

(UN)LAWFUL ORDERS

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In Trump v. United States, the United States Supreme Court held that the President has absolute criminal immunity for acts performed within his conclusive and preclusive constitutional authority, and that he has, at least, presumptive immunity from prosecution for all his official acts. Writing in dissent, Justices Sotomayor and Jackson warned that the majority's holding would permit the President to execute his political rival or stage a coup and that he may do so under the protection of criminal immunity. What other checks then remain to keep the President from using the military as his primary instrument to engage in such criminal and authoritarian conduct?

Normatively, the military should be the final check on the President engaging in such conduct. The fact that the President may have his own personal criminal immunity for ordering either the assassination of his rival or a coup does not make these orders lawful. And while military members have a legal obligation to follow lawful orders, they have a similar obligation to disobey unlawful orders. Consequently, should the President order the military to execute his political rival or to seize the structures of government to maintain power, the military should disobey these orders. But this check assumes that the orders are in fact unlawful, and that the military members understand what makes an order lawful or unlawful.

This Article's thesis is that military members currently lack the tools necessary to determine whether such an order is lawful or unlawful. By using Justice Sotomayor's hypothetical of the President ordering SEAL Team 6 to execute his rival as a case study, the Article addresses how a President may assert that such an order is either consistent with his own constitutional authority or at least supported by a delegation of congressional authority. Such a legal justification gives the order the gloss of lawfulness. When subsequently received by military officers, this gloss of legality is difficult to overcome because the legal standard for determining whether an order is lawful is overly legalistic and vague. This inaccessibility leaves military officers to rely upon their own legal understandings or that of their judge advocates. Particularly problematic is that these military members face significant consequences—legal, professional, and personal—if they are wrong. When coupled with the fact that military members and judge advocates are ill-suited for making these complex legal determinations, military members are incentivized to follow presidential orders accompanied by the gloss

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of legality. The result is that the military may become the vanguard of a presidential coup, instead of the final check against it.

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INTRODUCTION

The sitting President loses his election for a second term.¹ Rather than concede, he asserts the election was “stolen” and that his opponent used “fraud” and other illegal tactics to steal the presidency.² After

1. See, e.g., Michael Gold, Maggie Haberman, & Shane Goldmacher, *Trump, in Increasingly Dark and Dour Tones, Says He ‘Shouldn’t Have Left’ the White House*, NY TIMES (Nov. 3, 2024), <https://www.nytimes.com/2024/11/03/us/politics/trump-parally-election.html> [<https://perma.cc/VE88-6Z8D>].

2. See, e.g., Robert Yoon, *Trump’s Drumbeat of Lies About the 2020 Election Keeps Getting Louder. Here Are the Facts*, AP NEWS (Aug. 27, 2023, 8:43 AM), <https://apnews.com/article/trump-2020-election-lies-debunked-4fc26546b07962fdbf9d66e739fbb50d> [<https://perma.cc/7ZDM-KLHC>]; Daniel Barnes, *How Trump’s Challenges to the 2020 Election Unfolded in the Courtroom*, NBC NEWS (Nov. 2, 2024), <https://www.nbcnews.com>.

losing several court challenges to the elections results—where multiple courts in multiple jurisdictions uniformly find there to be no evidence to support the President’s assertions³—the President announces that he has no intention of leaving office, claiming to be the true President.⁴ As protests and calls for him to concede and participate in a peaceful transfer of power grow in frequency and intensity, the President invokes his authority under the Insurrection Act to declare an active insurgency.⁵ He makes the determination that his political opponent is the root cause of the insurgency and determines military action is necessary to quell the threat.⁶ Can the President order SEAL Team 6 to assassinate his political opponent?⁷

com/politics/2024-election/trumps-challenges-2020-election-unfolded-courtroom-rcna175490 [https://perma.cc/GZ3H-GEPB]; see also *Results of Lawsuits Regarding the 2020 Elections*, CAMPAIGN LEGAL CENTER, https://campaignlegal.org/results-lawsuits-regarding-2020-elections. [https://perma.cc/8CSX-H5MH].

3. See, e.g., Donald J. Trump for President, Inc. v. Sec’y Pennsylvania, 830 Fed. Appx. 377, 389 (3d Cir. 2020) (“Here . . . there is no clear evidence of massive absentee ballot fraud or forgery.”); David A. Graham, *The Cases Against Trump: A Guide*, ATLANTIC (July 19, 2024), https://www.theatlantic.com/ideas/archive/2024/07/donald-trump-legal-cases-charges/675531/ [https://perma.cc/LKS9-R2YZ]; see also *Results of Lawsuits Regarding the 2020 Elections*, supra note 2.

4. See, e.g., Stephen Collinson, *The World Leaders Who Refuse to Leave the Stage*, CNN (Oct. 26, 2022, 8:09 PM), https://www.cnn.com/2022/10/26/americas/world-leaders-meanwhile-intl/index.html [https://perma.cc/H8MC-MMAG]. See generally Barbara McQuade, *What Would Happen If Trump Refused to Leave Office?*, ATLANTIC (Feb. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/02/what-if-he-wont-go/606259/ [https://perma.cc/PK7R-G67W].

5. See Carrie Johnson, *Legal Experts Worry About Presidential Abuse of the Insurrection Act. Here’s Why*, NPR (Mar. 28, 2024, 6:57 AM), https://www.npr.org/2024/03/28/1241141939/insurrection-act [https://perma.cc/MLL6-6LTZ]; see also William A. Galston, *Fix the Insurrection Act Before a Trump Inauguration*, WALL ST. J. (Feb. 27, 2024), https://www.wsj.com/articles/fix-the-insurrection-act-before-inauguration-trump-troops-quell-protests-dd746268 [https://perma.cc/9K3C-Q2A9]; Julien Berman & Laura Dickinson, *Trump promised to be a dictator on Day 1: Can the Insurrection Act stop him?*, HILL (Nov. 19, 2024), https://thehill.com/opinion/white-house/4995967-trump-insurrection-act-military-power/ [https://perma.cc/JTQ2-EGE6].

6. See, e.g., Stephen I. Vladeck, *Yes, Trump Can Invoke the Insurrection Act to Deport Immigrants*, ATLANTIC (May 17, 2019), https://www.theatlantic.com/ideas/archive/2019/05/can-trump-use-insurrection-act-stop-immigration/589690/ [https://perma.cc/K49K-JSU4] (highlighting that under the Insurrection Act, “if the President determines that ordinary law enforcement is inadequate to enforce federal law, he can deploy the military to assist”).

7. The possibility of the President ordering SEAL Team 6 to execute his political rivals was first posed by Judge Florence Pan of the U.S. Court of Appeals. Alexandra Hutzler, *As Trump Battles for ‘Absolute Immunity,’ Question Surfaces About Assassinating Rivals*, ABC NEWS (Apr. 24, 2024, 3:04 PM), https://abcnews.go.com/Politics/provocative-question-trumps-immunity-fight-ordering-rivals-assassinated/story?id=109581560 [https://perma.cc/G24F-KJ2Z]; see also *Trump v. United States*, 603 U.S. 593, 693 (2024) (Jackson, J., dissenting) (“[E]ven a hypothetical President who admits to having ordered the assassinations of his political rivals or critics . . . has a fair shot at getting immunity

This question is no longer academic.⁸ In *Trump v. United States*, the United States Supreme Court recognized that the President has absolute criminal immunity for acts performed within his conclusive and preclusive constitutional authority.⁹ The Court also concluded that he has at least presumptive immunity from prosecution for all his official acts.¹⁰ Writing in dissent, Justices Sotomayor and Jackson warned that per the majority's holding, the President may use the military to execute his political rival or to stage a coup and that he may do so under the protection of criminal immunity.¹¹

Whether the President has absolute criminal immunity from ordering the assassination of his political opponent rests upon whether such an act is performed within his conclusive and preclusive constitutional authority.¹² Even if it is not, he may still have presumptive immunity if the order is considered an official act.¹³ As noted by Justices Sotomayor and Jackson, the majority refused to define what presidential conduct falls within each category, aside from one example.¹⁴ This determination will be left to future courts on a case-by-case basis.¹⁵

In the meantime, can the President make a colorable legal argument that the President has the conclusive and preclusive constitutional

under the majority's new Presidential accountability model."); *id.* at 685 (Sotomayor, J., dissenting) (when addressing whether the President is immune for criminal activities performed in office, noting that "[w]hen he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune."); Meredith Deliso, *Hypothetical SEAL Team 6 Political Assassination Resurfaces in Supreme Court Presidential Immunity Dissent*, ABC NEWS (July 1, 2024, 1:31 PM), <https://abcnews.go.com/Politics/seal-team-6-assassination-hypothetical-scotus-presidential-immunity/story?id=111583216> [<https://perma.cc/5X5A-L2VH>].

8. See Anthony J. Ghitto, *The Presidential Coup*, 70 BUFF. L. REV. 369 (2022); see also Fred Wertheimer, *Trump's Next Presidential Coup Attempt Could Work*, JUST SEC. (May 10, 2022), <https://www.justsecurity.org/81410/trumps-next-presidential-coup-attempt-could-work/> [<https://perma.cc/86GR-4N6R>]; Alexander Hutzler et al., *Could a President Stage a Coup? And 9 More Key Moments from Trump's Supreme Court Immunity Hearing*, ABC NEWS (Apr. 25, 2024, 2:18 PM), <https://abcnews.go.com/Politics/10-key-moments-trumps-supreme-court-immunity-hearing/story?id=109635973> [<https://perma.cc/FZ8S-E5F8>].

9. Trump, 603 U.S. at 608.

10. *Id.* at 614.

11. *Id.* (Sotomayor, J., dissenting); *id.* at 692 (Jackson, J., dissenting).

12. *Id.*

13. *Id.* at 609–10.

14. *Id.* at 617–19, 667–68, 690 (Jackson, J., dissenting) ("So, how does this new Presidential accountability model work? An initial problem is the lack of clarity regarding what this new model entails.").

15. *Id.* at 706 (Jackson, J., dissenting) ("The majority of my colleagues seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm.").

authority to address threats to the domestic and national security of the United States?¹⁶ Can the President also claim that invoking the Insurrection Act and acting in accordance with the authority the Act gives him constitutes an official act?¹⁷ Justices Jackson and Sotomayor seem to think so. Justice Jackson considers the hypothetical President “who admits to having ordered the assassinations of his political rivals,” and notes that he “has a fair shot at getting immunity under the majority’s new Presidential accountability model.”¹⁸ Similarly, Justice Sotomayor posits, “[w]hen he uses his official powers in any way, under the majority’s reasoning, he now will be insulated from criminal prosecution. Orders the Navy’s [SEAL] Team 6 to assassinate a political rival? Immune.”¹⁹

The Court’s dissenting opinions reflect a discomfort of what happens when the majority’s decision pairs with broad assertions of presidential authority. Presidents have long asserted expansive constitutional authority in national security matters, especially when the supposed threats affect domestic matters.²⁰ By asserting that their ability to respond to domestic security threats stems from their conclusive constitutional authority, presidents begin to establish they have absolute liability from any criminal consequences of their actions.²¹ Further, the Supreme Court has long recognized the President is at the zenith of his power when he acts under explicit or implicit congressional authorization.²² The Insurrection Act sits as a loaded weapon, waiting to give the President congressional authorization to deploy the military

16. See generally Trevor W. Morrison, *Moving Beyond Absolutes on Presidential Immunity*, LAWFARE (Mar. 18, 2024), <https://www.lawfaremedia.org/article/moving-beyond-absolutes-on-presidential-immunity> [<https://perma.cc/2NVS-T29F>]; see also Michiko Kakutani, *A Jurist’s Argument for Bending the Constitution*, N.Y. TIMES (Sept. 19, 2006) (reviewing Richard Posner’s *Not a Suicide Pact: The Constitution in a Time of National Emergency*, where Posner makes arguments of an incredibly strong executive to deal with security threats both domestic and foreign); DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* 39–53 (2021) (“The twentieth century witnessed a vast increase in presidential power in both domestic and foreign affairs.”).

17. See generally Charlie Savage & Michael Gold, *Trump Confirms Plans to Use the Military to Assist in Mass Deportations*, N.Y. TIMES (Nov. 18, 2024), <https://www.nytimes.com/2024/11/18/us/politics/trump-military-mass-deportation.html> [<https://perma.cc/TG54-NLZQ>].

18. Trump, 603 U.S. at 693.

19. *Id.* at 685.

20. See Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L. J. F. 590, 591 (2020).

21. See Andrew Weissman, *Three Flaws in the Supreme Court’s Decision on Presidential Immunity*, JUST SEC. (July 1, 2024), <https://www.justsecurity.org/97781/three-flaws-supreme-court-immunity/> [<https://perma.cc/664N-2BTR>].

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

domestically.²³ If a President acts in his official capacity or under his preclusive and conclusive constitutional authority when he orders the assassination—which he most likely will claim—then he can act under the promise of criminal immunity, even if in fact a court later determines the order to be unlawful.²⁴

If the threat of criminal prosecution is removed, what checks remain to keep the President from using the military to engage in immoral and authoritarian conduct like ordering the execution of his rival? Normatively, the military should be the final check on the President engaging in such conduct.²⁵ The fact that the President may be able to make a colorable legal argument that he has such authority and consequently have his own *personal* criminal immunity for ordering either the assassination of his rival or a coup does not necessarily make these orders lawful.²⁶ And while military members have a legal obligation to follow lawful orders,²⁷ they have a similar obligation to disobey unlawful orders.²⁸ Thus, should the President order the military to execute his political rival or to seize the structures of government to maintain power, the military has a constitutional obligation to disobey these orders. But this check assumes that the orders are in fact unlawful,

23. See David French, *It's Time to Fix America's Most Dangerous Law*, N.Y. TIMES (Dec. 3, 2023), <https://www.nytimes.com/2023/12/03/opinion/insurrection-act-trump-president.html> [<https://perma.cc/CP6B-FLAY>].

24. Philip Bump, *The Perfectly Valid Presidential-Immunity Murder Hypothetical*, WASH. POST (July 2, 2024, 5:38 PM), <https://www.washingtonpost.com/politics/2024/07/02/trump-immunity-seal-team-6/> [<https://perma.cc/7STG-ZFV6>].

25. See Kori Schake, *Milley, Trump and the Fragile State of U.S. Democracy*, BLOOMBERG (Sept. 15, 2021, 1:08 PM), <https://www.bloomberg.com/opinion/articles/2021-09-15/milley-trump-nukes-and-the-future-of-u-s-democracy?srnd=undefined> [<https://perma.cc/R4C8-52AS>] (“[t]he failure of other institutional checks and balances has left our military leaders with a disproportionate responsibility . . .”); see also Fiona Hill, *Yes, It was a Coup Attempt. Here's Why.*, POLITICO (Jan. 11, 2021, 3:15 PM), <https://www.politico.com/news/magazine/2021/01/11/capitol-riot-self-coup-trump-fiona-hill-457549> [<https://perma.cc/HU8G-RMMJ>] (“So, what thwarted Trump’s slow motion, in plain-sight attempt at a self-coup? . . . [t]he military and other parts of the government resisted Trump’s efforts to personalize their power.”).

26. See Dan Maurer, *Can the Military Disobey Orders in the SEAL Team 6 Hypothetical?* LAWFARE (July 8, 2024, 12:00 PM), <https://www.lawfaremedia.org/article/can-the-military-disobey-orders-in-the-seal-team-6-hypothetical> [<https://perma.cc/8FT2-B6GN>].

27. *United States v. Kisala*, 64 M.J. 50, 51 (C.A.A.F. 2008) (citing *Lee v. Pearson*, 18 C.M.A. 545, 546 (2006)); see also *id.* at 52 n.5 (“[A] professional military institution could not otherwise function without a service member having a duty to obey lawful orders.”); 10 U.S.C. § 892.

28. See *United States v. Huet-Vaughn*, 43 M.J. 105, 114 (C.A.A.F. 1995) (“The duty to disobey an unlawful order applies only to a ‘positive act that constitutes a crime’ that is ‘so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.’”).

and that the military members understand what makes an order lawful or unlawful.

This Article's thesis is that military members currently lack the tools necessary to determine the lawfulness of an order. Using Justice Sotomayor's hypothetical of the President ordering SEAL Team 6 to execute his opponent as a case study, the Article addresses how a President may assert that such an order is either consistent with his own conclusive constitutional power or at least supported by a delegation of congressional authority. In turn, the order given to the military would possess the gloss of lawfulness.

When subsequently received by military officers, this gloss of legality is difficult to overcome. Much of the difficulty stems from the legal standard in determining whether an order is lawful and the consequences of being wrong.²⁹ The legal standard for lawfulness originates from the "obedience to orders" defense.³⁰ When military members face a court-martial for the predicate offense (the murder of the rival in our hypothetical), they may raise the defense that they committed the act because they were following orders.³¹ To be successful in raising this defense, the military member must satisfy the "manifestly illegal formula," requiring her to show that she "was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."³²

29. See Eugene R. Fidell, *Wrestling with Legal and Illegal Orders in the Military in the Months Ahead*, JUST SEC. (Oct. 19, 2020), <https://www.justsecurity.org/72934/wrestling-with-legal-and-illegal-orders-in-the-military-in-the-months-ahead/> [<https://perma.cc/LY9J-CKDS>]. See, e.g., *United States v. Kisala*, 64 M.J. 50, 51-55 (2006) (convicting defendant in a court-martial who refused an order to receive the Anthrax vaccine of willfully disobeying a lawful order and sentencing him to a reduction in grade to E-1, confinement for thirty days, and a bad-conduct discharge; rejecting defendant's argument that order was unlawful on appeal, noting "an order is presumed to be lawful and a subordinate disobeys at his own peril."); *United States v. Yarborough*, 50 C.M.R. 149, 150 (A.F.C.M.R. 1975) (sentencing defendant to a "bad conduct discharge and hard labor without confinement for three months (both suspended with provision for automatic remission), and reduction to airman basic" for failure to obey a lawful order by possessing LSD); *United States v. Thomas*, 41 C.M.R. 673, 675 (A. Ct. Crim. App. 1969) (sentencing defendant to "a bad conduct discharge, confinement at hard labor for 18 months, and forfeiture of all pay and allowances" for willfully disobeying an order).

30. Rules for Court-Martial § 916(d) (2024); see also John Ford, *When Can a Soldier Disobey an Order*, WAR ON THE ROCKS (July 24, 2017), <https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/> [<https://perma.cc/RGX8-C2XU>].

31. See, e.g., Joshua Barajas, *How the Nazi's Defense of 'Just Following Orders' Plays Out in the Mind*, SCIENCE (Feb. 20, 2016), <https://www.pbs.org/newshour/science/how-the-nazis-defense-of-just-following-orders-plays-out-in-the-mind> [<https://perma.cc/676S-3CVS>].

32. Rules for Court-Martial § 916(d) (2024).

At the court-martial, the determination of the lawfulness of an order is a finding of law to be made by the military judge.³³ But at the time the order is received, how is the military officer to know if the order is manifestly unlawful? How is the military officer to know if a person of ordinary sense and understanding would have known the orders to be unlawful?

This Article argues military officers receiving the order also have little help in making this “finding of law” in real time, especially amid the “fog of war.”³⁴ It focuses on two tools military officers generally have at their disposal: their personal understanding of their constitutional obligations and the advice of their judge advocates. First, the officer has her own interpretation of the lawfulness of the order.³⁵ I have previously argued that officers should exercise constitutional faithfulness in determining whether an order is lawful.³⁶ This approach would require the military officer to refuse to follow orders that violate their oath to protect and defend the Constitution.³⁷ Unfortunately, military officers lack the legal knowledge or background necessary to determine whether a legally questionable order is a violation of their constitutional duties. And officers, by the nature of their training, backgrounds, careers, and

33. See *United States v. Schwartz*, 61 M.J. 567, 569 (N-M Ct. Crim. App. 2004) (citing *United States v. New*, 55 M.J. 95, 105 (C.A.A.F. 2001)).

34. See Samit D’Cunha, Tristan Ferraro, & Thomas de Saint Maurice, *Defining Armed Conflict: Some Clarity in the Fog of War*, ICRC HUMANITARIAN LAW & POL’Y (May 2, 2024), <https://blogs.icrc.org/law-and-policy/2024/05/02/defining-armed-conflict-some-clarity-in-the-fog-of-war/> [<https://perma.cc/UH7V-BNEY>]; see also Shane Reeves & David Wallace, *Can US Service Members Disobey an Order to Waterboard a Terrorist?*, LAWFARE (Apr. 6, 2016, 9:56 AM), <https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist> [<https://perma.cc/7K7V-X5LP>]. But cf. James E. Baker, *Good Governance Paper No. 21: Obedience to Orders, Lawful Orders, and the Military’s Constitutional Compact*, JUST SEC. (Nov. 2, 2020), <https://www.justsecurity.org/73221/good-governance-paper-no-21-obedience-to-orders-lawful-orders-and-the-militarys-constitutional-compact/> [<https://perma.cc/5YTQ-6NSY>].

35. See James E. Baker, *Good Governance Paper No. 21: Obedience to Orders, Lawful Orders, and the Military’s Constitutional Compact*, JUST SEC. (Nov. 2, 2020), <https://www.justsecurity.org/73221/good-governance-paper-no-21-obedience-to-orders-lawful-orders-and-the-militarys-constitutional-compact/> [<https://perma.cc/JD65-VLEX>]; see also Graham Parsons, *There’s a Dangerous Misconception About the Military’s Obligations to the President*, N.Y. TIMES (Sept. 29, 2024), <https://www.nytimes.com/2024/09/29/opinion/trump-military.html> [<https://perma.cc/Y2EX-CQ99>].

36. Ghiotto, *Presidential Coup*, *supra* note 8, at 432–33.

37. Professor John C. Dehn raises similar concerns and makes similar recommendations regarding potential presidential abuse of the military and suggests that senior military officers should exercise “constitutional fidelity” in determining whether to follow questionable orders. See John C. Dehn, *The Good Officer: President Trump, General Milley, and the “Necessity” of Constitutional Fidelity*, 90 BROOK. L. REV. 1, 40–44 (2024).

specialties, have a bias—whether implicit or explicit—that makes them an unreliable arbiter of an order’s lawfulness.³⁸

Second, the officer can consult with her own judge advocate.³⁹ Think of this tool as a second opinion—asking a second lawyer to review the legal review performed by the initial lawyer who provided the gloss of lawfulness to the presidential order.⁴⁰ In theory, this tool helps control the officer’s lack of legal training and expertise. But are judge advocates capable of filling this role? This Article makes the argument that they are not. In making this argument, I focus on the training judge advocates receive, the career pressures placed upon them, the fact they often operate with imperfect information, and how judge advocates have largely shifted from a semi-independent entity within the military structure prioritizing “candid” legal advice to a fully embedded military entity modeled as a general counsel’s office. The impact is that judge advocates are also ill-suited to review lawfully questionable orders and they are incentivized to legally justify the actions requested by their superior officers.

Adding to the difficulty in overcoming the gloss of legality are the consequences of being wrong. Should the officer refuse the order, they face either administrative punishment or a court-martial for failure to obey a lawful order.⁴¹ Should the officer follow the order, and it eventually proves to be unlawful, the officer can be tried for the acts performed in either civilian or military court.⁴² Taken together, the

38. In a professionalized military, military officers have career motivations much like in the civilian world. These motivations may impact how they view an order from either the President or a superior officer. For example, if following the order, no matter what the consequence for the nation, could benefit the military officer’s career, perhaps they may be more likely to follow the order. Further, the military follows an illiberal approach to government in many ways. Military officers are trained in this approach and may be ill-equipped to then consider the consequences of their actions in a liberal democracy context. A more thorough discussion of these potential conflicts can be found in Sections III.A.1 and III A.2.

