

The Constitutional Creation of a New Branch of the Military

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On June 18, President Donald J. Trump directed “the Department of Defense (DOD) and Pentagon to immediately begin the process necessary to establish a space force as the sixth branch of the armed forces” (Harwood 2018). The President argued this move was necessary to ensure American dominance over this developing warfighting domain. However, the president cannot just direct the DOD and Pentagon to create a new executive branch because the Constitution of the United States gives to Congress the power to establish, support and maintain the armed forces of the United States (Article I, section 8). The Constitution only gives the president the power of being the Commander-in-Chief of the Armed Forces established and funded by Congress (Article 2, section 2). Thus, the president can only propose such a new institution, but it is Congress that would have to establish it in law. Nevertheless, the president does hold some power to reorganize aspects of the federal government and past presidents have taken advantage of that ability. In the following paper, I will state reasons for acquiring a Space Force, take on the core constitutional questions that are raised in the creation of a new branch of the armed forces, and look to options available in creating a new force to deal with the challenges of warfare in space in the 21st century.

American forces must gain and maintain space superiority as a condition for fighting just as they must gain control of the airspace before engaging in a ground campaign. We need a space force to avoid disparate space-related efforts being scattered across the Army, Air Force, Navy, and Space and Missile Systems Center. According to NASA Administrator Jim Bridenstine, “Our very way of life is dependent on space. The way we navigate. The way we communicate. Over-the-horizon communications. The way we produce food. The way we produce energy. The

way we do disaster relief. In fact, the way we do banking in the United States of America, if we lose the GPS signal, there are no interbank transfers. That means there will be no milk in the grocery store. Our way of life shuts down." (Zuckerman 2018) Not surprisingly, the current National Security Strategy states that the United States considers unfettered access to space and freedom to operate in space to be a vital interest. Furthermore, it states that "any harmful interference with or an attack upon critical components of our space architecture that directly affects this vital U.S. interest will be met with a deliberate response at a time, place, manner, and domain of our choosing" (Trump 2017). Space-derived information services, such as imagery, weather, communications, positioning, navigation, timing, and weapons command and control are both essential to our civilian economy and U.S. military operations. Additionally, Space capabilities enable the American way of warfare by making it possible for U.S. military commanders and forces to see the battlespace more clearly, communicate with certainty, navigate with accuracy, and strike with precision. According to the 2018 Worldwide Threat Assessment of the US Intelligence Community, "both Russia and China continue to pursue anti-satellite (ASAT) weapons as a means to reduce US and allied military effectiveness" and "if a future conflict were to occur involving Russia or China, either country would justify attacks against US and allied satellites as necessary to offset any perceived US military advantage derived from military, civil, or commercial space systems" (Coats 2018).

Taking this into account, the mission of the United States Space Force will be to deliver options for the defense of the United States of America and its global interests in Space. The space forces will perform functions that are critical for the joint force: intelligence, surveillance and reconnaissance, command and control, positioning, navigation, timing, weather services, counterspace, communications, and space lift. As our reliance on space increases, so too, must

our ability to integrate space capabilities throughout joint operations. To retain the US military's asymmetric advantage based on space superiority, the Space Force must fully exploit and defend the space domain. Thus, the United States needs the Space Force to improve integration across combatant commands, services, and agencies as well as to develop space warfighting doctrine, tactics, techniques and operations.

A core constitutional question raised in the creation of a new branch of the armed forces is whether it can be created without amending the Constitution since that document only names the Army and the Navy, not the Air Force or the Space Force under Article 1, Section 8. There are two basic and divergent ways of looking at the Constitution – originalism and “living” methods. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. Conversely, living constitutionalists believe that the meaning of the constitutional text should change over time as society changes, including social attitudes and values, even without the adoption of a formal constitutional amendment. Originalists might read land and naval forces language literally and so would read it as excluding an Air Force and a Space Force. However, living constitutionalists might interpret that same land and naval forces language to include an Air Force and a Space Force since land and naval forces were all that was known at the time the Constitution was ratified but, with changing times, changing structures to American forces were necessary. Harold I. Baynton, Acting Assistant to the Attorney General took the living constitutionalist view when he stated the case for the constitutionality of the Air Force in his 1947 Memorandum for the Special Counsel to the President. He contended that the president is the Commander in Chief of all the Armed Forces of the United States. Further, he states “The phrase “Army and Navy” is used in the Constitution as a means of describing all the armed forces of the United States. The

fact that one branch of the armed forces is called the ‘Air Force,’ a name not known when the Constitution was adopted, and the fact that the Congress has seen fit to separate the air arm of our armed forces from the land and sea arms cannot detract from the President’s authority as Commander in Chief of all the armed forces” (Bayton 1947). A contrary opinion given by originalists is that the Constitution is silent about any militarized air units even though the drafters of the Constitution were aware of flight. Lighter than air and dirigible technology were around at the time the constitution was written. Then, if the founders knew about these things and did not enumerate Congress with the power to create an Air Force, we must assume that this is a power not given in the Constitution.. Thus, the originalists would claim that the creation of the Space Force and the Air Force, by Congressional or Executive action, are unconstitutional since the land and naval forces language would exclude an Air Force and a Space Force. However, the living constitutionalists would argue that the language would include an Air Force and a Space Force since land and naval forces are all the armed forces that were known at the time the Constitution was ratified.

