

Congress and the Operational Disciplining of the Use of Armed Force: Are Rules of Engagement Within the Preclusive Core of the President’s War Powers?

DAN MAURER*

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.¹

Their extent must be determined by their nature, and by the principles of our institutions.²

TABLE OF CONTENTS

I. INTRODUCTION	1394
II. THE INSEPARABILITY OF INTERNATIONAL LAW OF WAR FROM DOMESTIC SEPARATION OF POWERS	1399
III. RULES OF ENGAGEMENT AS A COMMAND & CONTROL—AND LEGAL COMPLIANCE—TOOL	1405
IV. THE MOST-LIKELY FRAMEWORK: JUSTICE JACKSON’S YOUNGSTOWN CONCURRENCE	1409
A. <i>Foreseeable (but Hypothetical) Congressional Interest in the Rules of Engagement</i>	1409

* Associate Professor of National Security Law, The Judge Advocate General’s Legal Center and School; Lieutenant Colonel, U.S. Army, Judge Advocate General’s Corps; former “chief of operational law” for a U.S. Army Service Component Command headquarters in Europe and Africa, and former Assistant Professor of Law at the U.S. Military Academy (West Point). Special thanks to Professor Dakota Rudesill for the gracious invitation to participate as a panelist at the *Ohio State Law Journal*’s 2023 symposium on “The Ukraine War and its Legal Implications,” the remarks for which (loosely) form the basis of this article, and to the author’s colleagues in the National Security Law Department at the Army’s JAG School for their insights and comments on an earlier draft. Special thanks also to the editors and staff of *OSLJ* for their professionalism and intellectual engagement during the symposium and for their helpful editorial support on this article. The author’s observations, analysis, and conclusions do not represent the opinions or policies of any part of the U.S. government.

¹ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 188 (2005).

² *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (“[Congress] has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.”).

B. <i>Framing the Domestic Legal Problem</i>	1410
C. <i>Has Congress Already Implicitly Authorized the President to Produce ROE?</i>	1412
D. <i>Does ROE Reside in the “Zone of Twilight?”</i>	1414
E. <i>The “Lowest Ebb” Scenario</i>	1415
1. <i>War-Waging by Branch: Text and Precedent</i>	1415
a. <i>Constitutional Text</i>	1415
b. <i>Supreme Court Precedent</i>	1419
i. <i>Chief Justice Chase’s Milligan Dictum</i>	1419
ii. <i>Little v. Barreme</i>	1420
iii. <i>Fleming v. Page</i>	1424
iv. <i>The Prize Cases</i>	1425
v. <i>Curtiss-Wright</i>	1426
vi. <i>Chappell v. Wallace</i>	1428
vii. <i>Hamdan v. Rumsfeld</i>	1429
2. <i>Initial Conclusions</i>	1432
V. CONCLUSION.....	1433

I. INTRODUCTION

This symposium contribution poses single question: *does the Constitution permit Congress to dictate operational rules of engagement (ROE) binding on the Department of Defense, thus restricting the battlefield discretion of the Commander-in-Chief and the military chain-of-command, or is the power over such rules solely within the reach of the President?* The answer is far from obvious. The question seems to have been lying dormant at the busy intersection of domestic security law, policy, and international laws of war. Scholars exploring the fringe edges of constitutional war powers have not yet located it; courts expounding separation-of-powers principles oversimplify war-waging concepts and so have not yet dug in this soil; Executive Branch lawyers have sped right past this question on their way to advocating for nearly unilateral presidential authority over the conduct of hostilities. The military’s intuitive assumption that the Rules of Engagement are the province of the Executive Branch alone, if only because it is presently inconceivable for Congress to do so and because the ROE have always had their source at the Pentagon, is wrong.³

³ This is unsurprising, given that most relevant source material discussing ROE emphasize it as a “commander’s tool” for the control of force, ensuring it is consistent with operational and mission requirements, national policy, and the international law of armed conflict. *See, e.g.,* NAT’L SEC’Y L. DEP’T, JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 105 (2022), <https://tjagls.army.mil/documents/35956/56931/2022+Operational+Law+Handbook.pdf/> [<https://perma.cc/7V4T-SZYA>] [hereinafter OPERATIONAL LAW HANDBOOK]; *see also*

To see why the counter-intuitive answer is right—that Congress may constitutionally exercise authority over these rules—this article relies on the contemporary international crisis in Eastern Europe to frame this domestic separation of war powers problem.

To be clear about this article's subject matter, it is not the well-trod question of which political branch, if any, has the authority to initiate hostilities unilaterally;⁴ nor is it the slightly more operationally focused question of whether Congress might be able to impose constraints (or remove them) on the *scope, size, or duration* of an existing conflict.⁵ Rather, this article looks a layer further down to a question that has gone unnoticed by scholars, courts, Congress, and executive branch lawyers: may Congress *legislate* operation-specific “Rules of Engagement,” or direct the Department of Defense to do so with certain specified definitions and rules, that “delineate the circumstances and limitations under which US forces will initiate and/or continue combat engagement with other forces encountered?”⁶ In short, it parallels recent work

Colonel Gary P. Corn, *Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement*, 49 VAND. J. TRANSNAT'L L. 1, 3 (2016) (noting that ROE “have evolved as the primary command-and-control tool for regulating and aligning the use of force with political, military, and legal imperatives”).

⁴ A representative sampling of scholarship on this question, some of which will be discussed *infra*, includes Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 615–16 (2017); DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS—1776 TO ISIS* 416–27 (2016); and JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54 (1993). The federal circuits have both avoided this separation of powers issue by declaring it a non-justiciable political question. *See, e.g.*, *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973); *Dacosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973). They have *also* ruled on this very question, deciding whether evidence of tacit or express Congressional support for the Vietnam war was constitutionally sufficient. *E.g.*, *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970); *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971).

⁵ For example, a recent Lexis search uncovered more than 1,500 law review and journal articles discussing the War Powers Resolution, 50 U.S.C. § 1541–50 (1973). *See, e.g.*, Eric Talbot Jensen, *Future War and the War Powers Resolution*, 29 EMORY INT'L L. REV. 499, 503 (2015) (arguing that the Statute fails to serve its purposes by failing to adequately account for and regulate hostilities involving emerging advanced technologies like cyber and drones); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 101–02 (1984) (arguing its constitutionality lies in its “defining” the war power per the “declare war” clause of U.S. CONST. art. I, § 8, cl. 11, not as an exercise of it); 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, 705 (2008) [hereinafter Barron & Lederman, *Original Understanding*] (commenting that “the precise list of executive actions encompassed by [traditional unitary Executive proponents, regarding war powers] is not self-evident”).

⁶ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 207 (2010, as amended through 15. Feb. 2016) (defining “rules of engagement”); *accord* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-04, DEP'T OF

by Professors Ashely Deeks and Matthew Waxman (who focused on potential legislative regulation of artificial intelligence in the President's command and control of nuclear weapons):⁷ the separation of powers issue here is not about the jurisdictional province of war-making; it is about *rule-making* for war-waging.⁸

This article is situated within the larger project of reassessing the degree to which Congress can or should be a more active protagonist during armed conflict as a check on a president's wartime overreaching, or at least play a role in establishing "principled limits on Executive power" during wartime.⁹ It questions the premise that "it is not practically possible to draw a sharp and clear-cut distinction between the powers of military command and the power to regulate the forces and to govern them,"¹⁰ at least insofar as they relate to operational Rules of Engagement. It may be the case that some, and only some, constitutional war powers are a zero-sum game.¹¹ ROE may not be one of them.

Mindful of the Supreme Court's assertion that "[u]nder Clause 14, Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority,"¹² and that "it would be contrary to the respect owed

DEFENSE LEGAL SUPPORT TO MILITARY OPERATIONS, at GL-3 (2016) [hereinafter Joint Pub. 1-04] (defining "rules of engagement").

⁷ Ashley Deeks & Matthew Waxman, *Can Congress Bar Fully Autonomous Nuclear Command and Control?*, LAWFARE (June 5, 2023), <https://www.lawfareblog.com/can-congress-bar-fully-autonomous-nuclear-command-and-control> [<https://perma.cc/3QVW-ELNZ>] (asking whether Congress is barred "from legislatively restricting the president's freedom of action as to whether—and especially how best—to use a particular weapon in the military arsenal").

⁸ In this sense, this article continues the line of argument contained in Barron & Lederman, *Original Understanding*, *supra* note 5, at 693 ("[E]ven when hostilities are underway, the Commander-in-Chief often operates in a legal environment instinct with legislatively imposed limitations."). Of note, Barron & Lederman refer to "rules of engagement" but only as a metaphor describing the ways in which Congress and the President partake in the "interdepartmental struggle for war powers supremacy itself"). *Id.* at 724–25.

⁹ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2049 (2005).

¹⁰ JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 240 (1925).

¹¹ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."); *see also* *INS v. Chada*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution . . ."); *NLRB v. Noel Canning*, 573 U.S. 513, 556 (2014) (stating that friction is an "inevitable consequence of our constitutional structure").

¹² *Loving v. United States*, 517 U.S. 748, 767 (1996).

the President as Commander-in-Chief to hold that he may not be given wide discretion and authority,”¹³ scholars addressing the separation of war powers dilemma have tried to draw sharp lines. In doing so, they have bifurcated in error two activities that should be joined. They make categorical distinctions between battlefield “tactics” or “operations” on the one hand (ostensibly within the preclusive power of the President) and rules that regulate conduct or the discipline of the service members, or even rules that specifically regulate “captures,” on the other (those powers within Congress’s Article I responsibilities).¹⁴ Courts, however, have had less difficulty seeing the interrelationship between soldier conduct in the field and tactical mission requirements and planning—the Supreme Court has long recognized that the American military justice system was originally an “instrumentality” for maintaining good order and discipline in combat and such a categorical distinction is not manifested in actual combat.¹⁵ The two issues—tactics (the “science and art of disposing and maneuvering forces in combat”¹⁶) and rules enforcing disciplined behavior during combat subject to criminal and administrative remedies—both implicate questions of *how to conduct*

¹³ *Id.* at 768.

¹⁴ See, e.g., Saikrishna Prakash, *Regulating the Commander-in-Chief: Some Theories*, 81 IND. L.J. 1319, 1322 (2005).

¹⁵ See, e.g., *In re Grimley*, 137 U.S. 147, 153 (1890); *Carter v. McClaghry*, 183 U.S. 365, 390 (1902); *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 343 (1922); *Burns v. Wilson*, 346 U.S. 137, 140 (1953), *United States ex rel. Toth v. Quarles*, 360 U.S. 11, 17, 22 (1955); *Reid v. Covert*, 354 U.S. 1, 36, 39 (1955); *Parker v. Levy*, 417 U.S. 733, 751 (1974).

¹⁶ *Tactics*, Merrian-Webster.com, <https://www.merriam-webster.com/dictionary/tactics> [https://perma.cc/TPW3-PKH4]. The U.S. Army defines it similarly. DEP’T OF ARMY, ADP 3-90, OFFENSE AND DEFENSE, at 1-1 to 1-3 (July 2019) (“Tactics is the employment, ordered arrangement, and directed actions of forces in relation to each other” and is both an “art” and “science.” “The art of tactics is three interrelated aspects: the creative and flexible array of means to accomplish missions, decision making under conditions of uncertainty when faced with a thinking and adaptive enemy, and the understanding of the effects of combat on Soldiers” whereas the “science of tactics is the understanding of those military aspects of tactics—capabilities, techniques, and procedures—that can be measured and codified.”).

hostilities.¹⁷ Both issues are jointly addressed by ROE,¹⁸ but the fundamental question of who regulates the conduct of hostilities is not facially clear from the text, nor the history of constitutional interpretation by the Court.¹⁹

This first portion of what necessarily must be a longer two-part study introduces the problem by posing a brief hypothetical inspired by the contemporary conflict in Ukraine, describes ROE, looks to the Constitutional text and finds it—unsurprisingly—ambiguous, and surveys potentially relevant Supreme Court jurisprudence that may favor either Congress’s overlapping interest in, or the President’s preclusive authority over, the ROE. The second half of the study²⁰ will continue with a more detailed, though largely fictitious, hypothetical, impose a non-arbitrary rejection of “originalism” or “original public meaning” as a methodology for answering this ROE problem, and apply a Justice Frankfurter-inspired “historical gloss”²¹ perspective but will ultimately find it to be inconclusive as well. Lest we leave the ROE question unsettled, the second article concludes with a pragmatic, functionalist, test inspired by the principal-agent nature of American civil-military relations.