39. Konstantin Toropin, *What if the President Issues a Potentially Illegal Order to the Military?*, MILITARY.COM (July 12, 2024, 4:34 PM), <https://www.military.com/daily-news/2024/07/12/what-happens-if-President-issues-potentially-illegal-order-military.html> [<https://perma.cc/55LK-KSPR>]; see also *United States v. Gentle*, 37 C.M.R. 57, 60 (1966) (staff judge advocate opined on the lawfulness of a particular order).

40. See Toropin, *What if the President Issues a Potentially Illegal Order to the Military?*, *supra* note 39; see also Charlie Dunlap, *Yes, the Law of Military Orders Matters, and Here’s How*, LAWFIRE (Nov. 2, 2024), <https://sites.duke.edu/lawfire/2024/11/02/yes-the-law-of-military-orders-matters-and-heres-how/> [<https://perma.cc/23XJ-KNUC>].

41. See *supra* note 29 and accompanying text (giving examples of service members being court-martialed for failing to obey an order).

42. See, e.g., Ian Shapira, *‘It was Insanity’: 50 Years Ago at My Lai, U.S. Soldiers Slaughtered Hundreds of Vietnamese Women and Kids*, SEATTLE TIMES (Mar. 16, 2018), <https://www.seattletimes.com/nation-world/it-was-insanity-50-years-ago-at-my->

prospect of consequences and the ill-suited circumstances in which military members and judge advocates make these complex legal determinations, military members are incentivized to follow presidential orders accompanied by the gloss of legality. Consequently, the military may become the vanguard of a presidential coup, as opposed to the final check against one.

While the SEAL Team 6 hypothetical may seem extreme, the lessons learned from analyzing it and understanding how the military responds to such an order expose the difficulty and importance of clarifying what makes an order lawful. Such an analysis may also give military officers the tools they need to make the right assessment in real time. These lessons may then be extended to less extreme hypotheticals—such as the President ordering the military to open fire on American protestors⁴³ or ordering the military to stand down and not respond to the storming of the Capitol—that are becoming increasingly realistic in today’s charged environment.

This Article contributes to the ongoing dialogue concerning the risks associated with the ever-growing threat of an illiberal presidency. It adds a particularly important piece to the puzzle—what is the military’s role in the looming threats and what can be expected of military actors? Such a perspective is essential and rare. The military has an insulated culture from the broader American society.⁴⁴ Its regulations and culture are foreign to many academics; as a result, it has long been ignored or given blind deference by the legal academy. This Article seeks to break down that deference and provide an honest and rigorous accounting of

lai-u-s-soldiers-slaughtered-hundreds-of-vietnamese-women-and-kids/ [https://perma.cc/ERG9-BSPS].

43. Michael Martin & Tinbete Ermyas, *Former Pentagon Chief Esper Says Trump Asked About Shooting Protesters*, NPR (May 9, 2022, 5:00 AM) <https://www.npr.org/2022/05/09/1097517470/trump-esper-book-defense-secretary> [https://perma.cc/B7N3-YJFZ] (“We reached that point in the conversation where [President Trump] looked frankly at Gen. Milley and said, ‘Can’t you just shoot them, just shoot them in the leg or something.’”); see also Ivana Saric, *The Times Trump Has Advocated for Violence*, AXIOS (May 2, 2022), <https://www.axios.com/2022/05/02/trump-call-violence-presidency> [https://perma.cc/Y9CP-G4M9] (quoting President Trump asserting “[i]f a city or state refuses to take the actions necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them”); *Morgan v. Rhodes*, 456 F.2d 608, 609 (6th Cir. 1972) (discussing how the Ohio National Guard, after being ordered to Kent State University by Ohio’s governor, used live round on peaceful protestors), *vacated as moot sub nom Gilligan v. Morgan*, 413 U.S. 1 (1973).

44. Brandon Roberts, *Public Understanding of the Profession of Arms*, MILITARY REV., Nov.–Dec. 2012, at 41 (“Military organizations are unlike any other social institutions in contemporary American society. Virtually all modern military sociologists have come to view modern militaries as highly professionalized social institutions.”).

the individuals who may be the last and final check against an abuse of power that threatens democracy and violates constitutional principles.

The Article's novelty and importance also stem from how the arguments are supported. I use not only case studies to support the arguments that military officers and judge advocates are ill-suited in determining the lawfulness of legally questionable orders, but I also utilize autoethnographic methods.⁴⁵ Specifically, I rely upon my own prior military service to share experiences that are attendant to service as a judge advocate.⁴⁶ The perspective of what occurs "inside the military" deserves to be part of the broader discussion of what can be expected of the military when they receive these legally questionable orders.⁴⁷

This Article proceeds in four parts. Part I provides an introduction to how military orders are given and follows how an order would flow through the chain-of-command until the potentially unlawful act is performed, creating decision points at multiple times and levels of authority. It then discusses the role attorneys play in the giving of the order, focusing on how lawyers may ensure the morally and democratically dubious order has the gloss of legality. Part II focuses on the military members receiving the orders. It addresses the legal framework military members face in receiving orders, deciding whether they must follow the orders, and the consequences they face in either following or not following the orders. Part III focuses on the two primary tools military members have at their disposal—their own constitutional

45. Autoethnographic methods, where authors "seek to use their personal experience to larger social and cultural contexts," are unusual in legal scholarship. Regardless I join the chorus of innovative and courageous legal scholars who connect their scholarship to their own experiences, recognizing that they are not "approaching this from a neutral and impersonal, and objective stance." Maybell Romero, *Ruined*, 111 GEO. L.J. 237, 255–56 (2022).

46. I spent twelve years as an active-duty judge advocate, three years as an Air National Guard judge advocate, and three years as an Air Force reserve judge advocate. I have advised commanders at all levels of command. I have experienced the pressures placed upon judge advocates. I have been trained both by commanders and by judge advocates. I draw from these personal experiences to shine a light on what judge advocates do and how they relate to the command that they serve.

47. See Sarah Lawsky, *Entry Level Hiring Report 2024*, PRAWFSBLAWG (May 14, 2024), <https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report/> [<https://perma.cc/PG4M-JAKS>]. In this report, there are no categories or references for new law professors who are veterans or have a military background; instead, the primary focus is on the ranking of law school and PhD programs. *Id.*; see also Eric J. Segall & Adam Feldman, *The Elite Teaching the Elite: Who Gets Hired by the Top Law Schools?*, 68 J. LEGAL EDUC. 614 (2019); Michelle Weyenberg & Jack Crittenden, *How Elitism is Killing Us: Elitism in Hiring Law Professors*, NAT'L JURIST (Sept. 21, 2023, 9:00 AM), <https://nationaljurist.com/national-jurist-magazine/elitism-part-4-do-so-many-law-professors-get-hired-from-so-few-schools/> [<https://perma.cc/UF3H-RDFA>]; Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813 (2020).

interpretations and the assistance of judge advocates. This Part applies a critical lens to both military members and judge advocates to argue that these tools are insufficient. Part IV then discusses the consequences of this framework and provides several solutions to give military members the tools they need to adequately consider the lawfulness of any given order.

I. GIVING THE ORDER

The President is unlikely to personally assassinate his political opponent. Instead, he would order the military to carry out the attack.⁴⁸ Presidents giving orders and military members receiving orders would not be foreign to military members. Military professionals view orders as essential to securing good order and discipline within the military structure.⁴⁹ Military commanders—including the President as the commander-in-chief—regularly order service members to put themselves at risk of near death.⁵⁰ They must order their subordinates to kill to achieve mission success.⁵¹ And at times, when the mission requires it, they must order service members to not kill, despite pending danger.⁵² Very often, these orders are time-sensitive and given during the fog of war.⁵³ For military commanders, subordinate members following orders immediately and without deliberation is essential to mission effectiveness.⁵⁴

While the President giving orders and the military member following those orders is not unique, the process of how orders flow

48. See generally Kelsey Griffin, Erica Orden & Lara Seligman, *The Terrifying SEAL Team 6 Scenario Lurking in the Supreme Court's Immunity Ruling*, POLITICO (July 2, 2024, 8:39 PM), <https://www.politico.com/news/2024/07/02/trump-immunity-murder-navy-sotomayor-00166385> [<https://perma.cc/KBT8-GCC6>].

49. Kenneth M. Theurer & James W. Russell, III, *Why Military Justice Matters*, 37 REP. 10, 50 (2010).

50. *Id.* at 9.

51. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 144 (2009).

52. Anthony J. Ghiotto, *Back to the Future with the UCMJ: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485, 523–24 (2014).

53. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflexive, with no time for debate or reflection.”).

54. See *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (“The rights of men in the armed forces must perforce to be conditioned to meet certain overriding demands of discipline and duty.”); see also Eoghan Matthews, *Unmasking Insubordination*, MODERN WAR INSTITUTE (Feb. 2, 2022), <https://mwi.westpoint.edu/unmasking-insubordination/> [<https://perma.cc/P5H4-AU5C>].

from the President through the military hierarchy to the final military member is often complex. It involves multiple decision points. At each step, where a different military member receives the President's order, the member must review it, and determine whether he must obey it. Understanding this process is essential to understanding why a military member would even contemplate following an order to assassinate an American politician.

This Section briefly introduces how both the President and subordinate military members give orders. It explores the military chain of command and the legal authorities that exist at each link of that chain. Following a review of the chain of command, this Section returns to the starting point—the President's initial order—to understand the incentives and the mechanisms used by the executive branch to establish the order's lawfulness at the moment the order issues.

A. *The Chain of Command*

The Constitution establishes the President as the commander-in-chief of the military:⁵⁵ the zenith of the military chain of command.⁵⁶ Following the President are the other civilian components of military leadership: the Secretary of Defense and the Secretaries of the military departments.⁵⁷ Although there is a widespread perception that the first military member directly in the chain of command is the Chairman of the Joint Chiefs of Staff,⁵⁸ that position is mostly advisory and lacks operational command authority.⁵⁹ As such, while the President may direct an order to the Chairman and the Chairman must personally comply with that order, the Chairman cannot order a subordinate to complete the presidential order.⁶⁰

55. U.S. CONST. art. II, § 2, cl. 1.

56. See Saikrishna B. Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L. REV. 1, 13 (“The Commander-in-Chief Clause would then seem to grant quite straightforwardly the President sole and supreme military authority.”)

57. 10 U.S.C. §§ 111–120.

58. See e.g., Jeffrey Goldberg, *The Patriot: How General Mark Milley protected the Constitution from Donald Trump*, ATLANTIC (Nov. 2023), <https://www.theatlantic.com/magazine/archive/2023/11/general-mark-milley-trump-coup/675375/> [<https://perma.cc/7X3K-K7YF>].

59. JOINT PUBLICATION 1-0: JOINT PERSONNEL SUPPORT 45 (2010) (“The CJCS, in consultation with the other members of the Joint Chiefs of Staff, advises SecDef on manpower and personnel issues impacting the readiness of the Armed Forces of the United States and the force structure required to support achievement of national security objectives.”), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1_0.pdf?ver=wzWGXaj9anm9XlmWKqKq8Q%3d%3d [<https://perma.cc/2KCC-MELB>].

60. See 10 U.S.C. §§ 151–55 (detailing the legal duties and responsibilities of the Chairman of the Joint Chiefs of Staff). See generally *Chairman of the Joint Chiefs*

In executing a presidential order, the President utilizes the operational chain of command. The operational chain of command consists of Geographic Combatant Commands.⁶¹ These commands provide centralized oversight and coordination of military operations, ensuring strategic and operational effectiveness in their designated areas.⁶²

Each combatant command is led by a four-star general or admiral, typically with extensive experience and a deep understanding of the region's geopolitical dynamics.⁶³ By federal statute, these commanders report directly to the Secretary of Defense and the President.⁶⁴ In turn, these commanders exercise operational control over the military members under their command.⁶⁵ This operational control gives the Geographic Combatant Commanders the legal authority to issue orders to their assigned subordinates.⁶⁶

The President's order to assassinate his political opponent would traverse this chain of command. Starting at the beginning, the President may issue the order directly to the Geographic Combatant Commander. In this hypothetical, assuming the political rival is in the United States, the President will issue the order to the U.S. Northern Command ("NORTHCOM") commander.⁶⁷ The NORTHCOM commander will then decide whether this order is lawful and whether he must comply with the order. Assuming he agrees with the lawfulness of the order, the NORTHCOM commander will likely order his special forces unit,

of Staff, JOINT CHIEFS OF STAFF, <https://www.jcs.mil/About/The-Joint-Staff/Chairman/> [<https://perma.cc/44J8-LHCE>].

61. 10 U.S.C. §§ 161–65 (detailing the roles and responsibilities of the geographic combatant commanders).

62. The United States has six geographic combatant commands, each focusing on a different part of the globe: U.S. Africa Command (AFRICOM), U.S. Central Command (CENTCOM), U.S. European Command (EUCOM), U.S. Indo-Pacific Command (INDOPACOM), U.S. Northern Command (NORTHCOM), and U.S. Southern Command (SOUTHCOM).

63. See Mark Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 917–18 (2019) (providing general information regarding the combatant commands).

64. 10 U.S.C. § 162.

65. See JOINT PUBLICATION 1-0, *supra* note 59, at 22–23 (“CCDRs exercise combatant command (command authority) over assigned forces, directing and approving those aspects of personnel support necessary to carry out assigned missions and standardizing personnel policies as they deem necessary.”).

66. See Charles T. Berry Jr., *Understanding OPCON*, ARMY.MIL (May 3, 2010), https://www.army.mil/article/38414/understanding_opcon [<https://perma.cc/X8UF-Z8YX>].

67. “USNORTHCOM plans organizes and executes homeland defense and civil support missions, but has few permanently assigned forces. The command is assigned forces whenever necessary to execute missions, as ordered by the President or secretary of defense.” *Our Story*, U.S. N. COMMAND <https://www.northcom.mil/About/US-Northern-Command-Mission-Vision/> [<https://perma.cc/HYM4-9G7>].

Special Operations Command North, to execute the order.⁶⁸ The order is likely to be received by the Special Operations Command North Commander—who again will review the lawfulness of the order—before ordering a subordinate to commit the ordered act.

While seemingly straightforward, this chain of command creates issues for the President. At a minimum, there are three individuals between the President and his order being executed. Any of these individuals could potentially refuse to carry out the order. Each link in the chain of command acts as a checkpoint, reviewing the legality of a particular order. To incentivize compliance, the President may elect to establish the lawfulness of the order at the onset, strengthening the existing presumption of lawfulness for his orders.

B. *The Gloss of Lawfulness*

The President's role as the commander-in-chief grants him the legal authority to issue orders to the military.⁶⁹ But, the legal authority to issue an order does not guarantee the order's lawfulness:⁷⁰ the President's order must still comply with the Constitution and other legal authorities.⁷¹ How, then, can the President claim to have the constitutional authority to order the military to assassinate his political opponent?

This section addresses the arguments a President may make to assert that he has the constitutional authority to issue such an order. These arguments dissuade officers from fully investigating the legality of an order because they assume that the order went through serious legal scrutiny. In reality, the "legal scrutiny" considered only whether the President had the authority to issue an order; it did not consider the lawfulness of the order itself. This "gloss of legality" raises the likelihood that an unlawful order would be carried out.

68. "SOCNORTH plans, coordinates, and conducts special operations in collaboration with mission partners, to ensure allies and partners, compete below the level of armed conflict, deter conventional and irregular threats, and set conditions to execute contingency operations to defend the United States and its interests." *Special Operations Command North*, U.S.N. COMMAND, <https://www.northcom.mil/Mission-Partners/SOCNORTH/> [<https://perma.cc/7EJ4-G6YH>].

69. See generally Saikrishna B. Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1, 54–57 (2023).

70. See *United States v. Richards*, No. ACM 38346, 2016 CCA LEXIS 285, at *129 (A.F. Ct. Crim. App. May 2, 2016) (quoting *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005)); see also *United States v. Council*, No. ARMY 20190321, 2021 CCA LEXIS 255, at *11 (A. Ct. Crim. App. May 21, 2021).

71. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952) ("The President's power, if any, to issue the order [seizing control of private steel manufacturers in support of the Conflict in Korea] must stem either from an act of Congress or from the Constitution itself . . . It is clear that if the President had the authority to issue the order he did, it must be found in some provision of the Constitution.").

1. *Youngstown and the Insurrection Act*

A President who intends to order the military to assassinate his political rival has a decision to make. On one hand, the President may elect to completely disregard the lawfulness of his order. In this scenario, by rejecting even the appearance of the rule of law, the President likely loses any claim of legitimacy, and instead embraces an unlawfulness that makes a potential coup explicit and transparent.⁷² This scenario presents significant concerns that traditional legal norms are perhaps not equipped to address.⁷³ Additionally, in this scenario, it may be easier for a military member to disobey the questionable order as there is not even a suggestion of lawfulness attached to it.⁷⁴

On the other hand, a President may elect to subject his order to legal review. This review provides legitimacy to his actions, notwithstanding criticism that he has undue influence or control over the legal review process.⁷⁵ It is this option, of attaching the gloss of legality to the order, that leads to the uncertainty of what the military must do in response. The order to assassinate an American politician may appear both illegal and immoral to the military. Nonetheless, the order will likely arrive with a legal review asserting the President has such authority, and the order is legal, will create a conflict in decision-making.⁷⁶ A person of ordinary sense and reason may not consider such an order to be illegal if the President successfully construes the subject of the order as a threat and provides a legal analysis assuring the public that he has the authority to order an assassination.

Electing this option, the President would need to make an argument his order satisfies the requirements of *Youngstown Sheet & Tube Co. v.*

72. See e.g., Peter Nicholas, Katherine Doyle, Megan Lebowitz & Courtney Kube, *Fears Grow that Trump Will Use the Military in 'Dictatorial Ways' if He Returns to the White House*, NBC NEWS (Jan. 14, 2024), <https://www.nbcnews.com/politics/2024-election/trump-military-fears-rcna129159> [<https://perma.cc/BE7V-U8AR>].

73. See Gary Warner, *Trump Immunity Bid Opposed by 19 Top Former Defense Officials in Brief Filed with Supreme Court*, STARS & STRIPES (April 9, 2024), <https://www.stripes.com/theaters/us/2024-04-08/military-leaders-supreme-court-trump-immunity-13513330.html> [<https://perma.cc/73ZY-PAV7>].

74. See e.g., Zachary Cohen, *Can Military Commanders Refuse an Order from Trump?*, CNN (Sept. 7, 2018 at 7:02 AM), <https://www.cnn.com/2018/09/06/politics/us-military-chain-of-command-trump-orders/index.html> [<https://perma.cc/73ZY-PAV7>].

75. See generally Bradley Lipton, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249 (2010) (discussing the increased partisanship at the Office of Legal Counsel); see also Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, Too, While We're at It*, SLATE (Apr. 22, 2009), <http://www.slate.com/id/2216710> [<https://perma.cc/JZ4B-UVW6>].

76. See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–41 (2006).

Sawyer.⁷⁷ In *Youngstown*, the Supreme Court reviewed President Truman's order seizing American steel mills.⁷⁸ Writing in concurrence, Justice Robert Jackson laid out a three-part framework for assessing the President's power.⁷⁹

Under his three-part framework, the President is most powerful when operating in the first tier. The first zone requires the President to act pursuant to an express or implied authorization.⁸⁰ In the second tier, which occurs when Congress is silent as to his actions, he maintains significant power.⁸¹ The President is at his weakest in the third tier, when he acts contrary to the will of Congress. In this category, "he can rely only upon his own constitutional powers minus any constitutional powers over the matter."⁸²

When faced with the *Youngstown* framework in dealing with issues of national security, presidential administrations often claim to be in the first category, at the height of the President's authority.⁸³ To support this assertion, presidential administrations will argue that as the commander-in-chief, the President has the exclusive and inherent authority to address issues of national security.⁸⁴ This argument,

77. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314 (2006) (referring to Justice Jackson's concurring opinion as "the most celebrated judicial opinion of the separation-of-powers canon"); Kristen E. Eichenseher, *The Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1249–55 (2021).

78. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–83 (1952).

79. *Id.* at 635–39 (Jackson, J., concurring).

80. *Id.* at 635 ("[w]hen the President acts pursuant to an express or implied authorization of Congress, [so] his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

81. *Id.* at 636 ("[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or which its distributions are uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.").

82. *Id.* at 636–37.

83. JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION* 36–37 (2007) ("all OLC lawyers and Attorneys General over many decades were driven by the outlook and the exigencies of the presidency to assert more robust Presidential powers, especially during a war or crisis, than had been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress.")

84. The last four Presidential administrations have made sweeping changes of authority. See, e.g., *Campbell v. Clinton*, 52 F. Supp. 2d 34, 37–38 (D.D.C. 1999) (Despite having Congressional authorization to launch air strikes in Yugoslavia, President Clinton stated in his communications with Congress, "I have taken these actions pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive."); Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994); Memorandum from John C. Yoo,

though, often neglects the concurrent authority Congress has in national security matters.⁸⁵ Congress's concurrent powers—and knowing they have exercised these powers previously to limit or expand presidential authority in national security matters—has led some to conclude that the President may not claim the exclusive constitutional authority to order the assassination of his rival in the interests of national security.⁸⁶ The concurrent power held by Congress over national security matters would submit the order to *Youngstown's* second tier, allowing courts to review the action through the lens of shared authority and the “imperatives of events and contemporary imponderables.”⁸⁷

As the Supreme Court has never explicitly endorsed presidential arguments that the exclusive national security authority resides in

Deputy Assistant Att’y Gen., Off. of Legal Couns., to Alberto Gonzales, Couns. to the President, on Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memomilitaryforcecombatus10232001.pdf> [<https://perma.cc/Y5AB-H8BH>]; Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Off. of Legal Couns. to Robert J. Delahunty, Special Couns., on The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), <https://www.justice.gov/file/19151/download> [<https://perma.cc/CJG2-KUUY>]; Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 27 (2011) (“[W]e believe that . . . the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific Congressional approval.”); Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 82 (2014) (“[T]he President had the constitutional authority to order these military operations because he had reasonably determined that they would further sufficiently important national interests, and because their anticipated nature, scope, and duration were sufficiently limited that prior Congressional approval was not constitutionally required.”); April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. __ (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/dl> [<https://perma.cc/QAR9-9N2C>] (“Before the strikes occurred, we advised that the President could lawfully direct them because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense.”); Memorandum from Steven A. Engel, Assistant Att’y Gen., Off. of Legal Couns., to John A. Eisenberg, Legal Advisor to the Nat’l Sec. Council, on January 2020 Airstrike in Iraq Against Qassem Soleimani (Mar. 10, 2020), https://www.justice.gov/d9/2023-04/2020-03-10_soleimani_airstrike_redacted_2021.pdf [<https://perma.cc/MY26-D9G8>].

85. See Rebecca A. D’Arcy, Note, *The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 293–94 (2003); see also Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117, 1140–50 (2021) (discussing Congress’ broad delegation of national security authority to the executive branch and the judiciary’s reluctance to review such delegation and the executive branch’s exercise of such authority).