Given this history of interpreting the Constitution, there are three ways President Trump’s vision of a Space Force could be implemented. Congress can authorize the Space Force as a new military branch, Congress can authorize a Space Corps under the Air Force, or the president can stand up several of the component parts of the future Space Force via the creation of a new space operations force that directly reports to an existing or created combatant command. With the first option, Congress can establish the Department of the Space Force and can transfer current Department of the Air Force assets, such as the Air Force Space Command (AFSPC), to the Space Force. Congress has previously performed this action when it formally abolished the Army Air Corps via the National Security Act (NSA) of 1947 (Organization

Authority Record 2018). The NSA of 1947 established the Department of the Air Force and transferred Army Air Forces, the Army Air Corps, and the General Headquarters Air Force (Air Force Combat Command) to the United States Air Force (8. Congress 1947). Alternatively, Congress can authorize the Space Corps under the Air Force analogous to the Marine Corp under the Navy, to act as a separate military branch but existing within the Air Force. The Space Corps would act as a separate and dedicated force devoted to streamlining space acquisition, eliminating burdensome red tape, empowering a single accountable organization for space forces within the Air Force, and placing renewed emphasis on the organization and management of space in the Department of Defense. A third option is for President Trump to reorganize the Department of Defense, using existing authorities, by setting up an agency to develop space capabilities and fielding, along with a space operations command to develop space war fighters, leadership and support structures, and warfighting operations. In the past, presidents have constructed over 240 agencies through executive orders, reorganization plans, and orders issued by department secretaries or agency heads. However, this authority is tempered by Congress' ability to cut off funding for any agency established through executive actions for which they do not approve (Howell and Lewis 2002). Moreover, Congress would still have to pass legislation to combine these components into the sixth branch of the Armed Forces since Congressional action is required to create Executive Branch departments, to fund them, to determine the nature and scope of their duties and to confirm the appointment of their top leaders.

Even though President Donald J. Trump directed the Department of Defense to establish a space force as the sixth branch of the armed forces, the president can only propose such a new institution, but it is Congress that would have to establish it in law. There has been much congressional interest in developing Space Corps. The House-passed version of the FY2018

NDAAs (H.R. 2810 §1601) authorized the creation of a Space Corps within the Air Force. The Space Corps would be led by a Chief of Staff of the Space Corps and would be composed of such offices and officials determined appropriate by the Secretary of the Air Force, in consultation with the Chief of Staff of the Space Corps. However, the Senate version of the bill had no comparable provision (Williams and Towell 2017). Under the enacted final bill, Fiscal Year 2019 NDAA §169, Congress provided for the establishment of a space force as a subordinate unified command, to be known as U.S. Space Command, under the control of U.S. Strategic Command (USSTRATCOM) and directed DOD to create a plan to augment its civilian and military Space Cadre (Rep. Thornberry 2018). The president seemed like he was not satisfied with this bill since, after signing the 2019 NDAA, President Trump stated “It is not enough to merely have an American presence in space — we must have American dominance in space. And that is why, just a few days ago, the vice president outlined my administration's plan to create a sixth branch of the United States military, called the United States Space Force” (Gohd 2018).

At this time, the most likely and fastest avenue for President Trump to create the Space Force is a reorganization of the Department of Defense by the executive branch followed by congressional legislation to combine the reorganized components into the sixth branch of the Armed Forces. Also, this paper has stated reasons why we need a Space Force as the sixth branch of the military. One such reason is that American forces must gain and maintain space superiority as a condition for fighting just as they gain control of the airspace before engaging in a ground campaign. Even back in 1958, Senator Lyndon B. Johnson knew that space would be a critical domain for us to control. He stated “there is something more important than any ultimate weapon. That is the ultimate position – the position of total control over Earth that

lies somewhere out in space. That is ... the distant future, though not so distant as we may have thought. Whoever gains that ultimate position gains control, total control, over the Earth, for the purposes of tyranny or for the service of freedom” (Lang 2018).

The views presented in this article are those of the author and do not necessarily represent the views of DoD or its components.

