

THE COMMANDER IN CHIEF'S AUTHORITY TO COMBAT CLIMATE CHANGE

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Climate change is the world's greatest environmental threat. It is also increasingly understood as a threat to domestic and international peace and security. In recognition of this threat, the President has taken the initiative to prepare for climate change's impact—in some cases drawing sharp objections from Congress. While both the President and Congress have certain constitutional authorities to address the national security threat posed by climate change, the precise contours of their overlapping powers are unclear. As Commander in Chief, the President has the constitutional authority to repel sudden attacks and take care that the laws are faithfully executed. Congress has the constitutional power to provide for the common defense, declare war, and fund the military. Yet, modern realities have given such constitutional powers different meanings: Congress has not declared war in over seventy years, and the President commands a vast standing army and a global military presence.

This Article first outlines the myriad national security threats posed by a changing climate, addressing the President's and Congress's powers to plan, study, and invest in climate-resilient infrastructure at military installations that are vulnerable to a rise in sea levels. Second, this Article asserts that climate change will stress and test persistent separation of powers concerns at home and abroad. Specifically, the President has less authority to protect military infrastructure domestically in the face of congressional intransigence, but has comparably greater authority as Commander in Chief to respond to climate-induced events abroad. Third, this Article argues that the threat of climate change will increasingly challenge existing lawful use-of-force models as the military is increasingly called upon to respond to climate-induced humanitarian crises outside of the United States. Lastly, this Article concludes by offering recommendations for both the President and

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Congress to address the immediate national security implications of a changing climate.

“[I]n a sense, climate change can now be considered another weapon of mass destruction, perhaps the world’s most fearsome weapon of mass destruction.”

—Secretary of State John Kerry¹

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¹ John Kerry, Sec’y of State, U.S. Dep’t of State, Remarks on Climate Change (Feb. 16, 2014), <http://www.state.gov/secretary/remarks/2014/02/221704.htm>.

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INTRODUCTION

In 2014, the U.S. House of Representatives introduced a Resolution prohibiting the Department of Defense (the DoD) from spending congressional appropriations to implement four climate change assessments and reports.² In doing so, it attempted to impose limitations on how the President could direct the military to plan for the

² H.R. 4435, 113th Cong. § 320A (2014) (“None of the funds authorized to be appropriated or otherwise made available by this Act may be used to implement the United States Global Change Research Program National Climate Assessment, the Intergovernmental Panel on Climate Change’s Fifth Assessment Report, the United Nation’s Agenda 21 sustainable development plan, or the May 2013 Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866.”).

national security effects of climate change.³ While this attempt to defund climate change initiatives within the military was ultimately unsuccessful,⁴ it highlighted fundamental separation of powers questions concerning how the President's constitutional powers of the "sword"⁵ interact with Congress's powers of the "purse"⁶ as the nation prepares for climate change's national security effects.

The President, as Commander in Chief, has developed a *Climate Action Plan*⁷ and has issued executive orders requiring every federal agency to identify critical infrastructure at risk to climate change.⁸ But much more needs to be done in light of the increasingly understood threats posed by a changing climate.⁹ Domestically, climate change threatens military infrastructure, particularly at military installations near the coast and in low-lying areas that require investment in physical infrastructure resistant to sea level rise and storm surge.

Domestically, Naval Station Norfolk, in Virginia, is the largest naval base in the world, is the home of the U.S. Atlantic Fleet, and is located in an area uniquely vulnerable to climate change's effects.¹⁰ Consider this hypothetical: The President orders the DoD to invest heavily in climate adaptation measures at Norfolk while Congress passes

³ See *id.*

⁴ See H.R. 4435 (113th): Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr4435> (last visited Nov. 10, 2015).

⁵ See discussion *infra* Part II.A.1.

⁶ See discussion *infra* Part II.A.2.

⁷ See, e.g., EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013) [hereinafter 2013 CLIMATE ACTION PLAN], <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

⁸ See Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 19, 2015) ("Planning for Federal Sustainability in the Next Decade"); Exec. Order No. 13,653, 78 Fed. Reg. 66,819 (Nov. 1, 2013) ("Preparing the United States for the Impacts of Climate Change").

⁹ In addition, the scientific predictions surrounding climate change have only grown worse. The U.N. Intergovernmental Panel on Climate Change recently reaffirmed the scientific consensus on climate change, emphasizing the need for immediate international action. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2015), http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf.

¹⁰ See *Naval Station Norfolk*, CNIC, http://www.cnic.navy.mil/regions/cnrma/installations/ns_norfolk.html (last visited Nov. 10, 2015). The issue of Norfolk, Virginia, and its ability to withstand climate change's effects has been a source of growing interest, with former Vice President Al Gore exclaiming, "It's the biggest Navy base in the world, and it's going to have to be relocated. . . . It's just a question of when." See Jeff Goodell, *The Pentagon & Climate Change: How Deniers Put National Security at Risk*, ROLLING STONE (Feb. 12, 2015), <http://www.rollingstone.com/politics/news/the-pentagon-climate-change-how-climate-deniers-put-national-security-at-risk-20150212>; see also FORBES TOMPKINS & CHRISTINA DECONCINI, WORLD RES. INST., SEA-LEVEL RISE AND ITS IMPACT ON VIRGINIA 2 (2014) (estimating a cost of \$460 million to upgrade the infrastructure at Naval Station Norfolk in the face of rising sea levels).

an appropriations rider prohibiting funding for climate adaptation infrastructure and planning. Nevertheless, the President insists on safeguarding critical military infrastructure pursuant to his Commander in Chief power and continues to invest and plan for climate change's impact. Congress objects, unleashing a separation of powers standoff. Would Congress's action be an unconstitutional infringement on the President's Commander in Chief power?

Internationally, climate change is likely to act as a threat accelerant that will increase geo-instability as rising sea levels threaten several small developing island-states in the Pacific. Additionally, there will likely be an increase in demand for international military humanitarian assistance and in disaster response requests.¹¹ Climate change is also melting polar ice caps, opening Arctic Ocean sea-lanes, and creating a rush for new sources of natural resources.¹² Consider another hypothetical: The President orders the DoD to participate in military exercises aimed at planning for humanitarian disasters that could result from sea level rise, but Congress attaches an appropriations rider to the annual DoD appropriations bill preventing such activities. Is such an act an unconstitutional infringement on the President's authority? Similarly, if the President orders the military to respond to an international humanitarian crisis exacerbated by climate change without congressional authorization or a U.N. Security Council resolution, is it within his authority as Commander in Chief to do so?¹³ This Article addresses such questions, and others, in four parts.

Part I addresses climate change as a national security issue. It summarizes recent executive actions, provides an overview of climate change's myriad national security threats, and outlines ongoing climate change initiatives within the DoD. Today's military is preparing to respond to climate-induced events by seeking out novel partnerships, establishing military climate change task forces, and issuing specialized guidance to address a changing physical landscape.¹⁴

Part II addresses the separation of powers concerns associated with climate change, focusing on the President's authority as Commander in Chief to command and organize the military, conduct military operations, and respond to overseas crisis. But this authority must ultimately be reconciled with Congress's funding power. And it must take into account the few significant judicial decisions delineating the

¹¹ See DEP'T OF DEF., 2014 CLIMATE CHANGE ADAPTATION ROADMAP 4 (2014) [hereinafter DOD ROADMAP 2014], http://www.acq.osd.mil/ie/download/CCARprint_wForeword_c.pdf.

¹² *Id.* at 2.

¹³ See, e.g., Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 146-49 (1995).

¹⁴ See generally DOD ROADMAP 2014, *supra* note 11.

scope of the Commander in Chief power in the face of congressional support, inaction, or objection.¹⁵

Part III addresses the President's powers to respond domestically to the national security impacts of climate change. It focuses on the President's ability to plan and invest in climate adaptation measures at home and respond to domestic climate-induced humanitarian relief efforts. In his capacity as the overall military commander, the President not only has the authority, but also the obligation, to protect the nation from all threats, including those posed by climate change.¹⁶ But, the Commander in Chief's precise legal authority to address climate change is not without limitation. The President's powers of the "sword" under Article II must be reconciled with Congress's powers of the "purse" under Article I. And, the scope of the President's power must take into account judicial rulings, historical practice, and existing instances where Congress has already spoken.¹⁷

Part IV addresses the President's power to respond internationally to an increase in climate-induced humanitarian crises and other missions.¹⁸ Climate change will increase the demand for international humanitarian assistance and disaster response—actions normally undertaken with significant military involvement.¹⁹ Humanitarian assistance and disaster response missions are outside the traditional international justifications for the use of force as envisioned by the U.N. Charter, and as envisioned by congressional restrictions outlined in the War Powers Resolution (WPR).²⁰ Yet the increased demand for such services will likely further stress and test evolving international norms regarding the authorization of military force. The President's

¹⁵ See discussion *infra* Parts II.B.2, II.B.3.

¹⁶ See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 745 n.173 (2008) (referring to the President's higher obligation of preservation and protection of the nation, an assertion first articulated by Thomas Jefferson and later invoked by Lincoln).

¹⁷ Reconciling the power of the purse with the power of the sword has historically been a very difficult problem. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 187–88 (2005) ("But the precise boundary between the power of the purse and the power of the sword, between congressional rules and executive commands, has never been easy to define with perfect precision. One possible guidepost might be that laws *proscribing* certain uses of the military may be easier to justify than laws *prescribing* highly specific uses of armed forces in certain tactical situations: The latter might be thought to cross the line separating the legislation of general rules from the particulars of actual battle command.").

¹⁸ See MILITARY ADVISORY BD., CTR. FOR NAVAL ANALYSES, *NATIONAL SECURITY AND THE ACCELERATING RISKS OF CLIMATE CHANGE* (2014) [hereinafter CNA 2014], https://www.cna.org/cna_files/pdf/MAB_5-8-14.pdf.

¹⁹ *Id.*

²⁰ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (2012)).

constitutional foreign relations powers are increasingly interconnected with U.N. authorization, and the U.N. Security Council's definition of "threat" to international peace and security continues to evolve and expand to potentially encompass the threat of climate change.

This Article concludes by asserting that the President's powers to address climate change as Commander in Chief are comparably greater when turned outward in response to humanitarian assistance and disaster relief missions. This is due, in part, to the analysis in *Youngstown Sheet & Tube Co. v. Sawyer*,²¹ but also due to historical practice characterized by executive initiative, congressional acquiescence, and judicial deference.²² Parts III and IV offer substantive recommendations for Congress and the President to address the future threat posed by climate change. The analysis suggests that *Youngstown* itself may prove inadequate to address the multifaceted separation of powers concerns posed by this new threat to national security.

I. CLIMATE CHANGE: A NOVEL NATIONAL SECURITY THREAT

The climate wars are coming.²³ Climate change has been described as the most pressing environmental challenge of our time,²⁴ and it is increasingly understood as one of the greatest national security threats

²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²² See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (noting that the President bears the "vast share of responsibility for the conduct of our foreign relations" (quoting *Youngstown*, 343 U.S. at 610–11); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding the President's actions to settle claims with Iran, relying upon the absence of express congressional disapproval and a history of unchecked executive practice); *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 108–11 (1990) (discussing Justice Jackson's analysis of "historical gloss" on executive practice).

²³ I use the term "climate wars" to apply to a broad swath of conflicts, including international and non-international armed conflict, and humanitarian assistance activities where the military is involved in responding to climate-induced crises, both at home and abroad. This may include peacekeeping, peacemaking, and disaster relief operations.

²⁴ See *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) ("Global warming . . . [is] the most pressing environmental problem of our time." (quoting Petition for Writ of Certiorari, *EPA*, 549 U.S. 497 (No. 05–1120)). In dissent, Chief Justice Roberts stated that "[i]ndeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it." *Id.* at 535 (Roberts, C.J., dissenting); see also Encyclical Letter from the Holy Father Francis, *On Care for Our Common Home* (May 24, 2015), http://m.vatican.va/content/francescomobile/en/encyclicals/documents/papa-francesco_20150524_encyclica-laudato-si.html#&ui-state=dialog ("Climate change . . . represents one of the principal challenges facing humanity in our day."); see generally ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* 166–70 (2014); CHRISTIAN PARENTI, *TROPIC OF CHAOS: CLIMATE CHANGE AND THE NEW GEOGRAPHY OF VIOLENCE* (2011).

facing the United States and the world.²⁵ In the face of recent congressional reluctance to address the national security threats posed by climate change,²⁶ the President and the DoD have begun to prepare and plan for this emergent and growing national security threat.²⁷ Such efforts have not gone without criticism. Commentators have questioned the DoD's efforts to address climate change as a national security threat, asserting that linking climate change to infectious disease and terrorism amounts to hype and hysteria.²⁸

The climate change-national security linkage is recent. In 2003, the Pentagon released a report entitled *An Abrupt Climate Change Scenario and Its Implications for United States National Security*.²⁹ This report stated that an abrupt climate change scenario could potentially destabilize the geo-political environment, leading to an increase in conflict through resource shortages.³⁰ Four years later, an interdisciplinary group of former admirals and generals at the Center for Naval Analyses (CNA) produced one of the first reports for the DoD on this threat, clearly framing climate change as a national security threat.³¹ This study, titled *National Security and the Threat of Climate Change*, stated that climate change is a multiplier for instability in some

²⁵ See, e.g., Bryan Bender, *Chief of US Pacific Forces Calls Climate Biggest Worry*, BOS. GLOBE (Mar. 9, 2013), <https://www.bostonglobe.com/news/nation/2013/03/09/admiral-samuel-locklear-commander-pacific-forces-warns-that-climate-change-top-threat/BHdPVCLrWEMxRe9IXJZcHL/story.html> (quoting Admiral Sam Locklear who called climate change the biggest long-term security threat in the Pacific theater); John M. Broder, *Climate Change Seen as Threat to Security and Drain on Military*, N.Y. TIMES, Aug. 8, 2009, at A1.

²⁶ In the November 2014 elections, Republicans took control of the U.S. Senate. *2014 Senate Elections*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/elections/live_results/2014/senate (last visited Nov. 10, 2015). Senator Inhofe (R-OK), an outspoken critic of climate science, took the chairmanship of the Senate Committee on Environment & Public Works. U.S. SENATE COMMITTEE ON ENV'T & PUBLIC WORKS, <http://www.epw.senate.gov/public> (last visited Nov. 10, 2015). By one count, there are 160 Representatives in Congress on the record denying that climate change is real. See, e.g., Robert V. Percival, *Presidential Power to Address Climate Change in an Era of Legislative Gridlock*, 32 VA. ENVTL. L.J. 134, 144 (2014).

²⁷ See, e.g., DOD ROADMAP 2014, *supra* note 11. In recent testimony to the Senate Armed Services Committee, Admiral Locklear stated that from 2008 to 2012, 280,000 people died in the Pacific region due to natural disasters, 800,000 people were displaced, and \$500 billion in productivity was lost. See *Hearing to Receive Testimony on United States Pacific Command in Review of the Defense Authorization Request for Fiscal Year 2014 and the Future Years Defense Program: Before the S. Comm. On Armed Servs.*, 113th Cong. (2013) (testimony of Admiral Samuel J. Locklear III, USN, Commander, United States Pacific Command, Department of Defense).

²⁸ See Percival, *supra* note 26.

²⁹ PETER SCHWARTZ & DOUG RANDALL, CAL. INST. OF TECH., AN ABRUPT CLIMATE CHANGE SCENARIO AND ITS IMPLICATIONS FOR UNITED STATES NATIONAL SECURITY (2003), <http://www.dtic.mil/dtic/tr/fulltext/u2/a469325.pdf>.

³⁰ *Id.* at 2.

³¹ MILITARY ADVISORY BD., CTR. FOR NAVAL ANALYSES, NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE 39 (2007) [hereinafter CNA 2007], https://www.cna.org/cna_files/pdf/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf.

of the most volatile regions of the world.³² It further recommended that the United States fully integrate planning for climate change into its broader national security strategies.³³

The climate change-national security nexus also is relevant to the DoD's increased focus on energy security, a concern that grew out of the military's dangerous over-reliance on fossil fuel supply lines in Afghanistan and Iraq.³⁴ Indeed, recent studies suggest that the DoD's continual reliance on traditional fossil fuels places operational military forces at risk on the battlefield.³⁵

In 2014, CNA issued another report, entitled *National Security and the Accelerating Risks of Climate Change*, stating that climate change's effects are immediate and cannot be dismissed as a mere future threat.³⁶ It further declared that climate change catalyzes international instability by reducing access to fresh water, impairing food production, and transforming the world through the melting of the polar ice caps and the resulting rise in sea levels.³⁷ Domestically, climate change will restrict military training ranges, tax military capacity through an increase in domestic disaster relief scenarios, and threaten military infrastructure through increases in flooding and sea level rise.³⁸ Additionally, it will dramatically impact future military missions, as the military is increasingly called upon to provide humanitarian assistance and disaster relief at home and abroad.³⁹

In October 2014, former Secretary of Defense Chuck Hagel issued the DoD's *Climate Change Adaptation Roadmap*,⁴⁰ synthesizing many of its earlier reports and roadmaps. According to this roadmap, climate change's effects will require the DoD to provide material and security assistance with increasing frequency at home and abroad, and climate change "will affect [the DoD's] ability to defend the Nation and poses immediate risks to U.S. national security."⁴¹ This roadmap will likely

³² See *id.* at 6.

³³ *Id.* at 13–18 (noting that climate change's destabilizing impacts include reduced access to fresh water, impaired food production, health catastrophes, displacement of major populations, greater potential for failed states, a rise in terrorism, mass migrations, and escalation of conflicts over resources).

³⁴ MILITARY ADVISORY BD., CTR. FOR NAVAL ANALYSES, POWERING AMERICA'S DEFENSE: ENERGY AND THE RISKS TO NATIONAL SECURITY 9 (2009) [hereinafter CNA 2009], https://www.cna.org/cna_files/pdf/MAB_2-FINAL.pdf (quoting General James Mattis as stating that the military should be "[u]nleash[ed] . . . from the tether of fuel").

³⁵ *Id.* at i.

³⁶ CNA 2014, *supra* note 18.

³⁷ See *id.* at 11–18.

³⁸ See *id.* at 21–27.

³⁹ See *id.* at 23. Such missions include responding to wildfires, managing civil unrest after extreme weather events, and moving water to drought-stricken areas. *Id.*

⁴⁰ DOD ROADMAP 2014, *supra* note 11.