86. See e.g., Maurer, *Can the Military Disobey Orders in the SEAL Team 6 Hypothetical?*, *supra* note 26.

87. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

the executive branch, presidents often claim express or implied Congressional authorization of their actions.⁸⁸ When the President asserts his own inherent authority, and it is supported by explicit or implicit Congressional authorization, he operates at the zenith of his authority.⁸⁹ An example of this authority is the 2001 Authorization for the Use of Military Force (“AUMF”).⁹⁰ Following the terrorist attacks of September 11, 2001, Congress authorized President George W. Bush to use military power in response.⁹¹ The AUMF provided no geographical or temporal limits; rather, it authorized military force against Al Qaeda, the Taliban, and associated forces, wherever they may be.⁹² Since 2001, all subsequent United States presidents have relied upon the AUMF as explicit congressional authorization to legitimize lethal military operations and support for counterterrorism in nations like Syria, Somalia, Nigeria, Iraq, Djibouti, Jordan, Pakistan, Yemen, Cuba, Cameroon, Chad, Ethiopia, Georgia, Kenya, Kosovo, Lebanon, and Niger.⁹³

Turning to the SEAL Team 6 scenario, there is no explicit Congressional authorization that would support the President ordering the military to assassinate his rival. Even with the expansive authority provided to the President by the 2001 AUMF, it is unlikely to authorize military action within the United States against an American citizen.

88. See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2078-83 (2005).

89. *Youngstown*, 343 U.S. at 636.

90. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF was approved by both houses of Congress on September 14, 2001, and signed by the President on September 18, 2001.

91. See Mary Clarke Jalonick, *Senate Votes to Keep 2001 Authorization for War on Terror*, AP NEWS (Mar. 22, 2023), <https://apnews.com/article/senate-vote-war-powers-iraq-afghanistan-a174a1b97644f2f64994f13b1ff41a20> [<https://perma.cc/9KJF-AVDX>].

92. See generally Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SEC. J. 115 (2014).

93. See STEPHANIE SAVELL, WATSON INST. INT’L & PUB. AFFS., BROWN UNIVERSITY, *THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: A COMPREHENSIVE LOOK AT WHERE AND HOW IT HAS BEEN USED* (2021), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf [<https://perma.cc/BJ9S-4N5P>]. In addition to the AUMF authorization, Presidents also cite to prior OLC memos as binding precedent supporting such strikes. See Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1428–29 (2013) (“Presidents often can readily secure an opinion from the Office of Legal Counsel supporting their actions.”). Bipartisan groups of lawmakers have criticized the President for acting expansively with AUMF authorization rather and seeking explicit authorization. Despite these protests, Congress has failed in attempts to withdraw the reform or withdraw the 2001 AUMF. See Scott Wong & Kate Santaliz, *Lawmakers Press Biden to Get Congress’ Approval for Middle East Airstrikes*, MSNBC (Jan. 29, 2024), <https://www.nbcnews.com/politics/congress/lawmakers-press-biden-get-congress-approval-middle-east-airstrikes-rcna136206> [<https://perma.cc/7E84-T59D>].

In contrast, there is express Congressional prohibition against the President ordering the military to assassinate his political rival. The Posse Comitatus Act specifically prohibits the use of the federal military acting in law enforcement capacity domestically.⁹⁴ This explicit prohibition reflects a long-standing discomfort with the military acting domestically and serving as a domestic use of force at the disposal of the President or military officers.⁹⁵

However, there are exceptions to the Posse Comitatus Act. For one, the National Guard is exempt from it when operating under state status.⁹⁶ Additionally, it allows for Congress to make exceptions to the general prohibition against the use of the military domestically.⁹⁷ Presidents seeking to legitimize their use of the military domestically are likely to seek an authorized exception to the Posse Comitatus Act.⁹⁸ One such congressional provision that serves as an exception to the Posse Comitatus Act is the Insurrection Act.⁹⁹

Justices Robert Jackson and Sotomayor, writing nearly 70 years apart, both warned about the Supreme Court giving the President a “loaded weapon” he could use to abuse the power at his disposal.¹⁰⁰ To Justice Jackson, it was the Court determining that the President had the

94. 18 U.S.C. § 1385 (2018) (originally enacted as Act of June 18, 1878, ch. 263, 20 Stat. 152).

95. See Anthony J. Ghiotto, *Defending Against the Military: The Posse Comitatus Act’s Exclusionary Rule*, 11 HARV. NAT’L SEC. J. 359, 382–87 (2020).

96. U.S. ex rel. Gillet v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934) (“[E]xcept when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States.”); see also Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 415 n.211 (2003) (“The militia, however, remains primarily a state entity because unless the militia is called into federal service, the state governor is the commander-in-chief and appoints the militia’s officers.”)

97. See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstandings Before Any More Damage is Done*, 175 MIL. L. REV. 86, 127–45 (2003) (discussing Acts of Congress that explicitly granted domestic law enforcement powers to military branches).

98. See generally Bradley & Goldsmith, *Congressional Authorization and the War on Terror*, *supra* note 88, at 2075 (discussing the use of the Gulf of Tonkin Resolution as the primary Congressional authorization for the Vietnam War, referring to it “as an extraordinary board authorization to use force.”).

99. See Elizabeth Goitein, *The Alarming Scope of the President’s Emergency Powers*, ATLANTIC (January/February 2019), <https://www.theatlantic.com/magazine/archive/2019/01/Presidential-emergency-powers/576418/> [https://perma.cc/H5PD-XAGC] (“the misuse of emergency powers is a standard gambit among leaders attempting to consolidate power”).

100. Perry Stein, *Justice Sotomayor Dissent: ‘The President is Now a King Above the Law’*, WASH. POST (July 1, 2024), <https://www.washingtonpost.com/national-security/2024/07/01/sotomayor-jackson-trump-immunity-dissent/> [https://perma.cc/8HXZ-RAEB] (discussing Justice Sotomayor’s dissent in *Trump v. United States*).

authority to imprison Japanese Americans,¹⁰¹ and to Justice Sotomayor it was the Court giving the President sweeping criminal immunity for his criminal acts.¹⁰² In many ways, the Insurrection Act is the “loaded weapon” Congress gives to the President to exercise an incredible amount of authority without Congressional authorization.¹⁰³

The Insurrection Act of 1807 has been described as “a dangerous, centuries-old federal statute that authorizes the president, with few restraints, to deploy the U.S. military inside the United States to suppress threats the president perceives to the constitutional order.”¹⁰⁴ The danger rests in the incredible amount of authority Congress delegates to the President.¹⁰⁵ Under the act, the president may deploy active duty, guard, or reserve military personnel domestically when: (1) a state governor or legislature requests it due to an insurrection within the state;¹⁰⁶ (2) when the President independently “considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States *in any State by the ordinary course of judicial proceedings*”;¹⁰⁷ or (3) when the President independently determines “insurrection, domestic violence, unlawful combination, or conspiracy . . . hinders the execution” of federal or state law or “impedes the course of justice under those laws.”¹⁰⁸

Once the President finds that an insurrection is occurring and invokes the Insurrection Act, he is then given the authority to use American military force domestically to quell the threat.¹⁰⁹ The Insurrection

101. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“But once a judicial opinion rationalizes such an order to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal and transplanting American citizens. The principle then lies like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”).

102. *Trump v. United States*, 603 U.S. 593, 684 (2024) (Sotomayor, J., dissenting).

103. Steven Vladeck, *Trump’s George Floyd Protest Threats Raise Legal Question. Here’s What He Can (and Can’t) Do.*, NBC NEWS (June 2, 2020), <https://www.nbcnews.com/think/opinion/trump-s-george-floyd-protest-threats-raise-legal-questions-here-ncna1222241> [<https://perma.cc/L2Q7-PR6T>].

104. Bob Bauer & Jack Goldsmith, *Trump is Not the Only Reason to Fix This Uniquely Dangerous Law*, N.Y. TIMES (Dec. 27, 2023), <https://www.nytimes.com/2023/12/27/opinion/insurrection-act-Congress-trump.html> [<https://perma.cc/EN6Q-442D>].

105. See Tsai, *supra* note 20.

106. 10 U.S.C. § 251.

107. 10 U.S.C. § 252 (emphasis added).

108. 10 U.S.C. § 253.

109. 10 U.S.C. § 252 (“[H]e may call into federal service such of the militia of any State, and use such of the armed forces, *as he considers necessary* to enforce those laws or to suppress the rebellion.”) (emphasis added); 10 U.S.C. § 253 (“The President, by using the militia or the armed forces, or both, or by any other means, shall take such

Act lacks any temporal restraints, clear and articulable triggers to its operations, any definitions of what constitutes an “insurrection,” “rebellion” or “domestic violence,” and any role for Congress to review or assert itself into the process.¹¹⁰ The Supreme Court has confirmed the power granted to the President through the Insurrection Act, ruling that “the authority to decide whether [an exigency requiring the militia to be called out] has arisen belongs exclusively to the President, and . . . his decision is conclusive upon all other persons.”¹¹¹

A President asserting the constitutional authority to order the military to assassinate his political rival may potentially invoke the Insurrection Act to legitimize his order. The Insurrection Act grants him the sole authority to determine that his opponent is engaging in either insurrection, domestic violence, or conspiracy, and that such conduct hinders the execution of either federal or state law. Upon making that determination, he may then utilize military force to quell the insurrection.¹¹² Further, when acting under an invocation of the Insurrection Act, the President may also claim express congressional authorization under the first category of *Youngstown*.¹¹³

A military member receiving the order, however, may not be familiar with the Insurrection Act or the *Youngstown* framework. Furthermore, an order to conduct a military operation on United States soil against an American politician is likely to be jarring to a military member. A President’s assertion that the order is lawful, even when given in conjunction with the Insurrection Act, may not be enough to give the order a gloss of legality. Additionally, a judicial review of the order is not immediate and will likely be avoided by a President fearing such an order is an unlawful extension of *Youngstown* and the Insurrection Act. To incentivize compliance from the military, he needs

measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy”); see also Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CENTER, April 21, 2022, <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/9RD9-4TX5>].

110. Nunn, *supra* note 109. (2022), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/VPY9-LSYE>].

111. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); see also *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 95 (1874) (finding that when Congress delegated the authority to the President to determine which state or district was in a state of insurrection, such a determination made by the President was then unreviewable by the judiciary).

112. See generally Ryan W. Miller, *What is the Insurrection Act and How Could Trump Use It? Here’s What to Know*, USA TODAY (Jan. 11, 2021), <https://www.usatoday.com/story/news/nation/2021/01/11/insurrection-act-trump-capitol-riot/6619972002/> [<https://perma.cc/87CD-7BKL>].

113. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

an additional gloss of lawfulness. For that, he can turn to his Office of Legal Counsel.

2. *The Office of Legal Counsel*

The Office of Legal Counsel (“OLC”) is the Justice Department division responsible for providing legal advice to the executive branch.¹¹⁴ As Professor Emily Berman noted, characterizing the OLC’s role as purely giving legal advice “does not fully capture its significance. The opinions that OLC supplies function more as the equivalent of binding judicial precedent . . . they are the law of the executive branch unless overruled by the Attorney General or the President.”¹¹⁵ Because of the weight of its opinions, the OLC sets forth that they are a neutral arbiter of the law and strives to keep its reputation as a “straight shooter.”¹¹⁶

Professor Barry Sullivan called into question whether the OLC is in fact a “straight shooter” providing candid legal advice.¹¹⁷ He succinctly summarized the current state of the OLC:

OLC does not have the final word concerning government policy. Nor does it directly enforce any law. Its sole function is to provide legal advice to the executive branch. But the advice it provides addresses some of the most important questions of war and peace, the limits of executive power, the separation of powers, civil rights, and civil liberties. OLC is staffed by an Assistant Attorney General and five deputies, four of which are political appointees, and by a cohort of attorney-advisors most of whom are ambitious, young lawyers . . . All are appropriately interested in the success of the administration for which they work. And OLC’s client—the modern executive—is powerful beyond measure, unbounded unless by law.¹¹⁸

OLC does not provide the executive branch with candid legal advice.¹¹⁹ Instead, OLC searches and provides a legal justification for actions taken by an executive branch that has asserted and claimed

114. See Randolph D. Moss, *Executive Branch Legal Interpretations: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1308 (2002) (discussing the role and purpose of the OLC).

115. Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 533 (2021) (internal quotations omitted).

116. *Id.* at 533–34.

117. Barry Sullivan, *Reforming the Office of Legal Counsel*, 35 NOTRE DAME J.L. ETHICS & PUB. POL’Y 723, 729 (2021).

118. *Id.* at 727–28.

119. See generally Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL’Y 213, 227–31 (2012) (arguing that OLC “enables rather than constrains” executive power).

extreme amounts of constitutional authority.¹²⁰ Professor Berman argues that this shift—from a candid and independent legal body that merely “calls the balls and the strikes” to a pro-executive branch entity—results in OLC memos that “lend a veneer of neutrality” to the executive’s defenses against accusations of lawlessness.¹²¹

Returning to the SEAL Team 6 hypothetical, the President’s OLC is likely to provide the gloss of legality to his order to assassinate his political rival. His OLC will be staffed by ambitious political appointees. These attorneys will have the *Youngstown* framework, the Insurrection Act, and decades of prior OLC opinions that support an expansive view of presidential authority,¹²² especially in matters of national security. Thus, when the President issues the order, he will have an OLC memo, citing an extensive array of prior OLC memos supporting sweeping assertions of presidential authority, justifying that such an order is lawful.¹²³

C. Presidential Authority and Criminal Immunity

Presidential criminal immunity may also foster this veneer of legality for presidential orders. The three-part framework established by the Supreme Court in *Trump v. United States* appears to dovetail with *Youngstown*’s framework.¹²⁴ As discussed earlier, in *Trump*, the Supreme Court provided that a president has absolute criminal immunity for acts “within the scope of his exclusive constitutional

120. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 95-110 (2010) (arguing that the OLC is ultimately a political entity that has every incentive to enable and empower the President, rather than limit).

121. Berman, *supra* note 115, at 520.

122. See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 33-39 (2007) (providing a summary of the duties and functions of the Office of Legal Counsel, specifically, that “[t]he Supreme Court has never resolved whether the President can use force abroad unilaterally without Congressional authorization” and “[w]hen OLC writes its legal opinions supporting broad Presidential authority in these contexts . . . they cite executive branch precedents . . . as often as court opinions”).

123. See, e.g., Clive Stafford Smith, *Why Should the US be Afforded the ‘Power of Assassination’?*, AL JAZEERA (Dec. 6, 2020), <https://www.aljazeera.com/opinions/2020/12/6/why-should-america-be-afforded-the-power-of> [https://perma.cc/HN95-W2EH]. Although not an OLC memo, the Trump Justice Department argued before the D.C. Circuit that the President had the authority to order drone strikes on American citizens located in the United States in cases of national security concerns. See generally Amy Davidson Sorkin, *Trump’s Bizarre Immunity Claims Should Serve as a Warning*, NEW YORKER (Jan. 10, 2024), <https://www.newyorker.com/news/daily-comment/trumps-bizarre-immunity-claims-should-serve-as-a-warning>.

124. See Philip Bobbitt, *A Prudential Way Forward in Trump v. United States*, JUST SEC. (July 29, 2024), <https://www.justsecurity.org/98205/prudential-trump-v-united-states/> [https://perma.cc/FMD5-ADSB].

authority.”¹²⁵ The Court established a second category, granting the President presumptive immunity for all his official acts.¹²⁶ When the President’s official act speaks to conduct in areas where his authority is shared with Congress, the Court strongly suggested he will receive only presumptive immunity.¹²⁷ Finally, the Court established a third category. This third category offers no immunity and encompasses Presidential conduct that falls outside of an official act.¹²⁸

A President asserting authority under the different *Youngstown* categories may then claim the corresponding immunity contemplated in *Trump*. Consider the first tiers of *Trump* and *Youngstown* together. A President claiming that he has conclusive and presumptive power to address a national security emergency is likely to also claim that his proposed conduct also falls under the first-tier of *Trump*.¹²⁹ As such, he is not only acting at the zenith of his power, but the President is also doing so under absolute criminal immunity.¹³⁰ A similar analysis works in the second-tier as well. The President finds himself in the second-tier of *Youngstown* when the power he is asserting is shared with Congress and Congress has not explicitly given its power to the President.¹³¹ When applied to *Trump*, the President is then able to act with the presumption of immunity.¹³²

In sum, the President remains at the top of the military’s chain of command. He retains the authority to issue orders. For his subordinates, these orders must be lawful for them to have a legal obligation to follow them. The legally prescribed chain of command creates multiple checkpoints where subordinate commanders must consider the lawfulness of the order. For this reason, the President has the incentive to establish at least a gloss of legality at the onset. To do so, the President can turn to *Youngstown*, the Insurrection Act, his OLC, and his own criminal immunity to establish the lawfulness of his order, thereby ensuring compliance down the chain of command until the military executes the order.

II. RECEIVING THE ORDER

Should a military member receive the order to assassinate the President’s chief political rival—whether directly from the President or

125. *Trump v. United States*, 603 U.S. 593, 608 (2024).

126. *Id.* at 595.

127. *Id.* at 594.

128. *Id.* at 593.

129. See Bobbitt, *supra* note 124 (discussing different categories of immunity in *Trump v. United States*).

130. *Id.*

131. *Id.*

132. *Id.*

through her superior commissioned officer—what is she to do? What legal guidance or standard guides her actions? What legal protection does she have? What are the consequences of her decision to follow or not follow the order? Answering these questions is essential if the military is to be an effective check against the President abusing the military power at his disposal. While many Presidential orders may not shock the conscience as much as assassinating a political rival, the lessons learned from such an analysis are vital in understanding the legal uncertainty associated with following orders and the significant consequences of such uncertainty.

This Part answers these questions. First, it establishes the legal framework currently in place concerning the following of orders. This framework reflects the general presumption that military members must follow orders to ensure mission effectiveness. It starts with an explicit legal duty for military members to follow lawful orders and a more implicit duty to disobey unlawful orders. But the framework also provides little guidance for what makes an order lawful and what makes an order unlawful. What guidance it does provide is legalistic and vague, making it difficult for military officers—who are not lawyers and have minimal legal training—to make their decisions in real time under command and military pressure.

Second, it examines the consequences of being wrong. Despite this uncertainty, the legal framework then exposes the member to significant consequences, as they do not share in the President's criminal immunity. They face significant criminal, personal, and professional consequences if they reach the wrong conclusion on the lawfulness of the order they receive.

A. *The Legal Framework—Deciphering “Manifestly Illegal”*

The affirmative duty to disobey illegal orders is closely related to the “superior orders” defense to war crimes. This defense has its origins in the 19th century in the United States and many other nations.¹³³ As international law rapidly developed after World War I and World War II, so too did the superior orders defense.¹³⁴ Since the Leipzig trials after World War I largely failed to prosecute those accused of war crimes,¹³⁵

133. See generally Alan M. Wilner, *Superior Orders as a Defense to Violations of International Criminal Law*, 26 MD. L. REV. 127, 129 (1966) (outlining the treatment of the superior orders defense in the United States, Great Britain, Imperial Germany and Austria, and France).

134. See Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 52–59 (1996) (providing a summary of the development of the superior orders defense).

135. Wilner, *supra* note 133, at 134.

many Allied countries made field manuals revisions in preparation for holding Axis countries accountable for war crimes.¹³⁶ These field manuals reflected two different approaches to the superior orders defense in the 20th century.¹³⁷ The first approach was that obedience to superior orders could mitigate punishment but could not constitute a defense.¹³⁸ The second, in line with the Nuremberg Principles, was that obedience to superior orders could constitute a substantive defense if a moral choice was not available to the defendant.¹³⁹

In the United States, the modern formulation of the superior orders defense and its associated affirmative duty to disobey arose in 1956, when the U.S. Army Field Manual was updated to define the superior orders defense as unavailable to a defendant “unless he did not know and could not have reasonably been expected to know that the act ordered was unlawful.”¹⁴⁰ The most pertinent and impactful application of this defense was in *United States v. Calley*.¹⁴¹

On March 16, 1968, a United States Army platoon led by Lieutenant William Calley descended into Mai Lai, Vietnam.¹⁴² The platoon only encountered “unarmed, unresisting men, women, and children. The villagers, including infants held in their mother’s arms, were assembled in separate groups to collection points.”¹⁴³ Lieutenant Calley approached one of the collection points and informed his subordinate that he wanted the civilians dead.¹⁴⁴ He and his subordinate “then opened fire on the group, until all but a few children fell. Lieutenant Calley then personally shot these children.”¹⁴⁵

136. *Id.* at 136–37.

137. *Id.*

138. Lydia Ansermet, *Manifest Illegality and the ICC Superior Order Defense: “Schuldtheorie” Mistake of Law Doctrine as an Article 33(1)(c) Panacea*, 47 VAND. L. REV. 1425, 1446–47 (2011).

139. *Id.*

140. Department of the Army, *The Law of Land Warfare* 182 (FM 27–10) (1956).

141. *United States v. Calley*, 22 C.M.A. 534, 540–43 (1973); *see also* William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L. REV. 671, 674 (2000) (“My Lai has caused a fundamental reexamination in the teaching of battlefield fundamentals, has provided both the reason for and the contents of discussions surrounding professional conduct on the battlefield, and has been the motivation for new procedures to insure responsible command.”).

142. Much has been written on the Mai Lai massacre. An invaluable resource for understanding the facts of Mai Lai and the legal aftermath is HOWARD JONES, *MY LAI: VIETNAM, 1968, AND THE DESCENT INTO DARKNESS* 98 (2017).

143. *Calley*, 22 C.M.A. at 538. Some facts regarding Mai Lai and Lieutenant Calley remain disputed. I primarily use facts as stated by the United States Court of Military Appeals as they relate to the factual findings made by the court-martial jury members.

144. *Id.* at 539.

145. *Id.*

Lieutenant Calley and his subordinate then advanced to a second collection point that contained between 75 to 100 civilians.¹⁴⁶ He turned to his subordinate and declared they “got another job to do.”¹⁴⁷ The two proceeded to open fire, killing most of the civilians. Of note, a second subordinate refused to join the killings, and a third subordinate refused to provide Lieutenant Calley his firearm after Calley ordered him to do so.¹⁴⁸

Following the massacre at Mai Lai, the Army charged Lieutenant Calley with premeditated murder.¹⁴⁹ At his court-martial, Lieutenant Calley asserted that he was following orders.¹⁵⁰ He testified that his superior officer, Captain Medina, informed the troops prior to their descent into Mai Lai that “they were to kill every living thing—men, women, children, and animals—and under no circumstances were they to leave any Vietnamese behind them as they passed through village . . .”¹⁵¹ Calley asserted that he obeyed the orders “because he had been taught the doctrine of obedience throughout his military career.”¹⁵²

Because Lieutenant Calley raised the “obedience to orders,” defense, the military judge provided instructions to the jury on how such a defense would operate.¹⁵³ The judge began by highlighting that if Captain Medina in fact ordered the murder, such an order would be unlawful.¹⁵⁴ He then noted that “a determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it.”¹⁵⁵ Rather, he instructed, “[t]he acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior’s order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.”¹⁵⁶

146. *Id.*

147. *Id.*

148. *Id.*

149. Robert D. McFadden, *William L. Calley Jr., Convicted in My Lai Massacre, Is Dead at 80*, N.Y. TIMES (July 29, 2024), <https://www.nytimes.com/2024/07/29/us/william-calley-dead.html> [<https://perma.cc/SC5V-P92J>].

150. *Calley*, 22 C.M.A at 539.

151. *Id.* at 538 (“Asked if women and children were to be killed, Medina said he replied in the negative . . .”).

152. *Id.* at 539.