Bibliography

Abbott, Jason. *ASEAN's Struggle for a Role Betwixt Great Power of Competition and Rivalry* Louisville, KY, (September 5, 2018).

ADP 6-22 Army Leadership. Washington D.C: Army Publication Directorate, 2012.

Alvarado, Sebastian. "Protections of Pharmaceuticals Under the TPP." *Lexology*. December 12, 2017.

<https://www.lexology.com/library/detail.aspx?g=956f2898-4bf6-4e99-bf29-80cea10d4a46>.

Amadeo, Kimberly. *The Balance*. April 21, 2018. <https://www.thebalance.com/what-is-the-trans-pacific-partnership-3305581>.

ASEAN. *ASEAN Leaders Statement on Cybersecurity Cooperation*. April 27, 2018.

<http://asean.org/storage/2018/04/ASEAN-Leaders-Statement-on-Cybersecurity-Cooperation.pdf>.

ASEAN Secretariat. <http://aseanregionalforum.asean.org/about.html>. September 21, 2018.

<http://aseanregionalforum.asean.org/about.html>.

Bayton, Harold. *Presidential Authority as Commander in*. 08 26, 1947. <https://www.justice.gov/file/20626/download>.

Blackburn, Robert. *Britain's Unwritten Constitution*. British Library: Magna Carta, 2015.

Caffrey, C. "China Defence Budget." 2017.

Chalk, Peter. "The U.S. Army in Southeast Asia Near-Term and Long-Term Roles." *RAND*, 2013.

China accedes to Treaty of Amity and Cooperation in Southeast Asia. October 2003.

<http://www.china-embassy.org/eng/xw/t34707.htm>.

China Power Team. <https://chinapower.csis.org/much-trade-transits-south-china-sea/>. October 27, 2017. <https://chinapower.csis.org/much-trade-transits-south-china-sea/>.

Cicero. *On the Good Life*. Translated by Michael Grant. London: Penguin Books, 1971.

Coats, Daniel R. *Statement for the Record Worldwide Threat Assessment of the US Intelligence Community*.

Washington DC: Director of National Intelligence, 2018.

Congress, 115th. *John S. McCain National Defense Authorization Act for Fiscal Year 2019*. 08 13, 2018. <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>.

Congress, 80th. *National Security Act of 1947*. Washington, DC: 80th Congress, 1947.

De Witt, John. "Militias, Standing Armies, and the Future of Liberty: Essay V." *Unknown*, 1787: Unknown.

Department of Defense. "Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms." 2010.

Derouin, Peter W. *A Citizen Army as a Social and Public Policy: How The U.S. Constitution may Hold Some Answers to our National Defense*. Georgetown University, Washington, DC: UMI Dissertation Publishing, 2015.

Felton, Ryan. "Jalopnik News." *What Does the Withdrawal From TPP Mean for the US Auto Industry*. January 23, 2017. <https://jalopnik.com/what-does-the-withdrawal-from-tpp-mean-for-the-u-s-auto-1791523597>.

Garrett, Laurie. "The Drug Tradeoffs of TPP." *CFR*. October 7, 2015. <https://www.cfr.org/expert-brief/drug-tradeoffs-tpp-deal>.

Gohd, Chelsea. "Trump Touts Space Force While Signing \$717 Billion Defense Bill." *Space.com*. 08 14, 2018. <https://www.space.com/41495-trump-touts-space-force-while-signing-717-billion-defense-bill.html>.

Harwood, William. "Trump directs Pentagon to Create Military Space Force." <https://www.cbsnews.com>. 06 18, 2018. <https://www.cbsnews.com/news/trump-space-force-pentagon-create-military-space-force-national-space-council-meeting-2018-06-18/>.

Henderson, Christine Dunn, and Mark E Yellin. *Joseph Addison Cato: A tragedy and Selected Essays*. Indianapolis: Liberty Fund, 2004.

Hendrie, Alexander. *Americans for Tax Reform*. June 14, 2016. <https://www.atr.org/tpp-needs-be-fixed-it-can-be-passed>.

Hogue, Henry B. "<https://fas.org/>" *Federation Of American Scientists*. 12 11, 2012. <https://fas.org/sgp/crs/misc/R42852.pdf>.

Howell, William G., and David E. Lewis. "Agencies by Presidential Design." *The Journal of Politics*, 2002: 1095-1114.

Ikenberry, G. John. "The Rise of China and the Future of the West." *Foreign Affairs*, 2008.

Johnson, Jesse. <https://www.japantimes.co.jp/news>. August 26, 2016. <https://www.japantimes.co.jp/news/2016/08/26/asia-pacific/chinese-u-s-coast-guards-perform-joint-operations-rare-bright-spot-sino-american-relations/#.W6fopWhKg2x>.