⁴¹ *Id.* at 1.

serve as a meaningful planning document with broader implications for future military missions. It reinforces that climate change will negatively impact military infrastructure at home with an increase in flooding and sea level rise, requiring significant climate adaptation investment at military installations.⁴²

Senior executive national security policy documents have also addressed climate change. For example, the President's 2015 *National Security Strategy* listed climate change as one of the top eight strategic risks to U.S. national security interests.⁴³ The most recent *National Military Strategy*, issued by the Chairman of the Joint Chiefs of Staff (the nation's top military officer), stated that climate change will likely challenge weak or developing states' capacities to respond to natural disasters.⁴⁴

The *Quadrennial Defense Review (QDR)*, a key military planning document submitted to Congress by the Secretary of Defense every four years, has also reinforced the national security impacts of climate change.⁴⁵ For the first time, the QDR formally linked climate change with national security in 2010. It stated that the DoD must "foster efforts

⁴² See *id.* at 6.

⁴³ WHITE HOUSE, NATIONAL SECURITY STRATEGY 12 (2015) [hereinafter 2015 NSS], https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf ("Climate change is an urgent and growing threat to our national security, contributing to increased natural disasters, refugee flows, and conflicts over basic resources like food and water."). In 2010, President Obama stated:

The danger from climate change is real, urgent, and severe. The change wrought by a warming planet will lead to new conflicts over refugees and resources; new suffering from drought and famine; catastrophic natural disasters; and the degradation of land across the globe. The United States will therefore confront climate change based upon clear guidance from the science, and in cooperation with all nations—for there is no effective solution to climate change that does not depend upon all nations taking responsibility for their own actions and for the planet we will leave behind.

See WHITE HOUSE, NATIONAL SECURITY STRATEGY 47 (2010). "Climate" and "climate change" were mentioned twenty-eight times in the 2010 *National Security Strategy (NSS)*, see *id.*, and nineteen times in the 2015 NSS. See 2015 NSS, *supra*. In the 2002 NSS, "climate change" was mentioned only once. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 20 (2002), <http://nssarchive.us/NSSR/2002.pdf>.

⁴⁴ JOINT CHIEFS OF STAFF, DEP'T OF DEF., THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA: REDEFINING AMERICA'S MILITARY LEADERSHIP 2 (2011), <http://www.defense.gov/Portals/1/Documents/pubs/2011-National-Military-Strategy.pdf>. This document was released by the Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen. Further, the 2008 *National Defense Strategy*, signed by the Secretary of Defense, stated that climate pressures may exacerbate existing social, political, cultural, and technological change. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 4–5 (2008), <http://www.defense.gov/Portals/1/Documents/pubs/2008NationalDefenseStrategy.pdf>.

⁴⁵ DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW 84–88 (2010) [hereinafter QDR 2010], <http://www.strategicstudiesinstitute.army.mil/pdffiles/qdr-2010.pdf>; see also 10 U.S.C. § 118 (2012) (requiring the DoD to provide the QDR to Congress every four years).

to assess, adapt to, and mitigate the impacts of climate change,”⁴⁶ and that climate change will require the military to change “the operating environment, roles, and missions that [the DoD] undertake[s].”⁴⁷ The 2014 QDR built upon this earlier guidance, asserting that climate change may “increase the frequency, scale, and complexity of future missions”⁴⁸ It also highlighted the importance of military partnering, stating that climate change “creates both a need and an opportunity for nations to work together”⁴⁹

In addition to these reports and policy documents, the President has taken measures independent of Congress. In 2009, President Obama signed Executive Order 13,514, entitled *Federal Leadership in Environmental, Energy, and Economic Performance*, stating that all federal agencies would lead by example in reducing green house gas (GHG) emissions.⁵⁰ This Executive Order was revoked in March of 2015 with the issuance of Executive Order 13,693, entitled *Planning for Federal Sustainability in the Next Decade*, which set forward-looking goals for federal agencies in the area of energy, climate change, water use, vehicle fleets, construction, and acquisition.⁵¹

In June 2013, President Obama issued a federal *Climate Action Plan*, requiring federal agencies to report on the impacts of climate change and directing the DoD to assess the vulnerability of its coastal facilities.⁵² Soon after, President Obama signed Executive Order 13,653, entitled *Preparing the United States for the Impacts of Climate Change*, which established the Council on Climate Preparedness and Resilience with the mandate to modernize federal programs in support of climate resilient investment.⁵³ In addition, it directed each federal agency to develop and update plans to integrate climate change into agency

⁴⁶ QDR 2010, *supra* note 45, at 86.

⁴⁷ *Id.* at 84–85 (“DoD will need to adjust to the impacts of climate change on [its] facilities and military capabilities.”). *Id.*, at 85.

⁴⁸ DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW, at VI (2014), http://www.defense.gov/Portals/1/Documents/pubs/2014_Quadrennial_Defense_Review.pdf.

⁴⁹ *Id.* at 25.

⁵⁰ Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009), *revoked by* Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 19, 2015). In response to this executive order, the DoD issued its *Climate Change Adaptation Roadmap* in 2012. The roadmap stated that including climate change and climate variability considerations into the military planning process will enhance operational and infrastructure resilience. *See* DEP’T OF DEF., CLIMATE CHANGE ADAPTATION ROADMAP (2012), http://www.acq.osd.mil/ie/download/green_energy/dod_sustainability/2012/Appendix%20A%20-%20DoD%20Climate%20Change%20Adaption%20Roadmap_20120918.pdf.

⁵¹ 80 Fed. Reg. 15,871.

⁵² *See* 2013 CLIMATE ACTION PLAN, *supra* note 7, at 12–13.

⁵³ Exec. Order No. 13,653, 78 Fed. Reg. 66,819 (Nov. 1, 2013).

operations and overall mission objectives.⁵⁴ Most recently, President Obama updated an executive order that minimizes federal construction projects within the designated 100-year floodplain.⁵⁵

In sum, while the climate change-national security linkage is recent, a rapidly growing body of empirical studies, reports, and data that link national security to climate change has emerged. Clearly, the DoD must begin to prepare for climate change's impacts in response to increasing weather extremes and sea level rise.⁵⁶ And the President has begun to take action independent from Congress. The military will need the proper training, organizational alignment, and legal authority to respond to domestic and global instability exacerbated by a changing climate. Yet, climate change is unlike any traditional or historical national security threat. It transcends geographic borders and aggravates already existing threats—accelerating environmental degradation, poverty, social tensions, terrorist activities, and other forms of violence.⁵⁷ But what branch of government can claim the clearest constitutional authority to respond to this novel threat? This question is explored below.

II. SEPARATION OF POWERS: AUTHORITY OVER THE MILITARY'S ABILITY TO RESPOND TO CLIMATE CHANGE

This section addresses the traditional understanding of the President and Congress's authorities to address domestic and international national security threats—authorities that form the framework for efforts to address the national security impacts of climate change. The President may take action under his Commander in Chief power, while Congress can check his unilateral ability to do so given the power of the purse that it exercises over the military.⁵⁸ However, courts will be unlikely to mediate disputes between Congress and the President

⁵⁴ *Id.* § 6. One month later, the President issued a memorandum to all the heads of executive departments and federal agencies. It directed that twenty percent of each agency's electric energy consumption be renewable by 2020 (to the extent economically feasible and technically practicable). See Memorandum from Barack Obama, President of the U.S., to the heads of executive departments and agencies (Dec. 5, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/05/presidential-memorandum-federal-leadership-energy-management>.

⁵⁵ Exec. Order No. 13,690, 80 Fed. Reg. 6425 (Jan. 30, 2015).

⁵⁶ Climate adaptation is defined as "the adjustments that society or ecosystems make to limit negative effects of climate change. It can also include taking advantage of opportunities that a changing climate provides." *Adaptation Overview*, U.S. ENVTL. PROTECTION AGENCY, <http://www3.epa.gov/climatechange/adaptation/overview.html> (last visited Feb. 8, 2015). This could include "armoring" infrastructure and investing in climate-resilient infrastructure.

⁵⁷ See CNA 2014, *supra* note 18, at 2.

⁵⁸ See discussion *infra* Parts II.A.1, II.A.2.

given the political question doctrine and various other justiciability doctrines, which may make unilateral action easier by the President in the face of congressional opposition or acquiescence.⁵⁹

A. *Constitutional Text and Original Understanding of the President and Congress's Authorities to Direct the Military to Respond to National Security Threats*

1. Presidential Authority: Vesting Clause, Take Care Clause, and Commander in Chief Clause

The President's power to combat climate change must be derived from either the Constitution or from an act of Congress.⁶⁰ The text of the Constitution has three principal clauses that are critical to understanding the President's powers: (1) the Vesting Clause;⁶¹ (2) the Take Care Clause;⁶² and (3) the Commander in Chief Clause.⁶³ Important questions endure as to how these three clauses interact and whether such powers are independent or are aggregated.⁶⁴

The Vesting Clause states, "The executive Power shall be vested in a President of the United States of America."⁶⁵ Contrast the President's authority with Congress's legislative power in Article I, which states that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States . . ."⁶⁶ Article II does not contain the arguably limiting words "herein granted." In light of this disparity, commentators dating back to the nation's founding have vigorously debated the precise scope of the Vesting Clause and whether it should be read in a more expansive manner than Congress's Article I powers.⁶⁷

⁵⁹ See discussion *infra* Part II.B.1.

⁶⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (stating that the President's power to issue the order to seize domestic steel mills "must stem either from an act of Congress or from the Constitution itself").

⁶¹ U.S. CONST. art. II, § 1, cl. 1.

⁶² U.S. CONST. art. II, § 3.

⁶³ U.S. CONST. art. II, § 2, cl. 1.

⁶⁴ *Youngstown*, 343 U.S. at 587 (rejecting the President's contention that his power "should be implied from the aggregate of his powers under the Constitution").

⁶⁵ U.S. CONST. art. II, § 1, cl. 1.

⁶⁶ U.S. CONST. art. I, § 1 (emphasis added).

⁶⁷ Arguments for a more expansive executive power first arose from Alexander Hamilton, who at the time of the Constitution's ratification asserted that the entire executive power is vested in the President "subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument." ALEXANDER HAMILTON, LETTERS OF PACIFICUS NO. I (1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8, 13 (Morton Frisch ed., 2007). In making the case for a strong executive power, Hamilton advocated for a broad interpretation of the Vesting Clause,

In addition, the President has the constitutional obligation and authority to “take Care that the Laws be faithfully executed”⁶⁸ In following through on this constitutional obligation to implement the laws passed by Congress, the President must do so within the constraints of the Constitution, “which takes precedence over other forms of law.”⁶⁹ As discussed in greater detail below, the President has the authority under the Take Care Clause to ensure that all law is faithfully executed—which includes treaty obligations and international obligations.⁷⁰

Under the Take Care Clause, the President still has the discretion to exercise his independent judgment when faced with a law that he believes to be unconstitutional.⁷¹ Indeed, in limited circumstances, the President has exercised this unique discretion in opting not to execute a law that he viewed as an unconstitutional legislative encroachment upon Presidential power.⁷² And courts have upheld the President’s authority to refuse to enforce unconstitutional laws.⁷³ This was most recently seen in 2011, when the President declared the Defense of Marriage Act—as applied to legally married same-sex couples—unconstitutional and declined to enforce its implementing provisions.⁷⁴

While this Article focuses on the present situation, where the President is taking proactive measures to address climate change in the face of congressional intransigence, the Take Care Clause will likely also take on increased importance if the reverse were true (i.e., congressional initiative and presidential intransigence). While the President has

proclaiming, for example, that while Congress can alone declare war, the President can “do whatever else the laws of Nations, cooperating with the Treaties of the Country enjoin, in the intercourse . . . with foreign powers.” *Id.* at 16.

⁶⁸ U.S. CONST. art. II, § 3.

⁶⁹ Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) [hereinafter Dellinger 1994 OLC].

⁷⁰ Stromseth, *supra* note 13, at 153 (“The power to send troops abroad is certainly one of the powers which the President may exercise in carrying out such a treaty as . . . the United Nations Charter.” (quoting STAFF OF S.J. COMM. ON FOREIGN RELATIONS & ON ARMED SERVS., 82ND CONG., POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES 20 (Comm. Print 1951))).

⁷¹ See Dellinger 1994 OLC, *supra* note 69, at 200 (stating that the President must determine that “it is probable that the Court would agree with him”); see also The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980).

⁷² See Dellinger 1994 OLC, *supra* note 69, at 201.

⁷³ See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 906 (1991) (“[The President has] the power to veto encroaching laws or even to disregard them when they are unconstitutional.” (citation omitted)); *Myers v. United States*, 272 U.S. 52 (1926) (striking down a congressional attempt to prevent the President from removing postmasters without Senate approval as an unconstitutional infringement on the President’s removal power).

⁷⁴ Press Release, Dep’t of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

enormous discretion to utilize his veto power if he disagrees with a proposed law, he still has the obligation to execute laws that he believes to be constitutional.

Most significant for purposes of this Article is that the President is the Commander in Chief: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia . . . when called into the actual Service of the United States”⁷⁵

The President’s precise authorities as Commander in Chief have proven elusive to jurists and scholars throughout American history.⁷⁶ Indeed, Presidents and their advisors “cannot say where it begins or ends.”⁷⁷ Further, there is little discussion of the Commander in Chief Clause in records from the Constitutional Convention or the Federalist Papers. In one of the rare early writings interpreting this clause, Alexander Hamilton took a more limited view of the President’s Commander in Chief powers. In contrasting the President’s powers with the broad powers held by the British king, he stated:

[The Commander in Chief power] would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies⁷⁸

In interpreting the Commander in Chief Clause, courts have construed this power as one that directs the “movements of the naval and military forces placed by law at his command, and to employ them in the manner [the President] may deem most effectual to harass and conquer and subdue the enemy.”⁷⁹ And the Supreme Court has stated

⁷⁵ U.S. CONST. art. II, § 2, cl. 1.

⁷⁶ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued Presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.”); see also, e.g., LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 249–51 (5th ed., rev. 2007) [hereinafter FISHER, *CONFLICTS*] (noting the problems in applying this clause with the counteracting values of executive discretion and legislative limits).

⁷⁷ *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring).

⁷⁸ THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). *But see* LOUIS FISHER, *PRESIDENTIAL WAR POWER* 12 (2d ed., rev. 2004) [hereinafter FISHER, *WAR POWER*] (stating that Hamilton knew that command and direction “can be powerful forces in determining the scope and duration of war.”). And Hamilton himself took on a broader view of the President’s power as it relates to the Vesting Clause in the Pacificus-Helvidius debates. See HAMILTON, *supra* note 67.

⁷⁹ *Fleming v. Page*, 50 U.S. 603, 615 (1850); see also *Loving v. United States*, 517 U.S. 748, 772 (1996) (stating that the President as Commander in Chief must “superintend the military”). Superintends is defined “[t]o have charge of; exercise supervision over.” *Superintends*, AMERICAN HERITAGE DICTIONARY (2d College ed. 1991).

that this clause vests in the President supreme and undivided command of overall forces “necessary to the prosecution of a successful war.”⁸⁰

President Franklin Roosevelt’s Attorney General (and later Justice of the U.S. Supreme Court), Robert Jackson, stated that “the President’s responsibility as Commander in Chief embraces the authority to *command* and *direct* the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States.”⁸¹

Unquestionably, the Commander in Chief Clause ensures civilian control over the military by placing an elected civilian at its head. Further, from the Constitutional debates, it has been understood that the President’s Commander in Chief powers include the authority to repel sudden attacks without congressional authorization and to safeguard the nation.⁸² But applying these “cryptic words”⁸³ to the modern military and the multi-layered threat of climate change is particularly challenging, as discussed in greater detail below.

2. Congressional Authority: The Power to Declare War and the Power of the Purse

Congress has the constitutional power to *declare* war.⁸⁴ At the Constitutional Convention, the Founders were concerned about comingling the powers to declare war with the power to command and lead the military forces. James Madison stated that Congress “alone has access to the pockets of the people”⁸⁵ and warned about merging the Commander in Chief’s power with the power to declare war:

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred from the latter functions . . . analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.⁸⁶

⁸⁰ *United States v. Sweeny*, 157 U.S. 281, 284 (1895); FISHER, WAR POWER, *supra* note 78, at 13.

⁸¹ *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 61–62 (1941) (emphasis added). At the time of this opinion, the United States was a neutral party.

⁸² *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed. 1911).

⁸³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

⁸⁴ U.S. CONST. art. I, § 8, cl. 11.

⁸⁵ THE FEDERALIST NO. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961).

⁸⁶ Letter from James Madison to Thomas Jefferson (Aug. 11, 1793), in 6 THE WRITINGS OF JAMES MADISON: 1790–1802, at 148 (Gaillard Hunt ed., 1906).

Alexander Hamilton believed Congress's funding powers include the constitutional power to raise and regulate fleets and armies—an important check on the Executive.⁸⁷ And Congress has only declared war five times in American history.⁸⁸ In an increasingly interconnected world bristling with modern weaponry, presidents will be unable to wait for a formal congressional war declaration in the face of outside threats, making formal war declaration increasingly unlikely.

Distinct from the power to declare war and appropriate funding for the military, Congress may authorize military action.⁸⁹ This authorization trend has increased since the end of World War II and continues to this day with the Authorization for Use of Military Force (AUMF) in 2001.⁹⁰ The President has relied extensively on the AUMF, in conjunction with his Commander in Chief powers, to deploy military forces abroad in recent conflicts.⁹¹

Congress derives its funding power from both the Appropriations Clause⁹² and the Taxing and Spending Clause of the Constitution.⁹³ The Appropriations Clause states, “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”⁹⁴ The Taxing and Spending Clause states, “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”⁹⁵

⁸⁷ THE FEDERALIST NO. 69 (Alexander Hamilton).

⁸⁸ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 263 (1996). Formal war declarations were falling out of favor at the time of the nation's founding. A functionalist approach to the war declaration authority recognizes that Congress may be unable to convene on a moment's notice and the President may not be able to afford to wait to respond if the nation is under imminent attack. *See id.*

⁸⁹ See FISHER, CONFLICTS, *supra* note 76, at 251 (listing the Quasi-War with France in 1798–1800, and the recent wars in Iraq and Afghanistan as examples of congressional authorizations for the President to use force).

⁹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541(2012)).

⁹¹ See, e.g., MATTHEW C. WEED, CONG. RESEARCH SERV., R31340, A NEW AUTHORIZATION OF USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS IN BRIEF 1 (2015) (referencing the President's reliance on the 2001 AUMF for military strikes against the Islamic State in Iraq and Syria).

⁹² U.S. CONST. art. I, § 9, cl. 7.

⁹³ U.S. CONST. art. I, § 8, cl. 1.