153. *Id.* at 541–42.

154. *Id.* at 542.

155. *Id.* at 541.

156. *Id.* Lieutenant Calley was convicted in his court-martial for the premeditated murder of twenty-two Vietnamese citizens. *Calley*, 22 C.M.A. at 536 (Quinn, J.). The court-martial jury sentenced him to confinement at hard labor for twenty years. *Id.* The

These instructions clarified the superior orders defense.¹⁵⁷ This formula amounts to a three-part analysis to assess whether a military member was acting in conformance with a lawful order: (1) a finding of law as to whether the order was lawful. If the finding of law is that the order was lawful, the military member would be justified in committing the predicate acts performed in executing the order; (2) if the finding of law was that the order was unlawful, the military member would be excused from criminal liability, unless (3) there was a finding of fact made that the military member had actual knowledge that the order was unlawful but still followed it, or, if he lacked actual knowledge, a person of ordinary sense and understanding would, under the circumstances, know the order to be unlawful.¹⁵⁸

Both the President and Congress have formalized *Calley's* three-part analysis. First, the President included the “obedience to orders” defense in the Manual for Courts-Martial (“MCM”).¹⁵⁹ The MCM is an executive order that serves to augment the Uniform Code of Military Justice (“U.C.M.J.”).¹⁶⁰ It provides that “[i]t is a defense to any offense that the accused acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”¹⁶¹ The MCM also notes that “[o]rdinarily the lawfulness of an order is finally decided by the military judge.”¹⁶²

Similarly, Congress has codified the three-part framework through the U.C.M.J. Under the U.C.M.J., it is a criminal act to disobey a lawful

Court of Military Appeals affirmed the jury’s rejection of Casey’s “obedience to orders defense,” providing that “[w]hether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley is, in my opinion, so palpably illegal” *Id.* at 544.

157. The Court of Military Appeals in *Calley* relied on several state court cases in establishing this formulation. See *United States v. Clark*, 31 F. 710, 716–17 (C.C.E.D.Mich. 1887); *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.D. Cal. 1867) (No. 8,673); *Neu v. McCarthy*, 309 Mass. 17, 33 N.E.2d 570, 573 (1941).

158. R.C.M. 916(d) (2024). See generally Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55, 103–04 (2018) (discusses the “manifestly unlawful” standard deriving from *Calley*).

159. R.C.M. 916(d) (2024).

160. See John Ford, *When Can a Soldier Disobey an Order?*, WAR ON THE ROCKS (July 24, 2017), <https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/> [<https://perma.cc/BC8G-9HPP>]. For a more general discussion on how executive orders populate the MCM and how the MCM serves to augment the U.C.M.J. See MANUAL FOR COURTS-MARTIAL I-1–I-2 (2024).

161. R.C.M. 916(d) (2024).

162. R.C.M. 801(e) (2024).

order.¹⁶³ These punitive provisions not only require the government to prove that the accused received a lawful order, but also instruct that “[t]he lawfulness of an order is a question of law to be determined by the military judge.”¹⁶⁴ It addresses the lawfulness of an order by noting that “[a] general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful supervisor orders or for some other reason is beyond the authority of the official issuing it.”¹⁶⁵ Military courts have also found that the U.C.M.J., as implemented through the Manual for Courts-Martial, establishes an inference of lawfulness, providing that “[a]n order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.”¹⁶⁶ The inference is only rebutted when the order is a “patently illegal order, such as one that directs the commission of a crime.”¹⁶⁷

Ultimately, through this confluence of case law, executive orders, and congressional action, military members have their legal framework in receiving their orders. First, they must follow orders and disobey unlawful orders. Second, determining whether an order is lawful is a matter of law, ultimately to be decided by a military judge. Third, if the order is deemed lawful—and all orders carry with them a presumption of lawfulness—the military members must follow them. Fourth, if the order is deemed unlawful, the military members may still be held criminally liable for the predicate acts, but only if a person of normal common sense would understand the order to be unlawful.

Although the U.S. is not a signatory to the Rome Statute of the International Criminal Court, its approach to military orders closely tracks the standard used by the international community.¹⁶⁸

163. *See generally* 10 U.S.C. §§ 801–946(a). Two separate U.C.M.J. provisions criminalize the failure to follow a lawful order. These two provisions cross-reference one another in addressing the element of “receiving a lawful order” and in determining the lawfulness of the order. *See* 10 U.S.C. § 890 (assaulting or willfully disobeying superior commissioned officer) and 10 U.S.C. § 892 (failure to obey order or regulation).

164. MANUAL FOR COURTS-MARTIAL, part IV, para. 16(c)(2)(a)(ii) (2024) (explaining 10 U.S.C. § 890).

165. MANUAL FOR COURTS-MARTIAL, part IV, para. 18(c)(1)(c) (explaining 10 U.S.C. § 892).

166. *United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002); *see also United States v. Kisala*, 64 M.J. 50, 51–52 (C.A.A.F. 2006) (“[A]n order is presumed to be lawful and a subordinate disobeys an order at his own peril.”); *United States v. Nieves*, 44 M.J. 96, 98 (C.A.A.F. 1996) (“A superior’s order is presumed to be lawful.”).

167. MANUAL FOR COURTS-MARTIAL part IV, para. 16(c)(2)(a)(i) (2024) (explaining 10 U.S.C. § 890). *See, e.g., United States v. Keenan*, 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969); *United States v. Schultz*, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969); *United States v. Kinder*, 14 C.M.R. 742 (A.B.R. 1954).

168. Beth Van Schaack, Ambassador-at-Large for Glob. Crim. Just., Off. of Glob. Crim. Just., U.S. Dep’t of State, Remarks at 12th Consultative Assembly of

Article 33 states that the superior orders defense is unavailable to defendants unless they were under a legal obligation to obey orders, they did not know that the order was unlawful, and the order was not manifestly unlawful.¹⁶⁹ The manifestly unlawful standard is defined as “orders to commit genocide or crimes against humanity.”¹⁷⁰ Military members must still prove that they did not know that the order was unlawful.¹⁷¹

The Israeli Supreme Court coined a landmark definition of a “manifestly unlawful” order as “a black flag . . . [whose] unlawfulness pierc[es] the eye and revolt[s] the heart . . .” after the Kafr Qasim massacre where IDF soldiers massacred civilians returning home after a recently imposed curfew.¹⁷² This definition reflects an interpretation of the manifestly unlawful standard as a moral repulsion.

There are significant problems with this framework. Several decades ago, Professor Mark Osiel addressed the “manifestly illegal” prong of the superior orders defense.¹⁷³ He argued:

It is not entirely clear which crimes, committed under what circumstances, fall within the subset of manifestly illegal acts and which do not. Courts and other authorities concur that not all criminal acts are manifestly so, particularly those committed in the heat of combat . . . The precise scope and contours of this special subset of crimes, not simply illegal, but manifestly so, has been carefully explored in neither judicial opinions nor the scholarly literature built upon them.¹⁷⁴

Professor Osiel attributes this uncertainty to the fact that the military members’ conduct often falls in the “gray area, close to the line between excusable and inexcusable error. This gray can be quite large.”¹⁷⁵ For instance, one court noted that, “[b]etween an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which

Parliamentarians on the International Criminal Court and the Rule of Law, *The Universality of the Rome Statute and Expansion of the International Criminal Law Framework* (Nov. 4, 2022), <https://www.state.gov/the-universality-of-the-rome-statute-and-expansion-of-the-international-criminal-law-framework/> [<https://perma.cc/LR7Q-YRLR>].

169. Ansermet, *supra* note 138, at 1448–49.

170. *Id.* at 1449.

171. *Id.*

172. Or Bassok, *The Legal Takeover of the Manifestly Unlawful Order Doctrine in Israel*, JUST SEC. (Aug. 14, 2023), <https://www.justsecurity.org/87535/the-legal-takeover-of-the-manifestly-unlawful-order-doctrine-in-israel/> [<https://perma.cc/PML5-WVA2>].

173. Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939, 971–91 (1998).

174. *Id.* at 969.

175. *Id.*

it cannot be expected that the inferior is informed.”¹⁷⁶ Additionally, the United States Nuremberg Tribunal set forth that it is not “incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality.”¹⁷⁷

Despite being written as an assessment of the international standard, Professor Osiel’s analysis is accurate for the application of the superior orders defense formula as codified in U.S. law. There is little case law addressing whether an order is manifestly unlawful. A shepardizing of *Calley* reveals it has only been cited forty-two times since 1973.¹⁷⁸ None of the cases citing *Calley* relied upon it to decide whether an order was manifestly legal or illegal.¹⁷⁹ The United States Army Manual provides examples of conduct that may be considered manifestly unlawful, but that list is non-exhaustive and focuses heavily on wartime combat-related actions, such as maltreatment of dead bodies, poisoning of wells or streams, or summarily executing spies or other persons who have committed hostile acts, all of which are already prohibited by the law of armed conflict.¹⁸⁰ But again, the Manual also neglects to define what makes an order manifestly illegal, and instead relies on the analysis set forth in *Calley*.¹⁸¹

At best, outside of the Rome Statute, the understanding of what makes an order manifestly illegal is a test of “common conscience, of elementary humanity,” the illegality of which “is universally known to everybody.”¹⁸² Central to the universality component is a sense of shared morality. Specifically, that there is a sufficient universal consensus that some acts are moral and that some acts are morally repugnant; Professor Osiel argues that the standard goes even further, positing that for an “act to be manifestly wrongful, the law prohibiting it must be very clear, not unsettled or riddled with uncertainty Any act the wrongfulness of which can be discerned only by a trip to the library . . . is not manifestly illegal.”¹⁸³

176. *McCall v. McDowell*, 1 Abb. N. Cas. 212, 218 (1867).

177. Osiel, *Obeying Orders*, *supra* note 173, at 969 (quoting *In re von Leeb*, 11 Nuremberg Military Tribunals 511, 511 (1948)).

178. *Shepard’s Citing Decision Analysis*, LEXIS ADVANCE, <https://plus.lexis.com/api/permalink/4e8098c7-6e9c-4cdf-9998-0a4ec440c3c8/?context=1530671> (search performed by author July 2024).

179. *Id.*

180. See Osiel, *Obeying Orders*, *supra* note 173, at 974–75 (relying upon Dep’t of the Army, *The Law of Land Warfare* 3 (FM 27-10) (1956)).

181. *Id.*

182. *Id.* at 949 fn. 17 (relying on YORAM DINSTEIN, *THE DEFENSE OF ‘OBEDIENCE TO SUPERIOR ORDERS’ IN INTERNATIONAL LAW* 207–13 (1965)).

183. See Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 *THEORETICAL INQUIRIES L.*

The “person of ordinary sense and understanding” prong of the formula also does not provide clarity to the understanding of when an order is manifestly unlawful. This prong has come to be understood by many as a reasonable person standard: even if the military member did not have actual knowledge of the order’s manifest unlawfulness, would a reasonable person understand the order to be manifestly unlawful?¹⁸⁴ Professor Gary Solis, in his seminal work *Son Thang*, identified that this standard has been generally applied as a purely objective test, with military courts not considering the defendants’ own subjective intelligence levels.¹⁸⁵ Ultimately, this prong returns us to the manifestly illegal standard, but only asking whether a reasonable person would have known the order to be manifestly unlawful.

For example, an order to drive in the wrong direction down a one-way road is unlawful to a person of ordinary sense and understanding. But it is not a manifestly illegal order. What if the subordinate assumes it is a lawful order because it is necessary to complete a mission objective? Moral norms are not reliable either. For example, the human shielding defense,¹⁸⁶ used most recently by the Israeli and Russian governments, justifies strikes that injure or kill a high number of civilians.¹⁸⁷ An attack on a hospital should surely offend a person of ordinary sense and

9, 12–13 (2007) (“Since its inception . . . international law has been embedded in the optimistic trajectory sketched by Kant in his 1784 essay on *The Idea for Universal History with a Cosmopolitan Purpose*.”); see Osiel, *Obeying Orders*, *supra* note 173, at 975.

184. See Osiel, *Obeying Orders*, *supra* note 173, at 975.

185. GRAY D. SOLIS, *SON THANG* 159, 272, 274 (1997).

186. See generally Amnon Rubinstein and Yaniv Roznai, *Human Shields in Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL’Y REV. 93, 94–99 (2011) (providing a general discussion of the use of human shields in armed international conflict and defining “human shields” as “[t]he intentional use of a party to a conflict of one or more human beings, usually civilians . . . placed between the adversary and themselves in a way meant to deter an attack against the forces using the human shields”) (citing H. VICTOR CONDÉ, *A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY* 114 (2nd ed. 2004)). A human shield defense would constitute justifying a military operation that kills non-combatants on the ground that the adversary was using these non-combatants as a human shield. See Benjamin Wittes, *Initial Thoughts on Hamas’s War*, *LAWFARE* (Oct. 9, 2023), <https://www.lawfaremedia.org/article/initial-thoughts-on-hamas-s-war> [<https://perma.cc/QLL9-82CX>].

187. See ISRAELI MINISTRY OF FOREIGN AFFS., *HAMAS-ISRAEL CONFLICT 2023: KEY LEGAL ASPECTS* (Mar. 12, 2023), <https://www.gov.il/en/pages/hamas-israel-conflict2023-key-legal-aspects> [<https://perma.cc/WX8A-4ECE>]; Neve Gordon and Nicola Perugini, *Why We Need to Challenge Russia’s Human Shields Narrative*, *AL JAZEERA* (Apr. 3, 2022) <https://www.aljazeera.com/opinions/2022/4/3/why-we-need-to-challenge-russias-human-shields-narrative> [<https://perma.cc/C3XH-2N68>]; see also Beth Van Schaack, *Human Shields in International Humanitarian Law: A Guide to the Legal Framework*, *JUST SEC.* (Dec. 7, 2016) <https://www.justsecurity.org/35263/human-shields-ihl-legal-framework/> [<https://perma.cc/U3ZZ-B39S>].

understanding, but what if the commander instructed the subordinate that the basement of that hospital contains enemy combatants?¹⁸⁸

To re-center the domestic perspective, consider the SEAL Team 6 hypothetical in understanding the difficult situation military members face in receiving orders. If the President orders SEAL Team 6 to assassinate his political opponent—and does so with the gloss of legality—military members at multiple levels will have to determine whether it is a lawful order. The Geographic Combatant Commander would make the first determination. Assuming they determine it to be legal, it is likely to flow through several levels of command before it reaches the military member who will pull the trigger. At each level, these military members must determine whether the President’s order is manifestly unlawful. They start the analysis likely aware that all orders enjoy a presumption of lawfulness, so long as they stem from individuals with the authority to issue the orders. In many ways, this presumption reflects the value that obedience to orders is central to military effectiveness. And, while such an order may shock their consciousness, the order comes with the gloss of lawfulness.¹⁸⁹ Does this gloss eliminate the manifest illegality of the order? Does the assassination of an American political figure rise to the level of universal condemnation? Is there a law that makes such conduct explicitly illegal?

What is a military officer to do when she receives an order? Ultimately, she must make the personal finding of law as to whether the order is lawful. In making this personal finding, she must consider whether the order is manifestly illegal, or whether a reasonable person would know the order is manifestly illegal. In some ways, the difficulty of these questions speaks to the possibility that such an order would not be considered manifestly illegal, resulting in an obligation for the military member to follow the order. Not to mention, these orders are often given in real time under the pressures of command and potentially the “fog of war.”¹⁹⁰ Under these circumstances, this framework demands too much from military officers.

188. See, e.g., Louisa Loveluck, Evan Hill, Jonathan Baran, Jarrett Ley & Ellen Nakashima, *The Case of Al-Shifa: Investigating the Assault on Gaza’s Largest Hospital*, WASH. POST (Dec. 21, 2023), <https://www.washingtonpost.com/world/2023/12/21/al-shifa-hospital-gaza-hamas-israel/> [<https://perma.cc/X25Y-AJP6>].

189. See *supra* part I.B.

190. See Eugenia C. Kiesling, *On War Without the Fog*, MIL. REV. (Sept.–Oct. 2001), <https://www.clausewitz.com/bibl/Kiesling-OnFog.pdf> [<https://perma.cc/Q43Y-WDRE>] (discussing the origin of the term “fog of war” while describing it as “friction referring to physical impediments to military action, fog to the commander’s lack of clear information”).

B. The Consequences of Being Wrong

Contributing to the difficulty of these decisions for the military members is that their actions carry significant personal and professional consequences. The most significant consequence is trial by court-martial. Courts-martial serve as the primary punitive instrument for the military.¹⁹¹ Operating under the U.C.M.J. and executive orders, commanders may charge a member with a punitive offense under the U.C.M.J. and then a superior commander may refer the case to a trial by court-martial.¹⁹² In many ways, a court-martial reflects a civilian criminal trial, with a military judge, defense counsel, government trial counsel, and a military jury that adjudicates guilt.¹⁹³ The government is bound by the Military Rules of Evidence, which generally reflect the Federal Rules of Evidence,¹⁹⁴ and the accused service member has a right to a zealous defense and to confront the evidence brought against her.¹⁹⁵ A court-martial may then punish the military member with confinement, a reduction in rank, and punitive discharges.¹⁹⁶ The duration of confinement available is dependent upon the forum and convicted charges.¹⁹⁷

A military member may be charged and brought to a court-martial under Article 90 for willfully disobeying a superior commissioned officer¹⁹⁸ or under Article 92 for failure to obey an order.¹⁹⁹ The maximum punishment for violating Article 90 during a time of war is death and at any other time it is a dishonorable discharge, forfeiture of all pay and allowance, and confinement for five years.²⁰⁰ The maximum

191. Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline*, 66 CLEV. ST. L. REV. 123, 125 (2017).

192. Ghiotto, *Back to the Future with the UCMJ*, *supra* note 52, at 505–06; *see also* R.C.M. 401–407 (2024).

193. *See* David A. Schlueter & Lisa M. Schenk, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the American Military Justice System*, 14 N.Y.U. J. L. & LIBERTY 529, 538–40 (2020); *see also* CHRIS BRAY, *COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND* xiii (2016) (“If you attended a court-martial today, it would look a lot like a trial in your local courthouse: There’s a judge, the two sides look like the prosecutor and the defendant with his defense lawyer, and the members of the court look like a jury.”); Lauren A. Shure and Jeremy S. Weber, *Ortiz v. United States: The Savior or Death Sentence of the Military Justice System?*, 81 A. F. L. REV. 187, 190–92 (2020).

194. Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 17–20 (1990).

195. Ghiotto, *Back to the Future with the UCMJ*, *supra* note 52, at 506–11.

196. Jim Absher, *What is a Military Court Martial*, MILITARY.COM (Mar. 25, 2022), <https://www.military.com/benefits/military-legal-matters/courts-martial-explained.html> [https://perma.cc/D38J-33UK].

197. *Id.*

198. 10 U.S.C. § 890.

199. 10 U.S.C. § 892.

200. MANUAL FOR COURTS-MARTIAL, Part IV, para. 16(d)(1)–(2) (2024).

punishment for violating a lawful general order under Article 92 is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.²⁰¹

Even if the military member is not held criminally accountable for disobeying the order,²⁰² she may be held administratively accountable.²⁰³ The administrative options include letters of counseling, admonishment, or reprimand, all of which have significant career repercussions, especially for officers.²⁰⁴ And finally, even absent criminal punishment, the military member may face career repercussions, ranging from a loss of confidence, removal from command, no longer being competitive for promotion, unfavorable assignments, and ultimately even involuntary discharge from service.²⁰⁵

The consequences are similarly significant for obeying the order. If the order is unlawful, the President may have criminal immunity under *Trump* as the President has a colorable claim that he was acting within his official duties when he ordered the act.²⁰⁶ The military member who performed the “act” only has immunity if the order was not manifestly unlawful or if a reasonable person would not have known the order to be manifestly unlawful.²⁰⁷ Generally, “the farther down the chain one goes, the less immunity is likely to apply.”²⁰⁸ As discussed earlier, this standard is difficult, and the military member will be subject to the finding of law made by the military judge should the case proceed to court-martial.²⁰⁹ Consequently, by following orders and committing the act, the military member exposes herself to potential criminal liability for the predicate act in a court-martial, where she is then left to argue that the order was not manifestly illegal.

201. MANUAL FOR COURTS-MARTIAL, Part IV, para. 18(d)(1) (2024).

202. See Anthony Godwin, *Army Commander's Role: The Judge, Jury, & Prosecutor for the Article 15*, 46 SEATTLE U. L. REV. 889, 893–96 (2023) (summarizing the differences between court-martial proceedings and non-judicial punishment).

203. See *Counseling, Admonition, & Reprimand*, MYJAG, <https://myjag.com/otw/counseling-admonition-reprimand> [<https://perma.cc/RS9M-YB4W>] (last visited Nov. 7, 2024).

204. *Administrative Sanctions in the US Military*, MILITARY.COM (Sept. 11, 2014), <https://www.military.com/join-armed-forces/administrative-sanctions-in-the-us-military.html> [<https://perma.cc/53XX-T7JZ>].

205. See, e.g., Meghann Myers, *The Fallout of the Military's COVID-19 Vaccine Mandate*, MIL. TIMES (Mar. 27, 2023), <https://www.militarytimes.com/news/your-military/2023/03/27/the-fallout-of-the-militarys-covid-19-vaccine-mandate/> [<https://perma.cc/95N4-HVR4>].

206. *Trump v. United States*, 603 U.S. 593, 606 (2024).

207. *United States v. Yunis*, 924 F.2d 1086, 1097 (D.C. Cir. 1991).

208. Anthony J. Colangelo, *The Duty to Disobey Illegal Nuclear Strike Orders*, 9 HARV. NAT'L SEC. J. 84, 117 (2018).

209. *United States v. New*, 55 M.J. 95, 105 (C.A.A.F. 2001).

Further, the military member who followed the order also potentially faces criminal prosecution in the civilian courts for the predicate offense.²¹⁰ Considering the SEAL Team 6 hypothetical: if the military member executes the order in the United States, the state where the killing occurs will have jurisdiction to charge the member with murder. Similarly, if the military member crosses state lines to effectuate the murder, the federal courts may also have jurisdiction to charge the military member with murder. In civilian court, the military member may have more difficulty receiving the “obedience to orders” defense instructions.²¹¹ Instead, they may be forced to rely upon a mistake of fact or mistake of law defenses, which again leaves them with much uncertainty and the dramatic potential of being convicted of murder.²¹²

There are others who faces these significant consequences beyond the military member who executes the order. The order is unlikely to flow directly from the President to the military member who follows the order. There will be multiple military members who forward the order from the President to the military member carrying it out. Conceivably, each military member who forwards the order may be held criminally liable—or face comparable career and administrative consequences—if the order is lawful and they refuse to issue the subsequent orders. Similarly, if they do forward the order, and it ends up being unlawful,

210. *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020) (ruling that in addition to state criminal systems, military members are subject to the concurrent jurisdiction of the federal civilian criminal system and the military justice system).

211. Civilian courts have recognized that they may consider an obedience to orders defense stemming from military duty. *See United States v. Yunis*, 924 F.2d 1086, 1097–98 (D.C. Cir. 1991). However, civilian courts are often hesitant to review military decisions, granting broad deference to military members. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“[Judges] are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981)).