Kavanagh, Jennifer. "U.S. Security-Related Agreements in Force Since 1955: Introducing a New Database." *RAND*, 2013.

Kayes, D.C., C.N. Allen, and N. Self. "Integrating Learning, Leadership, and Crisis in Management Education: Lessons from Army Officers in Iraq and Afghanistan." *Journal of Management Education*, 2013: 180-202.

Kou. <https://www.theguardian.com/cities/ng-interactive/2018/jul/30/what-china-belt-road-initiative-silk-road-explainer>.

Lang, Neil deGrasse Tyson and Avis. *Space Is the Ultimate High Ground - That's Why Militaries Fund Astrophysics*. 09 04, 2018. <https://medium.com/s/story/space-is-the-ultimate-high-ground-thats-why-militaries-fund-astrophysics-67d7510c875>.

Machiavelli, Niccolo. *Discourses on Livy*. Translated by Harvey C Mansfield and Nathan Tarcov. Chicago: University of Chicago Press, 1998.

—. *The Prince*. Translated by Harvey C Mansfield. Chicago: University of Chicago Press, 1998.

Michener, J. A. *Chesapeake*. New York: Random House, 1978.

Mullin, Rick. *Cost to Develop New Pharmaceutical Drug Now Exceeds \$2.5B*. November 24, 2014. <https://www.scientificamerican.com/article/cost-to-develop-new-pharmaceutical-drug-now-exceeds-2-5b/>.

New Republic. "Revolutionary Road." *The New Republic* 247, no. 11 (November 2016): 34.

Office of the United States Trade Representative. "ustr.gov." *Getting the Best Deal for the US Auto Industry*. 2016. <https://ustr.gov/sites/default/files/TPP-Getting-the-Best-Deal-for-the-US-Auto-Industry-Fact-Sheet.pdf>.

Organization Authority Record. 09 01, 2018. <https://catalog.archives.gov/id/10493236>.

Owens, Mackubin. "The Heritage Guide to the Constitution." *Heritage.org*. The Heritage Foundation. <http://www.heritage.org/constitution/#!/articles/1/essays/52/army-clause> (accessed September 14, 2017).

Plato. *The Republic*. Translated by Allan Bloom. New York: Basic Books, 2016.

Rep. Thornberry, Mac [R-TX-13]. "H.R.5515 - John S. McCain National Defense Authorization Act for Fiscal Year 2019." *Congress.gov*. 01 03, 2018. <https://www.congress.gov/bill/115th-congress/house-bill/5515/text#toc-H41B12A193CB3471C9102C17FCA864134>.

Reuters. "CNBC." *US Economy Best Performance in Nearly 4 Years*. Aug 29, 2018. <https://www.cnbc.com/2018/08/29/second-estimate-of-q2-2018-gdp.html>.

Rocher, Sophie Boisseau du. "Scientific Cooperation in the South China Sea: A New Vector for China's Security Diplomacy in Southeast Asia?" *Center for Asian Studies*, 2016.

Shambaugh, David. *The US gives more to Asean than China does*. August 7, 2018. <https://www.scmp.com/comment/insight-opinion/united-states/article/2158490/us-gives-more-asean-china-does-asean-just>.

Stiehm, J.H. *U.S. Army War College: Military Education in a Democracy*. Temple University Press, 2010.

The McConnell Center. *The Declaration of Independence and the Constitution of the United States of America*. Louisville, KY: Mconnellcenter.org, 2017.

Trump, President Donald J. *National Security Strategy*. Washington, DC: The White House, 2017.

Vannarith, Chheang. *Future ASEAN Role for the US*. October 19, 2016. <https://asiafoundation.org/2016/10/19/future-asean-role-united-states/>.

Weiss, T.G. *Military-civilian Interactions: Humanitarian crises and the Responsibility to Protect*. Rowman & Littlefield, 2005.

Williams, Lynn M., and Pat Towell. "In Brief: Highlights of the FY2018 National." *Federation of American Scientists*. 08 15, 2017. <https://fas.org/sgp/crs/natsec/R44917.pdf>.

Wojciuk, Anna, Maciej Michalek, and Marta Stormowska. "Education as a Source and Tool of Soft Power in International Relations." *European Political Science*, 2015.

Xinhua. 2013. http://news.xinhuanet.com/politics/2013-10/25/c_117878897.htm.

Yilmaz, Serafettin. *China's 'Belt and Road' Strategy in Eurasia and Euro-Atlanticism*. March 2018. <https://doi.org/10.1080/09668136.2018.1435777>.

Zuckerman, Alex. *NASA Chief Explains the Need for a "Space Force"*. 07 06, 2018. <https://www.cbsnews.com/news/nasa-chief-explains-the-need-for-a-space-force/>.

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