¹⁷ This is nearly an axiomatic principle for the Armed Forces, long recognized and taken as an article of faith. *See, e.g.*, GENERAL WILLIAM T. SHERMAN, *MILITARY LAW* 132 (1880) (“Every general, and every commanding officer knows, that to obtain from his command the largest measure of force, and the best results, he must possess the absolute confidence of his command by his fairness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all his command[.] [but] [w]ithout this quality no army can fulfill its office”); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 48–49 (2d ed. 1920) (commenting that U.S. CONST. art. I, § 8, cl. 14 gives Congress ways to provide the Commander-in-Chief tools “to aid him in properly commanding the Army and Navy and enforcing discipline therein”); Gen. William C. Westmoreland, *Military Justice—A Commander’s Viewpoint*, 10 AM. CRIM. L. REV. 5, 6 (1971) (remarking that the goals of the military’s internal justice system are inclusive of conduct exhibited during combat: to deter conduct that “in the military [could be] infinitely more serious to soldiers, to the military organization as a whole, and to the Nation . . . [and to protect] the discipline, loyalty, and morale [and protect] the integrity of the military organization and the accomplishment of the military mission”); *see also* Memorandum from James Mattis, Sec’y of Def., to Sec’y of the Mil. Dep’ts, Chiefs of the Mil. Servs., Commanders of the Combatant Commands (Aug. 13, 2018), <https://www.usfk.mil/Portals/105/Documents/SECDEF/DISCIPLINE%20AND%20LETHALITY%20OSD010042-18%20FOD%20Final.pdf> [<https://perma.cc/QF4L-JNYK>].

¹⁸ *See infra* Part II.

¹⁹ Barron & Lederman, *Original Understanding*, *supra* note 5, at 705 (“The precise list of executive actions encompassed by [traditional unitary Executive proponents, regarding war powers] is not self-evident.”).

²⁰ Dan Maurer, *Congress and the Operational Disciplining of the Use of Armed Force: Rules of Engagement and “Military Agency Test” for the Separation of War Powers*, 85 OHIO ST. L.J. (forthcoming 2024).

²¹ *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (Frankfurter, J., concurring).

II. THE INSEPARABILITY OF INTERNATIONAL LAW OF WAR FROM DOMESTIC SEPARATION OF POWERS

The war between Ukraine and Russia—the most dangerous International Armed Conflict²² since the Second World War²³—presents a well-understood challenge on two obvious fronts. First, it presents a challenge to the efficacy and relevance of the international rule of law.²⁴ Second, it undermines faith in the State actors who are required to maintain the peace while extolling the virtues of, and practicing, the rule of law.²⁵ Beyond bearing witness to the unbearable human trauma of warfare, the facts on the ground and in the skies of eastern Europe have justified profound cynicism and skepticism about that rule of law.²⁶ Of what real value, for example, is Article 2(4) of the United Nations Charter (prohibiting aggressive war absent self-defense or a Security Council Resolution)²⁷ when a veto-wielding permanent member of the Security Council is the unlawful aggressor?²⁸

²²“Common Article 2” of the 1949 Geneva Conventions distinguishes categories of armed conflict that trigger the applicability of the rest of the Conventions (an “International Armed Conflict” is taken to mean “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; see INT’L COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 69 (2016).

²³See Jonathan Masters, *Ukraine: Conflict at the Crossroads of Europe and Russia*, COUNCIL ON FOREIGN RELS. (Feb. 14, 2023), <https://www.cfr.org/background/ukraine-conflict-crossroads-europe-and-russia> [https://perma.cc/RDQ8-HDTP].

²⁴Edith M. Lederer, *UN Chief: Rule of Law Risks Becoming ‘Rule of Lawlessness,’* AP NEWS (Jan. 12, 2023) (quoting U.N. Secretary-General Antonio Guterres), <https://apnews.com/article/russia-ukraine-politics-united-states-government-myanmar-nations-1856dc8d5af5d5decb0b8fab729ad40> [https://perma.cc/P9J5-LBSS].

²⁵Kemal Derviş & José Antonio Ocampo, *Will Ukraine’s Tragedy Spur UN Security Council Reform?*, BROOKINGS (Mar. 3, 2022), <https://www.brookings.edu/articles/will-ukraines-tragedy-spur-un-security-council-reform/> [https://perma.cc/85P7-V4FA]. But cf. David Ignatius, *The U.N. Is Getting Ukraine Surprisingly Right*, WASH. POST (Sept. 20, 2022), <https://www.washingtonpost.com/opinions/2022/09/20/united-nations-gets-ukraine-russia-right/> [https://perma.cc/7E98-38B5].

²⁶Stephen M. Walt, *The Conversation About Ukraine Is Cracking Apart*, FOREIGN POLICY (Feb. 28, 2023), <https://foreignpolicy.com/2023/02/28/the-conversation-about-ukraine-is-cracking-apart/> [https://perma.cc/RG8S-ZB6D].

²⁷U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”).

²⁸Shelby Magid & Yulia Shalomov, *Russia’s Veto Makes a Mockery of the United Nations Security Council*, ATLANTIC COUNCIL (Mar. 15, 2022), <https://www.atlanticcouncil.org/blogs/ukrainealert/russias-veto-makes-a-mockery-of-the-united-nations-security-council/> [https://perma.cc/5M2R-D7C8].

Aside from these grand issues, granular legal issues are legion. This war is a laboratory for lawyers and scholars to witness in real time how International Humanitarian Law (IHL) (also known as the “Law of War” or the “Law of Armed Conflict”)²⁹ is understood and complied with (or not) at two strata. At one level, war crimes result from strategic decisions by national leaders.³⁰ At another, tactical, level, where soldiers use state-sanctioned violence against civilians and civilian objects, some of that violence inevitably violates IHL and likely constitute war crimes.³¹ Abuses allegedly committed by Russian soldiers occupy most media attention,³² but there are also reciprocal reports of Ukrainian atrocities, like soldiers shooting Russians who should have been considered protected prisoners of war³³ or at least protected because they were *hors de combat*.³⁴ The extent to which either or both sets of perpetrators are prosecuted by domestic or international courts is an ongoing area of scholarly interest³⁵ and public attention.³⁶

²⁹ FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 11 (3d ed., 2001) (“The law of war nowadays is often referred to by a phrase better suited to express its object and purpose, such as ‘international humanitarian law applicable in armed conflict’ or ‘humanitarian law’—we shall be using these terms interchangeably, as we do with ‘war’ and ‘armed conflict.’”); see also DEP’T OF DEF., DIRECTIVE 2311.01E, DoD LAW OF WAR PROGRAM 15 (July 2020) (defining the “Law of War”).

³⁰ Rome Statute of the International Criminal Court art. 8 and 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 (describing the offenses of “war crime” and “crime of aggression”); Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SEC’Y (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> [<https://perma.cc/7LA2-YRA5>].

³¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (identifying conduct that constitute “grave breaches” of this Convention; the other three Conventions of 1949 contain similar catalogues).

³² Amanda Macias, *Russia Has Committed More Than 65,000 War Crimes in Ukraine, Prosecutor General Says*, CNBC (Feb. 1, 2023), <https://www.cnbc.com/2023/02/01/ukraine-russia-war-65000-war-crimes-committed-prosecutor-general-says.html> [<https://perma.cc/4MZ4-X93B>].

³³ Malachy Browne, Stephen Hiltner, Chevaz Clarke-Williams & Taylor Turner, *Videos Suggest Captive Russian Soldiers Were Killed at Close Range*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html> [<https://perma.cc/FZL4-HRGV>].

³⁴ GC I, *supra* note 22, at art. 12; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 41, ¶ 2 June 8, 1977, 1125 U.N.T.S. 3 (defining “hors de combat”).

³⁵ Lesley Wexler, *Accountability for Ukrainian War Crimes Ought to Include Ukrainian War Crimes*, JUSTIA: VERDICT (Mar. 16, 2023), <https://verdict.justia.com/2023/03/16/accountability-for-ukrainian-war-crimes-ought-to-include-ukrainian-war-crimes> [<https://perma.cc/85R2-8BSC>].

³⁶ Stephanie van den Berg & Anthony Deutsch, *Explainer: How Are War Crimes in Ukraine Being Investigated?*, REUTERS (Mar. 17, 2023),

The conflict also showcases the novel application of modern technology on the battlefield, raising questions about how the law of war can and should be interpreted beyond the somewhat limited and outdated terms of the Twentieth Century warfare that gave rise to modern IHL. Scholars and practicing international lawyers (including military attorneys advising the combatants) must now account for unmanned drones accepting mass surrenders;³⁷ civilians using a cell phone application to identify, geolocate, and track the trajectory of airborne threats like rockets and helicopters, instantly transmitting the data to local Ukrainian air defense artillery units;³⁸ and obscure and highly technical cyber activities that may or may not amount to the legal definition of an “attack.”³⁹

But back in the United States—even though not an official party to the conflict—the war in Ukraine highlights potential complications for *domestic* national security law. One such complication—the authority over ROE—implicates traditional frictions between the two political branches: simply, it is another (though understudied) potential frontline for separation of powers disputes. Obvious and well-worn tensions include Congress’s willingness or reticence to fund military operations that the President wishes to execute,⁴⁰ the President’s ability to deploy armed forces abroad without Congressional

<https://www.reuters.com/world/europe/how-are-war-crimes-ukraine-being-investigated-2023-02-23/> [https://perma.cc/8N96-FEE8].

³⁷ Marc Santora, *Surrender to a Drone? Ukraine Is Urging Russian Soldiers to Do Just That*, N.Y. TIMES (Dec. 20, 2022), <https://www.nytimes.com/2022/12/20/world/europe/russian-soldier-drone-surrenders.html> [https://perma.cc/AZ2F-ZQ9F].

³⁸ Michael N. Schmitt & William Casey Biggerstaff, *Are Civilians Reporting with Cell Phones Directly Participating in Hostilities?*, ARTICLES OF WAR (Feb. 21, 2023), <https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/> [https://perma.cc/2DLX-ZEUD]; Dan Maurer, *A State’s Legal Duty to Warn Its Own Civilians on Consequences of Direct Participation in Hostilities*, ARTICLES OF WAR (Nov. 2, 2022), <https://lieber.westpoint.edu/states-legal-duty-warn-civilians-consequences-direct-participation-hostilities/> [https://perma.cc/QB78-28WM].

³⁹ John Sakellariadis & Maggie Miller, *Ukraine Gears up for New Phase of Cyber War with Russia*, POLITICO (Feb. 25, 2023), <https://www.politico.com/news/2023/02/25/ukraine-russian-cyberattacks-00084429> [https://perma.cc/DQP9-3EP5].

⁴⁰ Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander-in-Chief*, 80 VA. L. REV. 833, 836–37 (1994) (reviewing “restrictive national security appropriations” in the Vietnam War and the Iran-Contra Affair); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 450–51 (2011); Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 564–65 (2007).

authorization,⁴¹ and the military's ability to make strategic, operational, and tactical war-waging decisions without Congressional interference.⁴²

⁴¹ The mountainous library of literature on this question includes notable works like Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 701–02 (1972), Alexander M. Bickel, *Congress, the President and the Power To Wage War*, 48 CHI.-KENT L. REV. 131, 133–34 (1971), William Van Alstyne, *Congress, the President, and the Power To Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 2 (1972), LOUIS FISHER, PRESIDENTIAL WAR POWER 12–13 (3d ed. 2013), FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW 33–34 (2d ed. 1989).