⁹⁴ U.S. CONST. art. I, § 9, cl. 7.

⁹⁵ U.S. CONST. art. I, § 8, cl. 1.

In interpreting these clauses, courts have afforded great deference to Congress's determination of what constitutes the "common Defence and general Welfare."⁹⁶

The Anti-Deficiency Act dates from 1870 and reinforces Congressional power over the nation's purse strings by providing a final check on unauthorized expenditures from the DoD and from executive branch officials.⁹⁷ The current version of the Act prohibits the making or authorizing of an expenditure by a governmental official in advance or in excess of a congressional appropriation.⁹⁸

The Constitution also grants Congress the power "[t]o raise and support Armies"⁹⁹ and "[t]o provide and maintain a Navy."¹⁰⁰ The Founders were concerned about a permanent standing army in light of the British Army's abuses during pre-Revolutionary times.¹⁰¹ The two-year appropriations limitation on the army served as an effective check on the President's powers, ensuring that Congress must continually validate and determine the proper size of and funding for the military. The Militia Clause of the Constitution authorizes Congress "[t]o provide for calling forth the Militia [(today's National Guard)] to execute the Laws of the Union, suppress Insurrections and repel Invasions."¹⁰²

In addition, under the Military Regulations Clause, Congress has the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."¹⁰³ This clause has been utilized by Congress to pass the Uniform Code of Military Justice (UCMJ), the criminal justice code for the armed forces.¹⁰⁴ In applying the Regulations Clause, courts have held that Congress has the power to determine the size of the armed forces and the "manner and by what means they shall be spent

⁹⁶ Moreover, courts have generally construed Congress's funding power as a constraint on the executive branch, requiring affirmative authorization prior to the expenditure of public funds. *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."); *see also* *United States v. Butler*, 297 U.S. 1, 65–66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

⁹⁷ Anti-Deficiency Act, ch. 251, § 7, 16 Stat. 251 (1870) (current version at 31 U.S.C. § 1341 (2012)).

⁹⁸ *Id.*

⁹⁹ U.S. CONST. art. I, § 8, cl. 12. But "no Appropriation of Money to that Use shall be for a longer Term than two Years." *Id.*

¹⁰⁰ U.S. CONST. art. I, § 8, cl. 13.

¹⁰¹ *See generally* Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119 (2014).

¹⁰² U.S. CONST. art. I, § 8, cl. 15.

¹⁰³ U.S. CONST. art. I, § 8, cl. 14.

¹⁰⁴ Uniform Code of Military Justice, ch. 169, 64 Stat. 108 (1950) (codified as amended at 10 U.S.C. §§ 801–940 (2012)).

for military and naval procurement.”¹⁰⁵ But the precise scope of this power is not well defined. Indeed, presidents dating back to Lincoln have made rules outside of Congress for the regulation of land and naval forces.¹⁰⁶

B. *Evolution in Interpretation: Judicial Deference, Historical Practice, and a Continually Funded Military Expand the President's Powers*

The events leading to the United States' entry into World War II further expanded the President's Commander in Chief power. Six months before the attack on Pearl Harbor, President Roosevelt seized a domestic aviation plant because a strike at the plant caused it to halt military production.¹⁰⁷ Attorney General Robert Jackson (the future drafter of the *Youngstown* concurring opinion) stated that the President had a “duty constitutionally and inherently resting upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States.”¹⁰⁸ Additionally, President Roosevelt demanded that Congress repeal certain provisions of the Emergency Price Control Act, asserting that he had the presidential powers “to take measures necessary to avert a disaster which would interfere with the winning of the war.”¹⁰⁹

After the Second World War, the Executive's powers were magnified with the emergence of the Cold War and the consequential

¹⁰⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring); see also *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (“[T]he Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline . . .”).

¹⁰⁶ Abraham Lincoln promulgated one of the first rules for the governance of warfare in the Lieber Code at General Orders No. 100. See generally JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012). The Supreme Court has also upheld the President's authority to issue regulations. See, e.g., *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885) (upholding the President's issuance of regulations to reward the apprehension of military deserters).

¹⁰⁷ Edward S. Corwin, *The Impact of Total War on the Powers and Structure of the National Government*, in *TOTAL WAR AND THE CONSTITUTION: FIVE LECTURES DELIVERED ON THE WILLIAM W. COOK FOUNDATION AT THE UNIVERSITY OF MICHIGAN, MARCH 1946*, at 35, 47–48 (1947).

¹⁰⁸ *Id.* at 48.

¹⁰⁹ 88 CONG. REC. 7044 (1942). Congress quickly complied with the President's request, averting a wartime constitutional crisis. FDR's Commander in Chief power was also utilized in an ignoble manner, such as in his issuance of an executive order that authorized the removal of 112,000 residents of Japanese descent from their homes to relocation centers. See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (discussing Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

development of a continual and well-funded standing army.¹¹⁰ Though Congress has not declared war since 1942, presidents now routinely send forces overseas on a variety of missions that fall short of wartime action.¹¹¹ Since World War II, presidents have increasingly asserted authority for military action independent of congressional authorization.¹¹² American history is “replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.”¹¹³

1. The Political Question Doctrine and Problems of Standing Limit the Judiciary’s Role

The judiciary will likely play a limited role in mediating the President and Congress’s powers to combat the national security impacts of climate change.¹¹⁴ This may strengthen the President’s hand if he takes the initiative in response to climate change. It also magnifies the importance of the judiciary’s few forays into resolving separation of powers disputes and forays into defining the President’s Commander in Chief power, all of which are exemplified by Jackson’s concurrence in the *Youngstown* opinion.¹¹⁵

As a fundamental matter, a case or controversy must exist prior to a lawsuit being brought to challenge an executive action.¹¹⁶ But courts often shy away from separation of powers cases and are reluctant to address the precise scope of the President’s Commander in Chief

¹¹⁰ See KOH, *supra* note 22, at 117–133 (describing why the President “nearly always wins” in foreign affairs due to executive initiative and congressional acquiescence).

¹¹¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (noting over 200 instances where the United States employed the military outside the country for the protection of American citizens or to protect national security); see also KOH, *supra* note 22 (asserting that the President’s powers have largely expanded since the conclusion of the Second World War due to a combination of (1) congressional acquiescence, (2) executive initiative, and (3) judicial tolerance).

¹¹² See BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCE ABROAD, 1798–2015, at 10–33 (2015), <https://www.fas.org/sgp/crs/natsec/R42738.pdf> (listing the numerous military actions taken—often without congressional involvement—since the Second World War).

¹¹³ *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980).

¹¹⁴ See *Goldwater v. Carter*, 444 U.S. 996 (1979) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”); *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (challenging the President’s power to use military force in Kosovo); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (challenging the President’s power to use military force in the Persian Gulf War).

¹¹⁵ See discussion *infra* Section II.B.3.

¹¹⁶ See, e.g., *United States v. Nixon*, 418 U.S. 683, 692–97 (1974).

powers.¹¹⁷ Indeed, while courts have ruled on the President's authorities in the *conduct* of military force, there is a scarcity of cases reconciling Congress's powers with the President's power in terms of their respective roles in the *authorization* of military force.¹¹⁸

In addition, to the extent the courts have adjudicated such disputes, they have suggested that the President has wide latitude with respect to his Commander in Chief's powers when applied outwardly, and less latitude when applied inwardly.¹¹⁹ At the same time, there is a continually evolving customary Commander in Chief power that derives from historical executive practice and congressional quiescence.¹²⁰ This construct was first developed in Justice Jackson's analysis in *Youngstown*.¹²¹ Thus, the judiciary will likely show greater presidential deference when the President is acting outwardly in response to a climate-induced international humanitarian assistance crisis. This would be due, in part, to longstanding civil libertarian concerns and existing statutory limitations on the President's power to use the military domestically.¹²²

Congress's power of the purse is not unlimited. When trying to reconcile the powers of the purse and the sword, Professor Henkin stated that "Congress decides the degree and detail of its support [for presidential foreign relations initiatives]: it determines ultimately the State Department's budget, how much money the President shall have to spend on the armed forces under his command, [and] how much he can contribute to United Nations programs."¹²³

¹¹⁷ See James M. Lindsay, *Is Operation Odyssey Dawn Constitutional? Part V*, COUNCIL ON FOREIGN REL.: THE WATER'S EDGE (Apr. 5, 2011), <http://blogs.cfr.org/lindsay/2011/04/05/is-operation-odyssey-dawn-constitutional-part-v> (discussing the Supreme Court's silence in separation of powers issues concerning foreign relations and the initiation of hostilities). While President Obama pulled back from his initial announcement to utilize military force in Syria and ultimately sought congressional approval, courts continue to view war powers cases as "unsuitable for judicial review," and one commentator has stated that Obama's use of force in Libya and elsewhere "will constitute a remarkable legacy of expanded presidential power to use military force." Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), <http://www.newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-look-for-congressional-authorization>.

¹¹⁸ JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS 34 (2013) [hereinafter CRS MILITARY OPERATIONS], <https://www.fas.org/sfp/crs/natsec/R41989.pdf>.

¹¹⁹ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

¹²⁰ *Id.* at 637.

¹²¹ *Id.*

¹²² For example, the Posse Comitatus Act limits the President's ability to utilize the military for law enforcement missions domestically. See Posse Comitatus Act, ch. 263, § 15, 20 Stat. 152 (1878) (current version at 18 U.S.C. § 1385 (2012)); see also 10 U.S.C. § 375 (2012).

¹²³ LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 74 (2d ed. 1996).

The President lacks any constitutional appropriations power and may only spend money on the military according to a specific appropriation and authorization from Congress. Herein lies the tension. Congress appropriates money for military programs and services, and each military service then allocates the appropriated money for various functions. But the President often takes the operational initiative to command, deploy, and make tactical decisions regarding the utilization of military forces.¹²⁴

2. Limited Court Rulings Addressing the Commander in Chief's Powers Evolve to Reflect Historical Realities

Prior to the Civil War, the Supreme Court appeared willing to take on cases challenging presidential actions as Commander in Chief.¹²⁵ Early cases were more closely aligned with the Hamiltonian view of the Commander in Chief power as “nothing more than the supreme command and direction of the military and naval forces.”¹²⁶

For example, in 1804, the Court heard *Little v. Barreme*, one of the earliest cases addressing the President's authority as Commander in Chief in the conduct of war.¹²⁷ In *Little*, Congress had specifically authorized hostilities with France to include the seizure of merchant ships heading to French ports. But President John Adams ordered the seizure of a merchant vessel departing from a French port—an order that exceeded explicit congressional authorization.¹²⁸ Chief Justice Marshall upheld the damage award for the ship's owners, ruling that the President had exceeded his authority as Commander in Chief by taking action contrary to congressional authorization.¹²⁹ This ruling foreshadowed (or perhaps informed) Justice Jackson's analysis in

¹²⁴ *Id.* at 113. “It is accepted that Theodore Roosevelt sent the [Great White Fleet] and compelled Congress to appropriate funds to bring it back.” *Id.* at 390 (quoting EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 159 (5th ed. 1984)). Congress threatened to withhold money for the Great White Fleet, but President Roosevelt replied that he already had the money and dared Congress to “try and get it back.” Mike McKinley, *Cruise of the Great White Fleet*, NAVAL HIST. & HERITAGE COMMAND (Apr. 1, 2015, 12:37 PM), <http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/c/cruise-great-white-fleet-mckinley.html>.

¹²⁵ See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

¹²⁶ THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹²⁷ *Little*, 6 U.S. (2 Cranch) 170.

¹²⁸ *Id.*; see also CRS MILITARY OPERATIONS, *supra* note 118, at 7.

¹²⁹ *Little*, 6 U.S. (2 Cranch) at 179.

Youngstown of the President's fluctuating powers as being at the "lowest ebb" when acting contrary to an express authorization from Congress.¹³⁰

Fleming v. Page addressed the scope of the President's power as Commander in Chief in the prosecution of the Mexican-American War.¹³¹ In *Fleming*, U.S. merchants sought relief against a U.S. port collector from duties imposed on goods shipped to the United States from Tampico, Mexico, after the American Army occupied Tampico during wartime hostilities.¹³² The duties collected were used solely for U.S. military purposes; they were not transferred to the U.S. Treasury as they were when duties were collected in U.S. ports.¹³³ The plaintiffs argued that Mexico was no longer a foreign country for purposes of U.S. customs laws.¹³⁴ The President asserted that he was merely acting as a military commander in prosecuting a war waged against an enemy.¹³⁵ Chief Justice Taney focused on the President's authority to conduct wartime operations, but placed a limitation on what the President could do outside of the conduct of war absent legislative action:

[The President's] duty [is] purely military. As commander-in-chief, he 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 to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.¹³⁶

In doing so, the Court acknowledged that while Congress did not expressly authorize the establishment of customs authorities in Mexican territories occupied in the aftermath of hostilities, the President still has independent discretion to utilize customs authorities in the prosecution of wartime activities pursuant to his Commander in Chief power.¹³⁷

Congress has also attempted to use its appropriations power to thwart the President's command and organization authority, but has largely been unsuccessful. For example, prior to the Civil War, Congress attempted to attach an appropriations rider to an Army Corps of Engineers' project by making the appropriation subject to the naming of

¹³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹³¹ *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850).

¹³² *See id.* at 614.

¹³³ *Id.* at 616.

¹³⁴ *Id.* at 606.

¹³⁵ *Id.* at 615.

¹³⁶ *Id.*

¹³⁷ *Id.* at 615–16.

a specific officer (Captain Montgomery Meigs) as the project's supervisor.¹³⁸ President Buchanan ultimately ignored this condition, and stated in his signing statement attached to the bill that such an appropriations condition would "interfere with the clear right of the President to command the Army and to order its officers to any duty."¹³⁹

Two Civil War-era cases are also instructive in defining the President's authority as Commander in Chief. *The Prize Cases*,¹⁴⁰ decided at the very outset of the Civil War, laid the basis for a broader conception of the President's Commander in Chief powers.¹⁴¹ The Court's ruling in *The Prize Cases* went beyond the Founders' earlier understanding that—in the absence of congressional authorization or formal war declaration—the Executive's powers extended only to repelling sudden attacks.¹⁴² In his administration's arguments in *The Prize Cases*, President Lincoln claimed that he had the authority as Commander in Chief—without congressional authorization—to blockade southern ports following the Confederate attack on Union forces at Fort Sumter, South Carolina.¹⁴³ The Court upheld the President's powers to put a naval blockade in place, a tactic normally employed when two opposing belligerents were at war, stating that "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but *bound* to resist force by force . . . without waiting for any special legislative authority."¹⁴⁴

Soon thereafter, the Court decided *Ex parte Merryman* following massive riots in Baltimore.¹⁴⁵ At the time, Maryland was a border slaveholding state of critical importance to the very survival of the United States, since it had not yet seceded. It served as the northern and eastern border of Washington, D.C., and its status as a slaveholding border state made secession a continual threat.¹⁴⁶ Lacking express

¹³⁸ Memorial of Captain Meigs, 9 Op. Att'y Gen. 462 (1860).

¹³⁹ Signing Statement of President James Buchanan to the House of Representatives (June 25, 1860), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 598 (James D. Richardson ed., 1897).

¹⁴⁰ 67 U.S. (2 Black) 635 (1862).

¹⁴¹ Cf. KOH, *supra* note 22, at 85 (stating that the Supreme Court's opinion in *The Prize Cases* "evinced a growing judicial receptivity toward expansive claims of executive power").

¹⁴² *Id.*

¹⁴³ See *The Prize Cases*, 67 U.S. (2 Black) 635.

¹⁴⁴ *Id.* at 668 (emphasis added). President Lincoln took this action during the three-month period between when hostilities commenced at Fort Sumter and when Congress convened in July of 1861. See Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review In Wartime*, in PRESIDENTIAL POWER STORIES 53–58 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

¹⁴⁵ See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

¹⁴⁶ See *id.*

constitutional authority, President Lincoln authorized the commanding general of the U.S. Army to suspend the writ of habeas corpus in Baltimore.¹⁴⁷ A military commander then arrested John Merryman on suspicion of aiding the Confederacy.¹⁴⁸ Merryman petitioned Chief Justice Taney for relief via a writ of habeas corpus.¹⁴⁹ The military commanders ignored the writ, pointing to the President's suspension of habeas.¹⁵⁰ Chief Justice Taney, riding the federal circuit, ruled that Lincoln lacked the constitutional authority to suspend habeas corpus, noting that this authority is vested in Congress within Article I of the Constitution.¹⁵¹

In a passionate defense of his executive authority, on July 4, 1861, Lincoln addressed Congress:

To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?¹⁵²

The threats posed by climate change are not as severe or imminent as the threat to the nation caused by the South's secession. Yet the science and empirical data governing climate change are increasingly a cause of immense concern, with potentially widespread repercussions for the nation's security.¹⁵³ Indeed, scientific studies increasingly point to potentially devastating consequences: massive retreat from coastal communities and a significant uptick in extreme weather events causing catastrophic damage.¹⁵⁴ As the climate science matures and the threats become increasingly pronounced, the enormity of climate change's threats will come into focus. Future Presidents may then look to

¹⁴⁷ See *id.* at 148–49 (“The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.”).

¹⁴⁸ *Id.* at 147.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 148 (citing U.S. CONST. art. I, § 9).

¹⁵² Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953) (footnotes omitted). The Presidential oath states, “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 7.

¹⁵³ See generally U.N. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS: SUMMARY FOR POLICYMAKERS (2013), http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf; DOD ROADMAP 2014, *supra* note 11.

¹⁵⁴ See DOD ROADMAP 2014, *supra* note 11.

Lincoln's broad interpretation of his constitutional authorities to defend their orders to enhance military infrastructure at home and to respond to climate-induced crisis inside the United States.

3. *Youngstown* and Jackson's Trilogy of Presidential Power: A Starting Point to Address the President and Congress's Authorities to Combat Climate Change

In *Youngstown*, a case decided during the Korean War, the Supreme Court denied the President's authority to commandeer the nation's domestic steel mills.¹⁵⁵ Writing for the Court, Justice Black held that the President lacked the authority as Commander in Chief to seize private, domestic property during a time of undeclared war with Korea.¹⁵⁶

Justice Frankfurter, concurring in the judgment, focused on executive practice—or a lack thereof—in defining Presidential power in the face of congressional knowledge:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.¹⁵⁷

Youngstown's greatest legacy is found in Justice Jackson's concurring opinion, which provides a flexible and oft-cited approach to discern the President's foreign relations and Commander in Chief powers in the face of congressional action or inaction. It is the opinion

¹⁵⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *United States v. Curtiss-Wright Export Corp.*, Congress enacted a joint resolution that authorized the President to proclaim arms sales between two belligerents illegal. 299 U.S. 304, 312 (1936). The President's authority to issue this proclamation was challenged by Curtiss-Wright, an arms distributor who was indicted for violating the congressional resolution and the Presidential proclamation. See *id.* at 311. Justice Sutherland ruled on the broad powers of the President to conduct foreign affairs, stating that the President's foreign relations powers included, "the very delicate, plenary and exclusive power of the President as the *sole organ* of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *Id.* at 319–20 (1936) (emphasis added).

