388.

[14] Much of the claims made here draw from SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015).

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the president could not declare war or raise the armed forces (p. 31). He also could not command the militia without congressional authorization (*id.*). In any event, the Anti-federalists were not concerned with the paper Constitution, but with the tyranny that a president might impose with a standing army at his back (pp. 26–27).

Barron's discussion of these debates finds uncertainty where there is none. The power to direct operations, expressly granted to the Continental Congress, but omitted from Article I, Section 8, was superfluous because it was included under the broad grant of authority to make rules for the "Government and Regulation" of the armed forces.[15] The fact that the founders rightly expected the president to direct the armed forces does not mean that Congress did not enjoy a supervening authority to do the same via statutes. After all, more than one entity can enjoy authority to direct a platoon, a brigade, or an army. In fact, through its adoption of Articles of War and Baron Van Steuben's *Drill Manual*, early Congresses did direct military operations after the Constitution's ratification.[16] And Congress would continue to do for many years to come.

More generally, we must not lose sight of the fact that the founders chose to replicate an office that was subject to micromanagement, in both Great Britain and America. Had they wished to create a new office—an autonomous or undirectable military supremo—they would have employed a different title, one without the baggage of subordinacy. And they would have gone out of their way to signal that this office was meant to be free of statutory commands that might issue from congressional exercises of the powers to declare war and to govern and regulate the armed forces.

Whatever the original understanding, it seems that the Clause's expansion had early beginnings. As Barron documents elsewhere, in the run-up to the Quasi War, some members of Congress denied that they could micromanage the military, saying that this was for the president alone.[17] Much later, Millard Fillmore would claim that the Congress could not constrain the president's use of the regular armed forces.[18]

During the Civil War, the Great Emancipator acted without the sanction of statutes in raising armies, expending funds, freeing slaves, and suspending habeas corpus (pp. 135–36, 142–43, 157–58). At times, Abraham Lincoln claimed that the latter act was done pursuant to his authority as commander in chief.[19] Moreover, during the war, a number of congressmen declared that their institution lacked authority to direct troops because that task was left to the president alone under the Commander in Chief Clause (pp. 153–54). Barron might have added that when Congress actually got around to passing a habeas statute in 1863, the administration hardly complied with the statute's conditions, including the requirement that detainees be released or tried.[20] Lincoln's stewardship arguably exhibited both aspects of thinking that have become quite common, even predominant—that Congress may not regulate the commander in chief's command of the armed forces and that the Constitution vests the commander with some nebulous emergency powers.

Before the Supreme Court, the attorney general argued that in war

> "the whole power of conducting it . . . is given to the President. . . . During the war, his powers must be without limit . . . . New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet."[21]

[15] *See* Prakash, *Separation and Overlap*, *supra* note 3, at 372–73.

[16] *Id.* at 330, 332–33.

[17] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 966 (2008).

[18] *Id.* at 988–90.

[19] Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T. L. REV. 575, 584 (2010).

[20] Barron & Lederman, *supra* note 17, at 1005–06. *See also* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 166–67 (1964).

[21] Barron & Lederman, *supra* note 17, at 1007 (quoting *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)).

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Perhaps in response, Chief Justice Salmon Chase endorsed the claim that the Congress could not regulate the conduct of war.[22] According to Chase, Congress could not "interfer[e] with the command of the forces and the conduct of campaigns. That power and duty belongs to the president as commander in chief."[23]

Ever since the Civil War (and especially during the last fifty or so years), presidents (and their many defenders) have claimed that as commanders in chief, they had authority to disobey congressional acts circumscribing how wars ought to be fought and that they might take certain emergency acts (pp. 302–07, 374, 421). To be sure, the development was hardly linear, as Barron expertly shows here and elsewhere. Even the Lincoln administration was a strange mixture of bracing assertiveness, occasional meekness, and furtive defiance when it came to the conduct of the war. But after Lincoln, the assertion that commanders in chief could disobey Congress's military commands rests on a plausible foundation.

Recall Barron's claim that the guidance from history is hardly crystal clear. From an originalist perspective, Barron concedes far too much because his assertion is *far too supportive* of the aggressive claims of modern commanders in chief. Early commanders in chief did not have emergency authority and never claimed authority to disobey congressional statutes related to the military and wars.[24] George Washington, a man who served as commander in chief under two different legal regimes, never asserted the authority to disobey an act of Congress or official authority to take property, suspend habeas corpus, or try individuals before a military court.[25] When Washington ordered such acts, he did so under the auspices of congressional statutes.