⁴² This was a particularly controversial subject in the George W. Bush Administration and its arguments in support of aggressive Commander-in-Chief power during the global war on terror. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Deputy Couns. to the President, on The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them 214 (Sept. 25, 2001) [hereinafter Yoo Against Terrorists Memo] (stating that Congress cannot "place any limits on the President's determinations as to . . . the amount of military force to be used in response, or the method, timing, and nature of the response . . ."); Memorandum from Jay S. Bybee, Assistant Att'y Gen., Off. of Legal Couns., to Couns. to the President, on *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* 39 (Aug. 1, 2002) (stating that Congress cannot "dictate strategic or tactical decisions on the battlefield"). For a very small sample of the enormous body of work on this subject, especially in response to these claims, see, for example, Major James A. Barkei, *Legislating Military Doctrine: Congressional Usurping of Executive Authority Through Detainee Interrogations*, 193 MIL. L. REV. 97, 99 (2007); Jules Lobel, *Conflicts Between the Commander-in-Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008); Oona A. Hathaway, Tobias Kuene, Randi Michel, & Nicole Ng, *Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform*, 63 WM. & MARY L. REV. 137, 143–45 (2021); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 364–68 (2008); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 169–172 (2004); Bradley & Goldsmith, *supra* note 9, at 2054–55; Janet Cooper Alexander, *John Yoo's War Powers: The Law Review and the World*, 100 CALIF. L. REV. 331, 338–39 (2012). The Court was far from silent on the matter. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004) (plurality opinion) (regarding whether the 2001 Authorization for the Use of Military Force, 50 U.S.C. § 1541 (2001) gave the President authority to detain a U.S. citizen captured in Afghanistan allegedly engaged in hostilities against U.S. Forces); Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004) (involving capture and detention of a U.S. citizen on American soil as an "enemy combatant," but ultimately not addressing the question of whether the President had authority to detain him militarily); Rasul v. Bush, 542 U.S. 466, 485 (2004) (deciding that federal courts have statutory habeas jurisdiction over claims from noncitizens held in U.S. military custody in Cuba); Hamdan v. Rumsfeld, 548 U.S. 557, 560, 567 (2006) (holding that the Bush Administration's "Combatant Status Review Tribunals" failed to comport with requirements imposed by the Uniform Code of Military Justice and the Geneva Conventions); and Boumediene v. Bush, 553 U.S. 723, 746–47 (2008) (holding, *inter alia*, that detained alien "enemy combatants" held at a U.S. military detention facility in Guantanamo Bay, Cuba, had the constitutional privilege of *habeas corpus* absent proper "suspension" of the writ by Congress). Neither these cases nor scholarship, however, have addressed the specific question of which branch

But even scholarship in that latter category has lacked sufficient nuance. The question simply gets reframed as what falls to the President to command outside the reach of Congress, but what “command” means has remained stubbornly opaque.⁴³ The understudied source of tension, one that could be raised by future U.S. involvement in a large-scale combat operation or war like that in Ukraine, is the specific set of parameters controlling the military’s actual use of force (servicemember by servicemember, unit by unit) *during* a conflict—the “Rules of Engagement,” rules for which the President and the Department of Defense have exercised apparently exclusive dominion for decades. This question engages claims like “Congress [has] the primary responsibility for determining the nation’s military policy”⁴⁴ on the one hand, and on the other hand claims like the President has a “prerogative of superintendence when it comes to the military chain of command itself [because] the President must to some considerable extent retain control over the vast reservoirs of military discretion that exist in every armed conflict, even when bounded by important statutory limitations”⁴⁵—a “presidential preclusive power over the conduct of campaigns.”⁴⁶ This article asks what, *exactly*, is Congress free to take as its own, and what might be “precluded” by pure Commander-in-Chief judgment?

At least two recent developments suggest Rules of Engagement are not beyond the ken or interest of Congress. First, widespread media coverage of allegedly unwarranted or legally unjustified civilian casualties caused by U.S. airstrikes in Syria, Iraq, and Afghanistan expressing concerns over flawed decision-making, inaccurate reporting, lack of transparency, and a dearth of accountability.⁴⁷ Such reporting often precedes Congressional inquiries⁴⁸ and Congressional directives to the Department of Defense.⁴⁹

rules over “rules of engagement,” which are intended to enforce compliance with *jus in bello*, among other things. *See* Part II.

⁴³ Lobel, *supra* note 41, at 394 (noting the “difficult questions as to where to draw the law line between congressional and Executive power over the conduct of warfare”).

⁴⁴ Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. LA. L. REV. 599, 599 (1984).

⁴⁵ Barron & Lederman, *Original Understanding* *supra* note 5, at 696–97.

⁴⁶ *Id.* at 697.

⁴⁷ Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html> [<https://perma.cc/6F7X-GT4U>]; Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html> [<https://perma.cc/5M39-XV3H>].

⁴⁸ *See, e.g.*, Letter from Elizabeth Warren, Senator, & Sara Jacobs, Representative, to Lloyd Austin, Sec’y of Def., 5-7 (Dec. 19, 2022) (demanding answers to eleven specific questions regarding reporting, fact-finding, and accountability related to civilian harm caused by U.S. military operations).

⁴⁹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, 10 U.S.C. § 184(a)(1)-(2) (2022) (directing the Department of Defense to establish a Civilian

Second, independent of that interest, there is a concern within the Department that two decades of combat during counterinsurgency and counter-terrorist operations with relatively restrictive ROE have left military commanders dangerously unprepared. It is not a lack of equipment or resources that worries some but rather a lack of relevant *experience*. Commanders, the worry goes, may not be comfortable in using their lawful authorities—established by both statute and treaty—to use “appropriate” violence necessary to achieve lawful objectives in a “large-scale combat operation” against a modern technologically-savvy State adversary, a conventional International Armed Conflict regulated primarily by the Geneva Conventions and the Hague Conventions.⁵⁰ Such hostilities, as the Ukraine-Russia War reminded both military professionals and the general public, are extremely lethal, inflict widespread damage, are tolerant (to a degree) of collateral civilian casualties, and do not require the use of precision munitions.⁵¹ The law of war is flexible enough to recognize this and make certain permissions for the use of lethal force conditional upon these realities,⁵² but these are not the combat realities (relatively low-intensity counter-insurgency and counter-terrorism on a global scale) in which current U.S. military leaders have been immersed since 2001.⁵³ Nor do they reflect current public perceptions and expectations about the potential sterility of modern warfare when armed with bountiful technological resources.⁵⁴ At the same time, the Department of Defense has made it explicitly clear that the “protection of civilians is a strategic priority as well as a moral

Protection Center of Excellence to “(1) serve as the focal point for matters related to civilian casualties and other forms of civilian harm resulting from military operations involving the United States Armed Forces; and (2) institutionalize and advance knowledge, practices, and tools for preventing, mitigating, and responding to civilian harm”).

⁵⁰ Lt. Gen. Charles Pede & Col. Peter Hayden, *The Eighteenth Gap: Preserving the Commander’s Legal Maneuver Space on “Battlefield Next,”* 101 MIL. REV. 6, 6–7 (2021); Lt. Gen. Stuart W. Risch & Col. Ryan B. Dowdy, *Multi-Domain Operations: Judge Advocate Legal Services’ Role in MDO and Bridging the Eighteenth Capability Gap*, 2022 ARMY LAW. 91, 96, 99, 101.

⁵¹ See Karen DeYoung, Missy Ryan & Alex Horton, *U.S. Poised to Give Ukraine Controversial Cluster Munitions*, WASH. POST (July 1, 2023), <https://www.washingtonpost.com/national-security/2023/06/30/cluster-bombs-ukraine/> [https://perma.cc/BPP4-RVAS].

⁵² Joint Pub. 1-04, *supra* note 6, at II-2.

⁵³ RONALD O’ROURKE, CONG. RSCH. SERV., RL43838, GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS 25 (2023).

⁵⁴ Pede & Hayden, *supra* note 50, at 6 (“Nongovernmental organizations, academics, and critics consider ‘smart bombs’ and [counter-terrorist] tactics to have become normative rules in warfighting. In short, they are not. This gap—the space between what the law of war actually requires, and a growing expectation of highly constrained and surgical employment of force born of our own recent experience coupled with our critics’ laudable but callow aspirations—left unchecked, threatens to unnecessarily limit a commander’s legal maneuver space on the [large-scale combat operations] battlefield.”).

imperative . . . [for this] directly contribute[s] to achieving mission success.”⁵⁵ Protecting civilians while achieving mission success is the core objective of ROE, as the next section explains.

III. RULES OF ENGAGEMENT AS A COMMAND & CONTROL—AND LEGAL COMPLIANCE—TOOL

The common misunderstanding—that there is a meaningful distinction between “tactics” and “discipline” and thus between what the President ostensibly controls to the exclusion of Congress—is not incurable. Recognizing the coincidence of these two concepts during hostilities requires a basic familiarization with ROE. Therefore, this Part briefly describes their purpose, structure, and content.

U.S. military operations in any conflict are directed and controlled by a series of classified orders of varying complexity and coverage, but all originate from orders issued by the relevant Combatant Commander, the four-star general or flag admiral nominated by the President and confirmed by the Senate to “(A) [t]o produce plans for the employment of the armed forces to execute national defense strategies and respond to significant military contingencies . . . (B) [t]o take actions, as necessary, to deter conflict . . . [and] (C) [t]o command United States armed forces as directed by the Secretary and approved by the President.”⁵⁶ These Commanders report only to the Secretary of Defense and the President in the operational chain-of-command, and—when so ordered—command and control forces assigned to their headquarters from all of the Services (e.g., Army, Navy, Air Force, Space Force).⁵⁷ Those mission-directing orders all include a classified appendix called the “Rules of Engagement” (within a classified annex, “Operations”) setting forth various control measures employed by the chain-of-command with respect to, *inter alia*, necessary conditions (including where and how) for use of lethal force, the scope of collective and unit self-defense, identification of “declared hostile forces,” restrictions on certain types of weapons, treatment of prisoners of war and other detainees and noncombatant civilians, and procedures for commanders at all

⁵⁵ Memorandum from Lloyd Austin, Sec’y of Def., to Senior Pentagon Leadership, Commanders of the Combatant Commands & Def. Agency & DOD Field Activity Dirs., *Civilian Harm Mitigation and Response Plan 1* (Aug. 25, 2022), <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF> [<https://perma.cc/Z499-97R7>].

⁵⁶ 10 U.S.C. § 164(b)(3).

⁵⁷ *Id.* § 164(b)(1). For example, if the United States engaged in armed conflict in Ukraine, the Commander of U.S. European Command (EUCOM) (dual-hatted as NATO’s Supreme Allied Commander Europe, or SACEUR) would exercise “authoritative direction” and control over military campaigns (“employing forces within that command as he considers necessary to carry out missions assigned to the command”) conducted by subordinate commands and joint task forces in the region. *Id.* § 164(c)(1)(A), (D).

echelons to request additional authorities as missions and circumstances change.⁵⁸

The “Theater”-specific or mission-specific ROE, in turn, are derived from a base document: the “Standing Rules of Engagement/Standing Rules for the Use of Force,” a partially classified document, issued only periodically, under the direction of the Chairman of the Joint Chiefs of Staff (CJCS).⁵⁹ By law, the CJCS is the primary military advisor to the President and Secretary of Defense,⁶⁰ responsible for producing the National Military Strategy⁶¹ and outranks all other officers in the Armed Forces but has no authority to command U.S. forces.⁶² There is no explicit statutory or regulatory basis, or Executive Order, for the SROE/SRUF.⁶³ However, the Department of Defense Law of War Program directs that:

Members of the DoD Components comply with the law of war during all armed conflicts, however characterized. In all other military operations, members of the DoD Components will continue to act consistent with the law of war’s fundamental principles and rules, which include those in Common Article 3 of the 1949 Geneva Conventions and the principles of military necessity, humanity, distinction, proportionality, and honor.⁶⁴

The Secretary of Defense further directs subordinate components and commands to “implement effective programs to prevent violations of the law of war, including . . . [i]nstructions, regulations, and procedures to implement law of war standards and establish processes for ensuring compliance”⁶⁵ and take “[a]ppropriate actions to ensure accountability and to improve efforts to prevent violations of the law of war in U.S. military operations.”⁶⁶

The Secretary has further directed the CJCS to “[p]rovide[] appropriate guidance to the Combatant Commanders, consistent with Section 163 of Title 10, U.S.C.,”⁶⁷ and “[re]view[] appropriate plans, policies, directives, joint

⁵⁸ OPERATIONAL LAW HANDBOOK, *supra* note 3, at 109 (¶ 7, referencing “Combatant Commanders’ Theater-Specific ROE”); *id.* at 110 (¶ V.B.1.d., referencing mission-specific ROE).

⁵⁹ JOINT STAFF OF THE JOINT CHIEFS OF STAFF, CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (2005) [hereinafter SROE/SRUF]. The unclassified current SROE/SRUF is reprinted in OPERATIONAL LAW HANDBOOK, *supra* note 3, at 116–30.

⁶⁰ 10 U.S.C. § 153.

⁶¹ *Id.* § 153(b).

⁶² *Id.* § 152(c).

⁶³ See OPERATIONAL LAW HANDBOOK, *supra* note 3, at 105.

⁶⁴ DEP’T OF DEF., *supra* note 28, at ¶ 1.2(a). The Department of Defense Office of the General Counsel is the “originating component” for this document, which was approved by the Deputy Secretary of Defense. *Id.* at 1.

⁶⁵ *Id.* at ¶ 1.2(c)(3).

⁶⁶ *Id.* at ¶ 1.2(c)(6).

⁶⁷ *Id.* at ¶ 2.8(a).

doctrine, and *rules of engagement*, as necessary, ensuring their consistency with this issuance and the law of war,”⁶⁸ to “[h]elp[] ensure that plans, policies, directives, and rules of engagement issued by the Combatant Commanders are consistent with this issuance and the law of war.”⁶⁹

Since 1994, the SROE/SRUF has “establish[ed] fundamental policies and procedures” that govern at all times and places, except where it provides for what could be called contingent exceptions, waivers, and variations.⁷⁰ For our purposes, we need only consider the SROE, as it is the portion that applies to U.S. commanders and military operations outside of U.S. territory or territorial seas, hence the kind of contingency involving hostile actions against foreign threats during armed conflict that animates the question posed in this article.⁷¹

Because no two hostile actions—at any scale, from skirmish to world war, are alike, the “purpose of the SROE is to provide implementation guidance on the application of force for mission accomplishment and the exercise of self-defense.”⁷² The current unclassified sections of the SROE define, *inter alia*, “hostile act” and “hostile intent,” “inherent right to self-defense,” and provide guidelines for requesting various “supplemental measures”⁷³ (additional authorities delegated lower down the chain-of-command to use certain types of weapons or tactics that would normally be withheld to higher echelons of command), with an intent to “ensure they allow maximum flexibility for mission accomplishment while providing clear, unambiguous guidance to the forces affected.”⁷⁴ Because ROE are tailored to a specific operation, they are always a modification of the original baseline SROE.⁷⁵ These SROE, it can be said, “undergo amplification at as many as nine subordinate levels of authority.”⁷⁶ As explained below, that “amplification” is itself constrained in scope and substance.