212. *See James B. Insko, Defense of Superior Orders Before Military Commissions*, 13 DUKE J. COMPAR. & INT’L L. 389, 395–96 (2003) (“Under the manifest illegality defense, a soldier is more likely to raise a mistake of fact claim when the legality of the order is more controvertible If a subordinate fires on a hospital, fully aware that hospitals are protected under international law, while believing assurances from his superior that the enemy uses the hospital as a command and control base . . . a mistake of fact defense will exonerate the subordinate.”).

they could be tried in military or civilian court for the predicate offense under a theory of accomplice liability.²¹³

So beyond applying the manifestly illegal formula, what are the military members who receive the order to do? They can roll the dice and live with the consequences of either following or not following the order.²¹⁴ Or, if they are uncertain and unsupportive of their order, they can resign their position.²¹⁵ But that option is generally reserved for high-ranking and elite officers who have earned the ability to resign because of their career and time-in-service.²¹⁶ They could also “go public” with the order, either by alerting Congress or the media.²¹⁷ This option borders on existential and lends itself to retaliation and significant career consequences for the officer.²¹⁸ The final option may be to seek injunctive relief in federal court, seeking judicial guidance

213. See Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 465–72 (2013) (reviewing theories of accomplice liability).

214. See, e.g., Oren Liebermann, *Only 43 of More Than 8,000 Discharged from US Military for Refusing Covid Vaccine Have Rejoined*, CNN (Oct. 2, 2023), <https://www.cnn.com/2023/10/02/politics/us-military-covid-vaccine/index.html> [<https://perma.cc/Y6XW-FTPB>] (discussing the military members who refused an order to obtain the COVID vaccine).

215. A study surveying senior officers seems to suggest this is a common strategy in the wake of a legal, but immoral order. See Steven Katz, *What Do Future U.S. Generals Think About Dissent, Disobedience, and Resignation?*, JUST SEC. (May 28, 2021), <https://www.justsecurity.org/76676/what-do-future-u-s-generals-think-about-dissent-disobedience-and-resignation/> [<https://perma.cc/N5LK-2NNA>] (showing a survey of military officers revealed that “forty-three percent of officers were likely or very likely to resign” when given a legal order affirmed by the Supreme Court to detain all American citizens originally from high-risk countries).

216. 10 U.S.C. §§ 1201–03; see also Andrew R. Milburn, *Breaking Ranks: Dissent and the Military Professional*, U.S. ARMY (Oct. 26, 2010), https://www.army.mil/article/47175/breaking_ranks_dissent_and_the_military_professional [<https://perma.cc/Y6XW-FTPB>] (discussing the benefits and negatives to resigning in light of a morally questionable order).

217. See Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 658–67 (2009) (arguing that JAG challenges to Bush Administration policies were rooted in an understanding of those policies’ legal and practical consequences rather than an attempt to increase the JAGs’ own autonomy); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1420–23 (2008) (noting that JAG testimony before Congress on the Military Commissions Act included admissions of problems with administration policies and assertions of independence).

218. See, e.g., Marc Santora, *Zelensky Removes a Top General Amid Criticism of Excessive Casualties*, N.Y. TIMES (June 24, 2024), <https://www.nytimes.com/2024/06/24/world/europe/zelensky-ukraine-general-dismissed.html> [<https://perma.cc/EZX6-ZJ6W>]; Helene Cooper & David E. Sanger, *Obama Fires McChrystal, Citing Need for Unity in Afghan War*, N.Y. TIMES (June 23, 2010), <https://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html> [<https://perma.cc/SSZB-VWPF>].

on the lawfulness of the order.²¹⁹ There is an existential component to this option as well, with such an action likely resulting in career repercussions.²²⁰

For the rational and career-minded military member, the best option is likely to consider the order and reach a good faith conclusion as to its lawfulness, meticulously applying the manifestly illegal formula. With the current difficult, legalistic, and unclear manifestly illegal formula, however, the military member requires assistance to help her navigate through the quagmire. Only by having effective tools to assess the lawfulness of the order will this option remain the best. But what tools do the military members have in reviewing the order? Are these tools effective?

III. MAKING THE DECISION—TOOLS OF ASSISTANCE?

Consider the SEAL Team 6 commanding officer who receives the presidential order to assassinate the President's political rival. What is she supposed to do when she receives the order? Her training tells her to follow the order, but such an order is likely to jar her conscience. Should she rely on her own understanding of whether the Constitution requires obedience? Can she go to her assigned judge advocate to ask for legal advice? If she does, what weight does the judge advocate give to the OLC legal review that says the President has issued the order under his legal authority and perhaps with the explicit authorization of Congress?

A central tenet of this Article is that even if an order has a gloss of lawfulness, and the President likely has criminal immunity no matter the order's actual lawfulness, the order may still be illegal or such a threat to American democracy that a military member must be able to refuse to obey the order without the fear of criminal, personal, or professional consequences. For this conceit to serve as the final check of a presidential coup, however, the military members receiving such an order must have the tools at their disposal to understand the lawfulness of the order under significant pressure.

This part discusses what tools commanders have at their disposal to assess the lawfulness of the order. It focuses primarily on two such

219. Ian Millhiser, *One of America's Most Partisan Judges Just Gave Navy SEALs Permission to Defy a Direct Order*, Vox (Jan. 4, 2022), <https://www.vox.com/2022/1/4/22866839/supreme-court-covid-vaccination-navy-seals-reed-oconnor-religion-military> [https://perma.cc/XB2K-BCGD] (discussing Navy SEAL members challenging President Biden's order mandating the COVID vaccine in federal court).

220. See, e.g., Brianna Herlihy, *Military Chaplains Appeal to Supreme Court Over COVID-19 Policies that Forced Out Religious Objectors*, FOX NEWS (Mar. 27, 2024), <https://www.foxnews.com/politics/military-chaplains-appeal-supreme-court-over-covid-19-policies-forced-religious-objectors-out> [https://perma.cc/3EHY-5N3L].

tools: the military officer's own constitutional faithfulness and the advice of her assigned judge advocate. Using case studies and my own individual experiences as a judge advocate, I make the argument that both tools are insufficient and ill-suited to review orders that arrive with the gloss of legality. The military officer is left alone without the requisite knowledge and expertise, determining whether an order that comes with the gloss of legality is in fact legal, based on an overly legalistic and confusing standard.

Senior military leadership appears confident in the effectiveness of the tools military members have available.²²¹ When asked if there were safeguards in place to protect against the President misusing the military against American citizens, Pentagon spokesman Major General Pat Ryder offered assurances that military members would not be placed in positions where they would be coerced into helping the President to overthrow the American form of government.²²²

General Ryder provided two explicit reassurances. First, he asserted that military commanders and leaders are "provided with training on the principles, requirements, and legal and ethical responsibilities associated with leadership and command to enable critical thinking and sound judgment when directing or implementing decisions, to include orders."²²³ Similarly, a spokesman for the Chief of Naval Personnel said that "the service's officers receive ethics training 'at various career points' and that admirals get more training as they are promoted from one star to four stars."²²⁴

Second, General Ryder highlighted the role of active-duty lawyers, referred to as judge advocates. He noted that "lawyers are available to advise military leaders—including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and combatant commanders—regarding the legal and prudential impacts of orders, as well as the legal effects and consequences such orders may have."²²⁵ Other defense officials supported General Ryder's argument, adding that "especially at those senior levels, legal reviews of most orders are part of the process, are conducted by lawyers assigned to the office of the commander or secretary, and do not need to be specifically requested."²²⁶

221. Konstantin Toropin, *What Happens if the President Issues a Potentially Illegal Order to the Military?*, MILITARY.COM (July 12, 2024), <https://www.military.com/daily-news/2024/07/12/what-happens-if-President-issues-potentially-illegal-order-military.html> [<https://perma.cc/DD6F-TQSZ>].

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

These two tools may help a military officer to properly understand and follow the manifestly illegal standard. Despite the Pentagon's assurances, however, these options are not sufficient. They often result in the opposite effect: an unquestioning obedience to orders. This section explains why.

A. *Relying on Constitutional Faithfulness*

Military members are amongst the most trusted individuals in American society.²²⁷ They receive extensive training at all stages of their career, which includes training in ethics and the law.²²⁸ Senior military officers receive vetting by Congress and participate at the highest levels of politics and government, both domestically and internationally.²²⁹

Military officers take an oath not to the President, but to “support and defend the Constitution of the United States against all enemies, foreign and domestic,” and that they “will bear true faith and allegiance to the same.”²³⁰ Enlisted members receive the same level of training and take an oath to “obey the orders of the President of the United States,” but this commitment is limited to when the president acts under the U.C.M.J.²³¹ Furthermore, their oath begins with a commitment to “support and defend the Constitution of the United States against all enemies, foreign and domestic,” and to also follow “the orders of the officers” above them.²³²

Despite the power at its disposal, the military has never engaged or participated in a coup against the United States.²³³ Instead, the military has generally accepted its subordination to civilian control.²³⁴ During the first Trump administration, when perhaps the threat of a coup reached its zenith in the United States, the military appeared to resist.²³⁵ The

227. Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america/#fn-20070758> [<https://perma.cc/3WRF-KM6G>].

228. Toropin, *supra* note 221.

229. See, e.g., Leo Shane III, *Officers Whose Nominations Were Blocked in Senate Could Get Back Pay*, MIL. TIMES (Dec. 8, 2023), <https://www.militarytimes.com/news/pentagon-congress/2023/12/08/officers-whose-nominations-were-blocked-in-senate-could-get-back-pay/> [<https://perma.cc/6QMY-R5RQ>].

230. 5 U.S.C. § 3331.

231. 10 U.S.C. § 502.

232. *Id.*

233. See Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 357–61 (1994).

234. *Id.*

235. See Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, NEW YORKER (Aug. 8, 2022), <https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals> [<https://perma.cc/N24S-ETL8>].

Chairman of the Joint Chiefs of Staff, General Mark Milley, carefully navigated the political environment to make sure the military was not complicit in any potential military misconduct.²³⁶ Meanwhile, former Secretary of Defense James Mattis simply ignored President Trump when ordered to take certain actions relating to North Korea, Iran, and Syria.²³⁷

This background gives credence to the argument that military members, and their constitutional faithfulness, can be their own tool in assessing the lawfulness of an order. But the potential tool of constitutional faithfulness does not survive critical analysis.

1. *Non-Lawyers in a Legal World*

The determination of whether an order is lawful is ultimately a finding of law.²³⁸ Should the question of an order's lawfulness proceed to trial, it is the military judge who makes the ultimate determination. When making this finding, the military judge will look to the manifestly illegal formula and draw from both domestic and international sources to decide whether the order is manifestly unlawful.²³⁹

The SEAL Team 6 hypothetical shows the difficult task facing military judges. Consider if a military member refuses the order and in response, his command refers the case to a court-martial. At trial, the military member is likely to raise the obedience to orders defense. The argument will be that such an order is manifestly unlawful and

236. See Jeffrey Goldberg, *The Patriot: How General Mark Milley protected the Constitution from Donald Trump*, THE ATLANTIC (Sept. 21, 2023), <https://www.theatlantic.com/magazine/archive/2023/11/general-mark-milley-trump-coup/675375/> [<https://perma.cc/PD66-93PK>].

237. Specifically, General Mattis ignored the following orders from President Trump: (1) a 2017 order to remove the spouses of children of military personnel from South Korea; and (2) an additional 2017 order to convene a meeting of senior national security and military advisors with President Trump to discuss military options for a possible conflict with North Korea. See Ellen Mitchell, *Mattis Ignored Orders from Trump, White House on North Korea, Iran: Report*, THE HILL (Apr. 29, 2019, 5:48 PM), <https://thehill.com/policy/defense/441240-mattis-ignored-orders-from-trump-white-house-on-north-korea-iran-report/> [<https://perma.cc/Z64B-AEZA>]. Such refusal on the part of General Mattis to follow these orders may seem like a viable option for the military to serve as a check against a rogue President, but the refusal does raise concerns of a potential military coup. See generally Dunlap, Jr., *supra* note 233. Professor Dunlap does recognize the potential for a future coup, but his analysis rests on the threat of a military coup, performed independently of the president, as opposed to a presidential coup that utilizes the military to achieve the president's intentions of staging a coup. *Id.*

238. *United States v. New*, 55 M.J. 95, 105 (C.A.A.F. 2001).

239. See Kelsey Griffin, Erica Orden & Lara Seligman, *The Terrifying SEAL Team 6 Scenario Lurking in the Supreme Court's Immunity Ruling*, POLITICO (July 2, 2024, 8:39 PM), <https://www.politico.com/news/2024/07/02/trump-immunity-murder-navy-sotomayor-00166385> [<https://perma.cc/9K59-X8XS>].

therefore he had no legal duty to follow the order. How will the military judge determine the President's order was unlawful? If the President issued the order following invoking the Insurrection Act and received a written legal review from the Office of Legal Counsel supporting the lawfulness of the action, what else can the military judge consider? Can the judge consider the universal and moral repudiation of such conduct? If so, how does the judge apply a universal standard?

The questions phased by military judges are difficult and explicitly legal questions. Quite simply, they require findings of law. Expecting a military member to address and answer these legal questions in real time upon receiving such an order is placing the military member in a legal capacity generally reserved for seasoned and experienced attorneys. Military officers have constantly proven themselves incapable of successfully acting in a legal capacity. The case studies support this argument.

The military justice system serves as the best example of military members struggling to act in a legal capacity. Throughout United States history, military commanders, not military lawyers, have controlled the military justice system.²⁴⁰ The rationale behind this authority is that military justice is ultimately a tool for the commander to ensure discipline among her subordinates.²⁴¹ To do so, the commander requires the authority to exercise all discipline, inclusive of the ability to court-martial an individual and execute any punishment ordered by the court-martial.²⁴² Whether the governing standard was the Lieber Code,²⁴³ the Articles of War, or the U.C.M.J., military commanders retained the

240. See David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 150–55 (1980) (noting that the court-martial serves “primarily as a function or instrument of the executive department to be used in maintaining discipline in the armed forces”).

241. See *Ortiz v. United States*, 585 U.S. 427, 480 (2018) (Alito, J., dissenting) (“Courts-martial are older than the Republic, and they have always been understood to be an arm of military command . . . Blackstone declared that the court-martial system of the British Empire was based solely on the ‘necessity of order and discipline’ in the military . . .”).

242. See *United States v. Jones*, 7 M.J. 806, 812 (N.C.M.R. 1978) (“Nevertheless, the evidence appears unmistakable that military leadership cannot be isolated from the powers and authority which military law has heretofore reposed in commanders and commanding officers. From a military standpoint, the entire crux of the matter is that those in command and control of combat forces must have an authoritative say in the administration of a tough, fair, efficient and comprehensible military justice system if they are to continue to perform their missions with the daring, initiative and effectiveness, to which they are held accountable. And no one can deny that American fighting units, of all types, besieged or besieging, have proven themselves second to none in executing their missions.”).

243. Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071, 2094–97 (2013).

exclusive authority to charge military members with criminal offenses, refer their charges to a court-martial, approve both the findings and sentence of a court-martial, and in most cases, to disprove the findings and sentence of a court-martial.²⁴⁴

A full accounting of the success of the commander-driven military justice system is beyond the scope of this Article.²⁴⁵ But a brief discussion on the military justice system's failure regarding sexual assault and addressing instances of misconduct by service members in Iraq and Afghanistan are highly relevant.

Beginning with sexual assault, military commanders long had the exclusive authority to address instances of sexual assault committed by military members.²⁴⁶ Yet commanders struggled to exercise their authority.²⁴⁷ The number of sexual assaults in the military continued to grow exponentially.²⁴⁸ There soon became a widespread perception that military commanders were refusing to address sexual assault via court-martial. And even when they address sexual assault, military commanders did so inadequately.²⁴⁹ Several high-profile instances exposed these problems nationally. A 2013 documentary, entitled *The Invisible War*, told the stories of several female members who experienced sexual assault during their time in the military.²⁵⁰ While their stories were all

244. See generally Ghiotto, *Back to the Future with the U.C.M.J.*, *supra* note 52, at 494–504 (providing a summary of the development of the military justice system).

245. For such accountings, see Dan Maurer, *A Logic of Military Justice?*, 53 *TEX. TECH. L. REV.* 669 (2021); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 *MIL. L. REV.* 129 (2014); David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 *MIL. L. REV.* 1 (2013).

246. Melinda Wenner Moyer, 'A Poison in the System': *The Epidemic of Military Sexual Assault*, *N.Y. TIMES MAG.* (Aug. 3, 2021), <https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html> [<https://perma.cc/DZ9D-RSED>].

247. See Michael Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 *WIS. J. L. GENDER & SOC'Y* 341 (2014).

248. Alex Horton, *Sexual Assault in Military Continues to Rise Despite Efforts to Reverse*, *WASH. POST* (Sept. 1, 2022, 7:05 PM), <https://www.washingtonpost.com/national-security/2022/09/01/sexual-assaults-military-increase/> [<https://perma.cc/L8E5-MWX3>] ("The Pentagon said there were more than 8,500 reported sexual assaults in 2021, an increase of 13 percent over 2020, and estimated that nearly 36,000 active duty troops experiences unwanted sexual contact . . . up from an estimated 20,000 in 2018 . . . Those figures represented the highest numbers among women since the department began recording the data in 2006.").

249. See Jessica Wolfendale, *Military Sexual Assault is a Moral Injury*, *WAR ON THE ROCKS* (May 21, 2021), <https://warontherocks.com/2021/05/the-military-justice-improvement-act-and-the-moral-duty-owed-to-sexual-assault-victims/> [<https://perma.cc/2CA4-QDFS>].

250. *The Invisible War* *Changing the Conversation on Rape in the Military*, *PBS NEWS* (Feb. 18, 2013, 5:00 PM), <https://www.pbs.org/newshour/nation/>

unique, they all shared a near sense of “inevitability of being raped” while in the military.²⁵¹ They all experienced sexual assault by fellow military members, with the victim being held responsible as opposed to the offender.²⁵²

Around the same time, an Air Force lieutenant colonel was accused of sexually assaulting a civilian woman in his home.²⁵³ A court-martial convicted him and sentenced him to a year of confinement.²⁵⁴ His superior commander, the general court-martial convening authority, set aside the conviction.²⁵⁵ In his justification, he relied upon the fact that in his review of the case, there was not sufficient evidence to convict the lieutenant colonel.²⁵⁶ He also added that he had concerns about the victim’s credibility, disregarding the jury’s clear finding that the victim

invisible-war-has-changed-the-conversation-on-rape-in-the-military [https://perma.cc/YJ8S-26RJ] (“The film . . . presents story after story of former servicewomen and men across all branches of the military who say they were sexually assaulted by a fellow service member during the time of their service. The film describes a climate in the military that, in the words of one victim, is designed to help women better deal with the inevitability of getting raped.”).

251. *Id.* (“The film also documents the emotional impact of the assaults, including elements unique to members of the military such as the challenge of continuing to serve while seeking justice . . .”).

252. *Id.* (“The film features women who told stories of being raped and sexually abused by fellow recruits and in some cases, by the superior officer to whom they were required to report such incidents. In several cases, unmarried female servicewomen were charged with adultery or fraternization after they reported rape or sexual assault by a married serviceman.”).

253. See Mark Visger, *The Canary in the Military Justice Mineshaft: A Review of Recent Sexual Assault Courts-Martial Tainted by Unlawful Command Influence*, 41 MITCHELL HAMLIN L.J. PUB. POL’Y & PRAC. 59, 71–72 (2019) (“During the same timeframe as the Gillibrand proposal was being considered, controversy erupted over the action of Lieutenant General Craig Franklin . . . He was the convening authority reviewing the court-martial conviction of Lieutenant Colonel James Wilkerson. Colonel Wilkerson . . . was alleged to have sexually assaulted a house guest while she slept in the family quarters. The military panel found Colonel Wilkerson guilty and sentenced him to one year of confinement and a dishonorable discharge.”).

254. Robert Draper, *The Military’s Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), <https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html> [https://perma.cc/6QUF-CHB6].

255. Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS & STRIPES (Feb. 27, 2013), <https://www.stripes.com/branches/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797> [https://perma.cc/5MR5-UCGY] (“Lt. Gen. Craig Franklin dismissed the case against Lt. Col. James Wilkerson, who after a weeklong trial . . . was found guilty of aggravated sexual assault Convening authorities have unfettered discretion to reduce penalties in criminal case dispositions and do so frequently.”).

256. Craig Whitlock, *Air Force General Defends Overturning Sexual-Assault Conviction*, WASH. POST (Apr. 10, 2013, 6:05 PM), https://www.washingtonpost.com/world/national-security/air-force-general-defends-overturning-sexual-assault-conviction/2013/04/10/42f8162c-a215-11e2-ac00-8ef7caef5e00_story.html [https://perma.cc/NRZ3-U2PD].

was credible.²⁵⁷ Finally, the superior commander expressed doubt that an “apparent family man and fine officer” would commit sexual assault in his own home with his wife and child nearby.²⁵⁸

These visible failures resulted in Representative Jackie Speier and Senator Kirsten Gillibrand calling for dramatic reforms to the military justice system.²⁵⁹ They advocated for removing commanders from the military justice system and giving such authority either to active-duty judge advocates or civilian attorneys.²⁶⁰ Their arguments were quite simple: accusing and prosecuting an individual of sexual assault is a legal process and a lawyer should be leading that effort, not a military officer without a legal degree.

For years, the military departments resisted these calls for reform.²⁶¹ Supported by their judge advocates, departmental leadership continued to insist that military officers were best positioned to address sexual assault in the military.²⁶² Congress endorsed the position of the military departments, making substantial reforms to sexual assault, but leaving military officers at the center of the military justice system.²⁶³ These reforms failed to address the issues as the number of sexual assaults continued to grow and there continued to be high-profile incidents of

257. *Id.*

258. Nancy Montgomery, *Emails Show General Warned Against Reversing Wilkerson Verdict*, STARS & STRIPES (Aug. 29, 2013), <https://www.stripes.com/migration/emails-show-general-warned-against-reversing-wilkerson-verdict-1.238114> [<https://perma.cc/GQK2-PJSV>].

259. Draper, *supra* note 254.

260. John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 1–3, 31–46 (2014) (discussing efforts to reform the Uniform Code of Military Justice and providing a history of other reform efforts built upon removing military justice authority from commanders).

261. Missy Ryan, *Pentagon Leaders Have Opposed Plans Overhauling the Military System for Trying Sexual Assault for Years. Has the Time Come for Change?*, WASH. POST (APR. 10, 2021, 4:30 PM), https://www.washingtonpost.com/national-security/sexual-assault-military-reform-pentagon-resistance/2021/04/10/e5a98a92-96f7-11eb-8e42-3906c09073f9_story.html [<https://perma.cc/33SM-RNEW>]; see also Max Jesse Goldberg, Note, *Congressional Influence on Military Justice*, 130 YALE L.J. 2110, 2134–36 (2021) (providing additional background).

262. See DAVID A. SCHLUETER & LISA M. SCHENCK, A WHITE PAPER ON AMERICAN MILITARY JUSTICE: RETAINING THE COMMANDER’S AUTHORITY TO ENFORCE DISCIPLINE AND JUSTICE 3, 6–10 (2020), <https://www.court-martial-U.C.M.J..com/files/2020/07/White-Paper-on-Military-Justice-Reforms-2020-w-App.pdf> [<https://perma.cc/Y5FX-KLGY>].