¹⁵⁶ See *Youngstown*, 343 U.S. at 587. This is commonly referred to as the *Steel Seizure* case, reflecting President Truman's effort to seize the nation's steel mills pursuant to executive order. While an in-depth analysis of the President's foreign relations power—as opposed to his Commander in Chief powers—is beyond the scope of this Article, it is generally understood that the President's Commander in Chief powers are a subset of his broader foreign relations powers. See *id.*

¹⁵⁷ *Id.* at 610–11 (Frankfurter, J., concurring).

routinely relied upon when courts reconcile the President and Congress's competing national security power.¹⁵⁸

In Jackson's ruling, governance is an art where constitutional provisions cannot be read in isolation, torn from context. "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."¹⁵⁹ Jackson provided a trilogy of categories in descending order of executive legitimacy to ascertain whether an executive action was constitutional.¹⁶⁰

In the first category, the President's power is at its maximum when acting pursuant to an express or implied authorization of Congress. This power "includes all that he possesses in his own right plus all that Congress can delegate."¹⁶¹ In the second category, when the President acts absent congressional grant or denial, he can act only upon his independent powers. But there may also be a "zone of twilight" where concurrent congressional and executive authorities exist.¹⁶² The precise inquiry of executive power will depend upon facts and "imperatives of events . . . rather than on abstract theories of law."¹⁶³ When acting in the third category, against the expressed or implied will of Congress, the President's power is at its "lowest ebb."¹⁶⁴ Here, the President "can rely only upon his own constitutional powers *minus* any constitutional powers of Congress over the matter."¹⁶⁵

Significantly, Justice Jackson focused on Truman's seizure of a domestic industry via the inward application of the Commander in Chief authority. Jackson viewed Truman's action to seize private, domestic steel mills—as opposed to an action taken outside of the United States—with great skepticism and placed it within the third category of executive power.¹⁶⁶ Congress had previously spoken on domestic property seizure and had not empowered Truman with such authority over domestic steel mills in time of war. Here, Truman's powers were "at [their] lowest ebb."¹⁶⁷ "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function

¹⁵⁸ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

¹⁵⁹ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

¹⁶⁰ *Id.* at 635–38.

¹⁶¹ *Id.* at 635.

¹⁶² *Id.* at 637.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 637–38.

¹⁶⁵ *Id.* at 637 (emphasis added); see also Barron & Lederman, *supra* note 16.

¹⁶⁶ See *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

¹⁶⁷ *Id.* at 637–40. Historically, the courts have not upheld the President's authority to act when doing so was contrary to congressional action. But recently, the President's powers were upheld when acting in this third category—when his powers were at the lowest ebb in opposition to congressional action. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

to command the instruments of national force, at least when turned *against the outside world* for the security of our society.”¹⁶⁸

Jackson stated that “it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.”¹⁶⁹

Jackson was particularly dismissive of the President’s assertion of inherent or implied powers, stating that such usage is “[l]oose and irresponsible . . . without fixed or ascertainable meanings.”¹⁷⁰ He acknowledged a gap between the President’s powers on paper and his real powers, noting that the scope and complexity of presidential activity has grown since the Constitution’s drafting.¹⁷¹ Jackson further stated that Congress alone had the authority to raise revenues, and Congress may determine “what manner and by what means they shall be spent for military and naval procurement.”¹⁷² Lastly, just as the President has authority to command the Army and Navy, Congress funds and supplies the President with an Army and Navy.¹⁷³

Justice Jackson’s analysis in *Youngstown* is a helpful starting point to determine the President’s external and internal powers to combat climate change. Beyond Jackson’s three categories of presidential power, *Youngstown* is particularly relevant in addressing the President’s modern authority to combat climate change at home and abroad based upon (1) its reliance on a customary Commander in Chief power that has evolved based upon executive practice and congressional quiescence,¹⁷⁴ and (2) its harsh treatment of the President’s powers when turned inward.¹⁷⁵ The President’s *domestic* seizure of a *private*

¹⁶⁸ *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (emphasis added).

¹⁶⁹ *Id.* at 646. Justice Jackson famously stated that

[a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.

Id. at 634.

¹⁷⁰ *Id.* at 646–47.

¹⁷¹ *Id.* at 653.

¹⁷² *Id.* at 643.

¹⁷³ *Id.* at 643–44. The dissent focused on the President’s broad discretionary authority under the Take Care Clause. In doing so, the dissent noted that while a specific statute did not authorize the seizure of steel mills, there also is not a statute prohibiting the seizure of steel mills. See *id.* at 701–02 (Vinson, J., dissenting).

¹⁷⁴ See, e.g., KOH, *supra* note 22, at 117–26 (addressing the three part combination of executive initiative, congressional acquiescence, and judicial tolerance).

¹⁷⁵ See *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

enterprise was of grave concern for the Court.¹⁷⁶ Justice Jackson allowed for little indulgence in interpreting the President's Commander in Chief powers as applied domestically, but would indulge the widest latitude of interpretation when the President's powers are turned against the outside world.¹⁷⁷

Interestingly, the Court did not hear a separate, but equally important, question at the time. Was President Truman's deployment of forces in the Korean "War" constitutional in the absence of a war declaration or clear congressional authorization? Indeed, *Youngstown* addressed Truman's *conduct* in executing the war, but not his underpinning legal authority to make war and to deploy hundreds of thousands of military service members with only an authorization from a United Nations Security Council Resolution, but absent congressional authorization.¹⁷⁸ As discussed later, Truman's reliance on the United Nations set an important precedent that is particularly relevant in ascertaining future actions that may be taken to address the threat to international peace and security posed by climate change.

Youngstown stands out as a rare justiciable claim where the President's assertion of a broad Commander in Chief authority was not upheld. But the trend since World War II in separation of powers cases involving national security has been that the President nearly always "wins" due to a concoction of executive initiative, congressional acquiescence, and judicial tolerance in the context of national security affairs.¹⁷⁹ This was recently reinforced in *Zivotofsky v. Kerry*, when the President's authority in foreign relations was upheld despite being at the lowest ebb.¹⁸⁰

¹⁷⁶ *Id.* at 642. Justice Jackson stated,

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled . . . [that he] can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

Id.

¹⁷⁷ *Id.* at 645 ("His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch . . .").

¹⁷⁸ See, e.g., HENKIN, *supra* note 123, at 255 (noting that Truman "claimed authority to act [in Korea] from the United Nations Security Council resolutions").

¹⁷⁹ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) (explaining that the President has "the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action," given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require swift responses by the United States without the opportunity for congressional deliberation and action).

¹⁸⁰ See *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

The President has increasingly taken the initiative in national security matters. While each occupant of the White House shapes the office's authority, an unquestionable expansion in the exercise of executive power has occurred since the nation's founding.¹⁸¹ The Commander in Chief authority has been amplified due to a continually funded standing army and navy at the President's immediate command and disposal¹⁸²—beyond what was imagined at the Constitution's drafting.

This Article now turns to the specifics of reconciling the powers of the purse and sword domestically (Part III) and internationally (Part IV) when combating the national security impacts of climate change. Domestically, doing so will require investment in climate resilient infrastructure. Internationally, humanitarian and disaster relief operations will likely increase as climate change's impacts worsen.¹⁸³ Indeed, the U.S. military is often the *only* worldwide asset available to immediately intervene in response to a humanitarian assistance crisis or disaster.¹⁸⁴ Such operations require a quick response and unfold rapidly, with the President retaining a certain amount of operational flexibility to respond to international crisis in the absence of congressional authorization or acquiescence.

III. RECONCILING THE POWERS OF THE SWORD AND PURSE TO COMBAT CLIMATE CHANGE DOMESTICALLY

A. *Climate Adaptation at Military Installations: Reconciling Constitutional Powers to Invest in Climate Resilient Infrastructure*

Climate change is expected to cause an increase in sea level rise and in storm surge, requiring an increase in funding for climate resilient investment and military construction at installations vulnerable to climate change. In recent years, the national security appropriations process has grown increasingly convoluted. Indeed, the National Defense Authorization Act (NDAA) is increasingly complex and often

¹⁸¹ See HENKIN, *supra* note 123, at 46.

¹⁸² There are thousands of military installations throughout the world, and U.S. Navy warships, aircraft carriers, and submarines have conducted routine operations since the end of World War II. See Ruth Alexander, *Which Is the World's Biggest Employer?*, BBC NEWS (Mar. 20, 2012), <http://www.bbc.co.uk/news/magazine-17429786>.

¹⁸³ For example, the Secretary of the Navy has stated that the Navy receives a request for humanitarian assistance every two weeks. See Ray Mabus, Sec'y of the Navy, Remarks at the U.S. Naval Institute Defense Forum Washington 1, 4 (Dec. 10, 2013), <http://www.navy.mil/navydata/people/secnav/Mabus/Speech/USNI2013.pdf>.

¹⁸⁴ See *id.*

numbers over a thousand pages.¹⁸⁵ And Congress inserted an additional budgeting layer into the authorization and appropriation process in the 1970s.¹⁸⁶ Subsequently, sequestration, continuing resolutions, and an increased reliance on appropriations riders have become normalized.¹⁸⁷

Process-wise, the President first requests funds from Congress each fiscal year.¹⁸⁸ Next, Congress authorizes the programs for which the funds are sought.¹⁸⁹ This “authorizing authorization” is legislation that “sets up or continues the legal operation of a Federal program or agency.”¹⁹⁰ Congress will enact an appropriation, which makes funds available to execute previously authorized activities, thereby permitting “Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.”¹⁹¹ Next, the executive branch spends the appropriated funds, often attempting to maximize discretion with as much latitude as possible.¹⁹²

As part of the process, Congress may place appropriations riders on funds that restrict “the maximum or minimum amount that may be obligated or expended for specific purposes.”¹⁹³ This may include riders that are added to an existing appropriation by amendment.¹⁹⁴ The precise scope of this authority remains a source of considerable debate.¹⁹⁵ Separate from the congressional appropriations process, the

¹⁸⁵ See, e.g., National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

¹⁸⁶ See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. § 601 (2012)) (creating the House and Senate Budget Committees and the Congressional Budget Office (CBO)); see also, e.g., WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 48 (1994).

¹⁸⁷ See BANKS & RAVEN-HANSEN, *supra* note 186, at 6; see also e.g., David M. Herszenhorn, *Senate Bill Passes, Averting a Shutdown*, N.Y. TIMES (Sep. 30, 2015), <http://www.nytimes.com/2015/10/01/us/politics/government-shutdown-congress.html>.

¹⁸⁸ See BANKS & RAVEN-HANSEN, *supra* note 186, at 43.

¹⁸⁹ *Id.* (An “authorizing legislation” is one that “sets up or continues the legal operation of a Federal program or agency either indefinitely or for a specific period of time or sanctions a particular type of obligation or expenditure within a program.” (quoting U.S. GEN. ACCOUNTING OFFICE, PAD-81-27, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS AND RELATED ACCOUNTING, ECONOMIC, AND TAX TERMS 39 (3d ed. 1981) [hereinafter 1981 GAO GLOSSARY OF TERMS]).

¹⁹⁰ 1981 GAO GLOSSARY OF TERMS, *supra* note 189.

¹⁹¹ *Id.* at 42.

¹⁹² See BANKS & RAVEN-HANSEN, *supra* note 186, at 43. In ruling on the constitutionality of congressional appropriations and authorizations, courts have historically given greater weight to authorizations. See, e.g., Nat'l Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671, 684 n.17 (D.D.C. 1988) (stating that an appropriations rider was “merely an appropriations measure by which no substantive rights or causes of action are created”), *vacated as moot sub nom.*, Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989).

¹⁹³ BANKS & RAVEN-HANSEN, *supra* note 186, at 43 (quoting 1981 GAO GLOSSARY OF TERMS, *supra* note 189, at 39).

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

DoD installations propose military projects that are good candidates for investment: the “DOD typically requests—and Congress funds—hundreds of military construction projects each year, some of which have expected life spans of more than 20 years.”¹⁹⁶ But adapting to climate change and sea level rise is not yet a criterion used to rank potential projects.¹⁹⁷

Three laws largely govern the process for the appropriation and authorization of funds. First, the Department of Defense Appropriations Act appropriates funds for baseline military operations.¹⁹⁸ Second, the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act appropriate military construction funds for the DoD.¹⁹⁹ Third, the NDAA provides maximum amounts that may be appropriated and additional purposes for which the funds may be drawn.²⁰⁰

In addition, the President is permitted to incur obligations in advance of an actual appropriation whenever he “determines such action to be necessary in the interest of national defense”²⁰¹ The DoD must also continually spend the money appropriated by Congress consistent with fiscal law principles governing purpose, time, and amount.²⁰² While most congressional appropriations are time limited,²⁰³ appropriations directed to military construction and acquisition projects have longer life spans.²⁰⁴ Hence, as a general matter, the executive branch may not augment funds from outside sources without specific congressional authority and the actual expenditures must

¹⁹⁶ U.S. GOV. ACCOUNTABILITY OFFICE, GAO-14-446, CLIMATE CHANGE ADAPTATION: DOD CAN IMPROVE INFRASTRUCTURE PLANNING AND PROCESSES TO BETTER ACCOUNT FOR POTENTIAL IMPACTS 44 (2014) [hereinafter GAO ADAPTATION 2014], <http://www.gao.gov/assets/670/663734.pdf>.

¹⁹⁷ See *id.* at 39–41. Further complicating matters, the Unified Facilities Criteria (UFC) does not include a definition of “climate change” or “climactic conditions.” *Id.* at 34.

¹⁹⁸ See, e.g., National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

¹⁹⁹ See, e.g., Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, Pub. L. No. 113-235, 128 Stat. 2103 (2014).

²⁰⁰ See, e.g., Department of Defense Appropriations Act, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

²⁰¹ 10 U.S.C. § 2201(a) (2012).

²⁰² See, e.g., 31 U.S.C. § 1301(a) (2012) (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”).

²⁰³ For example, the Operations and Maintenance fund is limited to just one year and is normally utilized to fund military deployments.

²⁰⁴ See, e.g., CONTRACT & FISCAL LAW DEP’T, JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 3-3 (2014) http://www.loc.gov/rr/frd/Military_Law/pdf/fiscal-law-deskbook_2014.pdf.

comport with the purpose of the appropriation.²⁰⁵ But the give and take between Congress and the President governing the military appropriations and authorizations process has grown increasingly complex and intricate over the years.²⁰⁶ Indeed, “the traditional legislative distinction between authorization and appropriation has blurred over time.”²⁰⁷

The DoD has begun to assess the vulnerability of military installations to climate change with an increased focus on sustainability in its facility investment decisions.²⁰⁸ Yet, the actual implementation and funding of climate change adaptation efforts at military installations remains lacking.²⁰⁹ While the DoD’s policy highlights the need to take climate change into account at military installations, the process for approving and funding military construction projects is held at each military department—Army, Navy, and Air Force—and climate change adaptation is not part of the funding criteria.²¹⁰

Climate change adaptation measures for DoD installations would normally be implemented through military construction projects, which have their own unique fiscal concerns. “Military construction” is broadly defined by statute to include “any construction, development, conversion, or extension of any kind carried out with respect to a military installation.”²¹¹ A military Secretary has the authority to “spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction

²⁰⁵ See, e.g., CRS MILITARY OPERATIONS, *supra* note 118, at 30. This applies to all expenditures of the federal government—there is not a military or contingency operation exemption. See *id.*

²⁰⁶ See BANKS & RAVEN-HANSEN, *supra* note 186, at 111.

²⁰⁷ *Id.*

²⁰⁸ See generally GAO ADAPTATION 2014, *supra* note 196; see also *Budget Issues: Opportunities to Reduce Federal Fiscal Exposures Through Greater Resilience to Climate Change and Extreme Weather: Hearing Before the S. Comm. on the Budget*, 113th Cong. 4 (2014) (testimony of Alfredo Gomez, Dir. Nat. Res. & Env’t, U.S. Gov’t Accountability Office), <http://www.gao.gov/assets/670/665089.pdf> (“DOD manages a global real-estate portfolio that includes over 555,000 facilities and 28 million acres of land with a replacement value that DOD estimates at close to \$850 billion.”).

²⁰⁹ See GAO ADAPTATION 2014, *supra* note 196, at 41.

²¹⁰ *Id.* at 41 (“Even if a potential adaptation project is included in an installation’s master plan, the projects must still be approved by the military-service headquarters, before being approved by the Office of the Secretary of Defense, the Office of Management and Budget, and, ultimately, by Congress.”).

²¹¹ 10 U.S.C. § 2801(a) (2012). “A military construction project includes all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility . . .” *Id.* § 2801(b). A “military installation” is broadly defined to include “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department.” *Id.* § 2801(c)(4).

project” of up to \$1,000,000.²¹² The DoD may carry out “unspecified minor military construction” projects that have an approved cost below \$3,000,000.²¹³ In addition, while Congress appropriates funds for each new military construction project, repairing and maintaining existing construction does not utilize military construction funds.²¹⁴

The Unified Facilities Criteria (UFC) is analogous to state and local zoning and building regulations, and is utilized by military planners and engineers to design and build new military construction.²¹⁵ It could also serve as a mechanism to implement climate adaptation measures at military installations. While the current UFC does not mandate that the effects of climate change be taken into account for new construction, it states that DoD planners should broadly consider “climactic conditions:”

Where changing external conditions impact planning decisions, master planners will seek to understand, monitor and adapt to these changes. Such conditions include, but are not limited to, changes in land use and . . . *changes in climactic conditions* such as temperature, rainfall patterns, storm frequency and intensity and water levels; and changes in infrastructure assets and configurations beyond and linking to the installation.²¹⁶

While “climactic conditions” are to be considered in planning decisions, this term is not defined, and planning for climate change is not required at military installations. Further, the UFC is de-linked from the important service-focused military construction and funding process.²¹⁷

Lastly, pursuant to the Sikes Act, each military installation must manage its natural resources in light of its ongoing mission-related activities.²¹⁸ Under existing DoD implementation guidance, such plans

²¹² § 2805(c). In addition, the Secretary of Defense may undertake construction projects resulting from a declaration of war or a national emergency. *See* 10 U.S.C. § 2808 (2012). This authority was invoked by President George W. Bush in support of the Global War on Terrorism. *See* Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 16, 2001).