At a more general level, at any scale of application or amplification, ROE function as contingent control measures: contingent upon the variables of national policy, mission-specific intent and enemy circumstances; control measures imposed by commanders as a lawful order that—in many instances—restrain the use of armed force by their subordinates.⁷⁷ But those contingencies are applied in the context of invariant international law regarding the use of

⁶⁸ *Id.* at ¶ 2.8(c).

⁶⁹ *Id.* at ¶ 2.8(d).

⁷⁰ SROE/SRUF, *supra* note 59, at 1. The history of a standardized SROE goes back slightly further to early and mid-1980s. *See* Corn, *supra* note 3, at 13–5 (briefly summarizing that history).

⁷¹ SROE/SRUF, *supra* note 59, at 1.

⁷² *Id.* at A-1.

⁷³ *Id.* at A-3 to A-4.

⁷⁴ *Id.* at I-1.

⁷⁵ Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 23–24 (1994).

⁷⁶ *Id.* at 21.

⁷⁷ *See generally id.*

force in combat, here referred to as the “laws of armed conflict” or LOAC.⁷⁸ As such, uniformed lawyers (“judge advocates”) help conceptualize and draft the ROE during military planning processes to aid the chain-of-command.⁷⁹ To Professor (and former Marine combat veteran) Gary Solis,

ROE are the primary means of regulating the use of force in armed conflict . . . Think of ROE as a tether with which senior commanders control the use of force by individual combatants. ROE are the commander’s ‘rules’ for employing armed force, arrived at with the help of military lawyers and implemented by those who execute the military mission . . . [and] ROE provisions may be, and often are, more restrictive than those of LOAC [and can never violate LOAC].⁸⁰

Another source, widely adopted as a training guide for commanders and military lawyers, describes ROE as:

[R]ules, issued by competent authorities, to military forces and associated groups and forces, and to other organized armed groups, that regulate the use of force and other activities that may be considered to be provocative. They assist in the delineation of the circumstances and limitations within which forces may be employed to achieve their objectives.⁸¹

The conflict-dependent or Theater-specific ROE (derived from the SROE) will, among other things, define the circumstances under which, for example, lethal force may be used to defend foreign civilian nationals; it may impose restrictions on the types of conventional munitions or cyber capabilities that may be employed; it will define concepts like “hostile intent” and principles of self-defense and proportionality; it will identify individuals, organization, or military forces of another nation as “declared hostile forces” making them lawful standing targets; and it may address the procedural management of detainees, prisoners of war, or other civilians located on or near the battlefield.⁸²

As the ROE are intended to impose controls on individual behavior and choices during hostilities, and they come in the form of a signed order by the Commander (at various echelons in the chain-of-command, each with their own ROE nested within and derived from the ROE and mission of their higher headquarters), violation of the ROE has criminal consequences. A servicemember who violates it could be prosecuted by a federal court-martial under the Uniform Code of Military Justice⁸³—not merely for the underlying

⁷⁸ *Id.* at 56, n.180; KALSHOVEN & ZEGVELD, *supra* note 28, at 11.

⁷⁹ CURTIS E. LEMAY CNTR., UNITED STATES AIR FORCE, PUB. 3-84, LEGAL SUPPORT 27 (2020); JOINT PUB. 1-04 at I-3 to I-14.

⁸⁰ GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 372 (3d ed. 2022).

⁸¹ *Newport Rules of Engagement Handbook*, 98 INT’L L. STUD. 1, 1–2 (2022).

⁸² *See, e.g., id.* at 47–82, 104–05.

⁸³ *See generally* Uniform Code of Military Justice, 10 U.S.C. §§ 801-946a.

misconduct per se (e.g., mishandling of civilian property overtaken during hostilities), and even if not a war crime per se, but for the unlawful act of failing to obey a lawful order.⁸⁴

The development and promulgation of ROE has been assumed to be a task solely within the responsibility (and capability) of the executive branch. As the next section makes clear, the assumption that Congress has no legitimate role to play—or let alone authority to mandate a change—in operational ROE to ensure compliance with Law of War obligations is not as strong as intuition might suggest.

IV. THE MOST-LIKELY FRAMEWORK: JUSTICE JACKSON'S *YOUNGSTOWN* CONCURRENCE

A. Foreseeable (but Hypothetical) Congressional Interest in the Rules of Engagement

Imagine a scenario in which the United States is a belligerent party to an international armed conflict against another nation-state, conducting most of the operations in a third State along with U.S. allies.⁸⁵ The hostilities have been protracted, inflicting much higher than anticipated casualties among U.S. and allied forces and among civilians located in the territory in which the fighting primarily occurs. Much of the combat has centered around densely populated urban areas, and the adversary's battlefield tactics and doctrine call for massing of conventional armored and infantry formations rather than dispersing or disaggregating into smaller, more technologically sophisticated precision formations and weapons. The U.S. military possesses several types of weapon systems that are designed for such threats: thermobaric weapons⁸⁶ and cluster munitions.⁸⁷ Both weapon systems have been used by the U.S. in prior armed

⁸⁴ 10 U.S.C. § 892; SOLIS, *supra* note 80, at 367.

⁸⁵ For the sake of this hypothetical, neither the *jus ad bellum* legal justification under the U.N. Charter nor any domestic war-making authority under U.S. law is relevant.

⁸⁶ Thermobaric weapons are “fuel-air” explosives or “vacuum bombs.” Matt Montazzoli, *Are Thermobaric Weapons Lawful?*, ARTICLES OF WAR (Mar. 23, 2022), <https://lieber.westpoint.edu/are-thermobaric-weapons-lawful/> [https://perma.cc/7FJD-KBLS] (describing the characteristics and use of this explosive); Patricia Zengerle, *Ukraine, Rights Groups Say Russia Used Cluster and Vacuum Bombs*, REUTERS (Mar. 1, 2022), www.reuters.com/world/europe/ukraines-ambassador-us-says-russia-used-vacuum-bomb-monday-2022-02-28/ [https://perma.cc/HVR2-NZGE]; Arthur van Collier, *Detonating the Air: The Legality of the Use of Thermobaric Weapons under International Humanitarian Law*, 105 INT'L REV. RED CROSS 1125, 1126 (2023).

⁸⁷ *Convention on Cluster Munitions*, UNITED NATIONS OFF. OF DISARMAMENT AFFS., <https://disarmament.unoda.org/convention-on-cluster-munitions/> [https://perma.cc/3SGH-KQ2H] (describing the mechanics and use of cluster munitions); Craig Hooper, *Ukraine Wants Cluster Munitions to Blast Russian Fortifications*, FORBES (July 1, 2023), <https://www.forbes.com/sites/craighooper/2023/07/01/ukraine-wants-cluster-munitions-to-blast-russian-fortifications/?sh=68d6f3823cc0> [https://perma.cc/2VLS-T2WS].

conflicts⁸⁸ but remain controversial because of the high risk that normal use results in unreasonable (and to that extent, unlawful) collateral damage to non-combatant civilians.⁸⁹ Cluster munitions are banned by a treaty ratified by 112 nations,⁹⁰ leaving the U.S. in a minority of the States⁹¹ who may use them. In short, these weapons are believed to have high combat utility but high humanitarian costs.

Further imagine that a significant majority of the U.S. Congress appears to disagree with the Department of Defense's claim that the current Theater-specific ROE and SROE from which it is derived are sufficient guides for the lawful use of force by the U.S. military in its ongoing combat operations. In particular, after hearing testimony from retired commanders and wounded veterans, the majority of the House Armed Services Committee believes the President has unreasonably restrained the military by forbidding the use of cluster munitions and thermobaric weapons in urban areas regardless of their tactical or strategic effect on the enemy. Believing that such weapons could facilitate swifter success in the war and that such weapons are not per se unlawful under LOAC, the Committee has forwarded a draft bill that would force the CJCS to revise the SROE and which directs the Secretary of Defense to ensure that the geographic Combatant Commander revises the Theater-specific ROE accordingly.

B. Framing the Domestic Legal Problem

To demonstrate the difficulty of fitting the specific ROE question within neat boundaries of one of the two political branches, this section briefly surveys the strongest or most-often asserted bases, other than "original intent" or "original public meaning,"⁹² for the more generic claims in support of the Executive and Legislative branches' respective roles (whether concurring, preclusive, or independent, or the like). Justice Robert Jackson's tripartite category framework for analyzing the President's power relative to that of Congress on a national security subject is the most appropriate starting point, having been endorsed (or at least discussed in depth) by scholars and the

⁸⁸ Montazzoli, *supra* note 86; Mary Wareham, *It's Time for the U.S. to Ban Cluster Munitions*, HUMAN RIGHTS WATCH (Sept. 19, 2022), <https://www.hrw.org/news/2022/09/19/its-time-us-ban-cluster-munitions> [<https://perma.cc/BPC7-HGG7>].

⁸⁹ See Wareham, *supra* note 88.

⁹⁰ Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39.

⁹¹ Convention on Cluster Munitions, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&clang=_en [<https://perma.cc/TQZ8-EYFM>] (listing current signatories).

⁹² The author's reasoning for this methodological choice is explained in the second part to this article, *supra* note 20 and surrounding text.

courts.⁹³ In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court held that President Truman's order, in the face of a significant labor strike, to seize control of steel mills across the country to avert an economic and military disaster during the onset of the Korean War, was unconstitutional.⁹⁴ In his concurring opinion, Jackson articulated a manner by which to classify the President's asserted war powers and assess their fluctuating constitutional footing as a function of the degree to which Congress has, or has not, acted under its own authority on the same matters.⁹⁵

First, the President's authority is at its "maximum" when acting "pursuant to an express or implied authorization of Congress."⁹⁶ Under these circumstances, advocates for the use of executive authority can be reassured that the act "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."⁹⁷ When the President makes formal rules for military court-martial procedure, she does so in the role of Commander-in-Chief but with specific authorization to do so from Congress.⁹⁸ When the President orders the deployment of U.S. military personnel pursuant to an AUMF, she likewise clearly acts pursuant to an express or implied authorization from Congress.⁹⁹

Contrariwise, the President is at the "lowest ebb" of her power when she takes some action "incompatible with the expressed or implied will of Congress."¹⁰⁰ Seizing of the steel mills was such an action.¹⁰¹ So, too, would a presidential order that keeps the Armed Forces engaged in hostilities after

⁹³ See H. JEFFERSON POWELL, *THE PRESIDENT AS COMMANDER-IN-CHIEF: AN ESSAY IN CONSTITUTIONAL VISION* 55–73 (2014); Barron & Lederman, *Original Understanding*, *supra* note 5, at 694; David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 945 (2008) [hereinafter Barron & Lederman, *Constitutional History*]; *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework . . ."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter & Ginsburg, J.J., concurring); *id.* at 583–85 (Thomas, J., dissenting); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., joined in relevant part by Souter, Ginsburg & Breyer, J.J., concurring) ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown* . . ."). *But see* Mark D. Rosen, *Revisiting Youngstown: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1706, 1739 (2007) (arguing that Jackson did not adequately justify a "categorical congressional supremacy" when the powers of the two branches overlap on a national security issue).

⁹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 579, 588–87 (1952).

⁹⁵ *Id.* at 636–40 (Jackson, J., concurring).

⁹⁶ *Id.* at 635 (Jackson, J., concurring).

⁹⁷ *Id.* at 637.

⁹⁸ 10 U.S.C. § 836(a).

⁹⁹ See U.S. Const. art. I, § 8, cl. 11.

¹⁰⁰ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁰¹ *Id.* at 640.