263. See Eleanor T. Morales & John W. Brooker, *Restoring Faith in Military Justice*, 55 CONN. L. REV. 77, 81, 84 (2022) (“The recent sexual assault crisis in the military has led to multiple interventions in the military justice system Prior to the 2022 NDAA, only commanders—not prosecuting attorneys—exercised prosecutorial discretion in the military justice system”).

military officers failing to administer the system properly.²⁶⁴ It was not until 2021 when Congress, through the National Defense Authorization Act, stripped the authority from the commanders to address sexual assault and other significant crimes and transferred that authority to the Office of Special Counsel, an independent office consisting of active-duty judge advocates who operate outside the chain of command.²⁶⁵

Aside from sexual misconduct and crimes, military officers also struggled in general to administer the military justice system in Iraq and Afghanistan. Perhaps no incident highlights this struggle better than Haditha, Iraq. In November 2005, a Marine company patrolling Haditha suffered a blast from an improvised explosive device.²⁶⁶ The blast killed one Marine and significantly injured two others.²⁶⁷ In response, the company entered Haditha to identify the potential insurgents who planted the IED.²⁶⁸ Several Marines began entering homes and executing the individuals they found in the homes.²⁶⁹ The Marines entered multiple homes and executed nineteen Iraqi civilians.²⁷⁰ The Marines also opened fire on a taxi, killing five passengers.²⁷¹

In total, the Marines killed twenty-four Iraqi civilians, including women, children, and the elderly.²⁷² The Marine commander at the time, General James Mattis, charged eight Marines in connection with the massacre.²⁷³ The charges ranged from unpremeditated murder to

264. Jennifer Steinhauer, *Lawmakers Reach Deal to Overhaul How Military Handles Sexual Assault Cases*, N.Y. TIMES (Dec. 7, 2021), <https://www.nytimes.com/2021/12/07/us/politics/military-sexual-assault-Congress.html> [https://perma.cc/Y8AU-E74Q] (“Years of small legislative steps have done little to stem the problem, and Ms. Gillibrand, as well as Representative Jackie Speier, who had worked on legislation for years, was often rebuffed by fellow lawmakers and Pentagon officials.”).

265. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 §§ 531-539G (2021). See generally Joseph Clark, *Senior Leaders Focused on Restoring Trust as DoD Makes Sexual Assault Reforms*, DOD NEWS (May 22, 2024), <https://www.defense.gov/News/News-Stories/Article/Article/3784780/senior-leaders-focused-on-restoring-trust-as-dod-makes-sexual-assault-reforms/> [https://perma.cc/L5LL-9CV9] (giving a high-level overview of recent reforms).

266. Martin Asser, *What Happened at Haditha?*, BBC NEWS (Mar. 10, 2008), http://news.bbc.co.uk/2/hi/middle_east/5033648.stm [https://perma.cc/SQS7-Y392].

267. *Id.*

268. William Langewiesche, *Rules of Engagement*, VANITY FAIR (Mar. 26, 2007), <https://www.vanityfair.com/news/2006/11/haditha200611> [https://perma.cc/FB3G-SHEZ].

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*; see also *Iraqi outrage over U.S. Marine’s plea deal in Haditha Killings*, CNN (Jan. 25, 2012), <https://www.cnn.com/2012/01/25/justice/california-iraq-trial/index.html> [https://perma.cc/7G58-4FKQ].

273. Dexter Filkins, *James Mattis, A Warrior in Washington*, NEW YORKER (May 22, 2017), <https://www.newyorker.com/magazine/2017/05/29/james-mattis-a-warrior-in-washington>

dereliction of duty.²⁷⁴ Six out of the eight Marines originally accused in the case had their charges dismissed by military judges, and a seventh was cleared of criminal wrongdoing. The only Marine convicted by court-martial was Sergeant Frank Wuterich, the alleged ringleader.²⁷⁵

During the court-martial, the jury heard testimony that Sergeant Wuterich actively shot the civilians in close range and approached a fellow Marine and told him “if anyone asks, the Iraqis were running away from the car and the Iraqi army shot them.”²⁷⁶ A witness also testified that Sergeant Wuterich, along with other Marines, urinated on the head of one of the dead Iraqis. Sergeant Wuterich testified himself that he told his subordinates to “shoot first and ask questions later.”²⁷⁷

Despite this testimony, the government initiated and agreed to a mid-trial plea bargain with Sergeant Wuterich.²⁷⁸ In exchange for Sergeant Wuterich pleading guilty to negligent dereliction of duty, the Marines agreed to dismiss the charges of assault and manslaughter.²⁷⁹ The Marines also agreed that Sergeant Wuterich would receive no confinement with his guilty plea.²⁸⁰ Under the agreement, Sergeant Wuterich, the sole Marine held criminally liable for Haditha, was convicted only of negligent dereliction of duty and was sentenced to a reduction of rank.²⁸¹ His sentence included neither discharge nor confinement.²⁸²

The lack of criminal consequence for the Marines involved in Haditha was almost immediately perceived as a failure of the military

[<https://perma.cc/W5WA-VANU>] (“[I]n Haditha, Mattis was responsible for deciding who would be charged . . .”).

274. *Id.* (“Mattis charged four marines with murder and four officers with dereliction of duty; he recommended letters of censure for three officers, essentially ending their careers. But he also granted immunity to several marines . . . and dropped charges against three others.”).

275. *Id.*

276. *U.S. Troops ‘Told to Lie’ About Iraqi Killings*, AL JAZEERA (Jan. 12, 2012), <https://www.aljazeera.com/news/2012/1/12/us-troops-told-to-lie-about-iraqi-killings> [<https://perma.cc/SKG4-CRWX>].

277. Charlie Savage & Elisabeth Bumiller, *An Iraqi Massacre, a Light Sentence, and a Question of Military Justice*, N.Y. TIMES (Jan. 27, 2012), <https://www.nytimes.com/2012/01/28/us/an-iraqi-massacre-a-light-sentence-and-a-question-of-military-justice.html> [<https://perma.cc/39Q4-QPY2>].

278. Michael S. Schmidt, *Anger in Iraq After Plea Bargain Over 2005 Massacre*, N.Y. TIMES (Jan. 24, 2012), <https://www.nytimes.com/2012/01/25/world/middleeast/anger-in-iraq-after-plea-bargain-over-haditha-killings.html> [<https://perma.cc/XV98-2AFK>].

279. Stan Wilson & Michael Martinez, *Marine in Haditha, Iraq, Killings Gets Demotion, Pay Cut*, CNN (Jan. 24, 2012), <https://www.cnn.com/2012/01/24/justice/california-iraq-trial/index.html> [<https://perma.cc/23L8-NC9T>].

280. *Id.*

281. *Id.*

282. *Id.*

justice system.²⁸³ It resulted in the Secretary of Defense, Leon Panetta, convening the Defense Legal Policy Board to examine how the military addressed the service members in Haditha and Iraq.²⁸⁴ The Board did not just review Haditha. There were other instances of service members killing civilians in Iraq and Afghanistan.²⁸⁵ And in many of these instances, the service members received minimal, if any, criminal punishment.²⁸⁶

I served as the Air Force staff attorney assisting the Defense Legal Policy Board in their review and in preparing their final report.²⁸⁷ What startled me about the experience was the lack of answers presented by the military commanders tasked with administering the military justice system. With Haditha, commanders attempted to excuse their failures by pointing to the difficulty in conducting investigations in a deployed environment and administering a military justice system in the fog of war.²⁸⁸ While the military commanders provided no answers and plenty of excuses, they retained their belief that commanders were in the best positions to administer the military justice system and to address illegal conduct by service members.²⁸⁹ Their actions, however, suggested strongly otherwise.

Beyond the military justice system, another area where military officers are placed in positions that are essentially legal in nature is

283. In 2010, the Secretary of the Navy reprimanded the Marine Corps for not dealing more harshly with the Marines involved with Haditha. He commented that he “was stunned to learn these guys were still in the Marines . . . They had taken part in the murder and nothing had been doneWhat happened . . . in Haditha was part of a pattern.” See Filkins, *supra* note 273. Despite this reprimand, General Mattis received very little pushback regarding Haditha during his Senate confirmation hearing after President Trump nominated him to serve as Secretary of Defense. See Tal Kopan, *Defense Nominee Mattis Emerges with Strong Support*, CNN (Jan. 12, 2007), <https://www.cnn.com/2017/01/12/politics/james-mattis-defense-confirmation/index.html> [https://perma.cc/W5E8-XKPK] (“In their opening statements, the top committee Republican and Democrat were both generally favorable to Mattis.”).

284. David Alexander, *Panetta Orders Review of Military Justice in Combat Zones*, REUTERS (Aug. 3, 2012, 5:23 PM), <https://www.reuters.com/article/world/us/panetta-orders-review-of-military-justice-in-combat-zones-idUSBRE8721MR/> [https://perma.cc/H7MA-9GA3].

285. DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES: MILITARY JUSTICE IN CASES OF U.S. SERVICE MEMBERS ALLEGED TO HAVE CAUSED THE DEATH, INJURY, OR ABUSE OF NON-COMBATANTS IN IRAQ OR AFGHANISTAN 154–183 (2013), <https://civiliansinconflict.org/wp-content/uploads/2017/09/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf> [https://perma.cc/ZT7G-3MXT].

286. *Id.*

287. *Id.* at 16 n.7.

288. *See id.* at 129, 161–63.

289. *See id.* at 91–117.

ordering airstrikes. The military relies heavily on airstrikes to achieve its objectives.²⁹⁰ The 2001 AUMF, issued by Congress following the September 11 terrorist acts in New York, Shanksville, and Washington D.C., grants the President broad authority to engage in military action throughout the world.²⁹¹ Despite this authorization, the law of armed conflict still requires that airstrikes comply with international laws and norms.²⁹² As such, military members are bound to perform a law of armed conflict analysis for each military action.²⁹³ A primary legal responsibility is to minimize the killing of civilians and non-combatants.²⁹⁴

This requirement is especially relevant for an airstrike. When a military officer orders an airstrike, there is an assumption that the airstrike is lawful—the commander has the legal authority to issue such an order and that the airstrike complies with the law of armed conflict.²⁹⁵ While judge advocates generally review potential airstrikes and provide a legal opinion, it is ultimately the military commander who retains the ultimate power over whether to order the strike.²⁹⁶

Unfortunately, military commanders tend to make a lot of mistakes while making this determination.²⁹⁷ Professor Oona Hathaway has argued that “mistakes in the U.S. counterterrorism campaign have been far more common than generally acknowledged.”²⁹⁸ She provides a thorough accounting of these mistakes, focusing on target misidentification, failure to detect the presence of civilians, failure to anticipate secondary explosions, and pre-strike proportionality assessment errors.²⁹⁹ These errors resulted in high-profile incidents of civilian casualties, such as

290. Joseph B. Piroch & Daniel A. Connelly, *Six Steps to the Effective Use of Airpower*, STRATEGIC STUD. Q., Winter 2021, 89–90, 97 (2021).

291. See Tess Bridgeman & Brianna Rosen, *Still at War: The United States in Syria*, JUST SEC. (Apr. 29, 2022), <https://www.justsecurity.org/81313/still-at-war-the-united-states-in-syria/> [<https://perma.cc/PP93-369A>].

292. See Christopher J. Markham & Michael N. Schmitt, *Precision Air Warfare and the Law of Armed Conflict*, 89 INT’L L. STUD. 669, 694–95 (2013).

293. See *id.* at 694.

294. See Robert Lawless, *The U.S. Legal Obligation to Take Precautions to Minimize Civilian Harm*, LIEBER INST. AT WEST POINT: ARTICLES OF WAR (Feb. 18, 2022), <https://lieber.westpoint.edu/us-legal-obligation-precautions-minimize-civilian-harm/> [<https://perma.cc/46HD-HLXJ>].

295. See *id.*

296. See Craig Jones, *Legal Advice in Modern Aerial Warfare*, LIEBER INST. AT WEST POINT: ARTICLES OF WAR (Nov. 22, 2021), <https://lieber.westpoint.edu/legal-advice-modern-aerial-warfare/> [<https://perma.cc/88ZR-BKJU>].

297. See Brianna Rosen, *Tragic Mistakes: Breaking the Military Culture of Impunity*, JUST SEC. (Nov. 23, 2021), <https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/> [<https://perma.cc/LBS6-N3SH>].

298. Oona A. Hathaway & Azmat Khan, *‘Mistakes’ in War*, 173 U. PA. L. REV. 1, 2 (2024).

299. *Id.* at 52.

when the United States struck a hospital in Kunduz, Afghanistan, or when the United States conducted a drone strike in Kabul that killed ten civilians, including an aid worker for a U.S. charity and seven of his children.³⁰⁰ Of course, these are not the only mistakes made by the military in targeting. During the wars in Iraq and Afghanistan, the United States made many additional targeting mistakes, including bombing Canadian forces at Tarnak Farms in Afghanistan³⁰¹ and the killing of a disputed amount of civilian noncombatants via an airstrike in Baghuz, Syria.³⁰²

The airstrike in Baghuz is especially helpful in understanding how military members struggle in making legal determinations, especially under the stress of combat.³⁰³ In Baghuz, a classified special operations unit conducting operations in Syria requested the strike.³⁰⁴ Because of both the sensitive nature of the operation and time demands, the request did not go through the American Air Force command in Qatar.³⁰⁵ Rather, the order went from the special operator to the pilot who executed the order.³⁰⁶ Almost immediately after the strike, an alarmed Air Force intelligence officer at the Combined Air Operation Center contacted an Air Force judge advocate.³⁰⁷ The judge advocate immediately reported the operation to his chain of command and alerted them it was a possible violation of the law of armed conflict and required an investigation.³⁰⁸

The command took no action.³⁰⁹ The judge advocate implored his command and investigators to act.³¹⁰ He then alerted the Defense

300. *Id.* at 23–26.

301. Adrian Humphreys, *U.S. Bombed These Canadians in Afghanistan 20 Years Ago. Here's What Happened Next*, NAT'L POST (Nov. 10, 2022), <https://nationalpost.com/news/canada/remembrance-day-tarnak-farm-afghanistan> [<https://perma.cc/3WP6-X9Q5>].

302. *US Defends Air Strikes that Killed Civilians in Syria*, BBC NEWS (Nov. 14, 2021), <https://www.bbc.com/news/world-us-canada-59279585> [<https://perma.cc/6MMD-TTEA>].

303. See Paola Rosa-Aquino, *U.S. Covered Up Airstrike That Killed Dozens of Civilians in Syria: Report*, N.Y. MAG.: INTELLIGENCER (Nov. 13, 2021), <https://nymag.com/intelligencer/2021/11/u-s-covered-up-death-toll-of-2019-syria-airstrike-report.html> [<https://perma.cc/47HS-HJ3P>] (providing a high-level overview of the Air Force's initial legal response to the Baghuz airstrike).

304. 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/M5Q3-E7Q7>].

305. *Id.*

306. *Id.*

307. *Id.*; see also Kevin Gosztola, *Pentagon and Its Overseers Suppressed Whistleblowers Who Challenged Massacre in Syria*, DISSENTER (Nov. 15, 2021), <https://thedissenter.org/pentagon-suppressed-whistleblowers-who-challenged-massacre-in-syria/> [<https://perma.cc/Q5FJ-3GB5>].

308. *Id.*

309. *Id.*

310. *Id.*

Department's independent inspector general. With no action after two years, the judge advocate finally emailed the Senate Armed Services Committee alerting them that "[s]enior ranking military officials intentionally and systematically circumvented the deliberate strike process."³¹¹ He alleged that the unit had "clearly [sought] to cover up the incidents."³¹² He called the civilian death toll "shockingly high."³¹³

The final accepted death toll at Baghuz continues to be disputed.³¹⁴ Following the strike, the special operations unit immediately determined the strike to be lawful—despite the clear civilian casualties—because the strike successfully killed several ISIS members.³¹⁵ The Department of Defense did not publicly acknowledge Baghuz for nearly two years. When it finally did, it asserted the strike was lawful because "52 enemy combatants—51 men and one child—were killed along with four civilians—one woman and three children."³¹⁶ However, the New York Times continues to report 64 civilian non-combatants were killed in the bombing.³¹⁷ In response, the Department of Defense claimed that it "was not clear that they were civilians, in part because women and children in the Islamic State sometimes took up arms."³¹⁸

An inspector general eventually investigated Baghuz and found no criminal wrongdoing on the part of any American military member. One of the investigation's evaluators commented, however, that "[l]eadership just seemed so set on burying this. No one wanted anything to do with it . . . It makes you lose faith in the system when people are trying to do what's right but no one in positions of leadership wants to hear it."³¹⁹

From these experiences, it is reasonable to lose faith in a military member's ability to successfully navigate legal functions. Historically, when tasked with leading the military justice system, military members failed to hold military members accountable for sexual assault and to punish military members for killing innocent civilians in Iraq and Afghanistan. When making the legal analysis of whether a potential

311. *Id.*

312. *Id.*

313. *Id.*

314. David Greitten, *U.S. Military Probe Finds No Wrongdoing in Deadly Syria Air Strike*, BBC (May 18, 2022), <https://www.bbc.com/news/world-us-canada-61492436> [<https://perma.cc/URB3-NRBU>].

315. *Id.*

316. *Id.*

317. 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/M5Q3-E7Q7>].

318. *Id.*

319. *Id.*

target is lawful, military members are historically often wrong. And when these mistakes occur, innocent people die. These failures to properly exercise legal decision-making responsibilities should place doubt upon the belief that military members can adequately make their own constitutional decisions as to the lawfulness of an order.

2. *Inadequate Training*

During the 2024 presidential campaign, several scholars and advocacy groups raised concerns about President Trump abusing the military power at his disposal, especially when considering the broad authority granted to the President by the potential invocation of the Insurrection Act. At this time, Department of Defense officials attempted to allay concerns about the military being complicit in a military coup by highlighting the training received by military members.³²⁰ They asserted that military officers receive training in ethics and that this ethics training increases for military officers who become general officers.³²¹ But is this training sufficient? Does this training include legal concepts and principles? Does it include specific training in the legal decisions attendant to receiving and giving lawful orders? Do all military members receive this type of training? Or is it reserved for only the highest-ranking officers?

Unfortunately, there are no clear answers to these questions. There is little orthodoxy in military training. The unique cultures of the different military departments, the different ranks, and the different essential tasks required for unique job responsibilities make a thorough review of all military training a monumental task. It is helpful to assess military training in areas where there is a commonality in examining professional military education for military officers.

Each military department requires officers to complete professional military education for each rank in which they serve.³²² Under this requirement, a military officer will complete a professional military education requirement several times throughout their career, with each program corresponding to their rank and the demands and responsibilities attendant to that rank.³²³ These educational programs may be completed virtually or in-person, with the commitments increasing as the officer

320. Toropin, *What Happens if the President Issues a Potentially Illegal Order to the Military?*, *supra* note 221.

321. *Id.*

322. See CHARLES A. GOLDMAN ET AL., INTELLECTUAL FIREPOWER: A REVIEW OF PROFESSIONAL MILITARY EDUCATION IN THE U.S. DEPARTMENT OF DEFENSE, RAND 5, 11–13 (2024) (providing an overview of the professional military education system).

323. See *id.*

advanced in rank.³²⁴ For example, in the Air Force, captains are required to attend Squadron Officer School.³²⁵ Attending Squadron Office School in-person is currently a five-week commitment.³²⁶ In comparison, the education requirement for majors is Air Command and Staff College and the requirement for lieutenant colonels is Air War College.³²⁷ Both programs are ten-month commitments and result in a master's degree.³²⁸ The virtual options tend to be go-at-your-own pace, but roughly correspond to the in-person option in terms of workload and completion requirements.³²⁹

Professional military education offers an ideal opportunity to educate and train officers in the legal responsibilities associated with giving and receiving orders. The officers are a captive audience, and the training can be tailored to the specific rank, allowing the officer to understand what authority she will have at that rank and what factors she must consider when following the order.

The syllabi for the different professional military education courses are not readily available. I can share my experiences to suggest that law is not heavily featured in the curriculum. As a captain, I completed squadron officer school via correspondence. I do not recall any of the coursework featuring legal concepts or understandings.

Air Command and Staff College, which I attended as a major, also failed to provide adequate legal training. I attended Air Command and Staff College in person. My class consisted of over five hundred other majors; yet, I was one of only six judge advocates to attend. I was startled by the lack of legal training provided during the academic year. Majors attending Air Command and Staff College often enter a squadron command position after completing the program. As a squadron commander, these majors would be responsible for disciplining their

324. *Id.* at 41–42 (while virtual options remain, “the majority of PME and other military educational institutions have some need for in-person learning.”).

325. AIR UNIVERSITY, *Welcome to Squadron Officer School* (Jan. 6, 2021), <https://www.airuniversity.af.edu/SOS/Display-Article/Article/1042972/welcome-to-squadron-officer-school/> [<https://perma.cc/4F6L-NT5R>]; *see also* AIR UNIVERSITY, *Eschool of Graduate PME–Squadron Officer School Eligibility*, <https://www.airuniversity.af.edu/GCPME/SOS/Eligibility/> [<https://perma.cc/Q785-B8CZ>].

326. *Id.*

327. GOLDMAN, *supra* note 322, at 63–66; *see also*, AIR UNIVERSITY, *Eschool of Graduate PME–Air Command and Staff College*, U.S. AIR FORCE, <https://www.airuniversity.af.edu/GCPME/ACSC/Eligibility/> [<https://perma.cc/A9TX-GA5L>] (“The program is offered to O-4 selects and above”); AIR UNIVERSITY, *Air War College (SDE) Distance Learning Program*, U.S. AIR FORCE, <https://www.airuniversity.af.edu/GCPME/AWC/> [<https://perma.cc/4TNN-WCKH>] (“The program is offered to O-5 selects and above.”).

328. *Id.*

329. *Id.*

subordinates, receiving orders from their superior commanders, and, at the time, for administering justice under the U.C.M.J. Many others would deploy and participate in combat operations throughout the globe, often in command positions.

During the nine-month program, we had one day of legal instruction. The instruction involved a judge advocate lecturing for approximately two hours about the military justice system. Much of the instruction centered around the claim, “If you have questions, make sure you talk to your JAG.” Although I did not attend the program in my capacity as a judge advocate, I found myself having to provide legal instruction throughout our courses. For example, in courses such as “Air Power,” “Joint Air Planning,” “Operational Leadership,” and “National Security,” legal requirements and legal considerations were never mentioned. The assigned readings did not discuss legal restrictions on the use of air power. I often had to remind our instructors and fellow students that law had to be a consideration in many of the decisions facing commanders.

My experience in our Joint Air Planning course highlights this obliviousness to the law. As our final exam, my small group section conducted a war game to simulate a joint air attack. In preparation, our instructor assigned us all roles that corresponded with the roles many of us would eventually fulfill at the Combined Air Operation Center in Qatar. Understanding that the Combined Air Operation Center always had a judge advocate present and that I was the only judge advocate in my section, I assumed I would be placed in the role of legal advisor. To my surprise, I was assigned to the targeting cell. That cell was responsible for identifying potential targets. No one was assigned to be the legal advisor. I asked my instructor about why we did not have a legal advisor and he responded along the lines of, “That’s for you guys to figure out in law school and not our problem here.”

My experience in Air War College was not much better. While I completed Air War College remotely, there were no components that focused on the legal responsibilities applicable to lieutenant colonels. From my own experiences in professional military education—experiencing it as a military officer and not as a judge advocate—the law was an afterthought. Not only did these courses fail to instill within the officers the tools necessary to perform a legal analysis, but they also failed to provide even the basics of the law.