²¹³ § 2805(a)(2). This number is raised to \$4,000,000 for military construction projects that threaten life, safety, or health. *Id.*

²¹⁴ *See* § 2811(e). “Repairs” have a different statutory definition than “construction,” and separate notification procedures to Congress. *See id.*

²¹⁵ *See* Dep’t of Def. Directive 4270.5, Military Construction ¶ 4.7 (2005), <http://www.dtic.mil/whs/directives/corres/pdf/427005p.pdf> (“The UFC . . . shall be used to the greatest extent possible by all the DoD Components for planning, design, and construction . . . of facilities, regardless of funding source . . .”).

²¹⁶ DEP’T OF DEF., UNIFIED FACILITIES CRITERIA (UFC) 2-100-01: INSTALLATION MASTER PLANNING ¶ 3-5.6.2.3 (2012) (emphasis added), http://wbdg.org/ccb/DOD/UFC/ufc_2_100_01.pdf.

²¹⁷ *See* GAO ADAPTATION 2014, *supra* note 196, at 41.

²¹⁸ *See* Sikes Act, 16 U.S.C. §§ 670(a)–(o) (2012). *See also* DEP’T OF DEF., MANUAL 4715.03: INTEGRATED NATURAL RESOURCES MANAGEMENT PLAN (INRMP) IMPLEMENTATION MANUAL

must assess the potential impacts of climate change and “take steps to implement adaptive management to ensure the long-term sustainability of those resources.”²¹⁹ However, similar to the UFC planning guidance, there is no formal link yet to the congressional authorization-appropriations process, and the military construction criteria are not synchronized with installation master resource plans.²²⁰

B. *The President's Authority to Respond to Climate Change Crises at Home: The Insurrection Act, the Posse Comitatus Act, and the Stafford Act*

The President is also expected to confront an increase in climate-induced disasters that will test his constitutional powers to respond with domestic humanitarian assistance operations. Three governing statutes, the Insurrection Act,²²¹ the Posse Comitatus Act (PCA),²²² and the Stafford Act,²²³ will take on increased importance as they inform the President's authority to utilize the military in response to a domestic civil support mission. Requests for federal law enforcement support are a sub-component of Defense Support of Civil Authorities (DSCA), which requires additional review to insure such activities do not violate the PCA.²²⁴

The Insurrection Act was passed in 1807 and governs the President's statutory authority to use the armed forces to suppress domestic insurrections and rebellions.²²⁵ Primary responsibility for protecting life and property and maintaining law and order is thus

(2013), <http://www.dtic.mil/whs/directives/corres/pdf/471503m.pdf> (providing more detailed guidance for the development of Integrated Natural Resource Management Plans); DEP'T OF DEF., INSTRUCTION 4715.03: NATURAL RESOURCES CONSERVATION PROGRAM (2011) [hereinafter DODI 4715.03], <http://www.dtic.mil/whs/directives/corres/pdf/471503p.pdf>.

²¹⁹ DODI 4715.03, *supra* note 218, at 16. Further, climate change is not defined in this instruction, and this requirement is to be met only “to the extent practicable.” *Id.*

²²⁰ See GAO ADAPTATION 2014, *supra* note 196, at 31. Military officials at the installation level are unsure how to meet current DoD direction to address climate change in Master Plans. *Id.*

²²¹ Insurrection Act, ch. 39, 2 Stat. 443 (1807) (current version at 10 U.S.C. §§ 331–335 (2012)).

²²² Posse Comitatus Act, ch. 263, § 15, 20 Stat. 152 (1878) (current version at 18 U.S.C. § 1385 (2012)).

²²³ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified at 42 U.S.C. § 5121 (2012)).

²²⁴ See Nevitt, *supra* note 101, at 151. The PCA and its implementing DoD directive permit direct assistance for actions that further a military or foreign affairs function, and to prevent loss of life or wanton destruction of property. See DEP'T OF DEF., INSTRUCTION 3025.21: DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (2013) [hereinafter DODI 3025.21], <http://www.dtic.mil/whs/directives/corres/pdf/302521p.pdf>.

²²⁵ 2 Stat. 443.

vested in state and local governments.²²⁶ Effectively, the PCA restricts active-duty military service members from directly participating in domestic law enforcement.²²⁷ In its modern form, it reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.²²⁸

The PCA should be read in conjunction with later statutes limiting the military from direct involvement with law enforcement activities.²²⁹

The Stafford Act was passed in 1988, amending the 1974 Disaster Relief Act “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate . . . suffering and damage.”²³⁰ Under the Stafford Act, the President can provide federal grants, assistance, and support pursuant to an emergency or major disaster declaration.²³¹

The DoD implements the Stafford Act and provides support to local and civil authorities via a DSCA policy directive.²³² A military response to a domestic emergency is initiated by a request for assistance from civil authorities.²³³ While all requests for assistance under DSCA are evaluated under six factors,²³⁴ military commanders still have

²²⁶ DoDI 3025.21, *supra* note 224, at 25.

²²⁷ 20 Stat. 152.

²²⁸ 18 U.S.C. § 1385 (2012).

²²⁹ *See, e.g.*, 10 U.S.C. § 375 (2012).

²³⁰ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified at 42 U.S.C. § 5121(b) (2012)).

²³¹ *See, e.g.*, William Banks, *Who’s in Charge: The Role of the Military in Disaster Response*, 26 MISS. C. L. REV. 75, 82–83 (2006) (“Under the Stafford Act, the military normally responds to requests for support from a state governor . . .”).

²³² *See* Dep’t of Def., Directive 3025.18, Defense Support of Civil Authorities (DSCA) (2012), <http://www.dtic.mil/whs/directives/corres/pdf/302518p.pdf>. DSCA is defined as “[s]upport provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, . . . and National Guard forces . . . in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities. . . . Also known as civil support.” *Id.* at 16.

²³³ *Id.* at 1. Military response under DSCA applies “within the United States, including the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States or any political subdivision thereof.” *Id.*

²³⁴ These include:

- (1) Legality (compliance with laws)[;]
- (2) Lethality (potential use of lethal force by or against DoD Forces)[;]
- (3) Risk (safety of DoD Forces)[;]
- (4) Cost (including the source of funding and the effect on the DoD budget)[;]
- (5) Appropriateness (whether providing the requested support is in the interest of the Department)[; and]
- (6) Readiness (impact on the Department of Defense’s ability to perform its other primary missions).

“immediate response authority” to employ resources “to save lives, prevent human suffering, or mitigate great property damage within the United States.”²³⁵

C. *Youngstown’s Shadow: The President’s Authority to Plan and Invest for Climate Change’s Impact at Home*

As discussed in Part I, climate change is expected to cause an increase in sea level, flooding, and storm surge that threatens the capacity for the military to train and respond to natural disasters both at home and abroad.²³⁶ Failing to invest in the necessary climate resilient military infrastructure will increasingly degrade military training and readiness.²³⁷ Indeed, the threat of climate change is unlike other national security separation of powers issues—it is an omnipresent, worldwide threat that exacerbates existing threats—and congressional restrictions that seek to limit the ability for the military to plan for climate change via restrictions on funding would be inherently vague.

Yet, the constitutional funding power still resides with Congress. Investing in climate resilient infrastructure requires congressional approval because it ultimately flows from Congress’s constitutional power of the purse.²³⁸ If Congress prohibited the DoD from taking sea level rise into account when investing in military infrastructure, the President might reasonably assert that, as Commander in Chief, he has an independent constitutional obligation and authority to protect installations from the threat of climate change.

If Congress expressed clear disapproval, the President’s power would likely be at its lowest ebb under the *Youngstown* framework—he would be taking action incompatible with the will of Congress.²³⁹ Thus, the President’s power to combat climate change would have to rely upon his own constitutional powers *minus* Congress’s constitutional

Id. at 4.

²³⁵ *Id.*

²³⁶ See generally DOD ROADMAP 2014, *supra* note 11; see also discussion *supra* Part I.

²³⁷ *Id.*

²³⁸ If Congress refuses to appropriate funds for higher-cost climate resilient military construction, under current fiscal law guidance, the DoD would have relatively clear authority to maintain or repair existing structures, but it would be prohibited from investing in new military construction for larger projects. See, e.g., GAO ADAPTATION 2014, *supra* note 196, at 44.

²³⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

powers over the matter.²⁴⁰ The President's actions would likely not be upheld. Similar to *Youngstown*, where Congress had addressed the seizure of private property in earlier statutes,²⁴¹ Congress already provides extensive statutory guidance on military construction matters. Further, Congress has sole constitutional appropriations power, which restricts the disbursing authority of the Executive. Indeed, in construing this power, the Court has ruled that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."²⁴²

At the lowest ebb, the President can "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."²⁴³ As Congress effectively occupies the constitutional field of providing for the common defense and appropriating money for the military, the President would likely lose under a *Youngstown* analysis in the event that a court found a justiciable claim in such a scenario.

If Congress attempted to limit the manner in which the President *planned* for future conflicts, a different result would likely occur. While the President's power may very well be at the lowest ebb—he would be planning for climate change against the expressed will of Congress—his residual Commander in Chief powers would be considerable. While Congress issues military regulations and provides funding and resources for the common defense, the President has the constitutional authority to protect the nation, command the armed forces, and organize the military in the face of outside threats. The President is at the top of the military's hierarchy and has the authority to *command* the armed forces as Commander in Chief. This cannot be constitutionally constrained by Congress.²⁴⁴ This reasonably encompasses the ability to train, prepare, and plan for future threats.

In asserting the power to plan for future conflicts, the President will assert that he has the inherent authority and responsibility to have a fully trained and operational-ready force to respond to the nation's threats. In doing so, the President, as Commander in Chief, will assert that he has the constitutionally derived discretion to organize and make operational decisions necessary to defend the nation and face outside

²⁴⁰ *Id.* at 637. *But see* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (ruling that the President is *not* required to issue passports indicating that Jerusalem is part of Israel despite a Congressional Act requiring the President to do so).

²⁴¹ *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring).

²⁴² *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

²⁴³ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

²⁴⁴ *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996) (stating that proposed funding restrictions generally prohibiting the President from placing U.S. Armed Forces under the operational or tactical control of the United Nations in U.N. peacekeeping operations would unconstitutionally constrain the President's exercise of his authority as Commander in Chief).

threats.²⁴⁵ These powers include the power to command military forces, make operational military decisions, and organize and train the military to ensure that it is ready to respond to future attacks and threats.²⁴⁶ Accordingly, directing the military to plan for climate change—such as via the DoD's role in the implementation of the Climate Action Plan²⁴⁷—can likely be implemented in the absence of congressional action.

Lastly, in countering such limitations on his authority as Commander in Chief, the President will also likely assert that such appropriations riders are an unconstitutional congressional encroachment upon his authority as head of the military. Indeed, national security appropriations riders have been construed narrowly by the judiciary and may not be imposed in a manner that exceeds Congress's constitutional power nor in a manner that unconstitutionally infringes on the President's power.²⁴⁸

Yet, *Youngstown's* limitations are visible if we are to completely address the President's powers to invest and plan for the effects of climate change. This is due in large part to Jackson's emphasis on the comparable power enjoyed by the President when his power is applied against the outside world (“indulge the widest latitude of interpretation”) as opposed to turned inward (“no such indulgence”).²⁴⁹ The President's undertaking adaptive measures to buttress domestic military installations ostensibly would be an inward-looking effort. At the same time, however, the need for such adaptation unquestionably relates to the military's preparedness to repel an invasion or respond to international crises. But climate-induced crises will feature both domestic and international aspects—a potential refugee crisis due to a massive storm event or drought in the developing world could come to the United States in the form of an immigration crisis. Climate change is an all-encompassing and unnervingly complicated threat. As such, Justice Jackson's analysis in *Youngstown*, which relies on a clear line separating “inward” and “outward” action,²⁵⁰ seems conceptually

²⁴⁵ See Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill, 25 Op. O.L.C. 279, 282 (2001) (“[T]he President has the authority to decide . . . what command structures the forces deployed are to have, what tactics they are to adopt, what military objectives they are to pursue, and . . . whether and how they are to cooperate with foreign or international forces . . .”).

²⁴⁶ See AMAR, *supra* note 17, at 188.

²⁴⁷ See 2013 CLIMATE ACTION PLAN, *supra* note 7.

²⁴⁸ Nat'l Fed'n of Fed. Emps. v. United States, 688 F. Supp. 671, 684 n.17 (D.D.C. 1988) (declaring an appropriation rider unconstitutional for infringing on the Executive's constitutional authority), *vacated as moot sub nom.*, Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989).

²⁴⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (Jackson, J., concurring).

²⁵⁰ *Id.*

inadequate to address the proper scope of executive authority to respond to climate change.

D. *Recommendations for the President and Congress to Combat Climate Change Domestically*

Based upon Congress's constitutional funding power discussed earlier, Congress has nearly plenary authority to limit the President's ability to fund climate resilient infrastructure at home.²⁵¹ Still, as Commander in Chief, the President could continue to organize, command, and plan for climate change's impacts at home.²⁵² Failing to invest in climate resilient infrastructure at home also has implications abroad, as it could negatively impact and degrade the ability of the President to defend the United States and respond internationally.

Similarly, efforts should be made to better synchronize the executive branch and the DoD's environmental planning documents with the appropriations process. This is no small task. If the DoD's central climate adaptation planning documents are updated to mandate future military construction in order to take into account future sea level rise—a prudent measure—there would still need to be congressional funding for such projects.

In addition, in planning for climate adaptation at home, there is a practical distinction between limiting military construction in areas that are particularly vulnerable to climate change's effects—such as prohibiting construction in floodplains areas—and requesting additional funding for climate resilient infrastructure.²⁵³ Recently, the President updated an executive order directing federal agencies to take future sea level rise projections into account prior to building on the floodplains.²⁵⁴ The President did not need a congressional appropriation

²⁵¹ See discussion *supra* Part III.A.

²⁵² *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring) (“What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.”).

²⁵³ Additionally, the military has historically utilized Readiness and Environmental Protection Integration (REPI) program funds to ensure that the domestic military mission can be sustained. See *About REPI*, READINESS & ENVTL. PROTECTION INTEGRATION PROGRAM, <http://www.repi.mil/AboutREPI/FrequentlyAskedQuestions.aspx> (last visited Nov. 13, 2015). REPI is another plausible climate adaptation tool that allows the DoD to enter into cost-sharing partnerships with outside groups to protect land areas outside a military installation, ensuring that development around an installation is conducive to mission readiness and operations. See *id.*; see also 10 U.S.C. § 2684a (2012).

²⁵⁴ See Exec. Order. No. 13,690, 80 Fed. Reg. 6425 (Jan. 30, 2015).

to do this and such measures could be continually updated as sea level and flood projections mature.

Lastly, the trilogy of domestic statutes governing domestic use of military force (the Insurrection Act, the Posse Comitatus Act, and the Stafford Act) should be reexamined in light of the increased demand for military resources needed to respond to national disasters at home. For example, the PCA restricts use of the military for law enforcement purposes at home, but it does not apply to humanitarian assistance and disaster relief operations at home and abroad that are led by state National Guard members.²⁵⁵ While it is beyond the scope of this Article to provide an in-depth summary of the changes that could be made, Congress should review each statute to ensure that the proper authorities are in place to enable the President to respond to climate change-induced natural disasters at home.

IV. RECONCILING THE POWERS OF THE SWORD AND PURSE TO COMBAT CLIMATE CHANGE INTERNATIONALLY

This Part addresses the circumstances under which the President may respond to climate-induced threats and crises overseas absent express congressional authorization. Under existing law, the President's power to respond to an overseas humanitarian crisis is significantly greater than his power to invest in climate-resilient infrastructure domestically, and comparably greater than his power to respond to domestic natural disasters.²⁵⁶ This is based upon the reasoning in *Youngstown*, statutory authority addressing overseas humanitarian assistance, and historic executive practice that hardens the President's customary Commander in Chief power.²⁵⁷

As discussed earlier, the sheer size of our continually funded military is at a scale that was unimaginable at the time of the Nation's founding.²⁵⁸ Hence, Congress feels "legally, politically, or morally obligated to appropriate funds to maintain the President's foreign affairs establishment."²⁵⁹ Today, as a practical matter, Congress lacks the

²⁵⁵ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-28: DEFENSE SUPPORT OF CIVIL AUTHORITIES I-6 (2013).

²⁵⁶ See *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (stating that the Court would grant the "widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world.").

²⁵⁷ See *id.*

²⁵⁸ See Alexander, *supra* note 182.

²⁵⁹ HENKIN, *supra* note 123, at 74. This was most recently seen in an executive-congressional showdown over the funding of the Department of Homeland Security. See Ashley Parker, *House Approves Homeland Security Budget, Without Strings*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/house-homeland-security.html?_r=0.

option to de-fund the military without delivering a massive blow to the national security apparatus, to existing treaty obligations, and to the economy.

Further, United Nations Security Council Resolutions are linked to the President's authority to respond to international crises. This is particularly relevant to combating climate change since the evolving definition of "threat to international peace and security" has now expanded to potentially include both hard and soft threats.²⁶⁰ This has significance for climate change because the international community—particularly small island developing states and less developed countries that are particularly vulnerable to climate change—seeks to employ all of its legal tools to combat climate change and to face this crisis. Climate change could feasibly be defined as such a soft threat, especially as the understanding of the threat increases and as the definition of "threat to international peace and security" continually evolves.

A. *The President's Constitutional and Statutory Authority to Respond to International Crises*

Climate change is expected to increase demands on the military as it is dispatched more frequently to respond to climate-induced humanitarian crises throughout the globe. But what are the outer boundaries of the President's authority to respond to such events, and how can this all be analyzed within the *Youngstown* framework?

1. Existing Statutory Authority Exists for the President to Utilize the Military for Humanitarian Assistance Operations Overseas

There is a longstanding recognition that the President's authority extends to dispatching armed forces outside of the United States on missions of goodwill or rescue.²⁶¹ The President has increasingly exercised broad authority and discretion in delivering humanitarian assistance abroad,²⁶² and existing statutory authorities are only bolstered by the historical practice of sending military forces overseas to respond to natural disasters.

²⁶⁰ See *infra* text accompanying note 369.

²⁶¹ See Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 62 (1941).