Congress rescinds an AUMF or fails to appropriate funds for the military operation. In such cases, the President will be subject to more scrutiny and skepticism from any court adjudicating the controversy but can only be said to have acted *unconstitutionally* if Congress engaged its *own* Constitutional powers (e.g., declaring war, raising and supporting armies, etc.) in a way that conflicts with the President's effort. In other words, "the President's asserted power must be both 'exclusive' and 'conclusive' on the issue" for his action to survive judicial scrutiny.¹⁰²

Third, there are ambiguous middle-ground situations in which the President and Congress "may have concurrent" power over a specific subject, as when there is neither a "congressional grant or denial of authority."¹⁰³ In this "zone of twilight," the President seems to have a freer hand to exercise initiative or assume "independent presidential responsibility," provided her actions are within her Article II powers to begin with.¹⁰⁴ In this latter category, resolution of a potential conflict over which branch's preference rules the day will be based on political wrangling driven by "the imperatives of events and contemporary imponderables."¹⁰⁵

C. Has Congress Already Implicitly Authorized the President to Produce ROE?

The most compelling argument that the President—through the Secretary of Defense, Chairman of the Joint Chiefs of Staff, and the Combatant Commanders—retains absolute authority over Rules of Engagement precluding any Congressional directive to change their substance is to argue that the existing SROE and Theater-level ROE reside in Justice Jackson's first grouping. There, the President acts with maximum discretion because she wields not only traditional authority over the combat conduct of the Armed Forces as Commander-in-Chief, but also powers granted by Congress. Though there is no *explicit* statutory authority with respect to operational ROE, Congress has legislated certain responsibilities of the Secretary of Defense, the CJCS, and the Combatant Commanders. These responsibilities can be read reasonably to encompass creation and promulgation of rules regulating the conduct of combat operations that reflect national policy and mission requirements provided they respect and are consistent with the Law of Armed Conflict. Specifically:

The Secretary [of Defense] is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the

¹⁰² *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (quoting *Youngstown*, 343 U.S. at 637–38).

¹⁰³ *Youngstown*, 343 U.S. at 637.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

President and to this title . . . he has *authority, direction, and control* over the Department of Defense.¹⁰⁶

...
Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.¹⁰⁷

From the statutorily established roles, responsibilities, and “command authority” of the Senate-confirmed Commanders of Combatant Commands,

Subject to the direction of the President, the commander of a combatant command . . . performs his duties under the *authority, direction, and control* of the Secretary of Defense¹⁰⁸ . . .

...
Unless otherwise directed by the President or the Secretary of Defense, the *authority, direction, and control* of the commander of a combatant command . . . include the command functions of . . . *giving authoritative direction* to subordinate commands and forces necessary to carry out missions assigned to the command, including the *authoritative direction over all aspects of military operations*, joint training, and logistics¹⁰⁹ . . . [including] employing forces within that command as he considers *necessary to carry out missions* assigned to the command¹¹⁰ . . . [and] coordinating and approving those aspects of *administration and . . . discipline necessary to carry out missions* assigned to the command.¹¹¹

...
[and] [t]he Secretary of Defense shall ensure that a commander of a combatant command has sufficient *authority, direction, and control* over the commands and forces assigned to the command to exercise effective command over those commands and forces. In carrying out this subparagraph, the Secretary shall consult with the Chairman of the Joint Chiefs of Staff.¹¹²

Such authorization from Congress, intended to strengthen civilian supremacy, make the planning and executing of military operations more efficient, effective, and joint as an entire national security enterprise directed by the Commander-in-Chief,¹¹³ is far from unequivocal evidence of Congressional will that ROE and other commands related to the control of the Armed Forces and their use of armed force reside with the Executive Branch. But it is some

¹⁰⁶ 10 U.S.C. § 113(b) (emphasis added).

¹⁰⁷ *Id.* § 113(d).

¹⁰⁸ *Id.* § 164(b)(2) (emphasis added).

¹⁰⁹ *Id.* § 164(c)(1)(A) (emphasis added).

¹¹⁰ *Id.* § 164(c)(1)(D) (emphasis added).

¹¹¹ *Id.* § 164(c)(1)(F) (emphasis added).

¹¹² 10 U.S.C. § 164(c)(2)(A) (emphasis added).

¹¹³ James R. Lochner III, *Has It Worked? The Goldwater-Nichols Reorganization Act*, 54 NAV. WAR COLL. REV. 95, 105–06 (2001).

evidence. It is not unreasonable to argue that these statutory provisions establish presidential control over standing and operational ROE. The administrative and disciplinary measures to control the use of lawful force in contextually-conditional situations given mission requirements and national policy—the “authority, direction, and control” of which Congress presented to the Secretary of Defense and Combatant Commanders, subject only to Presidential command¹¹⁴—are the SROE and any derivative ROE.

Nevertheless, the statutory language quoted above must be admitted to answer the question only implicitly, and thus is indirectly or even inadvertently suggestive that Congress appended this additional responsibility over ROE to the Commander-in-Chief’s authority.¹¹⁵ If only inadvertent, a fair application of *Youngstown*’s framework demands giving due consideration to the second category described by Justice Jackson. That analysis of the “zone of twilight” follows in the next section.

D. Does ROE Reside in the “Zone of Twilight?”

A slightly weaker argument supporting the President’s preclusive authority over the current SROE and Theater-specific ROE is that Congress and the President sit within the “zone of twilight,” the middle ground in Justice Jackson’s Concurrence in which Congress has neither expressly acted nor implied its preferences.¹¹⁶

Congress has not yet enacted a statute over the President’s veto prescribing new ROE with which the President disagrees. As discussed in Part II, *supra*, the SROE have already been promulgated by the CJCS and derivative Theater-specific ROE have been issued by Combatant Commanders for their respective geographic areas of operation and any specific military missions they undertake.¹¹⁷ By virtue of their respective roles and authorities (created by statute) relative to the President, the SROE and Theater ROE are tacitly imputed to be at the direction and approval of the President as Commander-in-Chief under her Article II enumerated power.¹¹⁸ There has been no claim that any

¹¹⁴ 10 U.S.C. §§ 113(b), 164(c)(1)(A).

¹¹⁵ Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1988) (“[B]y treating all manner of ambiguous congressional actions as ‘approval’ for a challenged presidential act, a court can manipulate almost any act out of the lower two Jackson categories, where it would be subject to challenge, into Jackson Category One, where the President’s legal authority would be unassailable.”).

¹¹⁶ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring).

¹¹⁷ See *supra* Part II.

¹¹⁸ WINTHROP, *supra* note 17, at 27 (“The authority for army regulations proper is to be sought—primarily—in the distinctive functions of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or

President has acted unconstitutionally, impinging or infringing upon Congress's own war powers by this direction and approval.

If we assume Congressional investigative interest and assume draft legislation on the subject, however, it is prudent to analyze the respective authority over ROE as a "lowest ebb" problem as well.

E. The "Lowest Ebb" Scenario

The strongest possible argument is that the President retains exclusive, not just primary, control over ROE *irrespective* of which of the three *Youngstown* situations exist—that this authority is clear regardless of where on the "spectrum running from explicit congressional authorization to explicit congressional prohibition"¹¹⁹ it happens to be. Having considered both the "maximum" and the "zone of twilight" scenarios, we can now assume for the sake of analysis the following additional facts would place the President in the "lowest ebb" category: (1) that Congress *does* enact ROE legislation over the President's veto, and (2) the President refuses to have the SROE amended and refuses to transmit the changes to the relevant Combatant Commander for amending the Theater ROE. The issue thus crystallized will be whether the President can aver that her power over such rules is both "exclusive and conclusive."¹²⁰ That is to say, if Congress has any constitutional authority over ROE, its decision necessarily trumps that of the President's, for she "can rely only upon [her] own constitutional powers minus any constitutional powers of Congress over the matter."¹²¹ As the Court described the analysis in *Zivotofsky* on the question of the President's exclusive power to "grant formal recognition" to foreign States,¹²² the relevant analysis begins and ends with "the Constitution's text and structure, as well as precedent and history bearing on the question."¹²³

1. War-Waging by Branch: Text and Precedent

a. Constitutional Text

A plain reading of the Constitution's text suggests that the discrete power to create and publish ROE rests with the branch that is permitted to legislate, *inter alia*, "Rules for the Government and Regulation of the land and naval Forces."¹²⁴ This reading is reinforced by the accepted use of the statutory

through his military subordinates, such orders and directions as are deemed necessary and proper to ensure order and discipline in the army.").

¹¹⁹ *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

¹²⁰ *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (citing *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)).

¹²¹ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹²² *Zivotofsky*, 576 U.S. at 5.

¹²³ *Id.* at 10.

¹²⁴ U.S. CONST. art. I, § 8, cl. 14.

Uniform Code of Military Justice (UCMJ) to enact rules that discipline the Armed Forces across a broad spectrum of conduct, including its conduct in combat.¹²⁵ This is in direct conflict, then, with Presidential precedent and the long history of the military chain-of-command issuing ROE or ROE-like orders, and the role that such rules play in the effective command and control of the Armed Forces.¹²⁶ It is tempting to reduce the problem to one of framing: if framed as a form of “disciplining” the military, conditioning it to certain lawful types of armed force, then it is within Congress’s responsibilities; if, instead, it is a form of “command,” then it is within the President’s responsibilities. This reductionism, however, ignores the nuances of what ROE is and the *multiple* purposes it serves.¹²⁷

Though undoubtedly a novel question, any conflict over the respective roles played by Congress and the President in the promulgation and enforcement of ROE is made more difficult to mediate by a combination of the multi-purpose nature of ROE and the imprecise division of labor set out in the Constitution’s first two Articles. The hinterland between Congress and the President is immediately obvious upon reading the text of Article I and Article II.¹²⁸ As Justice Frankfurter wrote:

The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government.¹²⁹

Congress is imbued with a range of relatively specific enumerated national security authorities: the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defense . . .”;¹³⁰ the power to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”;¹³¹ “to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”;¹³² to “raise and support Armies, but no Appropriation of Money to that

¹²⁵ See Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 9 (1970); *Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018); *Loving v. United States*, 517 U.S. 748, 761, 765–68 (1996).

¹²⁶ See *supra* Part II.

¹²⁷ See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 645–46 (Jackson, J., concurring) (“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 policymaking branch is a representative Congress.”). On the multiple purposes of ROE, see *supra* Part II.

¹²⁸ U.S. CONST. art. I, II.

¹²⁹ *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

¹³⁰ U.S. CONST. art. I, § 8, cl. 1.

¹³¹ U.S. CONST. art. I, § 8, cl. 10.

¹³² U.S. CONST. art. I, § 8, cl. 11.

Use shall be for a longer Term than two Years”;¹³³ to “provide and maintain a Navy”;¹³⁴ to “make Rules for the Government and Regulation of the land and naval Forces”;¹³⁵ to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”;¹³⁶ to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States[.]”.¹³⁷ In contrast, the President is simply assigned the role of “Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into actual Service of the United States”;¹³⁸ given the power to “make Treaties”;¹³⁹ and charged to “take Care that the Laws be faithfully executed”.¹⁴⁰

Locating with precision the constitutional border between Article I and Article II war powers has always posed cartographical challenges. Occasionally, those challenges have been obscured by over-generalized, somewhat superficial, judicial reasoning. As Justice Bradley wrote for the Court a decade after the U.S. Civil War, in a case affirming that there are unexpressed war powers inherent to the federal government at least implied by the Constitution’s text,

By the Constitution of the United States the power to declare war is confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the *entire charge of hostile operations*, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject.¹⁴¹

Justice Bradley’s summation errs toward glibness: it is not clear what he really had in mind by “invested with the entire charge of hostile operations.”¹⁴² No less than the “Blackstone of military law,”¹⁴³ Colonel William Winthrop, more than a century ago, wrote: “As constitutional Commander-in-chief of the Army, and independently of course of any authorization or action by Congress, the President is empowered to issue orders to his command.”¹⁴⁴ But that may mean nothing more than ordering the tactical maneuver of troops during hostile engagements with an enemy. Or it could naturally include ordering the

¹³³ U.S. CONST art. I, § 8, cl. 12.

¹³⁴ U.S. CONST art. I, § 8, cl. 13.

¹³⁵ U.S. CONST art. I, § 8, cl. 14.

¹³⁶ U.S. CONST art. I, § 8, cl. 15.

¹³⁷ U.S. CONST art. I, § 8, cl. 16.

¹³⁸ U.S. CONST art. II, § 2, cl. 1.

¹³⁹ U.S. CONST art. II, § 2, cl. 2.

¹⁴⁰ U.S. CONST art. II, § 3.

¹⁴¹ *Hamilton v. Dillin*, 88 U.S. 73, 87 (1874) (emphasis added).

¹⁴² *Id.*

¹⁴³ *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality opinion).