Beyond not providing sufficient legal instruction, I also found that these programs may incentivize obedience to civilian components in the military. With each level of professional military education, I found that we had more instruction and more guidance on the principle of civilian

control of the military. There are many different approaches to civilian control of the military. I found that the primary approach taught—at least in Air Force education—was the agency approach to civilian control of the military. Under this approach, the executive branch is the principal, and the military member is the agent. The principle can direct the behavior of the agent and when the agent fails to comply, the principle can discipline the agent. This approach conflicted with a more expansive conception of civilian control of the military that would provide military members with more autonomy and freedom to express disagreement with the civilian component.

From my experiences, this emphasis on the agency approach resonated with my peers. These were ambitious officers who wanted to continue serving and advancing in their careers. When trained that the civilian component exercised agency over them, they were hesitant to criticize executive branch guidance.

Training focused on subordination versus autonomy has consequences. In 2020, a group of social scientists conducted a study on the effect that military training had on the sense of agency and outcome processing.³³⁰ The study recognized that the military relied upon a strict hierarchical structure where members were required to follow orders.³³¹ Simultaneously, the study recognized that there were times when military members needed to exercise their own autonomy, especially when given unlawful orders by superior commanders.³³²

The study concluded that officers who received training focused on obedience and not autonomy were more compliant when ordered to provide shocks to another individual.³³³ Military members who received training that emphasized autonomy over obedience were less compliant when ordered to shock someone else.³³⁴ This study provides an important lesson to the military: if the military desires members who can engage with a superior commander's orders autonomously, including conducting their own legal analysis, their training needs to instill those skills and willingness.

My own experiences, though, inform me that the military is failing in that regard. Not only did professional military education emphasize an agency-principal theory of civilian control of the military that incentivized compliance with civilian leadership, but it also failed to

330. Emilie A. Caspar et al., *The Effect of Military Training on the Sense of Agency and Outcome Processing*, 11 *NATURE COMM'NS* 1 (2020).

331. *Id.* at 1–2.

332. *Id.* at 2.

333. *Id.* at 2, 5–7.

334. *Id.* at 2, 7.

fully incorporate legal standards and requirements. Most dramatically, it failed to immerse military members in legal analysis and the different legal tools necessary to assess the lawfulness of an order. Military members receiving an order from the President with the gloss of legality are left without the internal resources they need to assess its lawfulness.

3. *Illiberals in a Liberal Constitutional Democracy*

The “manifestly illegal” framework necessitates an analysis that extends beyond purely knowing the law. A framework that only considers a formal understanding of the law fails to address the consequences of following presidential order. Instead, an understanding of “manifestly illegal” must include universal values, norms, and concepts of morality. Such an understanding of “manifestly illegal,” assists in piercing an order’s gloss of lawfulness.

The difficulty in establishing a bifurcated understanding of “manifestly illegal”—encompassing both actual unlawfulness and a violation of universal norms, values, and morality—is defining what those universal values are.³³⁵ The increased political fraying of the United States evidences the difficulties in establishing universal norms.³³⁶ Similar struggles have occurred throughout Europe as well, with far-right authoritarian parties growing in both popularity and influence.³³⁷

Despite the difficulty in achieving perfect universality, an understanding of near universality is essential in limiting the scope of presidential authority. If a near-consensus can be reached, a President’s actions may be considered “unlawful” under the manifestly illegal standard, even if they have the veneer of lawfulness to them, should these actions violate the agreed upon universal values.

This Article asserts that a commitment to a liberal constitutional democracy remains a largely universal norm within the United States. Recognizing a growth in illiberalism and a growing discomfort with

335. See Steven Erlanger, *Are Universal Values Really Universal?*, N.Y. TIMES (Sept. 26, 2023), <https://www.nytimes.com/2023/09/26/world/are-universal-values-really-universal.html> [<https://perma.cc/HX5P-RRFZ>] (describing divergent cultural norms and values).

336. See Erin B. Carter et al., *American Democracy Is Still in Danger*, FOREIGN AFFAIRS (Jan. 6, 2023), <https://www.foreignaffairs.com/united-states/american-democracy-still-danger> [<https://perma.cc/8Q3U-ZZQ9>]; see also David French, *America is Being Pulled Apart. Here’s How We Can Start to Heal Our Nation*, TIME (Sept. 10, 2020, 6:40 AM), <https://time.com/5887428/american-political-division/> [<https://perma.cc/A4HD-Y22T>].

337. See generally Joschka Fischer, *Liberal Democracy Hangs in the Balance*, PROJECT SYNDICATE (July 29, 2024), <https://www.project-syndicate.org/commentary/american-and-european-liberal-democracy-at-stake-in-us-election-by-joschka-fischer-2024-07> [<https://perma.cc/9ZQ8-MDAW>].

democracy, most Americans remain committed to the values of a liberal constitutional democracy.³³⁸ What then are the values associated with a liberal constitutional democracy?

Professors Tom Ginsburg and Aziz Huq provide a compelling definition of a liberal constitutional democracy.³³⁹ Their definition provides “floor” requirements for a liberal constitutional democracy. These floor requirements are (1) free and fair elections; (2) the liberal rights to free speech and association; and (3) “the stability, predictability, and publicity of a legal regime usually captured in the term *rule of law*.”³⁴⁰

While classical liberalism is enigmatic and “[t]he history of liberalism . . . is a history of constant reinvention,”³⁴¹ some scholars have attempted to pin down the tenants of classic liberalism. For example, Professor Brenner Fissell recently defined liberalism around four central components: individualism, freedom, rationality and pacifism. Individualism emphasizes the inherent value of the human person on its own.³⁴² Freedom speaks to the belief that “[t]he moral primacy of the individual in relation to society is only meaningful because the individual has the freedom to think and act.”³⁴³ Rationality addresses that “[g]iven individuals’ status as beings with inherent moral value and autonomy, political actions must be justified to them using terms that are accessible via reason.”³⁴⁴ Finally, pacifism speaks to a general stance against war and violence.³⁴⁵

Thus, in understanding what universal values are associated with a classical liberal constitutional democracy, we can look to the liberal values of individualism, freedom, rationality, and pacifism *and* the democratic principles that serve to protect these values: open and free elections, freedom of speech and assembly, and a dedication to the rule of

338. See, e.g., Ian Ward, ‘I Don’t Want to Violently Overthrow the Government. I Want Something Far More Revolutionary’, POLITICO (June 8, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/06/08/the-new-right-patrick-deneen-00100279> [<https://perma.cc/4WV7-B39N>]; Brooke Masters, *Adrian Vermeule’s Legal Theories Illuminate a Growing Rift Among US Conservatives*, FINANCIAL TIMES (Oct. 13, 2022), <https://www.ft.com/content/5c615d7d-3b1a-47a2-86ab-34c7db363fe4> [<https://perma.cc/8986-BPNY>]; Park MacDougald, *A Catholic Debate over Liberalism*, CITY JOURNAL (Winter 2020), <https://www.city-journal.org/article/a-catholic-debate-over-liberalism> [<https://perma.cc/9BXV-U6TL>].

339. TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

340. *Id.* at 9–15.

341. Brenner Fissell, *The Military’s Constitutional Role*, 103 N.C. L. REV. (forthcoming 2025).

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

law. A Presidential order that violates these values and protections may then render such an order unlawful under the “manifestly illegal” standard, even if it has the gloss of lawfulness under the current legal framework outlined in *Youngstown*, OLC precedence,³⁴⁶ the Insurrection Act, and in *Trump*.

Much as a military member is likely unable to make the legal determination necessary to critically assess whether a President truly has the constitutional authority to issue the order, a military member is equally likely to be incapable of viewing the order through the lens of the values of liberal constitutional democracy. Professor Fissell explains this failure by highlighting the illiberal nature of the American military.³⁴⁷

Professor Fissell correctly points out that the military is ruled by command, is a hierarchical institution, prioritizes the group over the individual, and is violent, not pacifist. The military is neither liberal nor democratic. For the senior officers receiving the Presidential order, this illiberal world is what they know and what they succeeded in. For the younger officer, who comes later into the chain of command, they have been trained in this illiberal tradition. To then expect them to be able to apply the liberal constitutional democratic lens to a presidential order would require them to disregard this training and apply values and norms that are foreign from their service. This option is presently not realistic.

4. *Military Members Are People Too*

In a prior article, I briefly discussed the problems associated with military members serving as a potential check against a “presidential coup.”³⁴⁸ I identified careerism and extremism within the officer ranks as potential issues.³⁴⁹ These issues remain. There are extremists within the military that may relish the opportunity to support a presidential coup.³⁵⁰ Of important consideration is the fact that approximately 18%

346. See Saikrishna B. Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1428–29 (2013) (“Presidents often can readily secure an opinion from the Office of Legal Counsel supporting their actions.”).

347. Fissell, *supra* note 341.

348. Ghitto, *Presidential Coup*, *supra* note 8, at 441–42.

349. *Id.*

350. See Tom Nichols, *A Military Loyal to Trump*, ATLANTIC (Dec. 8, 2023), <https://www.theatlantic.com/magazine/archive/2024/01/trump-defense-department-military-loyalty/676140/> [https://perma.cc/HDR8-HX6Y]; see also Risa Brooks, *The Right Wing’s Loyalty Test for the U.S. Military*, FOREIGN AFFS. (Nov. 14, 2022), <https://www.foreignaffairs.com/united-states/right-wings-loyalty-test-us-military> [https://perma.cc/K6CZ-QF7Y].

of the defendants charged in relation to the January 6 insurrection were veterans.³⁵¹ Further, the military has its own systems of rewards, punishments, and incentives for conformance, much like organizations in the civilian world.³⁵² Military members may benefit careerwise—whether within the military or in the civilian world—by following or not following the order.³⁵³

Another consideration is bias, both implicit and explicit. Multiple studies have confirmed that all individuals possess implicit and explicit bias.³⁵⁴ Military members are no different.³⁵⁵ These biases are very likely to impact their decision-making process.³⁵⁶ Consider the SEAL Team 6 hypothetical. It is reasonable to believe that each military member has some opinion relating to both the current President and

351. Irene Loewenson, *Mattis Says Vets at Jan. 6 Capitol Riot 'Don't Define the Military'*, MARINE CORPS TIMES (Nov. 6, 2023), <https://www.marinecorpstimes.com/news/your-marine-corps/2023/11/06/mattis-says-vets-at-jan-6-capitol-riot-dont-define-the-military/> [https://perma.cc/5WB2-HA2R].

352. Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55, 115–29 (2018).

353. Ghiotto, *Presidential Coup*, *supra* note 8, at 441–42.

354. John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39 (2009) (“[R]esearchers have identified the existence and consequences of implicit bias through well-established methods based upon principles of cognitive psychology that have been developed in nearly a century’s worth of work.”).

355. A national advocacy group, Protect Our Defenders, released a study in 2017 that concluded “for every year reported and across all service branches, black service members were substantially more likely than white service members to face military justice or disciplinary action.” See Donald Christensen et al., *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities within the United States Military Justice System*, PROTECT OUR DEFENDERS (May 5, 2017), https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf [https://perma.cc/4NKW-8NCW]. In response, the military services have largely attributed these disparities to implicit biases held by military supervisors. See Sharif Calfee, *Implicit Bias Affects Military Justice*, PROCEEDINGS Vol. 145/4/1,394 (April 2019), <https://www.usni.org/magazines/proceedings/2019/april/implicit-bias-affects-military-justice> [https://perma.cc/QS63-LR5P]; see also Konstantin Toropin, *'Unacceptable': Pentagon Highlights Supervisors' Role in Racial Bias Across Services*, MILITARY.COM (June 9, 2023), <https://www.military.com/daily-news/2023/06/09/racial-bias-military-justice-starts-junior-officers-supervisors-pentagon-review.html> [https://perma.cc/Y6PL-6959] (“Bias from junior officers and supervisors is a key reason why minority troops face harsher treatment in the military criminal justice system, a new Pentagon internal review has found.”).

356. See Renee Goyeneche, *How to Keep Unconscious Bias Out of Decision-Making*, FORBES (July 1, 2022, 9:00 AM), <https://www.forbes.com/sites/womensmedia/2022/07/01/how-to-keep-unconscious-bias-out-of-decision-making/> [https://perma.cc/3FRC-6X8W]; see also Blair S. Williams, *Heuristics and Biases in Military Decision Making*, 90 MILITARY REV. 58, 68 (Sept.–Oct. 2010) (“When subjective assessments, ego, and emotion are intertwined with cognitive processes, we realize that intuitive decision making is fraught with potential traps.”).

the opponent. Even if the military member may think he can assess the lawfulness of the order without letting his personal or political bias impact his decision-making process, there is always a strong possibility that implicit bias may factor in the decision-making process.³⁵⁷

When we return to our hypothetical SEAL Team 6 commanding officer, we can see the impact that these limitations have on her once she receives the order to assassinate the President's political rival. She has served and succeeded in an environment that values and rewards obedience. Her professional military education has reinforced those values and has offered limited legal guidance that is insufficient to overcome the preference for obedience. She continues to have her own personal political values and perhaps she aspires for higher ranks, higher positions of authority, and certain post-military career opportunities. Her default may very well be to comply with the order, unable to truly exercise constitutional faithfulness.

B. Relying on Judge Advocates

Beyond an officer's own constitutional faithfulness—supported by their own constitutional interpretations—military members may also receive legal advice from a judge advocate. Military officers can compensate for their lack of legal training by seeking the advice of their judge advocate. Judge advocates operate at every level of command.³⁵⁸ They serve a variety of functions, ranging from providing legal assistance to military members, prosecuting and defending military members under the U.C.M.J., representing the military in civil litigation, reviewing government contracts, providing ethics advice, and advising military members both domestically and in the deployed environment on the lawfulness of military operations.³⁵⁹

357. See e.g., Walter Haynes, *Will the Military Become Just Another Politicized Institution*, WAR ON THE ROCKS (Dec. 10, 2020), <https://warontherocks.com/2020/12/will-the-military-become-just-another-politicized-institution/> [<https://perma.cc/8KB5-CTFA>] (“[A]s individuals inside the institution become more politicized, the resulting stress may lead to a reduction in cohesion and effectiveness.”); see also David Barno & Nora Bensahel, *The Increasingly Dangerous Politicization of the U.S. Military*, WAR ON THE ROCKS (June 18, 2019), <https://warontherocks.com/2019/06/the-increasingly-dangerous-politicization-of-the-u-s-military/> [<https://perma.cc/VJ5E-YVGE>] (“[T]he military has also become increasingly politicized over the past few years, in ways that profoundly threaten its reputation for nonpartisanship . . . Left unchecked, this trend may gravely endanger the military’s ability to give trusted advice to future Presidents and policymakers—which would have disastrous consequences for the nation’s security.”).

358. Michael W. Meier, *Evolving Role of the Judge Advocate in the 21st Century: From Operational Law to National Security Law*, 26 SW. J. INT’L L. 310 (2020).

359. See 10 U.S.C. §§ 806, 3037(c), 5148(d), 8037(c) (2006) (outlining the duties of judge advocates and legal offices); see also *Judge Advocate General’s Corps FAQs*, UNIV. OF VA. SCH. OF L. (Sept. 12, 2024), <https://www.law.virginia.edu/public-service/>

The presence and availability of judge advocates potentially mitigates the lack of legal training received by military members. In our hypothetical, the SEAL Team 6 commanding officer may request a review from their judge advocate as to the lawfulness of the order. Once she receives that review, the commanding officer should have the legal knowledge necessary to determine the lawfulness of the order.

More broadly, under this dynamic, military members are allowed to focus their training and time on their core responsibilities and rely upon their judge advocate to advise them on their legal rights and obligations. This division of labor is especially attractive when considering the lawfulness of orders. When a military commander receives an order—whether from the President or her superior commander—she should be able to turn to her judge advocate and receive a legal recommendation as to the lawfulness of the order.³⁶⁰

In my experience as a judge advocate, my peers at every rank and at every duty position were ethical and thoughtful attorneys and officers, committed to public service. But structural and institutional limitations were always present, and impacted judge advocates' ability to give thoughtful, strategic, and candid legal advice. These limitations become problematic when applied to the determination of whether an order is lawful. It is because of these structural and institutional limitations that judge advocates are not functioning as a proper tool to help commanders decipher the lawfulness of a Presidential order accompanied by the veneer of legality. The following discussion interrogates those limitations, focusing on the limited authority of judge advocates, the effects of careerism and a "general counsel" approach to service, and imperfect knowledge and experience needed to offer effective legal guidance.

1. *Limited Authority*

A starting point for any discussion on judge advocates is the limited nature of their authority. While judge advocates are commissioned officers and have the inherent authority to issue orders, they very rarely have command authority.³⁶¹ The distinction here is important. Consider a typical military legal office. The office will be led by a senior attorney,

judge-advocate-general-faqs [<https://perma.cc/MRM7-WCX2>]; *Judge Advocate General*, U.S. AIR FORCE, <https://www.airforce.com/careers/specialty-careers/jag> [<https://perma.cc/B2TX-D9JG>].

360. Toropin, *What Happens if the President Issues a Potentially Illegal Order to the Military?*, *supra* note 221.

361. 10 U.S.C. § 806, art. 6; see also Elizabeth L. Hillman, *Mission Creep in Military Lawyering*, 43 CASE W. RES. J. INT'L L. 565, 572–74 (2011).

the Staff Judge Advocate (“SJA”). Usually, the SJA will have several junior judge advocates, enlisted paralegals, and civilian attorneys and support staff working under her supervision. The SJA can order these subordinates to perform their assigned tasks and to report for duty. However, the SJA cannot give orders to individuals outside of her office to accomplish military missions. If the SJA’s assigned base flew F-16s, she would not be able to order a pilot to strike a target; conversely, if her superior commander who did have command and operational authority over the installation ordered the pilot to strike a target, the SJA would be unable to order the pilot to not do so.

This relationship establishes the judge advocate firmly as an advisor to the operational command.³⁶² Judge advocates hear and repeat often that “JAGs advise, commanders decide.” Such a relationship can create tension. A judge advocate has completed law school, specialized judge advocate training, and has experience in military law. They rely on this training and experience—that the commander lacks—to give the commander a legal opinion. Yet the commander is not required to follow that legal opinion; in fact, the commander is often not even required to obtain a legal review before acting.³⁶³

The fact that judge advocates rarely have authority over the “final decision,” coupled with the commander’s ability to proceed absent legal review or concurrence, limits the effectiveness of judge advocates in assisting commanders in determining the lawfulness of an order. While receiving a legal opinion from the judge advocate may help the commander eventually avoid liability for his actions, she is not bound to seek such a review and is not bound to heed the guidance.

2. *Careerism and the General Counsel Problem*

Judge advocates have a long history of independence and providing candid legal advice. During World War II, it was judge advocates who represented an American citizen accused of aiding the Germans in a military commission.³⁶⁴ When the Bush Administration elected to use torture methods against detainees—and OLC legally endorsed such conduct—it was senior judge advocates who voiced

362. *See id.* at 575–76.

363. *Id.* at 576 (“The judge advocate must have the ear of her commanding officer in order to be effective, yet we know that legal advice is not always welcome by commanders whether in the field or in garrison.”).

364. Andrew Buttaro, *Ex Parte Quirin: The Nazi Saboteur Case and the Tribunal Precedent*, 6 AM. U. NAT’L SEC. L. BRIEF 37, 45 (2016).

their dissent to members of Congress.³⁶⁵ Once lawyers and due process of law arrived at Guantanamo Bay, it was judge advocate prosecutors who initially voiced internal dissent to their superiors before resigning their positions, eventually going public over much of the terrible conditions and absence of due process given to detainees after their internal emails were leaked.³⁶⁶ It was a mid-career judge advocate who reported the airstrike in Baghuz, Syria.³⁶⁷ Many of these judge advocates incurred severe career consequences from their actions. Nonetheless, their actions spoke to the broader statement purpose of the Air Force Judge Advocate General Corps to always provide candid legal advice.³⁶⁸

I entered active duty as a judge advocate in January of 2006. At the time, we often heard of the dedication to candid legal advice. We were taught that when advising commanders, we must always provide candid legal advice, even if the commander does not want to hear it. During the nineteen years I have served, this dedication and messaging has changed. I found that increasingly the judge advocate was viewed not as an independent source of legal guidance, but rather as a means of support for the commander. And supporting the commander meant finding a way to “get the commander to yes.”

An example of this shift is the changing nature of the Air Force JAG Corps’ mission statement. In 2014, the mission statement was:

365. See Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 658–67 (2009); Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1423 (2008) (noting that JAG testimony before Congress on the Military Commissions Act included candid admissions of problems with administration policies and assertions of independence); Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1278 (2006); see also Julian E. Barnes, *Military Fought to Abide by War Rules*, L.A. TIMES (June 30, 2006), <https://www.latimes.com/archives/la-xpm-2006-jun-30-na-military30-story.html> [<https://perma.cc/6THY-BNG5>].

366. See Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES (Aug. 1, 2005), <https://www.nytimes.com/2005/08/01/politics/two-prosecutors-faulted-trials-for-detainees.html> [<https://perma.cc/XXM6-NENS>]; see also *Justice: Guantanamo Prosecutors vs. the System*, NEWSWEEK (May 17, 2008), <https://www.newsweek.com/justice-guantanamo-prosecutors-vs-system-90365> [<https://perma.cc/SSZ4-8MPE>].

367. Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. TIMES (Nov. 13, 2021), <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html> [<https://perma.cc/H8F9-SSBR>] (in telling the Senate Armed Services Committee about the cover-up, Major Dean Korsak wrote, “I’m putting myself at great risk of military retaliation for sending this.”).

368. See *I LEAD! Developing JAG Corp Leaders*, U.S. AIR FORCE (2005), <https://www.afjag.af.mil/Portals/77/documents/AFD-090116-050.pdf> [<https://perma.cc/GR3L-ZA4R>].

“Our JAG Corps mission is a powerful force enabler: we deliver professional, candid, independent counsel and full spectrum legal capabilities to command and the warfighter.”³⁶⁹ Compare that to the present mission statement: “Provide the Department of the Air Force, commanders, and personnel with professional, full-spectrum legal support, at the speed of relevance, for mission success in joint and coalition operations.”³⁷⁰ Gone are “professional,” “candid” and “independent,” replaced with “full-spectrum support” and “speed” and “mission success.” Increasingly, I found judge advocate messaging and training reflective of this shifting mission. Training and messaging no longer focused on giving candid and independent legal advice and were instead directed towards ensuring judge advocates understand that when a commander approached them wanting to take a certain action, their job as the primary legal advisor was to find a way they could legally do so.

With the shifting role of judge advocates, the judge advocate components adopted two different but concurrent approaches to managing judge advocates and allocating legal advice. The first approach was an independent and neutral actor approach. These were judge advocates assigned outside of the normal chain of command because of the importance of them remaining independent and candid in their legal advice. These judge advocates generally had military justice duties. Specifically, they were military defense counsels who represented military members accused of crimes or they were special victims counsel who represented victims of certain offenses such as sexual assault.³⁷¹ These judge advocates were not in the chain of command of any commander and instead fell under the command of other judge advocates.³⁷²

Historically, prosecutors were not under this independent and neutral actor approach.³⁷³ This made sense as military commanders controlled the military justice system and prosecutors served to effectuate the legal decisions made by the command.³⁷⁴ However,

369. See Hillman, *supra* note 361, at 571–72.

370. *Mission Statement*, U.S. AIR FORCE, <https://www.afjag.af.mil/> [<https://perma.cc/9V77-KCC2>].

371. Rebecca L. Farrell et al., *The Loneliest Jobs in the JAG Corps*, 2019 ARMY LAW. 82.

372. *Id.*

373. See generally Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 423–32 (2008) (describing the purpose of military justice as a tool for good order and discipline and the commander’s role in that).