²⁶² See RHODA MARGESSON, CONG. RESEARCH SERV., RL33769, INTERNATIONAL CRISES AND DISASTERS: U.S. HUMANITARIAN ASSISTANCE RESPONSE MECHANISMS 1 (2015) [hereinafter CRS CRISES 2015], <https://www.fas.org/sgp/crs/row/RL33769.pdf>.

Congress has authorized and appropriated funding for humanitarian assistance via a variety of existing statutory provisions.²⁶³ For example, Congress codified the importance of providing international humanitarian assistance at 22 U.S.C. § 2292, declaring the following congressional policy:

[R]ecognizing that prompt United States assistance to alleviate human suffering caused by natural and manmade disasters is an important expression of the humanitarian concern and tradition of the people of the United States, [Congress] affirms the willingness of the United States to provide assistance for the relief and rehabilitation of people and countries affected by such disasters.²⁶⁴

“Humanitarian assistance” is broadly defined: it encompasses a wide variety of crises, including natural disasters (e.g., earthquakes, droughts, and floods), man-made disasters (e.g., war and conflict), and refugee movement within and across sovereign borders caused by such crises.²⁶⁵

In addition, several related statutes provide support for overseas humanitarian assistance missions. The Foreign Assistance Act provides for International Disaster Assistance Funds, with the U.S. Agency for International Development (USAID) coordinating the overall U.S. government’s response.²⁶⁶ Humanitarian assistance is funded by an Overseas Humanitarian Disaster and Civic Aid appropriation.²⁶⁷ This authority generally allows the military to use its transportation network for humanitarian relief purposes.²⁶⁸ It further authorizes the DoD to conduct overseas humanitarian disaster relief and provide civic aid.²⁶⁹ The President may also direct the military to provide disaster relief outside the United States to prevent the loss of life.²⁷⁰ The Humanitarian

²⁶³ See generally *id.*

²⁶⁴ 22 U.S.C. § 2292(a) (2012); see also § 2292(b) (“[T]he President is authorized to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms and conditions as he may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad.”).

²⁶⁵ See, e.g., CRS CRISES 2015, *supra* note 262, at 1.

²⁶⁶ See §§ 2292a–2292q (2012). While these funds largely support non-governmental organizations (NGOs), the U.S. military is often the best and only option to respond to humanitarian crises.

²⁶⁷ See 10 U.S.C. § 2561 (2012) (“To the extent provided in defense authorization Acts, funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide.”).

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See 10 U.S.C. § 404(a)–(b) (2012). (“The President may direct the Secretary of Defense to provide disaster assistance outside the United States to respond to manmade or natural disasters when necessary to prevent loss of lives or serious harm to the

and Assistance Act allows for humanitarian assistance activities if the activities are in conjunction with previously authorized military activities, and if they promote both U.S. security interests and the readiness of the host nations' armed forces.²⁷¹

Lastly, Congress has authorized the use of “emergency and extraordinary expenses” funds for any type of emergency or extraordinary expenses that cannot be anticipated or classified.²⁷² There is also an emergency contingency operations funding authority for certain emergency contingency operations where Congress has not already appropriated funds.²⁷³

DoD policy guidance addressing Foreign Disaster Relief was recently updated.²⁷⁴ Under this new directive, the DoD responds to foreign disasters in support of the USAID pursuant to the legal authorities in 22 U.S.C. § 2292(b) and Executive Order 12,163.²⁷⁵

In sum, while the President's precise existing authority to respond to international humanitarian assistance and disaster relief is not without limitation, there are existing statutory tools where Congress has already spoken in support of a military response for the purposes of humanitarian assistance.²⁷⁶ In responding to climate-induced crises overseas, the President will likely look to Justice Jackson's analysis in *Youngstown*, and assert that he is acting in the first category, where there is explicit congressional authorization to provide humanitarian assistance. This grants him the powers of “all that he possesses in his

environment. . . . Assistance provided under this section may include transportation, supplies, services, and equipment.”).

²⁷¹ 10 U.S.C. § 401 (2012). (“[T]he Secretary of a military department may carry out humanitarian and civic assistance activities in conjunction with authorized military operations of the armed forces . . .”).

²⁷² 10 U.S.C. § 127 (2012).

²⁷³ *Id.* § 127a.

²⁷⁴ Dep't of Def., Directive 5100.46, Foreign Disaster Relief (FDR) (2012), <http://www.dtic.mil/whs/directives/corres/pdf/510046p.pdf>. Under the new directive, “foreign disaster” is defined as

[a] calamitous situation or event that occurs naturally (such as earthquakes, storms, droughts, volcanic eruptions, wild-fires) or through human activities (such as industrial explosions or fires, civil strife, infectious disease), which threatens or inflicts human suffering on a scale that may warrant emergency relief assistance from the USG or from foreign partners.

Id. at 11.

²⁷⁵ *Id.* at 1.

²⁷⁶ *See, e.g.*, 10 U.S.C. § 2561 (2012) (allowing the DoD to provide transportation of humanitarian relief and for other humanitarian purposes worldwide); *see also* § 2557(a)–(b) (allowing the DoD to provide “nonlethal excess supplies” to support domestic emergency assistance as well as humanitarian relief).

own right plus all that Congress can delegate.”²⁷⁷ These powers are extraordinary, personifying federal sovereignty. Further, because these powers are directed *outward*, a court will likely show greater deference to the President, allowing the “strongest of presumptions and the widest latitude of judicial interpretation.”²⁷⁸

2. The President’s Powers as Commander in Chief to Organize the DoD to Combat Climate Change

The President has historically asserted wide powers to organize and command the armed forces overseas pursuant to his Commander in Chief power.²⁷⁹ Congress’s funding power clashed with the President’s Commander in Chief authority when the House of Representatives passed a bill in 1996 that would have limited the President’s ability to place U.S. military forces under the military direction and control of United Nations commanders.²⁸⁰ This bill limited the President’s ability to participate in the full spectrum of U.N. peacekeeping operations.²⁸¹ Writing for the Office of Legal Counsel (OLC), Walter Dellinger stated that this congressional resolution amounted to an unconstitutional infringement on the President’s ability to exercise his Commander in Chief powers.²⁸² Relying upon the Court’s ruling in *Fleming v. Page*, Dellinger stated “that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces.”²⁸³ While Dellinger acknowledged Congress’s authority to issue military regulations, he argued that such congressional restrictions on the President’s authority cannot unduly constrain or inhibit the President’s authority regarding the conduct of military missions in the field.²⁸⁴

²⁷⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

²⁷⁸ *Id.* at 637.

²⁷⁹ See, e.g., Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill, 25 Op. O.L.C. 279, 279–80 (2001).

²⁸⁰ United States Armed Forces Protection Act of 1996, H.R. 3308, 104th Cong. (1996) (“[F]unds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control . . .”).

²⁸¹ *Id.* The bill was never passed by the Senate. H.R. 3308 (104th): United States Armed Forces Protection Act of 1996, Govtrack.us, <https://www.govtrack.us/congress/bills/104/hr3308> (last visited Nov. 13 2015).

²⁸² Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182 (1996).

²⁸³ *Id.* at 184 (citing *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850)).

²⁸⁴ *Id.* While the resolution did create a waiver process for the President, Dellinger viewed this as an unconstitutional burden on the President’s constitutional power. *Id.* at 186–87.

Lastly, Dellinger noted that, while Congress has broad spending and appropriations powers, “Congress may not deploy it to accomplish unconstitutional ends,” such as limiting the President’s authority to organize his operational military forces in the field.²⁸⁵ A President would likely look to Dellinger’s analysis when organizing the military to face the growing threat posed by climate change.

The modern military organization is based upon geographic and functional combatant commands.²⁸⁶ For example, European Command is a geographic combatant command with responsibility for all U.S. military forces in Europe, and the European Commander reports to the President via the Secretary of Defense.²⁸⁷

Today’s military organization should also be properly organized to face the future threats posed by climate change. As part of the DoD’s Unified Command Plan, the organization of DoD combatant commands are continually updated based upon emergent threats.²⁸⁸ Currently, the DoD is exploring ways to integrate climate change into the combatant commands’ broader strategic planning.²⁸⁹ Consider a hypothetical where the President proposes a new functional combatant command that seeks to address climate change’s impacts by formally integrating climate change planning into future operations and planning efforts. The President would likely assert—with sound justification consistent with past practice and congressional quiescence—that he has such organizing authority as Commander in Chief. The judiciary would likely view such separation of powers questions as non-justiciable political questions and be reluctant to hear such challenges.²⁹⁰

²⁸⁵ *Id.* at 188.

²⁸⁶ The geographic commands are led by a four star active duty military officer and include Northern Command, Central Command, Southern Command, European Command, Africa Command, and Pacific Command. See *Unified Combatant Commands*, U.S. DEP’T OF DEF., <http://www.defense.gov/Sites/Unified-Combatant-Commands> (last visited Aug. 19, 2015). The functional commands include Strategic Command, Special Operations Command, and Transportation Command. *Id.*

²⁸⁷ See *id.*

²⁸⁸ See ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS 1 (2013), <https://www.fas.org/sgp/crs/natsec/R42077.pdf> (stating that, while the Unified Command Plan is updated at a minimum of every two years, it can be updated anytime based on “changing strategic, political, and budgetary requirements”).

²⁸⁹ See *The National Security Implications of Climate Change: Hearing Before the Subcomm. on Int’l Dev. & Foreign Assistance, Econ. Affairs, Int’l Envtl. Prot., & Peace Corps of the S. Comm. on Foreign Relations*, 113th Cong. (2014) (statement of Daniel Y. Chiu, Deputy Assistant Secretary of Defense for Strategy and Force Development), <http://iipdigital.usembassy.gov/st/english/texttrans/2014/07/20140722304363.html#axzz3F5EQAMpg>.

²⁹⁰ See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); KOH, *supra* note 22, at 183–84.

3. Reconciling the Power of the Purse and the War Powers Resolution with the President's Authority to Respond to Climate Change Internationally

While considerable, the President's authority to use the military to respond to climate change-induced disasters overseas is not limitless.²⁹¹ It is limited first and foremost by the congressional funding power, which Congress could attempt to invoke if it disagreed with the President's overseas actions.²⁹² Of all the constitutional powers that Congress wields over the military, its power over the purse remains its most effective tool to limit the President's Commander in Chief authority. This authority has been successfully wielded to constrain the President's powers to deploy military forces. For example, Congress placed funding restrictions that limited military and paramilitary operations in both Angola and Nicaragua.²⁹³ Additionally, during the Iran-Contra crisis, Congress passed the Boland Amendments, broadly restricting the CIA and the DoD from any funding to support anti-Sandinista contra guerillas.²⁹⁴ Congress has also utilized its power of the purse to restrict funding for operations in Indochina, Somalia, and Rwanda.²⁹⁵

Separate from the congressional funding power, an analysis of the WPR is required to comprehensively understand the President's authority to send military forces abroad to respond to climate-induced disasters. The WPR was passed in 1973 in the waning days of the Vietnam War, and was passed to reinvigorate Congress's role in the war-making process by requiring the President to report to and consult with Congress as part of the decision-making process to send forces overseas in the absence of a war declaration or congressional authorization.²⁹⁶ It sets forth three main procedural requirements: (1) presidential consultation with Congress, (2) presidential reporting to

²⁹¹ See discussion *supra* Part III.A.

²⁹² *Id.*

²⁹³ RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 5–6 (2007) [hereinafter GRIMMETT, FUNDING CUTOFFS], <https://fas.org/man/crs/RS20775.pdf>.

²⁹⁴ Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830 (1982).

²⁹⁵ GRIMMETT, FUNDING CUTOFFS, *supra* note 293, at 1–2.

²⁹⁶ FISHER, WAR POWER, *supra* note 78, at 144–45 (asserting that allowing the President to use force for up to 90 days without congressional authorization effectively “legalizes a scope for independent presidential power”).

Congress, and (3) congressional termination of military action in the absence of a subsequent authorization or war declaration.²⁹⁷

Yet the WPR has largely not fulfilled its goal of increasing congressional involvement in constraining the President's ability to send forces into conflicts overseas.²⁹⁸ This is due to the vagueness of certain provisions, and a confusing statutory misalignment between the consultation procedures and reporting provisions. Additionally, there is a definitional gap in the WPR that is critically important for the President's authority to respond to future climate crises: it only addresses Congress's role in the authorization of military forces to respond to instances where imminent hostilities are likely.²⁹⁹ This does not squarely address most humanitarian assistance missions where hostilities are not clearly imminent.

First, under section 1541 of the WPR, "Purpose and policy," Congress takes care to define the contours of the constitutional powers of the President as Commander in Chief, stating that the President may only introduce military forces in certain circumstances to include "situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States."³⁰⁰

This provision—a result of a compromise between competing House and Senate resolutions—has not been heeded. This is due, in part, to its location in the "Purpose and policy" section, which presidents have historically viewed as not legally binding.³⁰¹

Second, under section 1542, "Consultation; initial and regular consultations," the President must consult with Congress "in every possible instance . . . before introducing United States Armed Forces into *hostilities* or into situations where *imminent involvement in hostilities* is clearly indicated by the circumstances."³⁰² While consultation is a key provision of the WPR, the requirement to consult

²⁹⁷ See FISHER, CONFLICTS, *supra* note 76, at 273.

²⁹⁸ See GRIMMETT, FUNDING CUTOFFS, *supra* note 293.

²⁹⁹ See 50 U.S.C. § 1542 (2012) ("The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . .").

³⁰⁰ § 1541(c); see also § 1541(a) ("It is the purpose of this [joint resolution] to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . .").

³⁰¹ JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 117 (1993).

³⁰² § 1542 (emphasis added).

also remains open to interpretation and executive discretion.³⁰³ It is unclear when, precisely, consultation is required, leaving the President with considerable discretion to decide how the consultation requirement is met.

Third, under section 1543, “Reporting requirement,” the WPR requires that in the absence of a congressional declaration of war, the President must make a report to Congress within forty-eight hours of introducing forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁰⁴ This somewhat mirrors the section 1542 consultation requirements to include “every possible instance” where United States Armed Forces are introduced “into hostilities or into situations where imminent involvement in hostility is clearly indicated by the circumstances.”³⁰⁵ There is an exception for presidential reporting to Congress for such instances that relate to “supply, replacement, repair, or training of such forces.”³⁰⁶ There is also no mention in the WPR of Congress’s role in humanitarian assistance or disaster relief mission³⁰⁷—an omission that is important to decipher the WPR’s role in constraining the President’s power to respond to climate-induced crises.

Again, the precise conditions that require a report to Congress remain unclear and subject to broad interpretation. Indeed, this language has been interpreted by presidents to sanction presidential use of military force that is unrelated to attacks against the United States or its military.³⁰⁸ The President also has to report to Congress only *after* hostilities have commenced, implying that the President has the authority to initially introduce forces without express congressional authorization.³⁰⁹ Presidents have continually read this provision expansively and in a manner that did not, for example, limit military deployments to Grenada, Haiti, Somalia, or Bosnia.³¹⁰

Additionally, by logical extension, the WPR does not mandate a reporting requirement when imminent hostilities are *not* clearly indicated by the circumstances. This apparent gap in the WPR will take

³⁰³ See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 13 (2012) [hereinafter GRIMMETT, WAR POWERS], <https://www.fas.org/sgp/crs/natsec/RL33532.pdf>.

³⁰⁴ § 1543(a)(1).

³⁰⁵ § 1542.

³⁰⁶ § 1543(a)(2).

³⁰⁷ See *id.*

³⁰⁸ See FISHER, CONFLICTS, *supra* note 76, at 273–74.

³⁰⁹ *Id.*

³¹⁰ FISHER, WAR POWER, *supra* note 78, at 149. The WPR reporting requirement has only been utilized twice in American history. *Id.* at 150. Most recently, U.S. military involvement in Libya tested the WPR’s application. See Goldsmith & Waxman, *supra* note 117.

on additional importance as the demand for military deployment for humanitarian assistance increases in the face of a changing climate.

Fourth, under section 1544 of the WPR, in the absence of congressional action, the President must terminate any use of United States Armed Forces after sixty calendar days from the date that the report was submitted.³¹¹ This has historically allowed the President to introduce U.S. forces into hostilities for up to sixty days.³¹² Moreover, the clock on these deadlines is not triggered unless the President makes a report under section 1543(a)(1) of the WPR.³¹³

Lastly, the WPR takes care to distinguish Congress's role in the *authorization* for the employment of the military from its funding and *appropriations* authority. The WPR explicitly states that the authority to introduce United States Armed Forces into hostilities shall not be inferred from any provision in any appropriation Act.³¹⁴

The WPR has largely proven ineffective as a restraint on the President's Commander in Chief power to send the military overseas.³¹⁵ Lacking a clear congressional statement of the WPR's role in the deployment of military forces in situations falling short of hostilities, the President has interpreted congressional silence as consent, and has routinely sent military forces to respond to foreign disasters without consultation.³¹⁶ This historical practice is bolstered by existing statutory guidance on humanitarian assistance.³¹⁷ Indeed, the President will be called upon and will seek greater operational authority to respond to climate-induced events, yet the WPR is silent on humanitarian assistance missions where hostilities are not anticipated. However, pre-existing general congressional authority already does exist for such missions, as previously discussed in Part IV.A.1.

Since the WPR reporting requirements are triggered in limited circumstances, Congress will continue to have a diminished role in the wide swath of military deployments that fall short of hostilities or imminent involvement in hostilities. Furthermore, Congress's historical quiescence of the President's actions strengthens the President's posture

³¹¹ § 1544(b) (“[T]he President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.”).

³¹² See generally GRIMMETT, WAR POWERS, *supra* note 303.

³¹³ § 1543(a)(1). The sixty and ninety-day clock have only begun twice in American history. See FISHER, CONFLICTS, *supra* note 76, at 274.

³¹⁴ § 1547(a)(1).

³¹⁵ FISHER, WAR POWER, *supra* note 78, at 267 (“No one has identified a military initiative, desired by the President after 1973, that has been canceled or restricted because of this legislation.”).

³¹⁶ See, e.g., KOH, *supra* note 23, at 39–40.