¹⁴⁴ WINTHROP, *supra* note 17, at 38.

operational transition of divisions, corps, or fleets from one battlefield to another. Or it may include reviewing and approving campaign plans drawn up by military commanders, deciding the timing of when troops will conclude operations and return home, determining the geographic scale of a combat operation, developing the national strategic policy for seeking alliances with other nations, and demarcating the acceptable terms of surrender. Whereas he suggested military “orders” are solely in the hands of the President, Winthrop also discussed the legal validity of Army “regulations,” in which he writes:

The authority for army regulations proper is to be sought—primarily—in the distinctive functions of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to ensure order and discipline in the army. His function as Executive empowers him, personally or through the Secretary of War, to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment.¹⁴⁵

It is unclear how to reconcile, both in general and specifically for ROE, the view that “orders to his command” (especially those related to “order and discipline”) are within the preclusive prerogative of the President, but that orders in the form of more general “regulations” related to the “military establishment” may be subject to constraints or demands imposed by statute.¹⁴⁶ One other prominent military lawyer and scholar, Brigadier General George Davis just prior to the U.S. entry into World War I, was more direct: “[i]n the exercise of military command and in the conduct of military operations the President is not subject to legislative or judicial control.”¹⁴⁷ But, again, we are left to guess at what, precisely, “military command” and “conduct of military operations” necessarily means.¹⁴⁸ President Taft, after he left office and before he joined the Supreme Court, wrote that only the President is to determine the movements of the army and the navy.¹⁴⁹ He subsequently wrote, in a way clarifying, that “Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.”¹⁵⁰ Nothing in the text of Article I, and certainly not Article II, gives an answer. As Jackson wrote in his *Youngstown* concurrence of Article II’s mysteries: “[t]hese cryptic words have given rise to some of the most persistent

¹⁴⁵ *Id.* at 27.

¹⁴⁶ *Id.* at 27, 38.

¹⁴⁷ GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 323 (3d ed. 1915).

¹⁴⁸ *Id.*

¹⁴⁹ See WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139 (1916).

¹⁵⁰ William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916).

controversies in our constitutional history.”¹⁵¹ Constitutional scholars have agreed: “the text is probably best construed to make clear that both branches come to the table with plausible claims to authority, but it is impossible to tell from the words of the document alone which one, if either, has a conclusive argument for primacy.”¹⁵²

b. *Supreme Court Precedent*

It should be first noted and emphasized that the Court has never directly or indirectly addressed the constitutional implications of one branch’s direction over ROE. Nevertheless, the Court’s views have long been relied upon by scholars and executive branch lawyers to deduce the existence of some sphere, of *unknown* dimensions, encapsulating exclusive Presidential direction: “the Commander-in-Chief Clause of Article II confers independent war powers that are subject to statutory limitations in an unspecified range of circumstances.”¹⁵³

i. *Chief Justice Chase’s Milligan Dictum*

Chief Justice Chase’s famous dictum from *Ex parte Milligan*, that Congress cannot “direct the conduct of [military] campaigns,”¹⁵⁴ is often cited as strong support of preclusive executive war power over *all* war-making activities except for declarations of war (i.e., initiation of hostilities): that is to say, over detention, interrogation, and prosecution of enemy combatants; tactical commands to the military, and applying appropriated funding to military operations.¹⁵⁵ However, “direct the conduct of military campaigns” is inherently

¹⁵¹ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 641 (Jackson, J. concurring).

¹⁵² Barron & Lederman, *Original Understanding*, *supra* note 5, at 772; *accord* *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (“[T]he Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare [and] has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.”).

¹⁵³ Barron & Lederman, *Original Understanding*, *supra* note 5, at 772.

¹⁵⁴ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139–40 (1866).

¹⁵⁵ See, e.g., Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress’s Power to Restrict the President’s Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 80 (1999) (“[T]he President’s power as Commander-in-Chief is not without limits, although his authority to control and direct military operations may be exclusive.”); Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Couns., to the Special Couns. to the President, on *The President and the War Power: South Vietnam and the Cambodia Sanctuaries* (May 22, 1970), at 330–31 (citing *Milligan*); *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (citing *Milligan*, 71 U.S. (4 Wall.) at 121); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1855 & n.197 (1998); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90

ambiguous—and very likely so to anyone who has ever fought in or planned combat operations. His formulation suffers the same defects as that of Justice Bradley, Colonel Winthrop, and Brigadier General Davis. “Direct the conduct of campaigns” could encompass the decision about which tactical units (e.g., the 82nd Airborne Division, or the aircraft carrier USS *Nimitz* and its Carrier Strike Group 11) to deploy, the decision about when to begin or conclude major operations, a decision of what sector should be emphasized with a higher tempo of operations or more troops, or a decision about which locations, objects, or people should designated a military objective.

Alternatively, it could mean the decision over the *manner* in which armed force will be used on generic or specified targets (e.g., detailing what types of weapons may be used or are categorically restricted, or detailing specific locations or times that specified weapons or tactics might be employed, or what rules dictate the procedure for detaining suspected combatants) within an ongoing series of related engagements with hostile forces intended to achieve some military or political end state. Professor John Dehn made a similar argument for not reading too much into Chase’s dictum:

The precise meaning of Chase’s statements regarding the relative war powers of Congress and the President is somewhat debatable. Placed in the full context of his opinion, however, Chase does not appear to have supported preclusive presidential authority over the conduct of war. His opinion more readily supports a much narrower view of presidential power as one of implied powers to direct the employment of military forces, subject to applicable laws. Chase’s acknowledgement of Congress’s powers to “provide by law for carrying on war” and to enact “all legislation essential to the prosecution of war with vigor and success” appears to recognize a substantial role for Congress in both initiating and regulating war . . . [and] would not preclude general regulation of the objects, means, or methods of those campaigns¹⁵⁶

At least for ROE, the Chase dictum is unhelpful and potentially misleading in its vagueness.

ii. *Little v. Barreme*

Other than Chase’s dictum, there are some other cases that may be interpreted as relevant to the ROE question. The early Nineteenth Century case of *Little v. Barreme*¹⁵⁷ is usually taken to stand for the proposition that a president cannot issue an order that allows him—through the actions of his subordinate military commanders—to bypass or ignore a law passed by

CORNELL L. REV. 97, 170 (2004); Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 YALE L.J. POCKET PART 84, 85 (2006).

¹⁵⁶ John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 637–38 (2011) (internal citations omitted).

¹⁵⁷ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

Congress.¹⁵⁸ This has come to represent a rare case of judicial non-deference to the executive in matters of national security: the early Court did not defer to the unilateral discretion of the President's war-waging decisions when Congress has, through legislation, framed the boundaries of an armed conflict (especially in an "undeclared war") that it has already authorized the president to lead.¹⁵⁹ Though typically cast in the ledger as a win for Congressional supremacy, it has an additional meaning that can—at least for the case of ROE—favor the Commander-in-Chief.

The controversy in *Little* arose out of an order issued by President John Adams to naval ship commanders during the United States' "quasi-war" with France.¹⁶⁰ Congress had enacted a non-intercourse law in early 1799 to prevent American residents trading with France or its colonies and possessions; it authorized the President to "give instructions to the commanders of the public armed ships of the United States" to stop, inspect, and seize ships and vessels violating the prohibition provided that the violators were en route *from* the United States *to* France or its territories.¹⁶¹ Captain Little erroneously seized a Danish ship, *The Flying Fish*, under color of this direct command.¹⁶²

It was an erroneous seizure for two reasons: first, the ship captain was not a resident of the United States, was Prussian by birth, and the Danish ship carried only Danish goods, making it "neutral."¹⁶³ Second, it was not leaving an American port when it was captured, and this key fact of the ship's itinerary made it non-targetable by the U.S. Navy.¹⁶⁴ The vessel's owners sued for the return of their impounded property and for damages against Captain Little.¹⁶⁵ Finding the ship and its contents to be neutral, the district court found in favor of the owners but refused to hold Captain Little liable on grounds that he had "probable cause" to believe the ship was American.¹⁶⁶

¹⁵⁸ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 55 (1993).

¹⁵⁹ *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); Jane Manners, *Executive Power and the Rule of Law in the Marshall Court: A Rereading of Little v. Barreme and Murray v. Schooner Charming Betsy*, 89 *FORDHAM L. REV.* 1941, 1944 (2021) ("*Little* does not stand for the idea that the president's constitutional war power is constrained only by explicit statutory limits. Instead, it represents the widespread founding-era understanding that in an undeclared war, the president's authority to engage in hostilities derives exclusively from statute."); Barron & Lederman, *Constitutional History*, *supra* note 93, at 968; Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 933, 939 (2007).

¹⁶⁰ See JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 338–40 (1996).

¹⁶¹ *Little*, 6 U.S. at 171, 177.

¹⁶² *Id.* at 175–76.

¹⁶³ *Id.* at 172, 176.

¹⁶⁴ *Id.* at 175–76.

¹⁶⁵ *Id.* at 175.

¹⁶⁶ *Id.* at 176.

On appeal, the chief problem according to Chief Justice John Marshall was that the order Captain Little apparently obeyed was itself unlawful, and that he was not shielded from tort liability merely because he obeyed an order from his commander-in-chief.¹⁶⁷ The order from President Adams—transmitted by the Secretary of the Navy along with a copy of the non-intercourse statute itself to all commanders including Little—evidently expanded the scope of the law by authorizing the Navy to stop, search, and seize vessels not only destined for French ports, but also American ships coming *from* such ports.¹⁶⁸ This extension of the Navy's jurisdiction, so-to-speak, by the President may have been sensible and in keeping with the spirit and intent of the non-intercourse law, Marshall suggested,¹⁶⁹ but this broad construction was clearly contrary to the limits constraining that jurisdiction expressly imposed by Congress and was, therefore, unlawful.¹⁷⁰

But *Little*, through a clear-eyed reading of an under-appreciated dictum, also presents an early illustration of two essential features of presidential authority still resident implicitly in the Commander-in-Chief clause important for the question posed of ROE. First, the case offers a brief glimpse—the first of its kind—of a military maxim described and legitimized by the judicial branch. Marshall recalled a classic distinction between civilians and military service members: by virtue of their employment and the nature of that employment's purpose in warfighting, service members are not typically free to disagree, dissemble, dissent, or disobey orders from the chain-of-command—certainly not those of the Commander-in-Chief.¹⁷¹

That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders . . . ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them[.]¹⁷²

This axiomatic principle has been repeated by the Court, by scholars, and by military commanders numerous times in the centuries since.¹⁷³

¹⁶⁷ See *Little*, 6 U.S. at 179.

¹⁶⁸ *Id.* at 178.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 177–79.

¹⁷¹ *Id.* at 179.

¹⁷² *Id.* at 179.

¹⁷³ See, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“[T]he different character of the military community and of the military mission requires a different application of those protections [because] the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“[T]o accomplish its mission[,] the military must foster instinctive obedience, unity, commitment, and esprit de corps.”); John H. Wigmore, *Lessons from Military Justice*, 4 J.

Second, *Little* illustrates a Commander-in-Chief issuing what the Department of Defense would call today operational ROE meant to influence or control the decision-making of his agents using force abroad against agents of an adversarial nation during ongoing “hostilities”¹⁷⁴ with that nation. While certainly not the object of the Court’s attention, the nature of the specific instructions from President Adams—in addition to unconstitutionally broadening the scope of the underlying statute—are noteworthy. The directive to his naval captains included admonitions and expectations to “exercise [their discretion with] sound and impartial judgment,” to be “vigilant that vessels or cargoes [that are] really American . . . do not escape you;” to base their decisions on “just suspicion,” and to “send all the evidence you can obtain to support your suspicions.”¹⁷⁵ These admonitions and expectations are frustratingly general; but in criticizing their vagueness, it is important not to overlook their functional utility as force management devices in much the same way that modern ROE functions.¹⁷⁶ Two of these directives implicated the mindset expected of commanders exercising discretion far from the command and control of the national government: “sound and impartial judgment;” only “just suspicion” backed by “evidence” shall support seizures of vessels.¹⁷⁷ So, while *Little* is usually considered evidence of a limit to Commander-in-Chief power in favor of more robust conditions set by Congress,¹⁷⁸ it is sensible to consider this case as indicia of the forms of direct presidential control over the means and methods of warfare—the waging of armed conflict—to which the Court offered no objection or comment.

AM. JUDICATURE SOC’Y 151, 151 (1921) (“[A]ction in obedience to regulations and orders [is] absolutely necessary for prompt, competent, and decisive handling of masses of men.”); SHERMAN, *supra* note 17, at 132 (“Every general, and every commanding officer knows, that to obtain from his command the largest measure of force, and the best results, he must possess the absolutely confidence of his command by his fairness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all in his command.”). *See generally* Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH. L. REV. 669, 709–23 (2021) (surveying myriad premises usually offered expressly or by implication about the nature of military service and military operations as the basis for a separate criminal justice system within the Armed Forces).

¹⁷⁴ *Little*, 6 U.S., at 177.

¹⁷⁵ *Id.* at 171–72.

¹⁷⁶ *See supra* Part II.

¹⁷⁷ *Little*, 6 U.S., at 171–72.