374. *Id.*

in response to the sexual assault crisis, Congress and the President recently established the Office of Special Trial Counsel.³⁷⁵ In this office, judge advocate prosecutors are under a judge advocate chain of command.³⁷⁶ The head of each service's Office of Special Trial Counsel reports directly to civilian department secretary.³⁷⁷ The judge advocates assigned to this office have specialized training in military justice and exclusive prosecutorial authority over serious offenses like sexual assault.³⁷⁸ They do so without being responsive to any military commander.³⁷⁹ This office also represents a unique area where judge advocates have legal authority as the heads of these offices have final disposition authority for qualifying offenses.³⁸⁰

The second approach is the general counsel model. Most judge advocates fall under this model, including judge advocates advising commanders in deployed environments. Here, judge advocates fall directly under the operational control of a military commander. The military commander is tasked with rating the officer and making promotion recommendations for the officer. In return, the judge advocate provides non-binding legal advice to the commander. Under the general counsel approach, the judge advocate is incentivized to provide the commander advice that supports the commander and her desires. Again, the general counsel approach embraces the "get the commander to yes," attitude in lieu of the provide-candid-legal-advice-at-all-cost attitude.

When coupled with careerism, the general counsel approach compromises the provision of candid legal advice. I can speak from my own experience. As a senior major, I became an SJA. As an SJA, I led an entire legal office and served as the primary legal advisor to our installation commander. I was a major and he was a senior colonel, a

375. See Lolita C. Baldor, *Independent Lawyers Begin Prosecuting Cases of Sexual Assault and Other Crimes in the US Military*, AP NEWS (Dec. 28, 2023, 12:54 PM), <https://apnews.com/article/military-sexual-assault-prosecution-overhaul-e6cb6e700338b1471501777a09ca467e> [https://perma.cc/C87J-83UQ].

376. *Sexual Assault Now Tried Outside Military Chain of Command*, U.S. DEP'T OF DEF. (Dec. 28, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3627107/sexual-assault-now-tried-outside-military-chain-of-command/> [https://perma.cc/Z5SU-5FN8].

377. *Transcript: Offices Of The Special Trial Counsel Background Interview On Reforms To Improve The Prosecution Of Sexual Assault And Other Serious Criminal Offenses in the Department of Defense*, U.S. DEP'T OF DEF. (Dec. 21, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3627337/offices-of-the-special-trial-counsel-background-interview-on-reforms-to-improve/> [https://perma.cc/QVQ7-WVUC].

378. *Id.*

379. *Id.*

380. *Id.*

two-grade distinction. We both arrived at the installation at the same time because our predecessors had been removed from their positions. The prior installation commander and SJA's mismanagement of a legal issue had led to their removal.³⁸¹

There was tension from day-one. The installation commander wanted to improve morale installation-wide. He was an F-15 pilot well-versed in fighter pilot culture and wanted a return to that culture installation-wide. At the same time, I was aware of the legal issues pre-dating us and we had an extensive docket of sexual assault cases. I advised a rather aggressive legal strategy throughout my time as an SJA. The idea was to restore the public perception of the installation through utilizing the military justice authority at the commander's disposal and in doing so also deter additional sexual assaults.

My installation commander often disagreed with me. As I struggled with advising a senior officer, I also had career concerns in the back of my mind. I was approaching my promotion board to lieutenant colonel. The installation commander was the one who would rate me every year and would also complete my promotion paperwork, providing a recommendation to the promotion board. While senior judge advocates controlled my next assignment, they welcomed the input from my installation commander. My commander was also not shy in calling senior judge advocates outside of our operational chain of command—but within my judge advocate chain of command—to second guess my legal advice.

I struggled in this dynamic. Do I give the commander what he wants in hopes he would take care of me careerwise? Do I continue to push back? Do I put him in a position where he was forced to act with a legal review from me saying the action was unlawful? Do I make tenuous legal arguments to support actions I had serious concerns about? It was not until I secured a job in academia and shared my intent to separate from the Air Force that I felt free to give candid legal advice. At least for me, removing the fear of negative career consequences freed me to give candid legal advice.

It is candid legal advice that is required when commanders receive legally and morally questionable orders. A judge advocate serving in the general counsel approach has career pressures that make giving such

381. See Shane Harris, *Air Force Launches Probe Into 'Miley-Gate'*, DAILY BEAST (Oct. 16, 2015, 1:05 PM), <https://www.thedailybeast.com/air-force-launches-probe-into-miley-gate> [<https://perma.cc/HFZ2-362D>]; see also Kellan Howell, *Mark Welsh, Air Force Chief, Questions Grounding of Three Pilots over Miley Cyrus Lyric Texts*, WASH. TIMES (Oct. 20, 2015), <https://www.washingtontimes.com/news/2015/oct/20/mark-welsh-air-force-chief-questions-grounding-of-/> [<https://perma.cc/R4BA-CJEJ>].

advice difficult and compromised. Should a judge advocate approach the question from the lens of “I need to find a way to justify this order so my commander says yes,” the commander will still lack the legal tools necessary to make appropriate determinations.

3. Imperfect Knowledge and Expertise

The final structural limit on judge advocates serving as a tool for commanders in assessing the lawfulness of a presidential order is that they often operate with imperfect knowledge. As a legal advisor, judge advocates make recommendations as to matters of law. For instance, does a commander have the legal authority to issue an order? Is the target a lawful target? Is the order lawful? These are all legal determinations. But to make these legal determinations, there are often findings of fact that need to be made. Consider the targeting example. If an Air Force commander wants to authorize an airstrike, the judge advocate needs to apply the law of armed conflict to make a legal recommendation. To apply the law of armed conflict, the judge advocate needs to know information about the target, the weapon system used to conduct the strike, the likelihood of civilian casualties, the expected effects of the weapons system, and the military necessity of the strike.

Much like how military members lack the training and expertise needed to make legal determinations, judge advocates also lack the training and experience in matters of war needed to make these factual determinations. If these factual determinations are ultimately incorrect, then the judge advocate’s legal advice may be incorrect as well.

When I was a major, I received a deployment tasking to serve as a legal advisor at the Combined Air Operations Center in Qatar. Prior to the deployment tasking, I had practiced very little international law. Most judge advocates start their career as generalists, being exposed to multiple areas of law. I was no different. When I finally did start to specialize, I specialized in military justice and then moved into leadership positions. The tasking worried me because of this lack of experience and expertise. I remembered briefly learning about the law of armed conflict in JAG School, but that had been twelve years before. While I understood how to review the law of armed conflict and was confident in my ability to use legal reasoning to analyze actions under the law of armed conflict standard, I was worried about my lack of expertise in military operations.

I had hoped to receive training in military operations prior to deployment. I especially needed to learn about different weapons systems and munitions so that I could properly assess collateral damage.

My deployment training greatly disappointed me. The five-week training taught us the inner workings of the Combined Air Operations Center, but short of a tour of the Air Force Museum, we received very little instruction on the munitions we would be reviewing for legal sufficiency.

I was assured during the training that I would be provided with all the facts I would need at the Combined Air Operation Center. An intelligence officer would tell me about the target and its military necessity. A weapons officer would explain to me the weapon they intended to use and the consequence of the weapon. From that guidance, I would then be able to answer the question of law as to whether the operation complied with the law of armed conflict.

While each military department does have judge advocates that have more experience in military operations than I did at that time, my experience tends to be the norm, not the exception. Judge advocates are placed in a position where they rely on military members for information necessary to make legal recommendations. But they often lack the experience and knowledge they need to ensure this information is in fact reliable and correct.

Overall, while judge advocates present the military command an enormous capability—the ability to provide candid legal advice on the lawfulness of an order—structural limitations prevent that. Judge advocates lack ultimate binding decision-making authority on whether an order is lawful. They are also assumed to serve as general counsel for the commander making the decision. Because of their training, they are incentivized to find a way for the commander to say yes to the order, preventing thoughtful review. When coupled with imperfect knowledge, judge advocates are not positioned to be an effective tool for commanders ordered to effectuate a presidential coup.

These limitations have a significant consequence. The SEAL Team 6 scenario highlights the consequence. The commanding officer who receives the order is not an attorney and has her own limitations and biases that incentivize her to follow the order. Theoretically, her assigned judge advocate should serve as a check on those limitations, providing candid, independent, and well-reasoned legal advice on the lawfulness of the order. However, the commanding officer's judge advocate has also been taught to get her commanders to yes; specifically, to find a legal way to support the actions a commander wants to take. Through the cover of an OLC legal opinion, judge advocates have a mechanism to satisfy the commander's presumptive obedience. Additionally, the commanding officer's judge advocate may have the same career concerns and personal biases as the commanding officer. The judge

advocate who explicitly disagrees with the OLC opinion supporting the operation may very well face significant career consequences. As such, the SEAL Team 6 judge advocate is unlikely to advise her commander that such an order is unlawful.

IV. ESTABLISHING A NEW FRAMEWORK

This Article has examined the legal and moral framework governing the obligations of military members to both obey and disobey orders. The framework establishes that military members must follow lawful orders and must refuse to follow unlawful orders. A member who refuses to follow a lawful order may be held criminally liable for her refusal. Similarly, a military member who refuses to follow an unlawful order will be excused from criminal liability. A member who follows a lawful order escapes criminal liability for the actions incurred by following that order. And a member who follows a manifestly unlawful order can still be criminally liable for the actions taken in furtherance of the order. All the while, a military member may rely upon her own constitutional faithfulness, as well as the advice of a judge advocate, to guide her decision-making process.

While this framework appears to be straightforward, in practice it is not. Orders carry with them a presumption of lawfulness, yet the definition of lawfulness is ill-defined. Some orders may align closely with written laws, but many others speak more about inherent values and universal morality. Are orders that have the gloss of legality, but violate universal norms still considered unlawful under this standard? Not to mention, an order's lawfulness is a finding of law, but military members are expected to make that determination upon receiving an order. If the member concludes an order is lawful, performs the actions required by the order, and is ultimately wrong, can she be held criminally liable for the underlying acts? And if so, what is the *mens rea* required to prove that she knew or should have known the order was unlawful?

Further, the tools provided to the military member to help guide her through this complicated and legalistic framework are currently insufficient. A military member lacks the legal training necessary to make complicated findings of law on her own. She is also impacted by her own career interests, indoctrination in military culture that is inherently illiberal, and her own personal biases. In theory, securing the advice of a judge advocate may control these issues. However, judge advocates face structural limitations that impede their ability to provide candid legal advice about the lawfulness of the orders they

receive. These limitations include the lack of authority, imperfect knowledge and training, and career incentives for satisfying their military superiors.

There are significant consequences to this broken framework. Military members are incentivized to blindly follow orders. Orders that appear to be legal may in fact be illegal. And blind obedience to these orders may diminish mission effectiveness and expose the military member to criminal liability for the underlying offense. Judge advocates are placed in a precarious position where their legal advice is compromised. And most significantly, the President may abuse this framework to order the military to effectively carry out a coup. This part provides several recommended solutions that serves to check the President, ensure continued military effectiveness readings, and reward constitutionally faithful military officers and judge advocates with the tools they need to perform their roles legally and professionally.

A. Solutions

To preserve our liberal constitutional government, there must be counters to these threats. Potential solutions must: (1) provide clarity to military members and military judges as to what constitutes lawful and unlawful in an order; (2) contemplate violations of universal norms and values; (3) establish workable *mens rea* levels for both following and not following orders; (4) incentivize disobedience as much as it incentives obedience; (5) enable military members to have sufficient constitutional knowledge to be able to faithfully follow their oaths; (6) remove structural limitations that prevent judge advocates from giving candid legal advice regarding the lawfulness of orders; (7) provide standards and resources military members can utilize quickly and in combat, ensuring military obedience and readiness; and (8) establish legislative initiatives that restrict the authority of the President's use of the military; thereby helping to reduce the veneration of lawfulness attached to presidential orders.

1. A New Executive Order

Any reform efforts should begin with a new Executive Order that withdraws the current iteration of R.C.M. 916(d), which currently governs the "obedience to orders" defense and establishes new binding requirements. The new Executive Order can then be used to fashion jury instructions, to supplement the U.C.M.J offenses regarding failures to obey lawful orders, and as guidance for military members and judge

advocates to consult upon receiving orders. The Author's proposed Executive Order language follows:

Military members have a duty to obey lawful orders. They also have a co-equal duty to disobey unlawful orders.

There is no presumption as to the lawfulness of an order. The lawfulness of an order is a finding of law made by a military judge. The government retains the burden to prove an order's lawfulness. They must satisfy this burden by proof beyond a reasonable doubt.

An order is lawful if:

- (a) The individual issuing the order has the lawful authority to issue the order;
- (b) There exists a military nexus to the order;
- (c) The order does not violate any state or federal law; and
- (d) The order is consistent with the values and norms of liberal constitutional democracies.

In determining whether an order is consistent with the values and norms of liberal constitutional democracy, military judges should consider the following factors: (1) whether the order interferes with free and open elections; (2) whether the order interferes with the freedoms of speech or association; or (3) whether the order violates the stability, predictability, and publicity of a legal regime usually captured in the term "rule of law."

A military member who is accused of violating a lawful order may raise a *disobedience to orders* defense. A military member who refuses to follow an unlawful order is justified and not subject to punishment.

A military member receives the *disobedience to orders* defense upon providing sufficient evidence to meet a preponderance of the evidence standard that the member believed the order to be unlawful. Upon a military judge finding sufficient evidence by a preponderance of evidence standard to the military member raising the *disobedience to orders* defense, the government shall have the burden to prove beyond a reasonable doubt the military member knew the order was lawful at the time the member elected to not follow the order.

To prove the military member knew the order was lawful at the time the member elected to not follow the order, the government must establish that the member knew or should have known the order was lawful.

In establishing the member knew or should have known the order was lawful, the government must show the member had actual knowledge of the order's lawfulness or that a reasonable military member, with the experiences, background, and knowledge of the accused military member, would have known the order to be lawful.

A military member accused of any offense under the Uniform Code of Military Justice may raise an *obedience to orders* defense. A military member who has committed acts in furtherance of a lawful order is excused from criminal liability for those acts.

A military member receives the defense upon providing sufficient evidence to meet a preponderance of the evidence standard that they believed the order to be lawful at the time they committed the acts. Upon a military judge finding sufficient evidence by a preponderance of evidence standard to the military member raising the *obedience to orders* defense, the government shall have the burden to prove the military member knew the order was unlawful at the time the member elected to follow the order and commit the acts in furtherance of the unlawful order.

To prove the military member knew the order was unlawful at the time the member elected to follow the order, the government must establish beyond a reasonable doubt that the member knew or should have known the order was unlawful.

In establishing the member knew or should have known the order was unlawful, the government must show the member had actual knowledge of the order's unlawfulness or that a reasonable military member, with the experiences, background, and knowledge of the accused military member, would have known the order to be unlawful.

2. *Enabling a Constitutionally Faithful Military*

The proposed Executive Order defines lawfulness, creates a co-equal defense of 'disobedience to orders,' and establishes new *mens rea* requirements that consider a reasonable military member with

the training, experiences, and background of the military member either following or not following the order. While these revisions help establish an improved framework, military members will still need help navigating the new standards.

Efforts should be made to enable military members to have sufficient knowledge and experience so they can adequately exercise their constitutional faithfulness. Although it is impractical to send all military members to law school, several institutional reforms can better enable military members to assess the lawfulness of the orders they receive. Recognizing the military necessity in prompt obedience to lawful orders, military members must also be able to apply the new framework quickly and in the fog of war.

First, professional military education should include mandatory legal components. At every stage of professional military education, there should be required legal courses. These courses should be taught by civilian attorneys who have expertise and experience in national security and constitutional matters. They should focus on legal issues attendant to the ranks held by attendees. Beyond stand-alone legal courses, legal concepts should be included in courses focusing on operational issues. Legal questions to include assessing the lawfulness of an order should be included in all war games and military exercises. Lastly, professional military education should embrace multiple theories of civilian control of the military. These theories should include the idea that military members may refuse orders to the President or their superior officer and still be acting in compliance with the norms of civilian control of the military.

Second, to mitigate the illiberal effects of military service, military members should have increased exposure to areas of government and public service that promote the values of liberal constitutional democracies. While the military departments have increased efforts to have military members perform special duties in other government offices, these opportunities should be increased and extended. Senior officers and enlisted members should be required to spend at least a year in either a civilian government or public interest office. These experiences, coupled with the new PME instruction, will provide military officers trained and prepared to make the lawfulness determination in real time during combat and military operations.

Third, military members should receive protection against retaliation for questioning orders. Military members who are denied career opportunities, promotions, or other benefits may claim retaliation if they had previously questioned a military order.

3. *Enabling Independent Judge Advocates*

Even the most constitutionally faithful military members will still require legal advice in navigating the new orders framework. By removing structural limitations, judge advocates should be primed and ready to provide this service. The starting point for structural reform is for the judge advocate leadership to create a new office specialized in assessing the lawfulness of orders. This office should follow the independent model of legal services, not the general counsel model. The newly formed Office of Special Counsel should serve as a model for this new office.

The new independent office modeled after the Office of Special Counsel should mitigate careerism and imperfect knowledge limitations. The office should be led by a senior judge advocate who reports directly to the military department's civilian secretary. She should have extensive legal knowledge and experience in operational law and national security matters. An LLM specializing in national security law from a civilian institution would be preferred.

In turn, she should have subordinate judge advocates who report directly to her. This chain of command will not include any commanders who receive legal advice from this office. These subordinate judge advocates should be competitively selected and have experience in national security law. They also should have LLMS in national security law from civilian institutions.

The new office can then provide three important functions. First, it can provide reach-back support to military members throughout the globe. When military members receive a questionable order, they may call upon the judge advocate office and receive a candid legal opinion as to the lawfulness of the order. Second, the judge advocates in this office may directly represent military members who receive legally questionable orders. These judge advocates may file requests on behalf of these military members for injunctive relief or temporary restraining orders in federal court to either block the order or receive judicial guidance on its lawfulness before acting. Third, this office may embed or deploy its members with military units in combat operations that require quick obedience to orders. These judge advocates may serve side-by-side with the military member giving the order and may provide on-the-scene legal approval.

Beyond fulfilling those three important functions, this new office can also reduce the workload of judge advocates who remain under the general counsel model. As discussed earlier, judge advocates fulfill a myriad of roles and responsibilities within the military structure. When asked to do too much with limited resources and limited

manpower, mission effectiveness is likely to suffer. In some ways, the failures of judge advocates to properly assist the command in sexual assault cases and crimes committed in a deployed environment reflect an overworked and overutilized JAG Corps. By establishing the new office, with expertise in determining the lawfulness of an order, judge advocates remaining in the general counsel model will have one less issue to address and can in turn focus their time and resources in assisting the command in issues that remain under commander control.

While the judge advocates selected for this new office should have experience in military operations, they will still likely have insufficient operational understanding to fully understand the effects of all the potential orders. To mitigate this lack of knowledge, an operational liaison officer—a non-judge advocate military officer—should be assigned to the office. This Operational Liaison Officer can provide expert opinions to the judge advocates when performing their legal analyses.

4. *Legislating Away the Gloss of Legality*

Lastly, Congress should take actions that make it more difficult for the President to act with the gloss of lawfulness. It can do so in several ways. First, Congress can reform the Insurrection Act.³⁸² By setting parameters for the President—such as defining terms, requiring reports to Congress, and allowing Congress to veto an invocation of it—Congress will help ensure the President cannot use the Insurrection Act as congressional authorization. Second, Congress can effectively override *Trump v. United States*, preventing the President from acting with criminal immunity when issuing orders to the military.³⁸³ Third, Congress can be more active in legislating the domestic use of the military.³⁸⁴ Although these acts may seem inconsequential, they potentially push the President into the third-tier of *Youngstown*, not

382. See, e.g., Alex Thompson, *Biden lawyer; former Trump admin officials urge Insurrection Act reform*, AXIOS (Apr. 8, 2024), <https://www.axios.com/2024/04/08/biden-trump-insurrection-act-president-military-reform> [https://perma.cc/YNX3-QSJ4]; see also Elizabeth Goitein, *The Antiquated Law Endangering Democracy*, BRENNAN CTR. FOR JUST. (July 15, 2024), <https://www.brennancenter.org/our-work/research-reports/antiquated-law-endangering-democracy> [https://perma.cc/BB37-53J6].

383. See, e.g., Mary C. Jalonick, *In an Attempt to Reverse the Supreme Court's Immunity Decision, Schumer Introduces the No Kings Act*, AP NEWS (Aug. 1, 2024, 5:32 PM), <https://abcnews.go.com/US/wireStory/attempt-reverse-supreme-courts-immunity-decision-schumer-introduces-112468913> [https://perma.cc/7HYH-VYS4].

384. See Elizabeth Goitein, *How Congress Can Limit the Damage of the Supreme Court's Awful Trump v. U.S. Ruling*, BRENNAN CTR. FOR JUST. (July 24, 2024),

only limiting his gloss of legality, but also perhaps ensuring the order is received as unlawful.

CONCLUSION

Can the President order SEAL Team 6 to assassinate his political rival? Yes. Will the military follow that order? Probably. Is such an order lawful? No, but it certainly might have the gloss of lawfulness based on prior OLC and Supreme Court precedent. Much like Justice Sotomayor said, we should all fear for our democracy.³⁸⁵ As Congress has proven to be too dysfunctional to address the issues and the judiciary is, at best, abdicating and, at worst, enabling the issues, scholars and policymakers must explore areas on the margins of presidential power that can provide some check against a potential presidential coup.

Reforming the framework for military members to receive and interpret orders is one such check. By a simple executive order, military members may be incentivized, encouraged, and protected to disobey military orders that strike at the heart of our liberal constitutional democracy. They can be supported by their own constitutional faithfulness and by independent judge advocates who are trained and ready to defend them. It is a small fix, but one that can have a massive impact.

Beyond the proposed Executive Order, there is additional work to be done. Further study and analysis of the National Guard is warranted. When Guard units are under federal command, they remain subject to the U.C.M.J. and executive orders such as the one proposed by this Article. However, when Guard units are under state command, they are subject to laws and regulations of the state, not the U.C.M.J. With the President maintaining control of the Washington, D.C. Guard and states having the ability to “loan” state guard units to other states, an unchecked National Guard, on state status, can provide the military force necessary to effectuate a presidential coup.

Further, more lessons can be learned from the experiences of other liberal democracies. The United Kingdom has recently made its entire Judge Advocate General Corps independent. Israel and Ukraine have also struggled with allowing for military orders that impact civilian populations, causing uncertainty in the international community on the actual lawfulness of these orders and the obligations of their military members in following them. And finally, any potential reform may be

<https://www.brennancenter.org/our-work/analysis-opinion/how-congress-can-limit-damage-supreme-courts-awful-trump-v-us-ruling> [https://perma.cc/Q6D7-GZVW].
385. *Trump v. United States*, 603 U.S. 593, 686 (Sotomayor, J., dissenting).

rendered moot if radicalism continues to grow within the military and such radicalism leads to a hostility to legal restrictions on military power.

Absent the reforms recommended in this Article and an honest accounting of other areas of reform, we are left at the mercy of our President's benevolence, hoping he might not use the loaded weapon the law has handed him. This is no comfort. Americans have "no right to expect that [our country] will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law may fill the place once occupied by Washington and Lincoln; and if this [occurs] . . . the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."³⁸⁶

386. *Ex parte Milligan*, 71 U.S. 2, 125 (1866).