³¹⁷ See 10 U.S.C. § 2551 (2012).

in taking the initiative in response to humanitarian crisis because such initiative would likely fall within the customary Commander in Chief authority.³¹⁸

Presidents can look to Justice Jackson's analysis in *Youngstown* for further support. The President can reasonably assert that he is acting in either Jackson's first or second category;³¹⁹ Congress has already spoken to humanitarian assistance broadly as congressional policy.³²⁰ The President therefore will assert that his power is at its maximum. He is acting pursuant to express congressional authorization that supports humanitarian assistance missions as a matter of policy detailed in numerous statutes.³²¹ This power is directed against the outside world where the President's actions would be supported by "the strongest of presumptions and the widest latitude of judicial interpretation."³²²

In the alternative, in the WPR context, the President can assert that Congress has chosen to be silent on its role in humanitarian assistance operations that fall short of hostilities. The President would assert that, at a minimum, he is acting within Jackson's second category. Here, he can rely upon his independent powers and congressional inertia, quiescence, and silence—all of which invite measures of independent presidential responsibility.³²³

B. *The U.N. Security Council and Presidential Authority to Respond to International Climate Change-Induced Disasters*

Under international law, as envisioned by the U.N. Charter, there is a strong prohibition against aggression and use of military force.³²⁴ Under the U.N. Charter, a state may use force against another state only when acting in self-defense or pursuant to a U.N. Security Council authorization for the use of force under Chapter VII of the Charter.³²⁵

³¹⁸ In *Dames & Moore v. Regan*, the Court endorsed the theory of customary national security law, "where there is no contrary indication of legislative intent and . . . a history of congressional acquiescence in conduct of the sort engaged in by the President." 453 U.S. 654, 678–79 (1981).

³¹⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–37 (1952) (Jackson, J., concurring).

³²⁰ See discussion *supra* Part IV.A.1.

³²¹ See *id.*

³²² *Id.* at 637.

³²³ *Id.*

³²⁴ U.N. Charter art. 2, ¶ 4.

³²⁵ *Id.* art. 39, art. 51. In the event of an attack on the United States, international law and the President's constitutional powers converge. HENKIN, *supra* note 123, at 47.

In U.S. constitutional law, the U.N. Charter is a treaty that is the supreme law of the land.³²⁶ Within the Charter is a powerful role for the Security Council, which is vested with the “primary responsibility for the maintenance of international peace and security,”³²⁷ which includes taking the “measures necessary to maintain international peace and security.”³²⁸ Member states are legally obligated to carry out the Security Council’s decisions.³²⁹ Yet the U.N. Security Council has historically only *recommended* or *authorized* member states to take appropriate actions, which includes the use of force, in response to threats to international peace and security.³³⁰ It has not *mandated* the use of force. Therefore, the President has not been legally obligated under the Constitution’s Take Care Clause, or under any treaty requirements, to commit U.S. forces as a result of a Security Council resolution. Moreover, Congress passed the United Nations Participation Act of 1945,³³¹ under which Congress must first give its consent prior to the President providing forces for the Security Council’s use via an Article 43 special agreement.³³²

Despite not requiring member states to use force to maintain international peace and security, support for the U.N. has been utilized to legitimize the President’s use of force absent congressional authorization. For example, President Truman looked to the U.N. Security Council as a legal authorization to send American forces into Korea.³³³ In doing so, Truman ordered the deployment of hundreds of thousands of service members to Korea without first seeking a congressional war declaration or authorization.³³⁴

³²⁶ A treaty is the supreme law of the land under the U.S. Constitution. See HENKIN, *supra* note 123, at 252 (“Under the U.S. Constitution, the Charter, as a treaty of the United States, is the law of the land, and law for the United States.”).

³²⁷ U.N. Charter art. 24, ¶ 1 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

³²⁸ *Id.* art. 51.

³²⁹ See *id.* art. 25, art. 48.

³³⁰ See Stromseth, *supra* note 13, at 156.

³³¹ United Nations Participation Act of 1945, ch. 583, 59 Stat. 619 (codified as amended at 22 U.S.C. §§ 287–287e-3 (2012))

³³² *Id.* § 287d. This Act does authorize the President to deploy up to 1,000 military personnel in operations not involving “the employment of armed forces contemplated by chapter VII of the United Nations Charter.” *Id.* § 287d-1(a). The United States has yet to conclude a special agreement with the Security Council, and these agreements were early casualties of the Cold War. See Stromseth, *supra* note 13, at 152.

³³³ S.C. Res. 82 (June 25, 1950). (“Call[ing] upon all Member States to render every assistance to the United Nations in the execution of this resolution”); see also S.C. Res. 84 (July 7, 1950); Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L L. 21 (1995).

³³⁴ See Fisher, *supra* note 333.

Presidents have continued the trend of looking to U.N. Security Council Resolutions as legal justification to send military forces overseas.³³⁵ In turn, the U.N. Security Council has both broadened the definition of “threat to international peace and security” and has even called upon member states to adopt domestic legislation in response to these evolving threats.³³⁶

Three recent historical examples of military involvement in humanitarian crises—Somalia, Haiti, and Kosovo—provide a plausible legal roadmap for the President to address future climate-induced disasters abroad as a result of U.N. Security Council action. The President ordered military forces to be deployed abroad in each instance without clear congressional approval and outside the WPR reporting and consultation requirements.³³⁷

First, consider the U.S. military’s deployment to Somalia in 1992. This mission highlighted the complicated nature of military support to humanitarian assistance operations under both domestic and international law. Both Presidents George H.W. Bush and Clinton sent U.S. forces to Somalia in support of a major humanitarian crisis to restore the flow of humanitarian relief and protect American aid workers in areas decimated by famine and disease.³³⁸ In justifying the President’s actions to act in Somalia, the OLC looked to existing statutory authority at 10 U.S.C. § 2551 as congressional support to distribute humanitarian relief.³³⁹

Further, U.N. Security Council Resolution 794 stated that “the magnitude of human tragedy [in Somalia] . . . constitutes a *threat* to international peace and security.”³⁴⁰ This Security Council Resolution was invoked by President Clinton to justify continual American military

³³⁵ See, e.g., Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 10–12 (1992) [hereinafter Somalia OLC], <http://www.justice.gov/sites/default/files/olc/opinions/1992/12/31/op-olc-v016-p0006.pdf>. (This serves to “strengthen the prestige, credibility and effectiveness of the United Nations.”); Authority of the President to Repel the Attack in Korea, 23 DEP’T ST. BULL. 173, 177 (1950) (“The continued existence of the United Nations as an effective international organization is a paramount United States interest.”). Climate change is increasingly viewed as a *threat* under international law, see discussion *infra* Part IV.C, and the President has a national interest in enforcing Security Council mandates and U.N.-sponsored humanitarian relief efforts.

³³⁶ S.C. Res. 1373 (Sept. 28, 2001) (requiring Member States to pass legislation to address the threat to international peace and security posed by terrorism).

³³⁷ See *infra* notes 338–57 and accompanying text.

³³⁸ Somalia OLC, *supra* note 335, at 7 (“I conclude that ample statutory authority exists for the use of the military to engage in the distribution of humanitarian relief in Somalia. *E.g.*, 10 U.S.C. § 2551.”).

³³⁹ See *id.* at 7, 8 n.1 (noting that combat will only be “incident” to the military deployment in Somalia and there is clear statutory authority to perform humanitarian tasks in Somalia).

³⁴⁰ S.C. Res. 794 (Dec. 3, 1992) (emphasis added).

intervention in Somalia.³⁴¹ The OLC asserted that the President's constitutional role as Commander in Chief "reasonably and lawfully" justified such actions in the absence of specific congressional authorization.³⁴²

Despite broad assertions of presidential Commander in Chief authority, following an escalation of hostilities, Senator Robert Byrd (D-WV) introduced an amendment to a bill that passed Congress, which prohibited the expenditure of DoD funds in Somalia after March 31, 1994.³⁴³ This effectively ended the "humanitarian assistance" mission in Somalia and once again demonstrated that Congress's power of the purse was the most important check on the President's powers.³⁴⁴

Two years later, the President asked the OLC for a legal opinion on the authority to deploy military forces to Haiti for another humanitarian assistance mission.³⁴⁵ The OLC concluded that the military deployment to Haiti would not run afoul of the WPR as hostilities were not imminent.³⁴⁶ Additionally, the nature, scope, and duration of the deployment did not amount to a "war" that required a formal congressional war declaration before such military deployment.³⁴⁷ The OLC looked to other factors to determine the nature of the military mission and of the President's powers, including whether Haiti welcomed the American presence and whether a U.N. Security Council Resolution existed that authorized military intervention.³⁴⁸

Lastly, but perhaps most notably, the President has authorized U.S. military forces overseas in the absence of either a U.N. or congressional authorization. In 1999, President Clinton ordered military air strikes in Kosovo and justified his decision to act outside of Congress and the U.N. under his powers as Commander in Chief, existing NATO authorization, and the national interest in supporting regional

³⁴¹ Somalia OLC, *supra* note 335, at 6-7 ("The President . . . might reasonably and lawfully determine that it was justified to use United States Armed Forces" to support a United Nations Security Council Resolution that authorizes "member nations to use 'all necessary means' to establish a secure environment for humanitarian relief operations in Somalia and to provide military forces to that end." (quoting S.C. Res. 794 (Dec. 3, 1992))).

³⁴² *See id.* at 6. Prior legal opinions authorized the use of troops without prior congressional approval "on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests." *Id.* (quoting 40 Op. Att'y Gen. 58, 62 (1941)). President Johnson also authorized the U.S. military to intervene in the Dominican Republic "to preserve the lives of American citizens and citizens of a good many other nations." *Id.* (quoting 53 DEP'T ST. BULL. 20 (1965)).

³⁴³ *See* Department of Defense Appropriations Act, 1994, H.R. 3116, 103rd Cong. (1993).

³⁴⁴ HENKIN, *supra* note 123, at 380 n.31.

³⁴⁵ Deployment of United States Armed Forces Into Haiti, 18 Op. O.L.C. 173 (1994).

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 173.

³⁴⁸ *Id.* at 177-78; *see also* S.C. Res. 940 (July 31, 1994) (authorizing a multinational force to use "all necessary means" to facilitate the departure from Haiti of the military leadership).

alliances.³⁴⁹ These strikes were ordered following Clinton's inability to secure U.N. Security Council support for a military intervention.³⁵⁰

Members of Congress unsuccessfully sought to restrict the President's actions in Kosovo via a variety of methods, including restrictions on military appropriations, utilization of the WPR, and seeking judicial relief.³⁵¹ The House passed a resolution prohibiting the appropriation of funds for the deployment of "ground elements" in Yugoslavia, but this never passed the Senate.³⁵² Eventually, Congress passed an emergency appropriation to fund the Kosovo operation, but this occurred after the President ordered the airstrikes.³⁵³ Indeed, military action in Kosovo started two months before the Kosovo-specific funding appropriations bill passed, and without congressional authorization for military action.³⁵⁴

Members of the House of Representatives sued the President, asserting that congressional authorization was required before the President commenced the air war over Kosovo.³⁵⁵ But similar to other legal challenges to the President's authority to initiate force, this lawsuit was dismissed as non-justiciable because the controversy was not ripe.³⁵⁶ The OLC stated that the President was otherwise independently authorized to take military action in Kosovo in the absence of such a statute or a prohibition on funding.³⁵⁷

The legal issues in Kosovo are particularly instructive for future executive involvement in overseas responses to humanitarian crises. They highlight how future climate change emergencies could unfold in the absence of a declared threat to international peace and security by the U.N. Security Council or a clear congressional authorization. Indeed, President Clinton's actions in Kosovo in 1999 served as the first time that the use of military force was clearly based on humanitarian assistance without either a (1) clear self-defense justification, (2)

³⁴⁹ See, e.g., GRIMMETT, FUNDING CUTOFFS, *supra* note 293, at 4. The forward deployed nature of the military facilitated the ease of such strikes. The OLC never issued a formal written legal opinion with the legal reasoning behind the Kosovo action.

³⁵⁰ See *id.*

³⁵¹ See *id.* at 4–5.

³⁵² See *id.* at 4.

³⁵³ See *id.*

³⁵⁴ See *id.* at 4–5.

³⁵⁵ See *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999). An OLC opinion stated that Congress could bring an end to U.S. involvement in Kosovo if Congress could enact a statute to that effect. See *Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327 (2000) [hereinafter *Kosovo OLC*], <http://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf>.

³⁵⁶ See *Campbell*, 52 F. Supp. 2d at 35; see also, e.g., *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissing a challenge to President H.W. Bush over plans to conduct military operations against Iraq by members of Congress because the controversy was not ripe).

³⁵⁷ See *Kosovo OLC*, *supra* note 355.

congressional authorization, or (3) accompanying U.N. Security Council resolution.

Most recently, in the summer of 2014, President Obama invoked broad war powers pursuant to a request from the Iraqi government to protect Iraqi citizens stranded on Mount Sinjar and threatened by ISIS.³⁵⁸ The use of military force occurred absent an existing U.N. Resolution or mandate from a regional organization.

In sum, recent history is marked by congressional acquiescence following the exercise of executive power. Judicial challenges to the President's use of military force without congressional authorization—as further evidenced by *Campbell v. Clinton* (concerning Kosovo) and *Dellums v. Bush* (concerning the first Persian Gulf War)—are routinely dismissed by the court for lack of standing or as a non-justiciable political question.³⁵⁹ This has effectively allowed each President to take the initiative through broad discretion in the use of military force, cognizant that the judiciary is unlikely to intervene in overruling the President's decision to authorize military action.

C. *Climate Change as a Potential Threat to International Peace and Security as Defined by the U.N. Security Council*

As discussed in Part I, climate change poses numerous national security threats, including drought, increased competition for natural resources, and migration and refugee crises.³⁶⁰ The U.N.'s evolving definition of "threat"—to include both "hard" and "soft" threats³⁶¹—has important implications for the Commander in Chief's power to combat climate change. Both military leaders and scientists have increasingly linked climate change to national security matters and global instability.³⁶² Could climate change be expressed as a threat to

³⁵⁸ See Christi Parsons & David S. Cloud, *U.S. Will Use Airstrikes to Avert Genocide in Iraq, Obama Says*, L.A. TIMES (Aug. 7, 2014, 8:13 PM), <http://www.latimes.com/world/middleeast/la-fg-iraq-us-humanitarian-aid-20140807-story.html>.

³⁵⁹ See, e.g., William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1335 (2006) ("The war powers is an extraordinarily rich area for consideration [of how political actors should engage in constitutional interpretation] . . . because the courts have historically retreated from the area . . .").

³⁶⁰ See generally PARENTI, *supra* note 24; Alexandra Knight, Note, *Global Environmental Threats: Can the Security Council Protect Our Earth?*, 80 N.Y.U. L. REV. 1549 (2005) (addressing the U.N. Security Council's role in taking non-military measures to counter environmental threats that are exacerbated by climate change); see also discussion *supra* Part I.

³⁶¹ See *infra* note 376 and accompanying text.

³⁶² Former U.N. Secretary General Boutros-Ghali has previously warned about "water wars" as nations fight for water and other natural resources, which is expected to be exacerbated by climate change. See Mike Thomson, *Ex-UN Chief Warns of Water Wars*, BBC NEWS (Feb. 2, 2005, 10:53 AM), <http://news.bbc.co.uk/2/hi/africa/4227869.stm>.

international peace and security under the U.N. Charter, and what does that mean for the Commander in Chief's authority to respond to climate change induced crises?

The Security Council can exercise its powers under both Chapters VI and VII of the U.N. Charter to determine the existence of a threat to peace and to take the necessary measures to address such a threat.³⁶³ Moreover, the U.N. has demonstrated an increased willingness since the end of the Cold War to address emergent and non-traditional security challenges—so-called “soft” threats.³⁶⁴ Recognizing climate change as a threat to international peace and security will not only raise the international community's awareness of the threat posed by climate change, but could also be utilized as justification by the President to send forces overseas for peacekeeping, peacemaking, and humanitarian assistance missions. This will take on increased importance as the international system looks to marshal all of the legal tools at its disposal to address the threat of climate change.

Chapter VI, Article 34 of the U.N. Charter (Pacific Settlement of Disputes) authorizes the Security Council to “investigate any dispute, or any *situation* which might lead to international friction or give rise to a dispute.”³⁶⁵ Under Article 35, any U.N. member may request Security Council assistance, for example, in response to an environmental disaster.³⁶⁶ In such circumstances, the U.N. has well-established procedures to recommend emergency assistance from other member states.³⁶⁷

Article 39, in Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), provides mechanisms for the Security Council to respond to international threats to the peace and acts of aggression.³⁶⁸ It states that “[t]he Security Council shall determine the existence of any *threat* to the peace, breach of the peace, or act of aggression and shall make recommendations, or

³⁶³ See U.N. Charter art. 39.

³⁶⁴ See CHRISTOPHER K. PENNY, CENTRE FOR INT'L SUSTAINABLE DEV. LAW, CLIMATE CHANGE AND THE SECURITY COUNCIL: A PRELIMINARY FRAMEWORK FOR IMPLEMENTING REMEDIAL MEASURES THROUGH CHAPTER VII OF THE U.N. CHARTER (2007), <http://cisdl.org/public/docs/legal/Penny%20-%20Climate%20Change%20and%20the%20Security%20Council.pdf>.

³⁶⁵ U.N. Charter art. 34 (emphasis added).

³⁶⁶ See *id.* art. 35, ¶ 1 (“Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.”).

³⁶⁷ See, e.g., Linda A. Malone, Essay, “Green Helmets”: A Conceptual Framework for Security Council Authority in Environmental Emergencies, 17 MICH. J. INT'L. L. 515, 533 (1996).

³⁶⁸ See U.N. Charter art. 39.

decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”³⁶⁹

Articles 41 and 42 provide the Security Council with the power to authorize both non-military and military measures.³⁷⁰ Article 41 states that the Security Council may take “measures not involving the use of armed force,” including severing diplomatic relations³⁷¹—a power that is nested within the President’s foreign relations powers.³⁷² Article 42 states that the Security Council may authorize “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”³⁷³

“Threat” is not well defined within the U.N. Charter. The Security Council has increasingly acknowledged that “soft threats” (e.g., epidemic diseases and mass migrations) in addition to “hard threats” (e.g., international aggression) can impact international peace and security.³⁷⁴ For example, the U.N. Security Council has resolved that the HIV/AIDS epidemic may pose a risk to stability and security.³⁷⁵ Indeed, the Security Council has acknowledged that non-military sources—including ecological sources—can serve as threats to international peace and security.³⁷⁶ The Security Council has shown increasing willingness to address the root cause of conflict that is behind humanitarian crises.³⁷⁷

³⁶⁹ *Id.* (emphasis added).

³⁷⁰ *Id.* art. 41. (“The Security Council may decide what measures *not involving the use of armed force* are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” (emphasis added)); *Id.* art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

³⁷¹ *Id.* art. 41.

³⁷² See U.S. CONST. art. II, § 2, cl. 2.

³⁷³ U.N. Charter art. 42.