¹⁷⁸ *See Brown v. United States*, 12 U.S. (8 Cranch) 110, 147–49 (1814) (Story, J., dissenting); *see also Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (regarding the Quasi-War with France, “Congress has not declared war in general terms; but congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels; nor even to capture French armed vessels lying in a French port . . .”). According to Professor Corn, this “suggests that Congress can limit the type of operations employed to achieve an authorized objective.” Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 207 n.113 (1998).

iii. Fleming v. Page

Nearly half a century after *Little*, the Court further elaborated upon the discretion that presidents as commanders-in-chief enjoy over the manner in which force is employed abroad during armed conflict. In *Fleming v. Page*, the controversy was not about command and control rules as such, but rather a question of status: was a Mexican port city, captured by the U.S. military during the Mexican-American War, a foreign port or a effectively part of the United States for the purposes of applying a statute that imposed duties on goods imported from “foreign” ports?¹⁷⁹ The Court’s reasoning focused on the effect of the U.S. victory over Mexican forces—that it had “conquered” the nation and was an occupying power exercising “sovereignty” over that region (“in the exclusive and firm possession of the United States, and governed by its military authorities”), including the port city of Tampico.¹⁸⁰ Nevertheless, this fact of military occupation over a vanquished nation was not an implicit annexation: “it does not follow that it was a part of the United States, or that it ceased to be a foreign country” merely because it “had been conquered in war.”¹⁸¹

Such a conclusion could have stood on its own merits, but the Court further distinguished—in what could be interpreted as dicta as well—between the powers of Congress to declare war and the president’s *derivative authority once war has been declared*.¹⁸² Noting that Congress has no power to declare war “for the purposes of aggression or aggrandizement,” it follows that the President cannot use the military “for . . . conquest or the acquisition of territory,” and that a declaration by Congress should not be read as a tacit authority for the president to use force to “enlarge the limits of the United States by subjugating the enemy’s country.”¹⁸³ Suitably contained, therefore, the President’s military power is understood narrowly. Per the Court:

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.¹⁸⁴

This passage from *Fleming* has flourished (in both the Executive Branch, regardless of the Administration’s party, and by some justices on the Court) in the subsequent centuries as a statement of inviolable presidential war-waging

¹⁷⁹ *Fleming v. Page*, 50 U.S. (9 How.) 603, 614 (1850).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 614–15.

¹⁸³ *Id.* at 614.

¹⁸⁴ *Fleming*, 50 U.S. at 615.

discretion, especially when Congress has supported or, as was the case in the Mexican-American War, explicitly authorized the use of armed force.¹⁸⁵

iv. The Prize Cases

The Civil-War era *Prize Cases*¹⁸⁶ are also often relied upon by Executive Branch lawyers advocating for strong, if not unilateral, presidential power over war-waging tactics and strategies without prior congressional authorization.¹⁸⁷ In those cases,¹⁸⁸ the Court approved of President Lincoln's order to blockade southern Confederate ports and to seize privately-owned ships attempting to breach that blockade (a typical war-time tactic), even though Congress had not formally declared war on the Confederacy and had not yet enacted legislation that would permit the President to do so.¹⁸⁹ In rhetorically musing about a foreign invasion, Justice Grier (writing for a 5-4 Court) observed that a president would be "bound" to resist it by force, to "accept the challenge without waiting for any special legislative authority."¹⁹⁰ Grier held that the President is "bound" to meet the threat posed by the rebellious southern States "in the shape it presented itself, without waiting for Congress to baptize it with a name."¹⁹¹ In particular, it is the President, not Congress, who "must determine what degree of force the crisis demands."¹⁹²

¹⁸⁵ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006) (Thomas, J., dissenting); *Hamdi v. Rumsfeld*, 542 U.S. 507, 581–82 (2004) (Thomas, J., dissenting); Yoo Against Terrorists Memo, *supra* note 41, at 190 n.3; Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Couns., to the Att'y Gen., *Authority to Use Military Force in Libya* 28 (Apr. 1, 2011), <https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-04-01-libya-deployment.pdf> [<https://perma.cc/Z3WF-DDDL>]; Memorandum from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Off. of Legal Couns., to Couns. to the President, *Targeted Airstrikes Against the Islamic State of Iraq and the Levant* 96 (Dec. 30, 2014), <https://www.justice.gov/d9/opinions/attachments/2021/03/10/2014-12-30-airstrikes-isil.pdf> [<https://perma.cc/G7ZU-TV7Y>]; Memorandum from Steven A. Engel, Assistant Att'y Gen., Off. of Legal Couns., to Couns. to the President, *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities* 4 (May 31, 2018) [hereinafter *Engel Syrian Airstrikes Memo*], <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/U6XX-TEC2>].

¹⁸⁶ *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

¹⁸⁷ E.g., Yoo Against Terrorists Memo, *supra* note 41, at 191 n.5. See generally Brief for Respondents at 18–19, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), (No. 05-184) (2005) (citing *The Prize Cases* four times).

¹⁸⁸ *The Prize Cases* involved four individual ships, each captured by U.S. public vessels as "prizes" of war during the Civil War: The vessels were the *Amy Warwick* (a merchant vessel owned by residents of Richmond, Virginia), the *Crenshaw* (a schooner, also from Virginia), the *Hiawatha* (a British barque), and the *Brilliant* (a Mexican schooner). *The Prize Cases*, 67 U.S. (2 Black) 635, 636–38 (1862).

¹⁸⁹ *Id.* at 641–42.

¹⁹⁰ *Id.* at 668.

¹⁹¹ *Id.* at 669.

¹⁹² *Id.* at 670.

However, Executive Branch reliance on *The Prize Cases* in the context of ROE would be misplaced. The decision has been relied upon extensively in support of claims of Presidential authority to *initiate* forms of hostile engagements without Congressional authorization.¹⁹³ It has also been used to justify specific departures from recognized laws of war on grounds that the particular character of hostilities was unique and made such quaint laws irrelevant and anachronistic (e.g., using “enhanced interrogation” techniques on unlawful enemy combatants; a nation state against a global terrorist network, after 2001).¹⁹⁴ Not only did these justifications improperly ignore the *Youngstown* framework in some instances,¹⁹⁵ their reasoning would fail to address Standing Rules of Engagement that form the baseline for derivative Theater-specific Rules of Engagement in traditional large-scale combat operations or conventional State-on-State warfare in which there is no debate over the applicability of the Geneva Conventions to U.S. operations in Europe. The decision not only addresses a singularly remarkable event in American history (the military blockade of rebellious port cities and related seizure of private ships during the Civil War), but the event also involved a national security policy and stratagem,¹⁹⁶ *not* a recurring series of related control measures imposed on U.S. military forces designed to comport with the international law of war, national policy, and specific mission objectives.

v. Curtiss-Wright

For similar reasons, the oft-cited *Curtiss-Wright Export Corp.*¹⁹⁷ is a misplaced fount of precedential authority for the Executive Branch, in so far as the question is limited to authority over ROE. *Curtiss-Wright* is of course important for its distinction between the scope and origin of the foreign and domestic powers of Congress and the President,¹⁹⁸ and for its famous assertion (quoting then-Representative John Marshall) that the President is the “sole organ of the nation in its external relations, and its sole representative with

¹⁹³ See, e.g., *Engel Syrian Airstrikes Memo*, *supra* note 174 at 4–5.

¹⁹⁴ Memorandum from Jay S. Bybee, Assistant Att’y Gen., Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A at 39 (Aug. 1, 2002).

¹⁹⁵ Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455, 461 (2005).

¹⁹⁶ As Justice Greer noted, “The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war.” *The Prize Cases*, 67 U.S. (2 Black) at 671.

¹⁹⁷ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936); see, e.g., Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Dep’t of Justice Off. of Legal Couns., for John Rizzo, Senior Deputy Gen. Couns., Cent. Intel. Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* 23 (May 30, 2005).

¹⁹⁸ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 315–16.

foreign nations.”¹⁹⁹ But that case dealt with a question of whether Congress improperly delegated certain authority over foreign affairs to the President;²⁰⁰ therefore, it is a question of exercising executive authority in what would have been called Justice Jackson’s first tier, where the President acts with her Article II power plus authorities Congress held, and assigned, under Article I.²⁰¹ And it certainly had nothing to do with imposing command or disciplinary controls over military members in their lawful exercise of armed force during combat hostilities. The case cannot reasonably be understood to mean that the President has plenary authority over all things military overseas,²⁰² especially moderating the use of force or other treatment of foreign nationals, common features of ROE.

The best that can be said of *Curtiss-Wright*, from an Executive Branch perspective on the question of ROE, is that it emphasized two reasons for why the President is afforded so much Constitutional discretion over foreign affairs. First, she is best positioned to know material facts necessary to make timely informed decisions. The President, “not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.”²⁰³ Because ROE are intended to be adjustable based on policy considerations and mission requirements, provided no permissions conflict with the laws of war,²⁰⁴ reasonable adjustment implies adjustment in a timely fashion, either before circumstances render pre-existing constraints unhelpful or irrelevant, or immediately after fluid situations during on-going hostilities demonstrate that new forms of command and control may be necessary for effective warfighting. While it is certainly *possible* for Congress as a body to deliberate and enact such ROE in a timely fashion, it is—almost by definition—not a body designed to operate in such a purposefully hasty manner. The Presidency, however, is.²⁰⁵

Second, the *Curtiss-Wright* Court noted that:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy[,] and even when brought to a conclusion[,] a full disclosure of all the measures, demands, or eventual concessions which may

¹⁹⁹ *Id.* at 319.

²⁰⁰ *Id.* at 311–315.

²⁰¹ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637.

²⁰² Barron & Lederman, *Original Understanding*, *supra* note 5, at 742–43, 743 n.168.

²⁰³ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

²⁰⁴ *See supra* Part II.

²⁰⁵ THE FEDERALIST NO. 70 (Alexander Hamilton) (regarding the attributes of an energetic president and their value in national defense); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1626 (2009) (arguing that the attributes of an energetic chief executive matter when it comes to interpreting the scope of the presidency’s national security power, she writes: “while formal dictates must always play a central role in constitutional decision-making, history, logic, and the reality of constitutional governance insist that at least some identified functional interests factor into our understanding of the separation of powers.”).

have been proposed or contemplated would be extremely impolitic[,] for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.²⁰⁶

The same might be said for specific command and control measures over combat forces during operations: missions require “caution, and their success must often depend on secrecy” and “full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated” might increase “danger and mischief, in relation to other [hostile armed] powers.”²⁰⁷ Nevertheless, it is certainly possible for Congress to respect these demands for secrecy by enacting classified ROE legislation, or to dictate that certain components of the SROE remain secret.²⁰⁸ While secrecy and dispatch are *normative* reasons for granting the President these authorities, clearly, the Executive is not the sole branch capable of acting with these qualities.

vi. Chappell v. Wallace

Further instructive comments come from outside the context of which branch may regulate the use of armed force during international hostilities. In *Chappell v. Wallace*, the question was whether enlisted military personnel may sue to recover damages from superior officers for injuries sustained from violations of their constitutional rights in the course of military service.²⁰⁹ In holding that no such civil cause of action for damages exists,²¹⁰ the Court noted several matters indirectly related to the use of armed force. As a starting truism, the Court observed: “[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion[.]”²¹¹ It emphasized that “no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.”²¹² But this strict discipline and regulation, required ultimately for effective and lawful use of force on the battlefield during combat, begins with habits of obedience to lawful orders from the chain-of-command—“the habit of immediate compliance with military procedures and orders must be virtually

²⁰⁶ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320–21 (quoting President George Washington).

²⁰⁷ *Id.*

²⁰⁸ See Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L SEC. J. 241, 249 (2015) (defining “secret law” as “legal authorities that require compliance that are classified or otherwise withheld from the public,” and noting that the “phenomenon has become particularly prevalent and problematic since 9/11”).

²⁰⁹ *Chappell v. Wallace*, 462 U.S. 296, 297 (1983).

²¹⁰ *Id.* at 305.

²¹¹ *Id.* at 300.

²¹² *Id.*

reflex with no time for debate or reflection.”²¹³ It is true that those military procedures, orders, and training originate with the military chain-of-command, ultimately under the superintendence of the President as Commander-in-Chief. But it is also true that Congress’s Article I authority to “make Rules for the Government and Regulation of the Land Naval Forces” generates the foundational disciplinary structure (e.g., the courts and the punitive statutes in the UCMJ) that permits the *enforceability* of those orders within the Executive Branch by that chain-of-command.²¹⁴ The Court found it “clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.”²¹⁵ The Court reemphasized Congress’s “plenary constitutional authority over the military” as the grounding for legislating a “comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure.”²¹⁶ To the extent that disciplined obedience is at the heart of ROE, not just banal military life in garrison or training, *Chappell* can imply that it is Congress, not the President, with the power to manage those rules as if akin to the UCMJ itself.

vii. Hamdan v. Rumsfeld

Another indirect source of argument that favors Congressional authority over ROE may be drawn from a relatively recent landmark case about due process for unprivileged unlawful belligerents captured during combat by U.S. forces during counter-terrorist and counter-insurgency operations abroad (that is, unlike the Russia-Ukraine International Armed Conflict in which the majority of fighters captured are likely to be privileged combatants protected by the Third Geneva Convention’s rules for Prisoners of War²¹⁷). In *Hamdan v. Rumsfeld*,²¹⁸ the Court addressed the George W. Bush Administration’s early effort to establish a military commission system for prosecuting non-U.S.