From the stance of Barron's apparent interpretive methodology, however, *Waging War* might be the one that is too aggressive in trying to hold back the tide of post-Civil War history. The "practice-makes-perfect" school, enunciated most famously in Felix Frankfurter's *Youngstown* concurrence, makes clear that a sufficient number of transgressive episodes alters the Constitution by applying a "gloss" on some power or another.[26] For over 150 years, numerous wartime presidents have ignored congressional statutes relating to war and acted unilaterally in emergencies. And in the modern era, since Harry Truman, many have claimed authority to act contrary to congressional statutes on the grounds that they are commanders in chief.[27] They have not always prevailed. But by the twenty-first century, the gloss is somewhat thick, so much so that from the perspective of the practice-makes-perfect school, one wonders about the relevance of the Revolutionary War, the Quasi-War, or the War of 1812. The fealty of those commanders in chief to statutory law and to the limits of their constitutional authority are matters of interest, no doubt. But one wonders whether they matter more than the limits of the French monarchy under the short-lived Constitution of 1791.

Even once-sharp critics of the modern accretion have turned. Senator Barack Obama adopted a stance of congressional supremacy and presidential obedience, only to be superseded by Commander in Chief Obama. The latter adopted the view that as commander in chief, he could ignore congressional statutes related to the conduct of the war. On occasion, he hid behind "interpretation" of statutes; however, the readings were sometimes so implausible that they were in the tradition of presidential doublespeak (p. 419).

Indeed, some critical commentators remarked that the Obama administration marked a "ratification" of the claims of the Bush administration.[28] But in truth, the ratification occurred much earlier. The legal academy's sharp hostility to the Bush administration made it impossible for many to see that while that administration had a

[22] *Milligan*, 71 U.S. at 2, 139.

[23] *Id.*

[24] Prakash, *Separation and Overlap*, *supra* note 3, at 363.

[25] *Id.* at 314–15, 324.

[26] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

[27] Barron & Lederman, *supra* note 17, at 1060–61.

[28] *Obama Ratifies Bush*, WALL ST. J. (Mar. 8, 2011), *at* https://www.wsj.com/articles/SB10001424052748703386704576186791361222486?mod=googlenews_wsj.

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far more aggressive view of the Commander in Chief Clause, it was merely a difference of degree from what had passed for legal analysis in previous administrations.

While many scholars were genuinely interested in the legal questions that arose during the Bush administration, many others seemed more interested in the morality of the Bush administration's interrogation tactics and detention policies.[29] In particular, although some of the objections to the so-called "torture memos" concerned their observance of professional standards, I believe that many castigated the memos because they seemed to lift constraints on torture, not because of their legal reasoning.

To see why this is so, imagine a counterfactual. Suppose Congress, fed up with a weak executive, ordered the commander in chief to torture prisoners, both as a measure of vengeance but also as a means of acquiring intelligence. And suppose that the commander in chief had scruples against doing so and labored to find a way out, seeking input from lawyers. Finally, imagine that an Office of Legal Counsel lawyer, Yohn Joo, authored an opinion denying that Congress could force the president to torture enemy prisoners on the grounds that the commander in chief had exclusive authority to decide matters of detention and interrogation. Would the legal academy, opposed as it was to torture, decry the Joo opinion as lawless? Or would Joo be supported by the bulk of the academy because, of course, if Congress could command the commander, Congress (and not the president) would be the real commander in chief? I think Yohn Joo would have been feted. This is not to suggest that there are no plausible constitutional distinctions between a congressional restriction on torture and a congressional requirement of torture; the point is simply that sometimes views about executive power really turn on matters having nothing to do with executive power.

In any event, the dustup over torture, the controversy most responsible for the keen interest in the conduct of war, did nothing to permanently dislodge or tarnish the maximalist view. For instance, after he left office, Greg Craig, the former White House counsel, wrote an op-ed urging the president to shut down Guantánamo, in defiance of a congressional statute.[30] The basis was the president's status as commander in chief.[31] Apparently Congress could not dictate where prisoners were housed. But Craig took pains to deny that the president could torture in contravention of a congressional statute.[32] Why could Congress bar torture but not force the president to keep Guantánamo open? The op-ed offers nary a word of explication.

If this is what passes for legal argumentation about the scope of the Commander in Chief Clause, we can be confident that the maximalist reading of the Clause is here to stay. It will be trotted out, as circumstances and convenience warrant. Of course, opponents of the maximalist view, whether they are fickle or firm ones, are now better equipped to give a fitting reply, for they can now cite Judge Barron's *Waging War*.

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[29] Alexa Van Brunt, *The 'Torture' Memos Prove America's Lawyers Don't Know How to Be Ethical*, WASH. POST (Dec. 12, 2014), *at* https://www.washingtonpost.com/posteverything/wp/2014/12/12/the-torture-memos-prove-americas-lawyers-dont-know-how-to-be-ethical/?utm_term=.e608df112ec9; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos: Most Scholars Reject Broad View of Executive's Power*, WASH. POST, July 4, 2004, at A12; Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES (June 25, 2004), *at* https://www.nytimes.com/2004/06/25/world/the-reach-of-war-penal-law-legal-scholars-criticize-memos-on-torture.html.

[30] Gregory B. Craig & Cliff Sloan, *The President Doesn't Need Congress's Permission to Close Guantánamo*, WASH. POST (Nov. 6, 2015), *at* https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec20f839_story.html?utm_term=.cb1d909e7514.

[31] *Id.*

[32] *Id.*

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