³⁷⁴ See, e.g., S.C. Res. 1199 (Sept. 23, 1998) (stating that the flow of refugees was a contributing factor to the threat posed by the Kosovo situation).

³⁷⁵ S.C. Res. 1308 (July 17, 2000).

³⁷⁶ In 1992, the President of the Security Council declared that “[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and *ecological* fields have become threats to peace and security.” Press Release, Security Council, Note by the President of the Security Council, U.N. Press Release S/23500 (Jan. 31, 1992) (emphasis added), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PKO%20S%2023500.pdf>.

³⁷⁷ S.C. Res. 1625 (Sept. 14, 2005) (affirming the U.N.’s determination to strengthen its conflict prevention capacities).

Thus, if the Security Council determined that climate change was indeed a threat to international peace and security, states may be called upon to maintain peace and security by providing armed forces in a variety of missions to ease the threat posed by climate change.³⁷⁸ Article 43 states that member states will make available “armed forces, assistance, and facilities . . . for the purpose of maintaining international peace and security.”³⁷⁹

There is wide discretion in defining the “threat” to international peace and security, with this definition continually evolving and expanding from its historical origins.³⁸⁰ There is also an increasing understanding of the potential role that the Security Council may play as a venue to address the threat of climate change, as former U.S. Ambassador to the U.N., Susan Rice, stated in an official Security Council meeting to address international peace and security.³⁸¹ If the Security Council determines that climate change is a threat to international peace and security, member states may be called upon to take action, or in line with past practice, the President may look to such a U.N. Security Resolution as additional support for taking action without congressional authorization.

To highlight the significance of climate change as an international threat, consider the potentially devastating threat climate change poses to Small Island Developing States (SIDS), such as Tuvalu or the Seychelles. These small island nations’ territorial integrity and sovereignty are at risk due to sea level rise caused and exacerbated by climate change.³⁸² The developing world is more vulnerable to drought, famine, mass migration, and resource and food shortages than the developed world, yet it is the least equipped to deal with natural disasters. Waiting for a formal, legally binding international climate change agreement may not be an option for the very survival of some SIDS. Until a legally binding agreement is forthcoming, these small island states have limited interim options. In light of the enormous

³⁷⁸ *Id.*

³⁷⁹ U.N. Charter art. 43.

³⁸⁰ See, e.g., Sonia Gupta, *Environmental Law and Policy: Climate Change as a Threat to International Peace and Security*, PERSPECTIVES ON GLOBAL ISSUES, Fall 2009, at 7, <http://www.pgi.nyc/archive/vol-4-issue-1/full-issue-04-01.pdf>.

³⁸¹ U.N. SCOR, 66th Sess., 6587th mtg. at 7, U.N. Doc. S/PV.6587 (July 20, 2011), <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CC%20SPV%206587.pdf> (“[T]he Council has an essential responsibility to address the clear-cut peace and security implications of a changing climate.”).

³⁸² See, e.g., REPUBLIC OF SEYCHELLES, REPORT ON CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS (2009) (outlining the unique climate change related threats to international peace and security facing small island developing states in a report submitted to the Department of Economic and Social Affairs, Division for Sustainable Development, at the United Nations).

threat posed by climate change, SIDS may look to the U.N. Security Council as a venue to declare climate change a threat to international peace and security, calling on member nations to assist in taking in refugees or provide humanitarian assistance.

Expanding the definition of “threat” too broadly, however, carries its own risks. The U.N. Security Council’s international legitimacy and acceptance may be openly criticized if it declared climate change a threat to international peace and security, calling upon member states to act.³⁸³ Such a pronouncement would appear to go beyond the U.N.’s original mandate. Ultimately, U.N. member states would have to be willing to accept the Security Council’s new role to overcome fears of illegitimate action.³⁸⁴

D. *Reconciling Separation of Powers Abroad: Recommendations for the President and Congress*

Drawing upon the Commander in Chief’s command and organization power, the President could order the DoD to review the current military combatant commands to ensure the proper military structure is in place to meet the future challenges of climate change.³⁸⁵ This would fall squarely within the President’s Commander in Chief authority and Justice Jackson’s first category, where the President acts pursuant to express or implied congressional authorization.³⁸⁶ Indeed, current law mandates that the President periodically review the mission, responsibility, and force structure of each combatant command.³⁸⁷ For one prominent example of a step that could be taken in light of the threat posed by climate change, we can look to the Arctic, which will take on growing significance with the expected continuing melting of the polar ice caps. Climate change is opening sea-lanes, creating international boundary disputes, and exposing areas to future natural resource exploitation.³⁸⁸ Yet, two geographic commands, European Command and Northern Command, share responsibilities over the

³⁸³ Cf. Malone, *supra* note 367, at 523–24.

³⁸⁴ *Id.*

³⁸⁵ See 10 U.S.C. § 161 (2012).

³⁸⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1951) (Jackson, J., concurring).

³⁸⁷ § 161(b)(1)(a).

³⁸⁸ In 2007, Russia planted a flag on the Arctic Ocean floor. See C.J. Chivers, *Russians Plant Flag on the Arctic Seabed*, N.Y. TIMES (Aug. 3, 2007), http://www.nytimes.com/2007/08/03/world/europe/03arctic.html?_r=0.

Arctic Ocean.³⁸⁹ Similarly, no nation “owns” the Arctic region and, unlike Antarctica, the Arctic lacks a comprehensive governing international treaty to settle future Arctic disputes.³⁹⁰ The President should continue to plan for the myriad impacts of a changing Arctic environment. These planning and organization functions reside almost entirely within the President’s Commander in Chief powers.³⁹¹

Congress has been relatively silent in formulating its role in the Arctic—the Senate has yet to ratify the U.N. Convention on the Law of the Sea, which provides a ready-made forum to resolve maritime disputes.³⁹² In planning for the opening of the Arctic, the President can assert that his actions are pursuant to his independent powers absent a congressional grant or denial of authority.³⁹³ Moreover, the President has the authority to organize military climate change task forces and Arctic task forces to be in a position to respond to future threats.³⁹⁴

Lastly, with regard to the opening of the Arctic, the United States and its Coast Guard are ill equipped to operate in the Arctic, especially because of the Coast Guard’s limited icebreaking capabilities.³⁹⁵ The United States is an Arctic nation. The opening of the Arctic will require the re-capitalization of ice-breaking vessels to guarantee safe passage of U.S. shipping and to protect U.S. global interests. The constitutional funding power to fund the military rests entirely in Congress’ hands—Congress should act now to re-capitalize and fund an Arctic fleet.

Additionally, the President should continually enter into international agreements and seek military-to-military partnerships that seek to collaborate on climate change efforts in order to be better prepared to respond to climate change-induced humanitarian crises. Climate change is a true collective action problem, and responding to its effects will not rest on any one nation’s shoulders. The United States should increase its ability to operate with international partners and work together with traditional and non-traditional allies prior to the next humanitarian assistance crisis. This has already begun in the Pacific

³⁸⁹ See FEICKERT, *supra* note 288, at 8–9. This is an improvement over 2011 when three combatant commands (European, Northern, and Pacific) had areas of responsibility with boundaries over the Arctic Ocean. *Id.*

³⁹⁰ See Erika Lennon, *A Tale of Two Poles: A Comparative Look at the Legal Regimes in the Arctic and the Antarctic*, SUSTAINABLE DEV. L. & POL’Y, SPRING 2008, at 32.

³⁹¹ See *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996).

³⁹² See United Nations Convention on the Law of the Sea, art. 76, Dec. 10, 1982, 1833 U.N.T.S. 397 (providing a procedure to submit continental shelf maritime claims).

³⁹³ See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

³⁹⁴ See *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996).

³⁹⁵ See RONALD O’ROURKE, CONG. RESEARCH SERV., RL34391, COAST GUARD POLAR ICEBREAKER MODERNIZATION: BACKGROUND AND ISSUES FOR CONGRESS (2015).

region, with the U.S. military working with China and other militaries in joint military exercises.³⁹⁶ The President also has clear authority to take such action: military-to-military partnerships relate to the President's powers as Commander in Chief.

E. *Reinvigorating the War Powers Resolution*

Congress could also take action to combat the national security impacts of climate change. Among other things, it should continue to re-examine the WPR and clarify its precise role in the deployment of troops for humanitarian assistance and disaster relief.³⁹⁷ Congress should more clearly communicate its role authorizing military force for humanitarian missions, particularly as humanitarian assistance operations may transform into combat operations over time. Moreover, Congress should review existing law and policy addressing the United States' role in providing military support to humanitarian assistance operations overseas. General statutory authority and congressional guidance exists on humanitarian assistance operations, but it remains unclear under what circumstances the President is authorized to commit military forces overseas absent specific congressional authorization to do so. And there is often not a clean delineation between humanitarian assistance, peacekeeping, and peacemaking operations.

With the emerging threat of climate change, an opportunity exists for Congress to reinvigorate the WPR. As climate change's effects expedite the trend for humanitarian assistance and disaster relief, Congress could use this as an opportunity to clarify its constitutional role in the authorization for the use of military force abroad. Opponents may assert that the President will only view this as an unconstitutional infringement on his Commander in Chief power. But, the underlying separation of powers concerns of vesting too much power in the President to utilize military force abroad have not changed.³⁹⁸ Absent

³⁹⁶ See Robert M. Farley, *RIMPAC Exercises Bring Welcome New Experience for Chinese Navy*, GLOBAL TIMES (China) (Apr. 7, 2013, 6:58 PM), <http://www.globaltimes.cn/content/773090.shtml#Uvv8F0JdVuA> ("Climate change, combined with an increasing proportion of the region's population relocating to the littoral, means that naval forces will be pressed to engage in humanitarian operations whether prepared or not.")

³⁹⁷ There are efforts underway by Senator Kaine (D-VA) to reinvigorate the WPR. See Jonathan Weisman, *An Obama Ally Parts with Him on War Powers*, N.Y. TIMES, Oct. 6, 2014, at A1.

³⁹⁸ See FISHER, WAR POWER, *supra* note 78, at 261 ("The framers' design, deliberately placing in Congress the decision to expend the nation's blood and treasure, has been radically transformed. . . . Presidents continue to wield military power single-handedly That is not the framers' model.").

congressional expression in this area, via change to the WPR or a similar act, the President will likely continue to fill the statutory and constitutional void. Congress will be left with its appropriation power as the *de facto* avenue to curb the President's Commander in Chief powers.³⁹⁹

F. *Onward to Paris: Addressing Climate Change as a National Security Issue Bolsters the President's Legal Position to Act Without Senate Advice and Consent*

The recently signed Minamata Convention on Mercury (Minamata Convention)⁴⁰⁰ may serve as an important precedent as the United States negotiation team looks to a binding climate change accord in Paris in December of 2015.⁴⁰¹ Signed without the Senate's advice and consent under Article II, the Minamata Convention bans primary mercury mining, requires permits for trade in pure mercury, and regulates specific mercury products, processes, and releases to air, land, and water.⁴⁰² The Minamata Convention is not clearly related to the President's national security or Commander in Chief powers, and the State Department issued a statement that the United States can implement Minamata Convention obligations pursuant to existing authority.⁴⁰³ The Treaty Clause of the U.S. Constitution requires a two-thirds vote of the Senate for treaty ratification.⁴⁰⁴ Yet the Minamata Convention, which has clear domestic implications and imprecise

³⁹⁹ See GRIMMETT, FUNDING CUTOFFS, *supra* note 293, at 1.

⁴⁰⁰ See generally *Global Treaty on Mercury Pollution Gets Boost from United States*, MINAMATA CONVENTION ON MERCURY (Nov. 7, 2013), <http://www.mercuryconvention.org/News/GlobalTreatyonMercuryPollutionGetsBoostfrom/tabid/3524/Default.aspx>.

⁴⁰¹ See generally U.N. CONF. ON CLIMATE CHANGE, <http://www.cop21.gouv.fr/en> (last visited Nov. 15, 2015).

⁴⁰² See MINAMATA CONVENTION ON MERCURY, *supra* note 400; Press Release, U.S. Dep't of State, United States Joins Minamata Convention on Mercury (Nov. 6, 2013), <http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm> ("The Minamata Convention represents a global step forward to reduce exposure to mercury, a toxic chemical with significant health effects on the brain and nervous system. The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minamata Convention complements domestic measures by addressing the transnational nature of the problem.").

⁴⁰³ See Press Release, U.S. Dep't of State, *supra* note 402.

⁴⁰⁴ U.S. CONST. art II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."); see also Hannah Chang, *International Agreements on Climate Change*, 35 COLUM. J. ENVTL. L. 337 (2010) (addressing binding international agreements, which are made without the advice and consent of the Senate).

existing statutory footing, was never presented to the Senate for ratification.

Bypassing Senate advice and consent on international agreements is not new in American history. Presidents have entered into executive agreements without congressional authorization or approval since the Nation's founding.⁴⁰⁵ Beyond the Minamata Convention, the President signed an agreement with China, pledging mutual reductions in GHG emissions—all without congressional involvement.⁴⁰⁶

While it is beyond the scope of this Article to provide an in-depth analysis of treaties, sole executive agreements, and congressional-executive agreements, the precise contours of what constitutes a valid legal authority to enter into such “non-Article II agreements” will take on increased importance as the world looks to Paris for a successful and binding climate change agreement in 2015. The Constitution is silent on sole executive agreements, and the judiciary has not provided precise guidance on the factors that inform whether Senate approval is required. Whether an international agreement can be safely legally classified as a treaty, sole executive agreement, or congressional-executive agreement is often times unclear. And the Supreme Court has upheld sole executive agreements as falling within the President's foreign relations powers.⁴⁰⁷ Further, such sole executive agreements are also supreme law of the land.⁴⁰⁸ The majority of accepted non-Article II international agreements involve military matters,⁴⁰⁹ and the Supreme Court has yet to strike down a sole executive agreement *ultra vires*.⁴¹⁰

Sole executive agreements have the strongest legal basis when they are based upon the President's foreign affairs power or pursuant to his power as Commander in Chief.⁴¹¹ As such, the recognition that climate change is not an environmental issue, but one of critical importance to the military and the nation's security, places a prospective Paris

⁴⁰⁵ See HENKIN, *supra* note 123, at 215.

⁴⁰⁶ David Nakamura & Steven Mufson, *China, U.S. Agree to Limit Greenhouse Gases*, WASH. POST (Nov. 12, 2014), https://www.washingtonpost.com/business/economy/china-us-agree-to-limit-greenhouse-gases/2014/11/11/9c768504-69e6-11e4-9fb4-a622dae742a2_story.html.

⁴⁰⁷ See, e.g., *United States v. Belmont*, 301 U.S. 324, 330–31 (1937). However, the precise scope and the President's outer limit to enter into sole executive agreements with other nations is unclear. See HENKIN, *supra* note 123, at 222. In addition, as Commander in Chief, the President can make armistice agreements ending hostilities without congressional approval. See *id.* at 47.

⁴⁰⁸ See HENKIN, *supra* note 123, at 228. Some executive agreements may be self-executing with status “as law of the land.” *Id.* at n.194 (stating that whether a sole executive agreement is self-executing is a matter of interpretation, “first for the President then for the courts”).

⁴⁰⁹ See Chang, *supra* note 404, at 357 (noting that 27% of all non-Article II international agreements that did not go to the Senate involved the military as the subject matter).

⁴¹⁰ *Id.* at 355.

⁴¹¹ See *Belmont*, 301 U.S. at 331.

agreement on comparably stronger legal footing if the President decides to ultimately bypass the Senate.

Applying the *Youngstown* analysis, how does a prospective climate change agreement look? There has yet to be an unconditional congressional statement coming out *against* a binding treaty with enforceable GHG emissions measures. However, in 1997, Congress expressed disapproval of any reduction on GHG emissions by the United States without similar commitments for GHG emissions by developing countries.⁴¹²

Congress, of course, could signal disapproval of such an agreement, placing the President's power at the lowest ebb. But the standard for expressing disapproval is high—it must be clear and direct, otherwise courts will view silence or a muted congressional reaction as congressional acquiescence.⁴¹³

While the 1992 United Nations Framework Convention on Climate Change was sent to the Senate for advice and consent in accordance with the Treaty Clause, the national security impacts of climate change were not nearly as well understood at that time.⁴¹⁴ In light of modern understandings of the destructive impacts of climate change, the President can now forcefully assert that a climate change agreement is not simply an international agreement addressing environmental concerns with domestic commitments to reduce GHG emissions. In addition, climate change is a clear issue of national security, where the President can assert his foreign relations and Commander in Chief powers. Indeed, the President can compellingly assert that a climate change agreement is—at its core—a national security agreement that draws upon these constitutional powers. The President's power to sign non-Article II agreements has the strongest legal footing when addressing matters related to these authorities.⁴¹⁵ Indeed, in asserting that he has the authority to enter into a sole executive agreement without Senate involvement, the President can reasonably assert that the Paris climate change accord is fundamentally a national security agreement that furthers international stability and security. Furthermore, existing statutory authority exists under section 111(d) of the Clean Air Act to implement certain GHG reduction obligations.⁴¹⁶

⁴¹² See S. Res. 98, 105th Cong. (1997).

⁴¹³ See *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

⁴¹⁴ See discussion *supra* Part I.

⁴¹⁵ See HENKIN, *supra* note 123, at 229 (“The President can also make many agreements on his own authority, including . . . military agreements within the Presidential authority as Commander in Chief.”).

⁴¹⁶ 42 U.S.C. § 7411(d) (2012).

CONCLUSION

Climate change is one of the most significant problems facing mankind in the twenty-first century. However, just as climate change poses particular threats to national security, viewing climate change through the national security lens creates certain opportunities for action. Indeed, the military has a rich culture of contingency and mission planning that can assimilate planning for climate change into its assumptions and mission analysis. The modern military has enormous human and financial resources—with 3.2 million employees, the DoD is the largest single employer in the world, with a budget in excess of \$740 billion.⁴¹⁷ It also has a strong cultural ethos built around planning for uncertainty.

The President, as Commander in Chief, will be continually challenged to find solutions within his constitutional confines to address the multi-faceted national security impacts of climate change. And the President will increasingly call upon the military to lead in this effort—both at home and abroad.

While the world looks with a hopeful eye to a governing international climate change agreement in Paris in December of 2015, immediate security challenges exist in vulnerable states that lack the resources to combat climate change's pernicious effects. The President, as Commander in Chief, should continue to take the initiative—at least to the maximum extent of his constitutional authority—to boldly address this emergent and all-encompassing threat.

⁴¹⁷ Alexander, *supra* note 182.