²¹³ *Id.*

²¹⁴ Const. Art. I, § 8, cl. 14. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78–79 (1857) (referring to clause 14 as the source of Congress’s independent authority over military justice); *Ex parte Reed*, 100 U.S. 13, 21 (1879) (the constitutionality of Congress’s power over courts-martial is “no longer an open question”); *Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018) (“[B]y granting legislative power ‘[t]o make Rules for the Government and Regulation of the land and naval Forces,’ the Framers also authorized Congress to carry forward courts-martial.”); see also Dakota S. Rudesill, *The Land and Naval Forces Clause*, 86 UNIV. CIN. L. REV. 391, 399–402 (2018) (describing this Clause’s well-established history as the basis for legislatively controlling military justice).

²¹⁵ *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

²¹⁶ *Id.* at 302.

²¹⁷ Third Geneva Convention Relative to the Treatment of Prisoners of War, art. IV, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²¹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

citizens who had either been a part of al Qaeda or engaged or participated in terrorist activities aimed at or harmful to the United States,²¹⁹ holding, *inter alia*, that the Detainee Treatment Act²²⁰ did not strip these detainees of their right to file a petition for *habeas corpus* with U.S. federal district courts, and that the trial-by-commission procedure established by the Act violated both the requirements of the UCMJ and Common Article 3 of the Geneva Conventions.²²¹

The Court acknowledged the President's wartime role as Commander-in-Chief, but nonetheless reaffirmed that Congress, through the UCMJ, "conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations'—including, *inter alia*, the four Geneva Conventions signed in 1949."²²² This means the President cannot override or "disregard valid substantive limitations that Congress placed upon his authority during wartime."²²³ Consistent with Justice Jackson's framework from *Youngstown*, "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, place on his powers."²²⁴ In this light, even if the President has independent power as Commander-in-Chief over ROE, that power is not exclusive and conclusive—it is subject to, in essence, Congressional discretion.

However, application of *Hamdan*'s reasoning to the case of ROE is not a sure bet. The case addresses treatment and due process of detainees—often a subject addressed by military orders and based on requirements in the Geneva Conventions but not, usually, of ROE.²²⁵ And this treatment was only in the context of what the Geneva Conventions require under Common Article 3 and what the UCMJ itself requires of criminal adjudications, including those addressing law of war violations by military commissions.²²⁶ The UCMJ, as federal statute, is unquestionably derived from Congress's "make rules for the government and regulation of the land and naval forces" and "[t]o define and punish . . . offences against the law of nations" authorities.²²⁷ A reasonable

²¹⁹ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834 (Nov. 16, 2001).

²²⁰ Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109–148, 119 Stat. 2739 (2005).

²²¹ *Hamdan*, 548 U.S. at 567.

²²² *Id.* at 613.

²²³ Vladeck, *supra* note 152, at 935.

²²⁴ *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (Jackson, J., concurring)).

²²⁵ *Id.* at 613; see also OPERATIONAL LAW HANDBOOK, *supra* note 3, at 116–30.

²²⁶ *Hamdan*, 548 U.S. at 613.

²²⁷ WINTHROP, *supra* note 17, at 16.

interpretation of the case, then, is that “[w]here Congress is acting pursuant to clear and unambiguous constitutional grants of authority, arguments in favor of Congress’s power to interpose substantive limitations upon the Executive are more compelling, for the executive’s structural claim to power in those fields is easier to rebut.”²²⁸ For example, Congress has given the President authority to convene, in the form of a prosecutor, general courts-martial herself, and to make rules for courts-martial (including evidentiary and procedural) provided they are consistent with rules governing criminal cases in federal district courts.²²⁹ If the President were to in turn delegate her court-martial convening authority to the Vice President, or to model the Rules for Courts-Martial after Louisiana’s rules for criminal procedure or those regulating courts-martial in the United Kingdom, she would be in effect disabling Congress’s clear structural authority—a relatively easy case of presidential encroachment into Article I power.²³⁰

Though *codified* ROE, if it came to that, would rely on the same Constitutional express powers as the military commissions and courts-martial do,²³¹ ROE is not, *per se*, a criminal code enacted under such a direct textual grant of power. In reviewing the implications of *Hamdan* not long after it was decided, Professor Vladeck cautioned that the case does not actually resolve the question of what happens when “the President is acting in a field where Congress’s authority is less well established or less clearly textually committed to the legislature . . .” for “those may well be the cases where the executive prevails even in Jackson’s ‘lowest ebb’ category.”²³² *Hamdan* is also a case concerned with Presidential approval of a process that overtly violated the Geneva Conventions; that concern is not materialized in ROE, given that—for it to be obeyed as a lawful order at all—it must not violate the Geneva Conventions even as it considers the context of national policy and mission or operational demands.²³³ *Hamdan* can therefore be distinguished from a controversy in which Congress attempts to enact ROE over the objection of the President.

Those distinctions, however, are arguably superficial. “The Court’s decision in *Hamdan*, with respect to the UCMJ, implies that [the “make Rules” clause in

²²⁸ Vladeck, *supra* note 152, at 962.

²²⁹ 10 U.S.C. § 822 (listing senior military positions and very few civilian positions authorized to convene general courts-martial); *id.* § 836 (authorizing the President to “prescribe rules”).

²³⁰ Vladeck, *supra* note 152, at 963.

²³¹ WINTHROP, *supra* note 17, at 16 (identifying the various express powers of Congress as the source of and authority for military law in general including the “discipline of armies as well as the war power”).

²³² Vladeck, *supra* note 152, at 963.

²³³ DEP’T OF DEFENSE, UNITED STATES MANUAL FOR COURTS-MARTIAL ¶ 16.c.(1)(a), at IV-24 (2019) (defining the “lawfulness of an order”) [hereinafter MCM]; *see also id.* ¶ 18.c.(1)(c), at IV-27 (in context of “failure to obey an order or regulation” offense of Article 92, UCMJ, referring to ¶ 16.c.).

§ 8] applies not only to the government and regulation of the *internal* affairs of the army and navy, but also to rules imposed by statute for *how the army and navy are to treat the enemy*.”²³⁴ If read in concert with *Chappell*, this presents Congress stronger footing for enacting legislation over ROE that does not impinge upon the President’s Article II power and would favor Congress in a “lowest ebb” situation.²³⁵ For if Congress has the “plenary authority” over the military’s internal justice system (as indicated by *Chappell*),²³⁶ that control reasonably includes decisions over which types of conduct, under which circumstances, may be prosecuted and punished by the military chain-of-command via courts-martial—a power it exercised by prohibiting, *inter alia*, various forms of “battlefield misconduct”²³⁷ otherwise regulated by operational ROE like the treatment of the enemy, including cruelty and maltreatment,²³⁸ unlawful detention,²³⁹ murder,²⁴⁰ rape,²⁴¹ conduct prejudicial to good order and discipline,²⁴² and conduct of a nature to bring discredit upon the armed forces,²⁴³ and by authorizing courts-martial for law of war violations.²⁴⁴ As discussed in Part II, *supra*, the ROE constitute part of a lawful general order, the disobedience of which would constitute a UCMJ violation, even if the specific conduct breaching the ROE was not, itself, a law of war violation.²⁴⁵

2. Initial Conclusions

In sum, a review of the primary Supreme Court precedent arguably favoring exclusive and conclusive control over the novel question of ROE—*Little*, *Fleming*, *the Prize Cases*, *Curtiss-Wright*, and the Chase dictum in *Ex parte Milligan*—are supportive only if construed broadly but are certainly not dispositive. In this landscape, there are four types of arguments for the Executive Branch to make. First, it may rely on dicta and a capacious analogy

²³⁴ Barron & Lederman, *Original Understanding*, *supra* note 5, at 733, n.130 (second emphasis added).

²³⁵ See *supra* Part III.E.1.b.vi.

²³⁶ *Chappell v. Wallace*, 462 U.S. 296, 302 (1983).

²³⁷ Dan Maurer, *War Crime Clemency: The President’s Self- (Defeating) Pardon*, 82 MD. L. REV. 581, 598–99 (2023) (defining “battlefield misconduct,” which could constitute a “war crime” depending on the applicable treaty or statutory elements, as “conduct [that] was incidental but orthogonal to the soldier’s otherwise legitimate performance of duties in combat; and [t]he victim of the conduct was a party or property protected from various applications of armed force by the laws of war, however those laws are codified”).

²³⁸ 10 U.S.C. § 893.

²³⁹ *Id.* § 897.

²⁴⁰ *Id.* § 918.

²⁴¹ *Id.* § 920.

²⁴² *Id.* § 934.

²⁴³ *Id.*

²⁴⁴ 10 U.S.C. § 818(a); MCM, *supra* note 217, at R.C.M. 201(a)(3), discussion, at II-11, R.C.M. 201(f)(1)(B), at II-13, R.C.M. 203, at II-17.

²⁴⁵ 10 U.S.C. § 892; SOLIS, *supra* note 80, at 367.

to modern day ROE (*Little, Milligan*). Second, it may argue that vague and overbroad constructions like “direct the movements of the naval and military forces . . . and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy”²⁴⁶ and “direct the conduct of [military] campaigns”²⁴⁷ reasonably include modern day ROE (*Fleming, Milligan*), a subject not contemplated by those cases. Third, it may take a generic axiom like “must determine what degree of force the crisis demands”²⁴⁸ out of context and ignore the unique historical circumstances in which it was presented (*the Prize Cases*). Fourth, it may emphasize only part of the *reasoning* (the part that offers normative grounds), not the holding, of a case involving exertion of executive authority coupled with Congressional authority over a domestic U.S. corporation, not the command and control of otherwise lawful violence on behalf of the State during an armed conflict (*Curtiss-Wright*). These cases do not provide strong support for a claim that the President retains exclusive and conclusive power over the form, substance, and enforcement of the SROE or Theater-specific derivative ROE.

Even if all four were employed, they would still contend with two significant judicial recapitulations of Congressional authority in national security. First, *Chappell*’s (ROE-unrelated) conclusion that Congress has “plenary” control over “regulations, procedures, and remedies related to military discipline” if that list is broadly interpreted to include ROE.²⁴⁹ Second, a fair reading of *Hamdan*’s (ROE-associated) lesson that Congress’s plenary control over discipline necessarily encompasses conduct with respect to how the enemy is treated by U.S. Forces during combat hostilities—a subject well within the current scope of ROE generally.

These cases strongly suggest that no persuasive argument favoring either Branch’s ROE-dominance can be based on either the text of Articles I and II or on recurrently cited cases from the Supreme Court implicating the separation of war powers at levels below that of war-initiation or war-making.

V. CONCLUSION

Separation of war powers analyses and debates have traditionally centered around “whether the President or the Congress has primary responsibility for the initiation of military action.”²⁵⁰ If the “first order” question, as Professor Waxman puts it, is whether and to what extent the national government has war powers, and the “second order” question—within the federal government—which branch can initiate and under which circumstances, then the *third* order

²⁴⁶ *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

²⁴⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

²⁴⁸ *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

²⁴⁹ *Chappell v. Wallace*, 462 U.S. 296, 302 (1983).

²⁵⁰ Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 622 (2017).

question must be the extent to which Congress might interpose its will, dictating tactical and operational level control over the use of armed force in hostilities. This is an area traditionally practiced and assumed to be in the sole are of responsibility of the President as Commander-in-Chief. The particularized question of ROE fits within this rubric of tactical and operational control, even though it has largely gone unnoticed as a potential separation of powers concern. Its lack of primacy does not make this latter question any less relevant or challenging.

This first half of the study has introduced the problem of ROE as a separation-of-powers edge case, placed it in context of a contemporary international armed conflict, and addressed ways in which neither the text of the Constitution nor the Court's interpretation of it provide definite answers to the ROE question. The second half of this study goes a bit further. It will begin with a more detailed hypothetical drawn from the contemporary conflict in Ukraine. It will then address why—in the absence of clear constitutional text and judicial understanding—an “original public meaning” interpretation of the branches’ war powers would also be unrevealing and its methodology inappropriate to the question. Without the interpretative aid of the text, nor the original meaning or the Framers’ intent, and no clear judicial conclusion, the article will assess whether the “historical gloss” or precedent of political practice affords a more concrete answer. Ultimately, it will propose a new test—rooted in principal-agent theory of civil-military relations—that may help clarify the blurred line currently separating the branches’ war powers at least as they relate to ROE. Any future large scale armed conflict or protected hostilities against another nation state, as the Russia-Ukraine War unfortunately reminds us, will provide a setting for this intersection of domestic and international law of war.